1

Introduction

Contract in the common law

THE principles of the English law of contract are almost entirely the creation of the English Courts, and the legislature has, until recently, played a relatively small part in their development. They are also, for the most part, a development of the last 200 years; for contract law is the child of commerce, and has grown with the growth of Britain from a mainly agricultural into a mainly commercial and industrial nation. In Blackstone's *Commentaries on the Laws of England*, which were first published in 1756, it is significant of the comparative unimportance of the subject that he devoted 380 pages to the law of real property, and only 28 to contract. The industrial revolution, however, brought about a fundamental change in the structure of the British economy. Land was no longer the primary source of wealth. Mills, mines, and factories sprang up and raw materials were converted by process of manufacture into products for sale in the markets of the world. The capital required for these enterprises was beyond the capacity of most private individuals and it was raised by public subscriptions for shares in joint stock companies or by loans from banks and other financial institutions. The growth of international trade further led to the creation of international commodity, shipping, insurance, and money markets, many of which were centred on London. All of these commercial developments depended—and still do depend—for their successful operation upon contract.

In this introductory chapter, we shall consider briefly: first, the nature and function of contract; secondly, the history of contractual obligations in English law; thirdly, the content of the contract law as set out in this book which is concerned with the 'general principles' of contract rather than the detailed rules applicable to different types of contracts; fourthly, the location of contract as part of the law of obligations and its relation to other parts of the law of obligations, tort and restitution, and to property law.

I. The Nature and Function of Contract

WE may provisionally describe the law of contract as that branch of the law which determines the circumstances in which a promise shall be legally binding on the person making it. Section 1 of the American Law Institute's *Restatement Second of the Law of Contracts* gives the following definition:

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty.

This definition is broadly acceptable, provided that it is realized that, in law, a promise may be constituted by an assurance that a thing *has been* or *is* (for example, that the engine of a car has been recently overhauled or is now in good mechanical condition) as well as that a thing *will be*, and provided that it is also appreciated that most, but not all, contracts take the form of an agreement, that is to say, each party agrees to accept the promise or promises of the other in return for the promise or promises made by itself.[1]

Nature of contract

The above definition is, however, very much a lawyer's definition and gives little indication of the nature of contract, and still less of its function. Most readers of this book will have some general notion of what a contract is. Indeed, they will enter into a contract very frequently, in some cases almost every day, for example, a contract of carriage (travel by bus or train), or a contract for the sale of goods (the purchase of groceries), or for the supply of services (a haircut), or one involving both sale and the supply of services (having a meal at a restaurant). But the law which will be found in the following pages of this book is law which is derived, for the most part, not from such simple consumer transactions, but from commercial transactions between businesspeople and companies. Commercial transactions involve the exchange of land, goods, or services for money. This exchange is not immediate, as in a supermarket, but is to take place in the future. Contract has an important function of securing that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid for its breach.

Take the example of the construction of an office building. The developer must first purchase the site, and this will often be done with money borrowed from a bank, the developer promising to repay the loan with interest at some future date. It must then engage an architect to design the building, a quantity surveyor to draw up bills of quantities, and a solicitor to do the legal work connected with the development. The building work will be put out to tender and the successful tenderer will be awarded the contract as main contractor. In its turn, the main contractor will often sub-contract parts of the work to other contractors. It may be that the developer will put the office space on the market while the building is still under construction and would-be occupants will agree to take a tenancy once it is completed. All of these relationships will depend on the promise of the participating parties that they will carry out their obligations in the future, whether these consist in the payment of money, or otherwise, and that they will be legally bound to their promised performance. No doubt, as a normal rule, each participant will duly fulfil its promise without the need for any intervention, or threatened intervention, by the law.[2] But, in the last resort, the recipient of the promise ('the promisee') will rely upon the law to reinforce by appropriate sanctions the

[1] Agreement is unnecessary for the enforcement of a promise in a deed (*post*, p. 174) and is not an altogether appropriate description of a unilateral contract, on which see *post*, pp. 10, 36, 53.

[2] Macaulay (1963) 28 American Sociological Review 55.

promise of performance given. By entering into a contract, the promisee is able to have recourse to those sanctions.

Planning

Another important function of contract is a constitutive one; to facilitate forward planning of the transaction and to make provision for future contingencies.[3] The more complex the transaction the greater will be the need for such planning and the more detailed the provisions that are likely to be made. First, and most obviously, contract will normally establish the value of the exchange, that is, how much is to be paid for the land, goods, or services to be provided. In the above example, the developer will need to measure the likely cost of the development against anticipated revenue. While this may to a considerable extent be a matter of estimate, the developer will seek, so far as is practicable, to establish by contract the value of the items that go to make up that cost, for instance, the interest to be paid for the loan and the price to be paid to the main contractor.

Secondly, contract will establish what are the respective responsibilities of the parties and the standard of performance to be expected of them. The building contract will incorporate the specifications for the work, sorting out what is to be done, the nature and quality of the materials to be used, and the date for completion of the work. It will provide for stage payments to be made by the developer. The respective responsibilities of the developer, architect, contractor, and subcontractors will also be established by contract.

Thirdly, contract enables the economic risks involved in the transaction to be allocated in advance between the parties. The building contract may provide, for example, for an increase in the price in the event of an increase in the cost of labour or materials to the contractor, and who is to bear the risk of strikes, bad weather, or fire. The party affected by the risk may then be able to cover it by insurance.

Finally, contract may provide for what is to happen if things go wrong. Suppose that the contractor fails to remedy defects when required to do so by the architect. Or suppose that the developer fails to pay for work which is certified to have been done. The contract can provide for payment in advance,[4] and can determine whether the party not in default is entitled to terminate the contract and on what terms.[5] The contract may also provide for payment by the contractor of a specified sum by way of 'liquidated damages'[6] in the event of delay in completion beyond the date fixed.

Contract is, in effect, the instrument by which the separate and conflicting interests of the participants can be reconciled and brought to a common goal.[7] The importance accorded by English law to the planning function is shown by its preference for rules that provide certainty, particularly in commercial contracts where speed and certainty have been said to be of paramount importance.[8]

[3] *Ibid.* [4] See *post*, pp. 594, 607. [5] See *post*, p. 132. [6] See *post*, p. 587.
[7] See Gurvitch, *Sociology of Law* (1947). [8] See *post*, pp. 31, 62, 140–1, 588.

(a) Freedom of Contract

Freedom of contract

The significance of the role played by contract in any economic system can scarcely be denied. The issue is the extent to which the law does, or should, assume that parties enjoy freedom of economic decision when entering into contracts. The concept of freedom of contract has two meanings. The first is the freedom of a party to choose to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to. Contractual obligation is thereby attributed to the will of the parties. This was one of the cornerstones of nineteenth-century *laissez-faire* economics.[9] Adam Smith in his *Wealth of Nations*, published in 1776, offered the first systematic account of economic affairs, championing the cause of freedom of trade against the economic protectionism current at that time, and freedom of contract was taken up as an ideal into classical economic theory.

When, therefore, in 1861, Sir Henry Maine wrote his *Ancient Law*, he postulated that the movement of progressive societies had hitherto been a *movement* from status (with its entrenched protection of privilege by legal and social restrictions) to contract. He considered this movement to be not only desirable, but inevitable. 'Imperative law', he said,[10] 'has abandoned the largest part of the field which it once occupied, and has left men to settle rules of conduct for themselves with a liberty never allowed to them till recently.'

But freedom of contract also referred to the idea that as a general rule there should be no liability without consent embodied in a valid contract. This second and negative aspect of freedom of contract was influential in narrowing the scope of those parts of the law of obligations which deal with liability imposed by law; tort and restitution.[11]

Its decline

Today the position is seen in a different light. Freedom of contract is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of a collectivist society it has ceased to have much idealistic attraction except, perhaps, to the proponents of a completely free market economy, who have advanced it in recent years in a modern and sophisticated way, some using the tools of micro-economic analysis.[12] But whatever its status may be as an ideal, the concept of freedom of contract has suffered severe inroads as the result of developments in modern social life and policy.

Statutory restrictions

In the first place, statute law today interferes at numerous points with inroads into the freedom of the parties to make what contract they like. The relations between employers and employed, for example, have been regulated by statutes

[9] See Friedmann, *Law in a Changing Society* (1959), ch. 4; Gilmore, *The Death of Contract* (1977); Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Cornish and Clark, *Law and Society in England, 1750–1950* (1989), pp. 201–3, 226.

[10] (1930), ch. ix, p. 322.

[11] *Post*, pp. 16–17.

[12] Posner, *Law and Economics*, 4th edn. (1992), ch. 4; Cooter and Ulen, *Law and Economics*, 2nd edn. (1996), ch. 6. Fried, in *Contract as Promise* (1981), provides a non-economic approach.

designed to ensure that employees are properly protected against redundancy and unfair dismissal, and that they know their terms of service. The public has been protected against economic pressure by such measures as the Rent Acts,[13] the Unfair Contract Terms Act 1977,[14] the Unfair Terms in Consumer Contracts Regulations 1994,[15] the Consumer Credit Act 1974,[16] and other similar enactments. These legislative provisions will override any contrary terms which the parties may make for themselves. Freedom of contract is also affected by statutorily imposed 'implied terms' which set the 'default' rule, although in certain circumstances this can be varied by the parties.[17] Further, both national[18] and European Community[19] legislation has been enacted to promote competition in industry and to safeguard the interests of consumers, and the Financial Services Act 1986 contains provisions to safeguard the interests of investors.

There are also wide-ranging statutory restrictions on discrimination on the grounds of sex and race in the provision of goods, facilities, and services, and in the selection of employees and in the terms upon which they employed.[20] These are a significant departure from the general freedom at common law to refuse to contract.[21] Although these primarily give rise to compensation orders, they can exceptionally lead to specific relief.[22] The prohibition on discrimination in the provision of goods, facilities, and services applies where the provision is made to the public or a section of the public.[23]

Standard form contracts; contracts of adhesion

Secondly, most contracts entered into by ordinary people are not the result of individual negotiation. An employee's contract of employment, for example, will often be determined by a collective agreement made between trade unions and employers. Standard form contracts are also frequently used, even between businesses. These will lay down the terms on which the supplier is prepared to do business, or embody or incorporate by reference the terms of a trade association. The freedom of the parties to negotiate is limited by such standard form contracts. Although a party, often a consumer, is free to decide not to deal with a particular retailer and to negotiate prices, delivery dates and so on, in many areas similar terms will be offered by other retailers so that the individual has either to accept the terms laid down *in toto*, or go without. Since, however, it is not feasible to go without many such goods or services, the individual is effectively compelled to adhere to those terms. In certain types of standard form contracts, however, for example those for the charter of ships, the standard form is often

[13] In particular the Rent Act 1977 (as amended by the Housing Act 1988), and the Landlord and Tenant Acts 1985, 1987 and 1988.

[14] *Post*, p. 182. [15] S.I. 1994 No. 3159, *post*, pp. 196, 291. [16] *Post*, p. 290.

[17] e.g. Sale of Goods Act 1979, ss. 12–15, *post*, p. 150; Defective Premises Act 1972, s. 1(1); Law of Property (Miscellaneous Provisions) Act 1994, Part I.

[18] Fair Trading Act 1973; Restrictive Trade Practices Act 1976; Competition Act 1980, *post*, pp. 371, 380.

[19] *Post*, pp. 372–4.

[20] Race Relations Act 1976, ss. 4(1)(c), 17, 20–1; Sex Discrimination Act 1975, s. 6(1)(c).

[21] *Timothy* v. *Simpson* (1834) 6 C & P 499. Cf. *Constantine* v. *Imperial Hotels Ltd.* [1944] K.C. 693.

[22] Race Relations Act 1976, s. 56; Sex Discrimination Act 1975, s. 65(1)(c).

[23] *Gill* v. *El Vino* [1983] Q.B. 425; *Quinn* v. *Williams Furniture Ltd.* [1981] I.C.R. 328.

extensively modified or supplemented by other terms appropriate to the particular charterparty.

'Compulsory' transactions

Thirdly, in the case of utilities such as water or electricity, which are in effect necessities of modern life, but the supplier is a monopoly or near monopoly, there may be a compulsion to supply, at least domestic consumers. Under the legislation regulating such utilities, including gas and telephones where it may now be possible to choose an alternative supplier, there is a duty to supply those who wish to be supplied,[24] there are prohibitions on undue preference and undue discrimination,[25] and a statutory regulator is given power to control prices and other terms of supply. This may be the modern equivalent of the common law duty on common innkeepers and common carriers to serve all comers on a reasonable basis,[26] probably because of their monopoly or near monopoly position. These common law doctrines have not, however, been developed and the field has been left to the anti-discrimination legislation, and that for the control of monopolies and restrictive trade practices, and for regulating utilities. Where there is a statutory obligation to supply and no or little power to negotiate about the incidents of the relationship, the Courts may regard its compulsory nature as incompatible with its being contractual.[27]

Finally, the negative aspect of freedom of contract sits uneasily with the practice of implication of terms into the contract, and the use of the standard of 'reasonableness' as a way of dealing with gaps in the contractual language.[28] Terms are implied not only under statute, but also at common law. Although the basis of such implication is said to be 'necessity'[29] or in the case of custom 'presumed consent',[30] in many cases this is rather artificial, and in truth in many standard transactions the implied terms are the legal incidents of the transaction,[31] from which the parties are, subject to statute, often free to deviate. Freedom of contract is also difficult to reconcile with the adoption of the 'objective theory' which provides in essence , that a person (A), whose conduct is such that the other party reasonably believes that A has assented to the terms of a contract, will be bound no matter what A's real intention is.[32] This rule can lead to the imposition of non-consensual obligations, since what creates the obligation is not consent in fact but acting as if consent is being given.

Notwithstanding that, in many areas of contract, freedom of contract in the classical sense is manifestly lacking, English law and English judges still to a great extent proceed on the assumption that the parties are free to choose whether or

[24] Gas Act 1986, s. 10; Electricity Act 1989, s. 16.

[25] Telecommunications Act 1984, ss. 3, 8(1)(d); Gas Act 1986, s. 14(3); Electricity Act 1989, ss. 3(2) and 18(4); Water Industry Act 1991, ss. 2(3)(a)(ii), 2(5).

[26] *Clarke* v. *West Ham Corp.* [1909] 2 K.B. 858, at pp. 879–82. Note that almost all carriers contract out of their common law liability.

[27] *Norweb plc* v. *Dixon* [1995] 1 W.L.R. 637; *Read* v. *Croydon Corp.* [1938] 4 All E.R. 631.

[28] e.g. *Tillmanns & Co.* v. *S.S. Knutsford Ltd.* [1908] A.C. 406; *Abu Dhabi National Tanker Co.* v. *Product Star Shipping Co. Ltd. (No. 2)* [1993] 1 Lloyd's Rep. 397, at p. 404.

[29] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, at p. 254. See *post*, p. 145.

[30] *Produce Brokers Co. Ltd.* v. *Olympia Oil & Cake Co. Ltd.* [1916] 1 A.C. 314, at p. 324. See *post*, p. 149.

[31] *Mears* v. *Safecar Securities Ltd.* [1983] Q.B. 54, at p. 78.

[32] *Post*, p. 31.

not they will enter into a contract and on what terms. We have noted the formulation of the test for implied terms, and, as recently as 1980, in the House of Lords, Lord Diplock observed:[33] 'A basic principle of the common law of contract . . . is that the parties are free to determine for themselves what primary obligations they will accept'. It may be objected that the general principles of contract law therefore present an inadequate, if not distorted, picture of modern economic life. This may be so, but it is nevertheless the fact that the law does still rest on the assumption of freedom of choice, and where a relationship is entered into in which there is no choice, a Court may hold that it is not contractual.[34]

(b) Sanctity of Contracts

Closely associated with the concept of freedom of contract is yet another principle, that of the sanctity of contracts.[35] Businesspeople in particular are concerned to ensure that the parties to a contract keep to their bargain and that as few avenues as possible should be afforded for escape from contractual obligations. In general, English law is reluctant to admit excuses for non-performance. But the Draconian requirements of commercial convenience have to be reconciled with the moral qualifications introduced by the need to discourage the grosser forms of unfair dealing. Thus the common law, and even more so equity, the influence of which has been more apparent in recent times, have admitted defences based on fraud, misrepresentation, mistake, duress (including economic duress) and undue influence, and endeavoured to curb the economic exploitation (in particular) of employees by the doctrine of restraint of trade. Although there is no general principle of 'inequality of bargaining power',[36] Courts take account of this in interpreting the contract and applying these doctrines. It should not be imagined, however, that contractual obligations can be repudiated by one party merely because that party was in the weaker bargaining position. In the 'rough and tumble' of commercial relationships, various types of pressure are frequently brought to bear and terms may be imposed which are, objectively, harsh; but the contract will still bind.

Further, the law will not permit a person of full age and understanding who failed to read the contract or to appreciate its full import and effect to escape from the contract. It will not re-write a contract for the parties or imply additional provisions merely because it would be reasonable so to do. And it will, in general, give effect to a written contract in accordance with its recorded terms, and not admit evidence to show that one party intended them to be construed in a different way from that which they actually express.

Frustration

In certain situations, however, the law will pronounce that the parties are relieved from performance of their obligations by reason of a change of circumstances occurring after the contract was made. But this principle—that of

[33] *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827, at p. 848.
[34] *Ante*, p. 6.
[35] See Hughes Parry, *The Sanctity of Contracts in English Law* (1959), and *post*, p. 17.
[36] *National Westminster Bank plc* v. *Morgan* [1985] A.C. 686, *post*, p. 290.

'frustration of the contract'[37]—is very limited in scope, and will not apply, for example, merely because a subsequent event changes the financial equilibrium of the transaction and forces a party who expected to make a profit from the transaction into a position of loss. The event must be of such a serious and fundamental character that to enforce the contract in the changed circumstances would be to enforce a different contract from the one which the parties made.

(c) The Interests Protected by Contract[38]

The entering into of a contract creates an interest in each party that the contract will be performed. The obligation may be strict, for example a seller's undertaking that it has good title to the goods sold, or it may be qualified, for example to use reasonable care, as is the case in many aspects of contracts for services by professionals such as lawyers or surveyors. If one party fails, in whole or in part, to perform the obligations undertaken in the contract, the other party, whose economic, physical, and, in some cases, psychological interests will be affected, will be entitled to redress. But what form will that redress take? Where the breach of contract consists of a failure to pay money, whether for goods bought and delivered or for services rendered, the redress for breach will often take the form of direct enforcement of the contract by an action (in debt) for the sum due.[39] Where the breach consists of the failure to render a non-monetary performance, for example, a seller's failure to deliver goods to a buyer or a painter's failure to decorate a house to a satisfactory standard, normally the redress will not take the form of specific performance of the contract, but will consist of monetary compensation.[40] How is that compensation to be assessed?

Reliance on the promise

On one view, the injured party would be entitled to compensation for the loss incurred in reliance on the promise, for example, in the case of a seller of goods, the expense incurred in obtaining the materials and manufacturing the goods, less what can be obtained on a substitute sale. And the law does indeed recognize such 'reliance loss' as an appropriate head of damages.[41]

Expectation of performance

But the basic object of damages in contract is to put the injured party in the same position as it would have been had the contract been duly performed. The injured party is entitled to protection of its interest in the performance of the contract. Suppose, for example,[42] a port authority by contract promises a car ferry operator that it will allow it to use the port facilities for car ferry operations during the coming year, but in breach of that contract repudiates the contract almost immediately after it is made. The reliance loss sustained by the ferry operator may be no more than (say) the trifling expense of having prepared draft timetables of ship movements for the contract period. But it will nevertheless be entitled to be

[37] See *post*, Chapter 14.

[38] See Fuller and Perdue (1936–37) 46 Yale L. 52,373; Atiyah (1978) 94 L.Q.R. 193; Taylor (1982) 45 M.L.R. 139; Burrows (1983) 99 L.Q.R. 217; Friedmann (1995) 111 L.Q.R. 628; Coote [1997] C.L.J. 537.

[39] *Post*, p. 593. [40] *Post*, p. 559. [41] *Post*, p. 566.

[42] See *Thoresen Car Ferries Ltd.* v. *Weymouth Portland B.C.* [1972] 2 Lloyd's Rep. 614.

compensated in damages for loss of its expectation of performance, that is to say, the profit which it would have made on the car ferry operations during the year in question. In some cases the injured party will be entitled to specific performance of the other party's obligation, whether by the payment of a debt that has accrued due[43] or by the rendering of other forms of performance.[44] This protection of expectation or performance interests is not peculiar to the English law of contract. It is a consequence of contract in all developed legal systems. Even if the contract is wholly executory, that is to say, nothing has been done by either party under it at the time of its breach, damages for lost expectations will be recoverable.[45]

Restitutio

The restitution interest in contract is of a less obvious nature. It usually arises where a contract is discharged as the result of a breach leaving one party in receipt of a benefit which it would be unjust to retain at the expense of the other, so that party will be compelled by the law to restore that benefit (or its value) to the other.[46] There are also many situations where, without any contract, a similar duty is imposed. These independent restitutionary claims fall outside the scope of contract law and thus of this book.[47]

II. The History of Contractual Obligations in English Law[48]

THE modern law of contract contains much which can properly be explained (if at all) only in the light of its history. Hence, even in a book which aims only at stating the principles of the modern law, it is desirable to give some account of how that law came to take the form which has just been indicated in outline. We shall see that it has not been by any process of analysis and elucidation of the essential nature of a contract that the law has been moulded. Indeed, the very idea of enforcing promises or agreements as such, which seems most natural to us, may not be an early one in the history of any legal system. We shall find the key to the story by examining the conditions which the Courts have attached at different stages to the actions which they were willing to admit for the enforcement of the kind of rights which we now regard as contractual.

The story can here be given only in the barest outline, and it should be understood that there are some points in it which remain obscure or controversial.

[43] *Post*, p. 593.

[44] *Post*, p. 595.

[45] But see the criticisms of Atiyah (1978) 94 L.Q.R. 193, and in *The Rise and Fall of Freedom of Contract* (1979).

[46] *Post*, p. 605.

[47] But see *post*, pp. 40, 64, 86, 211, 221, 228.

[48] See Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Baker, *Introduction to English Legal History*, 3rd edn. (1990), pp. 360–426; Baker and Milsom, *Sources of English Legal History* (1986), pp. 209–96, 358–505, hereafter 'Baker and Milsom'; Cornish and Clark, *Law and Society in England, 1750–1950* (1989), pp. 197–226; Milsom, *Historical Foundations of the Common Law*, 2nd edn. (1981), pp. 243–360; Simpson, *A History of the Common Law of Contract* (1975); Stoljar, *A History of Contract at Common Law* (1975).

(a) The Early Actions

'Wager of law'

Actions in what we call contract and tort were at first within the jurisdiction of local and manorial courts. The action would commonly end in a general denial of liability, upon which the defendant would 'wage his law', that is undertake to come at the next court day and swear to this denial in the presence of neighbours (their number specified by the Court) who would then swear to their belief in this oath. If on the day all the oaths were made correctly, the defendant won. The efficacy of this depended partly on the fear of damnation for perjury, and partly upon standing among the neighbours (the city of London, for example, which lived by the credit of its citizens, set particular store by this mode of proof). This social sanction would be lost as lawsuits were diverted from the local setting into royal courts in Westminster.

Trespass

In the field of tort, for which the very rough medieval equivalent is 'trespass', a case would come to a royal court only if there was some royal interest, normally a 'breach of the king's peace'. That allegation had two other effects. It precluded the defendant from answering by wager of law and required the case to go to a jury. And as between the main royal courts, it gave jurisdiction to the King's Bench concurrently with the Common Pleas. The allegation itself became increasingly fictionalized in the early fourteenth century; and around the middle of the century the Chancery began to make writs of trespass returnable into royal courts with no mention of the king's peace. This was the effective beginning of 'actions on the case'; and logically plaintiffs should not have been able to sue in the King's Bench, and defendants should have been permitted to wage their law. But on both points logic was overruled. All actions of trespass and case could go to either of the royal courts, and all went to jury trial; and this was a cause of developments to which we shall come, by which remedies in contract came to be sought by actions in tort.

In the field of contract, jurisdiction as between local and royal courts came to depend upon the amount at stake. From a beginning in the thirteenth century, originally concerned only with the recovery of debts, a general jurisdictional barrier developed at 40 shillings, then a sum so large that very few transactions of ordinary people would reach it. But the amount was never altered, so that a period of rapid inflation in the sixteenth century brought transactions of falling real value to Westminster, and therefore to the modes of proof in use there. In particular, since there had been no equivalent of the king's peace to affect proof as well as jurisdiction, wager of law was often available; but those who swore to the defendant would be not neighbours but persons hired in Westminster. In the old contract actions, therefore, the focus of attention for lawyers and litigants was not some substantive law of contract but modes of proof.

(i) Covenant

Covenant

The word 'covenant' (*conventio*, agreement) is the nearest medieval equivalent to our 'contract'. But even in local courts an action for money due under a contract would be called not covenant but debt (or detinue if the action was for a specific

chattel lent or bought, for example), so that actions called covenant mainly concern breaches of agreement for services like building or for sales or leases of land. The primary claim was for performance, and in royal courts the action was begun by a *praecipe* writ ordering the defendant to keep the agreement; but judgments ceased to order specific performance and damages were awarded instead. Some think that the plaintiff would have to have done his part of the bargain, but we are not informed about the early requirements; and in the royal courts the question was suppressed by a new requirement about proof. Early in the fourteenth century it became settled that the plaintiff was not entitled to an answer unless he could produce a document under the defendant's seal (in illiterate times the equivalent of a signature) setting out the terms of the agreement. Soon after this the action of covenant fell out of use, not because of this requirement but because the kind of sealed document to which we are about to turn proved more effective. But covenant retained a negative importance: parties might contract for the building of a house for example, not thinking of royal courts or sealing wax, and find the natural remedy barred.

(ii) Debt

Debt

Any claim for a fixed sum of money or a fixed quantity of fungible goods would in the royal court be made by the *praecipe* writ of debt. At first even a claim for specific goods would be made by the same writ, so that one who borrowed money and a book was seen to owe the book in the same way that the money was owed; but the separation of detinue need not be discussed here. In royal as in local courts, the defendant could normally answer by wager of law; and one lending a large sum or selling goods for a large price might take precautions, and this led to a separation between two principal uses to which the single writ of debt might be put.

Debt on obligatio

The simplest precaution for, say, a lender was to require the borrower to execute a document under seal, a bond. This was evidence not of a promise to pay but of indebtededness itself, and it was conclusive. The defendant could not deny that the debt was owed, though he could deny that the deed was his (*non est factum*). But that was a risky issue to take: it went to a jury, who would compare seals etc.; and if they found against the defendant he would go to prison. At law the defendant could not even say that payment had been made; and though he eventually got equitable protection from the Chancery in this situation, that was only after a long struggle between the competing goods of general certainty and individual justice.

But bonds were put to wider uses than ensuring that a lender or a seller would get the money that was due. One hiring a builder to build a house, for example, would take from him a bond by which the builder would acknowledge that he owed the customer an essentially penal sum, which bond would be void if conditions (written sometimes on the back of the bond, sometimes in a separate indenture) were satisfied; and those conditions specified the site, dimensions, materials, completion date etc. of the house. If the customer sued it would be on the bond for the penalty, and the builder could of course plead that he had satisfied the

conditions Conversely the builder would take a bond from the customer, commonly for double the agreed price, to be void if the agreed price was duly paid. Such conditional bonds became the principal vehicle for large transactions; and they continued to be so until the Chancery began to relieve against penalties and until *assumpsit* provided a simpler mechanism.

Debt on a contract

But a sealed document was never required in debt as it was in covenant. The lender could always sue for the repayment of the money lent, the seller for the price, and the builder or other provider of services for the agreed payment. But normally this was only possible when the plaintiff had done his part of the bargain, when the defendant had had his *quid pro quo*. And the medieval word 'contract' did not have its modern meaning: it meant precisely the obligation 'contracted' by a debtor who had received his *quid pro quo*. But much of the reality is hidden by the defendant's usual denial by wager of law—not a denial of any specific facts but just that he owed. And the availability of wager had a further consequence. Only the debtor himself could swear that he did not owe: even if the debt had been publicly incurred it might have been privately paid. So the executor of a dead debtor could not wage law, and it was held by a perverse logic that the executor could not be sued. But that applied only to debt on a contract: the executor could be sued if the plaintiff had a bond which would any way exclude wager.

The combined effect of these actions may be described in terms of an agreement to build a house. Well-advised parties would set it up by conditional bonds, so that the party alleged to be in breach would be sued in debt for the penalty and could plead that the conditions had been satisfied. If the agreement was informally made, the builder who had built could sue in debt for the price (normally answerable by wager of law). But the customer could not bring covenant if the builder did not build, because he had no document under seal; and probably he could not even bring debt to recover any money he had paid. This inequity played its part in the rise of *assumpsit*; but it is important not to suppose that from the beginning lawyers saw that *assumpsit* was to become a general contractual remedy.

(b) *Assumpsit*

Misfeasance

Among the tort actions which came to royal courts when the need to allege a breach of the king's peace was dropped were some in which there was a contractual background to the wrong. In 1348 a ferry-man was sued: he had undertaken to ferry a horse across the Humber, but so mismanaged it that the horse was drowned.[49] Its owner sued in tort, and the defendant (knowing there was no sealed document) argued that the proper action would be covenant. The action was held to be rightly brought in tort: the plaintiff complained of the killing of his horse, not the failure to transport it; and such claims for 'misfeasance' regularly succeeded.

[49] *Bukton* v. *Tounesende, The Humber Ferry Case* (1348), translated in Baker and Milsom (*supra*, n. 48), p. 358.

Nonfeasance

There was more difficulty if the defendant had made an undertaking but done nothing in the matter at all: this was clearly 'covenant' rather than 'trespass'. Many attempts to get 'trespass' remedies were made, mostly in situations in which performance of the *praecipe* order in covenant would be impossible (e.g. the date by which the house was to be built has passed) or would be no sufficient remedy (e.g. timbers have rotted because the roof was not mended as promised). These would have been arguments for not suing in covenant even if the builder or roof-mender had made their promises under seal; and this may have been among the reasons why customers set up their agreements by conditional bonds in which the penalty would cover any consequential damage as well as the value of the performance. And one must remember that all these early attempts to use *assumpsit* for a nonfeasance were by plaintiffs who had omitted the proper formalities. Perhaps they were caught out by the only transaction of a lifetime large enough to come to a royal court. But their hard cases seemed to a judge in 1425 to threaten bad law: 'if this action' (against one who had not built a mill as promised) 'should be maintained . . . then a man would have an action of trespass for every broken covenant in the world'.[50]

He was to be proved a prophet: but his logic was hard to overcome and we cannot be sure how and when it happened. A stage seems to be marked by a case of 1442 in which the defendant agreed to sell and convey land to the plaintiff from whom she took money. But she actually conveyed to a third party; and the plaintiff sued in tort for a deceit.[51] The agreement was made in London about land outside. If the land had been inside the city, the action would have been brought in city courts under the custom of London by which (a) actions in covenant did not require a document under seal, (b) the normal remedy in covenant was an order for performance, and (c) one who had put it out of his power to perform would be sued in deceit and imprisoned until he made fine with the city and repaid the money to his plaintiff. In London therefore the plaintiff's action would not have been a dodge to get round the absence of a sealed document but the natural remedy, essentially in rescission. In Westminster the logic got the plaintiff a remedy: but the Court could not order imprisonment (and therefore repayment of the money) but only damages.

This looked like enforcement rather than rescission, and the king's courts were left with a distinction without a real difference: the disappointed buyer who had paid for the land could get damages if his seller had conveyed to a third party, but not otherwise. Many approaches were tried; and around 1500 it begins to appear that nonfeasance was becoming remediable, at first only when the plaintiff had actually paid or there was some other detrimental reliance (and at any period one who has suffered no damage would normally prefer to hire somebody else rather than sue). Mutual promises do not become actionable until later in the century, by equally obscure stages; and the underlying illogicality is increasingly masked by elaborate and unreal allegations of deceit.

[50] *Watkins' (or Wykes') Case* (1425) translated in Baker and Milsom (*supra*, n. 48), p. 380, *per* Martin J., at p. 383.

[51] *Shepton* v. *Dogge (Nos 1 and 2)* (1442), translated in Baker and Milsom (*supra*, n. 48), pp. 390–5.

Assumpsit for money

From the use of *assumpsit* in lieu of covenant (where the absence of a sealed document might leave a plaintiff entirely without remedy) we turn to its use in lieu of debt (where the plaintiff always had a remedy, but might be faced by wager of law). But again one must not think that the end was aimed at from the beginning. The beginning is early in the sixteenth century in cases involving not money but fungible goods: a brewer contracts to buy malt or barley, and when it is not delivered has either to buy at a much higher price or to let his brewery go off stream.[52] The substantial claim goes not to the goods themselves but to the damage flowing from reliance upon the promise to deliver them; and this may be reflected in the language of deceit. When money is involved the reliance claim seems first to have appeared in situations involving third parties. Seller sells to Buyer in reliance upon the promise of a third party to pay if Buyer does not. It is Buyer who got the *quid pro quo* and contracted the debt; and any liability of the third party must be on the basis of reliance.[53]

One must not assume that the first use of the same logic as between two parties was intended as a conscious circumvention of debt. Debtor owes Creditor, and when pressed promises to pay the amount at a specified future date. Relying upon this promise, Creditor makes other bargains with third parties. When Debtor does not pay Creditor, Creditor cannot pay the third parties; and, particularly if he is a merchant, this failure so damages his own credit that he is ruined. This consequential damage is the gist of this action, not the original debt, which is not in principle even claimed. But jurors would include the amount of the debt in their assessment of damages; and such actions soon came to be used to recover debts but exclude wager of law.

Since debt was in the exclusive jurisdiction of the Common Pleas, it was the King's Bench that led in this development and an unseemly difference of practice arose. On the general issue of *Non assumpsit* the Common Pleas would direct the jury that if they were to find for the plaintiff they must find both that the defendant was *indebitatus* and that he made an express promise to pay the debt, the King's Bench that they need find only the indebtedness (because every debtor could be presumed to promise to pay: every contract executory imports in itself an *assumpsit*). But since the issue would be tried at *nisi prius*, the judge actually directing the jury might not come from the court in which the action had been begun. It seems clear that in *Slade's Case* the judges at *nisi prius* made a conscious effort to have the matter resolved. The jury was induced to bring in a special verdict that the debt was owed but that there was no subsequent promise to pay it. This was reported to the King's Bench, in which the action had been started; and instead of giving judgment that court referred it to the court of Exchequer Chamber, not really a court but an informal conference of all the judges. That body was unable to agree; the King's Bench gave judgment for the plaintiff in accordance with their own practice; and this result was unwillingly accepted by the Common Pleas.[53a]

[52] For example, see the cases in Baker and Milsom (*supra*, n. 48), pp. 406 and 411.

[53] Such cases are cited in argument in Baker and Milsom (*supra*, n. 48), pp. 414–15.

[53a] 1602 4 Co. Rep. 91a.

Various consequences followed. Since the *indebitatus assumpsit* action was formally for reliance damage and not the debt, it now had to be made clear that the debt itself was recoverable as well as any damage, that the actions were alternative, and that the one barred the other. And since formally the reliance damage flowed entirely from the promise to pay the debt, there was no logical need to specify how the debt had arisen; and so a defendant in the *indebitatus* action might not know the actual case he was to answer. The courts therefore required minimum particulars to be given; and a series of 'common counts' developed stating that the debt was for goods sold and delivered, for work and materials, and so on. More importantly *Slade's Case* marked the effective end of wager of law; and it was necessary to make explicit the important consequence that executors could now be sued for simple contract debts. Nor was the ending of wager unmixedly beneficial: it turned out that jury trial could be manipulated by fraudulent plaintiffs; and in 1677 the Statute of Frauds provided that in certain situations action could be brought only if there was some written evidence signed by the defendant.

With the important exception of agreements supported by sealed documents, in which covenant or debt still could and had to be brought, all contract litigation after *Slade's Case* was brought in *assumpsit*; and it was from this that the modern law of contract developed. It is indeed a law of contract rather than a law about particular contracts as in Rome. But its beginnings in tort, which remained obvious in the persistent language of deceit until the nineteenth century, inhibited the development of a satisfactory theoretical structure. Instead we have the 'doctrine' of consideration. There has been much speculation about its 'origin', on the basis that it must have developed from some earlier phenomenon. Consideration as detriment to the plaintiff looks much like the damage he suffered when the case was put in terms of deceit or reliance, and this provides some explanation of the uselessness of past consideration and of the rule that consideration must move from the plaintiff. Consideration as benefit to the defendant looks much like the *quid pro quo* of debt; and it must be remembered that after *Slade's Case* the debt and therefore the *quid pro quo* was the only issue in *indebitatus*. Other origins have been suggested, such as the canonist idea of *causa* which indeed played some part in the Chancery. But the reality seems to be that sixteenth century pleadings used the word to mean the reason for which the promise was given, and judges then and later decided which of these were a sufficient basis for legal action. If so, consideration is not so much a 'doctrine' as a considerable body of the substantive rules of contract.

(c) Subsequent Developments

Developmer
principles

There has been much later development, too detailed and perhaps too little explored by historians, to consider in this summary. Lord Mansfield in the eighteenth century and Lord Denning in the twentieth sought to rationalize consideration, but the substantive changes needed were too obtrusive. The English promissory estoppel for example is a pale shadow of the American, perhaps because the lesser weight given in the USA to deeds left more obvious injustice

when gratuitous promises were relied on. And the American reliance basis for remedy, essentially as alternative to consideration, is a reminder of the mongrel nature of the common law of contract.

The law started with covenant (or contract) as something essentially different from trespass (or tort). That difference was the continuing obstacle in the rise of *assumpsit*; and its overcoming introduced continuing confusion. It was nineteenth century judges and writers, including Anson, who sought to restore contract law as a thing in itself: rules mostly about the formation of binding agreements, with ancillary rules about the damages recoverable for breach.[54] The impulse may have been partly juristic, partly due to commercial demands for certainty and for more sophisticated rules to deal adequately with the expansion of trade and commerce that resulted from the industrial revolution. Consideration (or a deed) is then represented as something like offer and acceptance: one of the requirements for formation. But it sprang from a law about tort, about damage suffered by the plaintiff at the end of the story rather than about the beginning of a binding relationship between the parties. Like many mongrels the result may not be elegant; but it is strong.

The nineteenth century

We have noted that the concepts of freedom of contract and sanctity of contract were at their strongest during the nineteenth century. In 1875 Sir George Jessel M.R. stated:[55]

> if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.

This was said to have led to the reduction of supervision over the contractual terms to a bare minimum[56] and the deprivation of the tools available for such control of much of their effectiveness. The doctrine of consideration acquired a predominantly formal meaning, although it was on occasion used to invalidate unfair agreements.[57] A substantial part of the law of contract was attributed to the parties' agreement, and the role of equity, with its discretionary remedies, and its ability to avoid common law rules, was less central.

At the same time, non-contractual liability was kept within narrow boundaries. In restitution (then known as quasi-contract), Bowen L.J.'s famous statement that '[l]iabilities are not to be forced upon people behind their backs'[58] was profoundly influential. Indeed, Lord Sumner and Sir William Holdsworth argued that all such claims were founded upon an implied contract.[59] If there could not be a con-

[54] See Simpson (1975) 91 L.Q.R. 247.

[55] *Printing & Numerical Registering Co.* v. *Sampson* (1875) L.R. 19 Eq. 462, at p. 465.

[56] Atiyah, *The Rise and Fall of Freedom of Contract* (1979). But cf. Simpson (1979) 46 U. Chi. L.Rev. 533; Barton (1987) 103 L.Q.R. 118.

[57] *Stilk* v. *Myrick* (1809) 2 Camp. 317; 6 Esp. 129, *post*, p. 104.

[58] *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. 234, at p. 248.

[59] *Sinclair* v. *Brougham* [1914] A.C. 398, at p. 452 (overruled by *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669); Holdsworth (1939) 55 L.Q.R. 37. Cf Lord Wright (1938) 6 C.L.J. 305, at pp. 312 ff.

tract, there could not be an implied contract; there was no independent non-contractual claim. Tort liability was restricted by what was later called the 'privity of contract' fallacy, that duties which originated in a contract were confined to the parties.[60] It was also mainly concerned with the protection of proprietary interests and with providing a remedy for certain categories of physical injury. Although a number of economic torts were developed, notably deceit, injurious falsehood, inducement of breach of contract, and conspiracy, they required wilful misconduct. There was no liability for pure economic loss which was inflicted negligently.

The twentieth century

In the modern period there is evidence of the reshaping of contract law accompanied by an expansion of non-contractual obligations in tort, in particular for negligent misrepresentation causing purely economic loss, and in restitution. There has been a dilution of formal requirements and increased regard is given to considerations of substantive fairness. The erosion of the doctrine of consideration in the context of contract re-negotiation, and its replacement by rules of equitable estoppel[61] and economic duress is perhaps the most prominent example, but there are others, including an approach to discharge of contract, whether by breach or frustration, that gives greater emphasis to the consequences of an event than to the, often fictional, intentions of the parties.[62] The evolution of new doctrines and approaches has been gradual, and there have been exceptions and inconsistencies. For instance, when, in 1976, economic duress was first recognized as a factor vitiating contract, its theoretical basis was said to be 'coercion of the will', i.e. absence of consent. But this was rejected in less than a decade, whereas in the case of frustration, first recognized in 1863, it took almost a hundred years for the Courts to turn away from regarding implied contract as the basis of that doctrine.

Legislation

The last hundred years have also seen a rapid growth in the importance of statute law. There were great codifying Acts of the nineteenth century for particular types of contract, such as the Bills of Exchange Act 1882 and the Sale of Goods Act 1893. We have noted the considerable, and increasing, amount of regulatory legislation, which is designed to protect certain classes of the community or to implement government policy. There are also a number of reforming statutes such as the Law Reform (Frustrated Contracts) Act 1943, the Misrepresentation Act 1967, the Civil Liability (Contribution) Act 1978, and the Minors Contracts Act 1987 which have been passed to remedy defects or to make good particular deficiencies in the common law.

Codification

In 1872, the Indian Contract Act was enacted, which codified (with some variations) the general English law of contract for use in the Indian sub-continent. But English law remained, and still remains, predominantly judge-made law. In 1965, the Law Commission of England and Wales and the Scottish Law Commission announced their intention to codify the English and Scots law of contract.[63] The code as originally envisaged was to be a uniform body of law applying throughout England and Scotland, and it was to embody amendments

[60] *Winterbottom* v. *Wright* (1842) 10 M. & W. 109.
[61] *Post*, p. 110.
[62] *Post*, pp. 516, 548.
[63] Diamond (1968) 31 M.L.R. 361.

to the existing law of both countries. Subsequently, however, the Scottish Law Commission withdrew from this enterprise. In 1973, therefore, the Law Commission decided to suspend its work on a contract code.[64] Since then it has examined particular areas of the law of contract, and has either recommended reform, as in the case of minors' contracts, implied terms as to quality in the sale of goods, formalities and covenants of title in the sale of land,[65] contributory negligence as a defence in contract, and contracts for the benefit of third parties,[66] or has concluded that no legislation is necessary, as in the case of the parol evidence rule.[67] It is currently working on illegal contracts. It seems, however, unlikely that the project of codification will be revived.

European & international influences

The English law of contract is beginning to be exposed to the influence of the European Community and the predominantly civilian systems of its Members because of the perceived importance of its harmonization in the development of a single market in the Community. To date the most significant initiatives affecting contract law have been the Directives on Unfair Terms in Consumer Contracts[68] and those which seek to ensure that there is no discrimination in tendering procedures for major contracts for public works, supplies, and services.[69] There is also a movement to develop common principles of European contract law,[70] and there are wider international initiatives, such as the Unidroit Principles for International Commercial Contracts, the United Nations (Vienna) Convention on Contracts for the International Sale of Goods, and growing numbers of international standard form contracts. Renewed consideration is being given to the ratification by the United Kingdom of the Vienna Convention which has not yet been ratified because of a perception by some that English contract law is more sophisticated, and fear that uncertainty would result from the broadly formulated provisions of the Convention.[71]

[64] An early draft has since been published: see McGregor, *The Contract Code* (1993).

[65] Law Com No. 79 (1977); Law Com No. 134 (1984); Law Com No. 160 (1987); Law Com No. 164 (1987); Law Com No. 199 (1991), implemented respectively by the Civil Liability (Contribution) Act 1978, Minors Contracts Act 1987, the Sale and Supply of Goods Act 1994, and the Law of Property (Miscellaneous Provisions) Acts 1989 and 1994.

[66] Law Com No. 219 (1993), on which see *post*, p. 583 and Law Com No. 242 (1996) on which see *post*, p. 427.

[67] Law Com No. 154 (1986), *post*, p. 131.

[68] Council Directive 93/13/EEC (OJ L 95, 21 April 1993, p. 29), implemented by the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), *post*, p. 196. See also the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992 No. 3288), *post* pp. 190, 198, 244 and the Timeshare Act 1992.

[69] The main implementing regulations are S.I. 1991 Nos. 2679–2680 and S.I. 1992 No. 3279.

[70] See Lando and Beale, *The Principles of European Contract Law* (1995); Kötz, *European Contract Law* (trs. Weir) (1997).

[71] Hobhouse (1990) 106 L.Q.R. 530. Cf. Steyn, in Birks ed., *The Frontiers of Liability* (vol II) p. 11.

III. The Content of Contract Law

Separate contracts

THE increasingly complex social and commercial relationships of the twentieth century have produced a situation where it is no longer safe to assume that there is a law of contract rather than of contracts. Particular principles and rules of law are applicable, sometimes as the result of statutory definition, say, to contracts of sale of goods, insurance, the carriage of goods by sea, contracts of employment, consumer contracts, which are peculiar to those contracts. In the past, a number of commercial contexts, such as shipping, insurance and construction, have been particularly influential in the development of contract law. Some have suggested that they have been disproportionately influential. Whatever the influence of particular contexts, however, apart from statutory intervention the ideology of the common law of contract remains that of a single body of general principles of contract law which apply, with or without modification, across the range of such contracts. It is those general principles of contract law that this book seeks to expound.

General principles

The contract law contained in this book follows, for the most part, the subject-matter established by Sir William Anson in the seventh edition of his *Principles of the English Law of Contract and of Agency in its Relation* to *Contract*. It deals with the Formation of Contract, the Limits of the Contractual Obligation, Performance and Discharge, Remedies for Breach of Contract, and Agency. It also deals with those factors which tend to vitiate a contract, such as incapacity, misrepresentation, duress and undue influence, mistake and illegality. A word must be said about these.

Effect of vitiating factors

Not all the factors that vitiate a contract are uniform in effect. Some of them may render a contract void or illegal, others voidable, while others still may make the contract unenforceable at the suit of one or other of the parties. These terms (void, illegal, voidable, and unenforceable) therefore denote different degrees of ineffectiveness, and they are in constant use in the law of contract. They are, however, not infrequently used with insufficient precision,[72] and even the same term may have a different meaning in different situations.

Void contracts

In the case of a *void* contract, for example, the basic position is that such a contract is simply one which the law holds to be no contract at all, a nullity from the beginning. The parties would be in the same position as they would have been had the contract never been made. No property would pass under such a contract; so, for example, a third party who purchased goods which had been the subject of a void contract would acquire no title to the goods and have to deliver them up to the true owner.[73] Conversely, money paid in pursuance of a void contract could be recovered from the person to whom it had been paid.[74] This indeed is the meaning of 'void' where a contract is said to be void for mistake. Where a

[72] See Turpin (1955) 72 S.A.L.J. 58; Honoré (1958) 75 S.A.L.J. 32.

[73] *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; *post*, p. 312.

[74] *Couturier* v. *Hastie* (1856) 5 H.L.C. 673; *post*, p. 300; *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, *post*, p. 211.

contract is rendered 'null and void' by the Gaming Act 1845,[75] not only do no rights of action arise out of the contract, but any money or other property transferred cannot be recovered. In other cases, however, a void contract may not be so completely without legal effect. A contract for the sale of an interest in land 'can only be made in writing'[76] so that one that is not in writing is 'utterly void and ineffective',[77] but, if it is executed, it appears that property will nevertheless pass.[78]

Illegal contracts

Again, an *illegal* contract is commonly said to be 'void', but the effects of illegality may vary considerably according to the degree of moral turpitude involved, the culpability of the parties, and whether or not the contract itself is rendered illegal.[79] In this case, the invalidity is imposed *ab extra* by the law, and it is not at the discretion of the contracting parties.

Voidable contracts

A *voidable* contract, however, is a contract which one of the parties has the option to rescind or affirm. If the choice is to affirm the contract, or if the right to rescind is not exercised within a reasonable time so that the position of the parties has, in the meantime, become altered, the option to rescind may be lost and the party who had it will be bound by the contract; otherwise that party is entitled to repudiate its liability. Nevertheless, the contract is not a nullity from the beginning. Until it is rescinded, it is valid and binding. A third party, therefore, who purchases goods which have been the subject of a voidable contract acquires a good title to the goods and cannot be compelled to surrender them to their former owner.[80]

Unenforceable contracts

An *unenforceable* contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot be sued on it. The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of enforcement because it is not evidenced by writing as required by statute.[81] But, in some cases, the defect is curable: the subsequent execution of a written memorandum may satisfy the requirements of the law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract itself is unimpeachable, only it cannot be directly enforced in court.

[75] s. 18, *post*, p. 341.

[76] Law of Property (Miscellaneous Provisions) Act 1989, s. 2(1), *post*, p. 81.

[77] Gray, *Elements of Land Law*, 2nd edn. (1993), p. 257. See also *United Bank of Kuwait plc* v. *Sahib* [1997] Ch. 107, at p. 122 *per* Chadwick J. and in the Court of Appeal at p. 136 *per* Peter Gibson L.J.

[78] *Tootal Clothing Ltd.* v. *Guinea Properties Ltd.* (1991) 64 P. & C.R. 452, at p. 455, *post*, p. 88.

[79] *Aratra Potato Co. Ltd.* v. *Taylor Johnson Garrett* [1995] 4 All E.R. 695, at pp. 708–10; *Mohamed* v. *Alago & Co.*, *The Times*, 2 April 1998. See further *post*, Chapter 9.

[80] Sale of Goods Act 1979, s. 23.

[81] *Post*, p. 79 (contract of guarantee).

IV. Contract as Part of the Law of Obligations

THE law of obligations has traditionally been divided into contractual obligations, which are voluntarily undertaken and owed to a specific person or persons, and obligations in tort which are based on the wrongful infliction of harm to certain protected interests, primarily imposed by the law, and typically owed to a wider class of persons.[82] Recently it has been accepted that there is a third category, restitutionary obligations, based on the unjust enrichment of the defendant at the plaintiff's expense,[83] such as where the plaintiff has mistakenly paid the defendant money or discharged the defendant's debt. Contractual liability, reflecting the constitutive function of contract,[84] is generally for failing to make things better (by not rendering the expected performance), liability in tort is generally for action (as opposed to omission) making things worse, and liability in restitution is for unjustly taking or retaining the benefit of the plaintiff's money or work. It accordingly follows that it is a defence to a claim in restitution that the defendant has changed its position, for example by incurring expenditure in reliance on a payment received from the plaintiff, so as to make it inequitable to order that the money be repaid.[85]

Although this tripartite division is a useful starting point, as the summary of the history of contract above indicates, it is to some extent a rationalization of a less tidy common law. The recent expansion of all these types of obligation also increases the occasions in which the different categories will overlap and it has been argued that the division made between duties which are voluntarily assumed and duties which are imposed by law is an oversimplification.[86] Moreover, care must be taken not to reverse the contractual allocation of risks by non-contractual actions.[87]

Concurrence of claims in contract & tort

Although the Court may decline to find a duty in tort where the parties are in a contractual relationship,[88] or may hold that a term of a contract has excluded or limited what would otherwise be a tortious duty, pre-contractual events, such as misrepresentation, may give rise to an action in tort.[89] Additionally, it is clear that in many cases, exemplified by negligent failure by professionals, such as solicitors and surveyors, to carry out their undertakings to their clients, a defendant may be liable to the same plaintiff in both contract and in tort.[90] Indeed the fact that tort liability may be grounded in an 'assumption of responsibility', means that a negligent breach of contract may often give rise to claims in both contract and tort.[91]

[82] Winfield, *Province of the Law of Tort* (1931), p. 380; Cane, *The Anatomy of Tort Law* (1997).

[83] *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548; *Kleinwort Benson Ltd.* v. *Glasgow City Council* [1997] 3 W.L.R. 959. See Burrows, *The Law of Restitution* (1993).

[84] *Ante*, p. 3.

[85] *Lipkin Gorman* v. *Karpnale Ltd.* (*supra*, n. 83) at pp. 579–80.

[86] Atiyah (1978) 94 L.Q.R. 193, at p. 223. Cf. Burrows (1983) 99 L.Q.R. 217.

[87] e.g. *Marc Rich & Co. A.G.* v. *Bishop Rock Marine Co. Ltd.* [1996] A.C. 211, and see *post*, p. 445.

[88] *Tai Hing Cotton Mill* v. *Liu Chong Hing Bank* [1986] A.C. 80, at p. 107; *Greater Nottingham Co-operative Society* v. *Cementation Piling and Foundations Ltd.* [1989] Q.B. 1.

[89] *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, *post*, p. 242.

[90] *Midland Bank Trust Co. Ltd.* v. *Hett, Stubbs and Kemp* [1979] Ch. 384; *Henderson* v. *Merrett Syndicates* [1995] 2 A.C. 145.

[91] *White* v. *Jones* [1995] 2 A.C. 207, *post*, p. 425, on which see Weir (1995) 111 L.Q.R. 357.

Where this is so, 'the plaintiff can advance his claim, as he wishes, either in contract or in tort, and no doubt he will . . . advance the claim on the basis that is most advantageous to him'.[92] The practical differences between contract and tort include, for example, the measure of recovery,[93] the period of limitation, the relevance of the plaintiff's contributory fault (it is generally irrelevant in contract but relevant in tort),[94] and assignability, since only a contractual claim can generally be assigned.

Contract & restitution

Historically, the effect of the implied term theory was that contract was thought in effect to have swallowed up restitution. While it is now clear that restitution is independent of contract, the two overlap in the case of money paid and services rendered under ineffective contracts and contracts discharged by breach or by frustration.[95] It may also be difficult to distinguish restitution from contract where one person has 'freely accepted' or 'acquiesced' in services rendered by the other.[96] Where there is a contract and it makes provision for repayment or recompense, there will be no claim in restitution.[97] Where, however, it does not, a claim may lie, and, for example, in the case of a contract discharged for breach, the innocent party's restitutionary claim may be greater than the contractual claim for damages.[98] We shall also see that a restitutionary remedy may be available in respect of work done by one party during pre-contractual negotiations which do not ripen into a contract.[99]

V. Contract and Property

THE law of obligations must be distinguished from the law of property which governs the acquisition of the rights persons have in things, which may be land or moveables, and may be a tangible physical object or an intangible, such as a debt, shares in a company or a patent.[100] Whereas a person's property right in a thing is generally valid against the whole world, the rights under the law of obligations, including contract, are personal and valid only against a specific person or persons. Property rights may be *protected* by the law of tort, as where the use and enjoyment of land is protected by the torts of trespass and nuisance. Property rights may be *transferred* by contract, as where A sells goods to B, and the property passes under section 18 of the Sale of Goods Act 1979, but they may also be transferred in other ways, for example by delivery with the requisite intention, as where a gift is made. As we have seen, property can pass under voidable and unenforceable contracts as well as valid ones, but not normally under void contracts.[101] Where property has so passed (whether under the contract or by delivery), B may

[92] *Coupland* v. *Arabian Gulf Petroleum Co.* [1983] 3 All E.R. 226, *per* Robert Goff L.J., at p. 228.
[93] *Post*, pp. 241, 244, and 564 (remoteness).
[94] *Post*, p. 583.
[95] *Post*, pp. 211, 218–25, 528, 604–14.
[96] See Beatson, *The Use and Abuse of Unjust Enrichment* (1991), ch. 2.
[97] *Pan Ocean Shipping Co. Ltd.* v. *Creditcorp Ltd.* [1994] 1 W.L.R. 161.
[98] *Post*, p. 604.
[99] *Post*, pp. 40, 64.
[100] Lawson and Rudden, *The Law of Property*, 2nd edn. (1982), ch. II.
[101] *Ante*, p. 20.

in turn resell the goods and pass the property in them to C, even though B may not have paid A, or may have committed some other breach of contract, but an unpaid seller in possession of goods has the power to dispose of them in certain cases.[102] Where property has not passed to B, B is only able to confer a contractual right to the goods upon C. The position of a person who only has a contractual right to a thing is less secure than that of a person who has a property right since contractual rights may generally only be enforced against the other party to the contract (in our example, B) whereas property rights are generally enforceable against all persons. C would therefore only be able to enforce a contract right against B, and not against A, or anyone who acquires the goods from A.

[102] See Sale of Goods Act 1979, ss. 39(1)(c), 48(3)–(4).

PART 1

Formation of Contract

2. The Agreement 27
3. Form, Consideration, and Promissory Estoppel 74
4. The Terms of the Contract 125

2

The Agreement

A CONTRACT consists of an actionable promise or promises. Every such promise involves at least two parties, a promisor and a promisee, and an outward expression of common intention, and of expectation as to the declaration or assurance contained in the promise.

Contract and agreement

It has been previously pointed out[1] that this outward expression of a common intention and of expectation normally takes the form of an agreement. In most cases, therefore, it will be necessary to ascertain at the outset whether or not an agreement has been concluded.

I. Establishing an Agreement

THE fact that an agreement has been reached will frequently be self-evident, since, although as a general rule English law has no requirements of writing or other form,[2] the agreement will be set out in a written document signed or initialled by both parties. But, in certain circumstances, it may be more difficult to discover whether the parties have agreed. The alleged agreement may, in whole or in part, have been concluded by word of mouth or by conduct. Difficulties of proof will then arise and the resultant questions of fact will have to be determined by the trial judge from the evidence given by the parties and their witnesses. We are not, however, here concerned with difficulties of proof, but rather with those problems that occur even where there is no dispute as to what the parties said or did. Such problems are not infrequent in practice, especially when the fact of agreement has to be elicited from correspondence, or from an exchange of other types of communication such as 'telex' messages, facsimile, or electronic mail.

Conclusion of an agreement

(a) Offer and Acceptance

In order to determine whether an agreement has actually been concluded, we must normally inquire whether in the negotiations which have taken place between the parties there has been a definite offer by one party, and an equally definite acceptance of that offer by the other. For most contracts are reducible by analysis to the acceptance of an offer. If, for instance, A and B have agreed that A

Contract may originate in offer and acceptance

[1] See *ante*, p. 2. [2] On such requirements, see *post*, Chapter 3.

shall purchase from B a property for £50,000, we can trace the process to a moment at which B must have said to A, in effect, 'Will you give me £50,000 for my property?', and A has replied, 'I will'; or at which A has said to B, 'Will you let me have the property for £50,000?' and B has said, 'I will'. There are, however, cases to which this analysis does not readily apply. These include a contract alleged to have come into existence during and as a result of performance,[3] the signature of a prepared document, the acceptance by two parties of terms suggested by a third, negotiations through a single intermediary,[4] and multiparty agreements.[5] Where, however, a contract is alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, the Court should look at the correspondence to see whether there is an offer by one party and an acceptance by the other party.[6] It would be a mistake to think that *all* contracts can thus be analysed into the form of offer and acceptance or that, in determining whether an exchange does give rise to a contract, the sole issue is whether the communications match and are identical.[7] The analysis is, however, a working method which, more often than not, enables us, in a doubtful case, to ascertain whether a contract has in truth been concluded, and as such may usefully be retained.

How offer and acceptance made

The process of 'offer and acceptance' may take place in any one of three ways:

(1) In the offer of an act for a promise: as when a person offers goods or services which when accepted bind the acceptor to reward the offeror for them.

Illustration: A plc allows B to do work for it or to send it goods under such circumstances that no reasonable person would suppose that B meant to do the work or supply the goods for nothing. A plc will be liable to pay for the work. The doing of the work or the supply of the goods is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance.[8] Mere failure to disown responsibility to pay is not, however, enough.

(2) In the offer of a promise for an act:[9] as when a person offers a reward for

[3] *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154, at p. 167; *G. Percy Trentham Ltd.* v. *Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25, at p. 27.

[4] *Pagnan SpA* v. *Feed Products Ltd.* [1987] 2 Lloyd's Rep. 601, at p. 616.

[5] *Clarke* v. *Earl of Dunraven (The 'Satanita')* [1897] A.C. 59, *post*, p. 30.

[6] *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294, *per* Lord Diplock at p. 297. Cf. *Port Sudan Cotton Co.* v. *Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5.

[7] e.g. whether a statutory 'cooling off' period has passed (Consumer Credit Act 1974, ss. 67–8; Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 (S.I. 1987 No. 2117), as amended by S.I. 1988 No. 958; Timeshare Act 1992; Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992 No. 1942)) and whether written terms have been incorporated (*Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd.* [1989] Q.B. 433, at p. 443).

[8] *St John Tugboat Co. Ltd.* v. *Irving Refinery Co. Ltd.* [1964] S.C.R. 614, at pp. 621–2; *Steven* v. *Bromley & Son* [1919] 2 K.B. 722, *post*, p. 30. In such cases where there is an impediment to the creation of a contract such as informality (*post*, p. 86) or incompleteness (*post*, p. 67) there may be a restitutionary claim for a *quantum meruit*: *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403; *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 W.L.R. 932; *British Steel Corpn.* v. *Cleveland Bridge and Engineering Co. Ltd.* [1984] 1 All E.R. 504; *Pavey & Matthews Pty. Ltd.* v. *Paul* (1986) 162 C.L.R. 221 (Australia).

[9] Or forbearance. See also *post*, p. 99.

the doing of a certain thing, which being done that person is bound to make good the promise to the doer.

Illustration: C, who has lost her dog, offers by advertisement a reward of £25 to anyone who will bring the dog safely home; a promise is offered in return for an act; and when D, knowing of the reward, brings the dog safely home, the act is done and C is bound to pay the reward.

(3) In the offer of a promise for a promise: in which case, when the offer is accepted by the giving of the promise, the contract consists of an outstanding obligation on both sides.

Illustration: E offers to pay F a certain sum of money if F will promise to dig E's garden for him within a certain time. When F makes the promise asked for, he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow the first to do it and to pay for it.

Difference between contracts 'unilateral' and 'bilateral'

It will be observed that cases (1) and (2) differ from (3) in an important respect. In (1) and (2), it is performance on one side which makes obligatory the promise of the other; the outstanding obligation is all on one side. In consequence, such a contract is sometimes termed 'unilateral'[10] as only one person is bound. In (3), however, each party is obliged to some act or forbearance which, at the time of entering into the contract, is future; there is an outstanding obligation on each side. This is frequently known as a 'bilateral' contract, and each party is both a promisor and a promisee. It is reasonable to presume in cases of doubt that a bilateral, rather than a unilateral contract has been concluded. Thus if G says to H: 'If you will let me have that table you are making, when it is finished, I will give you £25 for it', and H replies 'All right', there is a bilateral contract and H is bound to deliver the table.[11]

Exception—promises in deeds

In one exceptional situation, however, it is clear that a contract can come into existence without any need for an 'offer and acceptance'. This is the case of a promise in a deed. For example, if a wealthy person, by a document executed as a deed, promises to pay a college £100,000 in order to establish a scholarship, the promise is binding without any need for an acceptance or even knowledge by the object of the promise[12] and even though it is, in fact, merely a gift.[13]

(b) Inferences from Conduct

Agreement inferred from conduct

The description which has been given of the possible forms of offer and acceptance shows that conduct may take the place of written or spoken words either in the offer or in the acceptance. An agreement may also be inferred from conduct alone; the intention of the parties is a matter of inference from their conduct, and the inference is more or less easily drawn according to the circumstances of the case.[14] In day-to-day contracts such inferences are frequent. For example,

[10] *G.N. Ry.* v. *Witham* (1873) L.R. 9 C.P. 16, at p. 19; *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154, at pp. 167–8, 171, 177.

[11] *Restatement of the Law of Contracts* (2d), § 31.

[12] Although he cannot be compelled to accept the benefit: *Townson* v. *Tickel* (1819) 3 B. & Ald. 31.

[13] See *post*, p. 76. On the use of contracts by deeds, see generally *post*, Chapter 3.

[14] Cited with approval in *Wright & Co. Ltd.* v. *Maunder* [1962] N.Z.L.R. 355, at p. 358.

a person who boards a bus or who hires a taxi-cab thereby undertakes to pay the fare to his destination even though he makes no express promise to do so.[15] Again, a person who puts a coin in an automatic machine thereby enters into a contract with the supplier although no words have been exchanged on either side.

To illustrate the operation of an inferred agreement, let us consider a few decided cases. In *Stevens* v. *Bromley & Son*:[16]

> The charterer of a ship agreed to load a cargo of steel billets at a certain rate of freight. Nearly half the cargo tendered by it, and accepted for shipment by the shipowner, consisted of general merchandise, for which the current rate of freight was substantially higher than the rate for steel billets agreed on under the charter.

It was held that the proper inference from these facts was that the parties had made a fresh contract; the charterer by its conduct had requested the shipowner to carry a substituted cargo on the terms that it would pay the current rate of freight for cargo of that description, and the shipowner had accepted that offer and was entitled to the higher rate for that part of the cargo.

Sometimes the inference from conduct is not so clear, because the contract has assumed a less simple form. If more than two parties are involved, it may not be particularly helpful to look for a definite offer and acceptance. In *Clarke* v. *Earl of Dunraven (The Satanita)*:[17]

> The owner of a yacht, the *Satanita*, entered his boat in a yacht club regatta. The rules of the regatta bound competitors to make good any damage caused by fouling. While coming up into position for the start of a race, the *Satanita* fouled and sank the *Valkyrie*, which had also been entered by its owner under the same rules.

Although the immediate relationship of each owner was not with the other, but with the secretary of the yacht club, it was held that a contract existed between them, and that the owner of the *Valkyrie* could recover damages. Lord Hershell said:[18]

> The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability.

Similar principles mean that in the case of a company or other corporate entity there will, for certain purposes, be a contract both between the entity and its members and between each of the members themselves.[19]

exceptionally from inactivity

Can an offer be inferred from inactivity? It has been stated that, where neither party to an arbitration has taken any steps in the proceedings for a very long time,

[15] See *Wilkie* v. *London Passenger Transport Board* [1947] 1 All E.R. 258.
[16] [1919] 2 K.B. 722. See also *Sullivan* v. *Constable* (1932) 48 T.L.R. 369.
[17] [1897] A.C. 59. For an explanation of this case in traditional terms of offer and acceptance, see Salmond and Williams, *Contracts*, p. 71.
[18] At p. 63.
[19] *Rayfield* v. *Hands* [1960] Ch. 1 (company); *J. H. Rayner (Mincing Lane) Ltd.* v. *Department of Trade and Industry* [1989] Ch. 72, at p. 190; [1990] 2 A.C. 413, at p. 515 (international organization whose members were states).

an offer to abandon the arbitration can be inferred.[20] It should be noted that in this context a contract to arbitrate disputes between the parties exists and the question is whether *that* contract can be modified. However, even in this context the inference of an offer from mere silence is only a possibility in an exceptional case. Inactivity on its own, without some overt act, is almost always likely to be insufficient.[21] In the case of 'inertia selling' statute has intervened, and the despatch of goods without any prior request may constitute a gift rather than an offer.[22]

Objective inference

It is important, however, to note that the test of a person's intention is not a subjective, but an objective one; that is to say, the intention which the law will attribute to a person is always that which that person's conduct bears when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's own mind. Thus a person may be held to have made an offer although not appreciating that one was being made,[23] or if the offer was made under a mistake,[24] if words or conduct, when reasonably construed, amounted to an offer, provided that the offeree neither knew nor could reasonably have known of the misunderstanding at the time the offer was accepted.[25] Although the approach is objective, it is not purely objective in the sense that the intentions of the parties are entirely irrelevant so that a contract may be formed which is in accordance with the intention of neither party.[26] It has been stated that 'the judicial task is not to discover the actual intentions of each party;

[20] *Andre et Compagnie S.A.* v. *Marine Transocean Ltd.* [1981] 2 Lloyd's Rep. 29, at p. 31; *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal* [1981] 2 Lloyd's Rep. 438, at p. 439; [1983] 1 A.C. 854, at pp. 865, 885, 914, 916, 924.

[21] *Allied Marine Transport Ltd.* v. *Vale do Rio Doce Navegacao S.A.* [1983] 2 Lloyd's Rep. 411, at p. 417; [1985] 1 W.L.R. 925, at p. 937 (C.A.); *Cie Francaise d'Importation etc S.A.* v. *Deutsche Conti Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, at pp. 598–9; *Yamashita-Shinnihon SS Co. Ltd.* v. *l'Office Cherifien des Phosphates* [1994] A.C. 486. Since 1990 arbitrators have a statutory power (now contained in the Arbitration Act 1996, s. 41(6)) to dismiss a claim for want of prosecution.

[22] Unsolicited Goods and Services Acts 1971 and 1975, ss. 1 and 6. The receiver must serve notice on the sender indicating the place where the goods can be collected within 30 days. On acceptance by silence, see *post*, p. 47.

[23] *Upton-on-Severn R.D.C.* v. *Powell* [1942] 1 All E.R. 220. But there the liability (to pay for the provision of fire fighting services) is probably (see *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 W.L.R. 932, at p. 938) best regarded as restitutionary rather than contractual because neither party believed it was entering into a contract: the fire brigade rendering the services (the 'offeree') believed it was under a duty to provide the service without charge. Cf. *Henkel* v. *Pape* (1870) L.R. 6 Ex. 7.

[24] *Centrovincial Estates plc* v. *Merchant Investors Assurance Co. Ltd.* [1983] Com. L.R. 158 (rent of £65,000 mistakenly proposed instead of £126,000); *Moran* v. *University College Salford (No. 2)*, *The Times*, 23 November 1993 (mistaken unconditional offer of university place); *O.T. Africa Line Ltd* v. *Vickers plc* [1996] 1 Lloyd's Rep. 700 (payment of £150,000 mistakenly offered instead of $150,000). See also *post*, pp. 308–10.

[25] The better view is that the offeror need not be aware of the offeree's state of mind: see *Paal Wilson & Co. A/S* v. *Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, at p. 924 (Lord Brightman). See also *ibid.*, at p. 914 (Lord Brandon) and cf. *ibid*, at p. 916 (Lord Diplock). See generally Spencer [1973] C.L.J. 104, 106–13; Cartwright, *Unequal Bargaining* (1991), pp. 5–24.

[26] Cf. *Upton-on-Severn R.D.C.* v. *Powell* [1942] 1 All E.R. 220, *ante*, n. 23; *Solle* v. *Butcher* [1950] 1 K.B. 671, at p. 691; *Furness Withy (Australia) Pty. Ltd.* v. *Metal Distributors (U.K.) Ltd.* [1990] 1 Lloyd's Rep. 236, at p. 243; Williston, *Law of Contracts*, 3rd edn. (1957), § 95. On the merits and demerits of this 'detached objectivity', see Howarth (1984) 100 L.Q.R. 265; Vorster (1987) 104 L.Q.R. 274.

it is to decide what each was reasonably entitled to conclude from the attitude of the other'.[27]

(c) English Law and International Conventions

Technique of agreement

The rules which govern the making of an offer and its acceptance are set out in the following sections of this chapter.[28] We shall see that the offer must be communicated to the offeree and that the acceptance of the offer must normally be communicated to the offeror. We shall therefore consider the *technique* of agreement: in what way, and at what point in time, communication is effective; the need for an exact correspondence between the terms of the offer and those of the acceptance; and how an offer may be terminated.

International sale of goods

It should be noted, however, that these rules of English law will not necessarily apply in the case of a contract of international sale of goods. Different rules are contained in the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), and these may be applicable by virtue of the Uniform Laws on International Sales Act 1967. ULFIS is to be replaced by the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention).[29]

II. The Offer

Offer defined

AN offer is an intimation, by words or conduct, of a willingness to enter into a legally binding contract, and which in its terms expressly or impliedly indicates that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance, or return promise on the part of the person to whom it is addressed.

Supply of information

A statement of fact made merely to supply information cannot be treated as an offer, and accepted, so as to create a valid contract. In *Harvey* v. *Facey*:[30]

> A telegraphed to B 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price, answer paid'. B replied by telegram, 'Lowest price for Bumper Hall Pen £900'. A telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you'. Bumper Hall Pen was a plot of land, and A claimed that this exchange of telegrams constituted a valid offer and acceptance.

[27] *Gloag on Contract*, 2nd edn. (1929), p. 7; approved by Lord Reid in *McCutcheon* v. *David Macbrayne Ltd.* [1964] 1 W.L.R. 125, at p. 128.

[28] See also Winfield (1939) 55 L.Q.R. 499; Ellison Kahn (1955) 72 S.A.L.J. 246; *Restatement* (2d), §§ 20–74.

[29] See Nicholas (1989) 105 L.Q.R. 201 and, on whether the United Kingdom should accede, Hobhouse (1990) 106 L.Q.R. 530; Steyn, in Birks ed., *The Frontiers of Liability* (vol. II), 11; Reynolds, *ibid.*, 18.

[30] [1893] A.C. 552.

The Judicial Committee of the Privy Council pointed out that the first telegram of A asked two questions, (1) as to the willingness of B to sell, and (2) as to the lowest price; and that the word 'telegraph' was addressed to the second question only. They held that no contract had been made, that B in stating the lowest price for the property was not making an offer but supplying information, that the third telegram set out above was an offer by A—not the less so because he called it an acceptance—and that this offer had never been accepted by B.

(a) Offers and Invitations to Treat

Distinct between invitatio

It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to, result in any binding obligation from offers which admit of acceptance, and so become binding promises. A person advertises goods for sale in a newspaper, or announces that they will be sold by tender or by auction; a shopkeeper displays goods in a shop window at a certain price; or a bus company advertises that it will carry passengers from A to Z and will reach Z and other intermediate stops at certain times. In such cases it may be asked whether the statement or act made is an offer capable of acceptance or merely an invitation to make offers, and do business; one that contemplates that further negotiations will take place. A statement or act of this nature, if it is not intended to be binding, is known as an 'invitation to treat'.

As the classification of any particular act or statement as being either an offer or an invitation to treat depends on intention to be bound rather than upon any *a priori* principle of law, it is not easy to reconcile all the cases or their reasoning. Where the intention is unclear the Court will take account of the surrounding circumstances and consequences of holding an act or statement to be an offer as well as what is in fact said.

Adverti

Generally speaking advertisements in newspapers or periodicals that the advertiser has goods for sale are not offers.[31] Neither are catalogues or price lists.[32] Again, a display of goods marked at a certain price by a shopkeeper in a shop window[33] does not bind the shopkeeper to sell at that price or to sell at all. The display is merely an invitation to treat; it is for the customer to offer to buy the goods, and the shopkeeper may choose either to accept or to refuse the offer.[34] One reason given for this conclusion is that otherwise the advertiser, catalogue publisher, and shopkeeper would be obliged to sell to every person who accepted such an 'offer', even where supplies had run out. In the case of displays on shelves

[31] *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204 (advertisement of 'Bramblefinch cocks and hens' for sale). Cf. advertisements of a *unilateral* contract, which are offers: *Carlill* v. *Carbolic Smoke Ball Co. Ltd.* [1893] 2 Q.B. 49, *post*, p. 36; *Bowerman* v. *A.B.T.A.* [1995] 145 N.L.J.R. 1815; the 'reward' cases, *post*, p. 49.

[32] *Grainger & Son* v. *Gough* [1896] A.C. 325 (bookseller's catalogue with prices); *Seacarriers A/S* v. *Aoteraroa International Ltd.* [1985] 2 Lloyd's Rep. 419 (quotation of freight rates).

[33] *Timothy* v. *Simpson* (1834) 6 C. & P. 499 (*infra*, n. 36); *Fisher* v. *Bell* [1961] 1 Q.B. 394 (on which, see now, Restriction of Offensive Weapons Act 1961, s. 1); *Esso Petroleum Ltd.* v. *Commissioners of Customs and Excise* [1976] 1 W.L.R. 1 (indication of price at which petrol to be sold at attended service station not an offer).

[34] Subject to anti-discrimination legislation: *infra*, n. 37.

in a self-service shop, which are also generally invitations to treat, it is said that if the display were an offer, once an article was selected and placed in the receptacle, the customer would have no right to change his mind.[35] Another reason given is that if a display was an offer a shopkeeper might be forced to contract with his worst enemy: a 'shop is a place for bargains, not for compulsory sales'[36] but this is less convincing in the light of modern regulation of trading practices, for example the prohibition of sex and racial discrimination[37] and the statutory protection of consumers.[38] Where the display clearly states that the goods will be sold to a person who pays the required price it is, however, likely to be held to be an offer.[39]

Different considerations apply where the transaction is effected through a machine[40] as where the display is on a vending machine or where, as in many self-service petrol stations,[41] the product purchased cannot easily be retrieved from the buyer's property. In such cases the display is likely to be an offer.

In the case of auctions a difficult distinction has been made between an advertisement that an auction sale shall be 'without reserve', which has been said to be an offer,[42] and an advertisement that an auction will take place on a certain day, which has been held to be an invitation to treat.[43]

There is a similar diversity in the cases on the status of acts or statements about the carriage of persons. A statement in a railway timetable that a certain train will run at a certain time has been said to be an offer capable of acceptance by a passenger who goes to the station to buy a ticket,[44] although regulations[45] in effect provide that no contractual liability is to arise.

[35] *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.* [1952] 2 Q.B. 795 aff'd. [1953] 1 Q.B. 401. See Unger (1953) 16 M.L.R. 369 for criticism and note (i) the context, whether the display constituted an unlawful 'sale' of drugs unsupervised by a registered pharmacist under the Pharmacy and Poisons Act 1933, s. 18(1), and (ii) in the USA it has been held that there is no acceptance until the goods are presented at the checkout: *Lasky* v. *Economic Stores* 5 N.E. 2d 305 (1946).

[36] Winfield (1939) 55 L.Q.R. 499, 518. See *Said* v. *Butt* [1920] 3 K.B. 497 (theatre manager refused entry to critic who had got someone else to buy a ticket for him to a first night performance); *Timothy* v. *Simpson* (1834) 6 C. & P. 499 (a person who went into a shop asked to pay 7/6d although item was marked at 5/11d and shop assistant said 'don't let him have it, he's only a Jew. Turn him out.').

[37] Sex Discrimination Act 1975; Race Relations Act 1976, *ante*, p. 5. See also *Quinn* v. *Williams Furniture* [1981] I.C.R. 328; *Gill* v. *El Vino* [1983] Q.B. 425.

[38] *Post*, n. 39.

[39] *Warwickshire C.C.* v. *Johnson* [1993] 1 All E.R. 299, at p. 302 (Notice stating 'We will beat any TV HiFi and Video price by £20 on the spot' said to be 'a continuing offer' and shop manager criminally liable under the Consumer Protection Act 1987, s. 20(1) for a misleading indication as to the price at which goods may be available). See also Consumer Credit Act 1974, s. 43 and *Jenkins* v. *Lombard North Central plc* [1984] 1 W.L.R. 307.

[40] *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163, at p. 169 (machine controlling entry to car park).

[41] *Re Charge Card Services* [1989] Ch. 417, at p. 512 (open offer to sell at pump prices accepted by motorist putting petrol in tank). See also *Chapelton* v. *Barry U.D.C.* [1940] 1 K.B. 532 (display of deck chairs for hire an offer). On non-self service petrol sales, see *supra*, n. 33.

[42] *Warlow* v. *Harrison* (1858) 1 E. & E. 309, discussed *post*, p. 56.

[43] *Harris* v. *Nickerson* (1873) L.R. 8 Q.B. 286.

[44] *Denton* v. *Great Northern Railway Co.* (1856) 5 E. & B. 860, *per* Lord Campbell C.J. and Wightman J. (Crompton J. dissenting). See also *Wilkie* v. *L.P.T.B.* [1947] 1 All E.R. 258 (contract formed when passenger boarded bus, i.e. running the bus constituted the offer).

[45] Made by the Railways Board and the independent railways contractors under the Transport Act

Tenders

An announcement inviting tenders is not normally an offer; unless accompanied by words indicating that the highest or the lowest tender will be accepted,[46] it is a mere attempt to ascertain whether an acceptable offer can be obtained.[47] In a case where there is no offer to contract with the highest or lowest bidder, if the invitation to tender prescribes a clear, orderly, and familiar procedure, it may be an offer to consider all conforming tenders. Thus, where, a local authority's staff failed to clear a letterbox and the authority did not consider a tender submitted before the deadline, it was held liable for breach of contract.[48] The freedom to decide which tender to accept has been limited by European Community law.[49] Tendering procedures for major contracts for public works, supplies, and services must not discriminate against nationals of another Member State. A person seeking tenders is obliged to conform to non-discriminatory standards and a disappointed tenderer may claim damages if there has been breach of the rules.

(b) General Offers

Offer m made to world

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person.

This proposition is best understood by an illustration:

An insurance company offers a reward to any person who finds and returns a valuable diamond brooch insured by them. X who knows of the offer, finds and returns the brooch. She is entitled to claim the reward.[50]

An offer, by way of advertisement, of a reward for the rendering of certain services, addressed to the public at large, *prima facie* creates a power of acceptance in every person to whom it is made or becomes known. But a contractual obligation to pay the reward only comes into existence when an individual person performs the stipulated services, and not before.[51] A general offer may be susceptible of acceptance either by only one person or by a number of persons.

In some cases, such as the offer of a reward for information or the return of a lost possession, the offer is exhausted when once accepted. The offeror clearly does not intend to pay many times over for the same thing. So, where a reward is offered for information and the information asked for reaches the offeror from

1962 and the Railways Act 1993. In the context of bus services, see Public Passenger Vehicles Act 1981 and regulations made under it.

[46] *Harvela Investments Ltd.* v. *Royal Trust of Canada (C.I.) Ltd.* [1986] A.C. 207.

[47] *Spencer* v. *Harding* (1870) L.R. 5 C.P. 561. Contrast *G.N. Ry.* v. *Witham* (1873) L.R. 9 C.P. 16; *Percival Ltd.* v. *L.C.C. Asylums etc. Committee* (1918) 87 L.J.K.B. 677.

[48] *Blackpool and Fylde Aero Club Ltd.* v. *Blackpool B.C.* [1990] 1 W.L.R. 25. See also *Fairclough Building Ltd.* v. *Port Talbot Borough Council* [1992] Construction Industry Law Letter 779. See *post*, p. 560 on the remedy for breach of this obligation.

[49] The EC Directives (consolidated in 93/36, 93/37, and 93/38/EEC, [1993] OJ L199/36, 14 June 1993) have been implemented in the United Kingdom by delegated legislation: S.I. 1991 No. 2680; S.I. 1991 No. 2679; S.I. 1992 No. 3279; S.I. 1996 No. 2911. See *post*, p. 210.

[50] For the position where X does not know of the offer, see *post*, pp. 49–50.

[51] *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154, at p. 168. See also *Williams* v. *Carwardine* (1833) 4 B. & Ad. 621, *post*, p. 50.

several sources, it has been held that the person who gave the earliest information is entitled to the reward.[52]

In other cases the nature of the act asked for by the offeror and the circumstances in which the offer is made mean that it remains open for acceptance by any number of persons, such acceptance being signified by performance of its terms. In *Carlill* v. *Carbolic Smoke Ball Co.*:[53]

The Carbolic Smoke Ball Co. offered by advertisement to pay £100 to any one 'who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions'. It was added that £1,000 was deposited with the Alliance Bank 'showing our sincerity in the matter'. Mrs Carlill used the Smoke Ball as required by the directions; she afterwards suffered from influenza and sued the company for the promised reward.

The company was held liable. It was urged that a notification of acceptance should have been made to the company. The Court held that this was one of the class of cases in which, as in the case of a reward offered for information or for the recovery of lost property, there need be no acceptance of the offer other than performance of the condition. The further argument that the alleged offer was merely an advertisement or puff which no reasonable person would take to be serious was rejected because the statement that £1,000 had been deposited to meet demands was regarded as evidence of the sincerity of the offer. The advertisement was an offer which was capable of being accepted by a number of persons, and which had been accepted by Mrs Carlill when she performed the stipulated conditions.

(c) Communication of the Offer

Offer must be communicated

In general an offer is effective when, and not until, it is communicated to the offeree. It follows that there can in general be no acceptance in ignorance of an offer, and, despite one somewhat unsatisfactory contrary decision, this is undoubtedly correct in principle.[54]

Cross-offers

The necessity for the communication of the offer, and for its consequent acceptance, appears to be the reason why two identical cross-offers do not ordinarily make a contract. Two manifestations of a willingness to make the same bargain do not constitute a contract unless one is made with reference to the other.[55] In *Tinn* v. *Hoffman & Co.*:[56]

On the 28 November 1871, the defendants wrote to the plaintiff offering to sell him 800 tons of iron at 69*s.* per ton, together with a further quantity at the same price. On the same day, the plaintiff wrote to the defendants offering to buy 800 tons at 69*s.*, together with a

[52] *Lancaster* v. *Walsh* (1838) 4 M. & W. 16.

[53] [1893] 1 Q.B. 256. See also *Bowerman* v. *A.B.T.A.* [1995] 145 N.L.J.R. 1815.

[54] *Gibbons* v. *Proctor* (1891) 64 L.T. 594, 55 J.P. 616. For criticism and contrary authority, see *post*, pp. 49–50.

[55] If one is made with reference to the other, there is no reason why a contract should not be held to exist, even though it is expressed to be an 'offer' and not an acceptance: but see *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294.

[56] (1873) 29 L.T. 271, at pp. 275, 277, 278, 279; *Restatement* (2d), § 23.

further quantity at a lower price. The letters crossed in the post. The plaintiff contended that there was, at all events, a good contract for 800 tons at 69*s.* per ton.

A majority of the Court of Exchequer Chamber expressed the opinion that the defendants would not be bound as a result of the simultaneous offers, each being made in ignorance of the other.

Offer by rendering must be commun

It would also seem to explain why, although conduct, such as the rendering of services can constitute an offer, where that offer is not communicated to the party to whom it is intended to be made there is no opportunity of rejection and no presumption of acceptance. Thus, if A does work for B without the request or knowledge of B, A can only sue in contract for the value of the work where there is evidence of a recognition or acceptance of the work by B. This is clearly illustrated by the case of *Taylor* v. *Laird*:[57]

The plaintiff was engaged to command the defendant's ship and to conduct certain explorers on an expedition up the River Niger. He threw up his command in the course of the expedition, but helped to work the vessel home, though without the knowledge of the defendant. He then claimed to be remunerated for the services thus rendered.

It was held that he could not recover. The defendant never had the option of accepting or refusing the services while they were being rendered; and he repudiated them when he became aware of them. The plaintiff's offer, being uncommunicated, did not admit of acceptance and could not give him any contractual rights against the defendant. Pollock C.B. said:[58]

Suppose I clean your property without your knowledge, have I a claim on you for payment? How can you help it? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?

In certain circumstances, for instance where the services rendered are necessary services, restitutionary liability may arise but such liability is not contractual.[59]

Contrac 'standar

Finally, we must note that, where the terms of the contract are contained in a ticket, receipt, or 'standard form' document, in certain circumstances it will be sufficient if the person tendering the document has done all that might reasonably be expected to give notice of the contractual terms to the class of persons to which the other party belongs.[60] This topic is considered in Chapter 4, The Terms of the Contract, later in this book.[61]

[57] (1856) 25 L.J. Ex. 329. See also *Forman & Co. Pty. Ltd.* v. *Ship Liddesdale* [1900] A.C. 190.

[58] At p. 332.

[59] On necessity, see *Jenkins* v. *Tucker* (1788) 1 Hy. Bl. 90 (burial of the dead); *Re Rhodes* (1890) 44 Ch. D. 94 (restitution in respect of the maintenance of a mentally incapable person recognized in principle but recovery on facts because there was no intention to charge for the services). See also *Way* v. *Latilla* [1937] 3 All E.R. 759, at pp. 764–5 (no concluded contract but restitution based on acceptance of services). For the practical difference between the two forms of liability see *post*, p. 40, 64.

[60] *Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416.

[61] See *post*, p. 160 ff.

III. The Acceptance

Acceptance defined

ACCEPTANCE of an offer is the expression, by words or conduct,[62] of assent to the terms of the offer in the manner prescribed or indicated by the offeror.

(a) Offer and Acceptance Must Correspond

Acceptance must coincide with offer

If a contract is to be made, the intention of the offeree to accept must be expressed without leaving room for doubt as to the fact of acceptance, or as to the coincidence of the terms of the acceptance with those of the offer. These requirements may be summed up in the general rule, sometimes called the 'mirror image' rule, that the acceptance must be absolute, and must correspond with the terms of the offer.

Inconclusive acceptances

In determining whether or not an acceptance is conclusive, an alleged acceptance must be distinguished from (i) a rejection and counter-offer; (ii) an acceptance with some variation or addition of terms; or (iii) an acceptance which is equivocal, or which is qualified by reference to the subsequent arrangement of terms.

(i) Rejection and counter-offer

Counter-offer

A counter-offer amounts to a rejection of the offer, and so operates to bring it to an end.

In *Hyde* v. *Wrench*,[63] for example:

> W offered to sell a farm to H for £1,000. H said that he would give £950. W refused, and H then said he would give £1,000, and, when W declined to adhere to his original offer, H tried to obtain specific performance of the alleged contract.

The Court, however, held that an offer to buy at £950 in response to an offer to sell for £1,000 was a refusal followed by a counter-offer, and that no contract had come into existence. But making express what would otherwise be implied[64] or inquiring whether the offeror will modify his terms does not necessarily amount to a counter-offer. So in *Stevenson, Jacques & Co.* v. *McLean*,[65] the offeree could still accept an offer of a certain quantity of iron 'at 40*s.* nett *cash* per ton', even though he had telegraphed to the offeror requesting information as to possible terms of credit. It was held that this was not a counter-offer, but was 'a mere inquiry, which should have been answered and not treated as a rejection of the offer'.[66]

[62] *Ante*, p. 29.
[63] (1840) 3 Beav. 334.
[64] *Lark* v. *Outhwaite* [1991] 2 Lloyd's Rep. 132, at p. 139.
[65] (1880) 5 Q.B.D. 346. See also *Brown & Gracie Ltd.* v. *F. W. Green & Co. (Pty.) Ltd.* [1960] 1 Lloyd's Rep. 289, at p. 297; *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294, at p. 302.
[66] At p. 350.

(ii) Change of terms

Introduction of new terms

A purported acceptance of an offer may introduce terms at variance with or not comprised in the offer. Although, exceptionally in such a situation the response may be regarded as an acceptance with an offer to enter a further contract,[67] generally, in such cases no contract is made, for the offeree in effect rejects the offer and makes a counter-offer.

In the case of *Jones* v. *Daniel*:[68]

A offered £1,450 for a property belonging to B. In accepting the offer B enclosed with the letter of acceptance a contract for the signature of A. This document contained various terms as to payment of deposit, date of completion, and requirement of title which had never been suggested in the offer.

The Court held that there was no contract; B had not accepted A's offer but made a counter-offer of his own, which was never accepted by A. Similarly in *Brogden* v. *Metropolitan Railway Co.*,[69] the insertion by the offeree of the name of an arbitrator into a prepared draft contract tendered to him by the offeror amounted to a material alteration in its terms so that the acceptance did not correspond with the offer; but the despatch of the draft by the offeree constituted a counter-offer which in this case was accepted by conduct on the part of the offeror.

'Battle of the forms'

In modern commercial practice, a particular problem has arisen which is that of the 'battle of the forms'. A firm may, for example, offer to buy goods from another on a form which contains or refers to its standard conditions of trade. The seller 'accepts' the offer by a confirmation on a form which contains or refers to its (the seller's) standard conditions of trade. These may differ materially from those of the buyer. Two questions typically arise; is there a contract and, if there is, do the buyer's or the seller's conditions prevail?

One possible solution to this problem is to say that the seller, by purporting to accept the buyer's offer, has waived its own conditions of trade, so that the contract is concluded subject to the buyer's conditions.[70] In *Butler Machine Tool Co. Ltd.* v. *Ex-cell-o Corporation (England) Ltd.*,[71] however, a majority of the Court of Appeal applied the 'mirror image' rule and stated that the seller's confirmation amounts to a counter-offer. This is capable of acceptance by the buyer. The buyer may indicate that it accepts the counter-offer made to it by some act or performance; e.g. the receipt and acceptance of the goods or by, for instance, the return of an 'acknowledgement' form containing the seller's conditions. In our example, therefore, such an acceptance would conclude a contract subject to the seller's conditions, since it was the seller who fired the 'last shot' in the battle of the forms.

[67] *Monvia Motorship Corp.* v. *Keppel Shipyard (Private) Ltd.* [1983] 1 Lloyd's Rep. 356 (P.C.).

[68] [1894] 2 Ch. 332. Contrast *Global Tankers Inc.* v. *Amercoat Europa N.V.* [1975] 1 Lloyd's Rep. 666, at p. 671.

[69] (1877) 2 App. Cas. 666, *post*, p. 41.

[70] See also *Chas. Davis (Metal Brokers) Ltd.* v. *Gilyott & Scott Ltd* [1975] 2 Lloyd's Rep. 422, per Donaldson J. at p. 425.

[71] [1979] 1 W.L.R. 401, at pp. 406, 407. See also *British Road Services* v. *Arthur Crutchley Ltd.* [1968] 1 All E.R. 811; *A. Davies & Co. (Shopfitters)* v. *William Old* (1969) 67 L.G.R. 395.

The difficulty is, however, that the operation of the 'last shot' approach depends upon chance and can be arbitrary. Furthermore, unless and until the counter-offer is accepted, there is no contract, even though both buyer and seller may firmly believe that a contract has been made.[72] Where they have acted on that basis and the transaction is executed, it may be possible to treat a matter not finalized in negotiations as inessential[73] but this is not always so. The position, especially in relation to executory transactions, is not satisfactory. It is suggested that, in these circumstances, the following solution, which reflects business practice,[74] and international conventions and which only represents a minor departure from the 'mirror image' rule should be adopted. If an offeror receives a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer, and does not promptly object to the offeree about the discrepancy, the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance.[75] In effect this simply puts the burden on the offeror to object to such additional or different terms:[76] the requirement that they do not materially alter the terms of the offer[77] substantially preserves the requirement of objective agreement.

In cases where there is no contract even though services have been rendered or goods delivered, the rendering of services or delivery of goods may give rise to a restitutionary obligation to pay a reasonable sum.[78] But in such cases, while restitution may protect the performer by the award of the reasonable value of the performance rendered, a recipient, who may have had certain requirements as to the time of performance or its quality may be unprotected. This is because, in the absence of a contract, the party rendering the services or delivering the goods will not be liable in damages for delay or for defective performance.[79]

[72] [1979] 1 W.L.R. 401, at p. 406.

[73] *G. Percy Trentham Ltd.* v. *Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25 (facts compared to 'battle of the forms').

[74] Beale & Dugdale (1975) 2 B.J.L.S. 45, 49–51.

[75] See the Uniform Laws on International Sales Act 1967, Sched. 2, Art. 7(2); *ante*, p. 25; Vienna Convention, Art. 19. See also Lord Denning M.R. in *Butler Machine Tool Co. Ltd.* v. *Ex-cell-o Corporation (England) Ltd.* [1979] 1 W.L.R. 401, (but cf. the House of Lords' disapproval of his approach to formation in *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294, at pp. 297, 302 (H.L.)). Cf. the broader approach of the United States' Uniform Commercial Code § 2–207 which applies even where a variation is material but which has been said (Farnsworth, *Contracts*, 2nd edn. (1990), p. 172) to raise as many questions as it answers.

[76] See *post*, p. 47 on acceptance by silence.

[77] Under the Vienna Convention most non-trivial variations are likely to be regarded as 'material'. Art. 19(3) provides that alterations relating, among other things, to the price, quantity, and quality of the goods, place and time of delivery, extent of one party's liability to the other, or to the settlement of disputes are material alterations. See Nicholas (1988) 105 L.Q.R. 201, at p. 217; Scot. Law Com. No. 144 (1993), § 4.19.

[78] *Peter Lind & Co.* v. *Mersey Docks & Harbour Board* [1972] 2 Lloyd's Rep. 234; *British Steel Corporation* v. *Cleveland Bridge & Engineering Co. Ltd.* [1984] 1 All E.R. 504. See also *Brewer St Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] 1 Q.B. 428 (per Denning L.J.). Cf. *Regalian Properties plc* v. *London Dockland Development Cpn.* [1995] 1 W.L.R. 212. For the conditions of such liability see *post*, pp. 64–5, 69.

[79] McKendrick (1988) 8 O.J.L.S. 197, 212–13; Ball (1983) 99 L.Q.R. 572. A contract will also have implied terms as to quality, description, and title: see *post*, p. 150 (Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982).

(iii) Equivocal or qualified acceptance

Acceptanc indefinite qualified t

The acceptance must assent unequivocally and without qualification to the terms of the offer. For example, the reply 'Your order is receiving our attention' is probably too indefinite to amount to an acceptance.[80] The acceptance may also be qualified by reference to the preparation of a more formal contract or by reference to terms which have still to be negotiated. In such a case the agreement is incomplete[81] and there is no binding contract.

(b) Communication of the Acceptance

(i) Communication generally necessary

Mental as insufficien

Acceptance means, in general, communicated acceptance, which must be something more than a mere mental assent. A tacit formation of intention is insufficient.

In an old case in the Year Books[82] it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the contract was made and the property passed when he had seen and approved of the subject of the sale. But Brian C.J. said:

> It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased then you should have signified it to such an one, then I grant you need not have done more, for it is matter of fact.

Lord Blackburn approved this decision in *Brogden* v. *Metropolitan Railway Co.*:[83]

> B altered a draft coal supply agreement sent to him by M and returned it signed and marked 'approved'. M's agent put it in a drawer. The parties appear to have ordered and supplied coal upon the terms stated but, a dispute having arisen, B contended that he was not bound by the agreement.

It was held that there was a contract between the parties. This had not, however, come into existence at the time M's agent acquiesced in the offer by putting the letter in his drawer but later, when coal was ordered and accepted by M.

Notificati offeror

Even if there is some overt act or speech to give evidence of the intention to accept, English law stipulates, in addition, that acceptance is not complete *unless and until it is communicated to the offeror*. In the words of Lindley L.J.: 'Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that acceptance should be notified'.[84] Thus, if an offer is made by telephone, and in

[80] *Rees* v. *Warwick* (1818) 2 B. & Ald. 113; *Restatement* (2d), § 57.

[81] See *post*, p. 67.

[82] *Anon.* (1477) Y.B. Pasch. 17 Edw. IV, f. 1, pl. 2.

[83] (1877) 2 App. Cas. 666.

[84] *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, at p. 262. See also *Robophone Facilities Ltd.* v. *Blank* [1966] 1 W.L.R. 1428; *Allied Marine Transport Ltd.* v. *Vale do Rio Doce Navegacao* [1985] 1 W.L.R. 925, at p. 937. Cf. *post*, p. 50 (no need for communication where offer stipulates a prescribed mode of acceptance).

the middle of the reply the line goes dead, so that the offeror does not hear the words of acceptance, there is no contract.[85] Again, if a person shouts to another across a river or courtyard, but the offeror does not hear the reply because it is drowned by an aircraft flying overhead, there is no contract at that moment and the offeree must repeat the acceptance in order that it might be effective.

Communication other than by offeree

The justification for the rule requiring communication is that the offeror is entitled to know whether a binding contract has been concluded by acceptance. In principle, therefore, there would seem to be no reason (other than one of certainty) why a contract should not come into existence if the offeror is made aware or is informed that the offer has been accepted even though the acceptance is not communicated to the offeror by the offeree.[86] *Powell* v. *Lee*,[87] however, appears to hold that it is necessary that the acceptance be communicated by the offeree or by his duly authorized agent.

The managers of a school resolved to appoint the plaintiff to the headmastership of a school. One of the managers, acting in his individual capacity, informed the plaintiff of what had occurred. He received no other communication and subsequently the resolution was rescinded.

It was held that there was no concluded contract. It was said: 'the mere fact that the [whole body of] managers did not authorize such a communication, which is the usual course to be adopted, implied that they meant to reserve the power to reconsider the decision at which they had arrived'.[88] In the absence of facts giving rise to such an implication, however, communication by a third party should, it is submitted, suffice.

The general rule that acceptance must be communicated before it can take effect is subject to a number of exceptions, to which we now turn.

(ii) Waiver of communication

The general rule that an acceptance of an offer made ought to be notified to the offeror is for the benefit of the offeror, who may expressly or impliedly waive the requirement of notification and agree that an uncommunicated acceptance will suffice. Thus acceptance may in certain circumstances be held to have been made even though it has not yet come to the notice of the offeror. In such a case two things are necessary. There must be an express or implied intimation from the offeror that a particular mode of acceptance will suffice. And there must be some overt act or conduct on the part of the offeree which is evidence of an intention to accept, and which conforms to the mode of acceptance indicated by the offeror.

In *Carlill* v. *Carbolic Smoke Ball Co.*,[89] previously discussed, it will be remembered that the manufacturers of the smoke balls advertised inviting performance

[85] *Entores* v. *Miles Far East Corporation* [1955] 2 Q.B. 327 *per* Denning L.J. at p. 332; Winfield (1939) 55 L.Q.R. 499, 514; *Restatement* (2d), § 65. But cf. *post*, p. 43 for the different rule which applies to acceptance by post, telegram, or telemessage.

[86] *Levita's Case* (1867) L.R. 3 Ch. App. 36. See also *Dickinson* v. *Dodds* (1876) 2 Ch.D. 463, *post*, p. 58 (third party notification of revocation of offer effective).

[87] (1908) 99 L.T. 284.

[88] (1908) 99 L.T. 284, *per* Channell J. at p. 286.

[89] [1893] 1 Q.B. 256, *ante*, p. 36.

of a condition, and it was sufficient for the purposes of binding them that Mrs Carlill had performed the condition without communicating to them the acceptance of the offer. Bowen L.J. stated:[90]

> The person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular method of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

Promise for an act

In the case of general offers and other offers which indicate performance as a mode of acceptance so as to create a unilateral contract it may well be impossible for the offeree to express acceptance otherwise than by performance of the contract. An offer of reward for the supply of information, or for the return of a lost dog, does not contemplate an intimation of acceptance from every person who, on becoming aware of the offer, decides to ascertain the information or to search for the dog;[91] the offeree may already have the information or have found the dog, and can do no more than send it on to the offeror.

The position differs when a specified individual receives an offer capable of acceptance by performance. The nature and terms of the offer need to be considered more carefully to ascertain whether they entitle the offeree to dispense with notice of acceptance. If A tells B by letter that he will receive and pay for certain goods if B will send them to him, such an offer may be accepted by sending the goods.[92] Where, however, the trustees of a will informed an annuitant under it that they offered to redeem her annuity for cash, and she thereupon, without further communication with them, executed a release of the annuity, it was held that no contract for the sale and purchase of the annuity was concluded.[93] The Court considered it was impossible to suppose that the purchasers intended their offer to be accepted by the vendor merely executing a document; communication to them of the acceptance was necessary. The circumstances of each case must be taken into account before a decision can be reached.

(iii) Acceptance by post, telegram, or telemessage

A distinction is drawn between acceptance by instantaneous methods such as telex, telephone, and probably fax, e-mail and electronic data interchange, and acceptance by non-instantaneous methods such as post, telegram, or telemessage. Instantaneous methods, where the acceptor will generally know that his

[90] *Ibid.*, at p. 269. Lindley L.J. (*ibid.*, at p. 262) said such cases were either an exception to the rule or ones in which acceptance need not precede the performance. See also *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241, at p. 245.

[91] *Carlill* v. *Carbolic Smoke Ball Co.* (*supra*, n. 89), at p. 270.

[92] *Harvey* v. *Johnston* (1848) 6 C.B. 295, at p. 304; *Newcomb* v. *De Roos* (1859) 2 E. & E. 271.

[93] *Kennedy* v. *Thomassen* [1929] 1 Ch. 426; *Restatement* (2d), § 56. But cf. *Rust* v. *Abbey Life Assurance Co. Ltd.* [1978] 1 Lloyd's Rep. 386, at p. 392 (offer to invest in property bond accepted by allocation of units; no need to send policy to offeror).

communication has not arrived at once and can try again, are subject to the general requirement that acceptance must be communicated to the offeror.[94] Where, however, it is reasonable for the offeree to notify acceptance by post, telegram,[95] or telemessage, *the acceptance is completed when the letter is posted*,[96] *the telegram handed in*,[97] *or possibly when the telemessage is dictated*.[98] The offeror is bound from that time although the acceptance has not been delivered and may never be delivered.

The postal acceptance rule was laid down in *Adams* v. *Lindsell*:[99]

On 2 September 1817, the defendants wrote offering to sell to the plaintiffs a certain quantity of wool, and added 'receiving your answer in course of post'. If the letter containing this offer had been properly directed, an answer might have been received by the 7th; but it was misdirected and did not reach the plaintiffs until the 5th so that their acceptance, posted the same day, was not received by the defendants until the 9th. On the 8th, however, that is before the acceptance had arrived, the defendants sold the wool to another. The plaintiffs sued for breach of contract.

It was argued on behalf of the defendants that there was no contract between the parties until the letter of acceptance was actually received. The Court replied:[100]

If that were so, no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs until the answer was received, then the plaintiffs ought not to be bound till they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*.

The logic of this passage is questionable, but it was undoubtedly necessary for the Court to establish some definite rule as to the time of a postal acceptance.

Burden of risk that acceptance may go astray

One of the more obvious consequences of the postal acceptance rule is that the offeror must bear the risk of the letter of acceptance being delayed or lost. In *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant*[101] the Court of Appeal held that the defendant, to whom a letter of allotment had been posted,

[94] *Entores* v. *Miles Far East Corporation* [1955] 2 Q.B. 327; *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H* [1983] 2 A.C. 34 (telex).

[95] *Henthorn* v. *Fraser* [1892] 2 Ch. 27, at p. 33.

[96] *Dunlop* v. *Higgins* (1848) 1 H.L.C. 381; *Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App. 587; *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant* (1879) 4 Ex. D. 216; *Henthorn* v. *Fraser* (*supra*, n. 95); *Port Sudan Cotton Co.* v. *Govindaswamy Chettiar & Sons* [1977] 2 Lloyd's Rep. 5.

[97] *Stevenson, Jacques & Co.* v. *McLean* (1880) 5 Q.B.D. 346; *Bruner* v. *Moore* [1904] 1 Ch. 305, at p. 316.

[98] There is no authority on this but if, see *infra*, the rationale of the postal acceptance rule is to protect an offeree who but for the rule may not know until it is too late that his acceptance has not reached the offeror, telemessages should be classified with letters and telegrams rather than with instantaneous means of communication; *Chitty on Contracts*, 27th edn. (1994), § 2–031. Cf. Winfield (1939) 55 L.Q.R. 499, 515.

[99] (1818) 1 B. & Ald. 681.

[100] *Ibid.*, at p. 683. The *ratio decidendi* of the case is complicated by the assertion that the delay was caused by the defendants' negligence in misdirecting their offer. It would seem that the effect of such delay is to extend the permissible period within which the offer may be accepted (see *post*, p. 59) unless the offeree knows or has reason to know of the delay: *Restatement* (2d), § 51.

[101] (1879) 4 Ex. D. 216.

but which had not reached him, was nevertheless liable as a shareholder. Where, however, the delay or loss is due to the fault of the offeree, as in the case of an acceptance which is improperly addressed or insufficiently stamped, it would seem that it only takes effect if and when it is received by the offeror, provided that this occurs within the time within which a regular acceptance would have been received.[102]

Where the postal acceptance rule does not apply, however, as we have seen,[103] save in the case of a prescribed mode of acceptance, where communication is not always necessary,[104] it is the offeree who bears the risk of the acceptance going astray.

Place of contracting

Whether the postal acceptance rule applies also determines *where* a contract is made. If the means of communication is by letter, telegram, or telemessage, the contract is complete when the letter is posted or the telegram is handed in[105] and possibly when the telemessage is dictated,[106] and it is there that the contract is made. In other cases the general rule that the contract is made when and where the acceptance is received applies. This may be of importance, for example, where, as in *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H*[107] leave is sought to serve a writ, or notice of a writ, on a defendant out of the jurisdiction, and the plaintiff seeks to rely on a rule of court which allows such service if the contract was 'made' within the jurisdiction.[108] The House of Lords refused leave to serve notice of a writ out of the jurisdiction on an Austrian company in respect of a telex of acceptance sent from London to Vienna. The general rule applied to instantaneous means of communication. The contract was made when and where the telex of acceptance was received, and this was in Vienna. On the other hand, if the means of communication is by letter or telegram, a different rule prevails. The contract is complete when the letter is posted or the telegram is handed in, and it is there that the contract is made.[109]

Rationale of postal rule

Various attempts have been made to justify the postal acceptance rule analytically. One line of reasoning attempts to eliminate any difficulties as to *consensus* by treating the post office as the agent of the offeror not only for delivering the offer, but for receiving the notification of its acceptance;[110] yet the post office is clearly not an agent to whom acceptance is or could be communicated. Another is based on the fact that posting the acceptance puts it irretrievably out of the offeree's control. The same can, however, be said of communication by telex which is not completed until receipt[111] so this does not explain why posting exceptionally constitutes an acceptance without notification.

[102] *Getreide-Import-Gesellschaft* v. *Contimar S.A. Compania Commercial y Maritima* [1953] 1 W.L.R. 793; *Restatement* (2d), §§ 67–8.

[103] *Ante*, pp. 41–2.

[104] *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241, at p. 245 and *ante*, p. 42.

[105] *Cowan* v. *O'Connor* (1888) 20 Q.B.D. 640.

[106] See *supra*, n. 101.

[107] [1983] 2 A.C. 34 approving *Entores* v. *Miles Far East Corporation* [1955] 2 Q.B. 327 where an offer by telex from Holland to London was held to constitute a contract made in England.

[108] R.S.C. Ord. 11, r. 1(1)(f).

[109] *Cowan* v. *O'Connor* (1888) 20 Q.B.D. 640.

[110] *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant* (1879) 4 Ex. D. 216, at p. 221; *Hebb's Case* (1867) L.R. 4 Eq. 9, at p. 12.

[111] *Entores* v. *Miles Far East Corporation* [1955] 2 Q.B. 327.

The better explanation would seem to be that the rule is based, not on logic, but on commercial convenience.[112] If hardship is caused, as it obviously may be, by the delay or loss of a letter of acceptance, some rule is necessary, and the rule at which the Courts have arrived is probably as satisfactory as any other would be.[113]

First, it is always open to the offeror to secure protection by requiring actual notification of the acceptance.[114] The nature of the offer or the circumstances in which it was made may indicate that notification is required and Courts may be willing to displace what has been termed an 'artificial concept of communication'.[115] Secondly, the rule is a pragmatic way of limiting the power to revoke an offer before acceptance,[116] even where the offeror has promised not to.[117] It also prevents the offeree from being able to nullify the acceptance while it is in transit and thus from speculating by watching the market and deciding whether to send an overtaking rejection.[118] Further, in the event of delay or loss of the letter of acceptance, it is the offeror who is more likely to be the first to enquire why no reply has been received to the offer, rather than the offeree to enquire whether the acceptance has been received.

The rule has, however, been criticized.[119] The number of different modes of communication now available[120] have been said to give rise to an increasing number of problems of demarcation and it is argued that the law would be much more coherent if there were only one rule for all means of communication. It has also been said that the law should not, as the postal acceptance rule does, favour the offeree because, while the offeror is in ignorance as to the actions of the offeree, the offeree has full knowledge of what the position is. The offeree knows that the acceptance has been posted and knows or ought to know that mail is not infrequently delayed.[121] Nevertheless, the ability of the offeror to control the method of acceptance, the offeror's ability to revoke even a 'firm' offer before accept-

[112] *Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App. 587, at p. 594; *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H* [1983] 2 A.C. 34, at pp. 41, 48.

[113] Winfield (1939) 55 L.Q.R. 499, at p. 506. Three principal systems seem to be in operation in other countries: (i) *information*: when the offeror is actually informed of the acceptance; (ii) *expedition*: when the offeree despatches the letter of acceptance; and (iii) *reception*: when the acceptance is received at its destination, whether the offeror is actually informed or not. See Evans (1966) 15 I.C.L.Q. 553. Under Arts. 18(2), 24 and 21(2) of the Vienna Convention the acceptance becomes effective at the moment the indication of assent is delivered at the address of the offeror; if the letter is lost, there is no contract, but if it is delayed, there is normally a contract, unless the offeror has promptly informed the offeree that he considers his offer as having lapsed.

[114] *Holwell Securities Ltd.* v. *Hughes* [1974] 1 W.L.R. 155.

[115] *Ibid.*, at pp. 157, 158, 161; *New Hart Builders Ltd.* v. *Brindley* [1975] Ch. 342 (rule displaced where contracts required 'notice to . . .' or 'to notify').

[116] *Re Imperial Land Co. of Marseilles (Harris' Case)* (1872) L.R. 7 Ch. App. 587, at p. 594.

[117] *Post*, p. 54. Nussbaum (1936) Col. L. Rev. 920, 922–7. The Scottish Law Commission, which rejects the rule (Scot. Law Com. No. 144 (1993), §§ 4.4–4.7), does not consider this.

[118] *Post*, p. 51. See also Farnsworth, *Contracts*, 2nd edn. (1990), p. 183.

[119] e.g. by Gardner (1992) 12 O.J.L.S. 170; Scot. Law Com. No. 144 (1993), §§ 4.4–4.7.

[120] Apart from telex, fax, e-mail and the various types of electronic document interchange, there are also couriers, private messenger delivery, and document exchange services.

[121] Scot. Law Com. Memorandum No. 36 [1977], § 48, quoted in Scot. Law Com. No. 144 (1993), § 4.5.

ance[122] and the desirability of preventing speculation by the offeree are, it is suggested, good reasons for the rule.[123]

The rule may in any event not be as anomalous as it appears when compared only with the rules governing instantaneous modes of communication. We have seen that, in the case of a prescribed mode of acceptance, a contract results as soon as the offeree does the stipulated act, whether it has come to the notice of the offeror or not.[124] In a previous edition of this work, it was argued that the principles governing postal acceptance were merely examples of a wider principle that where the offeror either expressly or impliedly indicates the mode of acceptance and this, as a means of communication, proves to be nugatory or insufficient, he does so at his own risk.[125] Suppose that A sends an offer to B by messenger across a lake with a request that B, if she accepts, will at a certain hour communicate her acceptance by firing a gun or lighting a fire. Why, it was asked, should B suffer if a storm renders the gun inaudible or a fog obscures the light of the fire? Although, as we have seen,[126] this 'risk' approach does not apply where instantaneous communication is concerned, it is suggested that it has validity in cases where there is bound to be a substantial interval between the time when the acceptance is sent and the time when it is received.[127]

Place of acceptance

Whether the rule applies also determines *where* a contract is made. We have seen that this may be of importance, for example, where, as in *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H*,[128] leave is sought to serve a writ, or notice of a writ, on a defendant out of the jurisdiction, and the plaintiff seeks to rely on a rule of court which allows such service if the contract was 'made' within the jurisdiction.[129]

(iv) Acceptance by silence

Silence or inaction

We have considered whether an offer can be inferred from inactivity[130] and now turn to the analagous position in the case of acceptance. Can the silence or inaction of an offeree who fails to reply to an offer operate as an acceptance? In principle, it is difficult to see how this should ever be so, for there will have been no communication of the acceptance to the offeror. But suppose that the offeror has waived communication by indicating that acceptance by silence will suffice. In such a case, it is clear that the offeror cannot confront the offeree with the

[122] *Ante*, p. 43, *post*, p. 54.

[123] It is significant that the Scottish Law Commission's proposal to abolish it was made together with a proposal to prohibit the offeror from revoking a 'firm' offer (Vienna Convention, Art. 16(2), *post*, p. 54). Prevention of speculation by the offeree, who unlike the offeror has *full* knowledge, does not appear to have been considered by the Scottish Law Commission: Scot. Law Com. No. 144 (1993), §§ 4.4–4.7. See also §§ 3.10–3.14.

[124] *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241, at p. 245 and *ante*, p. 43.

[125] Anson, 20th edn., p. 36.

[126] *Entores* v. *Miles Far East Corporation* [1955] 2 Q.B. 327; *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H* [1983] 2 A.C. 34, *ante*, pp. 41–2.

[127] *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H* [1983] 2 A.C. 34, at p. 48.

[128] [1983] 2 A.C. 34, *ante*, p. 45.

[129] R.S.C. Ord. 11, r. 1(1)(f).

[130] *Ante*, p. 30.

alternative of either refusing the offer or being subjected to a contractual obligation by reason of the failure to reply. Although a form or time of acceptance may be prescribed, an offeror cannot prescribe the form or time of refusal so as to impose a contract on the other party if the other party does not refuse in some particular way or within some particular time.[131] In *Felthouse* v. *Bindley*, for example:[132]

> Felthouse offered by letter to buy his nephew's horse for £30. 15*s*., adding, 'If I hear no more about him I shall consider the horse mine at £30. 15*s*'. No answer was returned to this letter, but the nephew told Bindley, an auctioneer, to keep the horse out of a sale of his farm stock, as he intended to reserve it for his uncle Felthouse. Bindley sold the horse by mistake, and Felthouse sued him for conversion of his property.

The Court held that as the nephew had never signified to Felthouse his acceptance of the offer before the auction sale took place, there was no bargain to pass the property in the horse to Felthouse, and therefore he had no right to complain of the sale. Willes J. said:[133] 'It is clear that the uncle had no right to impose upon the nephew a sale of his horse for £30 15*s*. unless he chose to comply with the condition of writing to repudiate the offer'.

Unsolicited goods

In more modern times this same principle may be illustrated by the practice of sending out unsolicited goods. A publisher may, for example, without previous order, send a book to a prospective customer with a letter saying, in effect, 'If you do not return the book by a certain day, I shall presume that you have bought it'. It is clear that he cannot by these means impose a contract on the unwilling recipient. But persons with no knowledge of the law may well be misled into thinking that they are bound to pay for the book, and the subsequent letters which they receive may frequently be designed to foster this misapprehension. As a result, in 1971, the legislature enacted the Unsolicited Goods and Services Act whereby the recipients of unsolicited goods may, in certain circumstances, treat them as if they were an unconditional gift to themselves, and suppliers may be guilty of a criminal offence if they demand or threaten legal proceedings for payment.

On the other hand, circumstances can arise where acceptance could more legitimately be presumed from silence. Previous dealings between the parties may have been conducted on the basis, for example, that orders for goods have been fulfilled by the seller without any notification of acceptance other than the despatch of the goods, and the offeror has thereby been led to believe that the practice will continue.[134] It is even arguable by analogy with the cases we have noted on waiver by the offeror of the need for communication of acceptance, that, if the offeror stipulates that acceptance may be constituted by silence or inaction, an unequivocal manifestation of an intention to accept on the part of the offeree (or, possibly, detrimental reliance on the offer by the offeree),[135] should bind the

[131] Pollock, *Principles of Contract*, 13th edn. (1950), p. 22.

[132] (1862) 11 C.B.N.S. 869, affirmed (1863) 7 L.T. 835. See also *Allied Marine Transport Ltd.* v. *Vale do Rio Doce Navegacao S.A.* [1985] 1 W.L.R. 925, at p. 937 (C.A.). See further Miller (1972) 35 M.L.R. 489.

[133] At p. 875.

[134] *Restatement* (2d), § 72.

[135] Cf. *Fairline Shipping Cpn.* v. *Adamson* [1975] Q.B. 180. See also, *post*, p. 110 (equitable estoppel).

offeror. This, however, would run counter to the decision in *Felthouse* v. *Bindley*, where, it will be noted, the nephew made known his intention to accept his uncle's offer but that, like other authorities that support the general rule, was a case where an offeror sought to impose on the offeree a term as to acceptance by silence. No doubt, in many cases, silence is ambiguous[136] and therefore cannot constitute an acceptance. But if, as in *Felthouse* v. *Bindley* itself, the necessary intention to accept could be proved, there seems to be no convincing reason why a contract should not come into existence, particularly where the offeree has relied on the terms of the offer and it is the offeror who now denies that there is a contract. Recent *dicta* support this. Thus, it has been stated:[137]

> [W]here the offeree himself indicates that an offer is to be taken as accepted if he does not indicate to the contrary by an ascertainable time, he is undertaking to speak if he does not want an agreement to be concluded. I see no reason in principle why that should not be an exceptional circumstance such that the offer can be accepted by silence.

In any event, acceptance may be inferred where the offeree takes the benefit of an offered performance which he has had a reasonable opportunity to reject.[138] If the offeror sends an unsolicited pot of jam to the offeree in circumstances which show that payment is expected, the offeror should be able to recover its price if the offeree accepts the benefit of this performance by consuming the jam.[139]

(c) Acceptor Must Have Knowlege of Offer

If A offers a promise for an act and B does the act in ignorance of the offer, can B claim performance of the offer on becoming aware of its existence? As illustrated by the case of cross-offers,[140] the answer is not really in doubt: if B has not heard of the offer before doing the act, it cannot be accepted.[141] In *Gibbons* v. *Proctor*,[142] however, a Divisional Court held that a police officer was entitled to claim a reward, offered by handbills, for information given to a superintendent of police, although it seems the officer did not know of the handbills before giving the information. The decision, as reported, is an unsatisfactory one, for the facts of the case are by no means clear. Accordingly, it cannot be considered as of compelling authority, and a New York case, *Fitch* v. *Snedaker*,[143] is usually cited to the

[136] *Ante*, pp. 30–1.
[137] *Re Selectmove Ltd.* [1995] 1 W.L.R. 474, *per* Peter Gibson L.J. at p. 478. See also *Vitol S.A.* v. *Norelf Ltd.* [1996] A.C. 800, at p. 812.
[138] *St John Tugboat Co. Ltd.* v. *Irving Refinery Co. Ltd.* (1964) 46 D.L.R. (2d) 1 (Canada); *Way & Waller Ltd.* v. *Ryde* [1944] 1 All E.R. 9. See also *Rust* v. *Abbey Life Insurance Co. Ltd.* [1979] 2 Lloyd's Rep. 334. Cf. *Yona International Ltd.* v. *La Reunion Francaise S.A.* [1996] 2 Lloyd's Rep. 84, at p. 110.
[139] *Weatherby* v. *Banham* (1832) 5 C. & P. 228.
[140] See *Tinn v. Hoffman & Co.* (1873) 29 L.T. 271, *ante*, p. 36
[141] *Taylor* v. *Allon* [1966] 1 Q.B. 304, at p. 311; *Tracomin S.A.* v. *Anton C. Nielsen* [1984] 2 Lloyd's Rep. 195, at p. 203.
[142] (1891) 64 L.T. 594, 55 J.P. 616. Cf. *Neville* v. *Kelly* (1862) 12 C.B.N.S. 740. See Hudson (1968) 84 L.Q.R. 503.
[143] (1868) 38 N.Y. 248. See also *Bloom* v. *American Swiss Watch Co.* 1915 A.D. 100 (South Africa); *R.* v. *Clarke* (1927) 40 C.L.R. 227 (Australia); *Restatement* (2d), § 51 and Comment a.

contrary. It was there laid down that a reward cannot be claimed by one who did not know that it had been offered. The latter decision is undoubtedly correct in principle. A person who does an act for which a reward has been offered in ignorance of the offer cannot say either that there was a *consensus* of wills with the offeror, or that the act was done *in return* for or *in reliance* on the promise offered. On no view of contract could that person set up a right of action. If, however, the acceptor knows of the offer, but is inspired to performance by a *motive* other than that of claiming the reward, such a motive is immaterial. So in *Williams* v. *Carwardine*[144] where the plaintiff, with knowledge of the reward, supplied information leading to the conviction of an assailant for murder, but only did this 'to ease her conscience, and in hopes of forgiveness hereafter', she was held entitled to claim the £20 offered. Her acceptance could be referred to the offer.

(d) Prescribed Mode of Acceptance

Unauthorized modes

If the terms or the circumstances of the offer do no more than suggest a mode of acceptance, it seems that the offeree would not be bound to this mode so long as the mode used was one which did not cause delay, and which brought the acceptance to the knowledge of the offeror. A departure from the usual or suggested method of communication would probably throw upon the offeree the risk that the acceptance would be delayed, but, subject to this, an offer delivered by hand could be accepted by post, or an offer made by post could be accepted by telegram or telex. Is, however, an offeror who expressly prescribes the method of communication free to treat any departure from this method as a nullity? In the American case, *Ellison* v. *Henshaw*:[145]

> E offered to buy flour from H, requesting that an answer should be sent to him at Harper's Ferry by the wagon which brought the offer. H sent a letter of acceptance by mail to Georgetown, thinking that this would reach E more speedily. He was wrong, and the letter arrived after the time that the reply might have been expected.

The Supreme Court of the United States held that E was entitled to refuse to purchase:[146]

> It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it.

The same rule probably applies in English law: an offeror, who by the terms of the offer insists upon its acceptance in a particular manner, is entitled to say that he is not bound unless acceptance is effected or communicated in that precise

[144] (1833) 4 B. & Ad. 621; the fact of her knowledge is disclosed by the report in (1833) 5 C. & P. 566; *Lark* v. *Outhwaite* [1991] 2 Lloyd's Rep. 132, at p. 140. Cf. *R.* v. *Clarke* (*supra*, n. 143).

[145] (1819) 4 Wheaton 225.

[146] *Ibid.*, *per* Washington J. at p. 228.

way.[147] Nevertheless, if the stipulation as to the mode of acceptance is inserted at the instance of and for the protection or benefit of the offeror, the offeror may by conduct or otherwise waive strict compliance with it, provided that the offeree is not adversely affected.[148]

It will be noted, however, that, in *Eliason* v. *Henshaw*, the letter was sent both to a different place and by a method which proved to be less expeditious than that chosen by the offeror. There would seem to be no supportable reason why a different mode of acceptance, which is not less advantageous to the offeror, should not be held to conclude a contract,[149] unless the offeror has stipulated that acceptance shall be made in that way only and in no other manner.

(e) Revocation of the Acceptance

Revocation of an acceptance

One final problem remains: the question of the revocation of an acceptance. Since the general rule is that acceptance is not complete until it has been communicated to the offeror, it follows that an acceptance can be revoked at any time before this occurs, provided, of course, that the revocation itself is communicated before the acceptance arrives. But what is the position in relation to postal acceptances? Since the acceptance is complete as soon as the letter of acceptance is posted, a telephone call or telegram revoking the acceptance would be inoperative, though it reached the offeror before the letter. This, it is argued, is both the logical and fair conclusion; otherwise the offeree could blow both hot and cold, having the benefit of certainty in the postal acceptance, and the opportunity to revoke it if the offer turned out suddenly to be disadvantageous. On the other hand, it is contended that such a revocation can in no way prejudice the offeror, who could not know of the acceptance until it arrived, by which time he would already be aware of the revocation. There is no direct English authority on this point,[150] but the better view is that the offeree cannot so revoke.[151] If, for example, shares are offered on a fluctuating market, it would clearly be most unfair if the offeree could bind the offeror by a postal acceptance when the shares advanced in price, but send off a revocation if the market fell. There is no reason why an offeree who chooses to accept by post should have an opportunity of changing his mind which would not have been available if the contract had been made *inter praesentes*.

[147] *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241, at p. 246.

[148] *Ibid.*

[149] *Tinn* v. *Hoffman & Co.* (1873) 29 L.T. 271, at pp. 274, 278; *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* (*supra*, n. 147), at p. 246; *Restatement* (2d), §§ 29, 68; Winfield (1939) 55 L.Q.R. 499, 516.

[150] In *Household Fire and Carriage Accident Insurance Co. Ltd.* v. *Grant* (1879) 4 Ex. D. 216, Bramwell L.J. at p. 255, was of the opinion that the revocation would be effective. See also *Dick* v. *U.S.* (1949) 82 Fed. Supp. 326; Ellison Kahn (1955) 72 S.A.L.J. 246, 257; Hudson (1966) 82 L.Q.R. 169.

[151] In *Dunmore (Countess of)* v. *Alexander* (1830) 9 S. 190 (Scotland), Lord Craigie (dissenting) held that an offeree could not revoke her acceptance, but the majority of the Court treated the case as one of the revocation of an offer. See also *Wenkheim* v. *Arndt* (1873) 1 J.R. 73 (N.Z.); Winfield (1939) 55 L.Q.R. 499, 512.

This solution should not, however, be operated to the detriment of the offeror. If the offeror acts on the purported revocation, e.g. by selling the shares which are the subject-matter of the offer, the offeree would not be permitted once again to change his mind and rely on the postal acceptance rule in order to claim damages for breach of contract.

IV. Termination of the Offer

ONCE the acceptance has been communicated to the offeror it cannot be recalled or undone. But until an offer is accepted, it creates no legal rights, and it may be terminated at any time. Termination of the offer may come about in a number of ways: it may be revoked before acceptance, or the offeree may reject the offer. Also an offer may lapse for want of acceptance or be determined by the death of the offeror or offeree.

(a) Revocation of the Offer

The law relating to the revocation of an offer may be summed up in two rules; (i) an offer may be revoked at any time before acceptance, and (ii) an offer is made irrevocable by acceptance.

Revocable before acceptance

The first of these rules may be illustrated by the case of *Offord* v. *Davies*:[152]

D made a written offer to O that, if he would discount bills for another firm, they (D) would guarantee the payment of such bills to the extent of £600 during a period of twelve calendar months. Some bills were discounted by O, and duly paid, but before the twelve months had expired D, the guarantors, revoked their offer and notified O that they would guarantee no more bills. O continued to discount bills, some of which were not paid, and then sued the defendants on the guarantee.

It was held that the revocation was a good defence to the action. The alleged guarantee was an offer, for a period of 12 months, of promises for acts, of guarantees for discounts. Each discount turned the offer into a promise, *pro tanto*, but the entire offer could at any time be revoked except as regards discounts made before notice of revocation.

Irrevocable after acceptance

The rule that an offer is made irrevocable by acceptance is illustrated by the *Great Northern Railway Co.* v. *Witham*,[153] a transaction which, like that in *Offord* v. *Davies*, involved a continuing relationship:

The G.N.R. company advertised for tenders for the supply of such iron articles as it might require between 1 November 1871, and 31 October 1872. W sent in a tender to supply the articles required on certain terms and in such quantities as the company 'might order from time to time', and his tender was accepted by the company. Orders were given and exe-

[152] (1862) 12 C.B.N.S. 748.
[153] (1873) L.R. 9 C.P. 16. Contrast *Percival Ltd.* v. *L.C.C. Asylums etc. Committee* (1918) 87 L.J.K.B. 677.

cuted for some time on the terms of the tender but finally W was given an order which he refused to execute. The company sued him for breach of contract in that he had failed to perform this order.

It is important to note the exact relationship of the parties. The company by advertisement invited all dealers in iron to make tenders, that is, to state the terms of the offers which they were prepared to make. W's tender stated the terms of an offer which might be accepted at any time, or any number of times, in the ensuing 12 months. The acceptance of the tender did not in itself make a contract; it was merely an intimation by the company that it regarded W's tender as a standing offer, which on its part it would be willing to accept as and when it required the articles to be supplied. Each fresh order constituted an acceptance of this standing offer. If W wished to revoke his offer he could have done so, but only as to the future; in the meantime he was bound to perform any order already made. The Court therefore held that he was liable for breach of contract.

Unilateral contracts

Some difficulty is experienced in the case of 'unilateral' contracts, previously referred to,[154] where an act is done in return for a promise. If one person promises a certain sum to another on performance by that other of a stipulated act, at what point in time is the acceptance of the offer complete? The traditional answer to this question is that the acceptance is complete only when the act has been completely performed.[155] It therefore follows that up to this time the offeror is at liberty to revoke his offer. If, for example, a firm of breakfast food manufacturers were to offer to pay £100 to any person who consumed one hundredweight of their breakfast food within the next 3 months, they would be able to revoke their offer after 2 months had elapsed—to the detriment of those who had almost completed their part of the bargain, and with profit to themselves. Or to use a judicial example,[156] if one man offers another £100 if he will go to York, he can revoke when the other is half-way there.

In order to avoid such an inequitable result,[157] Sir Frederick Pollock argued that a distinction should be drawn between the acceptance of the offer and the performance of the stipulated act: the acceptance is complete once the offeree has unequivocally commenced performance (so that the offeror cannot effectively revoke the offer after this time), but the offeror is not bound to pay the £100 until the act has been completely performed.[158] This view has some judicial support. In *Errington* v. *Errington*,[159] where a father promised his son and daughter-in-law that a house in which they were living should belong to them as soon as they had paid off the instalments of a mortgage on the premises, and they commenced to

[154] See *ante*, pp. 29, 36.

[155] See *ante*, pp. 42–3.

[156] *Rogers* v. *Snow* (1573) Dalison 94; *G.N. Ry.* v. *Witham* (1873) L.R. 9 C.P. 16, at p. 19.

[157] It has been contended that there is no injustice, since the offeree is not bound to go to York and may give up at any time. The offeror, it is argued, ought to have a similar right to give up his side of the transaction: Wormser (1916) 26 Yale L.J. 136. This reasoning is not attractive.

[158] Pollock, *Principles of Contract*, 13th edn. (1950), p. 19; see also *Offord* v. *Davies* (1862) 12 C.B.N.S. 748, at p. 753; Law Revision Committee, Sixth Interim Report (Cmd. 5449 1937), § 39; *Restatement* (2d), § 45; Vienna Convention on Contracts for the International Sale of Goods, Art. 16(2)(b).

[159] [1952] 1 K.B. 290.

pay them to his knowledge, Denning L.J. considered that this promise could not be revoked:[160]

> The father's promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed.

On this view, the offeror is unable to revoke his offer; but his duty to perform his obligation is conditional upon performance of the stipulated act by the offeree.

An American writer has also suggested that every such offer impliedly contains yet another, namely, to keep the principal offer open for a reasonable time if the offeree commences performance of the stipulated act.[161] Yet a third view was put forward in *Morrison Steamship Co. Ltd.* v. *The Crown*.[162] In that case, Viscount Cave L.C. doubted whether a conditional offer was converted into a contract by commencement of performance. The offeree could not therefore insist on completing performance and claiming the promised sum.[163] But he suggested that 'when work is done and expense incurred on the faith of a conditional promise, the promisor comes under an obligation not to revoke his promise, and if he does so he may be sued for damages or on a *quantum meruit*'.

It may well be, of course, that the nature of the offer itself, or the circumstances under which it was made, indicate that it was never intended to be irrevocable by the offeror.[164] But otherwise it is submitted that English law will not deny the offeree a remedy if the offer is revoked before the performance requested has been completed.

'Firm' offers

It will be noted that in *Offord* v. *Davies*, discussed above, the mere fact that the defendants promised to guarantee payment for 12 months did not preclude them from revoking before that period had elapsed.[165] It is a rule of English law that a promise to keep an offer open needs consideration to make it binding and would thus only become so if the offeror gets some benefit, or the offeree incurs some detriment, in respect of the promise to keep the offer open. The offeree in such a case is said to 'purchase an option'; that is, the offeror, in consideration usually of a money payment, sometimes nominal,[166] makes a separate contract not to revoke the offer during a stated period. The position is similar where the offeree expressly or impliedly promises to do or refrain from doing something in exchange for the offeror's promise not to revoke the offer. For example, the offeree may promise not to negotiate with anyone else for a fixed period.[167] Again,

[160] At p. 295. See also *Harvela Investments Ltd.* v. *Royal Trust of Canada (C.I.) Ltd.* [1986] A.C. 207 (submitting bid in response to invitiation to tender).

[161] McGovney (1914) 27 Harv. L.R. 644, 659.

[162] (1924) 20 Ll. L.R. 283, at p. 287. See also *Daulia Ltd.* v. *Four Millbank Nominees Ltd.* [1978] Ch. 231, at p. 239.

[163] Cf. *White and Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413; *post*, pp. 536, 594.

[164] *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108.

[165] See also *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, *post*, p. 58; *Routledge* v. *Grant* (1828) 4 Bing. 653.

[166] *Mountford* v. *Scott* [1975] Ch. 258. See further, *post*, p. 96.

[167] *Pitt* v. *P.H.H. Asset Management Ltd.* [1994] 1 W.L.R. 327, at p. 332, *post*, p. 61 although this is probably better explained as a unilateral contract.

a builder tendering for a construction contract may have invited quotations for a fixed period (i.e. firm offers) from electricity or carpentry sub-contractors and expressly or impliedly promised to use the figures contained in those offers in its tender. In these cases the offeror by its promise precludes itself from exercising its right to revoke the offer; but where it receives no consideration for keeping the offer open, it says in effect, 'You may accept within such and such a time, but this limitation is entirely for my benefit, and I make no binding promise not to revoke my offer in the meantime'. This rule has been criticized,[168] but, subject to two exceptions, it seems to be good law.

Exceptions

The first of these exceptions relates to offers in a deed. Such an offer would appear to be irrevocable, since a deed is *factum*, a thing done beyond recall.[169] The second exception is statutory. By section 82(1) of the Companies Act 1985, an application for shares in a company may, in certain circumstances, not be withdrawn until after the expiration of the third day after the time of the opening of the subscription lists.

A firm offer may, moreover, also become irrevocable where the transaction can be characterized as a unilateral contract and the offeree has relied on the offer by embarking on performance of the specified act.[170] We shall see that in its present state of development English law does not recognize a general principle based on the protection of reliance.[171] Unless a unilateral contract can be found or the action in reliance has been requested by the offeror and amounts to consideration, an offeree who relies on a firm offer will not be protected by the law of contract. Similarly there is unlikely to be a remedy in tort for revoking an offer that has been relied on[172] but, where the offeree's action in reliance consists in the rendering of services or the delivery of goods, unless the offeree can be said to have taken the risk that the offer might be withdrawn, as may well be the case in the context of tendering, the offeror may be obliged by the law of restitution to pay a reasonable sum in respect of the services or goods.[173]

Auction sales 'without reserve'

The issues concerning the revocability of offers can be illustrated by considering the position of goods put up for sale by auction upon an advertised condition that the sale shall be 'without reserve'. In such cases the auctioneer thereby indicates to prospective buyers that the bid of the highest *bona fide* bidder will be accepted, and that the goods will not at any stage be withdrawn, for example, on the ground that the reserve price has not yet been reached. An auctioneer who does so

[168] The Law Revision Committee recommended that 'an agreement to keep an offer open for a definite period of time or until the occurrence of some specified event shall not be unenforceable by reason of the absence of consideration': Sixth Interim Report (Cmd. 5449 1937), § 38. The Vienna Convention on Contracts for the International Sale of Goods, Art. 16(2), provides that an offer indicating that it is irrevocable or one that has been relied on by the offeree cannot be revoked.

[169] See generally *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105; *Restatement* (2d), § 25 comment c. Cf. *McAlester Canadian Oil Co.* v. *Petroleum Engineering Co.* (1958) 13 D.L.R. (2d) 724 (lapse of offer under seal).

[170] *Ante*, p. 53.

[171] See *post*, p. 117 ff. (the limits of equitable estoppel) and *post*, p. 120 for criticisms.

[172] *Holman Construction Ltd.* v. *Delta Timber Co. Ltd.* [1972] N.Z.L.R. 1081 (negligent pre-contractual statement).

[173] *Ante*, p. 40; *post*, p. 64.

withdraw the goods is said to be liable for breach of contract with such a bidder. In *Warlow* v. *Harrison*:[174]

An auctioneer advertised a brown mare for sale by auction 'without reserve'. The owner's name was not disclosed. The plaintiff bid 60 guineas; the owner bid 61 guineas, and the auctioneer knocked down the mare to him. The plaintiff claimed damages from the auctioneer as being the highest *bona fide* bidder.

A majority of the Court of Exchequer Chamber considered that the auctioneer was liable on a contract that the auction sale was to be 'without reserve'.[175] The judgments have, however, been criticized as inconsistent with established principles.

First, it is clear that a bid at an auction is only an offer which can be retracted at any time before the fall of the hammer.[176] This rule is now to be found in s ection 57(2) of the Sale of Goods Act 1979. No contract for the sale of the goods in the auction, therefore, comes into existence until a bid is accepted by the auctioneer.

Secondly, an advertisement that an auction of certain articles will take place on a certain day does not bind the auctioneer to sell the goods, nor does it make the auctioneer liable upon a contract to indemnify persons who have incurred expense in order to attend the sale.[177] Such an advertisement is an invitation to treat.

So, where goods are advertised for sale without reserve, until the auctioneer accepts by the fall of the hammer, no contract of sale is concluded with the buyer. If, therefore, the auctioneer withdraws the goods prematurely, refusing to knock them down to the highest bidder, there can be no possible action on any *contract of sale* because none has yet come into existence. The Court in *Warlow* v. *Harrison* stated that the plaintiff was not suing upon the contract of sale (which would at that time have been required by the Statute of Frauds to be evidenced in writing),[178] but upon a different, collateral, contract with the auctioneer. When the auctioneer put up the mare for sale 'without reserve' he contracted that this would be so, that this contract was made with the highest *bona fide* bidder, and it was broken upon a bid being made by or on behalf of the owner.[179]

Several objections have been taken to this analysis.[180] If an advertisement that an auction sale will be held is merely an invitation to treat, how can it be said that a stipulation contained in it that the sale will be 'without reserve' amounts to an offer? Secondly, if a bid may be retracted, or outbid, at any time before it is accepted, how can it be said that it is certain who is the highest bidder? Thirdly, what is the consideration for the promise, since the promisee is not bound to pur-

[174] (1858–59) 1 E. & E. 295, 309; *Johnston* v. *Boyes* [1899] 2 Ch. 73. Contrast *Fenwick* v. *Macdonald, Fraser & Co. Ltd.* (1904) 6 F. 850 (Scotland). By the Sale of Goods Act 1979, s. 58(4) the seller is now precluded without notification from the bidding himself or employing anyone to bid for him, and any sale contravening this rule may be treated as fraudulent by the buyer.

[175] The minority held that the auctioneer would be liable for breach of warranty of authority: see *post*, p. 652. In fact, a new trial was ordered but never took place.

[176] *Payne* v. *Cave* (1789) 3 Term R. 148.

[177] *Harris* v. *Nickerson* (1873) L.R. 8 Q.B. 286.

[178] See *post*, p. 75.

[179] (1858) 1 E. & E. 309, at p. 317.

[180] See Slade (1952) 68 L.Q.R. 238; Gower (1952) 68 L.W.R. 456; Slade (1953) 69 L.Q.R. 21; Cox (1982) 132 New L.J. 719.

chase, but may withdraw the bid at any time? While there is a certain artificiality in treating the bidder as having provided consideration by bidding, i.e. by exposure to the risk that the bid would be accepted by the auctioneer, this unilateral contract analysis[181] accords with the modern approach to similar situations.[182]

Revocation must be communicated

It remains to state that revocation, as distinguished from lapse, if it is to be operative, must be communicated. In the case of acceptance we have seen that, in certain circumstances, it is not necessary that the acceptance should have actually come to the notice of the offeror; the posting of a letter, the doing of an act, may constitute an acceptance and make a contract. A revocation of an offer cannot, however, be communicated in the same way, by the posting of a letter of revocation, or by the sale to A of an article offered to B to purchase but must be brought to the notice of the offeree. The law on this subject was settled by *Byrne & Co.* v. *Leon Van Tienhoven & Co.*:[183]

The defendants, writing from Cardiff on 1 October, made an offer to the plaintiffs in New York asking for a reply by cable. The plaintiffs received the letter on the 11th, and at once accepted in the manner requested. In the meantime, however, the defendants had, on 8 October, posted a letter revoking the offer. This letter did not reach the plaintiffs until the 20th.

Lindley J. held, first, that a revocation was inoperative until communicated, and secondly, that the revocation of an offer was not communicated by the mere posting of a letter; therefore the plaintiffs' acceptance on 11 October could not be affected by the fact that the defendants' letter of revocation was already on its way. He pointed out the inconvenience which would result from any other conclusion:[184]

If the defendants' contention were to prevail no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

Earlier suggestions that an offer to sell property could be revoked merely by the sale of the property to a third person, and without communication to the offeree[185] must be regarded as of no authority today.

[181] *Ante*, pp. 35, 55.

[182] See, on tenders, *Harvela Investments Ltd.* v. *Royal Trust of Canada (C.I.) Ltd.* [1986] A.C. 207; *Blackpool and Fylde Aero Club Ltd.* v. *Blackpool B.C.* [1990] 1 W.L.R. 25.

[183] (1880) 5 C.P.D. 344. See also *Thomson* v. *James* (1855) 18 D. 1 (Scotland); *Stevenson* v. *McLean* (1880) 5 Q.B.D. 346; *Henthorn* v. *Fraser* [1892] 2 Ch. 27. But in *Shuey* v. *United States* 92 U.S. 73 (1875), where a reward was offered in a newspaper, it was held that this offer could be 'withdrawn through the same channel by which it was made', even though the revocation did not come to the notice of the offeree.

[184] At p. 348.

[185] *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, at pp. 472, 474; *post*, p. 58. See also *Cooke* v. *Oxley* (1790) 3 T.R. 653.

It has been stated that a revocation must be 'brought to the mind' of the offeree[186] but it is submitted that where it arrives at its address it will be effective when it would, in the ordinary course of business, have come to the offeree's attention.[187] Where the offeree refrains from opening a letter or neglects to pay attention to the telex or fax machine[188] it should, therefore, be effective on arrival. The requirement that a revocation be communicated means that, in law, an offeror may be bound by an agreement which it does not believe itself to have made; but, again, if one of the two parties must suffer, there would seem no good reason why it should be the offeree rather than the offeror.

Dickinson v. *Dodds*

The case of *Dickinson* v. *Dodds*[189] establishes that an offeree who knows that an offer has been withdrawn cannot accept it even if the communication has not come from the offeror:

On 10 June 1874, Dodds made a written offer to Dickinson to sell certain premises for £800, and stating that this offer would remain open until 9 a.m. on 12 June. On the 11th, however, he sold the property to a third person without notice to Dickinson. Dickinson had in fact been informed of the sale, though not by anyone acting under the authority of Dodds. Nevertheless before 9 a.m. on the 12th he purported to accept Dodds' offer. He then brought an action for specific performance of the contract.

The Court of Appeal held that there was no contract. James L.J., after stating that a promise to keep the offer open could not be binding, and that at any moment before a completed acceptance of the offer one party was as free as the other, went on to say:[190]

[I]n this case, *beyond all question, the plaintiff knew* that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, 'I withdraw the offer'.

Is it then the case that information of the offeror's intention to revoke, from whatever source it reaches the offeree, is good notice of revocation? The inconvenience might be grave. Suppose a company receives an offer of a consignment of goods from a distant correspondent, with liberty to reserve an answer for some days. In the meantime an unauthorized person tells the offeree-company that the offeror has sold or promised the goods to another. What is the offeree to do? The informant may be right, and then, if the offeree accepts, the acceptance may be worthless. Or the informant may be a gossip or mischief-maker and if, because of what the offeree has been told, it refrains from accepting it may lose a bargain. The answer would appear to be that it is open to an offeror, who has revoked an offer

[186] *Henthorn* v. *Fraser* [1892] 2 Ch. 27, *per* Lord Herschell at p. 32. See also *ibid.*, *per* Kay L.J. at p. 37 ('actual knowledge', 'actually received').

[187] *Tenax S.S. Co. Ltd.* v. *The Brimnes (Owners)* [1975] 1 Q.B. 929, at pp. 945, 966, 969 (revocation by telex). See also Vienna Convention on Contracts for the International Sale of Goods, Arts. 16(1) and 24 (revocation effective if it 'reaches' the offeree's place of business or mailing address before he has dispatched an acceptance).

[188] *Tenax S.S. Co. Ltd* v. *The Brimnes* (*supra*, n. 187). But not where it arrives after or near the close of a working day and is not seen on that day; *ibid.*, at p. 970; *Brinkibon Ltd.* v. *Stahag Stahl und Stahlwarenhandelsgesellschaft m.b.H.* [1983] 2 A.C. 34, at p. 42; *ante*, p. 45.

[189] (1876) 2 Ch. D. 463.

[190] At p. 472; see also Mellish L.J. at p. 474.

without direct communication to the offeree, to show that the offeree knew, from a trustworthy source, that the offer had been withdrawn.[191] The Court would have to decide every such case on the facts presented, but the onus would be upon the offeror to establish that the information ought reasonably to have been believed.

(b) Rejection of the Offer

Rejection by offeree

An offer will be held to have terminated once it has been rejected by the offeree.

The rejection need not be express, provided that the offeror is justified in inferring that the offeree does not intend to accept the offer.[192] It would seem, therefore, that a rejection would not operate so as to destroy the power of acceptance until it comes to the notice of the offeror:

Suppose that A makes an offer to B by letter. Immediately on receiving the letter B writes a letter rejecting the offer. Before the rejection arrives, B changes her mind and telephones her acceptance.

There would be a contract between A and B.[193] It should not be supposed, however, that an uncommunicated rejection would always be without effect. It would, in certain circumstances, preclude the operation of the rule that a letter of acceptance is complete when posted:

Suppose that C Ltd. makes an offer to D Ltd. Immediately on receiving the offer D writes a letter rejecting the offer. Before the rejection arrives, D changes its mind and posts a letter accepting the offer.

Although there is no English authority on this point, it would not seem possible for D to claim that the normal rule as to postal acceptance applied. The letter of acceptance would only create an obligation if received by the offeror before the rejection.[194]

(c) Lapse of the Offer

Offer for a fixed time

An offer may be considered to have lapsed owing to the passing of time. The parties may expressly fix a time within which an offer is to remain open. Where the offeror prescribes a specific time limit for acceptance, the offer is conditional upon acceptance within that time.[195] For example, 'This offer to be left open until Friday, 9 a.m. 12 June', allows the offeree to accept the offer, if unrevoked, at any time up to the hour named, after which the offer would lapse.[196] Similarly, an offer to supply goods of a certain sort at a certain price for a year from the

[191] *Cartwright* v. *Hoogstoel* (1911) 105 L.T. 628; *Restatement* (2d), § 42.
[192] *Restatement* (2d), § 37. [193] Winfield (1939) 55 L.Q.R. 499, 513; *Restatement* (2d), § 39.
[194] *Restatement* (2d), § 39.
[195] The offeror could nevertheless waive this condition, and treat the late acceptance as valid, provided he did not thereby adversely affect the offeree.
[196] *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, *ante*, p. 58.

present date,[197] or an offer to guarantee the payment of any bills of exchange discounted for a third party for a year from the present date,[198] are offers which may be revoked at any time, except as regards orders already given or bills already discounted, and which will, in any event, lapse at the end of a year from the date of offer.

No fixed time

In most cases, however, the offeror will not specify any particular time, and it is left to the Court, in the event of litigation, to say what is a reasonable time within which an offer may be accepted. We have already seen that an offer is accepted when acceptance is made in a manner prescribed or indicated by the offeror.[199] If the circumstances of the offer, for example, if it is made by telegram, suggest that a reply is required urgently, the offer will be considered to have lapsed if the offeree does not quickly decide whether to accept, or chooses a means of communication which will delay the notification of the acceptance.[200] In other cases, the efflux of a reasonable time will terminate the offer. An instance of this is provided by *Ramsgate Victoria Hotel Co.* v. *Montefiore*:[201]

The defendant, M, offered by letter dated 8 June to purchase shares in the plaintiff company. No answer was received by him until 23 November, when he was informed that shares were allotted to him. He refused to accept them.

It was held that M's offer had lapsed by reason of the delay of the company in notifying its acceptance, and that he was not bound to accept the shares.

The lapse of such an offer after a reasonable time may be explained on the ground that an offeree who delays in accepting the offer impliedly rejects it by his conduct. On this view, the knowledge of the offeror of the offeree's intention to keep the offer alive might preclude an offer from lapsing even after the passage of what might otherwise be a reasonable time,[202] although clearly the offer could not be kept open indefinitely. On the other hand, an alternative explanation is that a term should be implied into the offer that its continued existence is conditional upon acceptance being made within a reasonable time, in which case the manifestation of a desire not to reject the offer would probably be irrelevant.

Express or implied condition

The terms of the offer may expressly indicate that its continuance is conditional upon the existence of circumstances other than time; and a condition of this nature may also be implied. For example, where the contract requires for its performance the existence of a particular thing, and before acceptance the thing is destroyed or substantially impaired, the offer is terminated unless the offeror has assumed the risk of such mischance.[203] Thus, in *Financings Ltd.* v. *Stimson*:[204]

The defendant signed an 'agreement' whereby he undertook to buy a motor-car on hire-purchase terms from the plaintiff company. The agreement contained a clause which stated that it was to become binding only upon acceptance by signature on the company's

[197] *G.N. Ry.* v. *Witham* (1873) L.R. 9 C.P. 16.
[198] *Offord* v. *Davies* (1862) 12 C.B.N.S. 748.
[199] *Ante*, p. 50.
[200] *Quenerduaine* v. *Cole* (1883) 32 W.R. 185.
[201] (1866) L.R. 1 Ex. 109. See also *Chemco Leasing S.p.A.* v. *Rediffusion Ltd.* [1987] 1 F.T.L.R. 201.
[202] *Manchester Diocesan Council for Education* v. *Commercial & General Investments Ltd.* [1970] 1 W.L.R. 241, at pp. 247–9.
[203] *Restatement* (2d), § 266.
[204] [1962] 1 W.L.R. 1184.

behalf. Before the company signed, the motor-car was stolen by thieves. It was subsequently recovered in a damaged condition.

It was clear that the 'agreement' was in fact only an offer since it contemplated acceptance by the company. The Court of Appeal held that this offer was only capable of acceptance if the car remained in substantially the same condition as it was when the offer was made. Since this was not the case, the offer had lapsed and there was no binding contract.

(d) Effect of Death

Death of offeror

In principle, an offeree cannot accept after being informed of the death of the offeror.[205] An acceptance communicated to the offeror's personal representatives will not bind them, unless the offer is one which could not have been revoked by the offeror during his lifetime.[206] Where the offeree accepts in ignorance of the offeror's death the position is less clear. One view is that the offer is terminated automatically and that knowledge is irrelevant.[207] The alternative, and it is submitted better, view[208] is that an offeree who does not know of the offeror's death should be entitled to accept the offer, unless the offer on its true construction indicates the contrary,[209] e.g. where the offer is personal to the offeror.

Death of offeree

It would seem that an offer is in any event determined by the death of the offeree;[210] his personal representatives could not accept the offer on behalf of the offeree's estate.

V. Uncertain and Incomplete Agreements

ALTHOUGH the parties may have reached agreement in the sense that the requirements of offer and acceptance have been complied with, there may yet be no contract because the terms of the agreement are uncertain or because the agreement is qualified by reference to the need for a future agreement between them. For 'unless all the material terms of the contract are agreed there is no binding obligation. An agreement to agree in future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it'.[211]

[205] *Coulthart* v. *Clementson* (1870) 5 Q.B.D. 42.

[206] *Errington* v. *Errington* [1952] 1 K.B. 290, at p. 295. Even in this case, death may terminate the offer where it is dependent on the personality of the offeror.

[207] *Dickinson* v. *Dodds* (1876) 2 Ch. D. 463, at p. 475; *Restatement* (2d), § 48.

[208] *Bradbury* v. *Morgan* (1862) 1 H. & C. 249, often said to support this, was in fact (like *Lloyd's* v. *Harper* (1880) 16 Ch. D. 290, *post*, p. 417) a case where a contract had been concluded before death.

[209] *Harris* v. *Fawcett* (1873) L.R. 8 Ch. App. 866, at p. 869; *Coulthart* v. *Clementson* (1870) 5 Q.B.D. 42, at p. 46.

[210] *Re Cheshire Banking Co. (Duff's Executor's Case)* (1886) 32 Ch. D. 301; *Reynolds* v. *Atherton* (1921) 125 L.T. 690, at p. 695, but see (1922) 127 L.T. 189, 191 (H.L.); *Somerville* v. *National Coal Board* 1963 S.L.T. 334 (Scotland).

[211] *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1, *per* Maugham L.J. at p. 13.

The terms of a contract must provide a basis for determining the existence of a breach and for giving an appropriate remedy.[212] Nevertheless, as we shall see, although there are differences of approach in the cases, the law is generally anxious to uphold the contract wherever possible lest it should be criticized as the destroyer of bargains.[213] In addition, where uncertainty or incompleteness prevent an agreement from constituting a contract the fact situation may give rise to liability in tort, for instance for misrepresentation,[214] or in restitution in respect of benefits received or work done.[215]

(a) Certainty of Terms

The law requires the parties to make their own contract; it will not construct a contract for them out of terms which are indefinite or unsettled. A vague or uncertain promise does not accordingly give rise to an enforceable contract. Thus:

C agreed to sell land to D, that the price was to be paid by instalments and that on each payment 'a proportionate part' of the land was to be conveyed. It was held that, since the part to be conveyed on each occasion could not be identified, the agreement as a whole was uncertain and unenforceable.[216]

E Ltd. made a contract with F and promised that 'if satisfied with you as a customer' it 'would favourably consider' an application for the renewal of the contract. It was held that there was nothing in these words which would create a legal obligation.[217]

G agreed to pay H, an estate agent, commission should H 'be instrumental in introducing a person willing to sign a document capable of becoming a binding contract'. It was held that this agreement was too uncertain to be enforced.[218]

Similarly when a motor-van was to be bought on the understanding that part of the price should be paid on 'hire-purchase' terms,[219] and when woollen goods were to be bought 'subject to war clause',[220] there was no contract in either case, for 'hire-purchase' terms, and 'war clauses' may take many forms, and it is for the parties, and not for the Court, to define them.

The approach of the Courts

On the other hand, in many transactions, particularly those for future performance over a period, the parties may neither be able nor desire to specify all matters. A transaction which at first sight seems to leave some essential term of the bargain undetermined may, by implication, if not expressly, provide some method of determination other than a future agreement between the parties. In that event, since it is a maxim of the law that that is certain which can be made certain, there will be a good contract.[221] In every case the function of the Court is

[212] *Restatement* (2d), § 33(2). [213] *Hillas* v. *Arcos* (1932) 147 L.T. 503, *per* Lord Tomlin at p. 512.
[214] *Post*, pp. 65 and 242. [215] *Post*, p. 64.
[216] *Bushwell Properties Ltd.* v. *Vortex Properties Ltd.* [1976] 1 W.L.R. 591.
[217] *Montreal Gas Co.* v. *Vasey* [1900] A.C. 595.
[218] *Jacques* v. *Lloyd D. George & Partners* [1968] 1 W.L.R. 625.
[219] *G. Scammell & Nephews Ltd.* v. *Ouston* [1941] A.C. 251.
[220] *Bishop & Baxter* v. *Anglo-Eastern Trading Co. and Industrial Ltd.* [1944] K.B. 12; *British Electrical and Associated Industries (Cardiff) Ltd.* v. *Patley Pressings Ltd.* [1953] 1 W.L.R. 280.
[221] *Id certum est quod certum reddi potest.* See Fridman (1960) 76 L.Q.R. 521; Samek (1970) 47 Can. Bar Rev. 203.

to put a fair construction on what the parties have said and done, though the task is often a difficult one. As Lord Wright stated:[222]

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.*

The line between discovering the agreement of the parties and imposing an agreement on the basis of what the Court considers the parties ought to have intended can be fine. The Court must be satisfied that the parties have in fact concluded a contract, and not merely expressed willingness to contract in the future. It may have regard to what has been said and done, the context in which it was said or done, the relative importance of the unsettled matter, and whether the parties have provided machinery for settling it.

Previous transactions; trade custom

In *Hillas & Co.* v. *Arcos Ltd.*[223] the terms were ascertained from previous transactions between the same parties and the custom of the particular trade:

> In 1930 the plaintiffs agreed to sell the defendant a quantity of Russian softwood timber 'of fair specification'. The contract contained a clause giving to the plaintiffs an option to purchase further timber in 1931, but the option gave no particulars as to the kind or size or quality of the timber, nor of the manner of shipment. When the plaintiffs sought to exercise the option, the defendant pleaded that the clause was too indeterminate and uncertain to indicate an unequivocal intention to be bound, and that it was merely an agreement to negotiate a future agreement.

The House of Lords held that, in the light of the previous dealings between the parties, there was a sufficient intention to be bound: the terms left uncertain in the option could be ascertained by reference to those contained in the original contract and from the normal practice of the timber trade.[224]

The standard of reasonableness

Alternatively, where the intention to buy and to sell is clear, incidents of the transaction may be determined by the standard of reasonableness, or by rules of law. Thus, in *Hillas* v. *Arcos* the phrase 'of fair specification' was held to mean timber distributed over kinds, qualities, and sizes in fair proportions having regard to the season's output, a matter which, if the parties fail to agree, could be ascertained by the Court determining what is reasonable.[225] In the case of price, in transactions for the sale of goods or the supply of services the matter is now governed by statute. By section 8 of the Sale of Goods Act 1979:[226]

[222] *Hillas & Co.* v. *Arcos Ltd.* (1932) 147 L.T. 503, at p. 514.
[223] (1932) 147 L.T. 503.
[224] On the terms implied by trade custom and law see further, *post*, p. 148.
[225] (1932) 147 L.T. 503, at pp. 512, 513, 516. See also standards provided in the agreement such as 'market value' (*Brown* v. *Gould* [1972] Ch. 53) or that hire shall be 'equitably decreased' (*Didymi Cpn.* v. *Atlantic Lines and Navigation Co. Ltd.* [1988] 2 Lloyd's Rep. 108).
[226] See also Supply of Goods and Services Act 1982, s. 15(1). Cf. Vienna Convention, Art. 55 ('current trade price').

(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined as mentioned in subsection (1) above the buyer must pay *a reasonable price*.

In such cases, the Court will allow an action to recover a reasonable sum for what the goods or services are worth.[227]

Section 8(2) of the Sale of Goods Act provides for silence as to the price, and will not apply where an agreement states that the parties will subsequently agree the price to be paid. So in *May & Butcher* v. *The King*,[228] where the supplicants agreed to purchase from the Crown all its surplus old tentage at such price as 'shall be agreed upon . . . [between them] . . . as the quantities of the said old tentage become available for disposal, and are offered to the purchasers', the House of Lords held there was no concluded contract.

Executed transactions

The Court will also have regard to what has been done by the parties. Where a transaction has been wholly or partially performed it will be:

> difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential.[229]

In the case of executed transactions, the basis of liability is not, however, always contractual. In some cases the objective test of intention[230] may mean that a contract comes into existence as a result of the performance and liability can be characterized as consensual.[231] In others, however, as we have seen in the context of 'the battle of the forms',[232] no contractual analysis is possible and, where it is held that there is liability, it is imposed by the Court in the form of a restitutionary obligation upon the defendant to pay a reasonable sum for the work done or the goods received.[233] We have seen that, where the liability is restitutionary, the interests of the recipient of the goods or services may not adequately be protected.[234] Moreover, in determining whether to give a restitutionary remedy, considerations of 'risk' and 'fault' in relation to the reason the transaction fails to

[227] *British Bank for Foreign Trade Ltd.* v. *Novinex* [1949] 1 K.B. 623; *Powell* v. *Braun* [1954] 1 W.L.R. 401 (executed transactions); *Hondly* v. *M'Laine* (1834) 10 Bing. 482 (executory transaction).

[228] [1934] 2 K.B. 17n; *King's Motors (Oxford) Ltd.* v. *Lax* [1970] 1 W.L.R. 426. Contrast *Smith* v. *Morgan* [1971] 1 W.L.R. 803.

[229] *G. Percy Trentham Ltd.* v. *Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25, *per* Steyn L.J. at p. 27. See also *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53, at pp. 57–8; *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1.

[230] *Ante*, p. 31.

[231] *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1; *Way* v. *Latilla* [1937] 3 All E.R. 759. But cf. *ibid.* at pp. 764–5.

[232] *Ante*, p. 39.

[233] *British Steel Cpn.* v. *Cleveland Bridge and Engineering Co. Ltd.* [1984] 1 All E.R. 504, at p. 511 in the context of goods delivered under a letter of intent, *post*, p. 68. Birks, *An Introduction to the Law of Restitution* (1985), pp. 271–2, explains *Way* v. *Latilla* [1937] 3 All E.R. 759 in this way and see *ibid.*, at pp. 764–5.

[234] *Ante*, p. 40.

come to fruition as a contract are taken into account so that a person who is held to have taken the risk of the transaction failing or to have been responsible for this will not be entitled to recompense for the work done or the services rendered.[235]

Machinery for ascertainment

A contract will not fail for uncertainty even though a material term is to be agreed in future if the contract itself provides machinery for ascertaining it. So, for example, if the contract provides that the parties are to agree a price or quantities for delivery, but also contains an arbitration clause which covers a failure to agree the price or the quantities, the Courts will imply that, in default of agreement, a reasonable price is to be paid, such price to be determined by arbitration.[236] Moreover, in the case of a lease, if premises are let to a tenant for (say) a term of 10 years at a fixed rent for the first 5 years, but at a rent 'to be agreed' thereafter, the Court will itself determine by inquiry what is a reasonable rent for the premises should the parties fail to agree.[237] Unless the machinery is held to be an essential part of the agreement, the Court will similarly intervene if, for any reason, its operation is stultified, for example, by the refusal of one of the parties to appoint a valuer or an arbitrator.[238]

Meaningless term

We should also note that if the contract contains an indefinite, but subsidiary provision, the Courts have felt at liberty to strike it out as being without significance, and to give effect to the rest of the contract without the meaningless term.[239]

Agreements to negotiate and not to negotiate

The position of agreements to negotiate and agreements not to negotiate was considered by the House of Lords in *Walford* v. *Miles*.[240]

On 17 March the defendants agreed that, provided the plaintiffs' bank confirmed that the plaintiffs had the necessary financial resources to purchase the defendants photographic processing business for £2 million, they would 'break off any negotiations with any third party and would not consider any other alternative and would not accept a better offer but would deal exclusively with the plaintiffs, with a view to concluding the deal as soon as possible after April 6'. The defendants continued to keep in touch with the other interested party and on 27 March withdrew from the negotiations with the plaintiffs. They later sold the business to the third party. The plaintiffs sued for breach of contract and for misrepresentation.

It was found that the defendants had represented that they were not in negotiation with the other interested party and the plaintiffs were awarded tortious damages for misrepresentation.[241] The contractual claims, however, failed.

[235] *Jennings & Chapman Ltd.* v. *Woodman, Matthews & Co.* [1952] 2 T.L.R. 409; *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 W.L.R. 932; *Regalian Properties plc* v. *London Dockland Development Cpn.* [1995] 1 W.L.R. 212.

[236] *Foley* v. *Classique Coaches Ltd.* [1934] 2 K.B. 1; *F. & G. Sykes (Wessex) Ltd.* v. *Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53; *Vosper Thornycroft Ltd.* v. *Ministry of Defence* [1976] 1 Lloyd's Rep. 58; *Queensland Electricity Generating Board* v. *New Hope Collieries Pty Ltd.* [1989] 1 Lloyd's Rep. 205, at p. 210.

[237] *Beer* v. *Bowden* [1981] 1 W.L.R. 522.

[238] *Sudbrook Trading Estate Ltd.* v. *Eggleton* [1983] 1 A.C. 444.

[239] *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543. See also *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [1959] A.C. 133; *Whitlock* v. *Brew* (1968) 118 C.L.R. 445 (Australia).

[240] [1992] 2 A.C. 128.

[241] These amounted to £700 and were in respect of the expenses of the negotiation and the preparation of the contract documents: [1992] 2 A.C. 128, at p. 135. On damages for misrepresentation, see *post*, pp. 241, 243.

It was held that an agreement to negotiate is like an agreement to agree and is unenforceable 'simply because it lacks the necessary certainty'.[242] Two reasons have been given for this conclusion. First, in *Walford* v. *Miles* Lord Ackner asked how the Court is to police such an agreement and questioned whether it is possible to tell whether it has been breached:[243] '[H]ow can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations?' The position of parties in negotiations was stated to be adversarial and to entitle them to pursue their own interests so long as they avoided making misrepresentations and, if they so wished, to withdraw from the negotiations at any time and for any reason. It was said not to be possible to cure this uncertainty by asking whether the negotiations have been conducted 'in good faith' because a duty to negotiate in good faith 'is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party'. Secondly, it has been said that '[n]o court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be'.[244]

There are, however, difficulties with this aspect of the decision. First, it is unlikely to give effect to the reasonable expectations of business people which it is an important object of the law of contract to facilitate.[245] It appears to require a higher degree of certainty and less willingness to use the standard of reasonableness to resolve ambiguity than some of the cases we have considered. Secondly, it is not the case that it is a fundamental attribute of a negotiation that the parties should have absolute freedom to walk away from it for any reason or no reason at all. The law does in fact permit a party to a negotiation to give up this freedom: an agreement to use 'reasonable' or even 'best' endeavours to agree appears to have the necessary certainty to constitute a contract.[246] In such a case the Court may have to determine the difficult question of whether the agreement has been broken, i.e. whether 'reasonable' or 'best' endeavours have in fact been used.[247] It is submitted that there is no satisfactory distinction between such an agreement and an agreement to negotiate in good faith. The objection that it would not be possible to assess damages is also open to question because, as will be seen, solutions have been found in other contexts in which the transaction contains a large amount of chance and in which the Court has not held that there is no contract.[248] It is unfortunate that Lord Wright's *dictum* in *Hillas* v.

[242] [1992] 2 A.C. 128, at p. 138. See also *Courtney & Fairbairn Ltd.* v. *Tolaini Bros (Hotels) Ltd.* [1975] 1 W.L.R. 297; *Mallozzi* v. *Carapelli S.p.A.* [1976] 1 Lloyd's Rep. 407 (C.A.). Cf. *Hillas* v. *Arcos* (1932) 147 L.T. 503, *per* Lord Wright at 515.

[243] [1992] 2 A.C. 128, at p. 138.

[244] *Courtney & Fairbairn Ltd.* v. *Tolaini Bros (Hotels) Ltd.* [1975] 1 W.L.R. 297, *per* Lord Denning M.R. at p. 301.

[245] F.P. (1932) 48 L.Q.R. 141; Davenport (1991) 107 L.Q.R. 366.

[246] *Walford* v *Miles* [1992] 2 A.C. 128, *per* Lord Ackner at p. 138; *Lambert* v. *H.T.V. Cymru (Wales) Ltd.*, *The Times* 17 March 1998. In *Queensland Electricity Generating Board* v. *New Hope Collieries Pty Ltd.* [1989] 1 Lloyd's Rep. 205, at pp. 209–10 (P.C.) an obligation to make reasonable endeavours was *implied*. Cf. *Scandinavian Trading Co. A.B.* v. *Flota Petrolera* [1981] 2 Lloyd's Rep. 425, at p. 432, affirmed on other grounds [1983] 2 A.C. 694.

[247] Neill (1992) 108 L.Q.R. 405, 409–10; Cohen in Beatson and Friedmann, eds., *Good Faith and Fault in Contract Law* (1995), pp. 37 ff.

[248] See *post*, p. 560.

Arcos,[249] which recognized a contract to negotiate, has now been rejected by the House of Lords.

An agreement not to negotiate with any third party, a 'lock out' agreement, has been held not to be enforceable where, as in *Walford* v. *Miles*, it does not specify a time limit for its duration apparently on the ground that it would impose indirectly a duty to negotiate in good faith which, for the reasons given above, could not be a contract.[250] But such an agreement is sufficiently certain if it is limited to a fixed period.[251] The distinction between these cases is difficult to justify. It is submitted that neither indirectly imposes a duty to negotiate in good faith since the obligation is a negative one and that it should have been possible to resolve the uncertainty in the first case by applying the standard of reasonableness.[252]

(b) Incomplete Agreement

Further terms unresolved

The parties may agree on certain points, but nevertheless leave other points unresolved. The question then arises whether or not their agreement is complete. Difficulties of interpretation most frequently arise where a contract has to be made out of a correspondence involving lengthy negotiations. The parties discuss terms, approach and recede from an agreement; proposals are made and met by the suggestion of fresh terms; finally there is a difference, and one of the parties asserts that a contract has been made, and the other that matters have never gone beyond the discussion of terms. Where such a correspondence appears to result, at any moment of its course, in an agreement, it is necessary to ask whether this agreement amounts to a completed agreement, or whether there are other terms of the intended contract, beyond and besides those expressed in the agreement, which are still in a state of negotiation only, and without the settlement of which the parties have no idea of concluding any contract.[253] Where, however, the correspondence shows that the parties have definitely come to terms, even though certain material points may still be left open, a subsequent revival of negotiations cannot, except with the consent of both parties, affect the contract so made.[254]

These cases turn rather on the meaning to be given to the words of the parties than on rules of law.

Effect of reference to further agreement

The classic statement of the issues involved in cases where the agreement is couched in general terms, but reference is made to a contract in which the

[249] (1932) 147 L.T. 503, at p. 515. A majority of the New South Wales Court of Appeal has rejected the view that every promise to negotiate in good faith is unenforceable: *Coal Cliff Collieries Pty Ltd.* v. *Sijehama Pty Ltd.* (1991) 24 N.S.W.L.R. 1, at p. 26. In the USA the majority view gives contractual effect to an agreement to negotiate: Farnsworth (1987) 87 Colum. L. Rev. 217, 265–7.

[250] *Walford* v. *Miles* [1992] 2 A.C. 128, at p. 140.

[251] *Pitt* v. *P.H.H. Asset Management Ltd.* [1994] 1 W.L.R. 327.

[252] Neill (1992) 108 L.Q.R. 405, 413. Bingham L.J., dissenting in the Court of Appeal, was of this view: (1990) 62 P. & C.R. 410. The agreement provided a standard in stating that the transaction was to be concluded as soon as possible after 6 April: [1990] 1 E.G.L.R. 212.

[253] *Hussey* v. *Horne Payne* (1879) 4 App. Cas. 311.

[254] *Perry* v. *Suffields Ltd.* [1916] 2 Ch. 187; *Mitsui Babcock Energy Ltd.* v. *John Brown Engineering Ltd.* (1996) 51 Con. L.R. 129, at pp. 167, 175, 179.

intentions of the parties may be more precisely stated, is to be found in the judgment of Parker J. in *Von Hatzfeldt-Wildenburg* v. *Alexander*:[255]

> [I]f the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

Letters of intent

Difficulties frequently arise where parties in negotiations reach 'points of agreement' or exchange 'letters of intent' or 'letters of comfort', but nevertheless contemplate that a formal document is later to be drawn up. In such situations the question whether or not a binding contract has been concluded is a matter of interpretation for the Court. While such a letter can have contractual effect where it contains an express promise as to future conduct,[256] the Court may be unwilling to imply such a promise from a statement of present fact because the language is often vague or equivocal or because the surrounding circumstances, including previous negotiations, indicate that all that is assumed is a moral responsibility.[257]

The position may be even further complicated by the fact that the parties often act on their informal agreement pending the execution of a formal contract. Where a formal contract is eventually concluded, the Court may be prepared to imply a term that, although the informal agreement is not legally binding, the formal contract is to have retrospective effect. It will, in consequence, apply to work done and services rendered before it was made.[258] Where no formal contract is concluded, work done or goods delivered under a letter of intent which is not legally binding may give rise to a restitutionary obligation to pay a reasonable sum for the work or the goods.[259]

Agreement 'subject to contract'

The initial agreement for the sale or lease of land is usually entered into 'subject to contract' or 'subject to formal contract'. Such an agreement gives rise to no legal liability.[260] Thus in *Winn* v. *Bull*:[261]

[255] [1912] 1 Ch. 284, at p. 288.

[256] *Chemco Leasing S.p.A.* v. *Rediffusion* [1987] 1 F.T.L.R. 201 (C.A.) (comfort letter an offer but lapsed before acceptance). See also Staughton J.'s judgment quoted in *Kleinwort Benson Ltd.* v. *Malaysia Mining Cpn. Bdh.* [1988] 1 W.L.R. 799, at pp. 805–6.

[257] *Kleinwort Benson Ltd.* v. *Malaysia Mining Cpn. Bdh.* [1989] 1 W.L.R. 379, at pp. 388, 391, 393. Cf. *Wilson Smithett & Cape (Sugar) Ltd.* v. *Bangladesh Sugar Industries Ltd.* [1986] 1 Lloyd's Rep. 378 (letter of intent for the supply of sugar specifying amount, price, and shipping details held to be an acceptance).

[258] *Trollope & Colls Ltd.* v. *Atomic Power Construction Ltd.* [1963] 1 W.L.R. 333. See Ball (1983) 99 L.Q.R. 572.

[259] *British Steel Cpn.* v. *Cleveland Bridge & Engineering Co. Ltd.* [1984] 1 All E.R. 504. See *ante*, pp. 40, 64.

[260] See Law Com. No. 65, *'Subject to Contract' Agreements* (1975) and Law Com. No. 164, *Formalities for Contracts for Sale etc. of Land* (1987), §§ 1.4, 4.15.

[261] (1877) 7 Ch. D. 29.

A written agreement was drawn up whereby the defendant agreed to take a lease of a house for a definite period and at a fixed rent, but 'subject to the preparation and approval of a formal contract'.

It was held there was no contract. Jessel M.R. explained:[262]

It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared.

The insertion of the words 'subject to contract' renders the agreement nugatory in fact, and this is so notwithstanding that a deposit may have been paid.[263] As a normal rule, a binding contract for the sale of land will come into existence only when a formal 'exchange of contracts' contained in writing signed by or on behalf of each party[264] has taken place.[265] Up to this time either party is free to renegotiate the price, or even to withdraw entirely from the transaction and to do so because of movements in the value of property. The use of the words 'subject to contract' has also been held to preclude a claim in restitution for expenses incurred in respect of the intended contract; the use of those words was said to mean that the parties had in effect expressly agreed that there should be no legal obligation by either party to the other unless and until a formal contract had been entered into.[266]

On the other hand, an agreement for the sale or lease of land will be binding if the terms of the further formal contract are in existence and known to the parties, and not merely in contemplation. For example:

An offer was made to buy land, and 'if offer accepted, to pay deposit and sign contract on the auction particulars'; this was accepted, 'subject to contract as agreed'. The acceptance clearly embodied the terms of the contract mentioned in the offer, and constituted a complete contract.[267]

Further, if the parties use the phrase 'a provisional agreement', they then agree to be bound from the beginning, even though they stipulate that a formal document is to be drawn up later on.[268]

[262] At p. 32.

[263] *Coope* v. *Ridout* [1921] 1 Ch. 291; *Chillingworth* v. *Esche* [1924] 1 Ch. 97; *Eccles* v. *Bryant and Pollock* [1948] Ch. 93; *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146.

[264] Law of Property (Miscellaneous Provisions) Act 1989, s. 2, on which see *post*, p. 81.

[265] Cf. *Alpenstow Ltd.* v. *Regalian Properties Ltd.* [1985] 1 W.L.R. 721 (an agreement 'subject to contract' drawn up by a lawyer after 5 months of negotiation containing detailed and mandatory provisions of the approval, amendment, and exchange of contracts was very exceptionally held binding). In *Attorney-General of Hong Kong* v. *Humphreys Estates (Queens Gardens) Ltd.* [1987] 1 A.C. 114, at pp. 127–8, the possibility (said to be unlikely) of the parties being estopped from refusing to proceed was accepted. See also *Akiens* v. *Saloman* (1992) 65 P. & C.R. 364, at p. 370. See further, *post*, p. 121.

[266] *Regalian Properties plc* v. *London Dockland Development Cpn.* [1995] 1 W.L.R. 212, at p. 225. See also *Jennings & Chapman Ltd.* v. *Woodman, Matthews & Co.* [1952] 2 T.L.R. 409; *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 W.L.R. 932.

[267] *Filby* v. *Hounsell* [1896] 2 Ch. 737; *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124.

[268] *Branca* v. *Cobarro* [1947] K.B. 854. See also *Damon Comp. Nav. S.A.* v. *Hapag-Lloyd International S.A.* [1985] 1 W.L.R. 434, at pp. 443, 452.

Contracts subject to condition

There are, moreover, situations which at first sight appear to be cases of incomplete agreement, but really turn out to be cases where there is an immediate binding contract, although some of the parties' rights and obligations may be dependent upon the happening of a particular event.[269] For example, the agreement may contain such a term as 'subject to the purchaser's solicitors approving the title'. Until this approval is given the contract need not be implemented, although neither party is free to withdraw from it unilaterally. Alternatively, the contract may be fully operative at once, but upon the happening of a particular event it is thereby discharged.[270] The insertion of such conditions produces a quite different effect from a reservation like 'subject to contract' which prevents the formation of any contract at all. They are dealt with in Chapter 4, The Terms of the Contract, later in this book.

VI. Intention to Create Legal Relations

Offer must be intended to affect legal relations

ALTHOUGH a separate requirement of intention to create legal relations did not exist until the nineteenth century,[271] it is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences. A mere statement of intention made in the course of conversation will not constitute a binding promise, though acted upon by the party to whom it was made,[272] and even negotiated agreements do not necessarily give rise to legal obligations. For example, at common law, collective agreements arrived at by the process of collective bargaining between employers and trade unions are not as such enforceable in a court of law because (so it is argued) the parties do not intend to enter into legally enforceable contracts.[273]

Social engagements

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. Thus, social engagements do not admit of being regarded as business transactions. This is not always because such engagements are not reducible to a money value, for they often may be. The acceptance of an invitation to dinner or to play in a cricket match,[274] of an offer

[269] *Smith* v. *Butler* [1900] 1 Q.B. 694; *Marten* v. *Whale* [1917] 2 K.B. 480. Cf. *Pym* v. *Campbell* (1856) 6 E. & B. 370, *post*, p. 134.

[270] *Head* v. *Tattersall* (1871) L.R. 7 Ex. 7, *post*, p. 135.

[271] Simpson (1975) 91 L.Q.R. 247, 263–5; Hedley (1985) 5 O.J.L.S. 391.

[272] *Weeks* v. *Tybald* (1605) Noy 11; *Guthing* v. *Lynn* (1831) 2 B. & Ad. 232. But these cases appear to turn on uncertainty and vagueness rather than lack of intent. On the link between uncertainty and lack of intention to contract, see *ante*, p. 68; *post*, p. 72.

[273] *Ford Motor Co. Ltd.* v. *A.U.E.F.W.* [1969] 1 W.L.R. 339. By the Trade Union and Labour Relations (Consolidation) Act 1992, s. 179, a collective agreement is conclusively presumed not to have been intended by the parties to be legally enforceable unless it is in writing and contains a provision stating that the parties intend it to be a legally enforceable contract. See *N.C.B.* v. *N.U.M.* [1986] I.C.R. 736.

[274] See Atkin L.J. in *Balfour* v. *Balfour* (*infra*, n. 277) at p. 578.

to share the cost of petrol used on a journey,[275] or to take part in a golf club's competition[276] form agreements in which the promisee may incur expense in reliance on the promise. The damages resulting from breach might be ascertainable, but the Courts would hold that, if no legal consequences could reasonably have been contemplated by the parties, no action will lie.

In *Balfour* v. *Balfour*, Atkin L.J. stated:[277]

> It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract.

In that case:

Family arrangements

> A husband was employed in a government post in Ceylon. He returned with his wife to England on leave, but she was unable to go back to Ceylon with him for medical reasons. He consequently promised orally to make her an allowance of £30 a month until she rejoined him. He failed to make this payment, and she sued him.

The Court of Appeal held that, although it was not impossible for a husband and wife to enter into a contract for maintenance, in this case they never intended to make a bargain which could be enforced in law. While that decision has been criticized,[278] agreements between spouses and between parents and children[279] are, as we shall see, presumed not to be enforceable contracts. Thus, it has been said that a parent's promise to pay a child an allowance while at university ordinarily creates only a moral obligation.[280]

Intent disputed

The test of an intention to affect legal relations is an objective one. It may be that the promisor never anticipated that the promise would give rise to any legal obligation, but if a reasonable person would consider there was an intention so to contract, then the promisor will be bound.[281] It has therefore been contended that the common law does not require any positive intention to create a legal obligation as an element of contract, and that 'a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability'.[282] This view commands considerable respect, but it is submitted that there are difficulties in the way of its acceptance.

[275] *Coward* v. *Motor Insurers' Bureau* [1963] 1 Q.B. 259; *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145. But see now Road Traffic Act 1988, ss. 145, 149.

[276] *Lens* v. *Devonshire Club*, *The Times*, 4 December 1914, *per* Scrutton J., referred to in *Rose and Frank Co.* v. *J. R. Crompton & Bros. Ltd.* [1923] 2 K.B. 261, at p. 288. Cf. *Clarke* v. *Earl of Dunraven* [1897] A.C. 59, *ante*, p. 30 (contract between competitors in yacht club regatta).

[277] [1919] 2 K.B. 571, at p. 578. See also *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762, at p. 765; *Gould* v. *Gould* [1970] 1 Q.B. 275.

[278] *Post*, p. 73.

[279] *Jones* v. *Padavatton* [1969] 1 W.L.R. 328.

[280] *Fleming* v. *Beeves* [1994] 1 N.Z.L.R. 385, at p. 389 (New Zealand).

[281] *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, *ante*, p. 36; *British Airways Board* v. *Taylor* [1976] 1 W.L.R. 13. See *ante*, p. 31.

[282] 1 Williston, *Contracts*, § 21; Tuck (1943) 21 Can. Bar Rev. 123; Unger (1959) 10 M.L.R. 96; Hepple [1970] C.L.J. 122; Hedley (1985) 5 O.J.L.S. 391; *Restatement* (2d), § 21B.

In the first place, the parties to a business transaction may deliberately state that they do not intend to enter into any legal obligation, and the Court will then treat their promises as binding in honour only. Thus in *Appleson* v. *Littlewood Ltd.*[283] it was held that a competitor who claimed to have sent in a successful coupon in a football pool, of which one of the conditions was that the conduct of the pools and everything done in connection therewith was not to be 'attended by or give rise to any legal relationship whatsoever', could have no claim which a Court would enforce. Again, an agreement between a person appointed to serve as a curate and the church authorities has been held not to be intended to create a contractual relationship of any kind.[284] Moreover, until recently the Crown and civil servants were held not to be in a contractual relationship because the Civil Service Pay and Conditions Code's statement that 'a civil servant does not have a contract of employment enforceable in the courts' meant that the Crown did not have the requisite intention to contract.[285] The context in which an agreement is made,[286] what was said when it was made,[287] and the vagueness of the language used[288] may be held to be inconsistent with an intent to contract although, where the agreement is made in a commercial context, the onus on a party who asserts that an agreement was made without the intent is a heavy one.[289]

Secondly, where the agreement falls into that class of cases where legal contracts are not normally made, exemplified by social or family arrangements, it will be presumed that no intent to create an enforceable contract is present, even though there may have been an exchange of mutual promises and a 'consideration' moving from the promisee.[290] On the other hand, this presumption may be rebutted upon proof of the true intention of the parties, which is to be inferred from the language they use and the circumstances in which they use it. Thus in *Parker* v. *Clark*:[291]

The defendants, an elderly couple, agreed with the plaintiffs, who were 20 years younger, that if the latter would sell their cottage and come to live with the defendants, sharing household expenses, the male defendant would leave them a portion of his estate in his will. The plaintiffs sold their cottage and moved in with the defendants. Difficulties devel-

[283] [1939] 1 All E.R. 464. See also *Rose and Frank Co.* v. *Crompton & Bros. Ltd.* [1925] A.C. 445; *Jones* v. *Vernons' Pools* [1938] 2 All E.R. 626. Cf. *Edwards* v. *Skyways Ltd.* [1964] 1 W.L.R. 349 ('*ex gratia*' payment); *Home Insurance Co. Ltd.* v. *Administratia Asigurarilor* [1983] 2 Lloyd's Rep. 674, at p. 677 (agreement to be 'interpreted as an honourable engagement').

[284] *Diocese of Southwark* v. *Coker*, *The Times*, 17 July 1997.

[285] *R.* v. *Civil Service Appeal Board, ex parte Bruce* [1988] I.C.R. 649, [1989] I.C.R. 171; *McLaren* v. *Home Office* [1990] I.C.R. 84; *R.* v. *Lord Chancellor's Department, ex parte Nangle* [1991] I.C.R. 743; Trade Union and Labour Relations (Consolidation) Act 1992, ss. 62(7) and 245.

[286] *President of the Methodist Conference* v. *Parfitt* [1984] Q.B. 368 (Minister not in contractual relationship because of spiritual nature of functions).

[287] *Orion Insurance Co. plc* v. *Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep. 239.

[288] *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762, at p. 765; *Kleinwort Benson Ltd.* v. *Malaysia Mining Cpn. Bdh.* [1988] 1 W.L.R. 799; [1989] 1 W.L.R. 379, *ante*, p. 68.

[289] *Edwards* v. *Skyways Ltd.* (*supra*, n. 283), at p. 355; *Orion Insurance Co. plc* v. *Sphere Drake Insurance plc* (*supra*, n. 287), at pp. 263, 292.

[290] *Balfour* v. *Balfour* [1919] 2 K.B. 571, at p. 578; *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145; *Jones* v. *Padavatton* [1969] 1 W.L.R. 328.

[291] [1960] 1 W.L.R. 286. Cf. *Re Goodchild* [1997] 1 W.L.R. 1216.

oped between the two couples, and the defendants repudiated the agreement by requiring the plaintiffs to find somewhere else to live. The plaintiffs claimed damages for breach of contract.

It was argued that the agreement amounted to no more than a family arrangement of the type considered in *Balfour* v. *Balfour*, but Devlin J. held that the circumstances indicated that the parties intended to affect their legal relations and that the defendants were therefore liable. Indeed *Balfour* v. *Balfour* has been said to be an extreme example of this presumption,[292] which has also been said to be of limited assistance in family cases,[293] and there are several cases in which it has been held that a husband's promise to his wife, from whom he was about to separate, that she could have the matrimonial home, was enforceable as a contract.[294] Again, an informal family arrangement to share the winnings of a football pool entry,[295] was similarly enforceable since the necessary intention was present. The requirement under the Law of Property (Miscellaneous Provisions) Act 1989 that contracts involving land must be in a document signed by both parties,[296] however, means that in cases involving the matrimonial home even where the requisite intention exists there will often not be an enforceable contract. Where there is no executory contract, the performance of the transaction may create proprietary rights by way of a constructive trust based on common intention and reliance.[297]

Thirdly, it has been clearly established that the distinction between a warranty, which is a term of a contract, and a 'mere representation' depends upon whether the parties intended the statement to have contractual effect.[298] It would be somewhat curious if contractual intention could be dispensed with in proving the existence of a contract, but not in proving the terms of which it is necessarily composed.

The conclusion is that an intention to affect legal relations is essential to the formation of a contract in English law.

[292] *Pettitt* v. *Pettitt* [1970] A.C. 777, at pp. 806, 816.
[293] *Fleming* v. *Beeves* [1994] 1 N.Z.L.R. 383, at p. 389 (New Zealand).
[294] *Ferris* v. *Weaven* [1952] 2 All E.R. 233; *Merritt* v. *Merritt* [1970] 1 W.L.R. 1121; *Eves* v. *Eves* [1975] 1 W.L.R. 1338 (cohabitation); *Re Windle* [1975] 1 W.L.R. 1628; *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346 (cohabitation). Cf. *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762; *Spellman* v. *Spellman* [1961] 1 W.L.R. 921; *Morris* v. *Tarrant* [1971] 2 Q.B. 143; *Horrocks* v. *Forray* [1976] 1 W.L.R. 230 (cohabitation).
[295] *Simpkins* v. *Pays* [1955] 1 W.L.R. 975.
[296] *Post*, pp. 81, 84.
[297] *Pettitt* v. *Pettitt* [1970] A.C. 777, at p. 822; *Eves* v. *Eves* (*supra*, n. 294), at p. 1342; *Grant* v. *Edwards* [1986] Ch. 638; *Lloyds Bank plc* v. *Rosset* [1991] 1 A.C. 107, at p. 129.
[298] *Heilbut Symons & Co.* v. *Buckleton* [1913] A.C. 30, at p. 51; *Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370, at p. 374. See *post*, p. 126.

3

Form, Consideration, and Promissory Estoppel

Types of contract and promises with legal effect

HAVING dealt with the mechanics of agreement, certainty and intention, we now turn to other formal and substantive requirements of a legally enforceable contract. English law does not regard a bare promise or agreement as legally enforceable but recognizes only two kinds of contract, the contract made by deed, and the simple contract. A contract made by deed derives its validity neither from the fact of the agreement nor because it is an exchange but solely from the *form* in which it is expressed.

A simple contract as a general rule need not be made in any special form, but requires the presence of consideration which, we shall see, broadly means that something must be given in exchange for a promise. The paradigm of the simple contract is thus a bargain but we shall see that the requirement of consideration can be satisfied by nominal consideration, such as a peppercorn. In such cases it has been argued that consideration is really no more than a requirement of form.[1] In some simple contracts, statute imposes, in addition to the requirement of consideration, the necessity of some kind of form, such as writing, either as a condition of their existence or as a requisite of proving the contract.

In modern law requirements of consideration and writing may be circumvented by the operation of the equitable doctrine of estoppel. Under this, where the parties are in a legal relationship, a party who promises not to insist on his or her strict legal rights will, even though the promise is not supported by consideration, not be allowed to go back on it provided the promisee has relied on the promise and it would be inequitable for the promisor to insist on his strict legal rights. In such a case a promise can in effect be enforced even though it is not made by deed, is not in writing, and is not supported by consideration.

We shall deal with this topic under five headings: (I) contracts by deed, (II) contracts for which writing is required, (III) consideration, (IV) promissory estoppel, and (V) an appraisal of the doctrine of consideration. Before doing so, it is useful briefly to consider one matter. We have noted that contracts by deed are formal contracts, that requirements of writing are formal requirements, and that in some cases consideration appears to serve a formal function. What then is the role of such requirements of form?

[1] Before the development of offer and acceptance as a test of agreement and the separate requirement of an intention to create legal relations consideration was also seen as a test of agreement and intention: Simpson (1975) 91 L.Q.R. 247, 263.

The role of formal requirements

Historically, formal requirements played a large role in the English law of contract because the Statute of Frauds 1677 provided that many important and widely used types of contract, in particular contracts for the sale or disposition of an interest in land and, until 1954, contracts for the sale of goods of over £10 in value, were unenforceable unless supported by a note or memorandum in writing.[2]

The significance of formal requirements has now diminished, save in sales of land and a limited number of other types of contract, notably to protect parties, such as consumers and employees, who are in the weaker bargaining position.[3] Nevertheless, although it has been stated that the advantages of requirements of formality are purely negative in nature and consist in the avoidance of various evils,[4] before turning to the remaining requirements, it should not be forgotten that formality serves a number of useful functions.[5] First, there is the historically important evidential function.[6] A requirement such as writing facilitates and renders certain the existence of a transaction and its terms as well as the diagnosis of the intention of the parties. Secondly, there is the paternalistic and cautionary function of helping to ensure that a party deliberately considers whether to contract and to prevent people accidentally binding themselves on impulse or because of improper pressure. For instance, classes of contractors considered to be weaker, such as tenants, employees, borrowers, and guarantors may be protected by requiring a written agreement and clear language.[7] The corollary of these two functions is that formal requirements allow parties to bind themselves with certainty and to know to what they are binding themselves. As against these useful functions, if the form is complex, it can be inconvenient, mysterious, and inaccessible to ordinary people. Formal requirements may also affront social and commercial attitudes to promises ('my word is my bond') since requiring, for instance, a deed or writing implies mistrust. The result of these two dangers may be that the required form is not used, whether deliberately or by accident, and thus the requirement can have the effect of reducing rather than promoting the security of transactions.

Formal requirements thus prevent impulsiveness, coercion, inadequate evidence, and manufactured evidence, but they may undermine security of

[2] This requirement was repealed by the Law Reform (Enforcement of Contracts) Act 1954, implementing the Law Reform Committee's First Report (Cmnd. 9909, 1953). See also the Law Revision Committee's Sixth Interim Report (Cmnd. 5449, 1937).

[3] Writing: Consumer Credit Act 1974, s. 60; Unsolicited Goods and Services Act 1971, s. 3A. Notice of specified terms: Landlord and Tenant Act 1962, s. 1; Estate Agents Act 1979, s. 18; Employment Rights Act 1996, ss. 1–2, 4–6; Timeshare Regulations 1997 (S.I. 1997 No. 1081).

[4] Jhering, *Geist des Roemishen Rechts*, 480–2.

[5] See generally Law Com. No. 164, *Formalities for Contracts for Sale etc. of Land* (1987), §§ 1.4, 2.3–2.11. Cf. Law Revision Committee Sixth Interim Report, (Cmd. 5449, 1937), p. 6 ff.

[6] *Ibid.*, § 2.5. See also Holdsworth, *A History of English Law*, 380, 388–90; Simpson, *A History of the Common Law of Contract* (1975), ch. XIII.

[7] In some such cases (consumer credit, timeshare, and package travel) there may also be a statutory 'cooling off' period, see *ante*, p. 28, n 7. This is a paternalistic qualification to the substantive requirement of agreement rather than a formal requirement, but the requirement that notice must be given to the protected person of this right to cancel (Consumer Credit Act 1974, s. 64) is a requirement of form.

transactions if their complexity or social or commercial morality means they are not observed.

I. Contracts by Deed

LET us consider (a) how a contract by deed is made, and (b) in what circumstances it is necessary to employ it.

(a) How a Contract by Deed is Made

At common law it was often said that a contract by deed was executed by being 'signed, sealed and delivered'. The position is now largely governed by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.[8] To be a deed an instrument must make it 'clear on its face that it is intended to be a deed by the person making it, or as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)'.[9] The 1989 Act does not, however, lay down any prescribed manner of making it clear because to do so 'would invalidate what would otherwise be perfectly acceptable deeds merely for failure to include one vital word'.[10]

Execution of deed; attestation and sealing

In the case of deeds executed by an individual the requirement of sealing has been abolished;[11] the instrument must either be signed by the person making it in the presence of an attesting witness or, where it is not signed by that person, perhaps because of some physical incapacity, it must be signed at the direction and in the presence of that person and in the presence of two attesting witnesses.[12] In the case of a company incorporated under the Companies Acts either its common seal must be affixed or the instrument must be signed by two directors or one director and the company secretary and expressed to be executed by the company.[13] The requirement of sealing still applies to corporations sole and corporations incorporated under other statutes or by royal charter.[14] In modern times, seals are often very much of a legal fiction, being merely an adhesive wafer attached to the document or even a printed circle containing the letters 'L.S.' (*locus sigilli*).[15] Even a document bearing no indication of a seal at all will suffice, provided that there is evidence (e.g. attestation) that it was intended to be exe-

[8] Implementing Law Com. No. 163, *Deeds and Escrows* (1987). Section 1 applies to all deeds, and not just those relating to land, made on or after 31 July 1990; S.I. 1990 No. 1175.

[9] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(2)(a). For the similar rule for companies incorporated under the Companies Acts, see Companies Act 1985, s. 36A(5) (inserted by Companies Act 1989, s. 130(2)).

[10] 1988/89 503 H.L. Deb. 599 (The Lord Chancellor, Second Reading Debate).

[11] Law of Property (Miscellaneous Provisions) Act 1989 s. 1(1)(b).

[12] *Ibid.*, s. 1(3)(a). 'Signature' includes making one's mark: *ibid.*, s. 1(4).

[13] Companies Act 1985, s. 36A(4), inserted by Companies Act 1989, s. 130(2).

[14] Law of Property (Miscellaneous Provisions) Act 1989, s. 1(9)–(10).

[15] *First National Securities Ltd.* v. *Jones* [1978] Ch. 109.

cuted as a deed.[16] Failure to have a signature witnessed and attested or, where this is still required, to have the document sealed, will not be fatal if the signatory has taken the benefit of the deed or is estopped from denying its validity because another has detrimentally relied on it.[17]

Delivery

The 1989 Act preserves the requirement of 'delivery'[18] which, in this context does not signify handing over to the other party, but means an act done or word said so as to make it clear that the person making the deed regards it as binding. Thus, a deed may be 'delivered' even though it is retained in the custody of the grantor.[19]

Escrow

A deed may be delivered subject to a condition; it then does not take effect until the condition is performed. For example, on a sale of land the vendor does not normally intend the deed to operate until the purchase price has been paid and (where appropriate) the deed has been executed by the purchaser. In such a case, it is termed an *escrow*, but if the condition is fulfilled within a time which is reasonable in all the circumstances,[20] it becomes operative as from the date of its delivery.[21] At one time an escrow could not be handed to one who was a party to it, or else it took effect at once, on the ground that such handing over in fact outweighed oral conditions. But nowadays the intention of the parties prevails if they clearly mean the deed to be delivered conditionally.[22]

(b) When it is Essential to Contract by Deed

Statute sometimes makes it necessary for the validity of an instrument to employ the form of a deed; e.g. the conveyance of a legal estate in land must normally be made by deed in accordance with the provisions of the Law of Property Act 1925.[23]

Common law now[24] requires a deed only in the case of a gratuitous promise, or contract in which there is no consideration for the promise made on one side and accepted on the other. Thus one of the most common uses today of a deed (outside conveyances of land) is that of a gratuitous payment to a charity, whereby the

[16] *First National Securities Ltd.* v. *Jones* (*supra*, n. 15); *Commercial Credit Services* v. *Knowles* [1978] 6 Current Law 64. Cf. *T.C.B. Ltd.* v. *Gray* [1986] Ch. 621.

[17] *T.C.B. Ltd.* v. *Gray* (*supra*, n. 16); Law Com. No. 163, § 2.15.

[18] s. 1(3)(b). Authority by a party making a deed to an agent to deliver it need not be given by deed: *ibid.*, s. 1(1)(c).

[19] *Xenos* v. *Wickham* (1867) L.R. 2 H.L. 296; *Macedo* v. *Stroud* [1922] A.C. 330; *Vincent* v. *Premo Enterprises Ltd.* [1969] 2 Q.B. 609; *D'Silva* v. *Lister House Development Ltd.* [1971] Ch. 17.

[20] *Beesly* v. *Hallwood Estates Ltd.* [1961] Ch. 105; *Kingston* v. *Ambrian Investment Co. Ltd.* [1975] 1 W.L.R. 161. Cf. *Glessing* v. *Green* [1975] 1 W.L.R. 863.

[21] *Alan Estates Ltd.* v. *W. G. Stores Ltd.* [1982] Ch. 511.

[22] *London Freehold and Leasehold Property Co.* v. *Lord Suffield* [1897] 2 Ch. 608, at p. 621; *Glessing* v. *Green* (*supra*, n. 20); *Longman* v. *Viscount Chelsea* (1989) 58 P. & C.R. 189.

[23] ss. 52, 54, as amended by the Law of Property (Miscellaneous Provisions) Act 1989, s. 1(8), Sched. 1, para. 2.

[24] The rule that the contracts of a corporation aggregate had to be made under the corporate seal was abolished by the Corporate Bodies' Contracts Act 1960, passed as a result of the recommendations of the Law Reform Committee, Eighth Report (Cmd. 622, 1958). On the execution of deeds by companies, see Law Com C.P. No. 143 (1996).

charity is enabled to claim the income tax paid by the donor in addition to the covenanted sum.

It should be understood, however, that to give particular solemnity to a contract, agreements are frequently made by deed in circumstances in which there is no legal obligation to employ that form.

II. Contracts for Which Writing is Required

Simple contracts

WE have now dealt with the contract which is valid by reason of its form alone, and we pass to the simple or *parol* contract which depends for its validity upon the presence of consideration.

Contracts to be made in writing

Although there is a popular belief that only contracts in writing are enforceable, this belief is completely illusory and forms no part of the English common law. In certain exceptional cases, however, the law requires writing, sometimes as a condition of the validity of the contract itself, but sometimes only as evidence without which it cannot be enforced. It should be borne in mind that consideration is as necessary in these contracts as in those in which no writing is required: 'If contracts be merely written and not specialties, they are parol, and a consideration must be proved'.[25] The following are examples of contracts which must, by statute, be made in writing:

(1) The Bills of Exchange Act 1882[26] requires that a bill of exchange or promissory note and the acceptance of a bill of exchange must be in writing.
(2) Contracts of marine insurance are void unless made in writing in the form of a policy.[27]
(3) A consumer credit agreement, e.g. a hire-purchase or loan agreement, must be in writing and be signed by the hirer or debtor and by or on behalf of the owner or creditor. It must also be made in a certain form and contain certain information including prominent notices advising the hirer or debtor of the protection and remedies, including the right to cancel, available under the Act and the annual percentage rate of charge.[28]
(4) A bill of sale is void unless made in a certain form.[29]

Contracts to be evidenced by writing

Other contracts are not required by statute to be made in writing, but merely to be evidenced by writing before they can be enforced in legal proceedings. We have noted that, before 1954, the most frequent examples of such contracts were provided by those specified in the Statute of Frauds 1677. The object of these provisions was 'for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury'. But

[25] *Rann* v. *Hughes* (1778) 7 Term R. 350n.
[26] ss. 3(1), 17(2).
[27] Marine Insurance Act 1906, s. 22.
[28] Consumer Credit Act 1974, ss. 60, 64; Consumer Credit (Agreements) Regulations 1983 (S.I. 1983 No. 1553), as amended.
[29] Bills of Sale Act (1878) Amendment Act 1882, s. 9.

almost from its inception, this requirement of writing exhibited a tendency to encourage, rather than to prevent, dishonest dealing. The attempts of the judges consequently to circumvent the Statute, and the niceties of legal learning which resulted, rendered its operation both arbitrary and artificial. By the Law Reform (Enforcement of Contracts) Act 1954,[30] most of these provisions, together with their re-enacting statutes,[31] were repealed.

Two classes of contract were, however, exempted from this repeal. These are (a) contracts of guarantee, and (b) contracts for the sale or other disposition of land.

(a) Contracts of Guarantee

Guarantee

The Statute of Frauds provides:

> No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

Such a promise is a contract of guarantee or suretyship and is usually reducible to this form: 'Deal with X, and if X does not meet his obligations, I will be answerable'.

differs from indemnity

A guarantee must be distinguished from a contract of indemnity, which is not subject to any statutory requirement of writing. In a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a guarantor who promises to discharge the debtor's liability *if the debtor should fail to do so*. The guarantor's liability is therefore secondary to that of the principal debtor. In a contract of indemnity, however, the promisor is primarily liable, either alone or jointly with the principal debtor, and undertakes to discharge the liability *in any event* whether or not the principal debtor makes default.[32]

Necessitates primary liability of third party

In a contract of guarantee there must, in fact, be an expectation that another person will perform the obligation which the promisor has undertaken. If the promisor is primarily liable the promise is not within the Statute, and need not be in writing.[33] The question whether the undertaking is primary or secondary is determined, not merely from the particular words of the promise, but from the general circumstances of the transaction.[34] In the result, the borderline is often very artificial and the subject 'has raised many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public'.[35]

A real liability

The liability guaranteed may arise out of tort as well as out of contract.[36] It may

[30] See also the Sixth Interim Report of the Law Revision Committee (Cmd. 5449, 1937), and the First Report of the Law Reform Committee (Cmd. 8809, 1953).
[31] Sale of Goods Act 1893, s. 4.
[32] *Guild & Co.* v. *Conrad* [1894] 2 Q.B. 885, at p. 896.
[33] *Birkmyr* v. *Darnell* (1704) 1 Salk. 27, at p. 28.
[34] *Keate* v. *Temple* (1797) 1 B. & P. 158.
[35] *Yeoman Credit Ltd.* v. *Latter* [1961] 1 W.L.R. 828, *per* Harman L.J. at p. 892.
[36] *Kirkham* v. *Marter* (1819) 2 B. & Ald. 613.

also be prospective at the time the promise is made, as, for example, in consideration of a future advance of money; or it may be past, provided some new consideration is given.[37] Yet there must be a principal debtor at some time; if not there is no contract of guarantee, and the promise though not in writing will nevertheless be actionable. This is illustrated by *Lakeman* v. *Mountstephen*:[38]

It was proposed that the respondent, a builder, should construct certain drains. The respondent stated that he would do the work provided that the appellant, the Chairman of a local Board of Health or the Board would become responsible for payment. The appellant responded, 'Go on, Mountstephen, and do the work, and I will see you paid'. The Board repudiated liability on the ground that it had never entered into any agreement with the respondent. When sued, the appellant pleaded that his statement was a promise to be answerable for the debt of another within the Statute of Frauds and, not being in writing, was unenforceable.

The House of Lords held that the respondent was entitled to succeed. The Board had incurred no liability which could be guaranteed, and there could be no contract of a guarantee unless there was a principal debtor. The words of the appellant, when properly construed, indicated that he would therefore be liable, not as guarantor, but as sole debtor, by reason of his oral promise to the respondent.

A continuing liability

The promise must also not effect a release of the original debtor, whose liability must be a continuing liability. If there is an existing debt for which a third party is liable to the promisee, and if the promisor undertakes to be answerable for it, still there is no guarantee if the terms of the agreement are such as to extinguish the original liability. If A says to B, 'Give C Ltd. a receipt in full for its debt to you, and I will pay the amount', this promise would not fall within the Statute of Frauds; for there is no suretyship, but a substitution of one debtor for another.[39]

Exceptions

In two exceptional situations a contract of guarantee has been held to fall outside the Statute, even though it is a promise to answer for the debt, default, or miscarriage of another.

Part of larger transaction

The first is where the guarantee is merely incidental to a larger contract and not the sole object of the parties to the transaction. So in *Sutton & Co.* v. *Grey*,[40] where the defendants entered into an oral agreement with a stockbroker to introduce business to him on the terms that they were to receive half the commissions earned and to pay half the losses in the event of a client introduced by them failing to pay, it was held that their promise to answer for the debt of such a client did not fall within the Statute. It was incidental to a wider transaction and did not have to be evidenced in writing.

Protection of property

Secondly, where the main purpose of the guarantor is to acquire or retain property, and the guarantee is given to relieve the property from some charge or incumbrance in favour of a third party, it is not within the Statute. Thus if A buys goods from B which are subject to a lien in favour of C, and in order to discharge the lien A promises C to pay B's debt if B does not do so, this promise need not

[37] *Board* v. *Hocy* (1948) 65 T.L.R. 43.
[38] (1874) L.R. 7 H.L. 17.
[39] *Goodman* v. *Chase* (1818) 1 B. & Ald. 297.
[40] [1894] 1 Q.B. 285.

be evidenced in writing.[41] But the interest to be acquired or retained must be substantial and proprietary. An oral promise by a shareholder in a company to guarantee the company's debts in order to prevent an execution being levied on its assets does not come within this exception. The interest of a shareholder in the company's assets is purely personal, and is not a proprietary interest.[42]

Comment

These legal niceties have, however, little to commend them. The administration of justice is not a game, and it is a matter for regret that, if special protection was to be afforded by the law to guarantors, it should not have been embodied in a statute requiring the terms of all contracts of guarantee or indemnity to be set out in a written document,[43] instead of perpetuating subtle distinctions.

(b) Contracts for the Sale or Other Disposition of Land

The most important class of contracts subject to requirements of form are contracts relating to land. The Law Commission recently considered and rejected the abolition of all formal requirements, primarily because of the need for certainty, but also for protective, paternalistic reasons; time to reflect and, if necessary to seek legal advice 'is especially important in the case of contracts dealing with land because they often involve acceptance of a complexity of rights and duties'.[44] Indeed the Commission's recommendations, substantially enacted by the Law of Property (Miscellaneous Provisions) Act 1989, are in important respects more rigorous than what had hitherto been required.[45] By section 2(1) of the 1989 Act, contracts for the sale or other disposition of an interest in land:

> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

The section applies to agreements made in view of sales, leases, or other dispositions[46] of land. It applies where neither party has any proprietary interest in the relevant property.[47] Contracts for the grant of a lease for a period not exceeding 3 years,[48] those made in the course of a public auction, and those regulated by the

[41] *Fitzgerald* v. *Dressler* (1859) 7 C.B.N.S. 374.

[42] *Harburg India Rubber Comb Co.* v. *Martin* [1902] 1 K.B. 778.

[43] As in the case of certain contracts of guarantee and indemnity given in relation to regulated consumer credit agreements: Consumer Credit Act 1974, s. 105(1).

[44] Law Com. No. 164, §§ 2.7–2.9. For the other advantages of formality considered by the Commission, see *ante*, p. 75.

[45] Contracts made before the 1989 Act came into force on 27 September 1989 must comply with Law of Property Act 1925, s. 40(1) which substantially re-enacted the relevant portion of the Statute of Frauds, s. 4. The principles are therefore substantially the same as those for guarantees, on which see *post*, p. 84. For fuller discussion of s. 40(1) and the doctrine of part performance, see the 26th edition of this book, pp. 70–8 and *Chitty on Contracts*, 27th edn. (1994), § 4-005 ff.

[46] 'Disposition' has the same meaning as in the Law of Property Act 1925: Law of Property (Miscellaneous Provisions) Act 1989, s. 2(6).

[47] *Singh* v. *Beggs* (1995) 71 P. & C.R. 120.

[48] Contracts to grant leases of under 3 years need no formality (Law of Property (Miscellaneous Provisions) Act 1989, s. 2(5)) because the grant of such a lease itself needs no formality if it takes effect in possession, but contracts to assign such leases are subject to section 2: see Law Com. No. 164 (1987), § 4.10.

Financial Services Act 1986, for instance unit trusts investing in land, are excluded.[49] An example of the increased rigour is provided by the position of equitable mortgages by deposit of title deeds. These were previously valid without any writing, but have now been held to be subject to section 2 and void if they do not comply with it, because the basis of such equitable mortgage is contract.[50]

In one respect the 1989 Act probably requires a greater degree of formality than the Law Commission recommended. It appears no longer to be possible to have an enforceable contract by written offer and acceptance in correspondence; there must either be a single document incorporating all the terms agreed and signed by the parties or each party must sign a document incorporating the terms in the expectation that the other has also executed or will execute a corresponding document incorporating the same terms.[51] An option granted by the vendor of land is also a 'contract' within section 2[52] but the subsequent exercise of that option is a unilateral act and not within the section: 'It would destroy the very purpose of the option if the purchaser had to obtain the vendor's counter-signature to the notice by which it was exercised'.[53]

'Interest in land' is defined as 'any estate, interest or charge in or over land or over the proceeds of sale of land'.[54] Thus, a 'lock-out' agreement, where the owner of property agrees with a prospective purchaser not to consider any other offers for property for a fixed period, is not subject to section 2 because its negative nature—the vendor is not committed to a sale to the prospective purchaser—meant that there was no disposition of an interest in land.[55] Again, contracts which are preliminary to the acquisition of such an interest, or such as deal with a remote and inappreciable interest, would appear to be outside the section.[56]

Separate supplementary or collateral agreements to contracts relating to land are not within section 2. For instance, a contract to grant a lease, whereby the prospective tenant agreed to carry out certain work on the premises in exchange

[49] Law of Property (Miscellaneous Provisions) Act 1989, s. 2(5)(b), & (c). See Law Com. No. 164, §§ 4.11–4.12. Formalities have been abolished for public auctions because previously, although the contract was made at the fall of the hammer, it was necessary for a memorandum to be signed thereafter.

[50] *United Bank of Kuwait* v. *Sahib* [1997] Ch. 107, rejecting the argument that such deposits are equitable charges rather than agreements to mortgage.

[51] *Commission for New Towns* v. *Cooper (Great Britain) Ltd.* [1995] Ch. 259; *Firstpost Homes Ltd.* v. *Johnson* [1995] 1 W.L.R. 1567. N.B. clause 1(1) of the Draft Bill attached to the Report differs from section 2 and see Law Com. No. 164, § 4.15. But cf. *Hooper* v. *Sherman*, 30 November 1994 (C.A.), which did not refer to the Act's difference from the Law Commission's Draft Bill and relied on § 4.15.

[52] *Spiro* v. *Glencrown Properties Ltd.* [1991] Ch. 537; Law Com. No. 164, § 4.3.

[53] *Ibid.*, *per* Hoffmann J. at p. 541. See also *Trustees of the Chippenham Golf Club* v. *North Wiltshire D.C.* (1991) 64 P. & C.R. 527, at p. 530.

[54] Law of Property (Miscellaneouos Provisions) Act 1989, s. 2(6).

[55] *Pitt* v. *P.H.H. Asset Management Ltd.* [1994] 1 W.L.R. 327, *ante*, p. 67.

[56] e.g. *Wright* v. *Stavert* (1860) 2 E. & E. 721 (agreement with boarding-house keeper for board and lodging); *Angel* v. *Duke* (1875) L.R. 10 Q.B. 174 (agreement to repair house for prospective tenant); *Bligh* v. *Brent* (1836) 2 Y. & C. 268; *Humble* v. *Mitchell* (1839) 11 A. & E. 205 (agreement to transfer shares in company possessed of land). Cf. *Driver* v. *Broad* [1893] 1 Q.B. 744 (contract to sell debentures of company possessed of land is subject to the statute). These decisions concerned the Statute of Frauds.

for payment has been held to be outside it.[57] The line between the contract relating to land and the supplementary or collateral one is, however, not always easy to draw, particularly where, as commonly occurs, the contract has been duly signed and is awaiting exchange, but a further term is orally agreed immediately prior to exchange. In *Record* v. *Bell*, for instance:[58]

> The vendor of property had not received a copy of the entries from the Land Registry by the day before the contract, which had been drawn up, was to be exchanged. He agreed with the purchaser, who was concerned about undisclosed entries, to warrant his title if the purchaser exchanged contracts and this oral agreement was confirmed by letters. Contracts were exchanged and the title was as warranted but the purchaser, whose financial position had deteriorated, refused to complete and relied *inter alia* on non-compliance with section 2 of the 1989 Act, since all the terms were not in either the contracts exchanged or the exchange of letters.

Although the purchaser seemed to be thinking in terms of amending the main contract rather than a separate contract, the agreement was held to be a collateral contract and outside the section:

> [i]t would be unfortunate if common transactions of this nature should nevertheless cause the contracts to be avoided. It may, of course, lead to a greater use of the concept of collateral warranties than has hitherto been necessary.[59]

(c) The Form Required

Until the enactment of the 1989 Act this was substantially the same for both contracts of guarantee and contracts for the disposition of an interest in land. The provisions of the Statute of Frauds 1677, which still govern guarantees, were substantially re-enacted by section 40(1) of the Law of Property Act 1925. The fundamental change effected by the 1989 Act is that, whereas the form required under the earlier legislation is merely evidentiary and does not go to the *existence* of the contract, the form required by section 2 of the 1989 Act does. In the case of an agreement subject to section 2, failure to comply with the formalities renders the contract void,[60] whereas a contract subject to but which does not comply with the Statute of Frauds exists but is unenforceable. Thus, a guarantee may be enforceable either by having a written agreement signed by the party to be charged or by his agent or by having a note or memorandum of the agreement,

[57] *Tootal Clothing Ltd.* v. *Guinea Properties Ltd.* (1991) 64 P. & C.R. 452, *per* Scott L.J. at pp. 455–6, Wilde (1993) 109 L.Q.R. 191; *Record* v. *Bell* [1991] 1 W.L.R. 853.

[58] [1991] 1 W.L.R. 853; Smith (1992) 108 L.Q.R. 217; Harpum [1991] C.L.J. 399. Cf. *McCausland* v. *Duncan Lawrie Ltd.* [1997] 1 W.L.R. 38 (a variation of material term had to comply with section 2).

[59] *Ibid.*, at p. 64. This was anticipated by the Law Commission, Law Com. No. 164, § 5.7. On collateral contracts, see *post*, p. 129.

[60] *United Bank of Kuwait* v. *Sahib* [1997] Ch. 107, at pp. 122, 136; Law Com. No. 164, § 6.4. See also *ibid.*, § 4.2 in which the Commission stated that a regime, such as those under the Statute of Frauds 1677 and the Law of Property Act 1925, s. 40(1), which 'allows oral contracts to be binding but unenforceable and which may later become enforceable, but sometimes only against one party, is indefensibly confusing'.

which could be oral, similarly signed.[61] An oral agreement subject to section 2 of the 1989 Act could not be subsequently validated in this way. Before discussing the other consequences of this difference, we shall set out the requirements for the two types of contract.

Signature

A guarantee does not have to be signed by both parties, but only by the party to be charged or that person's agent.[62] The signature need not be an actual subscription of the party's name, it may be a mark; nor need it be in writing, it may be printed or stamped; nor need it be placed at the end of the document, it may be at the beginning or in the middle.[63] Section 2(3) of the 1989 Act requires all the parties to a contract for the sale or disposition of an interest in land or their agents to sign the document incorporating the terms.[64]

Parties and subject-matter

In a contract of guarantee, the parties and the subject-matter of the contract must appear in the note or memorandum. Where the parties are not named they must be so described as to be identified with ease and certainty.[65] All the material terms of the guarantee must be accurately set out in the memorandum. By section 3 of the Mercantile Law Amendment Act 1856, the consideration need not be stated in a contract of guarantee.

In a contract for the disposition of an interest in land the parties must all be identified by their signature and all the express terms must be incorporated in the document. Section 2 does not require the inclusion of implied terms, such as a landlord's covenant of quiet enjoyment,[66] and, if the parties have reached agreement but fail to record all the terms in writing or record one or more of them wrongly, the Court may order the written document to be rectified.[67] Where the written agreement is so rectified, the order does not necessarily have retrospective effect; 'the contract shall come into being . . . at such time as may be specified in the order'.[68] Where contracts are exchanged each document must contain the express terms and be signed by the parties.[69]

Several documents

The note or memorandum of a guarantee may consist of various letters and papers, but they must be connected and complete.[70]

In a contract for the disposition of an interest in land the incorporation of the express terms in the document can occur either by their being set out or by ref-

[61] *'Elpis Maritime Co. Ltd.* v. *Marti Chartering Co. Inc.* [1992] 1 A.C. 21, at p. 28.
[62] *Ante*, p. 79.
[63] *Leeman* v. *Stocks* [1951] Ch. 941. See also *Walker* v. *Copp Clark Publishing Co. Ltd.* (1962) 33 D.L.R. (2d) 338, at p. 344.
[64] For the position where the contract is made by an agent on behalf of an unnamed or undisclosed principal, see *post*, p. 644.
[65] *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124. Cf. *Potter* v. *Duffield* (1874) L.R. 18 Eq. 4. Many of the decisions under the Statute on contracts for the sale of land are applicable to guarantees.
[66] *Markham* v. *Paget* [1908] 1 Ch. 697.
[67] On rectification see *post*, p. 324.
[68] Law of Property (Miscellaneous Provisions) Act 1989, s. 2(4). See Law Com. No. 164, § 5.6.
[69] 1989 Act, s. 2(1), *ante*, p. 81.
[70] *Stokes* v. *Whicher* [1920] 1 Ch. 411, at p. 418 (oral evidence admissible to connect two documents if one document refers to other or assumes some other documentary transaction). See also *Elias* v. *George Saheley & Co. (Barbados) Ltd.* [1983] 1 A.C. 646. Cf. *Timmins* v. *Moreland Street Property Ltd.* [1958] Ch. 110.

erence to some other document or documents.[71] Where the document has not been incorporated, it may, as we have seen, nevertheless be effective if it is a separate supplementary or collateral agreement.

Effect of non-compliance

The effect of a failure to comply with the provisions of the Statute of Frauds is simply that the contract is not void, or voidable, but it cannot be enforced against a party who has not signed a note or memorandum because it is incapable of proof.[72] No action can be brought until the omission is made good. Thus, provided the note or memorandum acknowledges the existence of the contract,[73] it may be made at any time before the commencement of the action,[74] and it does not matter that it was never intended to serve as a note or memorandum but was prepared for some entirely different purpose.[75]

As a contract for the disposition of an interest in land 'can only be made in writing and only by incorporating all the [express] terms', as we have noted, an agreement not complying with the requirements of section 2 is a nullity. At the heart of the Law Commission's recommendations was the view that the equitable doctrine of part performance should 'no longer have a role to play in contracts concerning land'.[76] Under this doctrine, the Courts, in certain cases, allowed an unenforceable oral contract concerning land to be proved by oral evidence, when the party seeking to enforce the contract had done acts in performance of its obligations under it, provided that the performance was referable to some contract,[77] the acts were performed by the person seeking to enforce the contract,[78] and the contract was one which, if properly evidenced, would have been specifically enforceable.[79]

[71] Under Law of Property Act 1925, s. 40(1), implied reference in the signed document sufficed (*Timmins* v. *Moreland Street Property Ltd.* [1958] Ch. 110) and although it is not clear from the wording of s. 2(2) of the 1989 Act, which differs from the Law Commission's Draft Bill, whether such reference will suffice, the Commission was content for the established rules as to joinder to apply: Law Com. No. 164, § 4.6. It appears that s. 2(2) of the 1989 Act would allow reference to more than one document: 503 H.L. Deb. 1988/89 col. 610 (Lord Mackay Clashfern L.C.)

[72] *Leroux* v. *Brown* (1852) 12 C.B. 801; *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, at p. 474.

[73] *Buxton* v. *Rust* (1872) L.R. 7 Ex. 279 (notwithstanding announcement of intention to repudiate contract). See also *Reuss* v. *Picksley* (1866) L.R. 1 Ex. 342; *Parker* v. *Clark* [1960] 1 W.L.R. 286 (written offer containing all material terms suffices though contract concluded by subsequent oral acceptance). Cf. *Thirkell* v. *Cambi* [1919] 2 K.B. 590 (writing denying agreement or a material term insufficient); *Tiverton Estates Ltd* v. *Wearwell Ltd.* [1975] Ch. 146 (agreement 'subject to contract' insufficient).

[74] *Re Hoyle* [1893] 1 Ch. 84 (recital in will confirming oral guarantee); *Elpis Maritime Co. Ltd.* v. *Marti Chartering Co. Inc.* [1992] 1 A.C. 21. See also *Lucas* v. *Dixon* (1889) 22 Q.B.D. 357; *Farr Smith & Co. Ltd.* v. *Messers Ltd.* [1928] 1 K.B. 397.

[75] *Jones* v. *Victoria Dock Co.* (1877) 2 Q.B.D. 314 (entry in company's minute book); *Phillips* v. *Butler* [1945] Ch. 358 (receipt for deposit).

[76] Law Com. No. 164, § 4.13.

[77] *Rawlinson* v. *Ames* [1925] Ch. 96; *Steadman* v. *Steadman* [1976] A.C. 536 (mere payment of a sum of money could amount to a sufficient act of part performance, but differing views were expressed as to whether the acts performed must be referable to some contract *concerning land*: *ibid*, at pp. 542, 547, 554, 562, 568–70, on which see *Re Gonin* [1979] Ch. 16; *Sutton* v. *Sutton* [1984] Ch. 184). Cf. *Maddison* v. *Alderson* (1883) 8 App. Cas. 467.

[78] *Caton* v. *Caton* (1865) L.R. 1 Ch. App. 137, at p. 148, affd. (1867) L.R. 2 H.L. 167.

[79] *Britain* v. *Rossiter* (1882) 11 Q.B.D. 123; *McManus* v. *Cooke* (1887) 35 Ch. D. 681, at p. 697. This requirement means the doctrine has no application to contracts of guarantee which equity would not specifically enforce.

Under the new law, although the doctrine of part performance can no longer apply as such, the Commission considered that the parties to an agreement that does not comply with the statutory requirements would not simply be left remediless by the law.[80] The use of collateral contracts and the remedy of rectification have been mentioned above. It should also be noted that where the void contract has been performed, for example by the execution of a valid lease or the completion of a conveyance, a property right will have been created and the parties may not need to rely on the void contract.[81] But the primary tools the Commission anticipated would be used to enable justice to be achieved between the particular parties are the equitable doctrine of estoppel and restitutionary obligations to repay money or make recompense for work done.

Estoppel

Under the doctrine of estoppel, which is considered in section IV of this chapter, a party to a transaction who either detrimentally relies on the belief (encouraged or acquiesced in by the other party) that he or she has or will acquire rights in the property of the other or who has conducted dealings in reliance on an underlying assumption as to a present, past, or future state of affairs, or a promise by the other that strict legal rights will not be insisted upon, will be protected by equity. Thus, the Law Commission pointed to a case in which acquiescence in improvements to a property was held to justify the conveyance of the fee simple[82] and another in which non-contractual assurances that a housekeeper could remain in a house were protected by equitable relief.[83] The first type of estoppel, proprietary estoppel, will, however, generally only be available to protect a purchaser. Moreover, although this is difficult to justify in principle,[84] in its present state of development in English law, promissory estoppel only operates to modify an existing legal relationship and does not create new causes of action where, as in the case of an agreement that is void for non-compliance with section 2 of the 1989 Act, none existed before. Moreover, section 2(5) of the 1989 Act only takes the 'creation or operation of resulting, implied or constructive trusts' out of the section and may therefore only cover proprietary estoppel. Even in the case of proprietary estoppel, if granting relief will in substance have the effect of enforcing a void contract, as it sometimes can in cases of estoppel,[85] it is arguable that it subverts the policy underlying section 2.[86] The indications are, however, that the Courts will be unsympathetic to those who seek to rely on the statute in ways considered to be unmeritorious.

Restitutionary obligations

In principle a vendor of land who has received a cash deposit from a purchaser under an agreement that does not comply with section 2, i.e. a void contract, may not forfeit the deposit if the purchaser defaults but must repay it,[87] except where

[80] Law Com. No. 164, §§ 5.1–5.2.

[81] *Tootal Clothing Ltd.* v. *Guinea Properties Ltd.* (1991) 64 P. &. C.R. 455.

[82] *Pascoe* v. *Turner* [1979] 1 W.L.R. 431.

[83] *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306.

[84] See *post*, pp. 120–22 for criticism of the present position.

[85] See e.g. *Crabb* v. *Arun D.C.* [1976] Ch. 179, *post*, p. 118.

[86] See Goff and Jones, *The Law of Restitution*, 4th edn. (1993), pp. 471–2.

[87] See *Rover International Ltd.* v. *Cannon Film Sales Ltd. (No. 3)* [1989] 1 W.L.R. 912, at pp. 925, 938; *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669. Where the Statute of Frauds applies, the vendor may forfeit the deposit: *Monnickendam* v. *Leanse* (1923) 39 T.L.R. 445.

the purchaser has received part of the benefit bargained for in the contract, for example by entering into possession.[88]

Where services are rendered under an agreement concerning land which does not comply with the requirements of section 2 in the belief that there was a valid contract, the party conferring the services may be able to recover their reasonable value in a restitutionary action.[89] Thus, for example, reasonable recompense should be awarded in respect of alterations to property effected by a lessor or vendor at the request of prospective tenants or purchasers in the belief that there was a valid contract.[90] In principle, recompense should also be awarded in respect of services rendered by the prospective purchaser or lessee, for example improvements to the property and other services rendered at the request of or with the acceptance of the owner of property. As this would be limited to the executed part of the transaction, it would not seem to undermine the policy of section 2, just as recompense in respect of services rendered under contracts unenforceable for non-compliance with the Statute of Frauds and similar provisions has not been held to undermine the policy of those provisions.[91]

It is apparent that both estoppel and restitutionary obligations may provide what in many cases was hitherto provided by the doctrine of part performance: a remedy in a situation in which a party has acted on the void contract. Indeed, there are significant overlaps. Both estoppel and part performance can be seen as manifestations of the equitable principle that a person may not rely on strict legal rights where to do so is unconscionable,[92] and the rendering of bargained-for performance, which is the key to the availability of restitutionary recompense, looks very much like part performance under another name. There is, however, a significant difference since under the doctrine of part performance the executory parts of a contract that has been part-performed could be enforced, whereas both estoppel and restitution only seek respectively to give relief for the executed part of the transaction. These equitable and restitutionary remedies and the fact, noted above, that completion of the void contract by the execution of a lease or a

[88] *Linz* v. *Electric Wire Co. of Palestine* [1948] A.C. 371, at p. 377. On what count as such benefits, see *post*, p. 605, and cf. in the context of valid contracts *Hunt* v. *Silk* (1804) 5 East. 449 (recovery of payment denied because of possession prior to execution of lease) and *Johnson* v. *Johnson* (1802) 3 B. & P. 162 (recovery of purchase money despite possession where purchaser evicted because of defect in vendor's title). The requirement that the failure of consideration be *total* has been put into question: *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669; *Goss* v. *Chilcott* [1996] A.C. 788; but cf. *Stocznia Gdanska S.A.* v. *Latvian S.S. Co.* [1998] 1 All E.R. 882 at p. 898.

[89] *Rover International Ltd.* v. *Cannon Film Sales Ltd. (No. 3)* (*supra*, n. 87), at pp. 926–8. See also *Craven-Ellis* v. *Canons Ltd.* [1936] 2 K.B. 403. Cf. *Guinness plc* v. *Saunders* [1990] 2 A.C. 663, *per* Lord Templeman at pp. 689, 694.

[90] By analogy with *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] 1 Q.B. 428, *ante*, p. 40 (anticipated contract which failed to materialize).

[91] *Deglman* v. *Guaranty Trust Co. of Canada* [1954] 3 D.L.R. 785 (Canada); *Pavey & Matthews Pty Ltd.* v. *Paul* (1986–87) 162 C.L.R. 221 (Australia).

[92] Finn, *Essays in Contract*, p. 123; Bently and Coughlan (1990) 10 L.S. 325, 331; Meagher, Gummow, and Lehane, *Equity Doctrines and Remedies*, 3rd edn. (1992), § 2045. Cf. *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 164 C.L.R. 387, at p. 405.

conveyance creates a property right so that the parties no longer need to rely on the contract explain the statement in one case that:[93]

> [S]ection 2 is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2.

It has been suggested[94] that the uncertainties of the Statute of Frauds and section 40(1) of the Law of Property Act 1925 stemmed from the tendency of the judges to prevent technical and unmeritorious circumvention of obligations by relying on non-compliance with the statutory requirements. The early indications are of a similar approach to the 1989 Act with new but similar uncertainties. The Law Commission's recognition that it would be necessary to rely on estoppel, restitution, and collateral contracts to do justice between parties in individual otherwise hard cases[95] accepted this substantial qualification to its stated aim of increasing certainty.

III. Consideration

(a) Consideration Defined

It has already been stated that consideration is a universal requisite of contracts not made by deed. A promise is not accordingly of itself enforceable in English law. Consideration is the doctrine designed to establish which promises should be legally enforceable.[96] What then is it? In *Currie* v. *Misa*[97] Lush J. stated:

> A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.

This brings out the idea of reciprocity as the distinguishing mark; it is the gratuitous promise that is unenforceable in English law.

We shall, however, see that consideration reflects a variety of policies and serves a number of functions.[98] First, enforceability may depend on the content of the promise or the circumstances in which it was made.[99] Thus, promises to do what one is already obliged to do, particularly where a contract has been renegotiated or the promise is not made at the request of the promisee have, as we shall see,

[93] *Tootal Clothing Ltd.* v. *Guinea Properties Ltd.* (1991) 64 P. & C.R. 452, *per* Scott L.J. at p. 455, Wilde (1993) 109 L.Q.R. 191.
[94] *Ante*, pp. 79, 81.
[95] Law Com. No. 164, §§ 5.2, 5.4–5.8.
[96] See Atiyah, *Essays on Contract* (1986), ch. 8; Treitel (1976) 50 A.L.J. 439.
[97] (1875) L.R. 10 Ex. 153, at p. 162. See also *Thomas* v. *Thomas* (1842) 2 Q.B. 851, at p. 859; *Bolton* v. *Madden* (1873) L.R. 9 Q.B. 55, at p. 56.
[98] Llewellyn (1941) 41 Col. L. Rev. 777, 778, 863; Simpson (1975) 9 L.Q.R. 247, at p. 263.
[99] *Post*, pp. 104–6 (pre-existing duties and duress).

caused difficulties. Secondly, consideration has been said to be a test of which promises the parties are deemed to intend to be legally enforceable either as a matter of substance, where there is a bargain, or because they have been put into the form of an exchange. It thus serves an evidential and formal function.[100] Thirdly, consideration is sometimes seen as a requirement which ensures that a promisor has deliberately decided to contract and prevents parties accidentally binding themselves on impulse.[101]

Benefit or detriment

It will be seen from the definition in *Currie* v. *Misa* that consideration consists either in some benefit to the promisor or some detriment to the promisee; but there is considerable controversy as to the relative importance of these two factors. It is universally conceded that detriment to the promisee is a good consideration, since detriment is, as Sir Frederick Pollock has succinctly stated, 'the price for which the promise of the other is bought'.[102] On the other hand, many modern authorities consider that benefit to the promisor is merely an accident, particularly in view of the rule that consideration must move from, i.e. be provided by, the promisee.[103] Yet the element of benefit cannot be entirely disregarded, since there are some situations in which a promise has been held not to be gratuitous on the ground that it secured some benefit including 'practical' benefit to the promisor, though without any real detriment to the promisee. These instances should be noted in the discussion of the rules which govern the operation of the doctrine.[104]

Given in return for promise

The consideration must necessarily be given in return for the promise, and it is usually, although not invariably,[105] given at the request of the promisor. The promisee must, therefore, prove either an exchange of promises (e.g., a promise to supply goods in return for a promise to pay for them) or some act or forbearance on the part of the promisee in return for the promise made. A benefit conferred or a detriment suffered otherwise than in return for the promise of the other party cannot constitute consideration.[106] In particular, there will be no consideration merely because there is detrimental action by the promisee in *reliance* on the promise, but not in *return* for it. Thus, in *Combe* v. *Combe*,[107] where

[100] Fuller (1941) 41 Col. L. Rev. 799; Cohen (1933) 46 Harv. L. Rev. 553, 582–3; *post*, p. 123.

[101] *Pillans* v. *Van Mierop* (1765) 3 Burr. 1663, *per* Wilmot J. at p. 1670.

[102] *Principles of Contract*, 13th edn. (1950), p. 133, approved in *Dunlop Tyre Co. Ltd.* v. *Selfridge Ltd.* [1915] A.C. 847, at p. 855, and by the Sixth Interim Report of the Law Revision Committee, *Statute of Frauds and the Doctrine of Consideration* (Cmd. 5449, 1937), p. 12. Cf. Atiyah, *Essays on Contract* (1986), p. 183 (consideration is a 'reason for the recognition of an obligation').

[103] See *post*, p. 95.

[104] *Good* v. *Cheesman* (1831) 2 B. & Ad. 328; *Alliance Bank Ltd.* v. *Broom* (1864) 2 Dr. & Sm. 289, *post*, p. 99; *Bolton* v. *Madden* (1873) L.R. 9 Q.B. 55; *De la Bere* v. *Pearson* [1908] 1 K.B. 280, *post*, p. 97 n. 144; *Ward* v. *Byham* [1956] 1 W.L.R. 496, at p. 498, *post*, p. 101; *Chappell & Co. Ltd.* v. *Nestlé Co. Ltd.* [1960] A.C. 87, *post*, p. 90; *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, at pp. 15–16, *post*, p. 105.

[105] Goodhart (1951) 67 L.Q.R. 456 effectively demonstrates that a request is not essential to a binding obligation provided that the consideration is referable to the promise. Cf. Smith (1953) 69 L.Q.R. 99. See also *Ball* v. *National and Grindlays Bank Ltd.* [1973] Ch. 127.

[106] *Wigan* v. *English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291; *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, at pp. 561, 575, *post*, p. 98.

[107] [1951] 2 K.B. 215; see *post*, p. 117.

a husband, upon divorce, promised his wife a permanent allowance of £100 a year, the Court of Appeal refused to hold that a consequent forbearance on the part of the wife to apply for maintenance amounted to consideration. The husband had not requested her to forbear, and her action could not be said to have been in return for his promise to pay.

Consideration and condition

Consideration must also be distinguished from the fulfilment of a condition. If A says to B, 'I will give you £500 if you break your leg', there is no contract, but simply a gratuitous promise subject to a condition.[108] Where the condition consists of the performance of some act by the promisee, the position may be more doubtful. If C says to D, 'You can have my brass bedstead if you come and collect it', there may still be only a conditional gift, unless performance of the stipulation is regarded by the parties as the price to be paid for the promise. This issue was discussed in *Chappell & Co. Ltd.* v. *Nestlé Co. Ltd.*:[109]

The appellants were the owners of the copyright of a tune called 'Rockin' Shoes' and the respondents were manufacturers of chocolate. The respondents offered to the public gramophone records of this tune in return for 1*s.*/6*d.* and the wrappers from three bars of their chocolate. Under the statutory provisions then in force[110] any person had an automatic right to use a copyright tune for a record, provided he paid a certain percentage of the 'ordinary retail selling price' of the record to the copyright owner. The appellants contended that the respondents could not rely on the statute, since it contemplated a price consisting of money alone, whereas in this case the consideration for the record included three chocolate wrappers.

The House of Lords, by a bare majority, held that the wrappers formed part of the selling price (consideration) for the record. The object of selling the record was to increase the sales of chocolate and the stipulated evidence of such sales formed part of the consideration. The acquisition of the wrappers was not simply a condition limiting the class of persons qualified to purchase records.

Consideration and gift

There may also be difficulty in distinguishing consideration from a gift. In *Esso Petroleum Co. Ltd.* v. *Customs and Excise Commissioners*,[111] a petrol company offered one coin, depicting a World Cup footballer, to every customer who purchased four gallons of petrol. A majority of the House of Lords held that the coin was an offer of consideration to the customer to enter into a contract of sale of petrol,[112] but the minority considered that the coin was a gift.

(b) Necessity for Consideration

Necessity in simple contracts

Consideration is necessary for the formation of every simple contract; a promise (unless in a deed) made without consideration is not actionable as a contract[113] in English law.

[108] *Shadwell* v. *Shadwell* (1860) 9 C.B.N.S. 159, *per* Byles J. at p. 177. [109] [1960] A.C. 87.
[110] Copyright Act 1956, s. 8. The statutory licence to record was abolished by the Copyright, Designs and Patents Act 1988, s. 170 and Sched. 1, para. 21.
[111] [1976] 1 W.L.R. 1. [112] Or (Lord Fraser) to pay the money price.
[113] But see Denning (1952) 15 M.L.R. 1, and *post*, p. 112.

As we have seen, from the very beginning of the action of *assumpsit*, a plaintiff who could not produce a sealed instrument had to show that he had contributed to the bargain by furnishing a valuable consideration of some kind. In 1756, however, Lord Mansfield became Chief Justice of the King's Bench, and the doctrine of consideration was attacked by him in two fundamental respects. In the first place, he asserted that consideration was only one of several modes of supplying evidence of the promisor's intention to be bound; and that if the terms of a contract were reduced to writing by reason of commercial custom, or in obedience to statutory requirement, such evidence dispensed with the need for consideration.[114] In *Rann* v. *Hughes*, however, Lord Mansfield's proposal was overruled. Skynner C.B. stated:[115]

Written evidence

> All contracts are by the law of England divided into agreements by speciality and agreements by parol; nor is there any such third class as some of the counsel have endeavoured to maintain as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.

Lord Mansfield's second attack was to hold that the existence of a previous moral obligation was sufficient to support an express, but gratuitous, promise.[116] This doctrine was finally rejected in *Eastwood* v. *Kenyon*:[117]

Moral obligation

> Eastwood had been guardian and agent of Mrs. Kenyon while she was a minor, and had incurred expenses in the improvement of her property: he did this voluntarily, and, in order to do so, was compelled to borrow money, for which he gave a promissory note. When Mrs. Kenyon came of age she assented to the transaction, and after her marriage her husband promised to pay the note. He was sued upon this promise.

It was held that the moral obligation to fulfil such a promise was insufficient where the consideration was wholly past. 'Indeed', said Lord Denman,[118] 'the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it'.

From that time onwards, every promise not in a deed has been subject to a general and uniform test of actionability. In each case it became necessary to ask whether the promisor gets any benefit or the promisee sustains any detriment, present or future, in respect of the promise. If not, the promise was gratuitous, and was not binding. We have noted the variety of policies that may be reflected in the doctrine of consideration. In working out this doctrine to its logical results it has, no doubt, happened from time to time that the Courts have been compelled to hold a promise to be invalid which the parties intended to be binding, or that the slightness of the benefit or detriment which may constitute a consideration has tended to bring the requirement into ridicule. The Courts are reluctant to

[114] *Pillans* v. *Van Mierop* (1765) 3 Burr. 1663. This is the position in Scotland: Lord Normand (1939) 55 L.Q.R. 358.

[115] (1778) 7 T.R. 350n. It should be noted, however, that the only report of the actual decision of the House of Lords states that the case was decided on the ground of failure to comply with the Statute of Frauds: (1778) 4 Brown P.C. 27.

[116] *Lee* v. *Muggeridge* (1813) 5 Taunt. 36, at p. 46 *per* Sir James Mansfield C.J. (who was Chief Justice of Common Pleas).

[117] (1840) 11 A. & E. 438.

[118] At p. 450.

describe a promise made in a commercial context as gratuitous and it has been said that 'a defence of lack of consideration rarely has merit'[119] and that 'businessmen know their own business best even when they appear to grant an indulgence'.[120] The doctrine has therefore been the subject of considerable criticism,[121] but it is advisable to reserve a discussion of this until the general rules governing the application of consideration to contracts have been examined.

(c) Executory and Executed Consideration

We must first deal with the relation of the consideration to the promise in respect of time. A consideration may be *executory*, a promise given for a promise; or it may be *executed*, an act or forbearance given for a promise.

An *executory* consideration consists of a promise to do, forbear, or suffer, given in return for a like promise. Thus mutual promises, for example, a promise to do work in return for a promise of payment, are illustrations of executory consideration. The fact that the promise given for a promise may be dependent upon a condition does not affect its validity as consideration. A promises B to do a piece of work for which B promises to pay if the workmanship is approved by a third party. The promise of B is consideration for the promise of A.

A contract arises upon a present or *executed* consideration when one of the two parties has, either in the act which constitutes an offer or the act which constitutes an acceptance, done all that party is bound to do under the contract, leaving an outstanding liability on one side only. The case of an act which constitutes an offer may be illustrated by the example of one who offers to do work or provide goods in circumstances that show an obvious expectation that payment be made; the contract arises when the work or goods are accepted by the person to whom they are offered, and that person by accepting them becomes bound to pay a reasonable price. So if a wine merchant sends to a customer a selection of wines, and the customer retains some and returns the rest, the customer will be bound to pay for those retained, since the tender of the wine will be at once the offer and the consideration for the obligation.[122] On the other hand, a contract for which the consideration is the act which constitutes an acceptance is best illustrated by the case of an advertisement of a reward for services, which becomes a binding promise when the service is rendered. In such cases it is not the offeror, but the acceptor, who has performed at the moment when the contract is entered into. If A makes a general offer of reward for information and B supplies the information, A's offer is turned into a binding promise by the act of B, and B simultaneously concludes the contract and furnishes consideration by performance.[123]

[119] *Thorensen Car Ferries Ltd.* v. *Weymouth Portland B.C.* [1977] 2 Lloyd's Rep. 614, *per* Donaldson J. at p. 619.

[120] *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741, *per* Lord Hailsham L.C. at pp. 757–8. See also *New Zealand Shipping Co. Ltd.* v. *Satterthwaite* [1975] A.C. 154, at p. 157, *post*, p. 103.

[121] See the Sixth Interim Report of the Law Revision Committee (Cmd. 5449, 1937).

[122] *Hart* v. *Mills* (1846) 15 M. & W. 85; Contrast *Taylor* v. *Laird* (1856) 1 H. & N. 266; *ante*, p. 37.

[123] *Ante*, pp. 36 and 40. See *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

(d) Consideration Must not be Past

Executed consideration must be distinguished from *past* consideration which is a mere sentiment of gratitude or honour prompting a return for benefits received and, in other words, is no consideration at all. In the case of executed consideration, both the promise and the act which constitutes the consideration are integral and co-related parts of the same transaction.[124] In the case of past consideration, however, the promise is subsequent to the act and independent of it; they are not in substance part of the same transaction. Thus if A saves B from drowning, and B later promises A a reward, A's action cannot be relied on as consideration for B's promise for it is past in point of time. Past consideration is, in effect, no consideration at all; that is to say it confers no benefit on the promisor, and involves no detriment to the promisee in return for the promise. It is merely an act or forbearance in time past by which a person has benefited without incurring any legal liability. If afterwards, whether from good feeling or interested motives, the person who has benefited makes a promise to the person whose act or forbearance led to the benefit, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced. In *Roscorla* v. *Thomas*[125] this principle was clearly stated:

> The plaintiff purchased a horse from the defendant, who afterwards, in consideration of the previous sale, warranted that the horse was sound and free from vice. It was in fact a vicious horse.

The Court held that the sale itself created no implied warranty that the horse was not vicious. The warranty had therefore to be regarded as independent of the sale and as an express promise based upon a previous transaction. It fell, therefore, 'within the general rule that a consideration past and executed will support no other promise than such as would be implied by law'.

The general rule is, however, subject to certain exceptions:

Exceptions

(i) Request of the promisor

Consideration moved by previous request

A past consideration will, it has been said, support a subsequent promise, if the consideration was given at the request of the promisor. Originally this was an unqualified exception based on the fact that, as was said in 1615 in *Lampleigh* v. *Brathwait*:[126]

> the promise though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference.

In the nineteenth century, however, with the rejection of Lord Mansfield's view that a previous moral obligation might be good consideration,[127] the scope

[124] *Westminster C.C.* v. *Duke of Westminster* [1991] 4 All E.R. 136, at p. 145.
[125] (1842) 3 Q.B. 234. See also *Re McArdle* [1951] Ch. 669; *Savage* v. *Uwechia* [1961] 1 W.L.R. 455; *Astley Industrial Trust Ltd.* v. *Grimston Electric Tools Ltd.* (1965) 109 S.J. 149.
[126] (1615) Hob. 105, at p. 106 (subsequent promise to pay for requested attempt to obtain pardon held enforceable).
[127] *Ante*, p. 91.

of the exception was restricted. By the end of the nineteenth century it was clear that a past service performed at the request of the promisor will only amount to consideration if it was assumed at the time that the service was ultimately to be paid for.

In *Re Casey's Patents, Stewart* v. *Casey*,[128] the owners of certain patent rights promised their manager a one-third share of the patents in consideration of his services in working for them. The Court of Appeal rejected the argument that this consideration was past. It held that the fact of the services by the manager raised an implication that they were to be paid for; the promise to pay was then an admission of a bargain which fixed the amount of that reasonable remuneration on the facts of which the services were originally rendered.

In *Pau On* v. *Lau Yiu Long*[129] the Judicial Committee of the Privy Council stated the conditions in which this exception will apply as follows:

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.

In that case the defendant had requested the plaintiff to promise not to sell certain shares for a year and later promised to indemnify the plaintiff if the shares fell below a certain price. The defendant contended that the consideration for the indemnity was past but it was held that all three conditions mentioned above were satisfied.

It is arguable, however, that this exception is an apparent rather than a real departure from the general doctrine as to past consideration. When a request is made which is in substance an offer of a promise upon terms to be afterwards ascertained, and an act is done in pursuance of that request, a subsequent promise to pay a fixed sum or to confer some other benefit may be regarded as a part of the same transaction, the effect of the promise being merely to render certain that which was uncertain before.

(ii) An antecedent debt

It has long been decided that the existence of an existing debt is sufficient consideration for a subsequent promise to pay that debt.[130] It should not be supposed, however, that the existence of a debt from A to B will always be consideration for any subsequent promise which A may make. There must be present consideration in the form of a forbearance to sue, or else, if a security is given by the debtor, it must be communicated to the promisee and induce such a forbearance.[131]

[128] [1892] 1 Ch. 104. See also *Kennedy* v. *Broun* (1863) 13 C.B.N.S. 677, at p. 740; *Wilkinson* v. *Oliveira* (1835) 1 Bing. N.C. 490.

[129] [1980] A.C. 614, at p. 629. See *post*, p. 104 for the facts..

[130] *Slade's Case* (1602) 4 Co. Rep. 91a; *ante*, p. 14. Note that such promises, if in writing, can have the effect of extending the limitation period, *post*, p. 616.

[131] *Wigan* v. *English and Scottish Law Life Assurance Association* [1909] 1 Ch. 291.

(iii) Negotiable instruments

By section 27(1) of the Bills of Exchange Act 1882, valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract; (b) an antecedent debt or liability. So if A, whose account at the bank is overdrawn, negotiates to its banker a cheque drawn by a stranger, the banker becomes a holder for value of the cheque, as the antecedent debt of A is consideration for the instrument.[132] This is a genuine exception to the rule.

(e) Consideration Must Move from the Promisee

Consideration must be furnished by promisee

This means that a party who wishes to enforce a contract must furnish or have furnished consideration for the promise of the other party. It is not, however, necessary that it should have been intended to benefit the other party. So it need not move to the promisor.

A separate rule from privity

This rule must be distinguished from another rule, namely the doctrine of *privity of contract*, with which it is often confused. As we shall see in a later chapter,[133] it is a general rule of English law that a contract cannot confer any rights on one who is not a party to the contract, even though the very object of the contract may have been to benefit the non-party or third party. A third party is unable to sue because there is no privity of contract between the third party and the promisor. This inability of one who is not a party to the contract to acquire rights under it follows from the view which our law has adopted as to the operation of contract generally and *which persons* can sue and be sued on a contract. It has no particular connection with the doctrine of consideration which is concerned with the separate policy question of which promises should be enforced. Nevertheless, an additional reason for refusing an action would be that a non-party has normally furnished no consideration.[134] Thus in *Tweddle* v. *Atkinson*[135] a contract between the fathers of a married couple provided that each should make a payment to the husband who should have power to sue for the payments. It was held that the husband could not sue: he was not only not a party to the contract, but also no consideration had moved from him, and so the promise was, as far as he was concerned, a gratuitous one.

The rules of privity and of consideration do not, however, always coincide in this way. If, for example, A and B enter into an agreement under which A promises B that if C will dig A's garden, A will pay £10 to B, B cannot enforce the promise. B is the promisee under the agreement but has provided no consideration. B has suffered no detriment (unless B impliedly undertook to procure that C would dig the garden) and, although A has received a benefit, that benefit was conferred by a third party, C, and not by B. The rule that consideration must move from the promisee is thus distinct from that of privity of contract. It is not

[132] But see *Oliver* v. *Davis* [1949] 2 K.B. 727.

[133] *Post*, Chapter 10.

[134] *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, at p. 855; *post*, p. 408.

[135] [1861] 1 B. & S. 393; *post*, p. 408.

enough that consideration should have been given; it must have been given by the promisee.[136]

Exceptions

There are, however, a number of exceptions to this rule. In the case of negotiable instruments, for example, it is not necessary that the person seeking to enforce the instrument should personally have furnished consideration, provided that consideration has at some time during the history of the instrument been given.[137] Trusts constitute another major exception, and other instances where the rule need not be observed will be found in the chapter on privity of contract, later in this book.[138]

(f) Consideration Need not be Adequate

Consideration need not be adequate to the promise, but it must be of some value in the eye of the law. The Courts will not make bargains for the parties to a suit and, if a person gets what has been contracted for, will not inquire whether it was an equivalent to the promise which was given in return. The consideration may be of benefit to the promisor, or to a third party, or may be of no apparent benefit to anybody, but merely a detriment to the promisee; in any case 'the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced'.[139] The most trifling detriment or benefit will suffice, and the following cases will show that the Courts have been prepared to find a contract where the consideration was virtually non-existent.

We have already seen that in *Chappell & Co. Ltd.* v. *Nestlé Co. Ltd.*[140] wrappers from chocolate bars were held to be part of the consideration for the sale of a record. In *Bainbridge* v. *Firmstone*:[141]

At the request of F, B allowed him to weigh two boilers provided he returned them in as good a condition as they were lent. F dismantled the boilers to weigh them and returned them in this state. B sued for breach of the agreement.

F was held liable. 'The consideration', said Patteson J.,[142] 'is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time'.

In *Haigh* v. *Brooks*,[143] the consideration of a promise to pay certain bills was the surrender of a document supposed to be a guarantee, which turned out to be of

[136] Cf. *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* [1967] A.L.R. 385 (consideration supplied by one of two joint promisees); *McEvoy* v. *Belfast Banking Co. Ltd.* [1935] A.C. 24, at p. 43 (consideration supplied by one of two joint and several promisees).

[137] Bills of Exchange Act 1882, s. 27(2). [138] *Post*, Chapter 10.

[139] *Bolton* v. *Madden* (1873) L.R. 9 Q.B. 55, *per* Blackburn J. at p. 57.

[140] [1960] A.C. 87, *ante*, p. 90. Cf. *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, at pp. 561 (gaming chips not consideration *inter alia* because they were 'worthless'). See also *ibid.* at pp. 575, 577.

[141] (1838) 8 A. & E. 743. [142] At p. 744.

[143] (1839) 10 A. & E. 309; affirmed *sub nom. Brooks* v. *Haigh* (1840) 10 A. & E. 323, where it was said by Maule J. that the delivery of the paper alone would suffice. See also *Veitch* v. *Sinclair* [1975] 1 N.Z.L.R. 264.

doubtful validity. The worthlessness of the document surrendered was held to be no defence to an action on the promise. The Court was not concerned with the adequacy or inadequacy of the price paid or promised. 'The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise'.[144]

The consequence of the rule that the Court is not concerned with the adequacy of consideration is that the requirement can be satisfied by nominal consideration. 'A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn'.[145]

No doctrine of fair price

In the Roman law of sale, and in certain continental systems, the price had to be a fair and serious one, and if this was not so, the seller could rescind the contract unless the buyer was willing to come up to the fair price. This doctrine of *laesio enormis* forms no part of the English common law. Even where statute has intervened to protect a class of contractor, such as consumers, it does not always require a 'fair' or 'reasonable' or 'market' price.[146] In equity, however, inadequacy of consideration is treated as affording corroborative evidence of fraud or undue influence, such as may enable a promisor to resist a suit for specific performance, or to get the promise cancelled.[147] Mere inadequacy of consideration is not of itself a ground on which specific performance of a contract will be refused unless it is such as to constitute of itself conclusive evidence of fraud[148] or unconscientious conduct.[149] Thus specific performance was ordered of an option to purchase a house for £10,000 even though the consideration for the grant of the option was the nominal sum of £1.[150]

(g) Consideration Must be Real

Reality of consideration

Though consideration need not be adequate, it must be real. It must be 'something which is of some value in the eye of the law'. Thus, 'it is no consideration to refrain from a course of action which it was never intended to pursue'.[151] We

[144] (1839) 10 A. & E. 309, *per* Lord Denman C.J. at p. 320. See also *De la Bere* v. *Pearson* [1908] 1 K.B. 280 (possible benefit to newspaper in publishing letter held to be consideration for offer to give financial advice) although liability today would probably lie in tort: *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465.

[145] *Chappell & Co. Ltd.* v. *Nestlé Co. Ltd.* (*supra*, n. 140), *per* Lord Somervell at p. 114. See also *post*, p. 123. Statute, however, may treat 'nominal' consideration differently from 'valuable' consideration, see Land Charges Act 1925, s. 20(8); Law of Property Act 1925, ss. 84(2) and 205(1)(xxi). Any substantial value, that is of more than say £5, will prevent a disposition from being for nominal consideration: *Midland Bank & Trustee Co. Ltd.* v. *Green* [1981] A.C. 513, at p. 532; *Westminster C.C.* v. *Duke of Westminster* [1991] 4 All E.R. 136, at p. 146.

[146] Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), r. 3(2)(b), on which see *post*, p. 197. Cf. Rent Act 1977, s. 70(1) (fair rent); Agricultural Holdings Act 1986, s. 12(2) (prudent and willing parties).

[147] *Post*, pp. 282, 288.

[148] *Coles* v. *Trecothick* (1804) 9 Ves. Jun. 234, *per* Lord Eldon at p. 246.

[149] *Post*, p. 597.

[150] *Mountford* v. *Scott* [1975] Ch. 258.

[151] *Arrale* v. *Costain Civil Engineering Ltd.* [1976] 1 Lloyd's Rep. 98, at p. 106. But an act may be consideration even if it is not solely induced by the promise: *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, at p. 490.

should now examine those cases where the reality of consideration has been questioned or defined.

(i) Motive and consideration

Motive

Motive must be distinguished from consideration. In *Thomas* v. *Thomas*:[152]

A deceased husband's executor promised to allow his widow to occupy a house the deceased had owned in return for her promise to keep it in repair and to pay a ground rent of £1 *per annum*. The executor stated that the agreement was entered into 'in consideration of' the expressed desire of the deceased that his wife should have the use of the house during her lifetime.

It was held that the desire to carry out the wishes of the deceased did not amount to consideration: 'Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff'.[153] In one sense, however, motive is relevant in that the consideration must be given in return for the promise; but the motive of the promisor must be to obtain a legally recognizable return for the obligation incurred, and not something which is of no value in the eye of the law.

Love and affection

It has already been noted that at one time the common law courts appear to have been attracted to the equitable principle that natural love and affection within a family could constitute a 'good' consideration; and that the moral obligations to make a return for past benefit was an equivalent to consideration. But past consideration is no consideration, and what the promisor gets in such a case is the satisfaction of motives of price or gratitude. The question was settled once and for all in *Eastwood* v. *Kenyon*,[154] and the final blow given to the doctrine that consideration for a promise could consist in a motive or obligation resting on the promisor.

(ii) Impossibility and uncertainty

Impossibility

Impossibility, either physical or legal, which exists at the time of formation of the contract and is obvious upon the face of it, makes the consideration unreal. The impossibility must be obvious, such as is, 'according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted'.[155] Thus a covenant in a charterparty that a ship would sail on a date which was already past at the time the contract was executed was held to be void for unreality in the consideration furnished.[156] Again, the old case of *Harvy* v. *Gibbons*,[157] where a bailiff was promised £40 in consideration of a promise made by him that he would release a debt due to his master, is an example of legal impossibility. The

[152] (1842) 2 Q.B. 851.

[153] *Ibid.*, *per* Patteson J. at p. 859. The issue arose because the executor had argued that the widow's case was procedurally defective because her declaration referred only to her promise to repair and pay rent and omitted to state part of the consideration, i.e. the desire of her deceased husband. The Court rejected this and found for the widow.

[154] (1840) 11 A. & E. 438; *ante*, p. 91.

[155] *Clifford (Lord)* v. *Watts* (1870) L.R. 5 C.P. 577, *per* Brett J. at p. 588.

[156] *Hall* v. *Cazenove* (1804) 4 East 477.

[157] (1675) 2 Lev. 161.

Court held that the bailiff could not sue; that the consideration furnished by him was 'illegal', for a servant could not release a debt due to his master. By 'illegal' it is plain that the Court meant legally impossible.

Uncertainty

A promise which purports to be a consideration may be of too vague and unsubstantial a character to be enforced. Thus in *White* v. *Bluett*:[158]

In proceedings by his father's executors on a promissory note, a son alleged that the father had promised to discharge him from liability in consideration of his promise to cease complaining, as he had been used to do, that he had not enjoyed as many advantages as his brothers.

It was said that the son's promise was no more than a promise 'not to bore his father', and was too vague to form a consideration for the father's promise to waive his rights on the note although, in another case, a promise to make a child happy was stated to be part of the consideration.[159] Again, it has been held that a promise to co-operate in the recovery from a joint debtor was sufficiently certain to form a consideration for a forbearance.[160] Other instances of uncertainty have already been given in connection with incomplete agreements[161] and it is possible that the recognition of 'practical' benefit as consideration[162] will mean that uncertainty should not be seen as an aspect of consideration.

(iii) Forbearance and compromise

Forbearance to sue

There is a clear public interest in encouraging the avoidance of litigation and the resolution of disputes by the parties provided that the settlement or compromise is genuine, entered into freely without the concealment of essential information or the taking of undue advantage.[163] A forbearance to sue, even for a short time, may be consideration for a promise, although there is no waiver or compromise of the right of action. In *Alliance Bank Ltd.* v. *Broom*:[164]

Messrs. Broom were asked to give security for moneys they owed to the bank. They promised to assign the documents of title to certain goods; they failed to do so, and the bank sued for specific performance of the promise.

The Court held that the bank was entitled to this remedy:

Although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time,

[158] (1853) 23 L.J. Ex. 36.
[159] *Ward* v. *Byham* [1956] 1 W.L.R. 496; *post*, p. 101. See also *Dunton* v. *Dunton* (1892) 18 V.L.R. 114 (Australia); *Hamer* v. *Sidway* 27 NE 256 (1891) (USA).
[160] *Bank of Nova Scotia* v. *MacLellan* (1977) 78 D.L.R. (3d) 1 (Canada).
[161] See *ante*, p. 67.
[162] *Pitt* v. *P.H.H. Asset Management Ltd.* [1994] 1 W.L.R. 327, at p. 332; *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, *post*, p. 105.
[163] *Colchester B.C.* v. *Smith* [1992] Ch. 421, at p. 435. Payments made to close a transaction are irrecoverable even if there is no consideration: *Woolwich B.S.* v. *I.R.C.* [1993] A.C. 70, at p. 165; Law Com No. 227, *Restitution: Mistakes of law and ultra vires public authority receipts and payments* (1994), §§ 2.25–2.38.
[164] (1864) 2 Dr. & Sm. 289.

but, at all events, some extent of forbearance . . . The circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.[165]

The consideration in such a case clearly consists in the benefit received by the promisor in that the promise 'stays the hand of the creditor'.[166]

In order that the forbearance should be a consideration, some liability should be shown to exist, or to be reasonably supposed to exist, by the parties. If the claim is not only invalid, but is known by the party forbearing to be so, there is no consideration.[167] It would also seem that the claim must be an honest claim and one which the promisee *bona fide* intends to pursue.[168] Where the claim arises out of an illegal agreement, such as a wagering contract, a forbearance to sue on that claim is not sufficient consideration.[169]

Compromise of a dispute

The compromise of a dispute, for instance by a promise to pay a proportion of a disputed sum claimed, furnishes consideration of the same character. The difference between forbearance and compromise is that in compromise the claim is not admitted and the claimant promises to abandon the claim. It has, however, been argued that if the claim compromised is of an unsubstantial character the consideration fails. The answer is to be found in the judgment of Cockburn C.J. in *Callisher* v. *Bischoffsheim*:[170]

> Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he *bona fide* believes that he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it . . . It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent.

In that case, the defendant agreed to deliver to the plaintiff certain securities in consideration that the plaintiff would cease to press a claim against the Honduras Government. The claim was worthless, but there was no evidence that the plaintiff knew this.[171] It was held that there was consideration for the agreement. If, however, one of the parties to the compromise has no case, and knows that there is no case, the agreement to compromise will not be held binding.

As in the case of forbearance, the compromise of a claim arising out of an illegal contract is insufficient as consideration, unless the compromise arises out of a dispute of fact as to whether the contract is in fact illegal.[172]

[165] At p. 292.
[166] Cf. *Cook* v. *Wright* (1861) 1 B. & S. 559, at p. 569.
[167] *Wade* v. *Simeon* (1846) 2 C.B. 548, at p. 564.
[168] *Miles* v. *New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, at p. 284; *Colchester B.C.* v. *Smith* (*supra*, n. 163), at p. 435.
[169] *Potchiakhoff* v. *Teakle* [1938] 2 K.B. 816; *Hill* v. *Hill (William) (Park Lane) Ltd.* [1949] A.C. 530; *post*, p. 341. But cf. *post*, n. 172.
[170] (1870) L.R. 5 Q.B. 449, at p. 452.
[171] See also *Wigan* v. *Edwards* (1973) 1 A.L.R. 497 (Australia) (honest claim sufficient).
[172] *Binder* v. *Alachouzos* [1972] 2 Q.B. 151, *per* Lord Denning M.R. at p. 158.

(h) Performance of an Existing Duty[173]

Existing duty

Is what is done, forborne, suffered, or promised more than that to which the promisee is legally bound? If nothing is got in return for the promise but that to which the promisor is already legally entitled, the consideration seems unreal. This may occur where the promisee is already under an existing duty to do something and then promises to do that thing. If you have to do an act anyway, how can it be to your detriment to reaffirm your obligation? If the act will be done anyway, how does it benefit me to pay you to do it? We shall see that there can be actual or 'practical' detriment and benefit in such situations whatever the theoretical position based on legal entitlement. The law draws a distinction between the performance of a public duty, the performance of an existing duty to a third party, and the performance of an existing duty owed to the promisor. In the first case there will be no consideration for the promise. In the second the law holds that valuable consideration is present. In the third case it has recently been held that only where there is, in the particular circumstances, a 'practical' benefit to the promisee is there consideration.

(i) Performance of a public duty

to the public

Where the promisee is already under an existing public duty, an express promise to perform, or performance of, that duty will not amount to consideration.[174] There will be no detriment to the promisee or benefit to the promisor over and above their existing rights and liabilities. In *Collins* v. *Godefroy*:[175]

> The plaintiff received a subpoena to appear at a trial as a witness on behalf of the defendant. The defendant promised him a sum of money for his trouble. A person who receives a subpoena is bound to attend and give evidence.

It was held that there was no consideration for the promise, the plaintiff being under a public duty to attend.

Where the undertaking is to do more than that to which the promisee is legally bound, this may be consideration, even though it is an act of the same kind as the subject of the obligation. In *Glasbrook Brothers Ltd.* v. *Glamorgan County Council*,[176] a police authority sued for the sum of £2,200 promised to it by a colliery company for whose mine the authority had provided a stronger guard during a strike than was in its opinion necessary. It was held that it was entitled to maintain an action on the promise.[177] Again, in *Ward* v. *Byham* it was held that there was consideration for a promise to pay a weekly sum to the mother of an illegitimate child if the mother proved the child was 'well looked after and

[173] See Davis (1937) 6 C.L.J. 202; Reynolds and Treitel (1965) 76 Malaya L.R. 1.

[174] *Thorensen Car Ferries Ltd.* v. *Weymouth Portland B.C.* [1977] 2 Lloyd's Rep. 614, at p. 619. Earlier cases tend to suggest that an agreement of this nature is invalid on grounds of public policy: *Wathen* v. *Sandys* (1811) 2 Camp. 640; *Bilke* v. *Havelock* (1813) 3 Camp. 374.

[175] (1831) 1 B. & Ad. 950.

[176] [1925] A.C. 270.

[177] See also *England* v. *Davidson* (1840) 11 A. & E. 856; *Neville* v. *Kelly* (1862) 12 C.B.N.S. 740 (rewards for police officers).

happy'.[178] Morris and Parker L.JJ. considered the mother had promised more than her statutory duty to maintain the child. Denning L.J.'s view[179] that she was only promising to do what she was bound to do but this sufficed because it was a benefit to the promisee (the child's father) was not shared by them.

More recently *Ward* v. *Byham* has been explained as an instance of the recognition that the mother's promise was a 'practical' benefit to the father which thus amounted to consideration for his promise.[180] It is possible the recognition that such 'practical' benefit can constitute consideration may lead to the reassessment of the general rule but, in the context of pre-existing public duties, it is important to bear in mind that it may be contrary to the public interest to give such recognition to a 'practical' benefit and that this should only be done where 'there is nothing in the transaction which is contrary to the public interest'.[181] For instance, the enforcement of an agreement to make a payment for the performance of a public duty such as the giving of evidence[182] or the renewal of a licence[183] might be thought to be contrary to the public interest in ensuring impartiality in the administration of justice and probity in government and local administration.

(ii) Performance of a duty owed to a third party

It is now established that consideration which consists in the performance of, or the promise to perform, an existing contract with a third party may be a real consideration. In these cases the promisee obtains the benefit of a direct obligation which can be enforced.[184]

Performance of duty

As far as performance of such a duty is concerned, in *Shadwell* v. *Shadwell*:[185]

> The plaintiff was engaged to be married. His uncle wrote to him stating that he was pleased to hear of the intended marriage and that as he promised to assist the plaintiff at starting, would pay him £150 yearly until the plaintiff's income as a Chancery barrister amounted to six hundred guineas. The plaintiff married. He never earned as much as six hundred guineas. The annuity fell into arrear; the uncle died, and the plaintiff sued his executors.

A majority of the Court thought that there was a benefit to the uncle in that the marriage was 'an object of interest to a near relative', and a detriment to the plaintiff because 'he might have made a most material change in his position and have induced the object of his affections to do the same, and might have incurred pecu-

[178] [1956] 1 W.L.R. 496. See also *Williams* v. *Williams* [1957] 1 W.L.R. 148 (husband's promise to pay weekly sum to wife who had deserted him, and thus forfeited right to maintenance, if she maintained herself and undertook not to pledge his credit held enforceable).

[179] At p. 498. See also *Williams* v. *Williams* (*supra*, n. 178), at p. 150.

[180] *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, *per* Glidewell L.J. at p. 13, *post*, p. 105. Cf. Purchas L.J. at p. 20.

[181] *Williams* v. *Williams* [1957] 1 W.L.R. 148, *per* Denning L.J. at p. 150. Note that, although Denning L.J.'s views on the general enforceability of a promise or performance of an existing duty have been disapproved, what he said about the relevance of the public interest has not.

[182] *Collins* v. *Godefroy* (*supra*, n. 175). But see now Supreme Court Act 1981, s. 36(4) (tender of expenses).

[183] *Morgan* v. *Palmer* (1842) 2 B. & C. 729, at p. 739.

[184] *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* [1975] A.C. 154, at p. 168.

[185] (1860) 9 C.B.N.S. 159.

niary liabilities resulting in embarrassments' if the promised income had been withheld.

In *Scotson* v. *Pegg*:[186]

Scotson promised to deliver to a third party X, or to his order, a cargo of coal then on board Scotson's ship. X made an order in favour of Pegg. Pegg then made an agreement with Scotson that if Scotson would deliver the coal to him, he would in return unload and discharge the coal at a fixed rate each day from the date when the ship was ready for discharge. When sued for breach, Pegg pleaded that Scotson had promised no more than he was bound under his contract with X to perform so there was no consideration for Pegg's promise to unload in the manner specified.

The Court held that Pegg was liable. Wilde B. said:[187] 'If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding'.

There are certain points about these cases which are unsatisfactory. For example, in *Shadwell* v. *Shadwell*, as Byles J., who dissented,[188] pointed out, the uncle derived no personal benefit from the marriage; the engagement was in no way induced by his promise, nor was the plaintiff's subsequent change of position in return for his undertaking. Again, the promise to deliver to Pegg at a fixed rate in *Scotson* v. *Pegg* may have involved duties more onerous than the existing obligation to deliver to X or there may have been some dispute as to Pegg's right to have the coals.[189] Nevertheless, a majority of the Privy Council in *New Zealand Shipping Co. Ltd.* v. *A. M. Satterthwaite & Co. Ltd.* (*The Eurymedon*),[190] took them as establishing that actual performance of an existing duty to a third party can be sufficient consideration, even though that performance is no additional detriment to the promisee. In *The Eurymedon* the unloading by stevedores of goods from a ship (which the stevedores were bound by a contract with a third party to do) was held to be consideration for a promise to relieve them of the liability for damaging the goods.

Promise to perform duty

The question then arises whether a distinction should be drawn between cases where the consideration alleged is *executed*, i.e. by performance of an existing duty to a third party, and cases where the consideration is *executory*, consisting of a promise to perform. Can a promise to perform an existing duty owed to a third party also constitute consideration?[191] An affirmative answer was given by the Judicial Committee of the Privy Council in *Pao On* v. *Lau Yiu Long*:[192]

[186] (1861) 6 H. & N. 295.

[187] At p. 300.

[188] His view was approved by Salmon L.J. in *Jones* v. *Padavatton* [1969] 1 W.L.R. 328, at p. 333.

[189] At p. 299, *per* Martin B. See *ante*, p. 100.

[190] [1975] A.C. 154. See also *Adams* v. *London Improved Motor Coach Builders Ltd.* [1921] 1 K.B. 495, at pp. 501 and 504 (trade union's undertaking to pay solicitor the costs of services rendered to a member did not preclude the member from also being liable to the solicitor).

[191] It has been argued that such a promise ought to be consideration because the promisor thereby foregoes the liberty to cancel the contract with the third party by mutual agreement: *De Cicco* v. *Schweizer* 221 N.Y. 431 (1917); Hamson (1938) 54 L.Q.R. 233, at p. 237.

[192] [1980] A.C. 614.

The plaintiffs agreed with a company (Fu Chip) to sell certain shares in return for an allotment to them of 4.2 million shares in Fu Chip. If all the newly allotted shares had been immediately sold in the market, this would have depressed the value of the shares. Accordingly the plaintiffs undertook in their agreement with Fu Chip not to sell or transfer for one year 60 per cent of the allotted shares. Subsequently the plaintiffs refused to complete the agreement unless the defendants (who were the majority shareholders in Fu Chip) promised to indemnify them against any fall in value of the allotted shares during the one year period. The defendants gave that indemnity. The allotted shares fell greatly in value, and, in answer to a claim on the indemnity, the defendants pleaded that there was no consideration for their promise to indemnify.

It was held that the consideration for the indemnity was the promise of the plaintiffs to perform their pre-existing contractual obligations to Fu Chip. 'Their Lordships', said Lord Scarman,[193] 'do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be a valid consideration'.

(iii) Performance of a duty owed to the promisor

General rule

Where the promisee merely undertakes to fulfil the conditions of an existing contract with the promisor the perception that it is not detrimental to do what one is obliged to do or beneficial to receive what one is entitled to receive has led to the conclusion that there is no consideration. In this context the need to discourage improper pressure by threatening not to perform one's contract unless the other party offers to pay more has been an important factor although the pre-existing duty rule was rather a blunt weapon for this since it invalidated non-extortive as well as extortive renegotiations. The regulation of renegotiations was, as we shall see, left to the equitable doctrine of promissory estoppel. Although the development of a concept of economic duress[194] means that the common law now has a more direct and precise method of controlling coercion, normally the performance of a duty owed to the promisor will not be consideration.[195] The general position is illustrated by the old case of *Stilk* v. *Myrick*:[196]

In the course of a voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to replace them, promised the rest of the crew that, if they would work the vessel home, the wages of the two deserters should be divided amongst them.

It was held that:

There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all emergencies of the voyage . . . The desertion of a part of the crew is to be con-

[193] At p. 632.

[194] *Post*, p. 272.

[195] *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* [1979] Q.B. 705, at p. 712; *Syros Shipping Co. S.A.* v. *Elaghill Trading Co. Ltd.* [1980] 2 Lloyd's Rep. 390; *Pao On* v. *Lau Yiu Long* [1980] A.C. 614, at p. 633; *Vantage Nav. Cpn.* v. *Suhail & Saud Bahwan Building Materials Llc.* [1989] 1 Lloyd's Rep. 138, at p. 147; *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, at pp. 16, 19, 20, *post*, p. 105.

[196] (1809) 2 Camp. 317. But see the report of the same case in 6 Esp. 129, and *Harris* v. *Watson* (1791) Peake 102 (promise invalid by reason of public policy).

sidered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port.[197]

The decision would have been otherwise if the existing contract had been terminated and a new agreement substituted[198] at a higher rate of pay, or if the promise had been made to compromise a dispute,[199] or if uncontemplated risks had arisen.[200] Then the crew would have provided consideration by entering into the new agreement, or forbearing to exercise what were or were believed to be their legal rights or by undertaking to do more than they were contractually bound to do. So where a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles, and the vessel proved to be unseaworthy, a promise of extra reward to induce him to abide by his agreement was held to be binding.[201]

Practical benefit

Even where the promise is only to perform the existing contractual obligation, the performance may in fact be detrimental to a performing party whose time or money could have been used to greater advantage elsewhere. It may also be beneficial to the promisee because 'a bird in the hand is worth more than a bird in the bush'[202] and because damages for breach of contract might not compensate fully.[203] In *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.*:[204]

R & N Ltd. contracted to refurbish a block of 27 flats. It sub-contracted the carpentry work to W for an agreed price of £20,000. W completed nine of the flats but got into financial difficulties because the agreed price was too low and because he failed to supervise his workforce adequately. R & N was concerned about delay because the main contract contained a penalty clause. It offered to pay W an additional £10,300 at the rate of £575 for each flat in which the carpentry work was completed. Eight further flats were completed but R & N made only one further payment of £1,500. W ceased work and sued for the additional sum promised. One of the grounds on which R & N resisted this claim was that W had given no consideration for their promise to pay the additional sum since he was promising to do no more than he was already bound to do by his sub-contract.

This defence failed. In the Court of Appeal Glidewell L.J. stated:[205]

(i) If A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

[197] *Per* Lord Ellenborough C.J. at p. 319.
[198] See *post*, p. 490.
[199] *Wigan* v. *Edwards* (1973) 1 A.L.R. 497; see *ante*, p. 100.
[200] *Hartley* v. *Ponsonby* (1857) 7 E. & B. 872.
[201] *Turner* v. *Owen* (1862) 3 F. & F. 176.
[202] *Corbin on Contracts* (1963), § 172. See also *Foakes* v. *Beer* (1884) 9 App. Cas. 605, *per* Lord Blackburn at p. 622.
[203] *Post*, pp. 561, 568, 586 (limitations on damages).
[204] [1991] 1 Q.B. 1.
[205] At pp. 15–16.

The Court identified several 'practical' benefits to R & N. These were: W's continued performance, avoiding a penalty for delay under the main contract, avoiding the trouble and expense of engaging others to complete the carpentry, and replacing a haphazard method of payment by a more formalized scheme which produced more orderly performance by W and thus enabled R & N to direct its other traders to do work in the completed flats which otherwise would have been held up until W completed his work.[206] It is clear that it was the development of economic duress as a method of controlling improper pressure that enabled the Court to take a more flexible approach to the requirement of consideration.[207]

> Now that there is a properly developed doctrine of the avoidance of contracts on the grounds of economic duress, there is no warrant for the court to fail to recognize the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.[208]

The recognition of 'practical' benefit as consideration could be a significant step towards the overt recognition that all promises made without duress in a commercial context give rise to enforceable contractual obligations. Several factors, however, make it difficult to assess whether this decision will be the catalyst or whether its impact will be more limited. First, the principle in *Stilk* v. *Myrick*, although refined and limited, was not overruled.[209] It appears from this that, where there is no 'practical' benefit to the promisor, the promise will be 'gratuitous' and unenforceable. Secondly, on the facts of *Williams* v. *Roffey Bros.*, although W did not undertake to do any work additional to that which he had originally undertaken to do, the institution of and adherence to the new work scheme was consideration since he was not obliged to perform in that way.[210] Thirdly, as will be seen, in the context of part-payment of a money debt, the Court of Appeal has, since *Williams* v. *Roffey Bros.*, declined to have regard to 'practical' benefit.[211]

The notion of 'practical' benefit has been criticized[212] as imprecise, as including the chance of a benefit, as putting into question the adequacy of contract damages and as undermining the strength of the obligation to perform a contract by recognizing, as Purchas L.J. did,[213] that a contracting party can rely upon his own breach to establish consideration. We shall, however, see that rigid adherence to

[206] At pp. 11, 19, 20.

[207] At pp. 13–14, 21. See also *Pao On* v. *Lau Yiu Long* [1980] A.C. 614, at pp. 624–35, *ante*, pp. 103–4.

[208] *Vantage Navigation Cpn.* v. *Suhail and Saud Bahwan Building Materials Llc. (The Alev)* [1989] 1 Lloyd's Rep. 138, *per* Hobhouse J. at p. 147.

[209] At pp. 16, 19, 20. See also *Anangel Atlas Comp. Nav. S.A.* v. *Ishikawajima-Harima Heavy Industries Co. Ltd. (No. 2)* [1990] 2 Lloyd's Rep. 526, at pp. 554–5.

[210] It seems clear that this consideration can be found in the *performance*; i.e the contract was *unilateral*. It is less clear that there was a new bilateral contract because, although Russell L.J. (at p. 19) considered that 'the terms upon which [W] was to carry out the work were varied', Purchas L.J. (at p. 23) stated that there was 'no obligation added to the contractual duties' and Glidewell L.J. did not address the point.

[211] *Re Selectmove Ltd.* [1995] 1 W.L.R. 474, at p. 481, *post*, p. 108.

[212] Chen Wishart, in Beatson and Friedmann eds., *Good Faith and Fault in Contract Law* (1995), Ch. 5; Coote (1990–91) 3 J.C.L. 23.

[213] [1991] 1 Q.B. 1, at p. 23.

the pre-existing duty rule has also been criticized as invalidating many commercially desirable renegotiations and that, before the development of economic duress, it was necessary to have recourse to equitable principles to protect the renegotiated transaction. Now that adequate safeguards exist against improper pressure there would seem to be no very convincing reason why a promise to perform or performance of, any existing duty, including public duties, should not be sufficient consideration provided that it is not contrary to public policy.[214]

(i) Discharge of an Existing Duty

Discharge of duty no consideration

The principle that the performance of an existing duty owed to the promisor is an unreal consideration has been applied not only to the creation of a new obligation, but also to the discharge of the existing duty itself. Thus if A owes B a debt of £200, and B agrees to accept £100 in full satisfaction of the debt, B is not bound by the agreement and may subsequently sue for the whole amount. The payment by a debtor of a smaller sum in satisfaction of a larger is not a good discharge of a debt. Such payment is no more than the promisee is already bound to do, and is no consideration for a promise, express or implied, to forgo the residue of the debt.

Unless a difference exists

If, however, there is a dispute as to the amount due[215] or the thing done or given by the promisee debtor is different from that which the recipient was entitled to demand,[216] however slight the difference, it will be sufficient consideration for the promise to discharge. Even the performance of the identical obligation will be effective if it is to take place at an earlier date or in a different place. So in *Pinnel's Case*:[217]

> Pinnel brought an action in debt on a bond against Cole for payment of £8 10*s*. on 11 November 1600. Cole pleaded that, at the instance of Pinnel, he had paid him the sum of £5 2*s*. 2*d*. on 1 October, and that Pinnel had accepted this in full satisfaction of the debt.
>
> The Court of Common Pleas stated that the payment of a lesser sum on the day in satisfaction of a greater was no satisfaction of the whole; and this principle (although not part of the *ratio decidendi*) is usually known today as the rule in *Pinnel's Case*. The Court recognized that 'the gift of a horse, hawk or robe, etc. in satisfaction is good' because it 'might be more beneficial to the plaintiff than the money . . ., or otherwise the plaintiff would not have accepted it in satisfaction'. Judgment was given for the plaintiff on a technical point of pleading;[218] but the fact that the payment and the acceptance of part of the money had taken place

[214] *Williams* v. *Williams* [1957] 1 W.L.R. 148, *per* Denning L.J. at 150. See also, *ante*, p. 102, n. 178.
[215] *Ante*, p. 100.
[216] Even a negotiable instrument (such as a cheque) for the smaller amount would at one time suffice, provided it was accepted by the creditor in discharge of the obligation (*Goddard* v. *O'Brien* (1882) 9 Q.B.D. 37), but this is no longer the case (*D. & C. Builders Ltd.* v. *Rees* [1966] 2 Q.B. 617).
[217] (1602) 5 Co. Rep. 117a. In *Vanbergen* v. *St. Edmund's Properties Ltd.* [1933] 2 K.B. 223, however, it was stated that the new element must not have been introduced merely to oblige the debtor and without any independent benefit to the creditor.
[218] See generally Simpson, *A History of the Common Law of Contract* (1975), pp. 105–6.

before the due day would otherwise have resulted in judgment for the defendant, for the difference in time would have constituted sufficient consideration for the promise to discharge the debt.

Foakes v. *Beer*

The rule in *Pinnel's Case* was considered and reaffirmed by the House of Lords nearly three centuries later in the leading case of *Foakes* v. *Beer*:[219]

Dr Foakes was indebted to Mrs Beer on a judgment for the sum of £2,090. Mrs Beer agreed that if Foakes paid her £500 in cash and the balance of £1,590 in instalments she would not take 'any proceedings whatever' on the judgment. Foakes paid the money exactly as required, but Mrs Beer then claimed an additional £360 as interest on the judgment debt. When sued, Foakes pleaded that his duty to pay interest had been discharged by the promise not to sue.

Their Lordships differed as to whether, on its true construction, the agreement merely gave Foakes time to pay, or was intended to cover interest as well, but they held that, even on the latter construction, there was no consideration for the promise. Foakes therefore remained bound to pay the additional sum. 'It is', said the Earl of Selborne,[220] 'not really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation'.

Lord Blackburn recognized that business people 'do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights',[221] particularly where the credit of the debtor is doubtful, but the House of Lords decided that a practical benefit of that nature is not good consideration. In *Re Selectmove Ltd.*[222] it was said that the principle that 'practical' benefit may amount to consideration recognized in *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.*[223] could not, consistently with the doctrine of precedent, be extended to an obligation to make payment because 'it would in effect leave the principle in *Foakes* v. *Beer* without any application'.

It has been argued that the rule is supportable on the ground that the law should not favour a person who is excused money which he ought to pay any more than a person who is promised money which has not been earned. On the other hand, it is open to the criticism that it not only runs counter to ordinary commercial practice, but that, taken in conjunction with the rule that the law will not inquire into the adequacy of consideration, it may lead to absurd results. 'According to English Common Law', said Jessel M.R.,[224] 'a creditor may accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfaction; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19*s.* 6*d.* in the pound'. There is also now a distinction which is difficult to justify on principle between obligations to render services, where practical ben-

[219] (1884) 9 App. Cas. 605.
[220] At p. 613.
[221] At p. 622. See also *ibid.*, *per* Lord Fitzgerald at p. 630.
[222] [1995] 1 W.L.R. 474, *per* Peter Gibson L.J. at p. 481. See Peel (1994) 110 L.Q.R. 353. See also *Ferguson* v. *Davis* [1997] 1 All E.R. 315.
[223] *Ante*, p. 105.
[224] *Couldery* v. *Bartrum* (1881) 19 Ch. D. 394, at p. 399.

efit is recognized, and obligations to pay money, where it is not. The rule enables a creditor to go back on an agreement solemnly entered into and intended to affect legal relations; and there are no strong policy considerations which would demand the application of the doctrine of consideration to the discharge, as opposed to the formation, of contracts.[225]

The Law Revision Committee, in 1937,[226] recommended the abolition of the rule in *Pinnel's Case* where the promisee had carried out his side of the agreement, but this reform has never been implemented. It would seem that the only way forward is for the House of Lords to reconsider its decision in *Foakes* v. *Beer* in the light of the recognition of 'practical' benefit and other developments, in particular the neutralization of the rule by the equitable principle of promissory estoppel in cases where the debtor's position has been altered in reliance on the promise. Before considering the equitable principle we shall consider two common law exceptions to the rule. The first is where a debtor makes a composition with creditors; the second is where part payment of a debt is made by a third party to the contract.

Compositions with creditors

A composition with creditors (apart from the statutory prohibition of preference by debtors who later become bankrupt)[227] is an exception to the rule, inasmuch as each creditor undertakes to accept a lesser sum than is due in satisfaction of a greater. All are bound, both at common law and by virtue of statute.[228] As far as the common law position is concerned, there is no difficulty as to the consideration between the creditors *inter se*; it is the forbearance on the part of each of them to claim the whole amount of their debt so that no one creditor may gain at the expense of the others. But it is difficult to see how the debtor's promise to pay, or the payment of, a portion of the debt can constitute the consideration upon which the creditor renounces the residue.[229]

The consideration must, then, be something other than the payment of a smaller sum in satisfaction of a larger, and it has been suggested that it consists in the procuring of a promise from each creditor to accept less than the full amount of the individual debt, thereby conferring a benefit on the creditors generally.[230] This solution is satisfactory so far as it goes, for there is no doubt that such a consideration would be sufficient, but it cannot apply to a case in which the debtor

[225] Sir Frederick Pollock, *Principles of Contract*, 13th edn. (1950), p. 150, considered as illegitimate the extension of the doctrine from formation to discharge. See also Kötz, *European Contract Law* (1997), pp. 68–71 and note that the Vienna Convention on Contracts for the International Sale of Goods, Art. 29(1) provides that 'a contract may be modified or terminated by the mere agreement of the parties'.

[226] Cmd. 5449. In Canada, provincial statutes have now abolished the rule by providing, as the Ontario Mercantile Law Amendment Act R.S.O. 1990, s. 16 does, that 'Part performance of an obligation either before or after the breach thereof, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation'.

[227] Insolvency Act 1986, ss. 340–2 (*post*, p. 349). See also Deeds of Arrangement Act 1914.

[228] Insolvency Act 1986, s. 260(2). A voluntary arrangement pursuant to the statute is not a contract with the debtor: *Johnson* v. *Davies* [1997] 1 W.L.R. 1511.

[229] *Fitch* v. *Sutton* (1804) 5 East 230, at p. 232.

[230] *Good* v. *Cheesman* (1831) 2 B. & Ad. 328.

does not in fact procure the creditors' promises.[231] In such cases the consideration does not move from the debtor.[232] A more acceptable reason for the existence of this exception would seem to be that a party to such an arrangement cannot claim the original debt because to do so would be to commit a fraud on the other creditors.[233]

Part payment by third party

This would also account for the existence of the second exception, that a creditor who accepts, in full satisfaction, part payment of a debt by a third party cannot later recover the balance from the debtor. In *Hirachand Punamchand* v. *Temple*:[234]

A father wrote to the plaintiffs, his son's creditors, offering to pay part of a debt due on a promissory note in satisfaction of the whole, and enclosing a draft for that amount. The plaintiffs cashed the draft, and then sued the son for the balance.

The Court of Appeal held that the creditors must be deemed to have accepted the draft in full satisfaction, and that the son's debt was extinguished. It approved a *dictum* of Willes J. in *Cook* v. *Lister*:[235] 'If a stranger pays part of the debt in discharge of the whole, the debt is gone, because it would be a fraud on the stranger to proceed'. These two exceptions could therefore be considered to be based on reasons of policy rather than on logical evasions of the strict doctrine of consideration.

IV. Promissory Estoppel

In practice the most significant limit to the rule in *Pinnel's Case* is also to be found in equitable principle of estoppel, in this context promissory estoppel which, as we have noted, neutralizes the effect of the rule in many cases. Here we consider the extent to which promissory estoppel operates in effect as an alternative to consideration in the discharge or modification of existing duties and its potential to operate in this way in the formation of contracts.

Before turning to the requirements for the establishment of a promissory estoppel, it should be noted that it is only one form of estoppel. We saw in Section II of this chapter that equity may, by the principle of estoppel, provide a remedy in respect of an agreement that does not comply with statutory requirements of form. Promissory estoppel is one strand in a broader equitable principle whereby parties to a transaction who have conducted their dealings in reliance on an under-

[231] Cf. *West Yorkshire Darracq Agency Ltd.* v. *Coleridge* [1911] 2 K.B. 326. [232] *Ante*, p. 95.

[233] *Wood* v. *Roberts* (1818) 2 Stark. 417. Another reason (*Corbin on Contracts* (1963), § 190) is that, subject to the statutory prohibition on preferences (Insolvency Act 1986, s. 340), the debtor's consideration lies in giving up the opportunity of treating his creditors unequally.

[234] [1911] 2 K.B. 330. See also *Welby* v. *Drake* (1825) 1 C. & P. 557.

[235] (1863) 13 C.B.N.S. 543, at pp. 594, 595. This is not also an exception to the rule that a non-party to a contract (here the debtor) cannot enforce it (*post*, p. 407) because the transaction between the creditor and the person who pays is best seen as an executed (complete) gift to the debtor of the discharge of the debt: see Birks and Beatson (1976) 92 L.Q.R. 188, 193–99.

lying assumption as to a present, past, or future state of affairs, or a promise or representation by words or conduct by one that strict legal rights will not be insisted upon, will not be allowed to go back on that assumption, promise or representation when it would be unfair or unjust to do so.[236] The Court will do what is necessary, but not more, to prevent a person who has relied upon such an assumption, promise, or representation from suffering detriment.[237] Promissory estoppel also has similarities to the common law principle of waiver by which the right to performance in accordance with the contract may be lost by a party who in effect promises (albeit without consideration) not to insist on strict adherence to the contract. Waiver is considered in the chapter on Discharge by Agreement.[238]

(a) Effect on Existing Duty

Promissory estoppel was invoked by Denning J. in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*:[239]

In 1937 the plaintiff leased to the defendant a block of flats for a term of 99 years at a rent of £2,500 a year. In 1940, many of the flats were empty, on account of the war, and the plaintiff agreed to reduce the rent to £1,250. In 1945 the situation had returned to normal and the flats were again full. A receiver for the debenture holders of the plaintiff brought an action against the defendant claiming the full original rent both for the future and also for the last two quarters of 1945.

Denning J. held that the action should succeed. It was the intention of the parties that the reduction of rent was to be a temporary expedient while the flats could not be fully let, and that it had ceased to apply early in 1945; therefore the full rent was payable for the last two quarters of 1945, which was all that was actually claimed in the action. The importance of the judgment, however, lies in his contention that, had the plaintiff sued for the full rent between 1940 and 1945, it would have been *estopped* by its promise from asserting its strict legal right to demand payment in full.

He relied on the decision of the House of Lords in *Hughes* v. *Metropolitan Railway Co.*:[240]

H served on M a notice to repair, within 6 months, houses held on lease from him. Failure to comply with this notice within the stipulated period would entitle H to forfeit the lease. The parties then negotiated for the purchase by H of M's lease and these continued for almost the entire period of the notice. Shortly before the notice was due to expire, H broke

[236] *Crabb* v. *Arun D.C.* [1976] Ch. 179 (proprietary estoppel); *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84, at p. 122 (estoppel by convention). But cf. *First National Bank plc* v. *Thompson* [1996] Ch. 231, *per* Millett L.J. at 236 (the 'attempt to demonstrate that all estoppels . . . are now subsumed in the single and all embracing estoppel by representation . . . has never won general acceptance').

[237] *Crabb* v. *Arun D.C.* (*supra*, n. 236), at p. 198; *Commonwealth* v. *Verwayen* (1990) 170 C.L.R. 394, at p. 413 (Australia).

[238] *Post*, Chapter 13.

[239] [1947] K.B. 130.

[240] (1877) 2 App. Cas. 439. See also *Birmingham and District Land Co.* v. *L. & N.W. Ry.* (1888) 40 Ch. D. 268. Contrast the view of this case advanced by Gordon [1963] C.L.J. 222.

off the negotiations, and, upon expiry, brought an action for possession claiming to have forfeited the lease.

The House of Lords held that, by entering into negotiations, H impliedly promised to suspend the notice previously given and that M had acted upon this promise by doing nothing to repair the premises. H was not to be allowed to take advantage of the forfeiture which occurred, and therefore the 6 months' period was to run only from the breakdown of the negotiations. Lord Cairns described the principle as follows:[241]

> If parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

Denning J. stated that the application of this principle led logically to the conclusion that 'a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration'.[242]

Criticisms

The correctness of Denning J.'s *dictum*[243] has, however, been the subject of considerable controversy,[244] and it received a cold welcome from academic writers of an orthodox frame of mind. In particular, two criticisms have been levelled against it.

Rule in *Jorden* v. *Money*

First, it is argued that the concept of 'promissory' estoppel offends against the rule in *Jorden* v. *Money*[245] in which it was held that only a representation of existing or past fact, and not one relating to future conduct, will ground an estoppel. The doctrine of estoppel would not therefore apply, as in the *High Trees* case, to a promise as to the future. The rule in *Jorden* v. *Money*, however, is not an absolute one, and it is qualified by a number of exceptions.[246] One of these exceptions is that principle expressed by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.*, which applies where two parties stand together in a contractual or other similar legal relationship, and one of them makes to the other a promise to forbear from enforcing its strict legal rights. To this situation the rule in *Jorden* v. *Money* has no application.

Inconsistent with *Foakes* v. *Beer*

Secondly, it is said that the *dictum* of Denning J. is inconsistent with the decision of the House of Lords in *Foakes* v. *Beer*. But the principle upon which

[241] At p. 448.

[242] [1947] K.B. 130, at p. 135.

[243] Being based on hypothetical facts, it is *obiter dictum* and not *ratio decidendi*.

[244] See Cheshire and Fifoot (1947) 63 L.Q.R. 283; (1948) 64 L.Q.R. 28; Wilson (1951) 67 L.Q.R. 330; Lord Denning (1952) 15 M.L.R. 1; Sheridan (1952) 15 M.L.R. 338; Bennion (1953) 16 M.L.R. 441; Guest (1956) 30 Aust. L.J. 187; Fridman (1957) 35 Can. Bar Rev. 279; Gordon [1963] C.L.J. 222; Campbell (1964) 1 N.Z. Univ. L.R. 232; Jackson (1965) 81 L.Q.R. 84, 223; Wilson [1965] C.L.J. 93; Thompson [1983] C.L.J. 257.

[245] (1854) 5 H.L.C. 185, and applied in *Citizen's Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352; *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, at p. 473.

[246] See Jackson (1965) 81 L.Q.R. 84, 223.

he relied in the *High Trees* case was that of estoppel, which must be specially pleaded. A plea of estoppel was never raised in *Foakes* v. *Beer*.

Scope of principle

The principle of promissory estoppel has subsequently been recognized in a number of cases,[247] and with its recognition has come a more precise definition of its scope.

Clear promise

In the first place, the promise must be clear and unequivocal,[248] although it need not be express and may be implied from words or conduct.[249] No estoppel can arise if the language of the promise is indefinite or imprecise and silence and inaction, for example the absence of protest about a breach, will not normally estop a party from relying on the breach.[250] Where, however, the language is clear, no question arises of any particular knowledge by the promisor.[251]

Inequitable to go back on promise

Secondly, it must be inequitable for the promisor to go back on the promise and insist on the strict legal rights under the contract. This may be illustrated from the case of *D. & C. Builders Ltd.* v. *Rees*:[252]

R owed £482 to the plaintiff, a small building company, in respect of work done for him. He delayed payment for several months, and then offered the plaintiff £300, stating in effect that if it did not accept this sum it would get nothing. As the plaintiff was in desperate financial straits, it accepted the £300 in full settlement of the debt. It then sued for the balance.

Lord Denning M.R. took the view that it was not inequitable for the plaintiff to go back on its promise; the settlement was not truly voluntary as the defendant had improperly taken advantage of the plaintiff's weak financial situation.[253] The defendant was therefore liable for the balance. Although there has been little other guidance as to when it will not be inequitable for a person to go back on such a promise, pointers as to what conduct will and what conduct will not be acceptable while renegotiating a contract can be found in the developing doctrine of duress.[254]

[247] As well as the cases discussed below, see *Tungsten Electric Co. Ltd.* v. *Tool Metal Manufacturing Co. Ltd.* (first case) (1950) 69 R.P.C. 108; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761; *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326; *Durham Fancy Goods Ltd.* v. *Michael Jackson Fancy Goods Ltd.* [1968] 2 Q.B. 839; *Covell* v. *Sweetland* [1968] 1 W.L.R. 1466; *Re Wyvern Developments Ltd.* [1974] 1 W.L.R. 1097, at pp. 1104–5; *Bremer Handelsgesellschaft m.b.H.* v. *Vanden Avenne-Izegem* [1977] 1 Lloyd's Rep. 133, at p. 165, aff'd [1978] 2 Lloyd's Rep. 109, at p. 127 (H.L.); *Nippon Yusen Kaisha* v. *Pacifica Navegacion S.A.* [1980] 2 Lloyd's Rep. 245; *K. Lokumal & Sons (London) Ltd.* v. *Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd's Rep. 28; *The 'Stolt Loyalty'* [1993] 2 Lloyd's Rep. 281. Cf. *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741, at pp. 758, 762.

[248] *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co. Ltd.* (*supra*, n. 247), at pp. 757, 758, 761, 762, 767–8, 771; *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera Ecuatoriana* [1983] Q.B. 549 (affd. [1983] 2 A.C. 694).

[249] *Hughes* v. *Metropolitan Railway Co.* (*supra*, n. 240). It is unlikely to arise where the negotiations are 'subject to contract': *Attorney-General for Hong Kong* v. *Humphreys Estates (Queen's Garden)* [1987] 1 A.C. 114.

[250] *Société Italo-Belge pour le Commerce et l'Industrie* v. *Palm & Vegetable Oils (Malaysia) Sdn. Bdh.* [1982] 1 All E.R. 19, at p. 25; *Vitol S.A.* v. *Esso Australia Ltd.* [1989] 2 Lloyd's Rep. 451, at p. 460.

[251] *Youell* v. *Bland Welch & Co. Ltd.* [1990] 2 Lloyd's Rep. 423, at pp. 448–50. (Cf. waiver where knowledge of all material facts is required.)

[252] [1966] 2 Q.B. 617. See also *P.* v. *P.* [1957] N.Z.L.R. 854.

[253] Cf. Danckwerts and Winn L.JJ. at pp. 626, 632–3, who applied the rule in *Pinnel's Case*.

[254] *Post*, p. 274.

Alteration of position

Thirdly, it has been said that the promisee must have 'altered his position' in reliance on the promise made.[255] There is, however, some doubt as to what is meant by this requirement. Normally, where it is sought to prove an estoppel, it must be shown that the person to whom the representation is made has acted detrimentally in reliance on it. If we regard these ideas as fundamentally similar, then the alteration of position which results from the promise must be such that, if the promise is revoked, the promisee will be in a worse position than if the promise had never been made. It is because the position of the promisee has been prejudiced that it is inequitable for the promisor to go back on the promise. In *Hughes* v. *Metropolitan Railway Co.* this requirement was clearly satisfied, since M had refrained from carrying out repairs in reliance on the promise and had thus lost the time which it would have enjoyed had the negotiations never taken place. On the other hand, in the *High Trees* case, no evidence was adduced to show any alteration of position by the tenant company, in the sense that it arranged, or omitted to arrange, its affairs any differently as a result of the promise.[256] The only thing it did in reliance on the promise was to pay part of the debt which it was contractually bound to pay. If the landlord had gone back on its promise, and claimed the full rent between 1940 and 1945, the tenant would have been in no worse position than if the promise had never been made. The *High Trees* case cannot in consequence be regarded as completely *in pari materia* with *Hughes* v. *Metropolitan Railway Co.* although, at common law, the waiver of an existing obligation does not require such detrimental reliance so long as it has been accepted and acted upon by the other party.[257]

That a weaker form of reliance will suffice is supported by Lord Cairns's statement of principle. He said that the person seeking to enforce his rights will not be allowed to do so 'where it would be inequitable having regard to the dealings which have thus taken place between the parties'. It is therefore arguable that it is for the Court to decide, on the totality of the evidence produced to it, whether the dealings between the parties are such as to render it inequitable for the promisor to go back on the promise. The promisee may have acted differently as a result of the promise even though it cannot be proved that any prejudice has been suffered as a result of the making of the promise. For instance, in *Société Italo-Belge pour le Commerce et l'Industrie* v. *Palm and Vegetable Oils (Malaysia) Sdn. Bdh.*:[258]

[255] *Tungsten Electric Co. Ltd.* v. *Tool Metal Manufacturing Co. Ltd.* (1950) 69 R.P.C. 108, at pp. 112, 115–16; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761, at pp. 764, 784; *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, at p. 1330; *Re Wyvern Developments Ltd.* [1974] 1 W.L.R. 1097, at p. 1104.

[256] It could be suggested that the tenants had 'altered their position' by relying on the informal promise and failing to secure a formal release under seal or by refraining from seeking alternative finance or declaring themselves bankrupt.

[257] *W. J. Alan & Co. Ltd.* v. *El Nasr Export and Import Co. Ltd.* [1972] 2 Q.B. 189, at p. 213, but cf. *ibid.*, at p. 221, for the view that there was detrimental reliance. See *post*, p. 496 and see further Clarke [1974] C.L.J. 260.

[258] [1982] 1 All E.R. 19. See also *Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrola Ecuatoriana* [1983] Q.B. 549 (affd. [1983] 2 A.C. 694); *Goldsworthy* v. *Brickell* [1987] Ch. 378, at p. 411.

The buyers of a cargo of palm oil did not protest about the sellers' failure to make a 'declaration of ship' in writing as soon as possible after sailing and asked the sellers to pass the shipping documents to a sub-buyer, a request that was held to be a representation that they were prepared to accept them and a waiver of any defect in them. The sub-buyer rejected the documents within 2 days and the buyers purported to do so as well.

It was stated that to establish inequity within Lord Cairns's principle, 'it is not necessary to show detriment; indeed the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights'.[259] Thus, on facts such as those in the *High Trees* case although the tenant may have benefited from the reduction in rent, it may have been lulled into a state of false security[260] and have conducted its affairs on the basis that it would only have to pay rent at the lower rate, for instance by ceasing to attempt to renegotiate the transaction or to seek alternative finance, or by deciding not to declare itself bankrupt. Such an alteration of position by the promisee would be a cogent factor to be taken into account in deciding this issue.[261] It does not, however, follow that in every case where there is such reliance by the promisee that it will be inequitable for the promisor to enforce the contract and in *Société Italo-Belge pour le Commerce et l'Industrie* v. *Palm and Vegetable Oils (Malaysia) Sdn. Bdh.*, although the sellers had actively relied on the buyers' representation by presenting the documents, the very short time between the representation and the rejection of the documents meant that, in the absence of evidence that the sellers' position had been prejudiced, it was not inequitable for the buyers to enforce their legal right to reject the documents.

Despite the absence of a requirement of 'detriment', the requirement that the promise be 'acted upon' means that there is, in this respect, a clear distinction from contracts supported by consideration which are enforceable even if wholly executory.[262]

Suspensive or extinctive?

Finally, it has been suggested that promissory estoppel only serves to suspend, and not wholly to extinguish the existing obligation; the promisor may, on giving due notice, resume the right which has been waived and revert to the original terms of the contract.[263] Thus in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*:[264]

[259] At p. 27.

[260] *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84, at p. 108.

[261] *Combe* v. *Combe* [1951] 2 K.B. 215, at pp. 220, 225; *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 1 W.L.R. 761, at p. 799 (where, see *infra*, the promisees continued to produce over quota); *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, at p. 482; *Youell* v. *Bland Welch & Co. Ltd.* [1990] 2 Lloyd's Rep. 423, at pp. 452–4.

[262] See *Waltons Stores (Interstate) Ltd.* v. *Maher* (1988) 164 C.L.R. 387, *per* Mason C.J. and Wilson J. at p. 406, *post*, p. 120. Cf. Lord Denning, who has contended extra-judicially that the repudiation of a promise solemnly given, and intended to affect legal relations, is in itself inequitable: (1952) 15 M.L.R. 1, 6–8.

[263] *Birmingham and District Land Co.* v. *L. & N.W. Ry.* (1888) 40 Ch. D. 268, at p. 286; *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, at p. 1330; See also Wilson (1951) 67 L.Q.R. 330; [1965] C.L.J. 93.

[264] [1955] 1 W.L.R. 761.

In 1938 the appellant granted to the respondent a licence to import, make, use, and sell certain hard metal alloys it had patented. The respondent was to pay royalties, and, if the amount of material made exceeded a named quota, 'compensation'. On the outbreak of war, the appellant agreed to suspend its right to compensation, the parties contemplating that a new agreement would be entered into when the war ended.

In 1945, the appellant claimed to have revoked its suspension and to be entitled to compensation from 1 June 1945. This claim failed on the ground that the revocation was premature as no adequate notice had been given to the respondent.

In 1950, the appellant brought the present action, claiming compensation from 1 January 1947, at which date the respondent was fully aware that the appellant was determined to revert to the original agreement.

The House of Lords held that the appellant had effectively revoked its promise to suspend its legal rights and that it was entitled to the compensation claimed; the equitable principle enunciated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.* was applicable to the situation, but the promisor might, on giving adequate notice to the promisee, resume its rights under the original agreement. As Bowen L.J. had said in an earlier case:[265]

> If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.

The temporary effect of the estoppel raised is, it has been argued, the characteristic of the doctrine and the reason why it should be considered a 'quasi-estoppel' rather than a true example of estoppel in equity or at common law.

It is, however, submitted that this is not a necessary limitation, and that promissory estoppel can extinguish, as well as suspend the promisee's obligations. For example, it is clear that the promise will become 'final and irrevocable if the promisee cannot resume his position'.[266] Otherwise, the effect of the estoppel will depend on the terms and intent of the promise. No doubt, as a normal rule, where the contract imposes an obligation to make periodic payments of money, such as the 'compensation' in the *Tool Metal* case, rent under a lease,[267] or instalments under a hire-purchase agreement,[268] a promise to waive part of these payments will be construed to mean that the promisor reserves to himself the right, on giving reasonable notice, to demand that future payments be made in full.[269] But it has been assumed, although not decided, that the right to claim the balance of past payments is foregone and is thus extinguished,[270] unless the promise is one which simply allows the promisee to postpone payment but does not extinguish the

[265] *Birmingham and District Land Co.* v. *L. & N.W. Ry.* (1888) 40 Ch. D. 268, at p. 286.
[266] *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326, at p. 1330. See also *Nippon Yusen Kaisha* v. *Pacifica Navigacion S.A.* [1980] 2 Lloyd's Rep. 245.
[267] *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.
[268] *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* (*supra*, n. 266).
[269] *Banning* v. *Wright* [1972] 1 W.L.R. 972, at p. 981.
[270] *Central London Property Trust Ltd.* v. *High Trees House Ltd.* (*supra*, n. 267); *Tungsten Electric Co. Ltd.* v. *Tool Metal Manufacturing Co. Ltd.* (1950) 69 R.P.C. 108; *P.* v. *P.* [1957] N.Z.L.R. 854.

debt.[271] This assumption seems correct. If the promise is such as unequivocally to indicate the intention of the promisor wholly to abandon all right to payment of the money contractually due, whether periodically or as a lump sum, there is no reason why the estoppel should not be held to have permanent effect.[272]

(b) Promissory Estoppel and the Formation of Contracts

It has been seen that the principle of promissory estoppel has been employed to obviate the necessity for consideration in cases where parties are already bound contractually one to the other and one of them promises to waive, modify, or suspend its strict legal rights. The question therefore arises whether the principle might similarly be employed as a supplement or alternative to consideration as a necessary element in the formation of contracts. If it could be so employed, there would be two routes to the legal enforceability of a promise; first the furnishing of consideration by the promisee in the form of the incurring of detriment or the conferral of benefit in return for the promise, and secondly, where the promise was intended to affect legal relations and to be acted upon by the promisee, where the promisee's position had been altered in reliance on the promise.[273] This has occurred in some jurisdictions[274] but not yet in England where it is thought to illegitimately outflank the requirement of consideration and where the main doctrinal vehicle for reconciling promissory estoppel and consideration has been the rule that promissory estoppel does not create new causes of action where none existed before; it is 'a shield and not a sword'.[275] It has been said 'that it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in a back-handed way the doctrine of consideration'.[276] Thus in *Combe* v. *Combe*:[277]

> A husband, upon divorce, promised his wife £100 a year as a permanent allowance. In reliance upon this promise, the wife forbore to apply to the Courts for maintenance. The husband failed to make the payments, and the wife sued him on the promise.

The Court of Appeal held that there was no consideration for the promise as the wife's forbearance had not been requested and was not in return for the promise made to her; nor could the wife rely on promissory estoppel, for as Denning L.J. put it:[278]

[271] *Ledingham* v. *Bermejo Estancia Co. Ltd.* [1947] 1 All E.R. 749.
[272] *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, at pp. 484–5; *Sydenham & Co. Ltd.* v. *Enichem Elastometers Ltd.* [1989] 1 E.G.L.R. 257. See also *Maharaj* v. *Chand* [1986] A.C. 898, at p. 908.
[273] See *ante*, p. 114.
[274] *Post*, p. 120.
[275] *Combe* v. *Combe* [1951] 2 K.B. 215, at p. 224.
[276] *Brikom Investments Ltd.* v. *Carr* [1979] Q.B. 467, *per* Roskill L.J. at p. 486; *Argy Trading Development Cpn. Ltd.* v. *Lapid Developments Ltd.* [1977] 1 W.L.R. 444.
[277] [1951] 2 K.B. 215. See also *Morris* v. *Tarrant* [1971] 2 Q.B. 143, at p. 160; *Argy Trading Development Co. Ltd.* v. *Lapid Developments Ltd.* [1977] 1 W.L.R. 444, at p. 457; *Syros Shipping Co. S.A.* v. *Elaghill Trading Co. Ltd.* [1980] 2 Lloyd's Rep. 390, at p. 393; *Hiscox* v. *Outhwaite (No. 3)* [1991] 2 Lloyd's Rep. 524, at p. 535.
[278] At p. 220. See *ante*, p. 89.

Seeing that the principle can never stand alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of a formation of a contract, though not of its modification or discharge.

There are similar statements in other cases[279] but the restriction of promissory estoppel to situations in which no new cause of action is created has not been adhered to consistently and is difficult to justify on any principled basis. First, the pre-existing legal relationship need not be a contractual one; promissory estoppel has been applied to a relationship between neighbouring landowners,[280] to one derived from statute,[281] and even an exchange of correspondence.[282] Secondly, there are cases in which, despite *Combe* v. *Combe*, Courts appear to have been willing to use promissory estoppel as a sword enabling a person to establish the constituent elements of a cause of action.[283] Thirdly, promissory estoppel is only one form of estoppel and it is possible to found a cause of action on other forms, in particular proprietary estoppel and estoppel by convention. They are not subject to the 'shield, not a sword' limitation.

Proprietary estoppel

Proprietary estoppel arises where a person acts in reasonable reliance on the belief that he or she has or will acquire rights in or over the property of another. Thus, in *Crabb* v. *Arun D.C.*:[284]

> The council built a road along the boundary between its property and C's and gave C a point of access to the road. Later C wished to divide his land and sell off one portion. For this purpose C needed a second point of access and, at a site meeting with officers of the council at which he said he would need access at an additional specified point, he was assured that would be acceptable to the council. Later the council fenced off the boundary and erected gates at the two agreed access points. After C sold the front plot without reserving any right of way from the back plot, the council removed the gates at the access point for the back plot and erected a fence, thus leaving the plot landlocked. It then asked C for £3,000 for a right of access. C sought a declaration claiming that he had a right of way over the second point of access.

[279] *Argy Trading Development Co. Ltd.* v. *Lapid Developments Ltd.* [1977] 1 W.L.R. 444, at p. 457; *Syros Shipping Co. S.A.* v. *Elaghill Trading Co.* [1981] 3 All E.R. 189.

[280] *Crabb* v. *Arun D.C.* [1976] Ch. 179 (*infra*, n. 284).

[281] *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227 (soldier and military authorities); *Durham Fancy Goods Ltd.* v. *Michael Jackson Fancy Goods Ltd.* [1968] 2 Q.B. 839 (statutory liability on director).

[282] *Pacol Ltd* v. *Trade Lines Ltd.* [1982] 1 Lloyd's Rep. 456, at p. 466 and *K. Lokumal & Sons (London) Ltd.* v. *Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd's Rep. 28 but cf. *Shearson Lehman Hutton Inc.* v. *MacLaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570, at pp. 596, 604.

[283] *Re Wyvern Developments Ltd.* [1974] 1 W.L.R. 1097, at p. 1104 (although there may have been consideration in this case—Atiyah (1974) 38 M.L.R. 65, 67—the detriment to the promisee was not requested); *Durham Fancy Goods Ltd.* v. *Michael Jackson Fancy Goods Ltd.* [1968] 2 Q.B. 839, at p. 847; *Evenden* v. *Guildford City Association F.C. Ltd.* [1985] Q.B. 917, at p. 924 (disapproved in *Secretary of State for Employment* v. *Globe Elastic Thread Co. Ltd.* [1980] A.C. 506); *Nippon Yusen Kaisha* v. *Pacifica Navegacion S.A.* [1980] 2 Lloyd's Rep. 245; *Pacol Ltd.* v. *Trade Lines Ltd.* [1982] 1 Lloyd's Rep. 456, at pp. 466–8.

[284] [1976] Ch. 179, on which see Atiyah (1974) 92 L.Q.R. 174; Millett, *ibid.*, 342.

The Court of Appeal granted the relief sought. There was no consideration for the council's undertaking and the formality requirements for a contract for the transfer of an interest in land had not been satisfied. But the council, at the meeting and by its conduct in putting up the gates, had led C to believe that he had or would be granted a right of access at the specified point and it was inequitable for it to insist on its strict title. The basis of proprietary estoppel lies in cases of improvements to specific property in the mistaken belief that the improver has or will be given ownership with the owner positively encouraging this detrimental reliance[285] or by standing by and acquiescing in it.[286] Not all cases, however, involve such improvements; in some other services were rendered in the belief that ownership would be given.[287] This form of estoppel is narrower than promissory estoppel in requiring detrimental reliance and the belief that a legal right over property[288] has or will be given, but it is broader in its ability to create new rights. One reason given for allowing the creation of new rights is that the legal owner of the property would otherwise be unjustly enriched by getting the benefit of the improved property for nothing. This does not, however, account for all the cases. For instance, in *Crabb* v. *Arun D.C.* the council would not have been unjustly enriched in this way. Scarman L.J. stated that he did not find the distinction between promissory and proprietary estoppel helpful,[289] and that case has been said to have virtually equated the two as mere facets of the same principle, the root of which is unconscientiousness.[290]

Estoppel by convention

When the parties have acted in a transaction upon a common assumption (either of fact or law, whether due to mistake or misrepresentation) that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of the facts so assumed where it would be unjust and unconscionable to resile from that common assumption.[291] There must be some mutually manifest

[285] *Ramsden* v. *Dyson* (1866) 1 H.L. 129, at p. 170; *Dillwyn* v. *Llewellyn* (1862) 4 D., F. & J. 517; *Pascoe* v. *Turner* [1979] 1 W.L.R. 431. See also Allan (1963) 79 L.Q.R. 238; Jackson (1965) 81 L.Q.R. 84, 223; Moriarty (1984) 100 L.Q.R. 376.

[286] *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustee Co. Ltd.* [1982] Q.B. 133. But cf. *Taylor* v. *Dickens, The Times*, 24 November 1997 (owner had to create or encourage a belief in the other that she would not change her mind). See also *Att.-Gen. of Hong Kong* v. *Humphreys Estates (Queen's Gardens)* [1987] 1 A.C. 114, at p. 124.

[287] *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346 (property management); *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306 (nursing).

[288] In principle this should include all forms of property but the cases, while contemplating property in goods, only provide authority for land.

[289] [1976] Ch. 179, at p. 193.

[290] *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustee Co. Ltd.* [1982] Q.B. 133, at p 153. See also *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84, at pp. 103–4, 122, and *infra*. See also *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196 (no longer inequitable to allow the expectation created to be defeated by the enforcement of legal rights).

[291] *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1982] Q.B. 84, at pp. 126, 130 (approving *Spencer Bower and Turner on Estoppel by Representation*, 3rd. edn., p. 157; *Hiscox* v. *Outhwaite* [1992] 1 A.C. 562, *per* Lord Donaldson M.R. at p. 575; *Norwegian American Cruises A/S* v. *Paul Mundy Ltd.* [1988] 2 Lloyd's Rep. 343, at pp. 351–2 (approving *Hamel-Smith* v. *Pyeroft & Jetsave Ltd.*, 5 February 1987, *per* Peter Gibson J.). The estoppel applies only 'for the period of time and to the extent required by the equity which the estoppel has raised': *Troop* v. *Gibson* (1986) 277 Est. Gaz. 1134, at p. 1144.

conduct by the parties, which is based on a common but mistaken assumption[292] which the parties have agreed on, such agreement may be inferred from conduct or even from silence.[293] In *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.*:[294]

The plaintiff company negotiated with the defendant bank for a loan to one of its subsidiaries to be secured *inter alia* by a guarantee by the plaintiff. The bank decided to make the loan through Portsoken, a subsidiary company it bought for the purpose, but the plaintiff's guarantee related to *moneys due to you*, i.e. the bank. The plaintiff got into financial difficulties and was wound up. The bank had sold property belonging to the plaintiff and applied $750,000 of the proceeds in payment of the outstanding balance of the loan made through Portsoken. The plaintiff's liquidator sought a declaration that the plaintiff was under no liability for loans made by Portsoken, and that the bank had not been entitled to apply the money in this way.

The Court of Appeal held that the guarantee, on its true interpretation, applied to loans by Portsoken, but also stated that even if it did not, the plaintiff was estopped from denying the fact by an estoppel by convention: both had assumed that the guarantee would cover loans by Portsoken. Again, although estoppel by convention differs from promissory estoppel since it does not require a representation, the tenor of the judgments is that the different forms of estoppels should not be divided into rigid categories and could be merged together into one general principle shorn of technicalities. Moreover, if the guarantee did not in fact cover loans by Portsoken, in substance the bank was founding a cause of action on the estoppel, although in form it used the estoppel as a defence to the plaintiff's claim for declaratory relief. Brandon L.J. stated that while a person 'cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed'.[295]

A general principle of estoppel preventing unconscientiousness

The tendency to regard the different forms of estoppel as aspects of a wider doctrine makes it difficult to justify restricting promissory estoppel to situations in which a promisee in the position of a defendant seeks to prevent a promisor from enforcing his strict legal rights, or a promisee in the position of a plaintiff has an independent cause of action and seeks to prevent a promisor from setting up a defence in breach of the promise which he has given. The High Court of Australia recognized this and has built on and gone further than *Crabb* v. *Arun D.C.* and *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* In *Waltons Stores (Interstate) Ltd.* v. *Maher*:[296]

M was in negotiations with W to whom he hoped to lease premises which were to be demolished and redeveloped to W's specifications. Solicitors had been instructed to pre-

[292] *Lokumal & Sons (London) Ltd.* v. *Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd's Rep. 28, *per* Kerr L.J. at pp. 34–5.
[293] *Republic of India* v. *India Steamship Co. Ltd. (The Indian Grace) (No. 2)* [1997] 2 W.L.R. 538, *per* Staughton L.J. at p. 549.
[294] [1982] Q.B. 84.
[295] [1982] Q.B. 84, at p. 132. See also *per* Lord Denning M.R. at p. 122. Cf. Eveleigh L.J. at p. 126.
[296] (1988) 164 C.L.R. 387. See also *Restatement* (2d), § 90 (USA); *Harris* v. *Harris* [1989] N.Z. Conv. C. 190, 406 (New Zealand).

pare formal documents and W's solicitors told M's solicitors that 'we believe approval will be forthcoming. Let you know tomorrow if any amendments not agreed to'. Later M submitted a contract and this was sent to W 'by way of exchange'. W did not respond for 2 months because it was privately reconsidering the whole deal and had instructed its solicitors 'to go slow'. Because it believed exchange would take place shortly and because, if the timetable for occupation specified by W was to be met, there was urgency, M started work. Two months later, when he had demolished the old premises and was well advanced with the new premises, W told him it intended to withdraw. M argued *inter alia* that W was estopped from denying that a concluded contract existed.

The majority of the Court, declining to fragment the unity of estoppel, held that promissory estoppel could found a cause of action and extended to the enforcement of voluntary promises; W was accordingly estopped. They did not believe this would abolish the doctrine of consideration 'in a back-handed way' because the two protected different interests. An estoppel remedy only seeks to effect the minimum equity needed to avoid the detriment from reliance and unconscionable conduct whereas, where a promise is supported by consideration, the expectations of the promisee are protected even if the promise is entirely executory and there has been no reliance on it.[297] For instance, on the facts of *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.*,[298] which we have considered, W's expectation was to earn the total contract price (£20,000 plus the additional £10,300 promised) for the carpentry work in the flats but his reliance loss was the value of his work and the cost of materials in the flats in which he had worked, a lesser sum. Moreover, the unconscionability necessary to found an estoppel does not exist wherever a person goes back on a promise. What is necessary, save in the case of estoppel by convention, is the creation or encouragement by the party who is to be estopped (the 'promisor') of an assumption in the other ('the promisee') that a contract will come into existence or a promise will be performed and reliance on that assumption by the promisee to his detriment to the knowledge of the promisor.

This step still has to be taken in England, although, as well as the cases considered above, it has been said to be possible that a party to negotiations set out in a document would be able to raise some form of estoppel to prevent the other from refusing to proceed with the transactions envisaged by the document.[299] We have also seen that where negotiations have not led to the conclusion of a contract, reliance in the form of the rendering of services or delivery of goods by one party on assumptions created or encouraged by the other may give rise to a restitutionary remedy.[300] There are, moreover, examples of reliance generating a contract through unilateral contracts in which promises are rendered legally enforceable by virtue of the performance of an act by the promisee (i.e. reliance), often where the

[297] (1988) 164 C.L.R. 387, at p. 406. On the remedial consequences of this difference, see *post*, pp. 564, 566.

[298] [1991] 1 Q.B. 1, *ante*, p. 105.

[299] *Att.-Gen. of Hong Kong* v. *Humphreys Estates (Queen's Gardens)* [1987] 1 A.C. 114, at pp. 127–8. See also *Akiens* v. *Salomon* (1992) 65 P. & C.R. 364, *per* Evans L.J., dissenting. But cf. *First National Bank plc* v. *Thompson* [1996] Ch. 231, *per* Millett L.J. at 236.

[300] *Ante*, pp. 40, 64 and *Brewer St. Investments Ltd.* v. *Barclays Woollen Co. Ltd.* [1954] 1 Q.B. 428.

promisor has not expressly requested the performance of the act[301] and more recently by the recognition that performance of an existing obligation may be a 'practical' benefit.[302] The doctrinal foundations thus exist for it to be held that promissory estoppel is capable itself of creating a cause of action, notwithstanding that the promisee has provided no consideration.[303] It may be that it has not been *necessary* to do so in the cases that have come before the Courts because either a restitutionary remedy could be found or a bargain exchange could be implied. It is, however, arguable that, until this step is taken, it will not be possible to take up the suggestion made by Lord Hailsham L.C. in 1972 and reduce the sequence of cases based on promissory estoppel to a coherent body of doctrine.[304]

It has, moreover, been argued that it is better to deal with such promises by estoppel than by expanding the concept of consideration, for instance by including 'practical' benefit.[305] This, it is said, would maintain a desirable distinction between non-bargain promises where only reliance is protected and bargains, where expectations are also protected. This does not, however, adequately reflect the fact that in several of the promissory estoppel cases the Court has concluded that the minimum equity needed to avoid the detriment will not be satisfied by anything short of enforcing the promise. Thus, for instance, the effect of the estoppel in the *High Trees* case would have been to prevent the landlord recovering the full rent between 1940 and 1945 and in *Crabb* v. *Arun D.C.* it was to grant C the right of way the council had undertaken to give him. In *Waltons Stores (Interstate) Ltd.* v. *Maher* the effect of the High Court of Australia's ruling that W was estopped from denying that a concluded contract existed appears to have been that M was entitled to damages in lieu of specific performance.[306] In these cases it appears that equitable relief went beyond the protection of reliance.[307]

[301] *Warlow* v. *Harrison* (1858) 1 E. & E. 309, *ante*, p. 56; *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, *ante*, p. 36; *Collen* v. *Wright* (1857) 8 E. & B. 647; *Spiro* v. *Lintern* [1973] 1 W.L.R. 1002; *New Zealand Shipping Co. Ltd.* v. *Satterthwaite & Co. Ltd.* [1975] A.C. 154, at pp. 167–8.

[302] *Ante*, p. 105.

[303] Thompson [1983] C.L.J. 257; Lunner [1992] Conv. 239.

[304] *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741, at p. 758.

[305] Chen-Wishart, in Beatson and Friedmann eds., *Good Faith and Fault in Contract Law* (1995), p. 141 ff, also pointing out (*ibid.*, p. 134) that in *Williams* v. *Roffey Bros. & Nicholls (Contractors) Ltd.* [1991] 1 Q.B. 1, *ante*, p. 105, damages appear only to have been awarded for reliance loss, on which see *post*, p. 566.

[306] The trial judge's decision to this effect was affirmed by the New South Wales Court of Appeal (1986) 5 N.S.W.L.R. 407, and the High Court of Australia (1988) 164 C.L.R. 387. Such damages are assessed on the same basis as damages at common law, see *post*, p. 595 n. 25.

[307] Atiyah, *Essays on Contract* (1986), pp. 239–40; Yorio and Thel (1991) 101 Yale L.J. 111. See also *Commonwealth of Australia* v. *Verwayen* (1990) 170 C.L.R. 394, at pp. 412–13, 429, 487, 501 (not, however, a contract case).

V. Appraisal of the Doctrine of Consideration

Justification

ATTEMPTS have been made to justify the doctrine of consideration on the ground that it is essential both to the form and the substance of a contract. Consideration, it has been argued, is a formal necessity which serves to distinguish those promises by which the promisor intends to be legally bound from those which are not seriously meant: 'buyers intend business where philanthropists may not'.[308] But English law already requires an intent to effect legal relations as a distinct element of a contract. Consideration is cogent evidence of the existence of such an intent, but it is by no means conclusive proof that it is present.[309] The abolition of the doctrine would therefore simply mean that the test of contractual intention would assume a greater significance in the law of contract. Few persons would contend that this constituted an insuperable objection to a change in the law,[310] for foreign systems seem to exist quite happily without the need for consideration.[311]

Similarly, aspects of the doctrine, in particular the pre-existing duty rule, have been justified by the need to discourage improper pressure and coercion, a function now more directly and effectively served by the recent recognition of economic duress ground for avoiding a contract.[312]

Promise or bargain

It has also been argued that English law has made the empirical choice of enforcing bargains in the sense of exchanges rather than promises: 'consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain'.[313] But this does not explain why it is thought better to enforce bargains.[314] Indeed the opposite appears to be the case. Desire to enforce promises had led the Courts on occasion to find a derisory consideration and to construct a bargain where none in fact was present since there was no real exchange. It has been stated that 'ultimately the question of consideration is a formality as in the use of a seal or the agreement to give a peppercorn'[315] and the recognition that a 'practical' benefit will make a promise enforceable[316] makes it difficult to sustain a purely bargain view of contract. Elsewhere, the absence of consideration may enable one of the parties to 'snap his fingers' at a promise deliberately made, and which the person seeking to enforce it has a legitimate interest to enforce.[317] The perception that this is incompatible with such legitimate

[308] Smith and Thomas, *A Casebook on Contract*, 2nd edn. (1961), p. 126.
[309] *Balfour* v. *Balfour* [1919] 2 K.B. 571; *Coward* v. *Motor Insurers' Bureau* [1963] 1 Q.B. 259, *ante*, p. 70.
[310] Cf. Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1971).
[311] Cf. Chloros (1968) 17 I.C.L.Q. 137; Markesinis [1978] C.L.J. 53.
[312] *Ante*, pp. 104, 106; *post*, p. 272 ff.
[313] Hamson (1938) 54 L.Q.R. 233, at p. 234.
[314] It has been said that non-bargain promises are economically sterile (Posner (1977) 6 J. Leg. Stud. 411) and that they should only be enforced if relied upon and only to the extent of the reliance (Eisenberg (1979) 47 U. of Chicago L.R. 1, 3–7).
[315] *Vantage Navigation Cpn.* v. *Suhail & Saud Bahwan Building Materials Llc. (The Alev)* [1989] 1 Lloyd's Rep. 138, *per* Hobhouse J. at p. 147.
[316] *Ante*, p. 105.
[317] *Ante*, p. 101 (pre-exisiting duty cases) and, albeit in the context of a contract for the benefit of a third party, *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847, *per* Lord Dunedin at p. 855.

interests led to the development of promissory estoppel in the context of the part performance of an existing duty. This development makes it difficult to regard bargain as the fundamental principle of contract. When put together with common law 'waiver',[318] it is arguable that consideration has been effectively confined to the formation of contracts and the error in making it also regulate the discharge of contracts[319] has been substantially corrected.

We have noted that consideration reflects a variety of policies and serves a number of functions. The doctrine has in the past been the Swiss army knife of the law, performing these functions[320] in an ingenious but imperfect way. Professor Simpson has described the identification and separation of these policies and functions and the development in the last 200 years of new, more targeted doctrines.[321] We now have a doctrine of offer and acceptance, a requirement of intention to create legal relations, a concept of economic duress, and a doctrine of privity of contract. There is considerable force in the conclusion of the Law Revision Committee in 1937,[322] which stated that in many cases consideration was a mere technicality, irreconcilable either with business expediency or common sense. It is submitted that its role should be confined to the formation of contracts and that there it should be supplemented by the principle of estoppel.

[318] *Post*, p. 496.
[319] Pollock, *Principles of Contract*, 12th edn. (1950), p. 146. See also Kötz, *European Contract Law* (1997), pp. 68–71.
[320] *Ante*, pp. 88–9.
[321] (1975) 91 L.Q.R. 247, 263.
[322] Cmd. 5449.

4

The Terms of the Contract

ONLY the most simple contracts consist of a single promise or undertaking on both sides. In most cases the contract is composed of a number of contractual terms, and it is now our task to consider the nature and import of those terms and the form which they may take. In this chapter, therefore, we shall first be concerned to distinguish the terms of a contract from other representations or assertions not intended to be an integral part of the agreement, and then to examine those terms which have been expressly inserted by the parties themselves and those which will be implied by the law.

The terms of a contract are often contained in some 'standard form' document drawn up by one of the parties or a trade association and frequently contain clauses excluding or limiting liability. This may give rise to special rules of notice between the contracting parties and to special rules of construction and interpretation with regard to exemption clauses which we shall, accordingly, consider separately.

I. Proof of Terms

(a) Terms and Representations

During the course of negotiations leading to the conclusion of a binding agreement, one or other of the contracting parties may make a statement or give an assurance calculated to produce in the mind of the other party a belief that facts exist which render the proposed bargain advantageous to the interests of the other party. When, later, the clouds of disagreement gather, a Court may have to decide whether this statement or assurance formed part of the contract, or whether it was merely a 'representation' or inducement, in the sense that the party making it did not undertake to make it good. Although, as we shall see,[1] a representation which proves to be false renders the agreement voidable at the suit of the party misled and, since 1964, may if made negligently give rise to damages nevertheless it cannot of itself give rise to an action for breach of contract. Such an action will only lie for breach of a contractual term. The point was clearly put by Williams J. in *Behn* v. *Burness*, when he said:[2]

[1] *Post*, Chapter 6. [2] (1863) 3 B. & S. 751, at p. 753.

Properly speaking, a representation is a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently the contract is not broken though the representation proves to be untrue.

The question whether a particular statement is a term of the contract or a representation is frequently one of considerable difficulty and the basis of the distinction between the two has been criticized.[3]

Test of contractual intention

The primary test is of *contractual intention*, that is, 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.[4] The question therefore is: on the totality of evidence, must the person making the statement be taken to have *warranted* its accuracy, i.e. promised to make it good? If the facts of the case are such as to show this intention the Court may construe as a term of the contract a statement or assurance made anterior to the final agreement. In *Bannerman* v. *White*:[5]

B offered hops for sale to W. W asked if any sulphur had been used in the treatment of the year's growth, as brewers were refusing hops contaminated with sulphur. B said 'No.' W said that he would not even ask the price if sulphur had been used. They then discussed the price, and W ultimately purchased by sample B's entire growth. After the hops were delivered he repudiated the contract on the ground that the hops contained sulphur. B sued for their price. It was proved that sulphur had been used on five of B's three hundred acres. B had used it for the purpose of trying a new machine, and had either forgotten the matter or thought it unimportant.

The jury found that the statement made as to the use of sulphur was not wilfully false, and so the question whether W was entitled to reject the hops turned upon whether it should be regarded as a condition of the agreement that the hops might be rejected if sulphur had been used. It was argued that 'the conversation relating to the sulphur was preliminary to entering on the contract and no part thereof', but the jury found it was understood and intended by the parties to be part of the contract of sale. The Court of Common Pleas upheld this finding, and said that B's assurance was the condition upon which the parties contracted and the breach of it discharged W from liability to take the hops.[6]

One question is whether the requisite intention must be positively shown or whether it can be inferred from the circumstances in which the statement was made. Although there is authority supporting the latter,[7] in *Heilbut, Symons & Co.* v. *Buckleton*, the House of Lords suggested that intention must be positively shown.[8]

[3] Williston (1913) 27 Harv. L. Rev. 1; Atiyah, *Essays on Contract* (1986), p. 275.

[4] *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, at p. 51 (*post*, n. 8).

[5] (1861) 10 C.B.N.S. 844. Contrast *Hopkins* v. *Tanqueray* (1854) 15 C.B. 130, which is probably wrongly decided.

[6] [1913] A.C. 30.

[7] *Schawel* v. *Reade* [1913] 2 Ir. R. 64, at pp. 84, 86 (H.L.), *per* Lord Atkinson and Lord Moulton.

[8] [1913] A.C. 30, at pp. 38, 42, 49–50, *per* Lord Haldane L.C., Lord Atkinson and Lord Moulton. See also *Independent Broadcasting Authority* v. *EMI Electronics Ltd.* (1980) 14 B.L.R. 1, at pp. 22–3, 32, 41 (H.L.) (in respect of a statement made *long* after the contract).

The respondent telephoned the appellants' agent and said 'I understand you are bringing out a rubber company'. The reply was 'We are'. The respondent asked for a prospectus, and was told there were none available. He then asked 'if it was all right', and the agent replied 'We are bringing it out'. On the faith of this, the respondent bought shares which turned out to be of little value. The company was not accurately described as 'a rubber company', although this assurance had not been given in bad faith. The respondent claimed damages for breach of contract.

The House of Lords held that no breach of contract had been committed. There had been merely a representation and no warranty. There was no intention on the part of either or both of the parties that there should be contractual liability in respect of the accuracy of the statement. *Heilbut, Symons & Co.* v. *Buckleton* has been criticized[9] and Courts are no longer as reluctant to find that a pre-contractual statement amounts to a term of the contract.[10]

The difficulty of ascertaining intention, however, means that the dividing line between the two categories of statement remains one that is not easy to draw in practice. For example, in *Oscar Chess Ltd.* v. *Williams*,[11] a private seller sold a motor-car to a firm of dealers. He told them that the car was a 1948 model, and the car log-book showed that it had been first registered in 1948. In fact it was a 1939 model. The log-book had been altered by some unknown person. The Court of Appeal (Morris L.J. dissenting) held that the seller's statement was not a term of the contract, but merely a representation not giving rise to any action for breach of contract. On the other hand, in *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd.*,[12] a statement made by a motor dealer to a private purchaser, based on a reading of the milometer, that it had done only 20,000 miles, whereas in fact it had done 100,000, was held to be a contractual term. The *Oscar Chess* case was distinguished on the ground that the seller 'honestly believed on reasonable grounds that [the statement] was true', whereas the motor dealer in the latter case 'who was in a position to know, or at least to find out the history of the car', 'stated a fact that should be within his own knowledge. He had jumped to a conclusion and stated it as a fact'.[13]

In endeavouring to reach a conclusion on this point, the Courts can be said to take into account a number of factors. First, they may have regard to the time which elapsed between the time of making the statement and the final manifestation of agreement; if the interval is a long one, this points to a representation.[14] Secondly, they may consider the importance of the statement in the minds of the parties; a statement which is important is likely to be classed as a term of the

[9] Williston (1913) 27 Harv. L. Rev. 1; Greig (1971) 87 L.Q.R. 179, Atiyah, *Essays on Contract* (1986), pp. 277–8.

[10] *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078, at p. 1081; *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, at p. 817; *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574, at p. 590.

[11] [1957] 1 W.L.R. 370. Cf. *Beale* v. *Taylor* [1967] 1 W.L.R. 1193.

[12] [1965] 1 W.L.R. 623.

[13] At pp. 628, 629.

[14] *Routledge* v. *McKay* [1954] 1 W.L.R. 615; *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574, at p. 591. Cf. *Birch* v. *Paramount Estates Ltd.* (1956) 167 Est. Gaz. 396.

contract.[15] Thirdly, if the statement was followed by the execution of a formal contract in writing, it is more likely to be regarded as a representation where it is not incorporated in the written document.[16] Finally, where the maker of the statement is, *vis-à-vis* the other party, in a better position to ascertain the accuracy of the statement or has the primary responsibility for doing this, the Courts will tend to regard it as a contractual term[17] unless it relates to a process, such as a medical procedure, the results of which are inherently unpredictable.[18]

Other factors

The precise place in which the dividing line between representations and terms is drawn may have also been affected by other factors. One of these was the distorting effect of the rule that, before 1964, precluded a damages remedy for negligent misstatement. While parties seeking to escape from this much criticized feature of English law would often argue that a statement was a warranty, at times when Courts have been conscious of the need to maintain the integrity of the rule, as in *Heilbut, Symons & Co.* v. *Buckleton*, they have not been receptive to such arguments.[19] Although the purpose of making the distinction is no longer to determine whether the maker of the statement is liable in damages, there are still remedial differences. As we shall see, damages for breach of contract do not depend on establishing negligence and the measure of damages for breach of contract differs from that for misrepresentation.[20] Secondly, we shall see that in the past it was generally not possible to adduce extrinsic, e.g. oral, evidence to contradict or vary the terms of a written agreement.[21] This 'parol evidence' rule meant that whatever the intention of the parties and however important the oral statement, it could only exceptionally be held to be a term of the contract and had, therefore, normally to be classified as a representation.[22]

(b) Collateral Warranties[23]

Where a preliminary statement or assurance is not a term of the principal agreement the Courts may be prepared to treat it as a contract or 'warranty', collateral to the principal agreement. In particular, in the past this device has been used where the principal agreement has been reduced to writing, since the parol evidence rule generally prevented the assurance from constituting a term of that contract. But the Courts will, provided the necessary contractual intention is present, construe the assurance as a collateral contract or warranty, conferring a right to

[15] *Bannerman* v. *White* (1861) 10 C.B.N.S. 844. Cf. *Oscar Chess Ltd.* v. *Williams (supra*, n. 11).

[16] *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, at p. 50. Cf. *Miller* v. *Cannon Hill Estates Ltd.* [1931] 2 K.B. 113, and see *post* (collateral warranty).

[17] *Schawel* v. *Reade (supra*, n. 7); *Dick Bentley Productions Ltd.* v. *Harold Smith (Motors) Ltd. (supra*, n. 12). See also *Harlingdon and Leinster Enterprises Ltd.* v. *Christopher Hull Fine Art* [1991] 1 Q.B. 564, at pp. 577, 585. Cf. *Heilbut, Symons & Co.* v. *Buckleton (supra*, n. 16); *Beale* v. *Taylor (supra*, n. 11).

[18] *Thake* v. *Maurice* [1986] Q.B. 644 (statement that vasectomy was irreversible not a warranty).

[19] Cf. *Heilbut, Symons & Co* v. *Buckleton* [1913] A.C. 30, at p. 51 and *Esso Petroleum Co. Ltd.* v. *Mardon* [1976] Q.B. 801, at p. 817.

[20] *Post*, pp. 241, 243.

[21] *Post*, p. 130.

[22] For a modern example, see *Lambert* v. *Lewis* [1982] A.C. 225, at p. 263.

[23] Wedderburn [1959] C.L.J. 58.

damages.[24] Thus where tenants executed leases upon the oral assurance of the landlord that the drains were in good order,[25] or that the landlord would not enforce a covenant against residing on the premises,[26] the tenant was held entitled to enforce the assurance as a collateral warranty. In particular, a statement will be likely to found a warranty where one party refuses to enter into a contract unless the other gives it an assurance on a certain point.[27] In 1913, Lord Moulton said of such collateral warranties that they are 'viewed with suspicion by the law. They must be proved strictly', and that they 'must from their very nature be rare'.[28] Nevertheless, since that time the Courts have showed themselves much more willing to treat pre-contractual statements as collateral warranties, and they are no longer rare. In *Esso Petroleum Co. Ltd.* v. *Mardon*,[29] for example:

> The plaintiff found a site on a busy main street which it considered suitable for the erection of a petrol filling station. An experienced employee estimated that the throughput of petrol at the station would reach 200,000 gallons in the third year of operation. But the planning authority refused permission for the forecourt and pumps to be sited on the main street and they had to be sited at the rear of the premises where they were only accessible by side streets. The defendant applied for a tenancy of the filling station. He was interviewed by the experienced employee, who gave him the same estimate of throughput but failed to take account of the fact that the filling station was now 'back to front'. In reliance on the estimate, the defendant took a 3-year lease of the filling station. Despite his best efforts, the site proved incapable of a throughput of more than 60,000 to 70,000 gallons. In an action by the plaintiff for possession of the station and monies due for petrol supplied, the defendant counterclaimed damages for (*inter alia*) breach of a collateral warranty.

The Court of Appeal rejected the argument that the estimate could not amount to a warranty because it was a forecast or statement of opinion. It was held that the statement as to potential throughput amounted to a collateral warranty—not in the sense that the plaintiffs guaranteed that the throughput would reach 200,000 gallons—but a warranty that the forecast had been prepared with reasonable care and skill. Since the plaintiffs negligently made 'a fatal error' in the forecast given to the defendant, and on which he took the tenancy, they were liable to him in damages.

(c) Floating Warranties

This device of a collateral warranty has also been employed where the principal contract is one to which either the person giving, or the person receiving, the assurance is not a party. In *Shanklin Pier Ltd.* v. *Detel Products Ltd.*:[30]

[24] *Morgan* v. *Griffith* (1871) L.R. 6 Ex. 70; *Newman* v. *Gatti* (1907) 24 T.L.R. 18, at p. 20; *Miller* v. *Cannon Hill Estates Ltd.* [1931] 2 K.B. 113; *Birch* v. *Paramount Estates Ltd.* (1956) 167 Est. Gaz. 396; *Frisby* v. *B.B.C.* [1967] Ch. 932.

[25] *De Lassalle* v. *Guildford* [1901] 2 K.B. 215.

[26] *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129. See also *Erskine* v. *Adeane* (1873) 8 Ch. App. 756 (landlord's assurance that the game upon the land would be killed down).

[27] *Erskine* v. *Adeane* (*supra*, n. 26); *De Lassalle* v. *Guildford* (*supra*, n. 25); *Couchman* v. *Hill* [1947] K.B. 554.

[28] *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, at p. 47.

[29] [1976] Q.B. 801.

[30] [1951] 2 K.B. 854. See also *Wells (Merstham) Ltd.* v. *Buckland Sand & Silica Co. Ltd.* [1965] 2 Q.B. 170; *Lambert* v. *Lewis* [1982] A.C. 225, at p. 263.

The plaintiff owned Shanklin Pier in the Isle of Wight. It wished to paint the pier and consulted the defendant, a firm of paint manufacturers. The defendant told the plaintiff that its paint was suitable for the purpose, and, relying on this statement, the plaintiff caused to be inserted in its agreement with the contractors who were to paint the pier a term requiring the use of the defendant's paint. The paint proved unsuitable and the plaintiff sued the defendant for breach of warranty.

McNair J. held that the plaintiff was entitled to damages. He said:[31]

I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A.

This principle is particularly applicable to cases of hire-purchase where a dealer first sells the article to a hire-purchase finance company which then lets it on hire to the hirer. If the dealer gives a warranty, and thus induces the hirer to enter into the contract of hire, this warranty is enforceable against the dealer by the hirer, even though the actual contract of hire purchase is not made between them.[32]

(d) Extrinsic Evidence

Where the parties put their agreement in a written document, the question arises whether extrinsic evidence may be led to establish the existence of a term or to explain the words used in the document.[33] It has often been said that 'it is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument', including a contract.[34] Although the purpose of this rule (which was more favoured in the past than it is now)[35] is to promote certainty[36] and to save time in the conduct of litigation,[37] it has long been the subject of a large number of exceptions which have resulted in uncertainty. Thus, extrinsic evidence is admissible to prove the factual background known to the contracting parties, including the aim of the transaction,[38] to ascertain the true meaning of ambiguity in a written agreement,[39] to prove the existence of a collateral agreement,[40] to establish implied terms[41] and, more

[31] At p. 856.

[32] *Andrews* v. *Hopkinson* [1957] 1 Q.B. 229; *Yeoman Credit Ltd.* v. *Ogders* [1962] 1 W.L.R. 215.

[33] See Steyn [1988] C.L.P. 23 and *post*, p. 156 on the construction of terms.

[34] *Jacobs* v. *Batavia and General Plantations Trust* [1924] 1 Ch. 287, at p. 295; *Bank of Australasia* v. *Palmer* [1897] A.C. 540, at p. 454; *Rabin* v. *Gerson Berger Association Ltd.* [1986] 1 W.L.R. 526, at p. 530; *Adams v. British Airways plc* [1995] I.R.L.R. 577, at p. 583.

[35] Law Com. No. 154, *The Parol Evidence Rule* (1986), §§ 2.3–2.4.

[36] *Shore* v. *Wilson* (1842) 9 C.L. & F. 355; 565–6; *Inglis* v. *John Buttery & Co.* (1878) 3 App. Cas. 552, at p. 577; *Mercantile Agency Co. Ltd.* v. *Flitwick Chalybeate Co.* (1897) 14 T.L.R. 90.

[37] *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, at p. 1384.

[38] *Ibid.*, at p. 1382; *International Fina Services A.G.* v. *Katrina Shipping Ltd.* [1995] 2 Lloyd's Rep. 344, at p. 350; *Charter Reinsurance Co.* v. *Fagan* [1996] 2 Lloyd's Rep. 113, at pp. 119, 123. See also *Hayden* v. *Lo & Lo* [1997] 1 W.L.R. 198, at p. 205.

[39] *L. G. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235, at p. 261.

[40] *Ante*, p. 128.

[41] *Gillespie Bros. & Co.* v. *Cheney Eggar & Co.* [1896] 2 Q.B. 59 (term implied under the Sale of Goods Act 1979); *Hutton* v. *Warren* (1836) 1 M. and W. 466 (custom).

importantly, if it is shown that the document was not intended to express the entire agreement between the parties.[42] It is also admissible to show that the contract is not operative[43] and to impugn the validity of the contract on the grounds of fraud, illegality, misrepresentation,[44] mistake, or duress.

The width of the exceptions led the Law Commission to conclude that:

> although a proposition of law can be stated which can be described as the 'parol evidence' rule it is not a rule of law which, correctly applied, could lead to evidence being unjustly excluded. Rather it is a proposition of law which is no more than a circular statement: when it is proved or admitted that the parties to a contract intended that all the express terms in their agreement should be 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.[45]

The Commission concluded[46] that there is no *rule of law* precluding the admissibility of evidence solely because a document exists which looks like a complete contract and that there was accordingly no need for legislation to abrogate the supposed rule as it had provisionally recommended in its Working Paper.[47] The presumption that a document which looks like a contract is the whole contract is only a presumption,[48] and, save where the document states that it contains the entire contract,[49] is unlikely to preclude the receipt of evidence of other terms not included expressly or by reference in the document. Although the traditional description of a parol evidence *rule* may have a lingering influence,[50] the Commission's approach has been judicially approved[51] and is also attractive from a policy point of view since, although facilitating the parties' intentions is an important function of contract law, regarding the issue as governed by a rule of law can have the effect of excluding much evidence of the intentions of the parties without achieving the certainty which the 'rule' aimed to achieve.

[42] *Mercantile Bank of Sydney* v. *Taylor* [1893] A.C. 317, at p. 321; *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.* (*supra*, n. 41), at p. 62; *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.* [1976] 1 W.L.R. 1078, at p. 1083.

[43] *Pym* v. *Campbell* (1856) 6 E. & B. 370.

[44] *Thomas Witter Ltd.* v. *T.B.P. Industries Ltd.* [1996] 2 All E.R. 573, at p. 595.

[45] Law Com. No. 154 (1986), § 2.7. See generally Wedderburn [1959] C.L.J. 58. Cf. Treitel, *The Law of Contract*, 9th edn. (1995), pp. 177–9.

[46] § 2.17.

[47] Law. Com. W.P. No. 76 (1976).

[48] *Gillespie Bros. & Co.* v. *Cheney Eggar & Co.* (*supra*, n. 41).

[49] *McGrath v. Shaw* (1987) 57 P. & C.R. 452, at pp. 459–60. But even such a clause may not prevent a claim for misrepresentation: *Thomas Witter Ltd.* v. *T.B.P. Industries Ltd.* [1996] 2 All E.R. 573, at pp. 595–7.

[50] e.g. *Perrylease Ltd.* v. *Imecar AG* [1988] 1 W.L.R. 463; *A. G. Securities* v. *Vaughan* [1990] 1 A.C. 417, at pp. 468–9, 475; *Guardian Ocean Cargos Ltd.* v. *Banco de Brasil S.A.* [1991] 2 Lloyd's Rep. 68 (but evidence admitted and approach consistent with Law Commission's). Administration of Justice Act 1982, s. 21, permitting the limited receipt of extrinsic evidence in the interpretation of wills, appears to assume the existence of a 'rule'.

[51] *Wild* v. *Civil Aviation Authority* (C.A., 25 September 1987); *Haryanto (Yani)* v. *E.D. & F. Man (Sugar) Ltd.* [1986] 2 Lloyd's Rep. 44, at p. 46. See also *Rosseel N.V.* v. *Oriental Commercial and Shipping Co. (U.K.) Ltd.* [1991] 2 Lloyd's Rep. 625, at p. 628; *State Rail Authority of New South Wales* v. *Heath Outdoor Pty. Ltd.* (1986) 7 N.S.W.L.R. 170, at p. 192; *Norwest Beef Industries Ltd.* v. *P & O Steam Navigation Co.* (1987) 8 N.S.W.L.R. 568, at p. 570.

II. Express Terms

(a) Types of Terms

Conditions and warranties

Once it has been established that a statement forms a term of the contract, it is necessary to consider what is its precise importance and effect. Contracts are normally made up of various statements and promises on both sides, differing in character and importance; the parties may regard some of these as vital, others as subsidiary, or collateral to the main purpose of the contract. Where one of these is broken, the approach of the Courts has been to discover, from the tenor of the contract, the expressed intention of the parties or the consequences of the breach, whether the broken term was vital to the contract or not.

On one approach, which is reflected in the Sale of Goods Act 1979,[52] the term is classified at the time the contract is made as either a condition or a warranty. If the parties regarded the term as essential, it is classified as a *condition*: any breach of a condition gives the innocent party the option of being discharged from further performance of the contract. The innocent party can also claim damages for any loss sustained by the fact that the contract has not been performed. If the parties did not regard the term as essential, but as subsidiary or collateral, it is classified as a *warranty*; its failure gives rise to a claim for such damages as have been sustained by the breach of that particular term, but the innocent party is not given the option of being discharged from further performance. The classification of a term as being either a 'condition' or a 'warranty' will therefore determine the legal remedies available to the innocent party in the event of its breach.

Nevertheless, it is right to observe that the word 'condition' is sometimes used, even in legal documents, to mean simply 'a stipulation, a provision', and does not carry the meaning given to it by lawyers as a term of art.[53] Likewise the word 'warranty' is employed in a variety of senses, and in many of the earlier cases and also in insurance law[54] it is not infrequently used simply to mean a term of the contract, whether a warranty proper or a condition. Whether or not the words 'condition' or 'warranty' are employed in their technical sense must, therefore, depend upon the intention of the parties to be collected from their agreement and from the subject-matter to which it relates.

Intermediate terms

Another approach, often seen as more modern but in fact with older roots,[55] is, however, to reject the proposition that every term of a contract can be classified as either a condition or a warranty. There has emerged yet a third category of *intermediate* (or 'innominate'[56]) terms: the legal consequences of the breach of such a term (i.e. whether or not the innocent party is entitled to treat itself as

[52] See *post*, p. 150.

[53] *L. G. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.

[54] Marine Insurance Act 1906, ss. 33–41; *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd.* [1992] 1 A.C. 233.

[55] e.g. *Freeman* v. *Taylor* (1831) 8 Bing. 124, at p. 138. See also *Boone* v. *Eyre* (1779) 1 H. Bl. 273n; *Davidson* v. *Gwynne* (1810) 12 East. 381; *Clipsham* v. *Vertue* (1843) 5 Q.B. 265; *McAndrew* v. *Chapple* (1866) L.R. 1 C.P. 643, at p. 648.

[56] This terminology was first used by Smith and Thomas, *A Casebook on Contract*, 4th edn. (1961).

discharged) depend upon the nature and consequences of the breach, and do not follow automatically from a prior classification of the undertaking as a condition or a warranty.

(b) Conditions[57]

A condition may be defined as a statement of fact, or a promise, which forms an essential term of the contract. If the statement of fact proves untrue, or the promise is not fulfilled, the innocent party may treat the breach as a repudiation which discharges him from further performance of the contract.

An illustration of a statement of fact forming a condition is the case of *Behn* v. *Burness*,[58] where a ship was stated in the contract of charterparty to be 'now in the port of Amsterdam'. The fact that the ship was not in the port at the date of the contract discharged the charterer from performance. An example of a promise is provided by the case of *Glaholm* v. *Hays*:[59]

A charterparty provided that a vessel was to go from England to Trieste and there load a cargo: 'the vessel to sail from England on or before the 4th day of February next'. The vessel did not sail for some days after the 4th February, and on its arrival at Trieste the charterers refused to load a cargo and treated the contract as repudiated.

It was held that the charterers were entitled to be discharged from the contract. The Court of Common Pleas stated:[60]

Whether a particular clause in a charter-party shall be held to be a condition, upon the non-performance of which by the one party, the other is at liberty to abandon the contract, and consider it at an end; or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties to be collected, in each particular case, from the terms of the agreement itself, and from the subject-matter to which it relates . . . Upon the whole, we think the intention of the parties to this contract sufficiently appears to have been, to insure the ship's sailing at the latest by the 4th February, and that the only mode of effecting this is by holding the clause in question to have been a condition precedent; which we consider it to have been.

Promissory and contingent conditions

The idea which underlies the use of the word 'condition' in *Glaholm* v. *Hays* is that the term is so vital to the operation of the contract that its fulfilment by one party is a condition precedent to liability on the part of the other. But it is also to be noted that, in its usual sense, a condition means an essential undertaking in the contract which one party *promises* will be made good. If it is not made good, not only will the other party be entitled to treat itself as discharged, but also *to sue for damages for breach*. A condition is therefore normally a 'promissory' condition, that is to say, the breach of it entitles the innocent party to be released from further performance of the contract and to be compensated by damages.

[57] See also *post*, Chapter 15.

[58] (1862) 1 B. & S. 877; (1863) 3 B. & S. 751.

[59] (1841) 2 M. & G. 257. See also *Petrotrade Inc.* v. *Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142, at p. 149.

[60] At pp. 266, 268.

Alternatively, and exceptionally, however, a condition may be a 'contingent' condition. For instance, it may be provided that a contract shall not take effect unless or until the condition is fulfilled or that a particular duty under the contract does not become due unless or until the fulfilment of the condition.[61] The existence or enforceability of the contract or the particular obligation is dependent upon the fulfilment of the condition, but there is no guarantee or promise that it will be fulfilled.

The distinction between promissory conditions and the first type of contingent condition was illustrated by Denning L.J. in *Trans Trust SPRL* v. *Danubian Trading Co. Ltd.*[62] when considering a stipulation in a contract of sale of goods which related to the opening by the buyer of a letter of credit[63] in favour of the seller:

> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract'.[64] If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from further performance of the contract and can sue the buyer for damages for not providing the credit.

This does not, however, take account of the situation in which the stipulation operates to qualify not the contract but the particular obligation but is nevertheless contingent. The examples below show that the insertion of a contingent condition may produce one of several effects.[65]

First, it may prevent the formation of any immediately binding contract, as in *Pym* v. *Campbell*[66] where the parties entered into an agreement for the sale and purchase of part of the proceeds of an invention on the express oral understanding that it should not bind them until a third party approved the invention. In such a situation, either party may withdraw from the transaction at any time before the condition is fulfilled.

[61] *Restatement* (2d), § 224 provides that a condition is 'an event, not certain to occur, which must occur, unless occurrence is excused, before performance under a contract comes due'.

[62] [1952] 2 Q.B. 297, at p. 304.

[63] See *post*, p. 422.

[64] See *ante*, p. 68. The parallel is not an exact one, for in the case of an agreement 'subject to contract' there is no obligation at all, whereas in the case of a contingent condition there may be an implied obligation to facilitate, or not to prevent, the fulfilment of the condition: *Dodd* v. *Churton* [1897] 1 Q.B. 562; *MacKay* v. *Dick* (1881) 6 App. Cas. 251: *Thompson* v. *ASDA-MFI plc* [1988] Ch. 241.

[65] For a more detailed account of these effects, see *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* [1968] 1 W.L.R 74, at p. 82; *Wood Preservation Ltd.* v. *Prior* [1969] 1 W.L.R. 1077, at p. 1090; *L. G. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1972] 1 W.L.R. 840, at pp. 850–1 (C.A.), [1974] A.C. 235 (H.L.).

[66] (1856) 6 E. & B. 370. See also *Aberfoyle Plantations Ltd.* v. *Cheng* [1960] A.C. 115; *William Cory & Son Ltd.* v. *I.R.C.* [1965] A.C. 1088. Cf. *Haslemere Estates Ltd.* v. *Baker* [1982] 1 W.L.R. 1109.

Secondly, one party may assume an immediate unilateral obligation, say, to sell or to buy land or goods from the other, but subject to a condition. In this case, there is a contract from the start imposing a unilateral obligation from which one party cannot withdraw;[67] but no bilateral contract of sale, binding on both parties, comes into existence until the condition is fulfilled.[68] Many options in leases and hire purchase agreements are of this nature; in such cases the fulfilment of the condition depends on the will of the option holder.

Thirdly, the parties may enter into an immediately binding contract, the operation of which is suspended pending fulfilment of the condition. So, for example, if a husband and wife enter into a maintenance agreement 'subject to the approval of the Court', this is a contract from which neither can resile until it can be definitely ascertained that the condition will not be fulfilled.[69] Alternatively, while the operation of the contract is not suspended, that of a particular obligation under it is. Thus, the obligation of an insurer to pay does not arise until the occurrence of the loss.

In none of these situations, however, does either party render itself liable in damages to the other in the event of non-fulfilment of the condition. Even if, as is often the case, the Court is prepared to imply a term that one of the parties will use all reasonable endeavours to secure fulfilment of the condition, as, for example, where a sale of land is conditional upon planning permission being obtained,[70] or goods are sold subject to an import or export licence,[71] the fact that the condition is contingent, and not promissory, will prevent any liability from arising if that party's reasonable endeavours prove unavailing.

Conditions subsequent

Another sense in which the word 'condition' is used is that of a condition subsequent, where the parties agree that the contract is to be immediately binding, but if certain facts are ascertained to exist or upon the happening of a certain event, then either the contract is to cease to bind or one party is to have the option to cancel the contract.

In *Brown* v. *Knowlsey B.C.*,[72] for example, a contract of employment provided that a temporary teacher's appointment was to last only as long as sufficient funds were provided either by the Manpower Services Commission or other sponsors. It was held that the contract was terminated when such funds ceased to be provided.

Such conditions may also take the form of promises or covenants which impose upon one of the parties to the contract an obligation which he is contractually bound to perform. For example, in many leases there is an express provision for forfeiture of the lease in the event of the tenant's failure to repair. But such a

[67] *Smith* v. *Butler* [1900] 1 Q.B. 694.

[68] *United Dominions Trust (Commercial) Ltd.* v. *Eagle Aircraft Services Ltd.* (*supra*, n. 65). Cf. *Eastham* v. *Leigh, London & Provincial Properties Ltd.* [1971] Ch. 871.

[69] *Smallman* v. *Smallman* [1972] Fam. 25.

[70] *Hargreaves Transport Ltd.* v. *Lynch* [1969] 1 W.L.R. 215.

[71] *Re Anglo-Russian Merchant Traders Ltd.* v. *John Batt & Co. (London) Ltd.* [1917] 2 K.B. 679; *Coloniale Import-Export* v. *Loumidis & Sons* [1978] 2 Lloyd's Rep. 560.

[72] [1986] I.R.L.R. 102. See also *Head* v. *Tattersall* (1871) L.R. 7 Ex. 7; *Gyllenhammer & Partners* v. *Sour Brodogradevna* [1989] 2 Lloyd's Rep. 403.

provision in addition imposes upon the tenant an obligation to repair, for the breach of which the landlord is entitled to damages.[73]

(c) Warranties

A warranty, being a less important term, does not entitle the innocent party to treat the contract as repudiated in the event of its breach, but only to claim damages.

A warranty has been defined as 'an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it'.[74] In another case it was said that: 'the proper significance of the word [warranty] in the law of England is an agreement which refers to the subject matter of a contract, but, not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of such a contract'.[75] The nature of a warranty is illustrated by the case of *Bettini* v. *Gye*:[76]

Bettini contracted with Gye, the director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts for a period of 3 months. Bettini undertook *inter alia* that he would be in London at least 6 days before the commencement of his engagement, for rehearsals, but only arrived 2 days beforehand. Gye refused to go on with the contract and was sued by Bettini for breach.

The Court held that, having regard to the length of the contract and the nature of the performances to be given, the rehearsal clause was not vital to the agreement. It was not a condition but merely a warranty. Accordingly its breach did not entitle Gye to treat the contract as at an end.

It is reasonable to assume that, in the particular circumstances of *Bettini* v. *Gye*, any breach of the rehearsal clause could have been compensated for by damages. But in most cases it would be misleading to conclude that damages would be a sufficient remedy for every breach of even a seemingly unimportant term. The consequences of the breach of such a term might be so serious as to go to the root of the contract and justify a refusal by the innocent party to proceed further with the contract. Unless, therefore, a term has been specifically designated a 'warranty' by statute,[77] or the parties have expressly so provided in their agreement, there are few situations[78] where a Court would be likely to hold, at the present day, that the parties intended that any breach of the term should give rise to a right to claim damages only, and so place the term within this category.

[73] *Bashir* v. *Commissioner of Lands* [1960] A.C. 44.

[74] *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, *per* Lord Abinger C.B. at p. 404.

[75] *Dawsons Ltd.* v. *Bonnin* [1922] 2 A.C. 413, *per* Lord Haldane at p. 422. See also Sale of Goods Act 1979, s. 61(1).

[76] (1876) 1 Q.B.D. 183. Contrast *Poussard* v. *Spiers* (1876) 1 Q.B.D. 410.

[77] Sale of Goods Act 1979, ss. 12(2), (4), (5) and (5A) and 61(1); Supply of Goods (Implied Terms) Act 1973, ss. 8(1)(b), (2) and (3); *post*, pp. 150–1.

[78] But see *Anglia Commercial Properties* v. *North East Essex Building Co.* (1983) 266 Est. Gaz. 1096 (time limit clause in building contract).

(d) Evaluation of the *Ab Initio* Classification of Terms

The dominant approach of the Courts in the 70 years following the enactment of the Sale of Goods Act in 1893 was to classify terms *ab initio* as conditions or warranties. There is one clear and obvious advantage in so classifying a particular term of a contract. It is that of certainty.[79] At least in commercial transactions it is important that parties (or their legal advisers) should be able to know, immediately and unequivocally, what their rights are in the event of a breach by the other party, and to make their decision accordingly. If the term broken is a condition, it will be known with certainty that the breach entitles the innocent party to terminate the contract forthwith.

This certainty is particularly important where the contract is one of a series of 'string' contracts where B buys goods from A and then sells them to C who in turn sells them to D. 'Members of the "string" will have many ongoing contracts simultaneously and they must be able to do business with confidence in the legal results of their actions.'[80] Certainty as to whether there is a right to terminate the contract is also important in cases where it would be difficult for the innocent party to quantify the loss suffered and therefore difficult for the Court to assess damages for a breach of the contract.[81]

On the other hand, the advantage of certainty has to be weighed against the need to reach a fair and just decision in individual cases. Since *any* breach of condition gives rise to a right of termination, the innocent party can refuse to perform the contract even though the breach is trivial in nature, and even though little or no loss has been suffered as a result. For example, it is a condition of a c.i.f. contract for the sale of goods that the goods must be shipped within the shipment period specified in the contract. If the goods are shipped one day later—or even earlier[82]—than the specified shipment period, the buyer is entitled to treat the contract as repudiated and to reject the goods, notwithstanding that the breach has caused no loss. A party may seek to rely on such a breach of condition to get out of a contract which has proved unprofitable, perhaps because of changes in the market.[83] It has been said that 'in principle contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions . . . the Court should tend to prefer that construction which will ensure performance, and not encourage avoidance of contractual obligations'.[84]

[79] *The Mihalis Angelos* [1971] 1 Q.B. 164, at p. 205; *A/S Awilco of Oslo* v. *Fulvia S.p.a. (The Chikuma)* [1981] 1 W.L.R., at p. 322; *Bunge Corpn.* v. *Tradax Export S.A.* [1981] 1 W.L.R., at pp. 718, 720, 725.

[80] *Bunge Corp.* v. *Tradax Export S.A.* [1981] 1 W.L.R. 711, *per* Lord Lowry at p. 720.

[81] *Ibid.*

[82] *Bowes* v. *Shand* (1877) 2 App. Cas. 455.

[83] *Arcos Ltd.* v. *Ronaasen & Son Ltd.* [1933] A.C. 470.

[84] *Cehave N.V.* v. *Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, at p. 71 (the rejected goods were later bought by the same buyers at a lower price and used for the same purpose). See also *Reardon Smith Line Ltd.* v. *Hansen-Tangen* [1976] 1 W.L.R. 989, *post*, p. 140.

(e) Intermediate Terms

Intermediate terms

In recent times the perceived disadvantages of *ab initio* classification of terms has led the Courts to curtail the right of termination which follows from the classification of a term as a 'condition' by the recognition of a new category of terms, namely, *intermediate* (or 'innominate') terms, the breach of which does not necessarily entitle the innocent party to terminate the contract.[85] The distinction between 'conditions' and 'warranties', which placed considerable emphasis on the quality of the term broken, that is to say, whether it was of major or minor importance, and on initial certainty has fallen out of favour. A new emphasis has been given to a more flexible test based on the gravity of the breach and of its consequences, a test that has its roots in older authorities.[86] In *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.*, Diplock L.J. said:[87]

> There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' . . . Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a 'condition' or a 'warranty'.

In that case,[88] it was argued on behalf of the charterers of a ship that the shipowners' obligation to provide a seaworthy vessel was a condition, any breach of which entitled the charterers to treat themselves as discharged. The Court of Appeal rejected this contention. The undertaking as to seaworthiness was not a condition, but an intermediate term. Breach of such a term would not give rise to a right to treat the charterparty as repudiated unless the conduct of the shipowners, and the actual or anticipated consequences of the breach, were so serious as to frustrate the commercial purpose of the venture. The reason was thus explained by Upjohn L.J.:[89]

> Why is this apparently basic and underlying condition of seaworthiness not, in fact, treated as a condition? It is for the simple reason that the seaworthiness clause is breached by the slightest failure to be fitted 'in every way' for service. . . . If a nail is missing from one of the timbers of a wooden vessel or if proper medical supplies or two anchors are not on board at the time of sailing, the owners are in breach of the seaworthiness stipulation. It is contrary to common sense to suppose that in such circumstances the parties contemplated that the charterer should at once be entitled to treat the contract as at an end for such trifling breaches.

Effect of breach of intermediate term

Where a failure of performance is not a breach of condition, but of an intermediate term, the right of the innocent party to treat itself as discharged from

[85] *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26; *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers' Assn.* [1966] 1 W.L.R. 287, at p. 341 (affirmed [1969] 2 A.C. 31). See also Reynolds (1963) 79 L.Q.R. 534; Lord Devlin [1966] C.L.J. 192.

[86] *Ante*, p. 132 n. 55.

[87] [1962] 2 Q.B. 26, at p. 70.

[88] For the facts of this case, see *post*, p. 548.

[89] [1962] 2 Q.B. 26, at p. 62.

further performance will depend upon the gravity of the breach and of its consequences. A number of expressions have been used to describe the circumstances that justify discharge, and these are discussed later in this work in the chapter on Discharge by Breach.[90] At the present day, a test which is frequently applied is whether the failure of performance is such as to deprive the innocent party of substantially the whole benefit which it was intended that it should obtain as the consideration for the performance of its own undertakings.[91] It should be noted that the test is a strict one. Thus, in the *Hongkong Fir* case, which concerned a 2-year charterparty, the ship was off hire because of unseaworthiness for all but 8 and a half weeks in the first 7 months of the charter, but the charterer was held not to be entitled to treat the contract as discharged. It follows that, in many cases, the innocent party may be compelled to 'wait and see' whether the consequences of the breach turn out to have so serious an effect.

(f) Distinguishing Intermediate Terms and Conditions

Whether a term will be classified as a condition depends in part on the Court 'making what is in effect a value judgment about the commercial significance of the term in question'.[92] A term is most likely to be classified as 'intermediate' if, as in the *Hongkong Fir* case, it is capable of being broken either in a manner that is trivial and capable of remedy by an award of damages or in a way that is so fundamental as to undermine the whole contract. However, the Courts have recognized that the greater flexibility involves more uncertainty and have indicated that in suitable cases they will not be reluctant to hold that an obligation has the force of a condition.[93] In the modern law, it is probably safe to say that any term of a contract will be classified as an intermediate term, and not as a condition, unless the Court concludes that it falls within one of the following situations:

The first of these is where a particular term has been categorized as a condition by statute. The Sale of Goods Act 1979[94] and the Supply of Goods (Implied Terms) Act 1973[95] expressly define certain implied obligations in contracts of sale of goods or hire-purchase as being 'conditions' or 'warranties'. There can be no doubt that such classification is binding. But in *Cehave N.V.* v. *Bremer Handelsgesellschaft mbH (The Hansa Nord)*[96] the Court of Appeal rejected the argument that the Sale of Goods Act created a statutory dichotomy which divided *all* terms in contracts of sale of goods into conditions and warranties and held that an express term 'shipment to be made in good condition' was an intermediate

[90] See *post*, p. 535.

[91] *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26, at p. 66; see also *post*, p. 548. Cf. Vienna Convention on International Sales Law, Art. 25.

[92] *State Trading Cpn. of India Ltd.* v. *M. Golodetz Ltd.* [1989] 2 Lloyd's Rep. 277, *per* Kerr L.J. at p. 283.

[93] *Bunge Corp.* v. *Tradax Export S.A.* [1981] 1 W.L.R. 711; *CIE Commerciale Sucres et Denrées* v. *Czarnikow Ltd.* [1990] 1 W.L.R. 1337; *Petrotrade Inc. v. Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142, at p. 149.

[94] See *post*, pp. 150–5.

[95] See *post*, p. 156.

[96] [1976] Q.B. 44. See also *Tradax International S.A.* v. *Goldschmidt* [1977] 2 Lloyd's Rep. 604.

term the breach of which had to be so serious as to go to the root of the contract in order to entitle the buyer to reject the goods.

The second is where a particular term has been categorized as a condition by previous judicial decision. Examples are mainly to be found in certain familiar terms in commercial contracts. Thus stipulations in a voyage charterparty as to the time at which the chartered vessel is expected ready to load[97] or in a time charterparty as to the date by which hire is to be paid,[98] and stipulations in a c.i.f. contract for the sale of goods as to the time within which the goods must be shipped[99] or a letter of credit opened,[100] have been held to be conditions, any delay in which entitles the other party to treat itself as discharged. It has, however, been stated[101] that a number of previous decisions on such terms are 'excessively technical' and are open to re-examination by the House of Lords.

The third situation is where the parties have expressly provided in their contract either that a particular term is to be a condition (in the technical sense)[102] or that the consequences of its non-performance by one party are to be that the other party is to have the right to treat himself as discharged. A stipulation as to the time of performance where time is expressly stated to be 'of the essence of the contract' is an example of this situation.[103]

Finally, if the nature of the contract or the subject-matter or the circumstances of the case lead to the conclusion that the parties must, by necessary implication, have intended that the innocent party would be discharged from further performance of its obligations in the event that a particular term was not fully and precisely complied with, that term will be held to be a condition.[104] This is more likely to be the case in single-performance contracts and contracts requiring the performance of particular acts at specified times and in sequence. It is less likely to be the case where the contract is for performance over a long term[105] when substantial performance may have been rendered by the contract-breaker before breach and where the term is of a broad and loose nature.

In *Bremer Handelsgesellschaft mbH* v. *Vanden Avenne-Izegem P.V.B.A.*[106] a prohibition of export clause in a contract for the sale of United States soya bean meal, which required the sellers to advise the buyers 'without delay' of impossibility of shipment by reason of such prohibition, was held by the House of Lords to be an intermediate term, since it did not establish any definite time limit within which

[97] *The Mihalis Angelos* [1971] 1 Q.B. 164. See also *Behn* v. *Burness* (1863) 3 B. & S. 751 (*ante*, p. 133).

[98] *Mardorf Peach & Co. Ltd.* v. *Attica Sea Carriers Cpn. of Liberia* [1977] A.C. 850.

[99] *Bowes* v. *Shand* (1877) 2 App. Cas. 455.

[100] *Ian Stach Ltd.* v. *Baker Bosley Ltd.* [1958] 2 Q.B. 130.

[101] *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, *per* Lord Wilberforce at p. 998.

[102] Cf. *L. G. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.

[103] *United Scientific Holdings Ltd.* v. *Burnley B.C.* [1978] A.C. 904, at pp. 923, 937, 944.

[104] *Ibid.*, at pp. 937, 941, 944, 950, 958; *Bremer Handelsgesellschaft mbH* v. *Vanden Avenne-Izegem P.V.B.A.* [1978] 2 Lloyd's Rep. 109, at p. 133; *Bunge Cpn.* v. *Tradax Export S.A.* [1981] 1 W.L.R. 711, at pp. 716, 717, 720, 729.

[105] *L. G. Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235; *Decro-Wall S.A.* v. *Practitioners in Marketing Ltd.* [1971] 1 W.L.R. 361.

[106] [1978] 2 Lloyd's Rep. 109.

the advice was to be given. But further provisions in the same contract, which took effect upon a number of events impeding performance and which established a time-table of fixed periods within which the occurrence was to be notified, an extension of time claimed, and the buyer was to have the option of cancelling the contract, were held to be conditions. Punctual compliance with these stipulations was required as part of a 'complete regulatory code'. Again in *Bunge Corporation* v. *Tradax Export S.A.*,[107] a case which also concerned a contract for the sale of soya bean meal:

> The sellers were required, by 30 June 1975, to load the goods on board ship at a single United States Gulf port to be nominated by them. The contract further provided that the buyers should give to the sellers 'at least 15 consecutive days' notice of probable readiness of vessel(s) and of the approximate quantity required to be loaded'. The buyers did not give that notice until 17 June, by which time less than 15 days of the loading period remained. The sellers declared the buyers in default and claimed damages for repudiation of the contract on the ground that the term as to notice was a condition.

The House of Lords held that the term, though not expressly stated in the contract to be a condition, was one by implication, so that its breach entitled the sellers to treat themselves as discharged. Their Lordships pointed out that, in general, time was of the essence in mercantile contracts,[108] and in particular in this case where the sellers needed the information to know which loading port they should nominate, so as to ensure that the goods would be available for loading on the ship's arrival at that port before the end of the loading period.[109]

A term is also likely to be held to be a condition where adherence to it is fundamental to the transaction in the sense that it cannot proceed without it and where the term is not one which admitted to different types of breach. So, for example, a stipulation in a conditional sale agreement that the seller was at the date of the agreement the owner of the item sold has been held to be a condition.[110]

(g) Loss of the Right of Discharge

Certain qualifications must be made to the rule that a breach of condition discharges the innocent party from further performance.

Waiver and affirmation

Where one party has been guilty of a breach of condition, the other party need not necessarily treat itself as discharged. Compliance with the condition can, if the innocent party so wishes, be waived[111] and the contract can be enforced as if it

[107] [1981] 1 W.L.R. 711.

[108] At pp. 176, 719, 725. See also *Toepfer* v. *Lenersan-Poortman N.V.* [1980] 1 Lloyd's Rep. 143; *Bunge GmbH* v. *Landbouwbelang G.A.* [1980] 1 Lloyd's Rep. 458. But this is not always the case; see *Torvald Klaveness A/S* v. *Arni Maritime Cpn.* [1994] 1 W.L.R. 1465, at pp. 1475–6 (redelivery date of chartered ship).

[109] [1981] 1 W.L.R. 711, at p. 729; *Petrotrade Inc.* v. *Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142, at p. 149.

[110] *Barber* v. *NWS Bank plc*, *The Times*, 27 November 1995. Such a condition would otherwise be *implied* by the Sale of Goods Act 1979, s. 12, *post*, p. 150.

[111] Provided that it is exclusively for its own benefit and not for the benefit of both parties.

had been omitted. Alternatively, the innocent party can elect to affirm the contract, that is to say, with knowledge of the breach to treat the contract as still binding and to rest content with damages, which are available as a remedy in any event. In this latter case, the innocent party may be said to sue upon a warranty '*ex post facto*'. This means simply that, having affirmed the contract, the innocent party cannot subsequently claim to be discharged by the breach of condition, but must sue as if it were a breach of warranty only.

These principles have been given statutory force in relation to contracts of sale of goods by section 11(1) of the Sale of Goods Act 1979:

> Where a contract of sale is subject to a condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

But they are of general application in the law of contract.

'Acceptance' and substantial benefit

Affirmation is voluntary; but an innocent party may, in certain circumstances, be compulsorily required to treat the breach as a breach of warranty and thus restricted to a remedy for damages. For example, an innocent party who has taken a substantial benefit under the contract may sometimes be precluded from opting to be discharged by reason of a breach of condition, and have to sue for damages only.[112] The Sale of Goods Act 1979 also provides that a buyer cannot treat the contract as repudiated for breach of condition where the goods which are the subject-matter of the sale have been 'accepted'. By section 11(4) of the Act:[113]

> where a contract of sale is not severable and the buyer has accepted the goods or part of them, the breach of a condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is an express or implied term of the contract to that effect.

Two points, however, require explanation. In the first place, the word 'accept' in the phrase 'and the buyer has accepted the goods' bears a technical meaning. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered and the buyer does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time the buyer retains the goods without intimating to the seller that the goods have been rejected.[114] It will be noted that there is no mention of any requirement that the buyer should *know* of the breach of condition before losing the right to reject, although, in the case of an intimation of acceptance or an act inconsistent with the seller's ownership, 'acceptance' will not be deemed to have taken place unless and until the buyer has had a reasonable opportunity of examining the goods for the purpose of ascertaining

[112] *Graves* v. *Legg* (1854) 9 Exch. 709, at p. 717; *Pust* v. *Dowie* (1865) 5 B. & S. 33; *Behn* v. *Burness* (1862) 1 B. & S. 877; (1863) 3 B. & S. 751.

[113] The terms 'condition' and 'warranty' are used in the Act in the senses given above; that is to say, a condition is a stipulation the breach of which may give rise to a right to treat the contract as repudiated, a warranty is one the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated: Sale of Goods Act 1979, ss. 11(3), 61(1).

[114] Sale of Goods Act 1979, s. 35, as amended by the Sale and Supply of Goods Act 1994.

whether they are in conformity with the contract[115] and the availability of a reasonable opportunity of examining goods is a material factor in determining whether a 'reasonable' time has elapsed.[116] Where the buyer has the right to reject goods by reason of a defect that affects all or some of them but accepts some of the goods the right to reject the rest is not lost by that partial acceptance.[117]

Secondly we must observe that acceptance does not necessarily have this effect if the contract is severable, for example, if delivery of the goods is to be made by instalments which are to be separately paid for. In such a case the Act provides that 'where the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated'.[118]

The right of the innocent party to treat itself as discharged may thus be lost either voluntarily or as the result of the operation of a rule of law.

III. Implied Terms

We now come to consider those cases where the law will imply into a contract terms which the parties have not themselves inserted. In some cases, in particular contracts for the sale and supply of goods and services, contracts of employment and contracts between landlord and tenant, terms are implied by statute.

In the absence of statutory provision the cases in which the Courts will imply a term into a contract are strictly limited, for they rightly conceive that it is not their task to make contracts for the parties concerned, but only to interpret the contracts already made.[119] Nevertheless, even where the contract is reduced to writing, in certain circumstances the Courts are prepared to imply terms into it. A distinction has developed between two broad categories of case. First, where it is sought to insert into a particular, sometimes detailed, contract a term that the parties have not expressed; in such cases a strict test is applied, the Courts do not imply terms where it would be reasonable to do so but only where it is necessary to give business efficacy to the contract. Here the implication of a term is normally said to depend upon an intention imputed to the parties from their *actual* circumstances; i.e. the express terms of the agreement and the surrounding circumstances.[120] Secondly, there are cases in which the Court is considering a common

[115] Sale of Goods Act 1979, s. 35(2).

[116] *Ibid.*, ss. 35(5) and 34 Cf. *Bernstein* v. *Pamson Motors (Golders Green) Ltd.* [1987] 2 All E.R. 220; *Shine* v. *General Guarantee Cpn.* [1988] 1 All E.R. 911.

[117] Sale of Goods Act 1979, s. 35A(1).

[118] Sale of Goods Act 1979, s. 31(2).

[119] *Phillips Electronique Grand Publique S.A.* v. *B.S.B. Ltd.* [1995] E.M.L.R. 472, *per* Sir Thomas Bingham M.R. at p. 481.

[120] *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108, at p. 137; *Shell U.K. Ltd.* v. *Lostock Garages Ltd.* [1976] 1 W.L.R. 1187, at p. 1196; *Anglo-Japanese Bank (International)* v. *Credit du Nord S.A.*

relationship, for example sale, carriage, landlord and tenant, or employment, where the parties may have left a lot unsaid. In such cases, when the Court implies a term, it is sometimes laying down a general rule that in all contracts of a defined type some provision is to be implied as an incident of the particular type of contractual relationship unless the parties have expressly excluded it, and it is somewhat artificial to attribute such terms to the unexpressed or implied intention of the parties.[121] A similar process takes place where a term is implied by a trade custom.[122]

(a) Business Efficacy and Necessity

Sometimes the parties to a contract may, either through forgetfulness or through bad drafting, fail to incorporate into the contract terms which, had they adverted to the situation, they would certainly have inserted to complete the contract. In such cases the Courts may, in order to give 'business efficacy' to the transaction, imply such terms as are necessary to effect that result.

The leading case is that of *The Moorcock*, which concerned a contract between a shipowner and the owner of a jetty to allow a steamship to be discharged and loaded at the jetty. The ship was grounded and damaged at low tide. The Court of Appeal held that the parties must have intended to contract on the basis that the ground was safe for the vessel at low tide, and therefore a term would be implied that the berth was reasonably safe for the purpose of loading and unloading. For a breach of this implied term the defendants were liable.

Bowen L.J. said:[123]

> 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 on 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 that 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 such events it should have.

But this principle has subsequently become unpopular, and it has been said to be the last resort of counsel in distress.[124] For instance, in *Easton* v. *Hitchcock*[125]

[1989] 1 W.L.R. 255, at p. 263. See also *Codelfa Construction Pty. Ltd.* v. *State Rail Authority of New South Wales* (1981–82) 149 C.L.R. 337, *per* Mason J. at p. 353 (account should be taken of the presumed intention of the parties in deciding whether a term is to be implied: High Court of Australia).

[121] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, at pp. 253–4 and 257–8; *Shell U.K. Ltd.* v. *Lostock Garages Ltd.* (*supra*, n. 120), at p. 1196; *Mears* v. *Safecar Security Ltd.* [1983] Q.B. 54, at p. 78; *Scally* v. *Southern Health and Social Services Board* [1992] 1 A.C. 294, at pp. 306–7.

[122] *Post*, p. 148.

[123] (1889) 14 P.D. 64, at p. 68.

[124] *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, *per* MacKinnon L.J. at p. 227.

[125] [1912] 1 K.B. 535. See also *Yorkshire Water Services Ltd.* v. *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep. 21.

the Court refused to imply a term into a contract for the hire of a private detective that ex-employees of the detective agency would not divulge confidential information, although it was clearly necessary to the running of a detective agency that secrecy should be maintained.

Obvious terms

The principle in *The Moorcock* is applied where, without the implied term, the contract will not be workable. But the Court is also prepared to imply a term if it was so obviously a stipulation in the agreement that it goes without saying that the parties must have intended it to form part of their contract. This test, which often overlaps with the business efficacy test,[126] is applied by asking whether, if an officious bystander were to suggest some express provision for a matter in the agreement, the parties would testily suppress him with a common 'Oh, of course!'[127] Such an implication will only be made if the Court is satisfied that both parties would, as reasonable persons, have agreed to the term had it been suggested to them so that the differing commercial motives of the parties will often preclude this type of implication.[128]

Clearly, however, the Court will be reluctant to make such an implication where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them[129] or in a novel or particularly risky contract.[130] It must be possible to formulate the term with a sufficient degree of precision, and without over-complication and artificiality,[131] and the term to be implied must not be inconsistent with the express terms of the contract.[132]

Must be necessary

In any event, the term to be implied must in all the circumstances be reasonable.[133] But this does not mean that a term will be implied merely because it would be reasonable to do so,[134] or because it would improve the

[126] *Tolstoy* v. *Aldington*, *The Times*, 16 December 1993 and 25 January 1994, *per* Steyn L.J.

[127] *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, *per* MacKinnon L.J. at p. 227. See also *McClelland* v. *Northern Ireland General Health Service Board* [1957] 1 W.L.R. 594; *Weg Motors Ltd.* v. *Hales* [1961] Ch. 176, at p. 192; *Bronester* v. *Priddle* [1961] 1 W.L.R. 1294, at p. 1304; *Liverpool City Council* v. *Irwin* [1977] A.C. 239, at p. 254; *Alpha Trading Ltd.* v. *Dunnshaw-Patten Ltd.* [1981] 1 Lloyd's Rep. 122, at p. 128.

[128] *Luxor (Eastbourne) Ltd.* v. *Cooper* [1941] A.C. 108; *Attica Sea Carriers Cpn.* v. *Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep. 250; *Liverpool City Council* v. *Irwin* (*supra*, n. 121), at p. 266; *Hughes* v. *Greenwich L.B.C.* [1994] 1 A.C. 170, at p. 179. See also *post*, p. 640.

[129] *Shell U.K. Ltd.* v. *Lostock Garages Ltd.* [1976] 1 W.L.R. 1187, at p. 1200. See also *Yorkshire Water Services Ltd.* v. *Sun Alliance & London Insurance plc* [1997] 2 Lloyd's Rep. 21.

[130] *Phillips Electronique Grand Publique S.A.* v. *B.S.B. Ltd.* [1995] E.M.L.R. 472, *per* Sir Thomas Bingham M.R. at pp. 482–3.

[131] *Ibid.*, at p. 497; *Luxor (Eastbourne) Ltd.* v. *Cooper* (*supra*, n. 121), *per* Viscount Simon L.C. at p. 117; *Ashmore* v. *Corporation of Lloyds (No. 2)* [1992] 2 Lloyd's Rep. 620, at pp. 626–9. But note that the term implied may involve a flexible criterion such as to take 'reasonable' care.

[132] *Duke of Westminster* v. *Guild* [1985] Q.B. 688, at p. 700; *Johnstone* v. *Bloomsbury H.A.* [1992] 1 Q.B. 333, *per* Browne-Wilkinson V.-C. and Leggatt L.J. at pp. 347 and 350, the former stating that powers created by an express term may be qualified by an implied duty to exercise those powers reasonably: *Imperial Tobacco Pension Trust* v. *Imperial Tobacco* [1991] I.R.L.R. 66 (employer's power to refuse consent to increases in pensions).

[133] *Young & Marten* v. *McManus Childs Ltd.* [1969] 1 A.C. 454, at p. 465; *Liverpool City Council* v. *Irwin* (*supra*, n. 121), at p. 262; *Wong Mee Wan* v. *Kwan Kin Travel Services Ltd.* [1996] 1 W.L.R. 38, at pp. 46–7, relying, *inter alia*, analogically on the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992 No. 3288), esp. reg. 15.

[134] *Reigate* v. *Union Manufacturing Co. (Ramsbottom) Ltd.* [1918] 1 K.B. 592, at p. 598; *Liverpool City Council* v. *Irwin* (*supra*, n. 121).

contract[135] or make its performance more convenient.[136] It must be necessary to imply such a term: 'The touchstone is always *necessity* and not merely *reasonableness*'.[137]

(b) Standardized Terms in Common Relationships

Notwithstanding what is stated above, in certain types of contract, implied terms have become standardized, and they will be implied in all contracts of that type in the absence of any contrary intention. For example, if a builder undertakes to build a house for a purchaser, it is an implied term of the contract that the work will be done in a good and workmanlike manner, that the builder will supply good and proper materials, and that the house will be reasonably fit for human habitation when built or completed.[138] Again, if a travel agent undertakes to arrange for services, such as accommodation and excursions, to be provided by others, it is an implied term of the contract that it would use reasonable care and skill in selecting the service-providers, but if the travel agent itself undertakes to supply the services, it is an implied term of the contract that the services themselves will be carried out with reasonable care and skill, even where the agent has arranged for its obligation to be performed by others.[139] Some of these standardized terms have subsequently been codified by statute.[140] Others, as will be seen, continue to emerge by a process of common law development.

In these cases concerning a common relationship, for example sale, carriage, landlord and tenant, or employment, the parties may have left a lot unsaid and the process of implication is different. It involves the Court determining, in the light of general considerations of policy, the standard incidents of the particular type of relationship rather than constructing a hypothetical bargain. Although it has sometimes been said that the criterion for this form of implication is also 'necessity'[141] rather than 'reasonableness',[142] it does appear that a broader approach is taken. While the parties can exclude or modify the standard incidents of the relationship by express words, unless they do so they will form part of the obligation as a legal incident of the particular kind of contractual relationship.[143] Such stand-

[135] *Trollope & Colls Ltd.* v. *N.W. Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, at p. 609.

[136] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109.

[137] *Liverpool City Council* v. *Irwin* (*supra*, n. 121), *per* Lord Edmund-Davies at p. 266.

[138] *Miller* v. *Cannon Hill Estates Ltd.* [1931] 2 K.B. 113; *Lynch* v. *Thorne* [1956] 1 W.L.R. 303; *Hancock* v. *Brazier (Anerley) Ltd.* [1966] 1 W.L.R. 1317.

[139] *Wong Mee Wan* v. *Kwan Kin Travel Services Ltd.* [1996] 1 W.L.R. 38, at pp. 42 and 46–7. In the second situation the contractor may be liable despite the absence of personal negligence.

[140] e.g. Defective Premises Act 1972, s. 1(1); Sale of Goods Act 1979, ss. 12–15 (*post*, p. 150); Supply of Goods and Services Act 1982, s. 13.

[141] *Liverpool City Council* v. *Irwin* (*supra*, n. 121), *per* Lord Wilberforce at p. 254 and *Scally* v. *Southern Health and Social Services Board* (*supra*, n. 121), *per* Lord Bridge at p. 307; *Ashmore* v. *Corporation of Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620, at p 627; *Ali* v. *Christian Salvesen Food Services Ltd.* [1997] I.C.R. 25.

[142] *Liverpool City Council* v. *Irwin* (*supra*, n. 121), *per* Lord Cross at p. 258 and *Shell U.K. Ltd.* v. *Lostock Garages Ltd.* (*supra*, n. 121), *per* Lord Denning M.R. at p. 1196. See also *Lister* v. *Romford Ice & Cold Storage Co. Ltd.* [1957] A.C. 555, *per* Viscount Simonds and Lord Tucker at pp. 576, 594.

[143] *Mears* v. *Safecar Security Ltd.* [1983] Q.B. 54, at p. 78.

ardized terms, implied by law, have been said to 'operate as default rules'.[144] In these cases it has been said[145] that the problem of implication is to be solved by asking:

> [H]as the law already defined the obligation or the extent of it? If so, let it be followed. If not, look to see what would be reasonable in the general run of such cases . . . and then say what the obligation shall be.

In such cases the contract may be partly but not wholly stated in writing and 'in order to complete it, in particular to give it a bilateral character, it is necessary to take account of the parties and the circumstances', that is the nature of the contract and the relationship established by it.[146] In *Liverpool City Council* v. *Irwin*:[147]

> Tenants in a council tower block withheld rent as a protest at conditions in the building. They alleged that the council was in breach of its duty to repair and maintain the lifts, staircases, and rubbish chutes in the common parts of the building which it controlled. There was no formal lease; merely a document entitled 'conditions of tenancy' and the conditions set out only related to the tenants' obligations. They contained nothing about the landlord's obligations.

It was held that the tenants were to have an implied easement over the common parts for access to their premises and to the rubbish chutes and that the landlord was also under an implied obligation to take *reasonable care* to maintain the common parts in a *reasonable state of repair* because the contract had not placed the obligation to maintain on the tenants individually or collectively, and the landlord retained control of this essential means of access. Again, in recent years an implied obligation of mutual trust and confidence has been recognized in contracts of employment by which both employer and employee are obliged not to conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between them.[148]

The distinction between terms implied as the incidents of a defined relationship and those implied to give business efficacy to a particular transaction was also applied in *Scally* v. *Southern Health and Social Services Board*:[149]

> A contract of employment contained a term giving certain employees the right to acquire a valuable additional pension benefit if they took certain action within a certain time. The

[144] *Malik* v. *Bank of Credit & Commerce International S.A.* [1997] I.C.R. 606, *per* Lord Steyn at p. 621. See also Rakoff, in Beatson and Friedmann, eds., *Good Faith and Fault in Contract Law* (1995), p. 191.

[145] *Shell U.K. Ltd.* v. *Lostock Garages Ltd.* (*supra*, n. 129), *per* Lord Denning M.R. at p. 1196. See also *Liverpool City Council* v. *Irwin* [1977] A.C. 239, *per* Lord Cross at pp. 257–8; *Scally* v. *Southern Health and Social Services Board* [1992] 1 A.C. 294, at p. 307. Cf. *Reid* v. *Rush & Tomkins Group plc* [1990] 1 W.L.R. 212 (no such term implied because extent of obligation raised issues of social policy which could only be resolved by the legislature).

[146] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, at p. 254; *Lister* v. *Romford Ice & Cold Storage Ltd.* [1957] A.C. 555, at p. 579.

[147] [1977] A.C. 239. See also *British Telecommunications plc* v. *Ticehurst* [1992] I.C.R. 383; *Malik* v. *Bank of Credit & Commerce International* [1997] I.C.R. 606 (implied obligation not to do acts likely to undermine the trust and confidence necessary in an employment relationship).

[148] *Ibid.* See further Deakin and Morris, *Labour Law* (1995), pp. 214–19, 298–99.

[149] [1992] 1 A.C. 294. Cf. *Ali* v. *Christian Salvesen Food Services Ltd.* (*supra*, n. 141).

term derived from a collective bargain negotiated by the employees' representatives and trade unions. The plaintiffs, employees who had not been informed of this right, claimed damages for, *inter alia*, breach of contract.

It was held that a term obliging the employer to take reasonable steps to inform its employees of this right should be implied into the contract because this term of the contract was not the result of individual negotiation but of a collective bargain, and the employees could not thus be expected to be aware of the term unless it was drawn to their attention. The implied obligation to inform employees did accordingly not apply to all contracts of employment. If this is an indication that the categories of defined relationships may be sub-divided into smaller and more numerous categories with terms that have a less general application, the distinction between implication of terms in cases concerning a common relationship and implication in those concerning a particular contract may be a fragile one.[150]

(c) Terms Implied by Custom

Another situation in which the Court lays down a general rule that some provision is to be implied in all contracts of a defined type unless the parties have expressly excluded it is where a term is implied by the custom of a locality or by the usage of a particular trade. Such a custom must be strictly proved. It must be notorious, as certain as the written contract, and reasonable.[151] Furthermore, the custom must not offend against the intention of any legislative enactment.

Illustrations

In *Hutton* v. *Warren*,[152] a term was implied by the custom of the country into an agricultural tenancy giving the outgoing tenant the right to a reasonable allowance for seeds and labour expended on the land even though the lease contained no express term to this effect. *Harley & Co.* v. *Nagata*[153] is an example of a term implied by the usage of a particular trade. It was held that, in the case of a time charterparty, a custom that the commission of the broker who negotiated the charterparty should be paid out of the hire that was earned, and should not be payable at all unless hire was in fact earned, should be imported into the brokerage contract. Again in *Mount* v. *Oldham Corporation*[154] an obligation to give a term's notice of an intention to withdraw a child from a private school or to pay a term's fees in lieu of notice was implied by custom.

Certain usages of the mercantile community at large have been codified, for example, those relating to negotiable instruments in the Bills of Exchange Act 1882.

Exclusion of customary terms

A custom or usage which would otherwise become an implied term of the contract may be expressly or impliedly excluded by the parties. Thus, in *Les*

[150] See Phang [1993] J.B.L. 242; [1994] J.B.L. 255 and note *Ashmore* v. *Corporation of Lloyd's (No. 2)* [1992] 2 Lloyd's Rep. 620, at p. 631 (no common relationship in many thousands of contracts between Lloyd's underwriters and the Corporation entered into on the same terms).

[151] *Nelson* v. *Dahl* (1879) 12 Ch. D. 568, at p. 575.

[152] (1836) 1 M. & W. 466.

[153] (1917) 23 Com. Cas. 121.

[154] [1973] Q.B. 309. See also *Lord Eldon* v. *Hedley Brothers* [1935] 2 K.B. 1.

Affréteurs Réunis Société Anonyme v. *Leopold Walford (London) Ltd.*[155] the custom that in a time charter the broker's commission was only payable if the hire was earned was excluded by an express provision that 'a commission of 3% on the estimated gross amount of hire is due (to the broker) *on signing this charter*', in other words, whether any hire was earned or not.

A certain and uniform course of conduct

A course of conduct which is said to form a custom must be both identifiable and uniform. It is these qualities that give the course of conduct the required certainty. The requirement of uniformity does not require total consistency of conduct. Thus, it has been stated that the continued adherence of 85 per cent of the Lancashire weaving mills to a custom was sufficient to maintain it,[156] although a higher degree of uniformity may be required for the creation of a new custom.[157] Once a custom has been proved in a sufficient number of cases, the Court will take judicial notice of it without the need for further evidence.[158]

Notoriety

To be notorious a custom need not be known to all the world, nor even to both parties to the contract.[159] It must, however, be well known in the market to which it applies and readily ascertainable by any person entering into a contract of which it will form a part.[160]

Recognized as having binding effect

The fact that a course of conduct is uniform, certain, and notorious is not, in itself, enough to give rise to a binding custom. It must also be shown that the course of conduct was intended to have a legally binding effect and that compliance with it was the result of a belief in a legal obligation to do so. A custom must therefore be distinguished from a course of conduct that is frequently, or even habitually, followed in a particular commercial community as a matter of grace or commercial convenience.[161] The clearest way of establishing this is to show that the custom has been 'enforced' but this is not necessary and it is sufficient for it to be established that the custom has been acted upon.[162] Where the conduct is required by the rules of a trade or professional association, that will be good evidence that compliance is the result of belief in an obligation to do so.[163]

Reasonableness

Reasonableness is a question of law and, to qualify, a custom must be 'fair and proper and such as reasonable, honest, and fair-minded men would adopt'.[164]

[155] [1919] A.C. 801, *post*, p. 418.

[156] *Sagar* v. *H. Ridehalgh & Son Ltd.* [1931] 1 Ch. 310.

[157] *Con-Stan Industries of Australia Pty. Ltd.* v *Norwich Insurance (Australia) Ltd.* (1985–86) 160 C.L.R. 226 (High Court of Australia), although instances of inconsistency were 'minute': [1981] 2 N.S.W.L.R. 879, at pp. 889–90.

[158] *Universo Insurance Co. of Milan* v. *Merchant's Marine Insurance Co. Ltd.* [1897] 2 Q.B. 93 (judicial notice taken of a broker's liability for unpaid premium in the marine insurance market). See also *J.A. Chapman & Co. Ltd.* v. *Kadirga Denizclik Ve Ticaret*, *The Times*, 19 March 1998.

[159] *Grissell* v. *Bristowe* (1868) L.R. 3 C.P. 112, at p. 128, rev'd on the facts of the case, (1868) L.R. 4 C.P. 36; *Buckle* v. *Knoop* (1867) L.R. 2 Exch. 125, at p. 129, aff'd *ibid.*, at p. 333.

[160] *Strathlorne S.S. Co. Ltd.* v. *Hugh Baird & Sons Ltd.*, 1916 S.C. (H.L.) 134, *per* Lord Buckmaster L.C. at p. 136.

[161] *General Reinsurance Cpn.* v. *Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856, *per* Slade L.J. at p. 874.

[162] *Cunningham* v. *Fonblanque* (1833) 6 C. & P. 44, at p. 49; *Hall* v. *Benson* (1836) 7 C. & P. 711; *Johnson* v. *Clarke* [1908] 1 Ch. 303, at p. 309. Cf. *Sea Steamship Co. Ltd.* v. *Price, Walker & Co. Ltd.* (1903) 8 Com. Cas. 292, at p. 295.

[163] *Cunliffe-Owen* v. *Teaher & Greenwood* [1967] 1 W.L.R. 1421 (Stock Exchange rules); *Shearson Lehman Hutton Inc.* v. *MacLaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570 (London Metal Exchange).

[164] *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* [1916] 2 K.B. 296, at p. 298.

Although evidence of the unreasonableness of a course of conduct may be used to show that it was not generally accepted or known and does not therefore amount to a custom,[165] where a custom has been sufficiently proved, the Courts' tendency to support freedom of bargaining in commercial markets means that it is unlikely to be held to be unreasonable.[166] Where the contracting parties are in a fiduciary relationship, as in the case of an agent or a broker, a stricter approach is taken. The variation, by a trade custom, of a fiduciary duty such as the rule that fiduciaries must not place themselves in a position where their own interest conflicts with that of their customer, is less likely to be held to be reasonable,[167] although in some cases it may be so held.[168]

(d) Sale of Goods

Implied terms in sale of goods

Contracts for the sale of goods are of such everyday occurrence, and are commonly made with so little consideration of the exact legal results which the parties would desire to produce by it, that if their rights and obligations were to be determined only by what they say or do when they make the contract their reasonable expectations would often be defeated. Consequently certain conditions and warranties are *implied* in a contract of sale,[169] originally by common law, but since 1893 in sections 12–15 of the Sale of Goods Act 1893. The provisions are now re-enacted (with amendments) in the Sale of Goods Act 1979.[170] In principle the statutorily implied terms may be negatived or varied by express agreement, by the course of dealing between the parties, or by a binding usage.[171] This freedom of the parties is, however, made subject to the Unfair Contract Terms Act 1977 which contains significant restrictions. We shall see that in the context of consumer sales the statutorily implied terms are compulsory and in other sales they can only be excluded if the Court is satisfied that the term doing so is reasonable.[172] Further controls are imposed by the Unfair Terms in Consumer Contracts Regulations 1994.

(i) Implied terms about title

By section 12 of the Sale of Goods Act 1979 the following terms are implied:

(1) a condition on the part of the seller that in the case of a sale he has a right to sell the goods, and in the case of an agreement to sell he will have such a right at the time when the property is to pass:

[165] *Bottomley* v. *Forbes* (1838) 5 Bing. (N.C.) 121, at p. 128.
[166] *Moult* v. *Halliday* [1898] 1 Q.B. 125, at p. 130.
[167] *Robinson* v. *Mollett* (1875) L.R. 7 H.L. 802; *Anglo-African Merchants Ltd.* v. *Bayley* [1970] 1 Q.B. 311; *North and South Co.* v. *Berkeley* [1971] 1 W.L.R. 470.
[168] *Jones* v. *Canavan* [1972] 2 N.S.W.L.R. 236; *Kelly* v. *Cooper* [1993] A.C. 205, at p. 214 (although this implication may have been on the ground of business efficacy).
[169] See *Benjamin's Sale of Goods*, 5th edn. (1997). On the loss of the right to reject goods for breaches of these provisions, see *ante*, p. 141. On a proposed E.C. Directive on this topic, see Com (95) 520, 18 June 1996; H.L. Select C'ttee on the E.C., 10th Report 1996/97, H.L. 57.
[170] Amended by the Sale and Supply of Goods Act 1994, substantially implementing the Report of the Law Commission, *Sale and Supply of Goods* (Law Com. No. 160, 1987).
[171] Sale of Goods Act 1979, s. 55. [172] Unfair Contract Terms Act 1977, s. 6, *post*, p. 187.

(2) a warranty that (a) the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made, and (b) the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known.

Limited title

Different and more limited warranties are implied in a contract of sale where 'there appears from the contract or is to be inferred from the circumstances of the contract an intention that the seller should transfer only such title as he or a third person may have'.[173] The seller can, by an express term of the contract, indicate an intention to pass only a limited title and such an intention may also be inferred. Where the goods are sold by a sheriff or an auctioneer[174] the intention of the parties to the contract may be that the buyer should have such title only to the goods, and such right only to take possession of them, as the seller has in fact acquired.[175] But where the seller purports to sell only such title as he or a third person may have, the warranties of freedom from encumbrances and quiet possession are not thereby excluded in their entirety. The seller must disclose to the buyer, before the contract is made, any known encumbrances, and further warrants that neither he nor anyone claiming under him (or the third person) will disturb the buyer's quiet possession of the goods.[176]

Statute prohibits absolutely the exclusion or restriction of liability for breach of the terms implied by section 12[177] and they are accordingly a compulsory part of a contract for the sale of goods.

(ii) Sale by description

By section 13 of the Act:

(1) In a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description.
(2) If the sale is by sample as well as by description it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.
(3) A sale of goods is not prevented from being a sale by description by reason only that, being exposed for sale or hire, they are selected by the buyer.

A sale of goods by description is a sale in which the buyer contracts in reliance on a description, express or implied,[178] even though the buyer has seen the goods[179] and may have selected the goods, e.g. in a self-service shop. Thus, it was held that

[173] Sale of Goods Act 1979, s. 12(3).
[174] *Chapman* v. *Speller* (1850) 14 Q.B. 621; *Bagueley* v. *Hawley* (1867) L.R. 2 C.P. 625; *Re Rogers* (1874) L.R. 9 Ch. App. 432, at p. 437; *Wood* v. *Baxter* (1883) 49 L.T. 45; *Niblett* v. *Confectioners' Materials Co. Ltd.* [1921] 3 K.B. 387, at p. 401; *Rowland* v. *Divall* [1923] 2 K.B. 500, at p. 505.
[175] *Bagueley* v. *Hawley* (*supra*, n. 174), at p. 629.
[176] Sale of Goods Act 1979, s. 12(4), (5).
[177] Unfair Contract Terms Act 1977, s. 6(1). An express term concerning title will be a condition: *Barber* v. *NWS Bank plc*, *The Times*, 27 November 1995 (C.A.).
[178] *Wallis, Son & Wells* v. *Pratt & Haynes* [1911] A.C. 394.
[179] *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85, at p. 100; *Nicholson & Venn* v. *Smith Marriott* (1947) 177 L.T. 189.

a person who agreed to buy a second-hand reaping machine described as 'new the previous year and only used to cut 50 acres' was entitled to reject the machine on delivery when he found that it was, in fact, a very old machine.[180] Not all descriptive words are, however, conditions; the words must identify the subject-matter of the contract. So, for instance, words identifying the yard in which a ship that is being sold is to be built are not within section 13.[181]

(iii) Implied conditions about quality or fitness

The general rule of a contract of sale, as of other contracts, is *caveat emptor*. Ordinarily, therefore, there is no implied condition or warranty of the quality of goods sold or of their fitness for any particular purpose. But, where goods are sold in the course of a business, the Act contains important qualifications of this principle, which were amended by the Sale and Supply of Goods Act 1994. In section 14(2) and (2C) it is enacted:

Quality of goods sold

(2) Where the seller sells goods in the course of a business, there is an implied condition[182] that the goods supplied under the contract are of satisfactory[183] quality.

(2C) There is no such condition as regards any matter making the quality of the goods unsatisfactory which is specifically drawn to the buyer's attention before the contract is made; or where the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

Prior to the 1994 amendment the requirement was that the goods be of 'merchantable' quality, a criterion that was criticized[184] as too open-ended, inappropriate for consumer transactions, and as not expressly requiring reasonable durability.[185] The Law Commission had recommended that the criterion be 'acceptable quality'[186] but this was not accepted, *inter alia*, because of concern that a buyer might decide reluctantly that the goods were of 'acceptable' quality even if, by objective standards the quality was not 'satisfactory'.[187] The new criterion, is 'satisfactory quality' and is defined in sections 14(2A) and (2B) of the Sale of Goods Act 1979:[188]

(2A) Goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances.

(2B) The quality of goods includes their state and condition and the following (amongst others) are in appropriate cases aspects of the quality of goods; fitness for all the

[180] *Varley* v. *Whipp* [1900] 1 Q.B. 513.
[181] *Reardon Smith Line Ltd.* v. *Hansen Tangen* [1976] 1 W.L.R. 989. See also *Ashington Piggeries* v. *Christopher Hill Ltd.* [1972] A.C. 441, at pp. 503–4.
[182] Sale of Goods Act 1979, s. 14(6)
[183] Defined *infra*.
[184] *Cehave N.V.* v. *Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, *per* Ormrod L.J. at p. 80; Law Com. No. 162, *Sale and Supply of Goods* (1987), § 2.9 ff.
[185] But see *Mash & Murrell* v. *Joseph I. Emmanuel* [1962] 1 W.L.R. 16; *Lambert* v. *Lewis* [1982] A.C. 225, at p. 276.
[186] Law Com. No. 162 (*supra*, n. 184), §§ 3.22, 3.27.
[187] 237 H.C. Deb (1993/94), col. 633. See further 139 H.C. Deb. (1987/88) W.A. 705; 165 H.C. Deb. (1989/90), col. 1225.
[188] Inserted by the Sale and Supply of Goods Act 1994, s. 1(1).

> purposes for which goods of the kind in question are commonly supplied, appearance and finish, freedom from minor defects, safety, and durability.

The indications are that recourse to decisions on the old law should only be had in exceptional cases[189] but, in the absence of guidance as to what 'satisfactory quality' means, they provide useful indications of what is likely to be required. Thus, in *Rogers* v. *Parish (Scarborough) Ltd.*[190] it was said that:

> Starting with the purpose for which ['goods of the kind in question'][191] are commonly bought, one would include in respect of any passenger vehicle not merely the buyer's purpose in driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one might add, of pride in the vehicle's outward and interior appearance. What is the appropriate degree and what relative weight is to be attached to one characteristic of the car rather than another will depend on the market at which the car is aimed.[192]

In that case, a new car had been delivered with substantial defects to its engine, gearbox, and bodywork and attempts to rectify these defects over a 6-month period had failed. It was held that the car was not of 'merchantable quality' and the buyer was entitled to reject it, even though the defects did not render it unroadworthy. Again, apart from the factors listed in subsection 2(B), the Court is likely to consider the consequences of the defect and the ease or otherwise with which it could be remedied and whether this would produce a result 'as good as new'.[193]

Second-hand goods sold as such and goods sold as 'seconds' or imperfect must still measure up to a reasonable standard, even though not to the standard of a new or perfect article.[194] The price of the goods may frequently be of relevance: a buyer who, for example, buys a cheap carpet cannot expect it to achieve the same quality of resilience or wear as a more expensive one.[195]

The condition as to satisfactory quality extends to 'the goods supplied under the contract' including packaging, containers and extraneous items mixed with the goods sold. Thus, in *Wilson* v. *Rickett, Cockrell & Co. Ltd.*[196] it was held that a ton of 'Coalite' which contained, unknown to either party, a detonator did not meet the statutory standard. The argument that there was nothing wrong with the 'Coalite' itself was rejected and the defendant was held liable for damage from an explosion caused when a bucketful of the fuel containing the detonator was put on a fire.

[189] *Rogers* v. *Parish (Scarborough) Ltd.* [1987] Q.B. 933, *per* Mustill L.J. at pp. 942–3.
[190] [1987] Q.B. 933.
[191] The bracketed words reflect the 1994 amendments. Before those, s. 14(6) referred to 'goods of that kind'.
[192] *Rogers* v. *Parish (Scarborough) Ltd.* (*supra*, n. 189), at p. 944.
[193] *Bernstein* v. *Pamson Motors (Golders Green) Ltd.* [1987] 2 All E.R. 220.
[194] *Bartlett* v. *Sydney Marcus Ltd.* [1965] 1 W.L.R. 1013; *Business Appliance Specialists Ltd.* v. *Nationwide Credit Cpn. Ltd.* [1988] R.T.R. 332; *Shine* v. *General Guarantee Cpn.* [1988] 1 All E.R. 911.
[195] Cf. *B. S. Brown & Son Ltd.* v. *Craiks Ltd.* [1970] 1 W.L.R. 752.
[196] [1954] 1 Q.B. 598.

Exceptions

The condition is, however, excluded if the defects are pointed out to the buyer before the contract is made, or if, before the contract is made, the buyer examines the goods, then as regards defects which the examination which has been made ought to have revealed.[197]

Fitness of goods

Section 14(3) of the 1979 Act deals with the fitness for purpose of the goods sold:

> (3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known—
>
> (a) to the seller, or
>
> (b) where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit-broker to the seller, to that credit-broker,
>
> any particular purpose for which the goods are being bought, there is an implied [condition][198] that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit-broker.

The application of this sub-section is illustrated by two cases concerning the purchase of food. In *Wallis* v. *Russell*[199] the plaintiff bought from a fishmonger 'two nice fresh crabs for tea' and in *Chaproniere* v. *Mason*[200] the plaintiff bought a bath bun from the defendant's baker's shop. The crabs were not fresh and the plaintiff suffered food poisoning after eating the crabs; the bath bun contained a stone and the plaintiff broke a tooth when he bit it. In the first case the plaintiff expressly made it known through her agent[201] that she required the crabs for eating and relied on the fishmonger to select fresh crabs. In the second case, in buying the bun from a baker, the plaintiff clearly made it known by implication that he required it for the purpose of eating and relied on the baker's skill and judgement. Both defendants were liable in damages for breach of this implied condition.

The reliance will usually arise by implication in a purchase by a private individual of goods from a shop, for such a person 'goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment';[202] and where two business people who are equally knowledgeable are dealing with one another, it may still be that the buyer reasonably relies on the seller's skill or judgement.[203] It is possible, however, that the reliance will be only partial. If, for example, the buyer procures the seller to manufacture goods in accordance with the buyer's

[197] Sale of Goods Act 1979, s. 14(2C); *R & B Customs Brokers Co. Ltd.* v. *United Dominions Trust Ltd.* [1988] 1 W.L.R. 321. Cf. *Thornett and Fehr* v. *Beer & Son* [1919] 1 K.B. 486 (on the previous and different wording of the proviso to s. 14(2) of the 1893 Act).

[198] Sale of Goods Act 1979, s. 14(6).

[199] [1902] 2 Ir. Rep. 585.

[200] (1905) 21 T.L.R. 633. See also *Priest* v. *Last* [1903] 2 K.B. 148 (hot-water bottle bursts); *Frost* v. *Aylesbury Dairy Co. Ltd.* [1905] 1 K.B. 608 (typhoid germs in milk); *St Albans City & D.C.* v. *International Computers Ltd.* [1996] 4 All E.R. 481, at p. 494 (computer disk with defective program).

[201] The purchase was made by the plaintiff's granddaughter on her behalf. On agency, see *post*, p. 623.

[202] *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85, *per* Lord Wright at p. 99.

[203] *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.* [1969] 2 A.C. 31. Cf. *Slater & Slater* v. *Finney Ltd.* [1997] A.C. 473 (no reliance because of unusual feature in buyer's machinery).

formula or specifications, there will be no implied condition that the formula or specifications will produce goods which are reasonably fit for the purpose made known to the seller by the buyer, yet the buyer may rely on the skill or judgement of the seller to ensure that the materials to be compounded in the formula are not toxic or harmful[204] or there may be an area of expertise outside the specifications in respect of which the skill or judgement of the seller is relied on.[205]

Comparison between s. 14(2) and s. 14(3)

The two sub-sections of section 14, to some extent, overlap, for both the definition of 'satisfactory quality' and section 14(3) refer to fitness for a purpose for which goods are commonly bought or supplied. A buyer who requires the goods for some special or unusual purpose, however, can recover, if at all, only under section 14(3). The special or unusual purpose must be made known to the seller and the buyer must show reliance on the seller's skill and judgement. Under section 14(2) it is not necessary to show such reliance. Where the goods are unfit for a special or unusual purpose, but nevertheless fit for all purposes for which such goods are commonly supplied, they will still be of 'satisfactory quality' and there will be no breach by the seller of section 14(2). Where, however, they are only fit for some of the purposes for which such goods are commonly supplied they will not be of 'satisfactory quality'.[206] As amended in 1994, the sub-section thus places the risk of unfitness for any of the common purposes on the seller. It is said that the seller who knows that its goods are not fit for one or more of the purposes for which goods of that kind are commonly supplied can protect itself by ensuring that the description of the goods excludes any common purpose for which they are unfit or by otherwise indicating that the goods are not fit for all their common purposes.[207] The amendment has therefore given the characterization of a purpose as 'common' or 'unusual' a new importance.

(e) Sale by Sample

Sale by sample

In a sale by sample there are two implied conditions. First, that the bulk will correspond with the sample in quality. Secondly, that the goods will be free from any defect making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.[208] The meaning of this last condition was considered in *Godley* v. *Perry*:[209]

A 6-year-old boy bought from a retailer in his shop a toy catapult made of brittle polystyrene which fractured while he was using it, blinding him in one eye. He sued the retailer for damages under section 14(2) and (3) of the Sale of Goods Act, and the retailer brought in the wholesaler from whom he had bought the catapult by sample as a third party. The wholesaler likewise joined the importer (from Hongkong) who had supplied him.

[204] *Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.* [1972] A.C. 441.
[205] *Cammell Laird & Co. Ltd.* v. *Manganese Bronze & Brass Co. Ltd.* [1934] A.C. 402.
[206] Sale of Goods Act 1979, s. 14(2B), *ante*, p. 152.
[207] See Law Com. No. 162, *Sale and Supply of Goods* (1987), § 3.36. Prior to the amendment it was not necessary for the goods to be fit for *all* of their common purposes: *Sumner, Permain & Co. Ltd.* v. *Webb & Co. Ltd.* [1922] 1 K.B. 55; *Aswan Engineering Establishment Co.* v. *Lupine Ltd.* [1987] 1 W.L.R. 1, and see *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.* [1969] 2 A.C. 31, at pp. 77.
[208] Sale of Goods Act 1979, s. 15.
[209] [1960] 1 W.L.R. 9.

The retailer was held liable but it was argued that the wholesaler and importer were not liable for breach of the condition as to satisfactory quality in a contract of sale by sample because a reasonable examination of the catapult would have revealed its fragility. Edmund Davies J. said:[210]

> Counsel . . . suggested that by holding the toy down with one's foot and then pulling on the elastic its safety could be tested and . . . its inherent fragility would thereby inevitably be discovered. True, the potential customer might have done any of these. He might also, I suppose, have tried biting the catapult, or hitting it with a hammer, or applying a lighted match to ensure its non-inflammability, experiments which, with all respect, are but slightly more bizarre than those suggested by counsel.

The phrase 'reasonable examination' was to be construed by the common-sense standards of everyday life: 'Not extreme ingenuity, but reasonableness, is the statutory yardstick.' The wholesaler and importer were held liable.

(f) Other Statutory Terms

Certain terms are implied by sections 8–11 of the Supply of Goods (Implied Terms) Act 1973[211] into all contracts of hire-purchase. These implied terms resemble very closely those implied in contracts of sale of goods, and relate similarly to title, quality, and fitness for purpose, and correspondence with description or sample. Statutory terms are also implied by the Supply of Goods and Services Act 1982 into contracts for work and materials, contracts of hire and contracts for the supply of services. For example, in a contract for the supply of services, there are implied terms that the supplier will carry out the service with reasonable care and skill and (if no time for completion is fixed) that he will carry out the service within a reasonable time. Finally, the covenants for title which are implied on a disposition of property are set out in Part I of the Law of Property (Miscellaneous Provisions) Act 1994.

IV. Construction of Terms

We have so far considered the mode in which the terms of a contract are ascertained; we have now to deal shortly with certain general principles which govern the construction of terms which have been reduced to writing, premising that the construction of a contract is always a matter of law for the Court to determine.

Intention must normally be ascertained from document itself

The professed object of the Court in construing a written contract is to discover the mutual intention of the parties,[212] the written declaration of whose minds it

[210] At p. 15.

[211] As amended by the Consumer Credit Act 1974, Sched. 4 and the Sale and Supply of Goods Act 1994, s. 7, Sched. 2, para. 4.

[212] *Pioneer S.S. Ltd.* v. *B.T.P. Tioxide* [1982] A.C. 724, at p. 736; *International Fina Services A.G.* v. *Katrina Shipping Ltd.* [1995] 2 Lloyd's Rep. 344, at p. 350..

is. Subject to the exceptions discussed above[213] this intention must be ascertained from the document itself. Accordingly, the parties cannot themselves give direct evidence to show that their real intentions were at variance with the provisions of the document[214] and the task of the Court is to construe the contractual term without any preconception as to what the parties intended.[215]

Evidence of prior negotiations cannot therefore be received in aid of the construction of a written document; but the Court must place itself in thought in the same factual matrix as that in which the parties were. Thus evidence may be admitted of the factual background existing at or before the date of the contract including evidence of the genesis and, objectively, of the 'aim' of the transaction.[216]

Again, the subsequent conduct of the parties may not be used as an aid to interpretation of a written contract because it is equally referable to what the parties intended to say as to the meaning of what they in fact said[217] and because 'otherwise one might have the result that a contract meant one thing on the day it was signed, but by reason of subsequent events meant something different a month or a year later'.[218] Subsequent conduct may, however, be used to show that a contract exists,[219] and it may also amount to a variation of its terms or give rise to an estoppel or a waiver.[220]

There are certain other rules of a general nature which are applied by the Courts in the case of written agreements:

(1) Words are to be understood in their plain and literal meaning. This does not necessarily mean the dictionary sense of the word, but that in which it is generally understood,[221] subject always, however, to admissible evidence being adduced to show that the word is to be understood in some other technical or special sense. The rule may also be departed from where it would involve an absurdity[222] or inconsistency with the rest of the instrument.[223] But, although a Court is unlikely to conclude that the parties intended a construction that leads to

Plain meaning

[213] *Ante*, p. 130. See also *post*, p. 161.

[214] *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, at p. 1385; *Hyundai Merchant Marine Co. Ltd.* v. *Gesuri Chartering Co. Ltd.* [1991] 1 Lloyd's Rep. 100, at p. 102. See also *British Movietonews Ltd.* v. *London & District Cinemas Ltd.* [1952] A.C. 166 reversing [1951] 1 K.B. 190 in which Denning L.J. had stated (at p. 201) that 'Even if the contract is absolute in its terms, nevertheless if it is not absolute in intent, it will not be held absolute in effect'.

[215] *Pagnan SpA* v. *Tradax Ocean Transportation S.A.* [1987] 1 All E.R. 81, at p. 88, aff'd [1987] 3 All E.R. 565.

[216] *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381; *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989; *Codelfa Construction Pty. Ltd.* v. *State Railway Authority of N.S.W.* (1982) 149 C.L.R. 337, at pp. 345–53 (High Court of Australia); *Investors Compensation Scheme Ltd.* v. *West Bromwich B.S.* [1997] C.L.C. 1248, *per* Lord Hoffmann at p. 1258. But cf. *Hayden* v. *Lo & Lo* [1997] 1 W.L.R. 198, at p. 205; *Scottish Power plc* v. *Britoil (Exploration) Ltd.*, *The Times*, 2 December 1997.

[217] *Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235, at pp. 261, 263.

[218] *Whitworth Street Estates (Manchester) Ltd.* v. *James Miller & Partners Ltd.* [1970] A.C. 583, at p. 603.

[219] *Ibid.*; *Wilson* v. *Maynard Shipbuilding Consultants AG Ltd.* [1978] Q.B. 665.

[220] *Ante*, p. 110; *post*, p. 496.

[221] *Robertson* v. *French* (1803) 4 East 130, at p. 135.

[222] *Abbott* v. *Middleton* (1858) 7 H.L.C. 68, at p. 69. See also *Investors Compensation Scheme Ltd.* v. *West Bromwich B.S.* [1997] C.L.C. 1248 (H.L.).

[223] *Watson* v. *Haggitt* [1928] A.C. 127.

an unreasonable result, 'to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could be better made'.[224]

Ut res magis valeat quam pereat

(2) Words susceptible of two meanings receive that which will make the instrument valid rather than void or ineffective.[225] Where a guarantee was expressed to be given to the plaintiffs 'in consideration of your *being* in advance' to J.S., it was argued that this showed a past consideration; but the Court held that the words might mean a prospective advance, and be equivalent to 'in consideration of your *becoming* in advance', or '*on condition* of your being in advance'.[226] So strong is this rule in favour of supporting the document that, in suitable cases, the Court is prepared to restrict the written words to those applicable in the agreement, supply obvious omissions, and to transpose or even reject words and phrases if the intention of the parties is clear.

Ex antecedentibus et consequentibus fit optima interpretatio

(3) 'An agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected *from the whole of the agreement*, and greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.'[227] The proper mode of construction is to take the instrument as a whole, to collect the meaning of words and phrases from their general context, and to try and give effect to every part of it.[228] However, if the words of a particular clause are clear and unambiguous, they cannot be modified by reference to the other clauses in the agreement.

Subsidiary rules

Subsidiary to these main rules there are various others, all tending to the same end, the effecting of the intention of the parties as ascertained from the written document:

Expressio unius

Where there is an express mention in the instrument of a certain thing, this will exclude any other thing of a similar nature: *expressio unius est exclusio alterius*.[229] So where a conveyance was made of an iron foundry and two houses, together with the fixtures in the houses, the fixtures in the foundry were held not to pass even though they otherwise would have done so.[230]

Ejusdem generis rule

The meaning of general words may be narrowed and restrained by specific and particular descriptions of the subject-matter to which they are to apply. Thus in construing a charterparty where liability to deliver cargo was excluded if through 'war, disturbance, or any other cause' it was not possible to do so, it was held that the words 'any other cause' were restricted to events of the same kind as war and disturbance, and so excluded ice.[231] But this rule (the so-called *ejusdem generis*

[224] *Charter Reinsurance Co. Ltd.* v. *Fagan* [1997] A.C. 313, *per* Lord Mustill at p. 388, limiting the statement in *Schuler AG* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235, *per* Lord Reid at p. 251.

[225] *Verba ita sunt intelligenda ut res magis valeat quam pereat*: Bac. Max. 3.

[226] *Haigh* v. *Brooks* (1839) 10 A. & E. 309; *Steele* v. *Hoe* (1849) 14 Q.B. 431.

[227] *Ford* v. *Beech* (1848) 11 Q.B. 852, *per* Parke B. at p. 866.

[228] *Ex antecedentibus et consequentibus fit optima interpretatio*: 2 Co. Inst. 317; *Barton* v. *Fitzgerald* (1812) 15 East 529, at p. 541.

[229] Co. Litt. 210a.

[230] *Hare* v. *Horton* (1833) 5 B. & Ad. 715.

[231] *Tillmanns* v. *S. S. Knutsford* [1908] 2 K.B. 385, affirmed [1908] A.C. 406; *Thorman* v. *Dowgate Steamship Co. Ltd.* [1910] 1 K.B. 410.

rule) is again only a canon of construction for the purpose of ascertaining what may be presumed to have been the meaning and intention of the parties to the contract. It is not a rule of law and is therefore subordinate to the parties' real intention and does not control it; and it will have no application if the parties, from a survey of the contract as a whole, can be shown to have intended a different interpretation to be given to the language which they have used.

Verba chartarum fortius accipiuntur contra proferentem

The words of written documents are construed more forcibly against the party putting forward the document.[232] The rule is based on the principle that a party which puts forward the wording of a proposed agreement may be assumed to have looked after its own interests, and is responsible for ambiguities in its own expression, and has no right to induce another to make a contract on the supposition that the words mean one thing, and then to argue for a construction by which they would mean another thing, more to its advantage.[233]

V. Exemption Clauses

(a) Contracts of Adhesion

One of the most important developments in the sphere of contract during the last hundred years has been the appearance of the standard form of contract,[234] or 'contract of adhesion'[235] as it is sometimes called. The idea of an agreement freely negotiated between the parties has given way to the necessity for a uniform set of printed conditions which can be used time and time again, and for a large number of persons, and at less cost than an individually negotiated contract. Each time an individual travels upon a ship, bus or train, buys a motor car, takes clothes to the dry-cleaner, deposits luggage in a railway cloakroom, or even, in some cases, takes the lease of a house or flat, a standard form contract, devised by the supplier, will be provided which the individual must either accept *in toto*, or, theoretically, go without. In fact, there is little alternative but to accept; the individual does not negotiate, but merely adheres. In some respects, therefore, it would be more correct to regard the relationship which arises not as one of contract at all, but as one of status. The contracting party enjoys, if that is the word, the status of a consumer.

The use of standard terms and conditions is not, however, confined to contracts made with consumers. Many contracts between business people—indeed, perhaps the majority of such contracts—are today entered into on the basis of a standard form of document, such as an order form, confirmation of order,

[232] *Verba chartarum fortius accipiuntur contra proferentem*: Bac. Max. 3; see *post*, p. 165.

[233] *Tan Wing Chuen* v. *Bank of Credit and Commerce Hong Kong Ltd.* [1996] 2 B.C.L.C. 69, *per* Lord Mustill at p. 77.

[234] See Sales (1953) 16 M.L.R. 318; Gower (1954) 17 M.L.R. 155; Turpin (1956) 73 S.A.L.J. 144; Coote, *Exception Clauses* (1964); Yates, *Exclusion Clauses in Contracts*, 2nd edn. (1982).

[235] Saleilles, *De la Déclaration de la Volonté* (1901).

catalogue or price list, put forward by one party,[236] or that person's standard form of agreement, or which incorporate by reference the standard terms and conditions of trade associations.

To such contracts the Courts have, until recently, been forced to apply the ordinary principles of the law of contract which may not be entirely capable of providing a just solution for a transaction in which freedom of contract exists on one side only. In particular, the party delivering the document may allocate the risks of non-performance or defective performance to the other party. While such allocation of risks should in principle lead to lower costs, it is only justifiable if at least some of the cost saving is passed on and if the other party is aware of the contractual allocation of risks. In fact the party delivering the document may seek unfair exemption from certain common law liabilities, and thus seek to deprive the other party of the compensation which that person might reasonably expect to receive for any loss or injury or damage arising out of the transaction. Moreover, standard form contracts with consumers are often contained in some printed ticket, or notice, or receipt, which is brought to the attention of the consumer at the time the agreement is made and which a prudent consumer would read from beginning to end. In fact, however, the consumer has normally neither the time nor the energy to do this, and, even if this was done, it would be of little assistance for the consumer could not discuss or vary the terms in any way. It is not until some dispute arises that the consumer realizes how few are the rights in the contract.

Acting within the limitations imposed on them by the contractual framework of these transactions, the Courts nevertheless endeavoured to alleviate the position of the recipient of the document by requiring certain standards of notice in respect of onerous terms, and by construing the document wherever possible in that person's favour. These rules are still important in determining the efficacy of clauses which purport to exempt one party from common law liability. But the measure of protection which they offered against unfair exemption clauses is somewhat slender, and the power of the Courts to control such clauses has been greatly increased since the enactment by the legislature of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Regulations 1994.[237]

(b) Notice of Printed Terms

Notice of terms of contract

A person who *signs* a document which contains contractual terms is normally bound by them even though that person has not read them and is ignorant of their precise legal effect.[238] But if the document is not signed, being merely delivered to the other party, then the question arises whether adequate notice was given of the terms of the contract.

[236] For the 'battle of the forms', see *ante*, p. 39.

[237] See *post*, pp. 182, 196.

[238] *Parker* v. *South Eastern Ry.* (1877) 2 C.P.D. 416, at p. 421; *L'Estrange* v. *F. Graucob Ltd.* [1934] 2 K.B. 394; *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69.

(i) The Notice must be contemporaneous with the contract

Notice must be contemporaneous

In order that a term should become binding as part of the contract it must be brought to the notice of the contracting party before or at the time that the contract is made. If it is not communicated until afterwards, it will be of no effect unless there is evidence that the parties have entered into a new contract on a different basis.[239]

An illustration of the necessity for contemporaneity is provided by *Olley* v. *Marlborough Court Ltd.*:[240]

The plaintiff and her husband registered at the defendant's hotel, paid for a week's board and lodging in advance, and then went up to their room. There a notice was exhibited stating: 'The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody'. Owing to the negligence of the hotel staff, a thief gained access to the room and stole some of their property.

The Court of Appeal held that the notice formed no part of the contract since the plaintiff could not have seen it until after the contract was made; the defendant was accordingly liable for the loss. Also, a customer who parked a car in a garage and received at the entrance a ticket from an automatic machine, was held not to be bound by the conditions printed on the ticket; the machine caused the ticket to be issued when the car was driven to the entrance to the garage, and the customer could not be affected by conditions brought to his notice after this time.[241]

Course of dealing

An exception clause will not necessarily be incorporated into a contract by virtue of a *previous* course of dealing between the same parties on similar terms.[242] But such a clause may be incorporated where each party has led the other reasonably to believe that it 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.[243] Where the clause is a usual one in the trade, and the parties are of equal bargaining power, less will be required in terms of the consistency of the previous course of dealing for it to be included in the contract.[244] In such cases the process of incorporation has been said to be based on a common understanding and appears to be very similar to that of implication on the basis of trade custom. It is, however, clear that one party cannot unilaterally,

[239] *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* (*supra*, n. 238).

[240] [1949] 1 K.B. 532. See also *Hollingworth* v. *Southern Ferries Ltd.* [1977] 2 Lloyd's Rep. 70 (sailing tickets delivered after booking made).

[241] *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163 (only Lord Denning M.R. found that the contract was concluded at that moment. Megaw L.J. and Sir Gordon Willmer reserved their opinions on this point).

[242] *Hollier* v. *Rambler Motors (A.M.C.) Ltd.* [1972] 2 Q.B. 71 (plaintiff had signed a form containing exemption clauses on three or four occasions over a 5-year period). See also *McCutcheon* v. *David Macbrayne Ltd.* [1964] 1 W.L.R. 125.

[243] *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.* [1969] 2 A.C. 31 (parties had contracted three or four times a month over a 3-year period). See also *Spurling (J.) Ltd.* v. *Bradshaw* [1956] 1 W.L.R. 461, at p. 467; *Gillespie Bros. & Co. 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; *Circle Freight Int. Ltd.* v. *Medeast Gulf Exports Ltd.* [1988] 2 Lloyd's Rep. 427.

[244] *British Crane Hire Cpn. Ltd.* v. *Ipswich Plant Hire Ltd.* [1975] Q.B. 303 (usual term incorporated on the basis of two transactions months before).

after the conclusion of the contract, impose upon the other onerous conditions without consent: any variation of a concluded contract can only take place by mutual consent of both parties.

(ii) The meaning of notice

Communication of notice

We have now to consider in what circumstances a party receiving a ticket, receipt, or common form document at the time the contract is made will be bound by the conditions contained in it. In order that a contract should come into existence, according to the normal rules of offer and acceptance, the terms of the contract should be communicated, that is to say the offeree should be made subjectively aware of their nature and extent. But the exigencies of modern conditions have introduced a more objective idea of *consensus* where such standard form contracts are concerned, and notice must here be reconsidered from this standpoint.

Let us take the example of a railway or cloakroom ticket, which the person receiving it puts into his pocket unread. Three general rules have been laid down by the Courts to determine whether the traveller or depositor will be bound by the terms contained in the ticket:[245]

(1) A person receiving the ticket who did not see or know that there was any writing on the ticket will not be bound by the conditions.
(2) A person who knows there was writing, and knows or believes that the writing contained conditions, is bound by the conditions.
(3) A person who knows that there was writing on the ticket, but does not know or believe that the writing contained conditions, will nevertheless be bound where the delivery of the ticket in such a manner that the writing on it could be seen is reasonable notice that the writing contained conditions.

It will quickly be seen that it is the third of these rules which is at once the most frequently to be applied and the most difficult in its application. It is sometimes known as the term of 'reasonable sufficiency of notice'.

(iii) Reasonable sufficiency of notice

A person may be bound by an exemption clause in a standard form document, even though subjectively ignorant of its content, if the party seeking to rely on the clause has done what was reasonably sufficient in the circumstances to bring it to the other party's notice. The principles were discussed in *Parker* v. *South Eastern Railway Co.*:[246]

The plaintiff deposited a bag in the defendant's station cloakroom. He received a paper ticket which said on its face 'See back' and on the back were a number of printed conditions, including a condition limiting liability for any package to £10. The plaintiff admitted that he knew there was writing on the ticket, but stated that he had not read it, and did

[245] *Parker* v. *South Eastern Ry.* (1877) 2 C.P.D. 416, at pp. 421, 423; approved in *Richardson, Spence & Co.* v. *Rowntree* [1894] A.C. 217; *Burnett* v. *Westminster Bank* [1966] 1 Q.B. 742.
[246] (1877) 2 C.P.D. 416; *Hood* v. *Anchor Line (Henderson Bros.) Ltd.* [1918] A.C. 837.

not know or believe that the writing contained conditions. The bag was lost, and the plaintiff claimed £24 10*s*., for its value.

The jury was directed to consider whether the plaintiff had read or was aware of the special condition upon which the bag was deposited. It answered this question in the negative and accordingly judgment was entered for the plaintiff. On appeal by the defendant, the Court of Appeal held that the jury had been misdirected. The real question was whether the defendant had done what was reasonably sufficient to give the plaintiff notice of the condition. A new trial was ordered.

Question of fact

The question whether all that is reasonably necessary to give notice has been done is a question of fact,[247] in answering which the tribunal must look at all the circumstances and the situation of the parties.[248] *Thompson* v. *L.M. & S. Railway Co.*[249] represents a very liberal approach to what constitutes reasonable notice. There a passenger travelling on an excursion ticket was injured by the alleged negligence of the defendant railway company. It was held that a clause exempting the company from liability,[250] printed in its timetable, was sufficiently, although circuitously, incorporated into the contract since the ticket referred to the timetables and excursion bills (the latter also referred to the timetables). But in *Richardson, Spence & Co.* v. *Rowntree*,[251] a term limiting the liability of a steamship company to $100 in a steamship ticket was held not to be incorporated. The ticket had been handed to the plaintiff folded up, and the conditions were obliterated in part by a stamp in red ink. The jury found that, although the plaintiff knew there was writing on the ticket, she did not know the writing contained conditions, and that reasonably sufficient notice had not been given. The House of Lords refused to upset this finding. If the notice is otherwise sufficient, the fact that a particular plaintiff is under some non-legal disability, for example, unable to speak English, or blind,[252] or, as in *Thompson* v. *L.M. & S. Railway Co.*, illiterate,[253] will be treated as irrelevant.

Unusual terms

Although a term must be construed in its context, it is not enough to look at a set of printed conditions as a whole. If the particular condition relied upon by the party seeking exemption is one which is unusual in that class of contract, special measures may be required fairly to bring it to the notice of the other party. It has even been said that some clauses '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

[247] *Parker* v. *South-Eastern Ry.* (1877) 2 C.P.D. 416; *Richardson, Spence & Co.* v. *Rowntree* [1894] A.C. 217.

[248] *Hood* v. *Anchor Line (Henderson Bros.) Ltd.* [1918] A.C. 837, *per* Lord Haldane at p. 844.

[249] [1931] 1 K.B. 41.

[250] The Unfair Contract Terms Act 1977, s. 2(1) now prevents the exclusion or restriction of liability for death or personal injury resulting from negligence, *post*, pp. 186–7.

[251] [1894] A.C. 217. See also *Union Steamships* v. *Barnes* (1956) 5 D.L.R. (2d) 535 (Canada).

[252] Contrast *Geier* v. *Kujawa, Weston and Warne Bros. (Transport) Ltd.* [1970] 1 Lloyd's Rep. 364, at p. 368 (where the plaintiff's ignorance of English was known). The term there, excluding the liability of a driver of a motor vehicle to a passenger, would now be invalid under the Road Traffic Act 1988, s. 149.

[253] However, the ticket had been bought on the plaintiff's behalf by her niece and it was found that the niece's father had ascertained, before the ticket was taken, that there were conditions for excursion tickets.

be sufficient'.[254] In *Interfoto Picture Library Ltd.* v. *Stiletto Visual Programmes Ltd.*:[255]

> The plaintiffs hired forty-seven transparencies to the defendants. The transparencies were despatched to the defendants in a bag containing a delivery note containing conditions printed in small but visible lettering on the face of the document, including condition 2, which stated that 'a holding fee of £5 plus VAT per day will be charged for each transparency which is retained . . . longer than . . . 14 days'. The daily rate per transparency was many times greater than was usual but nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2. The defendants returned the transparencies 4 weeks later and the plaintiffs claimed £3,783.50.

The Court of Appeal held that the contract was made when, after the receipt of the transparencies, the defendants accepted them by telephone. Although, to the extent the conditions were common form or usual terms, they were incorporated into the contract, it was held that condition 2 had not been so incorporated.[256] Bingham L.J. stated:[257]

> The defendants are not to be relieved of . . . liability because they did not read the condition, although doubtless they did not; but in my judgment they are to be relieved because the plaintiffs did not do what was necessary to draw this unreasonable and extortionate clause fairly to their attention.

Reference on face of ticket

If there is no reference on the face of a ticket to the fact that there are conditions printed on the back, the Courts have consistently held that such a notification is defective.[258] Strictly, of course, the issue is one of fact in each particular case, but this requirement may now fairly be said to be one of law.

Exhibited notices

A printed notice, or notices, containing conditions, for example, the notice exhibited at the counter of a left-luggage office at a railway station, has been held to become part of the contract where the ticket or receipt refers to it[259] and probably even where it does not, provided the notice is sufficiently prominent and can be plainly seen before or at the time of making the contract.[260] But there is also authority for the view that the terms of the notice must be 'brought home' to the party affected and accepted by that party as part of the contract.[261]

[254] *Spurling (J.) Ltd.* v. *Bradshaw* [1956] 1 W.L.R. 461, *per* Denning L.J. at p. 466; *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163; *Shearson Lehman Hutton Inc.* v. *MacLaine Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570, at p. 612.

[255] [1989] Q.B. 433.

[256] The plaintiff could only recover a holding fee assessed on the basis of a *quantum meruit*, here £3.50 per transparency per week beyond the 14-day period: [1989] Q.B. 433, at pp. 439, 445.

[257] [1989] Q.B. 433, at p. 445. See also *The Northern Progress* [1996] 2 Lloyd's Rep. 321; *A.E.G. (U.K.) Ltd.* v. *Logic Resources Ltd.* [1996] C.L.C. 265, *per* Hirst L.J. at p. 273, but cf. Hobhouse L.J. *ibid*, at p. 277.

[258] *Henderson* v. *Stevenson* (1875) L.R. 2 H.L. Sc. App. 470; *Sugar* v. *L.M. & S. Ry.* [1941] 1 All E.R. 172; *White* v. *Blackmore* [1972] 2 Q.B. 651, at p. 664. See also *Poseidon Freight Forwarding Co. Ltd.* v. *Davies Turner Southern Ltd.* [1996] 2 Lloyd's Rep. 388 (reference to terms on back of faxed document but terms not communicated).

[259] *Watkins* v. *Rymill* (1883) 10 Q.B.D. 178.

[260] *Olley* v. *Marlborough Court Ltd.* [1949] 1 K.B. 532, at p. 549; *Ashdown* v. *Samuel Williams & Sons Ltd.* [1957] 1 Q.B. 409; *White* v. *Blackmore* [1972] 2 Q.B. 651.

[261] *Harling* v. *Eddy* [1951] 2 K.B. 739, at p. 748; *Adams (Durham) Ltd.* v. *Trust Houses Ltd.* [1960] 1 Lloyd's Rep. 380; *McCutcheon* v. *David Macbrayne Ltd.* [1964] 1 W.L.R. 125; *Smith* v. *Taylor* [1966] 2 Lloyd's Rep. 231; *Mendelssohn* v. *Normand Ltd.* [1970] 1 Q.B. 177, at p. 182.

(iv) The notice must be in a contractual document

Vouchers and receipt

If the document is one which the person receiving it would scarcely expect to contain conditions, for example, if it consisted of the sort of ticket which a reasonable person would suppose to be merely a voucher or receipt, it cannot be said that the notice given was reasonably sufficient in the circumstances. It would be 'quite reasonable that the party receiving it should assume that the writing contained in it no condition, and should put it in his pocket unread'.[262]

In *Chapelton* v. *Barry U.D.C.*:[263]

The plaintiff wished to hire a deck chair on the beach. He took two from a pile belonging to the defendant, paying 2*d.* for each and receiving two tickets from an attendant. He set the chairs up firmly, sat on one—and went through the canvas. The plaintiff sued the defendant for personal injuries sustained, and the defendant pleaded an exemption clause printed on the back of the ticket: 'The council will not be liable for any accident or damage arising from the hire of the chair'. The plaintiff had glanced at the ticket but had not realized that it contained conditions.

The Court held that the defendants were not protected. A cheque-book cover,[264] a parking ticket issued by an automatic machine,[265] and a ticket for a public bath house[266] have similarly been held to be non-contractual documents.

(c) Construction of Exemption Clauses

Assuming that reasonably sufficient notice of a standard form contract has been given to the person who receives the printed document, we must now consider the way in which the terms of the document are to be construed. Such is the disparity between the bargaining power of large enterprises (both private and public) and consumers that terms have often been imposed upon consumers which are ungenerous or unfair in their application and which exempt the party putting forward the document, either wholly or in part, from his just liability under the contract. This may be one of the reasons why, at common law, the Courts evolved certain canons of construction which normally work in favour of the party seeking to establish liability and against the party seeking to claim the benefit of the exemption. The application of these canons of construction does not render exemption clauses generally ineffective. If the clause is appropriately drafted so as to exclude or limit the liability in question, then the Courts must (subject to the powers conferred on them by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994)[267] give effect to it. Moreover, as between businesses, exemption clauses can perform a useful function in that they may, for example, anticipate future contingencies which hinder or prevent performance, establish procedures for the making of claims and provide for the allocation of risks as between the parties to the contract. In a business transaction,

[262] *Parker* v. *South-Eastern Ry. Co.* (1877) 2 C.P.D. 416, *per* Mellish L.J. at p. 422.
[263] [1940] 1 K.B. 532.
[264] *Burnett* v. *Westminster Bank* [1966] 1 Q.B. 742.
[265] *Thornton* v. *Shoe Lane Parking Ltd.* [1971] 2 Q.B. 163.
[266] *Taylor* v. *Glasgow Corporation*, 1952 S.C. 440 (Scotland).
[267] See *post*, pp. 182 and 196.

the effect of an exemption clause may simply be to determine which of the parties is to insure against a particular risk. Exemption clauses in business transactions are not necessarily unfair or inequitable. But even in business transactions the Courts must be satisfied that the clause, on its wording, does have the effect contended for by the person relying on it, that is, the party seeking to exclude or restrict his liability.

(i) Strict interpretation

Need for precise words

'If a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words.'[268] The words of the exemption clause must therefore exactly cover the liability which it is sought to exclude. So an exemption clause in a contract excluding liability for 'latent defects' will not exclude the condition as to fitness for purpose implied by the Sale of Goods Act;[269] exclusion of *implied* conditions and warranties will not exclude a term which is actually expressed;[270] and a clause excluding liability for breach of *warranty* will not exclude liability for breach of condition.[271] In the leading case of *Wallis, Son & Wells* v. *Pratt & Haynes*:[272]

> The appellants bought seed described as 'common English sainfoin' subject to an exemption clause that 'the sellers give no *warranty* express or implied, as to growth, description, or any other matters'. The seed turned out to be giant sainfoin, indistinguishable in seed, but inferior in quality and of less value. The appellants were forced to compensate those to whom they had subsequently sold the seed, and sued to recover the money lost. The respondents pleaded the exemption clause.

It was held by the House of Lords that, even though the appellants had accepted the goods and could therefore only sue for breach of warranty *ex post facto*,[273] there was nevertheless originally a breach of the *condition* implied by section 13 of the Sale of Goods Act,[274] and this had not been successfully excluded.

Since the enactment of the Unfair Contract Terms Act 1977, which proscribes certain exemption clauses and subjects many others to a requirement of 'reasonableness', there are indications of a slightly less strict approach to construction. Thus, although 'the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses', mainly in consumer contracts and standard form contracts, it has been said that:

> in commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks . . . can be most economically borne . . . it is wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning.[275]

[268] *Alison (J. Gordon) Ltd.* v. *Wallsend Shipway and Engineering Co. Ltd.* (1927) 43 T.L.R. 323, *per* Scrutton L.J. at p. 324.
[269] *Henry Kendall & Sons* v. *William Lillico & Sons Ltd.* [1969] 2 A.C. 31.
[270] *Andrews Bros. Ltd.* v. *Singer & Co. Ltd.* [1934] 1 K.B. 17.
[271] *Baldry* v. *Marshall* [1925] 1 K.B. 260.
[272] [1911] A.C. 394.
[273] See *ante*, p. 142.
[274] See *ante*, p. 151.
[275] *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 826, *per* Lord Diplock at p. 851. See also *ibid.*, at p. 843, *post*, p. 172.

(ii) The 'contra proferentem' *rule*

Ambiguities resolved against drawer of document

We have considered the maxim *Verba chartarum fortius accipiuntur contra proferentem*; the words of written documents are construed more forcibly against the party putting forward the document;[276] in the case of exemption clauses this is the party seeking to impose the exemption. This rule of construction is only applied where there is doubt or ambiguity in the phrases used, and provides that such doubt or ambiguity must be resolved against the party proffering the written document and in favour of the other party. In *Lee (John) & Son (Grantham) Ltd.* v. *Railway Executive*:[277]

The lease of a railway warehouse contained a clause exempting the lessors from liability for 'loss damage costs and expenses however caused . . . (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'. Goods in the warehouse were damaged by fire owing to the alleged negligence of the lessors in allowing a spark to escape from their railway engines. The lessors claimed that the clause exempted them from liability.

The Court of Appeal held that, applying the *contra proferentem* rule, the operation of the clause was confined by the words 'but for the tenancy hereby created' to liabilities which arose only by reason of the relationship of landlord and tenant created by the lease. The clause was capable of a wider meaning, but it had to be construed against the grantor, and the defendants were not protected.

(iii) Exclusion of liability for negligence

Exclusion of negligence 'inherently improbable' unless term very clear

The ability of contracting parties to exclude themselves from liability for negligence has been substantially restricted by legislation.[278] Apart from statutory restrictions, although it is possible to exclude liability in negligence, the Courts have traditionally approached clauses which are said to exclude such liability on the assumption that it is 'inherently improbable' that the innocent party would have agreed to the exclusion of the contract-breaker's negligence.[279] To have this effect the contractual term in question must exclude liability for negligence clearly and unambiguously. Where it does, and a contracting party is so protected from the consequences of its negligence, it is not permissible for the other party to disregard the contract and to allege a wider liability in tort.[280] In *Rutter* v. *Palmer*,[281] for example:

[276] *Ante*, p. 159.

[277] [1949] 2 All E.R. 581. See also *Adams* v. *Richardson & Starling Ltd.* [1969] 1 W.L.R. 1645, at p. 1653 (construction of so-called 'guarantee'); *Tor Line A.B.* v. *Alltrans Group of Canada Ltd.* [1984] 1 W.L.R. 48, at p. 56 (H.L.).

[278] Unfair Contract Terms Act 1977, s. 2, *post*, p. 186; Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), Sched. 3, para. 1(a).

[279] *Gillespie* v. *Bowles (Roy) Transport Ltd.* [1973] Q.B. 400, *per* Buckley L.J. at p. 419; *Caledonia Ltd.* v. *Orbit Valve Co. Europe* [1994] 1 W.L.R. 1515, *per* Steyn L.J. at p. 1523; *Smith* v. *South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165, *per* Viscount Dilhorne at p. 168 (indemnity clause).

[280] *Hall* v. *Brooklands Auto-Racing Club* [1933] 1 K.B. 205, *per* Scrutton L.J. at p. 213; *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80, *per* Lord Scarman at p. 107.

[281] [1922] 2 K.B. 87. See also *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69 ('at the owner's risk'); *Scottish Special Housing Assoc.* v. *Wimpey Construction UK Ltd.* [1986] 1 All E.R. 956 ('at the sole risk of the Employer'); *Thompson* v. *T. Lohan (Plant Hire) Ltd.* [1987] 1 W.L.R. 649 ('the hirer . . . alone shall be responsible for all claims . . .').

The plaintiff left his car at the defendant's garage to be sold. The contract provided that 'customers' cars are driven by your [the defendant's] servants at customers' sole risk'. The car was taken for a trial run by one of the defendant's drivers, there was a collision and the car was damaged.

It was held that the clause effectively placed the risk of negligence on the plaintiff and so his claim failed. Similarly, such phrases as: 'will not be liable for any damage however caused',[282] 'will not in any circumstances be responsible',[283] 'arising from any cause whatsoever'[284] will ordinarily be construed to cover liability for negligence.

Particularly where an alternative non-negligent ground of liability

On the other hand, there may be some ground of liability (other than negligence) to which the party seeking exemption is subject in respect of the loss or damage suffered, e.g. a strict liability for breach of contract.[285] If the alternative ground is not so fanciful or remote that he cannot be supposed to have desired protection against it,[286] the exemption clause will be construed as extending to that ground alone, even if the words used are prima facie wide enough to cover negligence.[287] In *Canada Steamship Lines Ltd.* v. *The King*,[288] for example, a lease of a freight shed provided that the lessee should 'not have any claim against the lessor for damage to goods' in the shed. Owing to the negligence of the lessor's employees, a fire broke out and the lessee's goods in the shed were destroyed. The Judicial Committee held that a strict liability was imposed upon the lessor by the Civil Code of Lower Canada and the exemption clause should be confined to that head of liability to the exclusion of negligence. The lessor was accordingly liable for the destruction of the goods. English Courts, including the House of Lords,[289] have since applied this decision and it has been said that:[290]

Commercial contracts are drafted by parties with access to legal advice and in the context of established legal principles as reflected in the decisions of the courts . . . The parties to commercial contracts must be taken to know what those principles are and to have drafted their contract taking them into account; when the suggested result could have been easily obtained by an appropriate use of language but the parties instead only used general

[282] *Joseph Travers & Sons Ltd.* v. *Cooper* [1915] 1 K.B. 73; *Ashby* v. *Tolhurst* [1937] 2 K.B. 242; *White* v. *Blackmore* [1972] 2 Q.B. 651. Cf. *Bishop* v. *Bonham* [1988] 1 W.L.R. 742.

[283] *Harris Ltd.* v. *Continental Express Ltd.* [1961] 1 Lloyd's Rep. 251; *Carter (J.) (Fine Worsteds) Ltd.* v. *Hanson Haulage (Leeds) Ltd.* [1965] 2 Q.B. 495.

[284] *A. E. Farr Ltd.* v. *Admiralty* [1953] 1 W.L.R. 965; *Lamport & Holt Lines Ltd.* v. *Coubro & Scrutton (M. & I.) Ltd.* [1982] 2 Lloyd's Rep. 42.

[285] *White* v. *John Warwick & Co. Ltd.* [1953] 1 W.L.R. 1285.

[286] *Canada Steamship Lines Ltd.* v. *The King* [1952] A.C. 292; *Smith* v. *South Wales Switchgear Co. Ltd.* (*supra*, n. 279), at p. 178; *Lamport & Holt Lines Ltd.* v. *Coubro & Scrutton (M. & I.) Ltd.* (*supra*, n. 284).

[287] *Alderslade* v. *Hendon Laundry Ltd.* [1945] K.B. 189, at p. 192; *Canada Steamship Lines Ltd.* v. *The King* (*supra*, n. 286), at p. 208; *Sonat Offshore S.A.* v. *Amerada Hess Development Ltd.* [1988] 1 Lloyd's Rep. 145, at p. 157; *Shell Chemicals U.K. Ltd.* v. *P. & O. Roadtanks Ltd.* [1995] 1 Lloyd's Rep. 297, at p. 301. Cf. *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.* [1983] 1 W.L.R. 964, at p. 970.

[288] [1952] A.C. 292.

[289] *Smith* v. *South Wales Switchgear Co. Ltd.* [1978] 1 W.L.R. 165.

[290] *Caledonia Ltd.* v. *Orbit Valve Co. Europe* [1994] 1 W.L.R. 221, *per* Hobhouse J. at pp. 228, 232, approved by the Court of Appeal [1994] 1 W.L.R. 1515, at p. 1521. See also *Shell Chemicals U.K. Ltd.* v. *P. & O. Roadtanks Ltd.* [1995] 1 Lloyd's Rep. 297, at p. 301.

language, the result of the general principle is that the parties will not be taken to have intended to include the consequences of a party's negligence.

Position where the only possible liability is for negligence

It was at one time supposed that, where the head of damage in respect of which liability is sought to be imposed by an exemption clause is one which rests on negligence and nothing else, the clause *must* be construed as extending to that head of damage, because if it were not so construed 'it would lack subject matter'.[291]

But this rule no longer applies. The scope of an exemption clause depends in each case on its precise wording. All that can be said is that, if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him;[292] but it will not inevitably do so. In *Hollier* v. *Rambler Motors (A.M.C.) Ltd.*:[293]

The plaintiff arranged by telephone to have his car repaired by the defendant and subsequently sent the car to the defendant's premises for this purpose. On at least two previous occasions when the defendant had carried out repairs for him he had signed a form on which appeared the printed words: 'The company is not responsible for damage caused by fire to customer's cars on the premises'. While on the premises, the car was damaged by a fire caused by the defendant's negligence.

The Court of Appeal held that there was no sufficient previous course of dealing to incorporate the exemption clause into the oral contract;[294] but, in any event, the language of the clause did not unequivocally cover negligence. Although the only ground of liability on the part of the defendant would have been liability in negligence, the clause was not so plain as to indicate that the defendant was exempting itself in respect of damage caused by fire due to its own negligence. The plaintiff therefore succeeded in an action against the defendant for breach of the contract of bailment.

(iv) Exclusion and limitation clauses

It has been held that a less rigorous approach governs clauses that merely limit the compensation payable but do not totally exclude liability. In *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd.*,[295] a case from Scotland:

The respondent security company undertook to provide continuous security cover in respect of the appellant's fishing vessel in Aberdeen harbour, but by reason of negligence and breach of contract the vessel fouled the boat berthed next to her and sank. The loss of the vessel cost the appellants £55,000. The respondent's standard conditions of contract provided *inter alia* that its liability 'whether under express or implied terms of the contract, or at common law or in any other way' for any loss or damage was limited to £1,000.

The House of Lords held that, although the *contra proferentem* rule applied to limitation clauses, such clauses were not to be construed by the specially exacting standards applicable to clauses totally excluding liability and indemnity clauses. A number of reasons were given for this distinction. First, it was said that there was

[291] *Aldersdale* v. *Hendon Laundry Ltd.* [1945] K.B. 189, at p. 192.
[292] *Rutter* v. *Palmer* [1922] 2 K.B. 87, *per* Scrutton L.J. at p. 92.
[293] [1972] 2 Q.B. 71.
[294] See *ante*, p. 161.
[295] [1983] 1 W.L.R. 964 (H.L.).

a higher degree of improbability that a contracting party would agree to a total exclusion of liability than to a limitation of liability, particularly where, as in that case, '. . . the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the services contracted for'.[296] It was also said that limitation clauses 'must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure'.[297]

It is, however, somewhat difficult to see why such a clear distinction should be drawn between these two types of exemption clauses. In particular, it is not clear why only limitation clauses are 'related to other contractual terms' and to 'the opportunity of the other party to insure'. There may also be practical difficulties. Take the example of first, a clause *excluding* all liability, but not until 3 months after the delivery of goods,[298] and then a clause *limiting* liability to £100, but from the start.[299] Which is to be construed more generously? It is submitted that '[t]here is no difference in principle between words which save [contracting parties] from having to pay at all and words which save them from paying as much as they would otherwise have had to pay'.[300]

(d) 'Fundamental Breach' of Contract[301]

The rules of construction so far referred to are of limited utility for it will be obvious that the skill of the draftsman can prevail over any reluctance of the Courts to uphold an abuse of contractual freedom. Very gradually, however, there developed a new principle which seemed to offer some escape from even the most carefully drafted exemption clauses. This was the principle of the 'breach of a fundamental term' or of 'fundamental breach'.

Breach of a fundamental term

There were, it was said, in every contract certain *terms* which were fundamental, the breach of which amounted to a complete non-performance of the contract. A

[296] [1983] 1 W.L.R. 964 (H.L.) *per* Lord Fraser at p. 970. This statement was approved by the House of Lords in *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803, at pp. 810, 813, 817.

[297] *Ailsa Craig Fishing Co. Ltd* v. *Malvern Fishing Co. Ltd* (*supra*, n. 295), *per* Lord Wilberforce at p. 966.

[298] *Atlantic Shipping & Trading Co. Ltd.* v. *Louis Dreyfus & Co.* [1922] 2 A.C. 250. See also 'cesser' clauses in charterparties excluding the charterer's liability for breach once a cargo is shipped and replacing it with an alternative remedy by way of lien on the cargo: *Overseas Transport Co.* v. *MineralImportExport* [1972] 1 Lloyd's Rep. 201.

[299] See the combined operation of the package, unit, and weight limitations of Article IV, r. 5, of the Hague/Visby Rules and the one year time bar under Article III, r. 6: Carriage of Goods by Sea Act 1971.

[300] *Atlantic Shipping & Trading Co. Ltd.* v. *Louis Dreyfus & Co.* (*supra*, n. 298), *per* Lord Sumner at p. 260. See also *Darlington Futures Ltd.* v. *Delco Australia Pty. Ltd.* (1986) 161 C.L.R. 500, at p. 510 (High Court of Australia), disapproving the statements in *Ailsa Craig Fishing Co. Ltd.* v. *Malvern Fishing Co. Ltd* (*supra*, n. 295).

[301] See Guest (1961) 77 L.Q.R. 98; Reynolds (1963) 79 L.Q.R. 534; Montrose [1964] C.L.J. 60, at p. 254; Lord Devlin [1966] C.L.J. 192; Jenkins [1969] C.L.J. 251; Legh-Jones and Pickering (1970) 86 L.Q.R. 513; Baker (1970) 33 M.L.R. 441; Weir [1970] C.L.J. 180; Coote [1970] C.L.J. 221; Dawson (1975) 91 L.Q.R. 380; Coote (1977) 40 M.L.R. 31.

fundamental term was conceived to be something more basic than a warranty or even a condition. It formed the 'core' of the contract, and therefore could not be affected by any exemption clause.[302] For example, if there was a contract for the sale of mahogany logs, the obligation to deliver logs made of mahogany was a 'fundamental term' of the contract. If pinewood logs were delivered in their place, there would be a complete non-performance against which no exemption clause could prevail.[303]

Fundamental breach

Closely connected with this principle was yet another; that no party to a contract could exempt himself from responsibility for a fundamental *breach*. Its limits were never precisely defined, but it was said that a party could only claim the protection of an exemption clause 'when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it'.[304] So, for example, if those having charge of a railway cloakroom allowed an unauthorized person to have access to and remove luggage of a depositor without production of the cloakroom ticket, this was a 'fundamental breach' and the railway was not protected by an exemption clause excluding liability for loss or misdelivery.[305]

Rule of law

The two principles were in many cases used interchangeably;[306] but they appeared to establish that, however extensive an exemption clause might be, it could not exclude liability in respect of the breach of a fundamental term or of a fundamental breach. Expressed in this way, the principle constituted a substantive rule of law which would operate irrespective of the intention of the parties and fettering their freedom of contract.

Matter of construction

This 'rule of law' was, however, rejected in *U.G.S. Finance Ltd.* v. *National Mortgage Bank of Greece*.[307] Pearson L.J. stated:

> 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 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 intention of the contracting parties.

This opinion was subsequently unanimously endorsed by the House of Lords in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*.[308] In that case:

[302] *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1468, at p. 1470.
[303] *Ibid.* In the well-known words of Lord Abinger in *Chanter* v. *Hopkins* (1838) 4 M. & W. 399, at p. 404: 'If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it'. See also *Bowes* v. *Shand* (1877) 2 App. Cas. 455, at p. 480.
[304] *Spurling (J.) Ltd.* v. *Bradshaw* [1956] 1 W.L.R. 461, *per* Denning L.J. at p. 465.
[305] *Alexander* v. *Railway Executive* [1951] 2 K.B. 882.
[306] Cf. Montrose [1964] C.L.J. 60, at p. 254, and Lord Upjohn in the *Suisse Atlantique* case [1967] 1 A.C. 361.
[307] [1964] 1 Lloyd's Rep. 446, at p. 450.
[308] [1967] 1 A.C. 361; noted by Treitel (1966) 29 M.L.R. 546.

The appellant chartered to the respondent the m.v. *Silvretta* for a period of 2 years. It was agreed that, in the event of delays in loading or unloading the vessel, the respondent would pay to the appellant $1,000 a day by way of demurrage.[309] Lengthy delays occurred for which the appellant alleged the respondent was responsible, but it nevertheless allowed the respondent to continue to have the use of the ship for the remainder of the term. On conclusion of the contract, it sued the respondent for damages, claiming a sum in excess of that stipulated for as demurrage. The respondent relied on the demurrage clause as limiting its liability.

It was argued that the breaches would have entitled the appellant to treat the contract as repudiated; that these breaches amounted to a fundamental breach of contract; and that in consequence the respondent could not rely upon the clause which limited their liability to $1,000 a day. The House of Lords rejected this argument. They held that the demurrage clause was not an exemption clause but an 'agreed damages' provision.[310] Nevertheless, even if it had been considered an exemption clause, their Lordships were of the opinion that it covered the breaches which had occurred. Assuming that these breaches amounted to a fundamental breach of contract, in the sense that the appellant would have been entitled to treat itself as discharged from further performance, there was no rule of law which would prevent the application of an exemption clause to such a breach. Although on a number of occasions the Courts had, as a matter of construction, held an exemption clause to be inapplicable where there had been a fundamental breach, in this case there was no reason to limit the plain contractual provision that damages for delay should be assessed in accordance with the demurrage clause.

Certain statements in the *Suisse Atlantique* case were nevertheless open to the interpretation that in some situations a substantive doctrine of 'fundamental breach' still existed[311] and the heresy that a 'fundamental breach' of contract deprived the party in breach of the benefit of an exemption clause was not finally laid to rest by the House of Lords until *Photo Production Ltd.* v. *Securicor Transport Ltd.*:[312]

Securicor agreed to provide a visiting patrol service to the respondents' factory at a charge of £8.15*s.* a week, approximately 26*d.* per visit. The contract contained an exemption clause, the most relevant part of which stated: 'Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee . . . unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company . . .'. An employee of Securicor, while on patrol, deliberately lit a fire in the factory. The fire spread, and a large part of the premises were burned down.

[309] Demurrage is a sum agreed by the charterer to be paid to the owner as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading.

[310] See *post*, p. 587.

[311] [1967] 1 A.C. 361, at pp. 398, 427, 432. See *Harbutt's 'Plasticine' Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447 (exemption clause did not apply where further performance impossible or innocent party accepted breach as terminating contract). See also *Wathes (Western) Ltd.* v. *Austins (Menswear) Ltd.* [1976] 1 Lloyd's Rep. 14; *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519.

[312] [1980] A.C. 827. See also *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803; *Kenya Railways* v. *Antares Co. Pte. Ltd.* [1987] 1 Lloyd's Rep. 424; Unfair Contract Terms Act 1977, s. 9.

The Court of Appeal held that, since Securicor had been engaged to safeguard the factory, the deliberate act of their employee in starting a fire was not covered by the exemption clause. The House of Lords reversed this decision. On the true construction of the clause in the context of the contract, in particular the limited nature of the contractual task, the modesty of the charge, and the ability of the factory owners to insure against fire more economically, the House concluded that the risk assumed by Securicor was a modest one.[313] Accordingly, Securicor had effectively modified their obligation under the contract to the exercise of due diligence in their capacity as employers, and there was no evidence of any lack of due diligence on their part to foresee or prevent the fire. They were therefore absolved from liability. Their Lordships once again affirmed their opinion that the question whether or not an exemption clause protected a 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 construction of the contract. Even if the breach was so serious as to entitle the injured party to treat the contract as repudiated,[314] or to render further performance impossible, the other party was not prevented from relying on the clause.

Present day position

The need for a substantive principle of fundamental breach has largely been obviated by the enactment by Parliament in 1977 of the Unfair Contract Terms Act,[315] although certain types of contract are excepted, either wholly or partly from the operation of that Act.[316] In the *Photo Production* case, Lord Diplock stated[317] that, if the expression 'fundamental breach' was to be retained, it should 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.[318] Similarly it may be supposed that, if the expression 'fundamental term' is to be retained, it should be employed simply as an alternative method of describing a promissory condition.[319] There does not now exist in English law any special rule or rules applicable to cases of 'fundamental breach' where exemption clauses are concerned. No doubt, in deciding whether an exemption clause is, on its true construction, applicable to a particular breach, the Court may reach the conclusion that the parties never intended the clause to apply to the breach in question because its nature or seriousness is such as not to fall within the contemplated ambit of the clause. The parties are less likely to be taken to have agreed that one of them shall be excused in the case of a total non-performance or a performance which is wholly at variance with the object of the contract as ascertained from its other terms and the circumstances surrounding it. But there is no separate category of 'fundamental breaches' against which exemption clauses cannot prevail, and, if sufficiently clear, they will do so against the most serious and deliberate breach.[320]

[313] [1980] A.C. 827, at pp. 846, 851, 852.
[314] See *post*, p. 548.
[315] See *post*, p. 182.
[316] See *post*, p. 183.
[317] [1980] A.C. 827, at p. 849.
[318] See *post*, p. 550
[319] See *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, at pp. 398, 427, 432–5.
[320] *Kenya Railways* v. *Antares Co. Pte. Ltd.* [1987] 1 Lloyd's Rep. 424, at p. 430, *post*, p. 179; *Comp. Portorafti Comm. S.A.* v. *Ultramar Panama Inc.* [1990] 1 Lloyd's Rep. 310 (time bar in Hague-Visby

(e) Illustrations of Construction

Illustrations

It is now appropriate to consider how the Courts have approached the construction of exemption clauses, particularly with reference to certain familiar types of contract such as sale of goods, hire-purchase, carriage of goods, and bailment.[321]

(i) Sale of goods

Sale of goods

We have already seen that, in a contract of sale of goods, sections 12–15 of the Sale of Goods Act 1979 imply certain conditions as to title, correspondence with description and sample, fitness for purpose and satisfactory quality.[322] By virtue of section 6 of the Unfair Contract Terms Act 1977,[323] the power of a seller to exclude these implied conditions has been abrogated, either absolutely or subject to certain qualifications, except where the contract is one for the international sale of goods. But at common law, for example, the Courts have refused to apply an exemption clause covering 'defects in quality' to situations where there was a gross disparity between the goods described in the contract of sale and those delivered, or where the goods were so defective that they were completely unfit for the purpose for which they were required.[324] For example, where copra cake delivered under a contract of sale contained so great an admixture of castor beans as to render it dangerous to cattle, a clause disclaiming responsibility for 'defects' was held inapplicable, because what was delivered was not truly copra cake at all.[325] Such a clause conferred no protection in the circumstances, and, as Lord Wilberforce pointed out in the *Suisse Atlantique* case:[326] 'Since the contracting parties could hardly have been supposed to contemplate such a mis-performance, or to have provided against it without destroying the whole contractual substratum, there is no difficulty here in holding exemption clauses to be inapplicable'. But this is a matter of construction only and, as we have seen,[327] this will be affected by the contractual context. So, 'if an anxious hostess is late in the preparation of a meal, she can perfectly well say: "Send me peas or if you haven't got

Rules contained in the Schedule to the Carriage of Goods by Sea Act 1971 applies to fundamental and deliberate breaches). See also *Glebe Island Terminals Pty. Ltd.* v. *Continental Seagram Pty. Ltd.* [1994] 1 Lloyd's Rep. 213 (New South Wales Court of Appeal) ('exceptions shall apply whether or not loss . . . is caused by . . . actions constituting fundamental breach of contract') but cf. Handley J.A. dissenting, at p. 230. *Quaere* whether such a general clause would have this effect in England: *Tor Line A.B.* v. *Alltrans Group of Canada Ltd.* [1984] 1 W.L.R. 48, at p. 54; *Wibau Maschinenfabrik Hartman S.A.* v. *Mackinnon Mackenzie & Co.* [1989] 2 Lloyd's Rep. 494, at p. 505.

[321] See also Howarth (1985) 36 N.I.L.Q. 101.

[322] *Ante*, pp. 150–5.

[323] See *post*, p. 187.

[324] e.g. *Nichol* v. *Godts* (1854) 10 Exch. 191; *Wieler* v. *Schilizzi* (1856) 17 C.B. 619; *Azémar* v. *Casella* (1867) L.R. 2 C.P. 677; *Munro & Co. Ltd.* v. *Meyer* [1930] 2 K.B. 312; *Champanhac & Co. Ltd.* v. *Waller & Co. Ltd.* [1948] 2 All E.R. 724; *Boshali* v. *Allied Commercial Exporters Ltd.* (1961) 105 S.J. 987. Contrast *L'Estrange* v. *F. Graucob Ltd.* [1934] 2 K.B. 394, *ante*, p. 160; *Smeaton Hanscomb & Co. Ltd.* v. *Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1481; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 807.

[325] *Pinnock Brothers* v. *Lewis and Peat Ltd.* [1923] 1 K.B. 690. See also *Pollock & Co.* v. *Macrae*, 1922 S.C. (H.L.) 192 (clause not applicable to engine with so many defects as to destroy its workable character).

[326] [1967] 1 A.C. 361, at p. 433.

[327] *Ante*, p. 130.

peas, send beans; but for heaven's sake send something". That would be a contract for peas, beans or anything else *ejusdem generis* and it is a perfectly sensible contract to make'.[328]

(ii) Hire-purchase

Hire-purchase

The exclusion of terms implied in a contract of hire-purchase is now also governed by section 6 of the Unfair Contract Terms Act 1977.[329] At common law, principles have been applied to hire-purchase transactions which are similar to those applied in contracts of sale. A case of this nature arose in *Karsales (Harrow) Ltd.* v. *Wallis*:[330]

The defendant was shown a second-hand Buick motor-car in excellent condition, and wished to buy it on hire-purchase. His agreement with the finance company contained an exemption clause excluding liability for breach of conditions or warranties of any description. After the contract had been concluded, the car was towed at night to the defendant's premises in a deplorable state. Many detachable parts had been removed; new parts replaced by old; the engine was now so defective that the car would not go. The defendant refused to accept it, and was sued by the plaintiffs, assignees of the finance company.

The Court of Appeal held that the exemption clause was ineffective because what was contracted for had not been delivered: 'a car that would not go was not a car at all'.[331] On the other hand, a similar clause has been held to cover the delivery of a car which, though unroadworthy and unsafe when hired and in a 'lamentable condition', did still function as a car. These defects were covered by the clause.[332]

(iii) Carriage of goods

By sea

With regard to contracts of carriage, it is established that a carrier who deviates without justification from the recognized or agreed route, steps outside the 'four corners' of the contract and cannot claim the benefit of a clause designed to protect only when the carrier is acting in pursuance of its provisions.[333] Thus, if a ship deviates, the contract voyage comes to an end, and the shipowner cannot thereafter rely upon an exemption clause in the contract which relieves him from loss of or damage to the goods even though the loss or damage is not attributable to the deviation. In *Thorley (J.) Ltd.* v. *Orchis Steamship Co. Ltd.*:[334]

A cargo of locust beans was shipped on the defendant's steamship *Orchis* at Limassol for a voyage to London. The bill of lading exempted the defendant from liability arising from

[328] Lord Devlin [1966] C.L.J. 192, at p. 212. On this example, see *ante*, p. 171, n. 303.
[329] See *post*, pp. 187–8.
[330] [1956] 1 W.L.R. 936. See also *Yeoman Credit Ltd.* v. *Apps* [1962] 2 Q.B. 508; *Charterhouse Credit Co. Ltd.* v. *Tolly* [1963] 2 Q.B. 683; *Farnworth Finance Facilities* v. *Attryde* [1970] 1 W.L.R. 1053.
[331] *Per* Birkett L.J. at p. 942. See also Parker L.J. at p. 943.
[332] *Handley* v. *Marston* (1962) 106 S.J. 327. See also *Astley Industrial Trust Ltd.* v. *Grimley* [1963] 1 W.L.R. 584.
[333] e.g. *Davis* v. *Garrett* (1830) 6 Bing. 716; *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. See *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, at pp. 390, 399, 411, 422, 433.
[334] [1907] 1 K.B. 660.

any act, neglect, or default of itself or its agents in loading, stowing, or discharging the cargo. The ship deviated from her ordinary route during the voyage. While the beans were being discharged in London, they were damaged by contamination. The defendant relied upon the exemption clause.

It was held that it was unnecessary to trace the loss which had occurred to the deviation. By deviating, the defendant had voluntarily substituted another voyage for that stipulated in the bill of lading, and so could not claim the benefit of a clause which was only applicable to the contract voyage.

By land

Most cases on this point concern the carriage of goods by sea; but the same principles have been applied where the carriage was by land.[335] Contracts made between businesses for the carriage of goods by ship fall, as respects loss of or damage to the cargo, outside the Unfair Contract Terms Act 1977,[336] so that the 'deviation cases' continue to be of considerable importance. Such cases are based on the assumption that the parties did not intend the clause to apply to a journey not contemplated by the contract. However, the contract may confer upon the carrier a liberty to deviate, and such a provision will be upheld if clearly expressed,[337] although it will be so construed as not to defeat the main purpose or object of the contract voyage[338] unless possibly the occurrence of the events stipulated in the exemption clause will *always* result in the defeat of the main object since, in that case, 'there will be no scope for holding that that object requires the conclusion that the exemption clause is not applicable to that event'.[339]

A situation analogous to deviation occurs where a carrier has undertaken to stow cargo below deck but carries it on deck. It is a question of construction whether an exemption clause applies to such unauthorized deck carriage, and, while it has been held that a clause limiting liability to a specified sum per package of cargo did not so apply,[340] it has also been held that a clause requiring all claims to be brought within one year does apply.[341]

By the same token it is the duty of a carrier to carry the goods expeditiously to their destination, and delay may lie outside the scope of an exemption clause where the parties cannot be taken to have intended the clause to extend to the

[335] *London & North Western Ry.* v. *Neilson* [1922] 2 A.C. 263 (disclaimed liability for loss of goods 'in transit' did not cover deviation).

[336] Sched. 1, para. 2(*c*); see *post*, p. 183.

[337] *G. H. Renton & Co. Ltd.* v. *Palmyra Trading Corporation of Panama* [1957] A.C. 149; *Mayfair Photographic Supplies (London) Ltd.* v. *Baxter Hoare & Co. Ltd.* [1972] 1 Lloyd's Rep. 410.

[338] *Leduc* v. *Ward* (1888) 20 Q.B.D. 475; *Glynn* v. *Margetson & Co.* [1893] A.C. 351; *Neuchatel Asphalte Co. Ltd.* v. *Barnett* [1957] 1 W.L.R. 356.

[339] *Nissho Iwai Australia Ltd.* v. *Malaysian International Shipping Cpn. Bhd.* (1988–89) 167 C.L.R. 219, at p. 227 (High Court of Australia).

[340] *Wibau Maschinenfabrik Hartman S.A.* v. *Mackinnon Mackenzie & Co.* [1989] 2 Lloyd's Rep. 494, at p. 505 (see Hague-Visby Rules, Art. III, para. 5, contained in the Schedule to the Carriage of Goods by Sea Act 1971). See also *Royal Exchange Shipping Co. Ltd.* v. *Dixon* (1886) 12 App. Cas. 11; *J. Evans & Sons (Portsmouth) Ltd.* v. *Andrea Merzario* [1976] 1 W.L.R. 1078.

[341] *Kenya Railways* v. *Antares Co. Pte. Ltd.* [1987] 1 Lloyd's Rep. 424 (Hague-Visby Rules, Art. III, para. 6).

period of the delay,[342] or to a risk consequent upon the delay which is wholly at variance with the contract of carriage.[343]

Misdelivery of the goods by the carrier may be covered by an appropriately drafted exemption clause.[344] But where the main object and intent of the contract is that delivery should be made to a certain person or persons, the Court may be prepared to limit the operation of the clause to the extent that it is inconsistent with that main object and intent. In *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.*:[345]

> The respondent despatched goods by sea from England to Singapore. The bill of lading required the goods to be delivered 'unto order or assigns' and stated that 'the responsibility of the carrier shall be deemed to cease absolutely after the goods are discharged from the ship'. After the goods were discharged from the ship, the carrier's agents did not deliver them 'unto order or assigns', but released the goods to the consignees without production of the bill of lading, with the result that the respondent was never paid for the goods.

The Judicial Committee of the Privy Council held that, although the exemption, on the face of it, could hardly have been more comprehensive, 'it must at least be modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery'.[346] To hold otherwise would defeat the main object and intent of the contract. The carriers were therefore liable.

(iv) Bailment

Bailment

Principles of a similar nature have also been applied to contracts of bailment. An exemption clause, on its true construction, may not apply where the bailed goods have been handled in a manner not authorized by the contract. As Lord Hodson pointed out in the *Suisse Atlantique* case:[347]

> Under a contract of carriage or bailment if the carrier or 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 by the common law.

It is first, however, necessary to determine what are the 'four corners' of the contract. If, for instance, a railway company contracts to keep an item in a station cloakroom but keeps it elsewhere in the station and it is stolen or damaged, it will not be able to rely on a clause exempting it, for instance, from liability in respect of loss or damage. But if, on its true construction, the contract is not to keep the

[342] *The Cap Palos* [1921] P. 458 (towage).

[343] *Thomas National Transport (Melbourne) Pty. Ltd.* v. *May & Baker (Australia) Ltd.* [1966] 2 Lloyd's Rep. 347; *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* case, at p. 435; cf. *Colverd (A. F.) & Co. Ltd.* v. *Anglo-Overseas Transport Co. Ltd.* [1961] 2 Lloyd's Rep. 352.

[344] *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; *Nissho Iwai Australia Ltd.* v. *Malaysian International Shipping Cpn. Bhd.* (*supra*, n. 339).

[345] [1959] A.C. 576. [346] At p. 587. [347] [1967] 1 A.C. 361, at p. 412.

item necessarily in the cloakroom, but to keep it at the station, reliance can be placed on the clause.[348] Again, it has been held that warehousemen who stored groundnuts in a warehouse otherwise suitable but not ratproof could rely on a term of the contract excluding liability in the absence of 'wilful neglect or default' when sued in respect of damage to and contamination of the nuts by rats.[349] Although the warehousemen's storage had been negligent, the place where the nuts were stored was one permitted by the contract and the risk to which they were exposed was not one which was wholly uncontemplated by the contract. Since no wilful neglect or default had been proved, the warehousemen were not liable.

The Courts are extremely unlikely to allow a bailee who has converted the goods to shelter under the provisions of an exemption clause, which simply disclaimed liability for loss or damage to the goods bailed, unless the clause specifically authorized the bailee to do the act in question, e.g. to sell the goods in the event that they were not claimed.[350] A simple disclaimer of liability cannot have been intended by the parties to permit the bailee 'to give the goods away to some passerby, or to burn them or throw them into the sea'.[351] Similarly, if a bailee, without authority, sub-contracts its obligations to a third party, it will not be protected by an exemption clause, for example for non-delivery, which is intended to apply only while the goods are in its possession and control.[352]

On the other hand, an exemption clause, if appropriately drafted, has been held, at common law, to cover an honest, but negligent, re-delivery of the goods to the wrong person.[353]

Contracts of bailment, where the bailor is a consumer or if the goods are bailed on the bailee's written standard terms of business, are subject to section 3 of the Unfair Contract Terms Act 1977.[354] If the goods are lost or damaged by negligence, any exemption clause will also be subject to section 2(2) of the Act.[355] In either case, the clause will be of no effect unless it satisfies the requirement of reasonableness.

(v) Deliberate breaches

In a number of decisions, the view was expressed that, whereas a negligent breach could be covered by an exemption clause, a wilful or deliberate breach necessarily fell outside its scope.[356] This point was considered and firmly rejected by the House of Lords in the *Suisse Atlantique* case. Lord Wilberforce said:[357]

[348] *Gibaud* v. *Great Eastern Railway* [1921] 2 K.B. 426. See also *Lilley* v. *Doubleday* (1881) 7 Q.B.D. 510; *Spurling (J.) Ltd.* v. *Bradshaw* [1956] 1 W.L.R. 461, at p. 465.

[349] *Kenyon, Son & Craven Ltd.* v. *Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519.

[350] *Alexander* v. *Railway Executive* [1951] 2 K.B. 882, at p. 889; *Garnham, Harris & Elton Ltd.* v. *Ellis (Transport) Ltd.* [1967] 1 W.L.R. 940, at p. 946.

[351] *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576, at p. 587.

[352] *Garnham, Harris & Elton Ltd.* v. *Alfred W. Ellis (Transport) Ltd.* [1967] 1 W.L.R. 940. See also *Davies* v. *Collins* [1945] 1 All E.R. 247; *The Berkshire* [1974] 1 Lloyd's Rep. 185.

[353] *Hollins* v. *J. Davy Ltd.* [1963] 1 Q.B. 844. Contrast *Alexander* v. *Railway Executive* [1951] 2 K.B. 882; *Sydney City Council* v. *West* (1965) 114 C.L.R. 481 (Australia).

[354] See *post*, p. 189. [355] See *post*, p. 186.

[356] e.g. *Sze Hai Tong Bank Ltd.* v. *Rambler Cycle Co. Ltd.* [1959] A.C. 576.

[357] [1967] A.C. 361, at p. 435. See also *ibid.*, at pp. 394, 414, 415, 429; *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827 (*ante*, p. 172). Cf. *Comp. Portorafti Comm. S.A.* v. *Ultramar Panama Inc.* [1990] 1 Lloyd's Rep. 310, *ante*, p. 173, n. 320.

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; . . . but to create a special rule for deliberate acts is unnecessary and may lead astray.

(vi) Burden of proof

The party seeking to rely on an exemption clause must show that the loss or damage to the other party is within the scope of the clause. But the other party must first plead and prove that the loss or damage which has been sustained was caused by some breach of contract or duty on the part of the defendant. A bailor may well be assisted in this task by a particular rule of law, e.g. that it is for a bailee who is sued in respect of the loss of the goods bailed to it to prove that the loss occurred without its negligence.[358] The burden of proof, however, rests on the party seeking to establish liability.[359]

(f) Exemption Clauses and Third Parties[360]

Benefit to third parties

A contracting party (A) may seek exemption from liability to the other party to the contract (B) not only for itself but also for persons who are not parties to the contract, for example, its employees or sub-contractors who participate in the performance of the contract. This is because A's employees and sub-contractors, while not in a contractual relationship with B, may nevertheless be under duties to B imposed by the law of tort or the law of bailment. If the employees or independent contractors are not able to rely on the exemption clause as a defence to an action by B, they in turn may have a right to be indemnified by A. Even where there is no right to be indemnified, A may, particularly in the case of employees, nevertheless agree to meet the damages awarded to B.[361] In both cases the risk is ultimately borne by A, thus defeating the purpose of the exemption clause. Whether or not it is A who ends up paying, permitting B to succeed against the employees or independent contractors will in many cases upset the allocation of risks and consequent pattern of insurance in the transaction, since A and its employees and independent contractors will have expected B to insure against the relevant loss and not done so themselves.[362] Nevertheless such attempts to rely on exemption clauses have encountered great difficulties.

[358] *Houghland* v. *R. R. Low (Luxury Coaches) Ltd.* [1962] 1 Q.B. 694; *Port Swettenham Authority* v. *T. W. Wu & Co.* [1979] A.C. 580.

[359] With the demise of the principle of 'fundamental breach', it can no longer be said that the defendant (e.g., a bailee) carries the burden of disproving fundamental breach. Cf. *Woolmer* v. *Delmer Price Ltd.* [1955] 1 Q.B. 291; *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69. Contra *Hunt & Winterbotham (West of England) Ltd.* v. *B.R.S. Parcels Ltd.* [1962] 1 Q.B. 617; *Glebe Island Terminals Pty. Ltd.* v. *Continental Seagram Pty. Ltd.* [1994] 1 Lloyd's Rep. 213, at p. 238 (N.S.W. C.A.).

[360] See Law Com. No. 242, *Privity of Contract: Contracts for the Benefit of Third Parties* (1996), §§ 2.19–2.35.

[361] *Adler* v. *Dickson* [1955] 1 Q.B. 158.

[362] For example where there is a limitation clause, the non-party performer would be expected to insure up to the limit and the contracting party (B) beyond that: see *post*, p. 439, n. 254.

In the first place a third party, for example A's employees or sub-contractors, will normally have furnished no consideration for the promise,[363] and secondly English law has a requirement of 'privity of contract'; it is clearly established as a general rule that a person who is not a party to a contract can neither acquire rights nor be subjected to burdens under it.[364] There is thus a tension between the requirements of the doctrine of privity of contract and the commercial expectations of those who take part in multiparty transactions and wish to allocate risks, a tension reflected in fluctuations of judicial opinion. We consider this in Chapter 10, Privity of Contract, and shall see that the Courts have been willing to circumvent the strict doctrine of privity and at times to contemplate some form of modification or exception to it with regard to exemption clauses.[365]

(g) Other Common Law Limitations

The operation of exemption clauses may be further limited by the application of certain other rules of the common law of a heterogeneous nature.

(i) Express undertakings

Inconsistent undertaking

We have already seen that a collateral oral warranty may be enforced even though it runs counter to the terms (including exemption clauses) of the principal agreement.[366] There is a still more general principle, i.e. that where an express undertaking is given which is inconsistent with the printed clauses of a standard form document, the latter must be rejected in so far as they are repugnant to the express undertaking. In *J. Evans & Son (Portsmouth) Ltd.* v. *Andrea Merzario Ltd.*:[367]

The plaintiff, an importer of machines, arranged the carriage of the machines to England under contract with the defendant, a forwarding agent. The defendant orally assured the plaintiff that machines shipped in containers would be carried under deck. Nevertheless, eight containers carrying the plaintiff's machines were subsequently loaded on deck. One container fell overboard and was a total loss. The defendant denied liability, relying on an exemption clause in the contract of carriage.

It was held that the defendant's oral assurance overrode the exemption clause, and that it was liable for breach of the warranty given. Similarly, in *Mendelssohn* v. *Normand Ltd.*[368] the plaintiff parked in the defendant's garage on the terms that the defendant would 'accept no responsibility for any loss or damage sustained by the vehicle its accessories or contents however caused'. He left the car unlocked because an employee of the defendant stated that the car must be left unlocked and that the employee would lock it for him. It was held that the loss by theft of valuables in the car was not covered by the exemption clause.

[363] *Ante*, p. 95. [364] *Post*, p. 407. [365] *Post*, p. 439.
[366] *Ante*, p. 128. On the overriding of an exemption clause see *Webster* v. *Higgin* [1948] 2 All E.R. 127.
[367] [1976] 1 W.L.R. 1078. See also *Couchman* v. *Hill* [1947] K.B. 544; *Gallagher* v. *British Road Services Ltd.* [1970] 2 Lloyd's Rep. 440.
[368] [1970] 1 Q.B. 177.

(ii) Fraud or misrepresentation

Misrepresentation

A party who misrepresents (albeit innocently) the contents or effect of a clause inserted by it into a contract cannot rely on the clause in the face of the misrepresentation.[369] So in *Curtis* v. *Chemical Cleaning & Dyeing Co.*:[370]

The plaintiff took a dress to the defendant company for cleaning. She signed a receipt containing a clause exempting the defendant from all liability for damage to articles cleaned after the defendant's servant told her that it would not accept liability for certain specified risks, including damage to the beads and sequins on the dress. When it was returned, the dress was badly stained.

It was held that, as the plaintiff had been induced to believe that the clause only referred to the beads and sequins, the defendant was not entitled to rely on it in respect of damage by staining. Denning L.J., dealing with the question of exemption clauses generally, said:[371]

Any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough.

and fraud

It should also be noted that an exemption clause can never exclude liability for personal fraud.[372]

(iii) Reasonableness

Reasonableness in standard form contracts

The theory of freedom of contract presupposes that any party to a contract is free to choose whether or not to enter into it.[373] Therefore, a party who chooses to enter into a contract which is onerous has only itself to blame. The Courts will not interfere. But the emergence of standard form contracts has rendered much less attractive this ideal of contractual freedom: it is now seen that the bargaining powers of the parties may be so unequal that one can virtually dictate terms to the other. Even in 1877 in *Parker* v. *South Eastern Railway Co.*[374] Bramwell L.J. asked what the position would be if some unreasonable condition were inserted, as, for instance, to forfeit £1,000 if goods in a station cloakroom were not removed within 48 hours. He thought that 'there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand'. Lord Denning M.R. has on numerous occasions[375] maintained that an exemption clause will not be given effect if it is unreasonable, or if it would be unreasonable to apply it in the circumstances of the case, for 'there is the vigilance

[369] *Jacques* v. *Lloyd D. George & Partners Ltd.* [1968] 1 W.L.R. 625.
[370] [1951] 1 K.B. 805.
[371] At p. 808.
[372] *Pearson (S.) & Son Ltd.* v. *Dublin Cpn.* [1907] A.C. 351; *Armitage* v. *Nurse* [1997] 3 W.L.R. 1046.
[373] See *ante*, p. 4.
[374] (1877) 2 C.P.D. 416, at p. 428.
[375] *John Lee & Son (Grantham) Ltd.* v. *Railway Executive* [1949] 2 All E.R. 581; *Gillespie Bros. & Co. Ltd.* v. *Roy Bowles Transport Ltd.* [1973] Q.B. 400, at p. 416; *Levison* v. *Patent Steam Carpet Cleaning Co. Ltd.* [1978] Q.B. 69, at p. 161; *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1978] 1 W.L.R. 856, at. p. 865 (reversed [1980] A.C. 827).

of the common law which, while allowing freedom of contract, watches over to see that it is not abused'.[376]

This doctrine of 'abuse of freedom of contract' has not been accepted as part of the common law and weighty *dicta* indicate that the Courts have no general power at common law to strike down a contractual term merely because it is unreasonable or unfair.[377] Such a power has, however, been conferred by statute, notably by section 3 of the Misrepresentation Act 1967,[378] by the Unfair Contract Terms Act 1977, and by the Unfair Terms in Consumer Contracts Regulations 1994.

VI. Statutory Control of Exemption Clauses

(a) Unfair Contract Terms Act 1977[379]

Scope of the Act

The purpose of the Unfair Contract Terms Act 1977 is to limit, and in some cases to take away entirely, the right to rely on exempting clauses in certain situations. However, the title of the Act is somewhat misleading. In the first place, it is not confined to contract terms. The Act also extends to non-contractual notices containing provisions exempting from liability in tort,[380] although in this book we shall be concerned solely with contract terms. Secondly, the Act does not confer upon the Courts a general power to strike down any term of a contract on the ground that the term is unfair or oppressive; it applies, for the most part,[381] only to terms that 'exclude or restrict liability', i.e. exemption clauses. The Act also does not, in general, purport to affect the basis of liability,[382] so that the first enquiry must normally be whether or not the person seeking to rely on the term is in fact under any liability (or obligation), for example, in negligence or for breach of contract. Also logically prior to the application of the Act is the question whether the relevant term has become a term of the contract,[383] and, if so, whether on its true construction in the light of the rules discussed above it applies to the liability which it is sought to exclude or restrict.[384] It has been said that the existence of the statutory controls makes the strict tests of incorporation and construction, considered earlier in this chapter, unnecessary.[385] But, whatever the

[376] *John Lee & Son (Grantham) Ltd.* v. *Railway Executive* (*supra*, n. 375), at p. 584.

[377] *Grand Trunk Railway of Canada* v. *Robinson* [1915] A.C. 740, at p. 747; *Ludditt* v. *Ginger Coote Airways Ltd.* [1947] A.C. 233, at p. 242; *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, at p. 406; *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] A.C. 827, at p. 848.

[378] See *post*, p. 255.

[379] See Coote (1978) 41 M.L.R. 312; Sealy [1978] C.L.J. 15; Palmer and Yates [1981] C.L.J. 108; Adams and Brownsword (1988) 104 L.Q.R. 94. The Act derives substantially from recommendations made by the Law Commission: Law Com. No. 69 (1975); Scot. Law Com. No. 39 (1975).

[380] s. 2. See Markesinis and Deakin, *Tort Law*, 3rd edn. (1994), pp. 661–7.

[381] But see 1977 Act, ss. 3(2)(b), 4. Cf. the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), *post*, p. 196.

[382] But see 1977 Act, ss. 3(2)(b), 4.

[383] *Ibid.*, s. 11(2). See *ante*, p. 160. [384] See *ante*, p. 165.

[385] *Photo Production* v. *Securicor Transport* [1980] A.C. 827, *per* Lord Wilberforce at p. 843; *A.E.G. (U.K.) Ltd.* v. *Logic Resources Ltd.* [1996] C.L.C. 265, *per* Hobhouse L.J. at p. 277.

test, it is important that the application of the test of reasonableness should not be considered until it has been decided that, applying the tests of incorporation and construction, the exemption or limitation clause in question forms part of the contract and covers the events that have occurred. If it is either not incorporated or does not cover those events, then, however reasonable the clause, it will not apply.

Excepted contracts

It must further be noted that certain very important contracts are wholly or partially excepted from the operation of the Act. These include contracts of insurance,[386] commercial charterparties,[387] and contracts for the carriage of goods by sea,[388] international supply contracts,[389] contracts of employment (except in favour of an employee),[390] and any contract so far as it relates to[391] the creation or transfer of an interest in land,[392] any intellectual property,[393] or the creation or transfer of securities.[394] In many of these, however, there are specific legislative controls on exemption clauses,[395] and, in the case of consumer contracts, most will be subject to the Unfair Terms in Consumer Contracts Regulations 1994.[396]

Pattern of control

The 1977 Act is reasonably short; but many of its provisions overlap, so that, when applying the Act to a particular situation, it is often necessary to consider whether more than one section is relevant.[397] The pattern of control is also somewhat complicated. There are three broad divisions of control: first, control over contract terms that exclude or restrict liability for 'negligence'[398] (which includes a failure to exercise reasonable care and skill in the performance of a contract;[399] secondly, control over contract terms that exclude or restrict liability for breach of certain terms implied by statute or by common law in contracts of sale of goods, hire-purchase, and in other contracts for the supply of goods;[400] thirdly, a more general control in consumer contracts and standard form contracts over terms that exclude or restrict liability for breach of contract, or which purport to entitle one of the parties to render a contractual performance substantially different from that expected or to render no performance at all.[401]

If the contract term is subject to the control of the Act, the control may assume one of two forms: the restriction or exclusion of liability may be rendered absolutely ineffective,[402] or it may be effective only in so far as the term satisfies the requirement of reasonableness.[403]

[386] 1977 Act, Sched. 1, para. 1(a).
[387] *Ibid.*, Sched. 1, para. 2.
[388] *Ibid.*, Sched. 1, para. 3.
[389] *Ibid.*, s. 26.
[390] *Ibid.*, Sched. 1, para. 4.
[391] See *Micklefield* v. *S. A. C. Technology Ltd.* [1990] 1 W.L.R. 1002 (share option); *Electricity Supply Nominees Ltd.* v. *I. A. F. Group Ltd.* [1993] 1 W.L.R. 372 (services package in lease integral to and thus 'relates to' interest in land).
[392] Sched. 1, para. 1(b).
[393] Sched. 1, para. 1(c); Trade Marks Act 1994, s. 106(1) and Sched. 4, para. 1; *Salvage Association* v. *CAP Financial Services Ltd.* [1995] F.S.R. 654.
[394] Sched. 1, para. 1(d).
[395] *Post*, p. 198.
[396] S.I. 1994 No. 3159, *post*, p. 196.
[397] e.g. 1977 Act, ss. 2, 3 and 7.
[398] Defined in *ibid.*, s. 1(1).
[399] *Ibid.*, ss 2, 4, 5; see *post*, p. 187.
[400] *Ibid.*, ss. 6, 7; see *post*, pp. 187–8.
[401] *Ibid.*, s. 3; see *post*, p. 189.
[402] *Ibid.*, ss. 2(1), 5, 6(1), (2), 7(2).
[403] *Ibid.*, ss. 2(2), 3, 4, 6(3), 7(3), (4).

Unfair Contract Terms Act 1977: Pattern of Control

Type of Contract	Type of Liability	Business	Non-Business
Any Contract*	Negligent personal injuries	Unexcludable UCTA, s. 2(1)	Common law
	Negligent loss or damage	Reasonableness UCTA, ss. 2(2) and 11	
Consumer Contract*	Any term	Reasonableness UCTA, ss. 3(2) and 11	
	Sale of Goods Act, ss. 13, 14, 15 undertakings as to title, description, quality and fitness for purpose	Unexcludable UCTA, ss. 6(2) and 7(2)	
Standard Form Contract*	Any term	Reasonableness UCTA, s. 3(2)	
Sale of Goods	Sale of Goods Act s. 12 undertakings as to title	Unexcludable UCTA, ss. 6(1) and 7(4)	
	Sale of Goods Act, ss. 13–15, undertakings as to description, quality or fitness for purpose	Reasonableness UCTA, ss. 6(3), 7(3) Schedule 2	

* Save types of contract excluded by Schedule 1, on which see ante, p. 183.

(i) Varieties of exemption clauses

Extended meaning

Subject to certain exceptions,[404] the 1977 Act only applies to contract terms 'excluding or restricting' specific types of liability; but these are extended to include terms:[405]

(1) making the liability or its enforcement subject to restrictive or onerous conditions;
(2) excluding or restricting any right or remedy in respect of liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
(3) excluding or restricting rules of evidence or procedure.

Certain sections[406] also prevent excluding or restricting liability by reference to terms which exclude the relevant obligation or duty. The intention is clearly to

[404] S.I. 1994 No. 3159, *post*, ss. 3(2)(b), 4. [405] *Ibid.*, s. 13. [406] *Ibid.*, ss 2, 5, 6, 7.

embrace terms which, though they do not specifically exclude or restrict *liability*, have a similar effect and thus to prevent the evasion of the policy of the Act. For example, terms which require one party to make a claim within a certain time limit,[407] which take away the right to reject defective goods or to withhold payment (because of a counterclaim),[408] which state that an architect's certificate shall be 'conclusive evidence' that building work has been properly carried out, or which declare that the other party does not 'give any warranty or undertaking, express or implied, in respect of the goods supplied' or accept any responsibility with respect to the accuracy of a property valuation it supplies[409]—all of these are subject to control.

The difficulty, however, is to distinguish such terms from provisions which prevent a contractual duty from arising or circumscribe its extent, or which merely allocate the responsibilities under the contract between the parties.[410] For example, a seller's warning that goods should not be used after a specified time and a statement that the seller of a painting had no expertise in paintings of that type have been held to preclude the implication of obligations of fitness for purpose and correspondence with description under the Sale of Goods Act and not to exclude or restrict them.[411] It has been stated that the test is one of substance[412] but also that one has to ask whether 'but for' the clause there would be liability,[413] a formal test. It is submitted that, although it has the attraction of certainty, the latter test is too broad and that the Courts should determine whether a term in a contract 'excludes or restricts' liability by asking whether it deprives a contracting party of the contractual performance which the parties reasonably expected.[414]

(ii) 'Business liability'

Business liability

The 1977 Act is concerned, for the most part,[415] 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'.[416] The word 'business' has, however,

[407] *Green (R. W.) Ltd.* v. *Cade Bros.* [1978] 1 Lloyd's Rep. 602.

[408] *Stewart Gill* v. *Horatio Myer & Co.* [1992] 1 Q.B. 600; *Skipskredittforeningen* v. *Emperor Navigation* [1998] 1 Lloyd's Rep. 66; *Overland Shoes Ltd.* v. *Schenkers Ltd.*, *The Times*, 26 February 1998 (set-off).

[409] *Smith* v. *Eric S. Bush* and *Harris* v. *Wyre Forest D.C.* [1990] A.C. 831, *post*, p. 425.

[410] *Thompson* v. *T. Lohan (Plant Hire) Ltd.* [1987] 1 W.L.R. 649.

[411] *Wormell* v. *R.H.M. Agriculture (East) Ltd.* [1987] 1 W.L.R. 1091 (1977 Act, s. 14(3)); *Harlington & Leinster Enterprises Ltd.* v. *Christopher Hull Fine Art Ltd.* [1990] 1 All E.R. 737 (1977 Act, s. 13). See *ante*, p. 151, on these implied terms.

[412] *Phillips Products Ltd.* v. *Hyland (Note)* [1987] 1 W.L.R. 659, at p. 666; *Johnstone* v. *Bloomsbury Health Authority* [1992] Q.B. 333, at p. 346.

[413] *Smith* v. *Eric S. Bush* (*supra*, n. 409), at p. 857 (*per* Lord Griffiths). N.B. the notice there was a non-contractual disclaimer.

[414] Macdonald [1992] L.S. 277. See also Law Com. No. 69 (1975), § 146.

[415] Except 1977 Act, s. 6 (exclusion of implied terms in contracts of sale of goods and hire-purchase): see *post*, p. 187. But certain terms will only be implied if the seller or owner sells or hires the goods in the course of a business: see *ante*, p. 152.

[416] *Ibid.*, s. 1(3). Cf. the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), reg. 2, seller or supplier need only be acting for purposes *relating to* its business.

been described as 'an etymological chameleon',[417] and it will not always be easy to determine whether or not there is a business liability, for example, in the case of a university or college, since it does not appear necessary for a business that an activity be carried on with a view to profit.[418]

(iii) 'Deals as consumer'

Consumer contracts

In certain provisions of the 1977 Act, a distinction is drawn between cases where a party to a contract, i.e. the party against whom the exemption clause is raised, deals as consumer in relation to the other party, and cases where that person deals otherwise than as consumer. The significance of this distinction lies in the fact that, as a general rule, greater protection is afforded by the Act to a person who deals as consumer than to one who does not. In order that a party should have dealt as consumer, two conditions must have been satisfied.[419] First, he must not have made the contract in the course of a business or held himself out as doing so. Secondly, the other party must have made the contract in the course of a business. A partnership or company may deal as consumer.[420] In *R. & B. Customs Brokers Co. Ltd.* v. *United Dominions Trust Ltd.*[421] it was held that a firm of customs brokers had dealt as consumer when it purchased a four-wheel-drive vehicle for the use of one of its directors, on the ground that, to be in the course of a business, the transaction must either form an integral part of the buyer's business or, if incidental to it, be of a type that is regularly carried on by the buyer. The firm had purchased two or three cars in the past but this did not suffice to constitute a pattern of regular purchases. In addition, if the contract is one for the supply of goods—a contract of sale or hire-purchase,[422] or some other contract under which possession or ownership of goods passes (such as hire)[423]—a third condition must be satisfied; the goods supplied must be of a type ordinarily supplied for private use or consumption, i.e. not a steam-roller.[424] But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.[425]

The burden of proving that a party did not deal as consumer rests upon the party relying on the exemption clause.[426]

(iv) Negligence liability

Liability for negligence

Restrictions are placed by section 2 of the 1977 Act on the power of a party to a contract to secure exemption from business liability for negligence.[427] It is pro-

[417] *Town Investments Ltd.* v. *Department of the Environment* [1978] A.C. 359 *per* Lord Diplock at p. 383.

[418] See the partial definition in 1977 Act, s. 14.

[419] *Ibid.*, s. 12(1)(a), (b).

[420] Under the Unfair Terms in Consumer Contracts Regulations 1994 (*supra*, n. 416) a 'consumer' means a 'natural person'.

[421] [1988] 1 W.L.R. 321. See also *Rasbora Ltd.* v. *J.C.L. Marine Ltd.* [1977] 1 Lloyd's Rep. 645 (where a sale of a boat to a company formed for the purpose of buying the boat to be used by an individual was held to be a consumer sale).

[422] 1977 Act, s. 6.

[423] *Ibid.*, s. 7.

[424] *Ibid.*, s. 12(1)(c).

[425] *Ibid.*, s. 12(2).

[426] *Ibid.*, s. 12(3).

[427] 'Negligence' includes a common law duty to take reasonable care or use reasonable skill and also breach of the duty of care under the Occupiers' Liability Acts 1957 and 1984.

hibited to exclude or restrict liability for death or personal injury resulting from negligence by reference to any contract term.[428] In the case of other loss or damage, a party to a contract cannot exclude or restrict liability for negligence except in so far as the term satisfies the requirement of reasonableness.[429] Where, in a contract between A and B, a term purports to transfer from A to B responsibility for injury or damage caused to B by A's employees, that term has been held to fall within section 2.[430] But a term requiring B to indemnify A against injury or damage caused to third parties by A's negligence has been held not to on the ground that it was not an 'exclusion or restriction' of A's liability to the third party victim but an arrangement by A and B as to the responsibility for compensating the victim.[431]

Section 5 of the Act further prohibits absolutely the exclusion or restriction of the negligence liability of a manufacturer or distributor of goods by means of a written 'guarantee', such as is often provided, for example, by manufacturers of electrical equipment—compact disk players, razors, hair dryers and the like. But the goods must be of a type supplied for private use or consumption, and the loss or damage must have arisen from the goods proving defective while in consumer use, i.e. when a person is using them, or has them in his or her possession for use, otherwise than exclusively for the purposes of a business.

(v) Consumer indemnities

Unreasonable indemnity clauses

By section 4 of the 1977 act, a person who deals as consumer cannot, by any contract term, be compelled to indemnify another in respect of the latter's business liability for negligence or breach of contract, except in so far as the term satisfies the requirement of reasonableness. Thus, for example, if a car hire firm hires a car to a consumer subject to a term that the hirer will indemnify the firm against third party claims arising out of the hirer's use of the car, then that indemnity is subject to the test of reasonableness. But indemnities given by persons who do not deal as consumer are not affected by section 4, and, as we have seen in the context of section 2,[432] the Act does not control provisions in contracts which require one party (who does not deal as consumer) to indemnify the other against the latter's liability in negligence to third parties.

(vi) Sale of goods and hire-purchase

Sale and hire-purchase

Section 6 of the 1977 Act restricts the ability of sellers of goods to exempt themselves from liability for breach of the stipulations implied in contracts of sale

[428] *Ibid.*, s. 2(1), (3); *Johnstone* v. *Bloomsbury H.A.* [1992] Q.B. 333, at pp. 343, 346. Terms exempting a party from liability for non-negligently caused death or personal injury may be controlled by 1977 Act, s. 6 (sale of goods); the Consumer Protection Act 1987, ss. 5 and 7 (product liability) or the Defective Premises Act 1972, s. 1.

[429] 1977 Act, s. 2(2), (3).

[430] *Phillips Products Ltd.* v. *Hyland (Note)* [1987] 1 W.L.R. 659; *Flamar Interocean Ltd.* v. *Denmore Ltd.* [1990] 1 Lloyd's Rep. 434 ('deemed servant' clauses).

[431] *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. See also *Neptune Orient Lines Ltd.* v. *J.C.V. (U.K.) Ltd.* [1983] 2 Lloyd's Rep. 438, at p. 442 (promise not to sue third party).

[432] *Ante.*

by sections 12–15 of the Sale of Goods Act 1979. In the first place, it prohibits absolutely the exclusion or restriction of liability for breach of the provisions of section 12 of the 1979 Act (stipulations as to title).[433] Secondly, it prohibits absolutely the exclusion or restriction of liability for breach of the provisions of sections 13 to 15 of the 1979 Act as amended (conditions as to satisfactory quality, fitness for purpose, and correspondence with description or sample) where the buyer *deals as consumer*.[434] If the buyer does not deal as consumer, liability for breaches of sections 13 to 15 can be excluded or restricted, but only in so far as the term satisfies the requirement of reasonableness.[435]

Section 6 of the 1977 Act further contains similar provisions which prohibit, either absolutely or subject to the test of reasonableness, terms excluding or restricting liability for breach of the stipulations implied by the Supply of Goods (Implied Terms) Act 1973 in contracts of hire-purchase.[436]

(vii) Supply contracts

Contracts under which goods pass

Section 7 of the 1977 Act is concerned with contract terms excluding or restricting business liability for breach of an implied obligation in a contract 'where the possession or ownership of goods passes under or in pursuance of the contract' (other than a contract of sale of goods or hire-purchase, or on the redemption of trading stamps). Examples of such contracts are contracts of hire, or barter, and—most important of all—contracts for work and materials, such as building and engineering contracts. At common law, the obligations to be implied in such contracts were often indeterminate or imprecise, and varied according to the nature of the contract and the circumstances in which it was made. However, the Supply of Goods and Services Act 1982[437] now implies into such contracts terms similar to those implied in contracts of sale of goods in respect of the goods' correspondence with description or sample, or their quality or fitness for purpose. The 1977 Act absolutely prohibits the exclusion or restriction of liability for breach of these implied terms as against a person *dealing as consumer*.[438] As against a person dealing otherwise than as consumer, such liability can be excluded or restricted, but only in so far as the exempting term satisfies the requirement of reasonableness.[439] Terms excluding or restricting liability for breach of implied terms as to title to or quiet possession of the goods are also subject to the test of reasonableness.[440]

(viii) Contractual liability

Liability arising in contract

A more wide-ranging and general control is effected by section 3 of the 1977 Act, which deals with contractual liability. This section may apply, in addition to sections 6 and 7 mentioned above, to contracts of sale and hire-purchase and supply

[433] 1977 Act, s. 6(1).
[434] *Ibid.*, s. 6(2). This provision is fortified by *criminal* sanctions imposed by the Consumer Transactions (Restrictions on Statements) Orders (S.I. 1976 No. 1813 and S.I. 1978 No. 127). See *Hughes* v. *Hall & Hall* [1981] R.T.R. 430.
[435] 1977 Act, s. 6(3).
[436] See *ante*, p. 156.
[437] 1977 Act, ss. 3, 4, 5, 8, 9, 10.
[438] *Ibid.*, s. 7(2).
[439] *Ibid.*, s. 7(3). See *Stewart Gill Ltd.* v. *Horatio Myer & Co. Ltd.* [1992] Q.B. 600.
[440] 1977 Act, s. 7(4). Cf. *ibid.*, s. 7(3A); Supply of Goods and Services Act 1982, ss. 2, 7.

contracts. But it may also apply to any contract, unless it is of a type expressly excepted by the Act. Thus, it may apply, for example, to a contract with a holiday tour operator, a contract for the dry-cleaning of clothes or the repair of a watch, and a contract for the garaging of a car or for the storage of furniture. However, the section only applies as between contracting parties where one of them deals (1) as consumer,[441] or (2) on the other's written standard terms of business, and the liability which it is sought to exclude or restrict is a business liability. It has been pointed out earlier in this chapter that many contracts, not only with consumers but also between businesses, are today made by reference to standard terms and conditions printed in order forms, confirmations of order, or in catalogues or price lists. These will obviously attract the application of section 3.

Where a standard form of agreement is used but it has been altered to fit the circumstances of the individual transaction, the question whether section 3 applies has been said to be one of fact and degree.[442] Clearly differences as to price and date of delivery will not prevent the section applying to the rest of the terms. The test has been said to be one of habitual use,[443] and it is submitted that terms may overall be 'standard' even though, for example, a single provision in a standard form has been altered.

The control imposed by the section is as follows:[444]

> As against that party,[445] the other cannot by reference to any contract term—
>
> (a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (b) claim to be entitled—
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him, or
>
> (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,
>
> except in so far as . . . the contract term satisfies the requirement of reasonableness.

The wording of the first limb (a) of this provision, relating to the exclusion or restriction of liability in respect of breach of contract, is relatively easy to interpret. But the second limb (b) is more difficult to construe. It would appear to be the intention of (b) that it should apply in cases where there is *no breach of contract at all*, but one party claims to rely on a term of the contract which purports to entitle it either to render a contractual performance substantially different from that which was reasonably expected at the time of the contract or in respect of the whole or part of the contractual obligation to render no performance at all.[446] One

[441] *Ante*, p. 186.

[442] *Chester Grosvenor Hotel Co. Ltd.* v. *Alfred McAlpine Management Ltd.* (1991) 56 Build. L.R. 115, at pp. 131–3; *St Albans City & D.C.* v. *International Computers Ltd.* [1996] 4 All E.R. 481, at p. 491. Cf. *Flamar Interocean Ltd.* v. *Denmore* [1990] 1 Lloyd's Rep. 434, at p. 438; *Shearson Lehman Hutton Inc.* v. *MacLaine, Watson & Co. Ltd.* [1989] 2 Lloyd's Rep. 570, at p. 611; *Salvage Association* v. *CAP Financial Services Ltd.* [1995] F.S.R. 654.

[443] *Chester Grosvenor Hotel Co. Ltd.* v. *Alfred McAlpine Management Ltd. (supra*, n. 442).

[444] 1977 Act, s. 3(2).

[445] i.e. the consumer or the person dealing on the other's written standard terms of business.

[446] *Shearson Lehman Bros. Inc.* v. *Maclaine, Watson & Co. Ltd.* (*supra*, n. 442), at p. 612.

example might be that of a holiday tour operator who agrees to provide a holiday for a consumer at a certain hotel at a certain resort, but nevertheless reserves the right, in certain circumstances, to accommodate the consumer at another hotel, or to switch the holiday to a different resort, or to cancel the holiday in whole or in part.[447] In a commercial agreement, an example might be that of a *force majeure* clause, that is to say, a clause which comes into operation upon the happening of events beyond the trader's control, such as strikes, war, civil commotion, inability to obtain supplies etc., whereby the trader is excused from delivering the goods to be supplied under the contract, or is entitled to suspend or cancel the contract without any further liability on its part. In the case of the holiday tour operator, it might be held that such a provision did not satisfy the requirement of reasonableness. But it seems unlikely that a *force majeure* clause in a commercial agreement would be held to be unreasonable[448] in the absence of special circumstances.[449]

(ix) Reasonableness

The 'reasonableness' test

Except in those instances where the 1977 Act prohibits absolutely the exclusion or restriction of liability,[450] the contract terms controlled by the Act are subject to the test of reasonableness.[451] The question to be decided by the Court in all cases where the 'reasonableness' test is applied in relation to a contract term is whether the term is a fair and reasonable one to have been 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'.[452] It is therefore clear that the crucial time is the time of the making of the contract, and not the time at which liability arises.[453] The reasonableness of a contract term is therefore not affected by the nature or seriousness of the loss or damage sustained, except to the extent that it was or ought to have been in contemplation at the time the contract was made. It is also clear that circumstances solely known to one party, i.e. the person relying on the exemption clause, such as the experimental nature of the product supplied or the market difficulties involved in procuring it, are to be treated as irrelevant if they were not known, and could not reasonably have been known, to the other party at the time the contract was made.

[447] *Anglo Continental Holidays Ltd.* v. *Typaldos Lines (London) Ltd.* [1967] 2 Lloyd's Rep. 61. Package holidays are now subject to the Package Travel, Package Holidays and Package Tours Regulations 1992 (S.I. 1992 No. 3288) which (reg. 12) require the organization to permit the consumer to withdraw from the contract without penalty if it 'is constrained' to alter significantly an essential term.

[448] *Shearson Lehman Hutton Inc.* v. *MacLaine, Watson & Co. Ltd.* (*supra*, n. 442), at. p. 612.

[449] e.g. in an exclusive dealing agreement (see *post*, p. 376) where the supplier is entitled to suspend in the event of *force majeure* but the purchaser is not entitled, during the suspension, to purchase supplies from elsewhere.

[450] 1977 Act, ss. 2(1), 5, 6(1), (2), 7(2).

[451] *Ibid.*, ss. 2(2), 3(2), 4, 6(3), 7(3), (4).

[452] *Ibid.*, s. 11(1).

[453] *Stewart Gill* v. *Horatio Myer & Co.* [1992] 1 Q.B. 600, at pp. 607, 608. The reasonableness of a non-contractual notice is determined having regard to the circumstances when the liability arose or would have arisen: 1977 Act, s. 11(3); *Smith* v. *Eric S. Bush* [1990] A.C. 831, at pp. 848, 857.

In order to assist the Court in determining whether a term satisfies the requirement of reasonableness, the Act sets out certain 'guidelines' of circumstances to be taken into account:[454]

(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
(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;
(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 previous course of dealing between the parties);
(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;
(e) whether the goods were manufactured, processed, or adapted to the special order of the customer.

It will be seen that these guidelines could open up quite extensive enquiries, for instance, as to the market position at the time the contract was made. Strictly the guidelines are applicable to the test of reasonableness only in respect of the exclusion or restriction of liability for breach of the implied obligations as to description and quality in contracts of sale of goods and hire-purchase,[455] and supply contracts.[456] But 'the considerations there set out are normally regarded as being of general application to the question of reasonableness'.[457] However, even where the guidelines are directly applicable, they are not exhaustive; the Court is required to have regard 'in particular' to those matters, but it can also take account of any other relevant circumstances.

If a contract term seeks to restrict liability to a specified sum of money (as, for example, in the case of a term which states that a seller's total liability for loss or damage arising from defects in the goods shall be limited to £20,000) and the question arises whether the term satisfies the requirement of reasonableness, the 1977 Act requires that regard is also to be had in particular to (1) the resources which he would expect to be available to him for the purpose of meeting the liability should it arise, and (2) how far it was open to him to cover himself by insurance.[458]

The burden of proving that a contract term satisfies the requirement of reasonableness rests upon the person who claims that it is reasonable.[459]

[454] 1977 Act, s. 11(2), Sched. 2. For the guidelines under the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), see *post*, p. 197.
[455] 1977 Act, s. 6(3). [456] *Ibid.*, s. 7(3), (4).
[457] *Stewart Gill* v. *Horatio Myer & Co.* [1992] 1 Q.B. 600, *per* Stuart-Smith L.J. at p. 608. See also *Flamar Interocean Ltd.* v. *Denmore* [1990] 1 Lloyd's Rep. 434, at p. 438; *Smith* v. *Eric S. Bush* [1990] A.C. 831, *per* Lord Griffiths at p. 858.
[458] 1977 act, s. 11(4).
[459] *Ibid.*, s. 11(5). See *A.E.G. (U.K.) Ltd.* v. *Logic Resources Ltd.* [1996] C.L.C. 265.

(x) Application of the test of reasonableness

Nature of reasonableness test

The control of exemption and limitation clauses by a test of reasonableness means that decisions are likely to be made on a case by case basis and to turn on the type of contract and the precise nature of the relationship between the parties rather than the application of rules. The consequence is a body of law that is more flexible but less certain. Decisions of judges at first instance as to whether a clause is reasonable can be seen as broadly similar to exercises of structured discretion.[460] It has been stated that Courts must entertain a wide 'range of considerations, put them into the scales on one side or the other, and decide at the end of the day on which side the balance comes down'.[461] In such circumstances there will be room for a legitimate difference of judicial opinion as to the correct answer, and for this reason the decision of the judge at first instance will be treated 'with the utmost respect' and appellate courts will 'refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong'.[462] An example of such an error was where the trial judge considered the reasonableness of the part of the exemption clause that was in issue, requiring a purchaser to return defective goods at its own expense, separately from the rest of the clause, which in effect excluded all other warranties and conditions including those implied by the Sale of Goods Act.[463]

Factors taken into account

It has been said that 'it is impossible to draw up an exhaustive list of factors to be taken into account' in assessing the reasonableness of an exemption or limitation clause.[464] The decided cases, however, give guidance as to the most significant ones.[465]

The statutory guidelines concerning contracts of sale, which have a wider importance, and the statutory requirements that regard is to be had to the capacity of the party seeking exclusion to meet the liability and its insurability are set out above.[466] Thus, the Court will consider the relative bargaining strength of the parties.[467] A clause that has been imposed by one side is less likely to be reason-

[460] In the sense that there is significant scope for setting the reasons and standards (and assessing the relative importance of conflicting reasons and standards) according to which the decision is to be made within a broad but not unlimited statutory framework: see Galligan, *Discretionary Powers* (1986), p. 21.

[461] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803, at p. 816.

[462] *Ibid.*, *per* Lord Bridge at p. 810. See also *Phillips Products Ltd.* v. *Hyland* [1987] 1 W.L.R. 659, at p. 669.

[463] *A.E.G. (U.K.) Ltd.* v. *Logic Resources Ltd.* [1996] C.L.C. 265.

[464] *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, at p. 858.

[465] As well as decisions on the 1977 Act, guidance is gained from those on the Misrepresentation Act 1967, s. 3 (*post*, p. 255, and *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574), the Sale of Goods Act 1893, s. 55 (as amended by the Supply of Goods (Implied Terms) Act 1974 but now replaced by the Unfair Contract Terms Act 1977, ss. 6–7), but see *Rasbora Ltd* v. *J.C.L. Marine Ltd.* [1977] 1 Lloyd's Rep. 645; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803.

[466] *Ante*, p. 191.

[467] *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574, *per* Lord Denning M.R. at p. 594; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] Q.B. 284, at p. 302; *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, at p. 858; *Singer Co. (U.K.) Ltd.* v. *Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, at p. 169; guideline (a) in Sched. 2 to the 1977 Act; Sched. 2(a) to the Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159).

able than one that was the product of negotiations between representative bodies, or had evolved over time as a result of trade practice.[468] Again, where a party seeking to rely on a clause has given the other party the opportunity to pay more for the contractual performance without the clause, the clause is more likely to be held to be reasonable. For instance, in a number of standard forms governing contracts for the carriage of goods, the liability of the carrier is limited unless the owner of the goods declares their value and pays an increased charge.[469]

Insurance

The statutory requirement that regard is to be had to how far it was open to the party seeking exclusion to cover itself by insurance[470] was inserted to protect the small business, and possibly also professional persons who might not have the resources to meet unlimited liability should it arise, and who might not be able to obtain insurance cover against such liability. In their case, it might well be reasonable to impose a financial limit to liability. The provision may, however, be held to operate against larger companies with considerable assets, or to render a 'financial limit' clause unreasonable where insurance cover can in fact be obtained. Thus, it has been held that a limitation of liability of £100,000 by a multinational company with insurance cover of £50 million was unreasonable.[471] It is to be noted that it makes no reference to the *cost* of such cover, but it has been stated that 'the cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss'.[472]

Negligence

Negligence on the part of the party seeking to rely on the clause is also an important factor. The Court will take into account whether there has been such negligence, and, if so, whether it was reasonably practicable for the other party to have done anything to avoid the loss.[473] Excluding or limiting liability for negligence may be reasonable provided it is reasonably practicable for the other party to obtain the service from an alternative source, if the task is very difficult with a high risk of failure, or where it would be impossible to obtain adequate insurance cover against a potential liability that would be ruinous without insurance.[474]

Clarity

The clarity of the clause has been described as an 'overriding' factor; businesses must take the consequences of the uncertainty which their 'small print' has

[468] *Howard Marine and Dredging Co. Ltd.* v. *A. Ogden & Sons (Excavations) Ltd.* [1978] Q.B. 574, *per* Lord Denning M.R. at p. 594; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] Q.B. 284, at pp. 302, 307, 314; [1983] 2 A.C. 803, at p. 817. Trade practice without negotiation is not a weighty factor.

[469] *Gillespie* v. *Roy Bowles Transport Ltd.* [1973] Q.B. 400, at p. 446. See, for example, clause 29(A) and (D) of the British International Freight Association's Standard Trading Conditions, 1989 edn. See also Guideline (b) in Sched. 2 to the 1977 Act; *Singer Co. (U.K.) Ltd.* v. *Hartlepool Port Authority* [1988] 2 Lloyd's Rep. 164, at p. 170.

[470] 1977 Act, s. 11(4).

[471] *St Albans City & D.C.* v. *International Computers Ltd.* [1995] F.S.R. 686, aff'd [1996] 4 All E.R. 481, at p. 491. See also *Salvage Association* v. *CAP Financial Services Ltd.* [1995] F.S.R. 654.

[472] *Smith* v. *Eric S. Bush* (*supra*, n. 467), *per* Lord Griffiths at p. 858. See also *ibid.*, at pp. 851–4; *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] 2 A.C. 803, at p. 817.

[473] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] Q.B. 284, at pp. 307, 313; 2 A.C. 803, at p. 817. See also *Walker* v. *Boyle* [1982] 1 W.L.R. 495, at p. 507; *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, at p. 858 (non-contractual notice).

[474] *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, at pp. 858–9. See *ante*, p. 191 (s. 11(4)).

created; 'uncertainty' involves unfairness to the other side.[475] A clause is also less likely to be reasonable if the innocent party has not had an opportunity of discovering the defect or damage. Thus, a term in a bulk sale of seed potatoes requiring claims to be made within 3 days of delivery was held not to protect the seller when the potatoes were infected by virus, a defect not discoverable by inspection.[476]

Ratio of damage to price

Finally, there is the magnitude of the damage in relation to the contract price. There have been statements that where the price is small but the damages very large, as in the case considered in the next paragraph, this favours a finding of reasonableness.[477]

The operation of many of the above factors is illustrated by *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.*,[478] a case concerning the reasonableness test in section 55 of the Sale of Goods Act 1893 (now repealed),[479] which required the Court to consider the reasonableness of *reliance* upon the term and not, as is required by the 1977 Act, whether it is reasonable to include it in the contract. In that case:

GM, a firm of farmers, purchased from F, a seed merchant, a quantity of Dutch winter white cabbage seeds, described as 'Finney's Late Dutch Special' for £201. F negligently supplied seeds of a very inferior variety of autumn cabbage, and as a result the crop failed. GM's loss was £61,513 but F relied on exemption clauses contained in its standard conditions of sale which limited its liability to replacement of the seeds or a refund of the price paid, and excluded any express or implied condition, statutory or otherwise.

The House of Lords held that F could not rely on the clause. Although similar terms were incorporated universally in the terms of trade between seed merchants and farmers, they were never negotiated; the breach was due to negligence for which F was responsible and seed merchants could insure against crop failure caused by supplying the wrong seeds without materially increasing the price of the seeds. There was also evidence that, in practice, seed merchants always negotiated settlements of claims for damages in excess of the price of seeds if they thought that the claims were 'genuine' and 'justified'. The fact that merchants had not sought to rely on the limitation in the past showed that it would not be reasonable to allow such reliance in this case. Although, under the 1977 Act, reasonableness must be determined at the time of the contract and subsequent reliance is not relevant,[480] it is submitted that it is unlikely to be reasonable to include a term which has never in the past been relied on in a trade and that the absence of

[475] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] Q.B. 284, *per* Kerr L.J. at p. 314. See, similarly, Unfair Terms in Consumer Contracts Regulations 1994 (S.I. 1994 No. 3159), regs. 3(2) and 6, *post*, p. 197. Note the overlap with the rules of construction, *ante*, pp. 166–7.

[476] *R. W. Green* v. *Cade Bros. Farms* [1978] 1 Lloyd's Rep. 602; *R. & B. Customs Brokers Co. Ltd.* v. *United Dominions Trust Ltd.* [1988] 1 W.L.R. 321.

[477] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1983] Q.B. 284; [1983] 2 A.C. 803 (Lord Denning M.R. and Lord Bridge, cf. Kerr L.J.). See also *Smith* v. *Eric S. Bush* [1990] 1 A.C. 831, at pp. 859–60 (non-contractual notice).

[478] [1983] 2 A.C. 803.

[479] *Ante*, p. 150, n. 169.

[480] *Stewart Gill Ltd.* v. *Horatio Myer & Co. Ltd.* [1992] Q.B. 600.

such reliance *before* the contract under consideration was made remains relevant under the 1977 Act.

(xi) Powers of the Court

Powers of Court

Although the Act uses the words 'except in so far as the term satisfies the requirement of reasonableness', the powers of the Court under the 'reasonableness' provisions of the Act are limited to declaring the term either to be effective or of no effect and are probably more limited than its powers under the Unfair Terms in Consumer Contracts Regulations 1994.[481] It could not re-write the term[482] or, for example, where the term limited liability to a particular sum, render a 'judgement of Solomon' by raising that sum to an amount which it considered reasonable in the circumstances.[483]

On the other hand, if a single term both excludes liability which by the Act cannot be excluded (for example, for death or personal injury resulting from negligence) and liability which can be excluded subject to the test of reasonableness (for example, liability in negligence for other loss or damage), it is arguable that the term could nevertheless be upheld, if reasonable, in respect of the exclusion of the latter liability.[484]

(xii) Effect of the 1977 Act

It is difficult to assess the impact of the 1977 Act on contracting behaviour but, in the area of consumer transactions, the level of complaints about unfair terms and conditions has remained quite high, although a small percentage of total complaints.[485] In 1996 the Office of Fair Trading stated that it was 'very disturbed' to find that unfair terms often conflict with consumer protection legislation that has been in place for some time, including the 1977 Act.[486] It would seem that reliance on individual action by parties to contracts is insufficient and that public action, either under Part II of the Fair Trading Act 1973 or by the Office of Fair Trading proceeding against traders under Part III of that Act, or under the Unfair Terms in Consumer Contracts Regulations 1994,[487] is necessary.[488]

[481] S.I. 1994 No. 3159, reg. 5(1). *Post*, pp. 196 and 291.

[482] *Quaere* whether the Court could sever words that made the term unreasonable.

[483] *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* (*supra*, n. 477), at p. 816; *Stewart Gill Ltd.* v. *Horatio Myer & Co. Ltd.* [1992] Q.B. 600.

[484] This point was left open by Parker J. in *George Mitchell (Chesterhall) Ltd.* v. *Finney Lock Seeds Ltd.* [1981] 1 Lloyd's Rep. 476, at p. 480. But see *R. W. Green Ltd.* v. *Cade Bros. Farms* [1978] 1 Lloyd's Rep. 602, *ante*, p. 194 (3-day time bar invalid, limitation of damages to contract price valid).

[485] According to the Office of Fair Trading, there were some 16,200 complaints in 1989: *Trading Malpractices* (1990).

[486] Office of Fair Trading, *Unfair Contract Terms*, Bulletin 2, p. 5.

[487] S.I. 1994 No. 3159, *infra*.

[488] See generally Beale, in Beatson and Friedmann, eds., *Good Faith and Fault in Contract Law* (1995), ch. 9. *Post*, p. 199.

(b) Unfair Terms in Consumer Contracts Regulations 1994[489]

Unlike the Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contracts Regulations 1994 are not restricted to exemption and limitation clauses, but subject all the terms of a contract between a seller or supplier of goods or services and a consumer which have not been 'individually negotiated'[490] to a requirement of 'fairness'. For this reason, we shall consider the operation of the Regulations in Chapter 7, dealing with other common law and statutory controls on unfair and unconscionable bargains.[491] As, however, many of the terms controlled by the 1994 Regulations will in fact either be exemption or limitation clauses, it is useful here to indicate the main differences between the two statutory regimes.

Scope

First, the Regulations apply to some contracts, notably insurance,[492] excluded from the 1977 Act. The position of sales of land, which are excluded from the 1977 Act, is not altogether clear. The Regulations only apply to contracts for the sale of goods and supply of services which would ordinarily exclude dealings in land, but it has been argued that the Regulations must be interpreted in accordance with Community law and in that context those words are capable of applying to the creation and transfer of interests in land.[493] But they do not apply to some matters which are covered by the 1977 Act. For instance, the Regulations do not apply to non-contractual notices, and contracts 'relating to employment' are wholly excluded from their regime.[494] Again, under the Regulations only a natural person can be a 'consumer',[495] whereas, as we have seen, under section 12 of the 1977 Act, a company may qualify.[496] But the Regulations have a broader definition of 'seller' and 'supplier' since they only require a 'seller' or 'supplier' to be 'acting for purposes relating to his business'[497] and not, as under the 1977 Act, 'in the course of a business' and with some regularity.[498]

Secondly, the broader scope of the Regulations is accompanied by protection which is, in some respects, less certain than that in the 1977 Act. For example, there are no absolute bans, only factors[499] and an 'indicative and non-exhaustive

[489] S.I. 1994 No. 3159, implementing EEC Council Directive 93/13, OJ No. L. 95, 21 April 1993, p. 29. See generally Beale, (*supra*, n. 488); Collins (1994) 14 O.J.L.S. 229.

[490] S.I. 1994 No. 3159, reg. 3(1). They may, accordingly, catch, for instance, clauses by a principal restricting his agent's authority: cf. *Overbrooke Estates Ltd.* v. *Glencombe Properties Ltd.* [1974] 1 W.L.R. 1355, *post*, p. 256.

[491] *Post*, p. 291 ff. Apart from exemption and limitation clauses, according to the Office of Fair Trading, the most common categories of unfair terms are clauses excluding from the contract anything done or said by the salesman ('entire agreement' clauses), clauses hidden before the contract is made (*ante*, p. 161), clauses penalizing consumers, and clauses permitting the supplier to vary its price.

[492] But note that terms which clearly and plainly define or circumscribe the insured risk and the insurer's liability will not be assessed for fairness (S.I. 1994 No. 3159, reg. 3(2); Directive 93/13, Art. 4(1) and Recital 19) since these restrictions are taken into account in calculating the premium paid.

[493] Bright and Bright (1995) 111 L.Q.R. 655.

[494] Para. (a) of Sched. 1 to the 1994 Regulations. Cf. the more limited exemption in the 1977 Act, *ante*, p. 183.

[495] *Ibid.*, reg. 2(1).

[496] *Ante*, p. 186.

[497] *Ibid.*, reg. 2(1).

[498] *Ante*, p. 185.

[499] *Ibid.*, reg. 4(2) and (3). See further, *post*, p. 197.

list of the terms which may be regarded as unfair'.[500] A number of the terms in this list would be of no effect under the 1977 Act[501] or under the common law.[502]

The test of 'fairness'

A term will be 'unfair' where, 'contrary to the requirement of good faith', it 'causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer'.[503] It is, as yet, not clear to what extent the three elements of this test differ from the 'reasonableness' test of the 1977 Act. Some of the factors to be taken into account in the determination of 'reasonableness' under the 1977 Act are also to be taken into account in determining 'good faith' and 'fairness',[504] and either test is likely in most cases to lead to a very similar result. There have, as yet, been no significant judicial decisions but many of the cases the Director-General of Fair Trading has considered, as part of his duty to prevent the continued use of unfair terms,[505] have involved 'reasonableness' and the plainness and intelligibility of the language and do not show a sharp difference from the approach taken in the cases on the 1977 Act. For example, following complaints suppliers have agreed to withdraw or amend certain types of clause. Thus, clauses excluding liability for a failure to supply have either been withdrawn or limited to situations in which the failure is beyond the supplier's reasonable control. Clauses excluding delay have either been withdrawn or limited to delay for a reasonable period. Similarly, suppliers have agreed either to withdraw clauses preventing a consumer from withholding any part of the contractual payment where the goods or services are defective or to amend them to prohibit such withholding in the case of a minor defect beyond a proportionate amount of the contractual sum. Finally, suppliers have agreed to withdraw clauses excluding liability for damage if concerned with death or personal injury or to limit them to damage which has not been caused negligently.[506]

But the two tests are not the same. For instance, regulation 3(2) provides that the fairness of the price and the definition of the main subject-matter are not to be taken into account provided the relevant term is in 'plain intelligible language'. But, as we have seen, under section 3(2)(b) of the 1977 Act, exemption clauses shrinking the contractual obligation are subject to control and the reasonableness test if they permit a contractor to perform in a way that is 'substantially different from that which was reasonably expected'. Conceivably, under the Regulations, a term permitting such performance would escape control by the 'fairness' test if it

[500] *Ibid.*, reg. 4(4) and Sched. 3.

[501] For instance, excluding or limiting liability for death or personal injury (*ante*, p. 187), or for breach of implied undertakings as to fitness for use and quality in sales to consumers (*ante*, p. 188, but note that the proposals in EC Draft Directive on the Sale of Consumer Goods and Guarantees, COM(95) 520, 3 September 1996 would introduce a similar ban).

[502] For instance requiring a consumer in breach to pay a disproportionately high sum in compensation, *post*, p. 588.

[503] *Ibid.*, reg. 4(1), *post*, p. 291.

[504] The factors listed in (a)–(c) of Sched. 2 to the Regulations are strikingly similar to those in Schedule 2 to the 1977 Act. Cf. also reg. 4(2) and section 11 of the 1977 Act.

[505] S.I. 1994 No. 3159, reg. 8. *Quaere* whether this suffices to fulfil the obligation under Article 7 of the Directive to provide 'adequate and effective means' for persons or organizations with a legitimate interest in protecting consumers to prevent continued use of unfair terms.

[506] See Office of Fair Trading Bulletins on *Unfair Contract Terms*.

was in 'plain intelligible language'. The assessment of the fairness of a term is, as under the 1977 Act, to be made in the light of the circumstances at the time the contract was concluded.[507] But, unlike the 1977 Act, the Regulations expressly require regard to be had to 'all the other terms of the contract'.[508] The determination of fairness will thus take account of the entire contractual package and a term which, in isolation, might appear to be unfair, might not be when looked at in the light of the contract as a whole. We have noted that the Regulations probably permit a broader approach to severance since they provide that 'the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term'.[509]

More fundamentally, the broad test of 'good faith', with its conceptual roots in civilian systems of law, which has not been a general requirement in the English law of contract, is, as we shall see,[510] likely to lead to a wider inquiry than that under the 1977 Act. For instance, the Preamble to the Directive upon which the Regulations are based states that the requirement of 'good faith' is satisfied where the seller or supplier 'deals fairly and equitably with the other party *whose legitimate interests he also takes into account*'.[511] This question is considered in Chapter 7, dealing with unfair bargains.[512]

(c) Other Legislative Intervention

The exclusion or restriction of liability for misrepresentation is controlled by section 3 of the Misrepresentation Act 1967.[513] This is dealt with in Chapter 6. Legislative intervention has also occurred in a number of other important, but limited, spheres, as in the case of consumer credit,[514] consumer safety,[515] defective premises,[516] package holidays,[517] carriage by land,[518] sea,[519] or air,[520] insurance,[521] and employment.[522]

[507] S.I. 1994 No. 3159, reg. 4(2). Note that, unlike s. 11(1) of the 1977 Act, *ante*, p. 190, there is no express reference to circumstances which 'ought to have been' known to or in the contemplation of the parties at the time of contracting.

[508] S.I. 1994 No. 3159, reg. 4(2).

[509] *Ibid.*, reg. 5(2).

[510] *Post*, p. 291.

[511] Recital 16 of the Preamble to EEC Council Directive 93/13 (emphasis added). On the use of the preamble to a Directive in interpreting the implementing regulations, see Case C-106/89, *Marleasing S.A.* v. *La Commercial* [1992] 1 C.M.L.R. 305.

[512] *Post*, p. 291.

[513] As amended by the Unfair Contracts Act 1977, s. 8; see *post*, p. 255.

[514] Consumer Credit Act 1974, s. 173(1).

[515] Consumer Protection Act 1987, Part I.

[516] Defective Premises Act 1972, s. 6(3).

[517] Package Travel, Package Holidays and Package Tours Regulations (S.I. 1992 No. 3288), esp. reg. 15.

[518] Carriage of Goods by Road Act 1965; Carriage of Passengers by Road Act 1974; Carriage by Air and Road Act 1979; Public Passengers Vehicles Act 1981; International Transport Conventions Act 1983.

[519] Carriage of Goods by Sea Act 1924, Art. III, r. 8; Carriage of Goods by Sea Act 1971; Merchant Shipping Act 1995.

[520] Carriage by Air Act 1961; Carriage by Air and Road Act 1979.

[521] Industrial Assurance Acts 1923 and 1968; Road Traffic Act 1988, s. 148; Transport Act 1980, s. 61.

[522] Employment Rights Act 1996, the latest consolidation of legislation concerning individual employment.

Fair Trading Act 1973

More generally, under the Fair Trading Act 1973,[523] a Director General of Fair Trading has been appointed and a Consumer Protection Advisory Committee has been set up. The Director, or the Secretary of State for Trade and Industry or any other Minister, may refer to the Advisory Committee the question whether a consumer trade practice specified in the reference adversely affects the economic interests of consumers in the United Kingdom. The Advisory Committee will consider this reference and formulate a Report, which may then be followed by legislative action (i.e. a statutory instrument) by the Secretary of State.[524] The Act refers specifically to the situation where it appears to the Director that 'a consumer trade practice has the effect, or is likely to have the effect, of causing the terms or conditions, on or subject to which consumers enter into relevant consumer transactions, to be so adverse to them as to be inequitable'.[525] In addition to these general powers, the Act enables[526] the Director to take action against particular persons, firms, or companies who persist in a course of conduct which is detrimental to the interests of consumers in the United Kingdom or which is to be regarded as unfair to consumers. If the Director is unable to obtain a satisfactory written assurance that the conduct complained of will cease, he may institute proceedings before the Restrictive Practices Court, which can make an order (breach of which will be punishable as a contempt of Court) against the person, firm, or company concerned. We have noted that public action such as is possible under this Act and other legislation may be more effective in controlling the use of undesirable exemptions and limitation clauses.

[523] Parts I to III.
[524] See S.I. 1976 No. 1812, S.I. 1976 No. 1813, S.I. 1978 No. 127, S.I. 1977 No. 1918.
[525] Fair Trading Act 1973, s. 17(2)(c).
[526] *Ibid.*, Part III.

PART 2

Factors tending to Defeat Contractual Liability

5. Incapacity 203
6. Misrepresentation and Non-disclosure 232
7. Duress, Undue Influence, and Unconscionable Bargains 270
8. Mistake 294
9. Illegality 333