1 GUIDANCE ON READING CASES

SECTION 1: A GUIDING PRINCIPLE

It is essential to acquire case reading skills for the purposes of legal research, but there is very little point in reading a case if after reading it you do not understand how it relates to the legal principles you will have learnt in lectures. It is important, therefore, to know what issue you should find in the case and use this to give your case reading some direction and context.

Read a case with either a broad heading or a specific principle in mind. The principle or heading will be indicated on your lecture outline, in the lecture itself or in a textbook. If you need to read a recent case and have no indication of the issues involved, you will need to be guided by the catchwords and headnote at the top of the report. An individual case may well be concerned with many different issues which you are not currently studying, and while it is interesting to read about them, pressures of time mean that it is necessary to direct your reading.

Of course, if you have a casebook someone else will have provided the headings and decided what parts of which decisions and judgments are relevant to illustrate this principle. This saves time and can be very helpful indeed while you are still in the process of acquiring the skill of deciding what is relevant. There will, however, inevitably be occasions when you will need to read a case in the reports, e.g., if the case has just been decided.

SECTION 2: USEFUL NOTES

It is not simply a matter of reading a case; you must understand it and will probably wish to keep a note of it. It is advisable to remember that your notes should not be longer than the case itself!

The notes also need to be helpful. Avoid copying too much material (with the exception of the facts and specific statements in the judgments that you may wish to use later) and try to explain the case in your own words. This

will ensure that you understand what you are writing and will be able to use it later.

It is also a useful practice to use one side of the paper for lecture notes and to make notes on the relevant cases on the back of the preceding sheet. Some people prefer the use of small cards with an index system.

Check for any case notes or other critical assessments of the case in question and the issues it raises. Try to appreciate the significance of the case to the legal issue involved.

SECTION 3: THE BASICS OF READING A CASE

(a) Decide which case or cases to read

The more cases you read properly the better. Many lecturers indicate, sometimes by the use of an asterisk, the cases that they consider to be the most important or the best illustrations of the principle.

(b) Use the citation to find the report of the case

(c) Note the full case name and court

These are given at the top of the report (in older cases in the *English Reports* you may have to find the beginning of the reports of that particular reporter to find out the court). The court deciding the case can be significant, and you will need to be familiar with the court structure (civil for contract cases) and the doctrine of precedent.

Also note the reference of the case, since this will be needed for inclusion in the footnotes in any written work.

(d) Presentation of case reports

This is fairly standardised.

(i) *Catchwords* At the top of the headnote there is a section identifying the issues in the case (known as the 'catchwords'). These should correspond at some point with the legal issues given in the heading or principle in your lecture notes or outline. There is no need to note these catchwords.

(ii) *Headnote facts* Sometimes these facts will be very brief indeed and too general. On other occasions there will be full case facts and details of the decision at first instance, or previous appeals if the case is now on appeal.

Make notes on whatever facts are relevant to the principle you are using as your guide. If the headnote facts are brief, then look for further facts in the judgments.

Remember that each case is a decision on its particular facts so that the facts are important.

(iii) *Statement of the decision of the court* The headnote may not be detailed enough on the reasons for the decision, so that you will need to look at the judgments themselves to extract this information.

(iv) *More detailed facts* A more detailed statement of the facts may follow the headnote. Some judgments will also contain details of the facts. Lord Denning's judgments are particularly good at setting out the facts in a readable form, and he also used headings to useful effect.

(v) *Details of the grounds of any appeal and the arguments of each set of counsel* It can be particularly useful to read these arguments in the light of the actual decision given in the headnote. They are also helpful to those who are participating in moots.

(vi) *A judgment or number of judgments* The headnote will be helpful in many cases in indicating the majority, the judgments which require particular attention and the principles that you will need to look for in reading the judgments. It should also indicate any dissenting judgments.

With appeal cases the headnote may indicate relevant page numbers in judgments, e.g., *Howard Marine & Dredging Company Ltd* v *A. Ogden & Sons (Excavations) Ltd* [1978] QB 574.

If there is any difference of opinion on the reasons for a decision or an actual dissent, then these judgments require examination to determine the reasons given for the differences and dissents.

Ensure that the judgments do in fact correspond with the stated decision in the headnote, and use the comments in the judgments to explain and illustrate the decision.

SECTION 4: READING A CASE IN PRACTICE

Your Contract Law tutor has advised you to read *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256, on offer and acceptance.

Find the report of the case in volume one of the *Law Reports* Queen's Bench Division for 1893, at p. 256. (There are numerous other reports of this case, e.g., at 62 LJQB 257 or 67 LT 837.)

Make a note of the full case name and the fact that this is a decision of the Court of Appeal. (It may be preferable to list the members of the Court when stating the decision.) Also remember to note the reference used.

[IN THE COURT OF APPEAL]

CARLILL v *CARBOLIC SMOKE BALL COMPANY*

Contract — Offer by Advertisement — Performance of Condition in Advertisement — Notification of Acceptance of Offer — Wager — Insurance — 8 & 9 Vict. c. 109–14 Geo. 3, c. 48, s. 2.

The defendants, the proprietors of a medical preparation called 'The Carbolic Smoke Ball,' issued an advertisement in which they offered to pay 100*l.* to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The plaintiff on the faith of the advertisment bought one of the balls, and used it in the manner and for the period specified, but nevertheless contracted the influenza:—

Held, affirming the decision of Hawkins, J that the above facts established a contract by the defendants to pay the plaintiff 100*l.* in the event which had happened; that such contract was neither a contract by way of wagering within 8 & 9 Vict c. 109, nor a policy within 14 Geo 3, c. 48, s. 2; and that the plaintiff was entitled to recover.

(a) Catchwords

The catchwords are helpful in advising that this is a case about a contract and is concerned with an offer by advertisement. This is within your guiding principle of offer and acceptance.

This case is also about two other issues which are not within your guiding principle of offer and acceptance, namely wager and insurance. Do not worry about these for the present.

(b) Facts

The facts given in the headnote are very brief indeed. A more detailed statement of the facts follows the headnote.

(c) Decision

The facts are followed by a brief statement of what was decided.

We are told that the Court of Appeal affirmed the first instance decision of Hawkins J (the reference for this is given at the bottom of p. 256 in note (2) as [1892] 2 QB 484). If you are mooting, it is advisable to have full details of this decision to know the arguments presented and those that were accepted on that occasion.

The headnote states that the Court of Appeal held that the defendants (the Smoke Ball Company) agreed to pay the plaintiff £100 in the event which happened (namely, contracting influenza after having used one of the smoke balls in the specified manner and for the specified period).

We are also told that it was decided that it was not a wagering contract or a policy of insurance, so that the plaintiff was entitled to recover the £100.

(d) Note the facts

At this point it is advisable to note the facts to make it easier to understand the judgments. Because the headnote facts are too brief for this purpose, the statement of facts on pp. 256–57 of the report is used:

Carlill* v *Carbolic Smoke Ball Company [1893] 1 QB 256 (CA)

The defendants, who made and sold a medical preparation called 'The Carbolic Smoke Ball', issued an advertisement in a number of newspapers in the following terms:

> £100 reward will be paid by the Carbolic Smoke Ball Company to any person 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 supplied with each ball.

£1,000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter.

On the faith of this advertisement, the plaintiff bought one of the balls at a chemist's and used it as directed three times a day from 20 November 1891 to 17 January 1892, when she contracted influenza.

She sought payment of the £100 and the defendants refused.

(e) The decision at first instance

Hawkins J at first instance held that the plaintiff was entitled to recover, since the advertisement was intended to attract custom and was supported by the deposit with the Company's bank. The Company should not have been surprised if they were held to their promise. (The only way to find this information is to look at the report of the first instance decision.)

Since the Court of Appeal is purporting to affirm the first instance decision, there is no need in this instance to make detailed notes on it.

(f) The decision of the Court of Appeal

Making a note of the Court of Appeal's decision in this case is comparatively difficult since the headnote is a broad statement of result without giving reasons. It is therefore necessary to look at the judgments. (There is also no indication in the headnote of any dissent, so that the three judgments should be saying the same thing.)

On occasions it can be helpful to look at the arguments of counsel, and in this case the defendants put forward a number of arguments as to why there should be no binding contract. However, since the members of the Court of Appeal identify and answer these points in their judgments, there is no need to duplicate them by making notes on the arguments of counsel.

(g) The judgments

Read each judgment and make quick, rough notes.

(i) *The judgment of Lindley LJ*

(a) Lindley LJ rejects the two arguments which are outside the scope of our directing issue, namely that it was an unenforceable wagering contract and insurance policy.

(b) Lindley LJ considered that there was no doubt that the language used indicated that a binding promise was being made. To be enforceable the promise must have been intended to give rise to legal relations (page 171). One of the arguments put by counsel for the defendants was that this advertisement was not intended to create legal relations. It was a 'mere puff' or advertising gimmick which was not intended to be taken literally and which therefore could not be enforced by the plaintiff.

LINDLEY LJ: . . . Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: '1000*l.* is deposited with the Alliance Bank, shewing our

sincerity in the matter.' Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter — that is, the sincerity of his promise to pay this 100*l.* in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

(c) He then identified this offer as an offer to the world.

LINDLEY LJ: . . . Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay 100*l.* to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer.

The advertisement is an offer to pay a reward to anybody who performs the stipulated act, and performance of that act constitutes the acceptance of the offer.

Lindley LJ is stating that this is a unilateral contract, i.e., a promise to pay money in exchange for an act.

(d) A further argument on behalf of the defendants was that any acceptance had to be communicated to the offeror, and Mrs Carlill did not notify the Company that she intended to use the smoke ball in response to their advertisement.

LINDLEY LJ: But then it is said, 'Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified.' 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 the acceptance should be notified. But is that so in cases of this kind? . . . [I] think that the true view, in a case of this kind, is that the person who makes the offer shews by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance.

Thus Lindley LJ stated that the nature of the transaction indicated that the offeror had waived the normal requirement of communication of acceptance (although it was necessary, having performed, to notify the offeror of this fact in order to claim the reward).

(e) It was argued that the language of the advertisement was so vague that it could not amount to a promise at all.

LINDLEY LJ: . . . The language is vague and uncertain in some respects, and particularly in this, that the 100*l.* is to be paid to any person who contracts the increasing epidemic after having used the balls three times daily for two weeks. It is said, When are they to be used? According to the language of the advertisement no time is fixed, and, construing the offer most strongly against the person who has made it, one might infer that any time was meant. I do not think that was meant, and to hold the contrary would be pushing too far the doctrine of taking language most strongly against the person using it. I do not think that business people or reasonable people would understand the words as meaning that if you took a smoke ball and used it three times daily for two weeks you were to be guaranteed against influenza for the

rest of your life, and I think it would be pushing the language of the advertisement too far to construe it as meaning that. But if it does not mean that, what does it mean? It is for the defendants to shew what it does mean; and it strikes me that there are two, and possibly three, reasonable constructions to be put on this advertisement, any one of which will answer the purpose of the plaintiff. Possibly it may be limited to persons catching the 'increasing epidemic' (that is, the then prevailing epidemic), or any colds or diseases caused by taking cold, during the prevalence of the increasing epidemic. That is one suggestion; but it does not commend itself to me. Another suggested meaning is that you are warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst you are using this remedy after using it for two weeks. If that is the meaning, the plaintiff is right, for she used the remedy for two weeks and went on using it till she got the epidemic. Another meaning, and the one which I rather prefer, is that the reward is offered to any person who contracts the epidemic or other disease within a reasonable time after having used the smoke ball.

Lindley LJ considered that the statement could be construed to apply to any person who contracted influenza within a reasonable time of having used the smoke ball. Clearly this covered the plaintiff, who had contracted influenza while using the smoke ball.

(f) The promise by the Company had to be supported by consideration (pages 105–62) provided by Mrs Carlill (i.e., Mrs Carlill had to give something of value in exchange for the Company's promise). At the time of this decision, consideration was seen as being either a benefit to the offeror (the Company) and/or a detriment to the offeree (Mrs Carlill). Lindley LJ considered that consideration was present in the sense of a benefit to the offeror company and/or a detriment to the offeree (Mrs Carlill).

LINDLEY LJ: . . . It has been argued that this is nudum pactum — that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows. It is quite obvious that in the view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise.

Lindley LJ is stating that the performance of the conditions in the unilateral offer constitutes both the acceptance of the promise and the consideration for it.

(g) Lindley LJ concludes his judgment with the following statement:

LINDLEY LJ: It appears to me, therefore, that the defendants must perform their promise, and, if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.

(ii) *The judgment of Bowen LJ* This is the clearest of the judgments and the one most frequently cited. The order of presentation of the issues is also the most logical:

(a) Was the advertisement too vague to be enforced?

BOWEN LJ: . . . The defendants contend, that it is an offer the terms of which are too vague to be treated as a definite offer, inasmuch as there is no limit of time fixed for the catching of the influenza, and it cannot be supposed that the advertisers seriously meant to promise to pay money to every person who catches the influenza at any time after the inhaling of the smoke ball. . . . It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it? It was intended unquestionably to have some effect, and I think the effect which it was intended to have, was to make people use the smoke ball, because the suggestions and allegations which it contains are directed immediately to the use of the smoke ball as distinct from the purchase of it. It did not follow that the smoke ball was to be purchased from the defendants directly, or even from agents of theirs directly. The intention was that the circulation of the smoke ball should be promoted, and that the use of it should be increased. The advertisement begins by saying that a reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic after using the ball. It has been said that the words do not apply only to persons who contract the epidemic after the publication of the advertisement, but include persons who had previously contracted the influenza. I cannot so read the advertisement. It is written in colloquial and popular language, and I think that it is equivalent to this: '100*l.* will be paid to any person who shall contract the increasing epidemic after having used the carbolic smoke ball three times daily for two weeks.' And it seems to me that the way in which the public would read it would be this, that if anybody, after the advertisement was published, used three times daily for two weeks the carbolic smoke ball, and then caught cold, he would be entitled to the reward.

Bowen LJ adopted the correct approach of looking at the statement objectively to see what the reasonable man would consider was intended (see pages 18–20).

BOWEN LJ: . . . Then again it was said: 'How long is this protection to endure? Is it to go on for ever, or for what limit of time?' I think that there are two constructions of this document, each of which is good sense, and each of which seems to me to satisfy the exigencies of the present action. It may mean that the protection is warranted to last during the epidemic, and it was during the epidemic that the plaintiff contracted the disease. I think, more probably, it means that the smoke ball will be a protection while it is in use. That seems to me the way in which an ordinary person would understand an advertisement about medicine, and about a specific against influenza. It could not be supposed that after you have left off using it you are still to be protected for ever, as if there was to be a stamp set upon your forehead that you

were never to catch influenza because you had once used the carbolic smoke ball. I think the immunity is to last during the use of the ball. . . . I therefore, have myself no hesitation in saying that I think, on the construction of this advertisement, the protection was to enure during the time that the carbolic smoke ball was being used. My brother, the Lord Justice who preceded me, thinks that the contract would be sufficiently definite if you were to read it in the sense that the protection was to be warranted during a reasonable period after use. I have some difficulty myself on that point; but it is not necessary for me to consider it further, because the disease here was contracted during the use of the carbolic smoke ball.

Bowen LJ differs from Lindley LJ on the question of the length of the immunity. Lindley LJ considered it should last for a reasonable time after use of the smoke ball, while Bowen LJ confined it to protection during the use of the smoke ball. It did not affect the decision on these facts, since Mrs Carlill had been using the smoke ball when she contracted influenza.

(b) Bowen LJ then addressed the contention that this was a 'mere puff' and that there was no intention to create legal relations.

BOWEN LJ: Was it intended that the 100*l.* should, if the conditions were fulfilled, be paid? The advertisement says that 1000*l.* is lodged at the bank for the purpose. Therefore, it cannot be said that the statement that 100*l.* would be paid was intended to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

(c) He then went on to address the argument that this would amount to a contract with the whole world, which was not possible.

BOWEN LJ: . . . It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to any one who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement. It is not like cases in which you offer to negotiate, or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate — offers to receive offers — offers to chaffer, as, I think, some learned judge in one of the cases has said. If this is an offer to be bound, then it is a contract the moment the person fulfils the condition.

Bowen LJ raises the fact that this advertisement was an offer, whereas advertisements are normally invitations to treat (page 27). The unilateral contract is therefore an exception to the general rule in *Partridge* v *Crittenden* [1968] 2 All ER 421 (page 27), since an advertisement which requests the performance of an act will be an offer. Had it been construed as an invitation to treat, such advertisements to pay rewards would have made little sense. The offeror would have the benefit of seeing the stipulated conditions performed and yet would not be bound to pay the reward.

(d) Was it necessary that the acceptance be notified?

BOWEN LJ: . . . One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that

the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English law — I say nothing about the laws of other countries — to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, 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 mode 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 method 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. . . .

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write me a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer.

While it is normally necessary to communicate an acceptance, the offeror may waive this requirement, either expressly or impliedly. In unilateral contracts the offeror will in most instances be taken to have waived the requirement of communication of an intention to accept, so that all that is required is that the requested act is performed.

(e) Lastly, in answer to the argument that since catching influenza was only a condition, the Company's promise was not supported by any consideration from Mrs Carlill, Bowen LJ agreed with Lindley LJ that there was both a benefit to the Company and a detriment to Mrs Carlill.

BOWEN LJ: . . . Can it be said here that if the person who reads this advertisement applies thrice daily, for such time as may seem to him tolerable, the carbolic smoke ball to his nostrils for a whole fortnight, he is doing nothing at all — that it is a mere act which is not to count towards consideration to support a promise (for the law does not require us to measure the adequacy of the consideration). Inconvenience sustained by one party at the request of the other is enough to create a consideration. I think,

therefore, that it is consideration enough that the plaintiff took the trouble of using the smoke ball. But I think also that the defendants received a benefit from this user, for the use of the smoke ball was contemplated by the defendants as being indirectly a benefit to them, because the use of the smoke balls would promote their sale.

(iii) *The judgment of A. L. Smith LJ* This judgment is more general in its presentation of the issues:

A. L. SMITH LJ: . . . It comes to this: 'In consideration of your buying my smoke ball, and then using it as I prescribe, I promise that if you catch the influenza within a certain time I will pay you 100*l*.' It must not be forgotten that this advertisement states that as security for what is being offered, and as proof of the sincerity of the offer, 1000*l*. is actually lodged at the bank wherewith to satisfy any possible demands which might be made in the event of the conditions contained therein being fulfilled and a person catching the epidemic so as to entitle him to the 100*l*. How can it be said that such a statement as that embodied only a mere expression of confidence in the wares which the defendants had to sell? I cannot read the advertisement in any such way. In my judgment, the advertisement was an offer intended to be acted upon, and when accepted and the conditions performed constituted a binding promise on which an action would lie, assuming there was consideration for that promise. . . .

(a) A. L. Smith LJ examined the vagueness of the promise.

A. L. SMITH LJ: . . . [I]t was said that the promise was too wide, because there is no limit of time within which the person has to catch the epidemic. There are three possible limits of time to this contract. The first is, catching the epidemic during its continuance; the second is, catching the influenza during the time you are using the ball; the third is, catching the influenza within a reasonable time after the expiration of the two weeks during which you have used the ball three times daily. It is not necessary to say which is the correct construction of this contract, for no question arises thereon. Whichever is the true construction, there is sufficient limit of time so as not to make the contract too vague on that account.

A. L. Smith LJ neatly avoided having to choose whether he preferred the construction of Lindley LJ or that of Bowen LJ by stating that it was not necessary to do so. As a result there is no clear interpretation of the promise by the Court of Appeal.

(b) There was no express requirement that acceptance be notified.

A. L. SMITH LJ: Then it was argued, that if the advertisement constituted an offer which might culminate in a contract if it was accepted, and its conditions performed, yet it was not accepted by the plaintiff in the manner contemplated, and that the offer contemplated was such that notice of the acceptance had to be given by the party using the carbolic ball to the defendants before user, so that the defendants might be at liberty to superintend the experiment. All I can say is, that there is no such clause in the advertisement, and that, in my judgment, no such clause can be read into it; and I entirely agree with what has fallen from my Brothers, that this is one of those cases in which a performance of the condition by using these smoke balls for two weeks three times a day is an acceptance of the offer.

This is helpful since it indicates that if a unilateral offeror does wish to know who is attempting to accept his offer, he must include an express provision requiring this.

(c) A. L. Smith LJ also recognised that performance of the conditions specified constituted the acceptance, and concluded by agreeing that consideration had been provided since it was a detriment to the offeree to use the smoke ball as requested and a benefit to the Company.

A. L. SMITH LJ: Lastly, it was said that there was no consideration, and that it was nudum pactum. There are two considerations here. One is the consideration of the inconvenience of having to use this carbolic smoke ball for two weeks three times a day; and the other more important consideration is the money gain likely to accrue to the defendants by the enhanced sale of the smoke balls, by reason of the plaintiff's user of them. There is ample consideration to support this promise. . . .

Counsel for the defendants argued that the terms of the advertisement would enable someone who stole the smoke ball to claim the reward when clearly the actions of this thief had not benefited the defendants by way of increased sales. Lindley LJ and Bowen LJ considered that the benefit was the general increase in sales through improved public confidence (see page 7 and page 10) and that this was a sufficient consideration. This definition would allow a thief to claim the reward. Of course, a thief would suffer a detriment in using the smoke ball in the stipulated manner.

(h) Notes on the decision and the judgments

It is now necessary to use the judgments to state the decision and explain it:

The Court of Appeal (Lindley, Bowen and A. L. Smith LJJ) held that the defendants' promise in their advertisement was sufficiently certain and constituted a unilateral offer.

This offer was a promise to pay £100 to anyone who performed the stipulated conditions, namely using the smoke ball three times a day as directed for two weeks and still catching influenza.

The promise was intended to have legal effects, since the defendants had demonstrated their sincerity by depositing £1,000 with their bank.

The plaintiff had performed these conditions and therefore had accepted the offer. In a unilateral contract the offeror will normally have impliedly waived the requirement that the acceptance must be communicated in order to be effective so that notification of acceptance is not required.

The act of performance also constituted the consideration to support the defendants' promise; it was a detriment to the plaintiff to have to use the smoke ball in accordance with these directions, and it was a benefit to the defendants since the plaintiff's use of the smoke ball would indirectly improve its sales through increased public confidence in the product.

Therefore, since there was a binding contract the plaintiff was entitled to be paid the £100.

Note

You may wish to add to these notes by including any important statements from the judgments and by filling out the notes on the law concerning unilateral contracts. For example, you may wish to record Bowen LJ's

statement that this was an offer to the world (see page 9) and his statement (see pages 9–10) discussing the fact that in a unilateral contract there is no requirement to notify the offeror that you are intending to accept. Bowen LJ's example of the lost dog is particularly famous and worth noting.

(i) General notes on the legal principles in the case

This case has been valuable in explaining the unilateral contract.

A unilateral contract is a contract whereby the offeror makes a promise (in this case to pay £100) in return for the performance of a stipulated act. Mrs Carlill makes no promise and can decide not to continue her use of the smoke ball at any time.

To summarise, there are a number of exceptional rules which apply to unilateral contracts for which *Carlill* v *Carbolic Smoke Ball Company* is authority:

(a) Whereas the general rule is that an advertisement is an invitation to treat (i.e., an invitation to make an offer), if the advertisement requests the performance of an act then the advertisement will be an offer. This means that on performance of the requested act the offer has been accepted and there is a binding contract. Generally, a response to an advertisement is itself an offer so that there is no binding contract at that stage.

(b) Whereas the general rule is that an acceptance must be communicated to the offeror, the offeror may impliedly waive this requirement, and will be taken to have done so when the offer is unilateral unless there has been an express indication of the fact that notification is required.

(c) In a unilateral contract the requested act is both the acceptance and the consideration for the promise.

There are other legal principles applicable to unilateral contracts which it is convenient to consider at this point:

(i) It is possible to accept a unilateral offer of a reward only if you know that it has been made and accept in response to it (*R* v *Clarke* (1927) 40 CLR 227, page 41). This means that the act which is the purported acceptance cannot have been performed before any promise of a reward was made.

(ii) Since the acceptance is the performance of the stipulated act and performing this act may be a continuing act (as in *Carlill* v *Carbolic Smoke Ball*), the general principle should be that the offer may be revoked at any time before the act is completely performed. However, it now appears that it may not be possible to revoke a unilateral offer once the offeree has started to perform (*Errington* v *Errington and Woods* [1952] 1 KB 290, page 58).

(iii) Although the general rule is that a revocation of an offer must be communicated to the offeree, this is not practical in the case of a unilateral offer to the whole world since it is not possible to ascertain who the potential offerees are. The American case of *Shuey* v *US* 23 L ed 697, (1875) 92 US 73 (page 62) is authority for the fact that it is sufficient if the revocation is

communicated using the same channel used to communicate the original offer, and if this is done it is irrelevant if particular offerees did not see or know about the revocation.

Questions

1. What was the stipulated act in *Carlill* v *Carbolic Smoke Ball*? Was it merely using the smoke ball as specified so that catching influenza was only a condition of entitlement to enforce the promise? Or was it using the ball as specified *and* catching influenza? (See pages 106–7.)

2. What do you think the position would have been if at the time of using the smoke ball Mrs Carlill's only reason for doing so was to avoid catching influenza?

3. Did the smoke ball have to be purchased by Mrs Carlill?

4. What would the legal position be if, when Mrs Carlill had been using the smoke ball for one week, the Company had issued another advertisement withdrawing their offer but, as Mrs Carlill did not see this, she had carried on using the smoke ball for the full two weeks and caught influenza?

Notes

1. For further discussion of the background to the decision in *Carlill*, see A. W. B. Simpson, 'Quackery and Contract Law: The Case of the Carbolic Smoke Ball' (1985) 14 JLS 345.

2. In *Bowerman* v *Association of British Travel Agents Ltd* [1996] CLC 451, page 171, the majority of the Court of Appeal held, relying on *Carlill* v *Carbolic Smoke Ball Co.*, that a notice would reasonably have been read by the public as an offer by ABTA to give protection to the customer if the ABTA member failed financially. This unilateral offer was accepted by the customer when he booked a holiday with the ABTA member.

3. It is increasingly common for the courts to 'imply' unilateral contracts. This case law is discussed at pages 31–6.

EXERCISES

1. *Howard Marine and Dredging Co. Ltd* v *A. Ogden & Sons (Excavations) Ltd* [1978] QB 574 (CA) (for facts see page 503). The catchwords and headnote facts are far more detailed than in *Carlill* v *Carbolic Smoke Ball Company*, and the headnote decision is divided into four distinct issues:

Held, (1) that the contractors could not establish any claim in contract for there was nothing in the pre-contract negotiations which could amount to a collateral warranty.

(2) (*Per* Bridge and Shaw LJJ) That the plaintiff owners were liable in tort for damages under section 2(1) of the Misrepresentation Act 1967, for the misrepresentation by their marine manager at the pre-contract meeting on July 11, 1974, as to the deadweight capacity of the barges was a most material matter on which the contractors had relied in concluding the contract, and was one in respect of which the representor would have been liable had it been made fraudulently; that to avoid liability under the statutory terms the owners had to prove that their marine manager had had reasonable ground to believe and did believe up to the time the contract was made that the facts

he represented were true; that on an analysis of the evidence that burden had not been discharged for the marine manager had not shown any objectively reasonable ground for disregarding the figure of deadweight capacity in the ship's documents and for preferring the Lloyd's Register incorrect figure; and accordingly the contractors' appeal should be allowed.

Per Bridge LJ. In the course of negotiations leading to a contract the Act of 1967 imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe (post, p. 596F).

(3) (*Per* Bridge and Shaw LJJ) That the owners could not escape liability by reliance on the exception clause, for, as the judge had held, it was a provision in an agreement which would exclude or restrict any liability to which a party to a contract might be subject by reason of any misrepresentation made by him within section 3 of the Act of 1967, and should therefore be of no effect unless the court in its discretion allowed reliance on it as being 'fair and reasonable in the circumstances of the case'; and accordingly, as it was not 'fair and reasonable' to allow the owners to rely on it, the owners' cross appeal should be dismissed.

Per Shaw LJ. The contractors also have a cause of action in negligence at common law, for in a business transaction whose nature made clear the importance and influence of the answer to the question as to the vessel's carrying capacity, the owners were under a duty of care in giving information on matters peculiarly within their knowledge (post, pp. 600F–601D).

Per Lord Denning MR. The trial judge's decision that the misrepresentation at the July 11 meeting was not negligent showed that he was satisfied that the representor had discharged the burden of proof imposed by section 2(1) and there was no reason for disturbing that decision (post, p. 593C–G). Nor was there any reason why the court should not allow the owners to rely on the exception clause as 'fair and reasonable' under section 3 of the Act of 1967, since the parties to the contract were of equal bargaining power and the contractors could easily have obtained advice that the barges were not fit for the use for which they were intended before concluding the contract (post, p. 594B–F). Further, there was no special relationship between the parties which gave rise to the duty of care at common law; the only duty of the owners' marine manager was to be honest when asked about the dead-weight capacity; he had answered as best he could from memory and the contractors should not have acted on his oral answers without further inquiry (post, pp. 591H–592C).

Decision of Bristow J reversed in part.

The first part of the Court of Appeal's judgment relates to the contention that the pre-contractual statement was a collateral warranty so that its inaccuracy was a breach of contract. All of the members of the Court of Appeal rejected this but we do not know the reasons without looking at the judgments.

Secondly, the majority (Bridge and Shaw LJJ) held that the plaintiffs were liable in damages under s. 2(1) of the Misrepresentation Act 1967, and this time full reasons are given. The plaintiffs have failed to show that they had reasonable grounds to believe, and did believe up to the time the contract was made, that the facts represented were true. They had failed to show any 'objectively reasonable ground' for their actions. We are informed of a statement by Bridge LJ which goes further and imposes an absolute obligation not to state facts which you cannot prove you had reasonable grounds to believe.

Lord Denning MR (dissenting) considered that this burden had been discharged.

You will notice that the headnote contains references to pages and letters in the judgment. These can be very useful indeed in directing the reader to those parts of the judgments dealing with the major points of the decision.

Question

There were two other arguments addressed by the Court of Appeal, namely the claim in tort based on breach of a duty of care and the question of whether the exemption clause applied to allow the owners to escape liability. What did the majority of the Court of Appeal decide on these issues and what did Lord Denning decide?

Note

If you examine Lord Denning's judgments in this case you will discover that having explained the facts in a very clear and readable way he then deals with each of the issues under an appropriate heading. At pp. 590–95 of the report he examines first the collateral warranty argument, then the claim based on the tort of negligent misstatement and the claim under the Misrepresentation Act 1967, before discussing the exemption clause.

Look for these same issues in the judgments of Bridge LJ and Shaw LJ.

2. *New Zealand Shipping Co. Ltd* v *A. M. Satterthwaite & Co. Ltd, The Eurymedon* [1975] AC 154 (PC). This is another case which is examined only briefly here since a full discussion appears later (see page 120).

Our guiding principle is privity of contract (see chapter 6, pages 182–233). The issues which concern us are whether the stevedore can rely on a provision in a contract between the shipper and carrier, and whether the stevedore's act of unloading is a good consideration for the exemption.

Held, allowing the appeal (Viscount Dilhorne and Lord Simon of Glaisdale dissenting), (1) that the shipper agreed to exempt the carrier, his servants and independent contractors from liability in respect of the performance of the contract of carriage and the exemption was designed to cover the whole carriage from loading to discharge by whomsoever it was performed (post, p. 167F–H).

(2) That the bill of lading brought into existence a bargain, initially unilateral but capable of becoming mutual, between the shipper and the stevedore, made through the carrier as agent, which became a full contract when the stevedore performed services by unloading the goods; and the performance of those services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions in the bill of lading (post, pp. 167H–168B).

Dictum of Lord Reid in *Midland Silicones Ltd* v *Scruttons Ltd* [1962] AC 446, 474, HL(E) and *Carlill* v *Carbolic Smoke Ball Co.* [1893] 1 QB 256, CA applied.

Carle & Montanari Inc. v *American Export Isbrandtsen Lines Inc.* [1968] 1 Lloyd's Rep 260 considered.

Judgment of the Court of Appeal of New Zealand [1973] 1 NZLR 174 reversed.

Notice that this is a 3:2 decision and that the most important majority judgment, to which the page references refer us, is that of Lord Wilberforce. Clearly his judgment must be read, and so must the dissenting judgments.

We are referred to p. 167 of Lord Wilberforce's judgment, but will get a better picture of his reasoning if we read back a few pages and on to the end of the judgment.

(For extracts from this judgment, see pages 121 and 186.)

2 AGREEMENT

A contract is an agreement which is legally enforceable. This chapter deals with how we determine the existence of the agreement.

SECTION 1: SUBJECTIVITY VERSUS OBJECTIVITY

A: OBJECTIVITY PREVAILS

Smith* v *Hughes
(1871) LR 6 QB 597

BLACKBURN J: . . . If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms. . . .

Centrovincial Estates plc* v *Merchant Investors Assurance Company Ltd
[1983] Com LR 158 (CA)

Offices were let to the defendants at a yearly rent of £68,320 subject to review from 25 December 1982. The rent review clause provided that the rent reserved should on that date be increased to the then current market rental value, such value to be agreed by the parties or in default of agreement to be assessed by an independent surveyor or valuer. There was a proviso that in no circumstances should the rent be reduced below that which was payable immediately before the review.

On 22 June 1982 solicitors wrote to the defendants, inviting them to agree the figure of £65,000 per annum as the current market rental value. On 23 June, the defendants replied agreeing that figure. On receiving that reply, the solicitors telephoned to say that the letter of 22 June had

contained an error and that the plaintiffs had intended to propose £126,000. A further letter invited the defendants to treat the letter of 22 June as though it had contained the figure of £126,000, but the defendants refused to accept this and said that they wished to hold the plaintiffs to the binding agreement constituted by the letters of 22 and 23 June.

The plaintiffs commenced proceedings for, *inter alia*, a declaration that no legally binding agreement had been made. The Court of Appeal refused to grant such a declaration. Held: there was agreement at a figure of £65,000.

SLADE LJ: . . . In the absence of any proof, as yet, that the defendants either knew or ought reasonably to have known of the plaintiffs' error at the time when they purported to accept the plaintiffs' offer, why should the plaintiffs now be allowed to resile from that offer? It is a well-established principle of the English law of contract that an offer falls to be interpreted not subjectively by reference to what has actually passed through the mind of the offeror, but objectively, by reference to the interpretation which a reasonable man in the shoes of the offeree would place on the offer. It is an equally well-established principle that ordinarily an offer, when unequivocably accepted according to its precise terms, will give rise to a legally binding agreement as soon as acceptance is communicated to the offeror in the manner contemplated by the offer, and cannot thereafter be revoked without the consent of the other party.

Paal Wilson & Co. A/S* v *Partenreederei Hannah Blumenthal, The Hannah Blumenthal
[1983] 1 All ER 34 (HL)

Arbitration proceedings to settle a dispute were commenced by the buyer in 1972 but nothing happened apart from an intermittent exchange of letters between the parties from 1974 until 1980. The sellers argued that the delay amounted to an agreement to abandon the arbitration clause. Held: there was no evidence of abandonment.

LORD BRIGHTMAN: . . . To entitle the sellers to rely on abandonment, they must show that the buyers so conducted themselves as to entitle the sellers to assume, *and that the sellers did assume*, that the contract was agreed to be abandoned sub silentio. The evidence which is relevant to that inquiry will consist of or include: (1) what the buyers did or omitted to do *to the knowledge of the sellers*. Excluded from consideration will be the acts of the buyers of which the sellers were ignorant, because those acts will have signalled nothing to the sellers and cannot have founded or fortified any assumption on the part of the sellers; (2) what the sellers did or omitted to do, *whether or not to the knowledge of the buyers*. These facts evidence the state of mind of the sellers, and therefore the validity of the assertion by the sellers that they assumed that the contract was agreed to be abandoned. The state of mind of the buyers is irrelevant to a consideration of what the sellers were entitled to assume. The state of mind of the sellers is vital to what the sellers in fact assumed.

Note

This formula includes a subjective element, in that it is necessary to consider what it was reasonable for the offeree to believe with regard to the offer and then to examine what the offeree actually did believe.

Robert Goff LJ in *Allied Marine Transport Ltd* v *Vale do Rio doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, commented on *The Hannah Blumenthal* as follows:

> In his speech Lord Brightman was, as we understand it, asserting that if one party (O) so acts that his conduct, objectively considered, constitutes an offer, and the other party (A), believing that the conduct of O represents his actual intention, accepts O's offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A's acceptance, so that O's state of mind is, in such circumstances, irrelevant. With that proposition we very respectfully agree. . . .

The offeree must believe that the offer represents the actual intentions of the offeror.

B: SUBJECTIVITY HAS SOME RELEVANCE

If the offeree *knows or ought reasonably to have known* at the time of the purported acceptance that the offeror had made a mistake relating to the terms of the offer, the offeree cannot purport to accept that offer.

Hartog* v *Colin & Shields
[1939] 3 All ER 566

> The defendants contracted to sell 30,000 Argentine hare skins to the plaintiff, but by mistake they were offered at a price per pound instead of per piece. In the pre-sale negotiations reference had always been made to the price per piece and never to the price per pound, and there was expert evidence that Argentine hare skins were generally sold at prices per piece. Held: since the plaintiff could not reasonably have supposed that the offer contained the offerors' real intention, there was no binding contract.

Questions

1. What should the position be if the offeree has simply not addressed his mind to the question of whether the offeror in fact has this intention? (See Treitel, *The Law of Contract*, 9th edn, 1995, p. 9.)

2. Should the defendants in *Centrovincial Estates plc* v *Merchant Investors Assurance Company Ltd*, have known of the plaintiffs' mistake given the terms of the rent review clause?

SECTION 2: THE CRITERIA TO DETERMINE AGREEMENT

Traditionally the courts have required that agreement be demonstrated by an offer made by one party and by complete acceptance of that offer by the other party. However, Lord Denning, in particular, took the view that the circumstances as a whole should be examined in an attempt to discover whether the parties considered that there was agreement (*Butler Machine Tool Co. Ltd* v *Ex-Cell-O Corporation (England) Ltd* [1979] 1 All ER 965, page 37).

The majority of the Court of Appeal in the following case (Lord Denning and Ormrod LJ, Geoffrey Lane LJ dissenting) also adopted this new approach.

Gibson v *Manchester City Council*
[1978] 2 All ER 583 (CA)

The facts of this case appear at page 23.

LORD DENNING MR: To my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance. I know in some of the textbooks it has been the custom to do so; but, as I understand the law, there is no need to look for a strict offer and acceptance. You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material. If by their correspondence and their conduct you can see an agreement on all material terms, which was intended thenceforward to be binding, then there is a binding contract in law even though all the formalities have not been gone through. For that proposition I would refer to *Brogden* v *Metropolitan Railway Co* (1877) 2 App Cas 666.

It seems to me that on the correspondence I have read (and, I may add, on what happened after) the parties had come to an agreement in the matter which they intended to be binding. . . .

Note

Although this approach was rejected by the House of Lords, Lord Diplock stated [1979] 1 All ER 972, at page 974:

My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract 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 is not one of these. I can see no reason in the instance case for departing from the conventional approach of looking at the handful of documents relied on as constituting the contract sued on and seeing whether on their true construction there is to be found in them a contractual offer by the council to sell the house to Mr Gibson and an acceptance of that offer by Mr Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error.

Adams and Brownsword, *Understanding Contract Law*, 2nd edn, (1994) p. 62, conclude that 'in *Gibson* the consumer-welfarists were outvoted by formalists and market-individualists who refused to derogate from the general rule'. For an explanation of this terminology, see Adams and Brownsword, pp. 43–52.

In *New Zealand Shipping Co. Ltd* v *A. M. Satterthwaite & Co. Ltd, The Eurymedon* [1975] AC 154 (PC), Lord Wilberforce expressed some dissatisfaction with the traditional approach when he stated:

. . . English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

It appears that a contract may be found to exist, despite the fact that it cannot be analysed precisely into an offer and corresponding acceptance, where the terms have been fully agreed and executed by the parties.

Trentham Ltd v *Archital Luxfer*
[1993] 1 Lloyd's Rep 25 (CA)

Trentham were main contractors who were employed to design and build industrial units. This work included 'window works', i.e. the supply and installation of aluminium windows and doors. The defendants, Archital, were manufacturers, suppliers and installers of these products, and had actually carried out this work for Trentham and been paid. Trentham alleged that the defendants' work was defective and that they were therefore in breach of binding subcontracts between them. The defendants denied that any binding subcontracts had ever come into existence. Held: binding subcontracts had been concluded for the window works.

STEYN LJ: Before I turn to the facts it is important to consider briefly the approach to be adopted to the issue of contract formation in this case. It seems to me that four matters are of importance. The first is the fact that English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. And in the present case that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden* v *Metropolitan Railway,* (1877) 2 AC 666; *New Zealand Shipping Co. Ltd* v *A.M. Satterthwaite & Co. Ltd* [1974] 1 Lloyd's Rep 534 at p. 539, col. 1; [1975] AC 154 at p. 167 D-E; *Gibson* v *Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd* v *Novimex* [1949] 1 KB 628, at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it 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. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd* v *Atomic Power Construction Ltd* [1963] 1 WLR 333. . . . The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham's side created a right to performance of the work by Archital, and on Archital's side it created a right to be paid on an agreed basis. What the parties did

in respect of phase 1 is only explicable on the basis of what they had agreed in respect of phase 1. The Judge analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance. And it does not matter that a contract came into existence after part of the work had been carried out and paid for. The conclusion must be that when the contract came into existence it impliedly governed pre-contractual performance . . .

Notes

1. The significant factor in the decision was the fact that the arrangement was executed by the parties. Steyn LJ (with whose judgment Ralph Gibson and Neill LJJ agreed) accepted the decision of the judge at first instance which was based on offer and acceptance, but was also prepared to conclude that a contract can come into existence as a result of performance of an executed contract by relying on the decision in *Brogden* v *Metropolitan Railway Co.* (1877) 2 App Cas 666.

2. Compare this decision with the decision in *British Steel Corporation* v *Cleveland Bridge & Engineering Co. Ltd* [1984] 1 All ER 504, page 76, where despite the fact of performance, it was concluded that there was no binding contract. Can the distinction in result be explained on the basis of the different remedies being sought and the certainty or uncertainty of terms?

SECTION 3: OFFER DISTINGUISHED FROM INVITATION TO TREAT

If the statement maker clearly intends to be bound by acceptance of the stated terms the statement will amount to an offer, and on acceptance there will be a binding contract. However, if there is no such intention the statement will be part of the negotiating process (an invitation to treat) and any response to it will constitute an offer.

Much depends upon whether the language used indicates 'a definite promise to be bound'.

Gibson v *Manchester City Council*
[1979] 1 All ER 972 (HL)

The City Council adopted a policy of selling council houses to tenants. The respondent tenant applied on a printed form for details of the price and mortgage terms. The city treasurer wrote to the respondent that the Council 'may be prepared to sell the house to you at the purchase price of £2,725 less 20% = £2,180'. The letter gave details of the mortgage likely to be made available and stated 'If you would like to make a formal application to buy ... please complete the enclosed application form and return it to me as soon as possible.' The respondent completed the application form and returned it on 5 March. He wrote again on 18 March,

requesting the Council to carry on with the purchase in accordance with his application. Before contracts were prepared and exchanged political control of the Council changed and the Council decided to proceed with sales only where contracts had already been exchanged. The respondent claimed specific performance of the contract, claiming that the offer in the city treasurer's letter had been accepted by him in his letters of 5 and 18 March. Held: there was no binding contract because no offer capable of acceptance had been made by the Council. The statements in the city treasurer's letter that the Council '*may be prepared to sell*' and inviting Mr Gibson '*to make a formal application to buy*' were not an offer to sell but merely an invitation to treat.

LORD DIPLOCK: My Lords, the words I have italicised [see facts, above] seem to me, as they seemed to Geoffrey Lane LJ, to make it quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr Gibson's written acceptance of it. The words 'may be prepared to sell' are fatal to this; so is the invitation, not, be it noted, to accept the offer, but 'to make formal application to buy' on the enclosed application form. It is, to quote Geoffrey Lane LJ, a letter setting out the financial terms on which it may be the council would be prepared to consider a sale and purchase in due course.

Storer v *Manchester City Council*
[1974] 3 All ER 824 (CA)

The Council decided to sell council houses to tenants and instructed the town clerk to devise a simple form for quick agreements which dispensed with legal formalities. The plaintiff applied to buy his council house, and on 9 March 1971 the town clerk wrote to him 'I understand you wish to purchase your council house and enclose the Agreement for Sale. If you will sign the Agreement and return it to me I will send you the Agreement signed on behalf of the [Council] in exchange'. The enclosed 'Agreement for Sale' had been filled in with details which included the purchase price, the amount of the mortgage and the monthly repayments, although the date when the tenancy was to cease and the mortgage repayments begin had been left blank. On 20 March, the plaintiff signed and returned this Agreement for Sale, but before the town clerk had signed the Agreement on the Council's behalf the Council changed political control and discontinued such sales unless contracts had already been exchanged. The plaintiff sought specific performance alleging a binding contract. Held: a binding contract had been concluded. The Council's intention was to become contractually bound when the plaintiff had signed the Agreement and returned it.

LORD DENNING: [Mr Storer] had done everything which he had to do to bind himself to the purchase of the property. The only thing left blank was the date when the tenancy was to cease.

. . . The corporation put forward to the tenant a simple form of agreement. The very object was to dispense with legal formalities. One of the formalities — exchange

of contracts — was quite unnecessary. The contract was concluded by offer and acceptance. The offer was contained in the letter of 9th March in which the town clerk said:

> I . . . enclose the Agreement for Sale. If you will sign the Agreement and return it to me I will send the Agreement signed on behalf of the Corporation in exchange.

The acceptance was made when the tenant did sign it, as he did, and return it, as he did on 20th March. It was then that a contract was concluded. The town clerk was then bound to send back the agreement signed on behalf of the corporation. The agreement was concluded on Mr Storer's acceptance. It was not dependent on the subsequent exchange.

I appreciate that there was one space in the form which was left blank. It was cl 7 for 'Date when your tenancy ceases'. That blank did not mean there was no concluded contract. It was left blank simply for administrative convenience. . . .

The final point was this. Counsel for the corporation said that the town clerk did not intend to be bound by the letter of 9th March 1971. He intended that the corporation should not be bound except on exchange. There is nothing in this point. In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract', if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.

Questions

1. Lord Denning stated that Mr Storer 'had done everything which he had to do to bind himself to the purchase of the property'. Could the same be said of Mr Gibson?
2. If difference in language has such an impact, how would you advise negotiators for the sale of land to conduct their negotiations?

Note

In *Gibson* v *Manchester CC*, there was no firm offer of a mortgage by the Council, and it is unlikely that Mr Gibson would have intended to bind himself in the absence of a firm commitment on this matter.

A statement as to price in respect of a sale of land may merely indicate a starting point for negotiations and will not therefore be an offer. In *Harvey* v *Facey* [1893] AC 552 (PC), the correspondence ran thus:

> . . . [T]he appellants telegraphed, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price,' and the respondent telegraphed in reply, 'Lowest price for Bumper Hall Pen £900,' and then the appellants telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title-deed in order that we may get early possession,' but received no reply. . .

The Privy Council held that there was no contract. The defendants' reply was not an offer, only an indication of the minimum price if they decided to sell.

The plaintiffs' final telegram amounted to an offer to buy at £900 but this was not accepted by the defendants.

Clifton* v *Palumbo
[1944] 2 All ER 497 (CA)

The defendant was negotiating to purchase the plaintiff's large estate which was subject to a number of encumbrances. The plaintiff wrote, without legal assistance, 'I am prepared to offer you my estate for £600,000 . . . I also agree that a reasonable and sufficient time shall be granted to you for examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.' The plaintiff later informed the defendant that the price was too low and postponed a meeting 'until the pending negotiations for the sale and purchase may have more nearly reached definite agreement'. The defendant later sought to accept the 'offer of £600,000'. Held: this was merely a preliminary statement as to price so that negotiations could begin. The defendant's purported acceptance amounted to an offer to buy at that price.

Note
The Court of Appeal stressed the fact that the language used indicated that there were details needing to be finalised before agreement. In addition, this was a complex estate and the parties would be unlikely to bind themselves to an agreement in such vague terms.

Compare with the language used in the following case:

Bigg* v *Boyd Gibbins Ltd
[1971] 2 All ER 183 (CA)

The plaintiffs and defendants were negotiating for the sale of a property. The plaintiffs wrote to the defendants: 'For a quick sale I would accept £26,000'. The defendants replied 'I accept your offer'. The plaintiffs subsequently wrote 'I am putting the matter in the hands of my solicitors . . . My wife and I are both pleased that you are purchasing the property'. The plaintiffs alleged that the letters constituted an agreement for the sale of the property.

RUSSELL LJ: It seems to me that in fact — and I am not dissuaded by the Privy Council case of *Harvey* v *Facey* which had a particularity which I need not bother with — the defendants were correct in treating the first letter of 22nd December 1969, as an offer to sell the property at £26,000 when they write 'I accept your offer'. Further than that, it seems to me that the last letter of 13th January is a recognition, an affirmation indeed, that the parties have come to agreement on the sale of the property. 'I thank you for your letter . . . accepting my' offer to sell Shortgrove Hall at the 'price of £26,000'. Then again the phrase 'My wife and I are both pleased that you are purchasing' suggests to my mind that the plaintiffs regarded that which had passed up to then as having put the defendants in the position of purchasers. I cannot

escape the view, having read the letters, that the parties would regard themselves at the end of the correspondence, and would regard themselves quite correctly, as having struck a bargain for the sale and purchase of this property.

We were warned at an early stage in the argument, quite rightly, that agreement on price does not necessarily mean agreement for sale and purchase, and we were referred to the warning phrases used by Lord Greene MR in *Clifton* v *Palumbo*, where it was stated that 'offer' does not always mean offer in the sense of an offer for actual sale, but might be related to a negotiation continuing, but with agreement on one term or one element of the contract which would or might subsequently be concluded. But bearing in mind those warnings, I am bound to say for myself the impression conveyed to my mind by these letters, and indeed the plain impression, is that the language used was intended to and did achieve the formation of an open contract.

A: ADVERTISEMENTS

Generally advertisements are invitations to treat.

Partridge v *Crittenden*
[1968] 2 All ER 421 (QB)

The plaintiff had inserted an advertisement in a periodical which read 'Bramblefinch cocks, Bramblefinch hens, 25s each'. The plaintiff was charged with unlawfully offering for sale a wild live bird contrary to s. 6(1) and sch. 4 of the Protection of Birds Act 1954. Held: the advertisement was an invitation to treat, not an offer for sale and therefore the plaintiff could not be guilty of the offence charged.

Question
It is argued that if an advertisement were an offer, then the trader would have to supply the quantity ordered when the stock available to do so was limited. In *Grainger & Son* v *Gough* [1896] AC 325 Lord Herschell said (at p. 334):

The transmission of such a price-list does not amount to an offer to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.

What would the position be if the advertisement specifically stated:

(a) that supplies were unlimited; and
(b) that supplies were limited, e.g., goods in a sale?

Notes
1. A unilateral advertisement is an offer (see *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256, page 3).

If a shop advertises 'Sale — 15 video recorders at the knock down price of £60 each. First come first served', the wording may convert this

advertisement into a unilateral offer requiring the performance of an act, namely being the first person at the sale to offer to purchase a video recorder at the knock down price. There is American authority that this type of advertisement amounts to an offer (*Lefkowitz* v *Great Minneapolis Surplus Store* 86 NW 2d 689 (1957)). What would the practical consequences be if such an advertisement was considered to be an invitation to treat rather than an offer?

2. A notice which detailed the ABTA scheme of protection was held by a majority of the Court of Appeal in *Bowerman* v *ABTA Ltd* [1996] CLC 451, discussed at page 171, to be a unilateral offer which customers accepted by booking a holiday with an ABTA member. The result was a unilateral contract between the customer and ABTA.

B: DISPLAY OF GOODS

Fisher v *Bell*
[1961] 1 QB 394 (QB)

A shopkeeper displayed a flick knife in his shop window with a ticket behind it stating 'Ejector knife — 4s'. He was charged with offering the knife for sale contrary to s. 1(1) of the Restriction of Offensive Weapons Act 1959. Held: a display of goods in a shop window with a price ticket attached was merely an invitation to treat and not an offer for sale so that no offence had been committed.

Pharmaceutical Society of Great Britain v *Boots Cash Chemists (Southern) Ltd*

Boots were charged with an offence under the Pharmacy and Poisons Act 1933, s. 18, which required that sales of poisons in Part I of the Poisons List take place under the supervision of a registered pharmacist. Boots operated a self-service system, and a pharmacist at the cash desk was authorised to prevent the removal of any drug from the premises. The factor determining whether an offence had been committed was the point at which the sale in this self-service shop took place. The Court of Appeal agreed with Lord Goddard CJ. Held: Boots had not committed the offence. The display of goods on a supermarket's shelves was merely an invitation to customers to make offers to buy.

Court of Queen's Bench
[1952] 2 QB 795

LORD GODDARD CJ: . . . I think that it is a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell. I do not think I ought to hold that that principle is completely reversed merely because there is a self-service scheme, such as this, in operation. In my opinion it comes to no more than that the customer is informed that he may himself pick up an article and bring it to the shopkeeper with

a view to buying it, and if, but only if, the shopkeeper then expresses his willingness to sell, the contract for sale is completed. In fact, the offer is an offer to buy, and there is no offer to sell; the customer brings the goods to the shopkeeper to see whether he will sell or not. In 99 cases out of a 100 he will sell and, if so, he accepts the customer's offer, but he need not do so. The very fact that the supervising pharmacist is at the place where the money has to be paid is an indication to the purchaser that the shopkeeper may not be willing to complete a contract with anybody who may bring the goods to him.

Ordinary principles of common sense and of commerce must be applied in this matter, and to hold that in the case of self-service shops the exposure of an article is an offer to sell, and that a person can accept the offer by picking up the article, would be contrary to those principles and might entail serious results. On the customer picking up the article the property would forthwith pass to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable. On the other hand, if a customer had picked up an article, he would never be able to change his mind and to put it back; the shopkeeper could say, 'Oh no, the property has passed and you must pay the price.'

It seems to me, therefore, that the transaction is in no way different from the normal transaction in a shop in which there is no self-service scheme. I am quite satisfied it would be wrong to say that the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that that person can insist on buying any article by saying 'I accept your offer.' I agree with the illustration put forward during the case of a person who might go into a shop where books are displayed. In most book-shops customers are invited to go in and pick up books and look at them even if they do not actually buy them. There is no contract by the shopkeeper to sell until the customer has taken the book to the shopkeeper or his assistant and said 'I want to buy this book' and the shopkeeper says 'Yes.' That would not prevent the shopkeeper, seeing the book picked up, saying: 'I am sorry I cannot let you have that book; it is the only copy I have got and I have already promised it to another customer.' Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price. The offer, the acceptance of the price, and therefore the sale, take place under the supervision of the pharmacist.

Court of Appeal
[1953] 1 QB 401

SOMERVELL LJ: I agree with the Lord Chief Justice in everything that he said, but I will put the matter shortly in my own words. Whether the view contended for by the plaintiffs is a right view depends on what are the legal implications of this layout — the invitation to the customer. Is a contract to be regarded as being completed when the article is put into the receptacle, or is this to be regarded as a more organized way of doing what is done already in many types of shops — and a bookseller is perhaps the best example — namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having got the ones which they wish to buy, to come up to the assistant saying 'I want this'? The assistant in 999 times out of 1,000 says 'That is all right,' and the money passes and the transaction is completed. I agree with what the Lord Chief Justice has said, and with the reasons

which he has given for his conclusion, that in the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed. I can see no reason at all, that being clearly the normal position, for drawing any different implication as a result of this layout.

The Lord Chief Justice, I think, expressed one of the most formidable difficulties in the way of the plaintiffs' contention when he pointed out that, if the plaintiffs are right, once an article has been placed in the receptacle the customer himself is bound and would have no right, without paying for the first article, to substitute an article which he saw later of a similar kind and which he perhaps preferred. I can see no reason for implying from this self-service arrangement any implication other than that which the Lord Chief Justice found in it, namely, that it is a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen. On that conclusion the case fails, because it is admitted that there was supervision in the sense required by the Act and at the appropriate moment of time.

Notes

1. Lord Goddard and the Court of Appeal assumed that if they held that the display was an offer, the acceptance would be the customer's act of placing the goods selected in the wire basket. Might the acceptance be the customer's act of handing the goods to the cashier? (See Jackson (1979) 129 NLJ 775 and the American case of *Lasky* v *Economy Grocery Stores* (1946) 163 ALR 235, where it was held that the display was an offer but that acceptance did not take place until the goods were handed to the cashier.

2. Both Lord Goddard and the Court of Appeal considered that the offer must come from the customer and acceptance must be by or on behalf of the shopkeeper, but what did they say would constitute the offer and what act would be the acceptance? Montrose (1955) 4 Am J Comp Law 285, argues that the offer occurs when the customer hands the goods to the cashier, as opposed to when they are placed in the wire basket, because until that point the customer has not evinced a definite intention to be bound.

3. Misleading pricing constitutes a criminal offence (Consumer Protection Act 1987, ss. 20–26).

Questions

1. What is the position if there is a non-self-service counter inside a supermarket? For example, I request that a joint of beef be cut to my specifications but before I reach the cash desk I change my mind. Has a contract of sale already been concluded?

2. In *Chapelton* v *Barry Urban District Council* [1940] 1 KB 532 (page 251), the Court of Appeal held that a pile of deck chairs accompanied by a notice indicating the hire charge and stating that tickets should be obtained from the attendants, amounted to an offer.

If automatic machines represent standing offers (*Thornton* v *Shoe Lane Parking Ltd* [1971] 2 QB 163, see page 253), why are goods on supermarket shelves not classified as a standing offer? (See Unger (1953) 16 MLR 369.)

C: TENDERS

A request for tenders is an invitation to treat and each tender is an offer. The requestor is free to accept or reject any tender, even if it is the highest bid.

Spencer v *Harding*
(1870) LR 5 CP 561 (CP)

WILLES J: . . . The action is brought against persons who issued a circular offering a stock for sale by tender, to be sold at a discount in one lot. The plaintiffs sent in a tender which turned out to be the highest, but which was not accepted. They now insist that the circular amounts to a contract or promise to sell the goods to the highest bidder, that is, in this case, to the person who should tender for them at the smallest rate of discount; and reliance is placed on the cases as to rewards offered for the discovery of an offender. In those cases, however there never was any doubt that the advertisement amounted to a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that, of course, was soon overruled. It was an offer to become liable to any person who before the offer should be retracted should happen to be the person to fulfil the contract of which the advertisement was an offer or tender. That is not the sort of difficulty which presents itself here. If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied, and there would have been a good contract in respect of the persons. But the question is, whether there is here any offer to enter into a contract at all, or whether the circular amounts to anything more than a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them. In advertisements for tenders for buildings it is not usual to say that the contract will be given to the lowest bidder, and it is not always that the contract is made with the lowest bidder. Here there is a total absence of any words to intimate that the highest bidder is to be the purchaser. It is a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt.

Blackpool & Fylde Aero Club Ltd v *Blackpool Borough Council*
[1990] 3 All ER 25 (CA)

The plaintiff club and six other parties were invited by the Council to tender for a concession to operate pleasure flights from the airport. Tenders were to be submitted in the envelope provided and would not be considered if they were received after 12 noon on 17 March 1983. The club's tender was put in the Town Hall letter box at 11 a.m. on 17 March but the letter box was not cleared, as it should have been, at 12 noon. The club's tender was not considered on the basis that it was received too late. On discovering what had happened, the Council decided to carry out the tendering exercise again. However, when the successful tenderer threatened to sue, the Council retracted. The club sought damages for breach of warranty, arguing that the Council had warranted that if the tender was received by the deadline it would be considered. Held: an invitation to tender could give rise to a binding contractual obligation to

consider tenders conforming to the conditions of tender in these circumstances, namely:

(a) The tenders had been solicited by the Council from specified parties who were known to the Council.

(b) There were absolute conditions governing submission including an absolute deadline.

BINGHAM LJ: . . . During the hearing the following questions were raised: what if, in a situation such as the present, the council had opened and thereupon accepted the first tender received, even though the deadline had not expired and other invitees had not yet responded? or if the council had considered and accepted a tender admittedly received well after the deadline? Counsel answered that although by so acting the council might breach its own standing orders, and might fairly be accused of discreditable conduct, it would not be in breach of any legal obligation because at that stage there would be none to breach. This is a conclusion I cannot accept, and if it were accepted there would in my view be an unacceptable discrepancy between the law of contract and the confident assumptions of commercal parties, both tenderers (as reflected in the evidence of Mr Bateson) and invitors (as reflected in the immediate reaction of the council when the mishap came to light).

A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest (or, as the case may be, lowest). But where as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure (draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question and an absolute deadline) the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that. . . .

I readily accept that contracts are not to be lightly implied. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. . . . counsel for the club was in my view right to contend for no more than a contractual duty to consider. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance.

Question
If the remedy available for breach of warranty is to be damages, how might those damages be measured?

Notes
1. Bingham LJ refers to this decision as avoiding 'an unacceptable discrepancy between the law of contract and the confident assumptions of commercial parties', i.e., the club would not have bothered to tender unless its tender was to be considered, and the Council had declared the tendering process invalid until the successful tenderer had threatened legal action.
2. This decision can be analysed as an example of an implied unilateral contract, i.e., an offer to consider conforming tenders which is accepted by submitting a conforming tender.
3. For further discussion of this case see Adams and Brownsword (1991) 54 MLR 281, McKendrick (1991) LMCLQ 31 and Phang (1991) 4 JCL 46.
4. In *Fairclough Building Ltd* v *Port Talbot Borough Council* (1993) 62 Build LR 82, 33 Con LR 24, the Court of Appeal also recognised the existence of a contractual obligation to consider tenders from contractors on a Council short-list, 'unless there were reasonable grounds for not doing so'. On the facts in *Fairclough*, the Council did have reasonable grounds for removing the plaintiffs from the short-list so that there was no breach of contract and *Blackpool* was therefore distinguished.
The Court of Appeal in *Fairclough* also suggested that had there been a breach, damages would be based on the loss of a chance to be considered.

What if the invitation to tender expressly contains an undertaking to accept the highest (or lowest) bid?

Harvela Investments Ltd v ***Royal Trust Co. of Canada (CI) Ltd*** [1984] 2 All ER 65; [1985] 1 All ER 261 (CA); [1985] 2 All ER 966 (HL)

The plaintiff and the second defendant (Sir Leonard) were rival offerors for a parcel of shares belonging to the first defendants (Royal Trust). The first defendants invited both parties to submit a sealed offer or confidential telex by a stipulated date. They stated in the invitation to tender that they bound themselves to accept the highest offer they received which complied with the terms of the invitation. The plaintiff tendered a bid of $2,175,000, and the second defendant's bid was $2,100,000 or $101,000 in excess of any other offer. The first defendants accepted the second defendant's bid as being $2,276,000 and entered into a sale contract. The plaintiff brought proceedings contending that the second defendant's bid was invalid. At first instance Peter Gibson J held that the invitation to bid constituted an offer to be bound by the highest bid. This offer was unilateral in that it requested the performance of an act, submitting the highest bid, and performance of this act constituted the acceptance of that offer. The plaintiff's bid was the only valid bid so that there was a contract with

the plaintiff. The Court of Appeal agreed but refused to imply a term excluding referential bids. Held: (in the House of Lords) referential bids were invalid, so that the only valid bid was the plaintiff's and the first defendants were bound to accept it. Lord Diplock confirmed the analysis of Peter Gibson J on the effect of the invitation to tender.

LORD DIPLOCK: The construction question turns on the wording of the telex of 15 September 1981 referred to by Lord Templeman as 'the invitation' and addressed to both Harvela and Sir Leonard. It was not a mere invitation to negotiate for the sale of the shares in Harvey & Co Ltd, of which the vendors were the registered owners in the capacity of trustees. Its legal nature was that of a unilateral or 'if' contract, or rather of two unilateral contracts in identical terms to one of which the vendors and Harvela were the parties as promisor and promisee respectively, while to the other the vendors were promisor and Sir Leonard was promisee. Such unilateral contracts were made at the time when the invitation was received by the promisee to whom it was addressed by the vendors; under neither of them did the promisee, Harvela and Sir Leonard respectively, assume any legal obligation to anyone to do or refrain from doing anything.

The vendors, on the other hand, did assume a legal obligation to the promisee under each contract. That obligation was conditional on the happening, after the unilateral contract had been made, of an event which was specified in the invitation: the obligation was to enter into a synallagmatic contract to sell the shares to the promisee, the terms of such synallagmatic contract being also set out in the invitation. The event on the happening of which the vendors' obligation to sell the shares to the promisee arose was the doing by the promisee of an act which was of such a nature that it might be done by either promisee or neither promisee but could not be done by both. The vendors thus did not, by entering into the two unilateral contracts, run any risk of assuming legal obligations to enter into conflicting synallagmatic contracts to sell the shares to each promisee.

The two unilateral contracts were of short duration, for the condition subsequent to which each was subject was the receipt by the vendors' solicitors on or before 3 pm on the following day, 16 September 1981, of a sealed tender or confidential telex containing an offer by the promisee to buy the shares for a single sum of money in Canadian dollars. If such an offer was received from each of the promisees under their respective contracts, the obligation of the promisor, the vendors, was to sell the shares to the promisee whose offer was the higher; and any obligation which the promisor had assumed to the promisee under the other unilateral contract came to an end, because the event the happening of which was the condition subsequent to which the vendors' obligation to sell the shares to that promisee was subject had not happened before the unilateral contract with that promisee expired.

Since the invitation in addition to containing the terms of the unilateral contract also embodied the terms of the synallagmatic contract into which the vendors undertook to enter on the happening of the specified event, the consequence of the happening of that event would be to convert the invitation into a synallagmatic contract between the vendors and whichever promisee had offered, by sealed tender or confidential telex, the higher sum. . . .

Note

This is another example of an 'implied' unilateral contract. The invitation to tender was an offer of a unilateral contract to accept the highest bid. This was

accepted by everyone who bid. It was then followed by a synallagmatic (bilateral) contract with whoever was the highest bidder. If the requestor did not comply with the offer terms, then he would be in breach of the unilateral agreement and would be liable in damages.

D: AUCTION SALES

An auctioneer's request for bids is ar invitation to treat. The bid is the offer which the auctioneer can accept or reject. The Sale of Goods Act 1979, s. 57(2) provides that acceptance occurs on the fall of the hammer and any bidder may withdraw his bid before that time.

Harris v *Nickerson*
(1873) LR 8 QB 286 (QB)

The defendant auctioneer advertised that lots including certain office furniture would be sold by him at Bury St Edmunds on specified days. The plaintiff had a commission to buy this furniture and travelled from London for the sale. On the day on which the furniture was advertised for sale, the lots were withdrawn from sale. The plaintiff brought an action against the defendant to recover for his loss of time and expenses. Held: he had no such right of action. The advertisement was only an invitation to treat and did not amount to a promise that all the articles advertised would be put up for sale.

Note
What if the auction is advertised as being 'without reserve' (i.e., there is to be no reserve price and the property will be sold to the highest bidder)?

Warlow v *Harrison*
(1859) 1 E & E 309; 120 ER 925 (Exchequer Chamber)

The defendant, an auctioneer, advertised the sale without reserve of a horse by public auction. The plaintiff attended the sale and bid 60 guineas. The horse's owner bid 61 guineas. The plaintiff refused to make any further bid and the defendant (who, it appears, did not know that the bidder was the owner) knocked down the horse to the owner for 61 guineas. The plaintiff claimed that the horse was his since he was the highest bona fide purchaser at an unreserved sale. In his pleadings the plaintiff alleged that the defendant was the plaintiff's agent to complete this contract. Held: on the pleadings the plaintiff had no claim since there was no agency relationship between the plaintiff and the defendant. The pleadings required amendment.

MARTIN B (*obiter*): . . . The sale was announced . . . to be 'without reserve.' This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold

to the highest bidder, whether the sum bid be equivalent to the real value or not. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward. . . . Upon the same principle, it seems to us that the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bonâ fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer.

Notes

1. There were two agreements. First, the plaintiff's bid was an offer, but since his bid was not accepted he was not entitled to the horse which was knocked down to the owner. However, the advertisement of an auction sale without reserve is a unilateral offer by the auctioneer. Martin B suggests that only the highest bona fide bidder can accept this unilateral offer but it would seem that, although everyone who makes a bid would accept the offer, only the highest bona fide bidder would suffer any loss on breach. The plaintiff clearly accepted *this* offer and the auctioneer would be liable in damages for breach of his promise that there would be no reserve. (Compare this with the analysis of invitations to tender agreeing to accept the highest price in *Harvela Investments Ltd* v *Royal Trust Co. of Canada Ltd*, at page 33.)
2. See Slade (1952) 68 LQR 288, Gower (1952) 68 LQR 457 and Slade (1953) 69 LQR 21.

Questions

1. What is the position if the auctioneer, having accepted bids at an auction without reserve, withdraws the goods and does not allow the hammer to fall?
2. Can a bid be withdrawn at an auction without reserve?

SECTION 4: ACCEPTANCE

A: THE MIRROR IMAGE RULE

Hyde v *Wrench*
(1840) 3 Beav 334; 49 ER 132 (Rolls Court)

The defendant on 6 June offered in writing to sell his farm for £1,000; but the plaintiff offered £950, which the defendant, on 27 June, refused to accept. On 29 June, the plaintiff, by letter, agreed to give £1,000, but the defendant did not indicate assent to this. Held: there was no binding contract for the purchase of the farm.

LORD LANGDALE MR: . . . Under the circumstances stated in this bill, I think there exists no valid binding contract between the parties for the purchase of the property. The defendant offered to sell it for £1,000, and if that had been at once unconditionally accepted, there would undoubtedly have been a perfect binding contract; instead of that, the plaintiff made an offer of his own to purchase the property for £950, and he thereby rejected the offer previously made by the defendant.

I think that it was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it; and that, therefore, there exists no obligation of any sort between the parties . . .

Brogden v *Metropolitan Railway Company*
(1877) 2 App Cas 666 (HL)

Brogden had suggested that the Company, a supplier, should enter into a contract. The Company sent terms of agreement. Brogden added the name of an arbitrator to settle any differences before writing 'approved' and signing the document. The agreement was not formally executed but both parties acted in accordance with the arrangements it contained. When disputes arose Brogden denied that there was any binding contract. Held: Brogden, by inserting the name of an arbitrator, had rejected the offer and made a counter-offer. This counter-offer had been accepted by the Company when it ordered and had taken delivery of coal upon the terms of the agreement. There had therefore been acceptance by conduct.

Butler Machine Tool Co. Ltd v *Ex-Cell-O Corporation (England) Ltd*
[1979] 1 All ER 965 (CA)

On 23 May 1969, in response to an enquiry by the buyers, the sellers made a quotation offering to sell a machine tool to the buyers for £75,535, delivery to be in 10 months' time. The offer was stated to be subject to certain terms and conditions which 'shall prevail over any terms and conditions in the buyer's order'. The conditions included a price variation clause providing for the goods to be charged at the price ruling on the date of delivery. On 27 May the buyers replied by placing an order for the machine. The order was stated to be subject to certain terms and conditions, which were materially different from those put forward by the sellers and which, in particular, made no provision for a variation in price. At the foot of the buyers' order there was a tear-off acknowledgement of receipt of the order stating that 'We accept your order on the Terms and Conditions stated thereon'. On 5 June the sellers completed and signed the acknowledgement and returned it to the buyers with a letter stating that the buyers' order was being entered in accordance with the sellers' quotation of 23 May. When the sellers came to deliver the machine they claimed that the price had increased by £2,892. The buyers refused to pay the increase in price and the sellers brought an action claiming that they were entitled to increase the price under the price variation clause contained in their offer. The buyers contended that the contract had been concluded on the buyers' rather than the sellers' terms and was therefore a fixed-price contract. Held: the contract had been concluded on the buyers' terms. The majority, Lawton and Bridge LJJ, held that the buyers' order was a counter-offer which the sellers had accepted by completing and returning the acknowledgment.

LAWTON LJ: . . . The modern commercial practice of making quotations and placing orders with conditions attached, usually in small print, is indeed likely, as in this case, to produce a battle of forms. The problem is how should that battle be conducted? The view taken by the judge was that the battle should extend over a wide area and the court should do its best to look into the minds of the parties and make certain assumptions. In my judgment, the battle has to be conducted in accordance with set rules. It is a battle more on classical 18th century lines when convention decided who had the right to open fire first rather than in accordance with the modern concept of attrition.

The rules relating to a battle of this kind have been known for the past 130-odd years. They were set out by the then Master of the Rolls, Lord Langdale, in *Hyde* v *Wrench* (1840) 3 Beav 334; and Lord Denning MR has already referred to them; and, if anyone should have thought they were obsolescent, Megaw J in *Trollope & Colls Ltd* v *Atomic Power Constructions Ltd* [1963] 1 WLR 333 called attention to the fact that those rules are still in force.

When those rules are applied to this case, in my judgment, the answer is obvious. The sellers started by making an offer. That was in their quotation. The small print was headed by the following words:

> *General.* All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the Buyer's order.

That offer was not accepted. The buyers were only prepared to have one of these very expensive machines on their own terms. Their terms had very material differences in them from the terms put forward by the sellers. They could not be reconciled in any way. In the language of art 7 of the Uniform Law on the Formation of Contracts for the International Sale of Goods [Uniform Laws on International Sales Act 1967] they did materially alter the terms set out in the offer made by the sellers.

As I understand *Hyde* v *Wrench* (1840) 3 Beav 334 and the cases which have followed, the consequence of placing the order in that way, if I may adopt Megaw J's words, was 'to kill the quotation'. It follows that the court has to look at what happened after the buyers made their counter-offer. By letter dated 4th June 1969 the sellers acknowledged receipt of the counter-offer, and they went on in this way: 'Details of this order have been passed to our Halifax works for attention and a formal acknowledgement of order will follow in due course.' That is clearly a reference to the printed tear-off slip which was at the bottom of the buyers' counter-offer. By letter dated 5th June 1969 the sales office manager at the sellers' Halifax factory completed that tear-off slip and sent it back to the buyers.

It is true, as counsel for the sellers has reminded us, that the return of that printed slip was accompanied by a letter which had this sentence in it: 'This is being entered in accordance with our revised quotation of 23rd May for delivery in 10/11 months.' I agree with Lord Denning MR that, in a business sense, that refers to the quotation as to the price and the identity of the machine, and it does not bring into the contract the small print conditions on the back of the quotation. Those small print conditions had disappeared from the story. That was when the contract was made. At that date it was a fixed price contract without a price escalation clause.

Note

Lord Denning also allowed the appeal but came to his conclusion by a different route:

LORD DENNING: I have much sympathy with the judge's [Thesiger J] approach to this case. In many of these cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out-of-date. This was observed by Lord Wilberforce in *New Zealand Shipping Co. Ltd* v *A.M. Satterthwaite* [1975] AC 154. The better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them. As Lord Cairns LC said in *Brogden* v *Metropolitan Railway Co.* (1877) 2 App Cas 666:

> . . . there may be a *consensus* between the parties far short of a complete mode of expressing it, and that *consensus* may be discovered from letters or from other documents of an imperfect and incomplete description.

Applying this guide, it will be found that in most cases when there is a 'battle of forms' there is a contract as soon as the last of the forms is sent and received without objection being taken to it. That is well observed in Benjamin [on Sale]. The difficulty is to decide which form, or which part of which form, is a term or condition of the contract. In some cases the battle is won by the man who fires the last shot. He is the man who puts forward the latest term and conditions: and, if they are not objected to by the other party, he may be taken to have agreed to them. Such was *British Road Services Ltd* v *Arthur V. Crutchley & Co. Ltd* [1968] 1 All ER 811 per Lord Pearson; and the illustration given by Professor Guest in *Anson's Law of Contract* where he says that 'the terms of the contract consist of the terms of the offer subject to the modifications contained in the acceptance'. That may however go too far. In some cases, however, the battle is won by the man who gets the blow in first. If he offers to sell at a named price on the terms and conditions stated on the back and the buyer orders the goods purporting to accept the offer on an order form with his own different terms and conditions on the back, then, if the difference is so material that it would affect the price, the buyer ought not to be allowed to take advantage of the difference unless he draws it specifically to the attention of the seller. There are yet other cases where the battle depends on the shots fired on both sides. There is a concluded contract but the forms vary. The terms and conditions of both parties are to be construed together. If they can be reconciled so as to give a harmonious result, all well and good. If differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication.

In the present case the judge thought that the sellers in their original quotation got their blow in first; especially by the provision that 'These terms and conditions shall prevail over any terms and conditions in the Buyer's order'. It was so emphatic that the price variation clause continued through all the subsequent dealings and that the buyer must be taken to have agreed to it. I can understand that point of view. But I think that the documents have to be considered as a whole. And, as a matter of construction, I think the acknowledgment of 5th June 1969 is the decisive document. It makes it clear that the contract was on the buyers' terms and not on the sellers' terms: and the buyers' terms did not include a price variation clause.

Note

In *Butler* v *Ex-Cell-O Corp.* there was an express acceptance of the counter-offer. In *Sauter Automation Ltd* v *Goodman (Mechanical Services) Ltd* (1986) 34 Build LR 81, the last form was accepted by conduct, namely acts of

performance. See also *Nissan UK Ltd* v *Nissan Motor Manufacturing (UK) Ltd*, (unreported) 26 October 1994 for a further example of acceptance of counter-offer by conduct.

Questions

1. What would you advise a party to do to seek to ensure that his terms prevail? Consider the effect of Article 19, Vienna Convention (United Nations Convention on Contracts for the International Sale of Goods) (not ratified by the UK) and s. 2–207 of the US Uniform Commercial Code.
2. Lord Denning's approach separates the issue of formation from the question of content of the contract. Is there any empirical evidence to support Lord Denning's assessment that businessmen pay no attention to fine print and consider that they have a deal when the major terms are agreed? (See Beale and Dugdale (1975) 2 Br J Law & Soc 45, 48–51.)
3. What does Lord Denning mean when he refers to the parties reaching agreement 'on all material points'? What difficulties exist with his categorisation of terms? (See Rawlings (1979) 42 MLR 715.)
4. Case note, Adams (1979) 95 LQR 481.

Note

A request for further information before the offeree makes up his mind is not a counter-offer.

Stevenson, Jacques & Co. v *McLean*
(1880) 5 QBD 346 (QB)

The defendant wrote to the plaintiffs giving 40s net cash per ton as the lowest price at which he could sell iron and stating that he would hold the offer open until the following Monday. The plaintiffs telegraphed 'Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you could give'. The defendant did not reply. One of the issues before Lush J was whether this amounted to a counter-offer thereby rejecting the defendant's offer to sell at 40s net cash per ton. Held: the telegram was not a rejection of the defendant's offer but merely an inquiry as to whether the defendant would modify the terms of his offer.

LUSH J: . . . [T]he form of the telegram is one of inquiry. It is not 'I offer forty for delivery over two months,' which would have likened the case to *Hyde* v *Wrench* (1840) 3 Beav 334, where one party offered his estate for 1,000*l*., and the other answered by offering 950*l*. Lord Langdale, in that case, held that after the 950*l*. had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, 'Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give.' There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer.

B: ACCEPTANCE MUST BE MADE IN RESPONSE TO THE OFFER

An offer is not 'accepted' by doing the required act in ignorance of the offer. However, if the offeree responds with knowledge, his motive in so doing is irrelevant.

R v *Clarke*
(1927) 40 CLR 227 (High Court of Australia)

A reward was offered by the Government of Western Australia for information leading to the arrest and conviction of the persons who committed the murders of two police officers. Clarke gave this information after he had been arrested for this crime, and it was found as a fact that his only intention was to save himself from an unfounded charge and so he had not acted on the faith of, or in reliance upon, the offer. In reaching the conclusion that he could not recover, the High Court had to distinguish *Williams* v *Carwardine* (1833) 5 C & P 566, 172 ER 1101, where the plaintiff had given the information requested because she thought she was dying. It was held in that case that she could recover the reward which had been offered because she knew about the reward. Her motive in supplying the information was not material because she had acted on the offer.

HIGGINS J: . . . That case [*Williams* v *Carwardine*] seems to me not to deal with the essential elements for a contract at all: it shows merely that the *motive* of the informer in accepting the contract offered (and the performing the conditions is usually sufficient evidence of acceptance) has nothing to do with his right to recover under the contract. The reports show (as it was assumed by the Judges after the verdict of the jury in favour of the informer), that the informer *knew* of the offer when giving the information, and meant to accept the offer though she had also a *motive* in her guilty conscience.

. . . The reasoning of Woodruff J in *Fitch* v *Snedaker* (1868) 38 NY 248 seems to me to be faultless; and the decision is spoken of in *Anson* as being undoubtedly correct in principle:— 'The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard?' Clarke had seen the offer, indeed; but it was not present to his mind — he had forgotten it, and gave no consideration to it, in his intense excitement as to his own danger. There cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or to forgetting it after hearing. But for this candid confession of Clarke's it might fairly be presumed that Clarke, having once seen the offer, acted on the faith of it, in reliance on it; but he has himself rebutted that presumption.

Gibbons v *Proctor*
(1891) 64 LT 594

On 29 May, the defendant instructed handbills to be printed offering a reward of £25 to the person who gave information, leading to the

conviction of the perpetrator of a particular crime, to police Superintendent Penn. The plaintiff, a police officer, had already communicated the required information to a colleague, named Coppin, with instructions to forward it to Superintendent Penn. Coppin had communicated the information to his superior, Inspector Lennan, who had passed it on to Superintendent Penn. The information reached Penn on 30 May, which was after the time when the handbills had been distributed to police stations. Held: the plaintiff was entitled to the reward. Coppin and Lennan were the plaintiff's agents for the purposes of conveying the information. The terms of the offer required the information to be given to Penn. The acceptance was the supply of the information to Penn, and at that time the plaintiff knew that a reward had been offered.

Notes

1. Hudson (1968) 84 LQR 503 argues that on grounds of policy the law should encourage rather than penalise people who do not know about a reward and who act under a sense of moral duty.
2. It is also objectionable to allow the offeror of a reward to escape liability on his promise when he has had the benefit of seeing his conditions fulfilled. (Avoidance of this situation is the very reason for holding such a promise to be an offer and not an invitation to treat.)

C: THE OFFEROR PRESCRIBES THE METHOD OF ACCEPTANCE

Manchester Diocesan Council for Education v *Commercial & General Investments Ltd*
[1969] 3 All ER 1593 (ChD)

Condition 4 of a request for tenders stated that the person whose tender was accepted would be informed by letter sent to him at the address given in the tender. On 15 September 1964, the plaintiff wrote to the defendant company's surveyor stating that the sale to the company had been approved, but it was not until 7 January 1965 that the plaintiff's solicitors wrote to the defendant company at the address given in the tender giving formal notification of acceptance of its offer. It was alleged that the offer in the tender had lapsed so that it was necessary to decide when the contract had been concluded.

BUCKLEY J: . . . Condition 4, however, does not say that that shall be the sole permitted method of communicating an acceptance. It may be that an offeror, who by the terms of his offer insists on acceptance in a particular manner, is entitled to insist that he is not bound unless acceptance is effected or communicated in that precise way, although it seems probable that, even so, if the other party communicates his acceptance in some other way, the offeror may by conduct or otherwise waive his right to insist on the prescribed method of acceptance. Where, however, the offeror has prescribed a particular method of acceptance, but not in terms insisting that only acceptance in that mode shall be binding, I am of opinion that acceptance

communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract. Thus in *Tinn* v *Hoffman & Co.* (1873) 29 LT 271, where acceptance was requested by return of post, Honeyman J, said:

> That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message, or by any means not later than a letter written and sent by return of post . . .

If an offeror intends that he shall be bound only if his offer is accepted in some particular manner, it must be for him to make this clear. Condition 4 in the present case had not, in my judgment, this effect.

Moreover, the inclusion of condition 4 in the defendant company's offer was at the instance of the plaintiff, who framed the conditions and the form of tender. It should not, I think, be regarded as a condition or stipulation imposed by the defendant company as offeror on the plaintiff as offeree, but as a term introduced into the bargain by the plaintiff and presumably considered by the plaintiff as being in some way for the protection or benefit of the plaintiff. It would consequently be a term strict compliance with which the plaintiff could waive, provided the defendant company was not adversely affected. The plaintiff did not take advantage of the condition which would have resulted in a contract being formed as soon as a letter of acceptance complying with the condition was posted, but adopted another course, which could only result in a contract when the plaintiff's acceptance was actually communicated to the defendant company.

For these reasons, I have reached the conclusion that in accordance with the terms of the tender it was open to the plaintiff to conclude a contract by acceptance actually communicated to the defendant company in any way; and, in my judgment, the letter of 15th September constituted such an acceptance. . . .

Yates Building Co. Ltd v *Pulleyn & Sons (York) Ltd*
(1975) 119 SJ 370 (CA)

The defendants granted the plaintiffs an option to buy building plots for £18,900 'exercisable by notice in writing . . . between 6 April and 6 May 1973 . . . to be sent by registered or recorded delivery post' to the defendants or their solicitors. The option was exercised by a letter of 30 April 1973 sent by ordinary post but the defendants refused to accept it as a valid acceptance. Held: as the method was not clearly stated to be mandatory, any acceptance which was communicated to the offeror by any other no less advantageous method would conclude the contract. The provision was for the benefit of the plaintiffs, and they could waive the requirement and take the risk of ordinary post.

D: COMMUNICATION OF THE ACCEPTANCE TO THE OFFEROR

(a) Implied waiver of the need to communicate

Carlill v *Carbolic Smoke Ball Co.* (chapter 1), is authority for the general principle that in a unilateral contract the performance of the act is the acceptance ~~and there is no need to communicate the attempt to perform it.~~

However, silence in a bilateral contract will not constitute acceptance.

Felthouse v *Bindley*
(1862) 11 CB (NS) 869; 142 ER 1037 (CP)

The plaintiff and his nephew were negotiating for the sale of a horse. The plaintiff wrote to the nephew stating 'If I hear no more about him, I consider the horse is mine at £30 15s'. The nephew did not respond but did instruct the defendant, an auctioneer, to reserve the horse in question as it had already been sold. By mistake the defendant put the horse up for sale and it was sold. The plaintiff sued the auctioneer for the conversion of the horse (which meant that he had to show that the horse was his property at the time that it was sold). Held: the plaintiff did not have property in the horse.

WILLES J: . . . [I]t is clear that the uncle had no right to impose upon the nephew a sale of his horse for 30*l.* 15s. unless he chose to comply with the condition of writing to repudiate the offer. The nephew might, no doubt, have bound his uncle to the bargain by writing to him: the uncle might also have retracted his offer at any time before acceptance. It stood an open offer: and so things remained until the 25th of February, when the nephew was about to sell his farming stock by auction. The horse in question being catalogued with the rest of the stock, the auctioneer (the defendant) was told that it was already sold. It is clear, therefore, that the nephew in his own mind intended his uncle to have the horse at the price which he (the uncle) had named, — 30*l.* 15s.: but he had not communicated such his intention to his uncle, or done anything to bind himself. Nothing, therefore, had been done to vest the property in the horse in the plaintiff down to the 25th of February, when the horse was sold by the defendant. It appears to me that, independently of the subsequent letters, there had been no bargain to pass the property in the horse to the plaintiff. . .

Questions

1. Why had the nephew not accepted by his act of informing the auctioneer that the horse had been sold?
2. What would the position have been if the nephew had been trying to enforce the sale contract against his uncle based upon the uncle's statement that silence would constitute acceptance?

Note

Section 69 of the American Restatement (2d) Contracts (1979), contains this principle but also lists a number of exceptions. Treitel, pp. 31–33, considers that there are some situations in English law where both the offeree and offeror may find themselves bound by silent acceptance.

(b) The postal rule of acceptance

If the post is the proper method to communicate acceptance, then the acceptance is deemed complete as soon as the letter of acceptance is posted.

Adams v *Lindsell*
(1818) 1 B & Ald 681; 106 ER 250 (KB)

On 2 September, the defendants wrote to the plaintiffs offering to sell them certain fleeces of wool and requiring an answer in the course of post. The

defendants misdirected this letter so that the plaintiffs did not receive it until 5 September. The plaintiffs posted their acceptance on the same day but it was not received until 9 September. Meanwhile, on 8 September, the defendants, not having as they expected received an answer by 7 September, sold the wool to someone else. Held: there was a contract on 5 September when the plaintiffs posted their acceptance. In answer to the argument that the acceptance had to be communicated the court said, that if that were so, no contract could ever be completed by the post. If the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after 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 court stressed the fact that the delay in notifying the acceptance was solely the result of the defendants' mistake and 'it therefore must be taken as against them, that the plaintiffs' answer was received in course of post'.

Note

The following case considers the question of when the post is a proper method for communicating acceptance.

Henthorn* v *Fraser
[1892] 2 Ch 27 (CA)

The facts of this case appear at page 55.

LORD HERSCHELL: . . . Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

Note

The offer in this case had not been made by post. The offeree had been handed an option to purchase by the offeror in Liverpool. The offeree lived in Birkenhead. Therefore it was held that acceptance by post must have been within the parties' contemplation.

Household Fire and Carriage Accident Insurance Company (Ltd)* v *Grant
(1879) 4 Ex D 216 (CA)

The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant, and addressed to him and posted a letter containing the notice of allotment, but the letter was never received by him. Held: (Thesiger and Baggally LJJ, Bramwell LJ dissenting) the defendant had become a shareholder. Acceptance was complete when the letter of allotment was posted and it was irrelevant that it never arrived.

THESIGER LJ: . . . An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no

binding acceptance. How then are these elements of law to be harmonised in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case* (1867) LR 4 Eq 9, when in the course of his judgment he said: '*Dunlop* v *Higgins* (1848) 1 HLC 381 decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post office is the common agent of both parties.' Alderson, B., also in *Stocken* v *Collin* (1841) 7 M & W 515, a case of notice of dishonour, . . . says: 'If the doctrine that the post office is only the agent for the delivery of the notice were correct no one could safely avail himself of that mode of transmission.' But if the post office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? . . . The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden* v *Directors of Metropolitan Ry. Co.* (1877) 2 App Cas 666, 'put it out of his control and done an extraneous act which clenches the matter, and shews beyond all doubt that each side is bound.' How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Note

Bramwell LJ delivered an important dissenting judgment.

BRAMWELL LJ: . . . That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether anyone who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transferred? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter? Suppose an article is advertised at so much, and that it would be sent on receipt of a post office order. Is it enough to post the letter? If the word 'receipt' is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, may be he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post office is no more authorized by the offerer than the sending an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to shew that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled. . . .

Note

Evans (1966) 15 ICLQ 553 and Winfield (1939) 55 LQR 499 contain criticisms and justifications of the postal rule. See also Gardner (1992) 12 OJLS 170.

(i) *Avoiding the postal rule* The offeror can always require actual communication of the acceptance to him which will oust the operation of the postal rule. This leads to fine distinctions between words requiring actual communication and those which do not.

Holwell Securities Ltd* v *Hughes
[1974] 1 All ER 161 (CA)

On 19 October 1971, the plaintiffs were granted an option by the defendant 'exercisable by notice in writing to [the defendant] at any time

within six months from the date hereof'. On 14 April 1972, the plaintiffs wrote to the defendant giving notice of the exercise of the option but the letter did not arrive. The plaintiffs sought specific performance of the option agreement, arguing that it was complete on 14 April when the acceptance was posted. Held: the option had not been validly exercised because actual communication was required.

RUSSELL LJ: It is the law in the first place that prima facie acceptance of an offer must be communicated to the offeror. On this principle the law has engrafted a doctrine that, if in any given case the true view is that the parties contemplated that the postal service might be used for the purpose of forwarding an acceptance of the offer, committal of the acceptance in a regular manner to the postal service will be acceptance of the offer so as to constitute a contract, even if the letter goes astray and is lost. Nor, as was once suggested, are such cases limited to cases in which the offer has been made by post. It suffices I think at this stage to refer to *Henthorn* v *Fraser* [1892] 2 Ch 27. In the present case, as I read a passage in the judgment below, Templeman J concluded that the parties here contemplated that the postal service might be used to communicate acceptance of the offer (by exercise of the option); and I agree with that.

But that is not and cannot be the end of the matter. In any case, before one can find that the basic principle of the need for communication of acceptance to the offeror is displaced by this artificial concept of communication by the act of posting, it is necessary that the offer is in its terms consistent with such displacement and not one which by its terms points rather in the direction of actual communication. . . .

The relevant language here is, 'The said option shall be exercisable by notice in writing to the Intending Vendor . . .', a very common phrase in an option agreement. There is, of course, nothing in that phrase to suggest that the notification to the defendant could not be made by post. But the requirement of 'notice . . . to', in my judgment, is language which should be taken expressly to assert the ordinary situation in law that acceptance requires to be communicated or notified to the offeror, and is inconsistent with the theory that acceptance can be constituted by the act of posting, referred to by Anson as 'acceptance *without notification*'.

It is of course true that the instrument could have been differently worded. An option to purchase within a period given for value has the characteristic of an offer that cannot be withdrawn. The instrument might have said 'The offer constituted by this option may be accepted in writing within six months': in which case no doubt the posting would have sufficed to form the contract. But that language was not used, and, as indicated, in my judgment the language used prevents that legal outcome. . . .

LAWTON LJ: Does the rule apply in *all* cases where one party makes an offer which both he and the person with whom he was dealing must have expected the post to be used as a means of accepting it? In my judgment, it does not. First, it does not apply when the express terms of the offer specify that the acceptance must reach the offeror. The public nowadays are familiar with this exception to the general rule through their handling of football pool coupons. Secondly, it probably does not operate if its application would produce manifest inconvenience and absurdity. This is the opinion set out in Cheshire and Fifoot's Law of Contract. It was the opinion of Bramwell B as is seen by his judgment in *British & American Telegraph Co.* v *Colson* (1871) LR 6 Exch 108, and his opinion is worthy of consideration even though the decision in that case was overruled by this court in *Household Fire and Carriage Accident Insurance Co. Ltd* v *Grant* (1879) 4 Ex D 216. The illustrations of inconvenience and absurdity

which Bramwell B gave are as apt today as they were then. Is a stockbroker who is holding shares to the orders of his client liable in damages because he did not sell in a falling market in accordance with the instructions in a letter which was posted but never received? Before the passing of the Law Reform (Miscellaneous Provisions) Act 1970 (which abolished actions for breach of promise of marriage), would a young soldier ordered overseas have been bound in contract to marry a girl to whom he had proposed by letter, asking her to let him have an answer before he left and she had replied affirmatively in good time but the letter had never reached him? In my judgment, the factors of inconvenience and absurdity are but illustrations of a wider principle, namely, that the rule does not apply if, having regard to all the circumstances, including the nature of the subject-matter under consideration, the negotiating parties cannot have intended that there should be a binding agreement until the party accepting an offer or exercising an option had in fact communicated the acceptance or exercise to the other. In my judgment, when this principle is applied to the facts of this case it becomes clear that the parties cannot have intended that the posting of a letter should constitute the exercise of the option.

Questions

1. How would you advise an offeror to phrase his offer to ensure that any acceptance must be actually communicated? Which form of wording will have this effect and which will not?
2. Lawton LJ states that the postal rule will not apply where its application 'would produce manifest inconvenience and absurdity'. What situations would this cover, and are the examples he gives appropriate?

(ii) *May a postal acceptance be recalled or overtaken before it reaches the offeror?*

Countess of Dunmore* v *Alexander
(1830) 9 S 190 (Court of Session)

The Countess wished to change a servant and wrote to Lady Agnew mentioning this fact, stating the wages to be paid and asking for a reference for a certain Elizabeth Alexander who was leaving Lady Agnew's employment. Lady Agnew replied 'If Lady Dunmore decides on taking Betty Alexander, perhaps she will have the goodness to mention whether she expects her at the new or the old term'. On 5 November the Countess wrote to Lady Agnew asking her to engage Betty Alexander and that she wished her to start at the new term. This was forwarded to Alexander. In the meantime, on 6 November the Countess wrote another letter to Lady Agnew stating that she no longer needed Alexander. The second letter was forwarded to Alexander by express and both were delivered at the same moment to Alexander. Alexander argued that there was a concluded contract. Held: there was no concluded contract.

LORD BALGRAY: The admission that the two letters were simultaneously received puts an end to the case. Had the one arrived in the morning and the other in the evening of the same day, it would have been different. Lady Dunmore conveys a request to Lady Agnew to engage Alexander, which request she recalls by a

subsequent letter, that arrives in time to be forwarded to Alexander as soon as the first. This, therefore, is just the same as if a man had put an order into the Post Office, desiring his agent to buy stock for him. He afterwards changes his mind, but cannot recover his letter from the Post Office. He therefore writes a second letter countermanding the first. They both arrive together, and the result is, that no purchase can be made to bind the principal.

LORD CRAIGIE (dissenting): . . . Every letter between the principals, relative to an offer or an acceptance respectively was, as soon as it reached Lady Agnew, the same as delivered for behoof of the party on whose account it was written. I hold, therefore, that when Lady Dunmore's letter reached Lady Agnew, the contract of hiring Alexander was complete, — the offer on the part of Alexander being met by an intimated acceptance on the part of the Countess. No subsequent letter from the Countess to Lady Agnew could annul what had passed by the mere circumstance of its being delivered, at the same time with the first, into the hands of Alexander. I do not think the event could have retracted after the first letter reached Lady Agnew; and if she was bound, it seems clear that the Countess could not be free.

Notes

1. The case is of questionable authority in support of the proposition that it is possible to overtake a postal acceptance because the court appears to treat the letter from the Countess on 5 November as an offer and the letter of 6 November as a valid revocation of that offer.

2. Allowing a letter of acceptance to be withdrawn once posted is contrary to the postal rule and would give the offeree the best of both worlds, i.e., on posting he could decide whether to hold the offeror to the contract or recall his acceptance. However, Evans (1966) 15 ICLQ 553, argues in favour of allowing a revocation to overtake a postal acceptance. See also Hudson (1966) 82 LQR 169, who argues that there is no disadvantage to the offeror since the offeror will act on the first communication he receives.

(iii) *Are acceptances by telephone, telex and fax subject to the postal rule?* Where an acceptance is instantaneous, actual communication is required and the postal rule does not apply.

Entores Ltd v *Miles Far East Corporation*
[1955] 2 All ER 493 (CA)

An English company received a telex offer from a Dutch company and made a counter-offer which the Dutch company accepted by telex. The English company needed to establish that the contract was made within the jurisdiction. Held: since the acceptance was received in England, the contract was made within the jurisdiction.

DENNING LJ: . . . Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout

back his acceptance so that I can hear what he says. Not until I have his answer am I bound. . . .

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes 'dead' so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off, because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

Lastly take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails or something of that kind. In that case the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message 'not receiving'. Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or if the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance — yet the sender of it reasonably believes it has got home when it has not — then I think there is no contract.

My conclusion is that the rule about instantaneous communications between the parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.

Notes

1. Difficulties are bound to arise over exactly what is meant by the acceptance 'being received'. In *Tenax Steamship Co. Ltd* v *The Brimnes (Owners), The Brimnes* [1975] QB 929, a telex withdrawal had appeared on the charterers' telex machine between 17.30 and 18.00 (within office hours)

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on 2 April but it was not noted until the following day. The Court of Appeal held that the withdrawal was received when it appeared on the machine rather than when it was actually read the following day. The owners, having sent their message within office hours, had done all that they could be expected to do to transmit their message, and they would not know that it was not actually read until the following day.

By analogy, if an acceptance was sent during office hours it would be received when i was received by the telex or fax machine. There is support for this view in the judgment of Lord Fraser in *Brinkibon Ltd* v *Stahag Stahl GmbH* (below).

2. It appears that the position will be different if the communication is sent outside office hours. Such a communication will inevitably be 'non-instantaneous'.

Brinkibon Ltd v *Stahag Stahl GmbH*
[1983] 2 AC 34 (HL)

A telex acceptance was sent from London to Vienna. The English company could only serve a writ for breach of contract on the Austrian company if the contract was made in England. Held: (approving *Entores*), that the contract in question had been concluded where the telex acceptance had been received, in Vienna.

LORD FRASER: . . . I have reached the opinion that, on balance, an acceptance sent by telex directly from the acceptor's office to the offeror's office should be treated as if it were an instantaneous communication between principals, like a telephone conversation. One reason is that the decision to that effect in *Entores* v *Miles Far East Corporation* [1955] 2 QB 327 seems to have worked without leading to serious difficulty or complaint from the business community. Secondly, once the message has been received on the offeror's telex machine, it is not unreasonable to treat it as delivered to the principal offeror, because it is his responsibility to arrange for prompt handling of messages within his own office. Thirdly, a party (the acceptor) who tries to send a message by telex can generally tell if his message has not been received on the other party's (the offeror's) machine, whereas the offeror, of course, will not know if an unsuccessful attempt has been made to send an acceptance to him. It is therefore convenient that the acceptor, being in the better position, should have the responsibility of ensuring that his message is received. For these reasons I think it is right that in the ordinary simple case, such as I take this to be, the general rule and not the postal rule should apply. But I agree with both my noble and learned friends that the general rule will not cover all the many variations that may occur with telex messages.

LORD WILBERFORCE (*obiter*): Since 1955 the use of telex communication has been greatly expanded, and there are many variants on it. The senders and recipients may not be the principals to the contemplated contract. They may be servants or agents with limited authority. The message may not reach, or be intended to reach, the designated recipient immediately: messages may be sent out of office hours, or at night, with the intention, or upon the assumption, that they will be read at a later time. There may be some error or default at the recipient's end which prevents receipt at

the time contemplated and believed in by the sender. The message may have been sent and/or received through machines operated by third persons. And many other variations may occur. No universal rule can cover all such cases: they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie. . . .

Note

Lord Brandon expressed agreement with Lord Wilberforce on this point and Lord Wilberforce's *obiter* comment was relied on by Gatehouse J in the following decision.

Mondial Shipping and Chartering BV v *Astarte Shipping Ltd*
[1995] CLC 1011

The issue in the case was whether a telex notice of intention to withdraw the vessel for non-payment of hire, sent by the shipowners to the charterers late on the evening of Friday, 2 December 1994 (at 23.41 hours), was received instantaneously or at the start of business on the next working day. This was important on the facts because payment of the hire could lawfully have been made at any time before midnight on Friday, 2 December and, if the notice took effect at 23.41 on Friday, 2 December, the charterers would not have been in default at the time the notice was served. On the other hand, the notice would have been valid if it had not taken effect until the next working day, Monday, 5 December. Held: the notice was communicated at the start of business on the next working day, namely Monday, 5 December. Accordingly it was not served before the charterers were in breach of the charterparty which occurred at midnight on the Friday night. (However, the notice was nevertheless invalid because it did not indicate the action required of the charterers.)

GATEHOUSE J: . . . It was not in dispute in the present case that a notice under cl. 27 is not effective until it is actually received by the charterer — the 'postal rule' referable to the conclusion of a contract has no application. The crucial question is what is meant by 'received'? The charterers contended that this must be the moment when it was printed out on their telex machine; that this occurred before the time when they would be in default under cl. 7, and accordingly the notice was premature and invalid for that reason, apart from its want of proper form. The owners contended that the moment of receipt was when the telex message was, or must be taken to have been, first read by a responsible member of the charterers' organisation, i.e., at or shortly after 9 am on Monday 5 December; that the charterers were by then in default of their duty of punctual payment: accordingly the notice was not then premature; it gave the charterers 48 hours from that moment to remedy their default, and the owners were accordingly entitled to withdraw the vessel when they did, at about 9.25 am on the morning of 7 December, no hire having been received within the 48-hour grace period.

There is no authority on this. The question has not arisen in any reported decision. In *The Afovos* [*Afovos Shipping Co. SA* v *R. Pagnan and F. Illi, The Afovos* [1983] 1 Lloyd's Rep 335] and other similar cases of instantaneous transmission the message

was sent during ordinary business hours so the time of sending the notice by the owners and its receipt by the charterers was identical. It is therefore not significant that various judges have referred to the time when the notice was 'sent', or 'issued' (see, e.g., per Griffiths LJ [1982] 1 Ll Rep at p. 568:

> I would therefore hold that the notice given at 1640 hours on June 14 was not a notice pursuant to clause 31 because such a notice can only be issued after breach of the obligation to pay the hire.)

What matters is not when the notice is given/sent/despatched/issued by the owners but when its content reaches the mind of the charterer. If the telex is sent in ordinary business hours, the time of receipt is the same as the time of despatch because it is not open to the charterer to contend that it did not in fact then come to his attention (see *The Brimnes* per Brandon J [1973] 1 WLR 386 at p. 406, and per the Court of Appeal [1975] QB 929).

The problem has, of course, been referred to. See the well-known passage in the speech of Lord Wilberforce in *Brinkibon Ltd v Stahag Stahl and Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34 at p. 42. [Gatehouse J went on to consider this *obiter* statement, pages 52–3 above . . .] Brandon J also referred, in passing, to an out-of hours telex in *The Brimnes*. . . .

The charterers in order to found their contention that the telex message was premature, are in fact contending for a universal rule for telex communications which, they say, has the commercial advantage of certainty. But I propose to follow Lord Wilberforce's words and resolve this issue by reference to the particular circumstances. His Lordship's words, . . . were spoken with reference to where a contract is to be regarded as having been concluded: hence, as I think, his reference to the intentions of the parties and in some cases, where the risks should lie (both the cases cited were concerned with the risks which arise from a postal acceptance). A notice such as the one with which I am concerned is clearly of a quite different type and does not involve any consideration of the mutual intentions of contracting parties or of where the risks should lie. But I think the tribunal were entitled to find (para. 25 of their reasons) that a notice which arrives at 23.41 on a Friday night is not to be expected to be read before opening hours on the following Monday, and that was a conclusion of fact arrived at by the arbitrators as a matter of commercial common sense.

Why the telex was sent when it was is not explained. It may be that the owners or their agents, forgetful of the midnight rule (or, more likely, wholly ignorant of it) assumed that as the vessel had been delivered at 23.00 hours that was the moment each successive 15 days after which hire became overdue. If they had waited a further 20 minutes this problem would not have arisen.

In my judgment the tribunal were right to find that the notice under cl. 31 was not received by charterers until the opening of business on 5 December, and was not premature.

Note

This decision clarifies the position on communication where the message is very evidently sent 'outside ordinary business hours'. However, this expression is not defined and it is possible to imagine a situation arising where a message is sent within the communicator's business hours but outside the recipient's business hours.

Should this be judged by reference to the parties' own hours and knowledge of their respective practices?

Question
When are messages left on telephone answering machines communicated? See the arguments of Coote (1971) 4 *New Zealand UL Rev* 331.

SECTION 5: REVOCATION OF AN OFFER

An offer can be revoked at any time before it is accepted.

A: COMMUNICATION OF THE REVOCATION

A revocation of an offer must actually be communicated to the offeree. The postal rule applies only to acceptances and not to revocations.

Henthorn* v *Fraser
[1892] 2 Ch 27 (CA)

A withdrawal of an offer had been posted at midday but it was not received until 5 p.m. In the meantime an acceptance had been posted at 3.50 p.m. Held: there was a binding contract at 3.50 p.m. on posting the acceptance.

LORD HERSCHELL: If the acceptance by the Plaintiff of the Defendants' offer is to be treated as complete at the time the letter containing it was posted, I can entertain no doubt that the society's attempted revocation of the offer was wholly ineffectual. I think that a person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn. . . .

KAY LJ: Then what was the effect of the withdrawal by the letter posted between 12 and 1 the same day, and received in the evening? Did that take effect from the time of posting? It has never been held that this doctrine applies to a letter withdrawing the offer. Take the cases alluded to by Lord Bramwell in the *Household Fire and Carriage Accident Insurance Company* v *Grant* (1879) 4 ExD 216. A notice by a tenant to quit can have no operation till it comes to the actual knowledge of the person to whom it is addressed. An offer to sell is nothing until it is actually received. No doubt there is the seeming anomaly pointed out by Lord Bramwell that the same letter might contain an acceptance, and also such a notice or offer as to other property, and that when posted it would be effectual as to the acceptance, and not as to the notice or offer. But the anomaly, if it be one, arises from the different nature of the two communications. As to the acceptance, if it was contemplated that it might be sent by post, the acceptor, in Lord Cottenham's language, has done all that he was bound to do by posting the letter, but this cannot be said as to the notice of withdrawal. That was not a contemplated proceeding. The person withdrawing was bound to bring his change of purpose to the knowledge of the said party, and as this was not done in this case till after the letter of acceptance was posted, I am of opinion that it was too late.

Byrne & Co.* v *Van Tienhoven & Co.
(1880) 5 CPD 344 (CP)

On 1 October the defendants in Cardiff wrote to the plaintiffs in New York offering to sell goods. The plaintiffs received this offer on 11 October, and

accepted it by telegram on the same day. On 8 October the defendants posted a revocation of their offer which reached the plaintiffs on 20 October. The plaintiffs brought an action for non-delivery. Held: a revocation of an offer is not effective until it is communicated to the offeree. The offer was therefore available for acceptance until 20 October, and a binding contract was entered into on 11 October when the acceptance was telegraphed.

LINDLEY J: . . . It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted: *Harris' Case* (1872) LR 7 Ch App 587; *Dunlop* v *Higgins* (1848) 1 HLC 381, even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post office his agent to receive the acceptance and notification of it. But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of the 8th of October is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tin plates at a profit. In my opinion the withdrawal by the defendants on the 8th of October of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on the 11th of October, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. 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.

Stevenson, Jacques & Co. v *McLean*
(1880) 5 QBD 346

The defendant had made an offer to sell iron at 40s net cash per ton to the plaintiffs, and stated that he would hold the offer open until the following Monday. On the Monday the defendant sold the iron and informed the plaintiffs of this by a telegram sent at 1.25 p.m. Before this arrived (at 1.46 p.m.) the plaintiffs, having found a purchaser for the iron, sent an acceptance telegram to the defendant at 1.34 p.m. The plaintiffs brought an action for non-delivery. Held: although the defendant was free to revoke his offer before the close of the day on Monday, any revocation would not

have effect until it reached the plaintiffs. Consequently, the defendant's offer was still open when the plaintiffs accepted it at 1.34 p.m. (on sending the acceptance telegram).

Note
The revocation need not be communicated by the offeror himself.

Dickinson v *Dodds*
(1876) 2 ChD 463 (CA)

On Wednesday 10 June 1874, the defendant offered to sell his house to the plaintiff, stating that 'This offer to be left over until Friday 9 a.m.'. On the Thursday afternoon the plaintiff was informed by Berry that the defendant had been offering or agreeing to sell the property to Allan. The plaintiff therefore went to the house where the defendant was staying and left a formal written acceptance there (the evidence was that the defendant did not receive this document). On the Friday at 7 a.m., Berry, who was acting as agent for the plaintiff, found the defendant at the railway station, handed him a copy of the plaintiff's acceptance and stated its contents. The defendant had sold the property to Allan on Thursday 11 June. Held: the offer might be withdrawn at any time before acceptance since there was no consideration for the promise to keep the offer open until 9 a.m. Had it in fact been withdrawn?

JAMES LJ: . . . [I]t is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, 'Now I withdraw my offer.' It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in 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.'

. . . It is to my mind quite clear that before there was any attempt at acceptance by the Plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the Plaintiff has failed to prove that there was any binding contract between Dodds and himself.

Notes
1. Unless the promise to keep an offer open for a stated period is supported by consideration, the offeror is free to revoke the offer at any time before acceptance (*Routledge* v *Grant* (1828) 4 Bing 653, 130 ER 920). This may be harsh where the offeree has relied on this 'firm offer' promise. See the

proposals of the Law Commission Working Paper No. 60, 'Firm Offers', (1975).

2. Treitel cites *Dickinson* v *Dodds* as authority for the proposition that there is sufficient communication if the offeree knows from 'any reliable source' that the offeror no longer intends to contract with him. What problems might exist in deciding who is a 'reliable source'?

3. Although this decision appears to suggest that it is not necessary to communicate a revocation, it is based on a subjective approach to contract formation and is now incorrect on this point.

B: REVOCATION OF A UNILATERAL OFFER

Since the acceptance is the complete performance of the act in unilateral contracts, if (to use the classical example of a unilateral contract quoted by Brett J in *Great Northern Railway Company* v *Witham* (1873) LR 9 CP 16, at p. 19) I offer you £100 if you will walk to York, I could revoke my offer at any time before you reached York.

Petterson v *Pattberg*
161 NE 428 (1928); 248 NY 86 (Court of Appeals of New York)

Pattberg wrote to Petterson agreeing to discount the amount owing under Petterson's mortgage by $780 if the mortgage was paid on or before 31 May 1924. Within this time Petterson went to Pattberg's home to pay but Pattberg refused to let him in or to accept the money. Petterson sued for his loss of $780 in having to pay off the mortgage in full.

KELLOGG J: An interesting question arises when, as here, the offeree approaches the offeror with the intention of proffering performance and, before actual tender is made, the offer is withdrawn. Of such a case Williston says:

> The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated. *Williston on Contracts*, § 60b.

. . . We think that in this particular instance the offer of the defendant was withdrawn before it became a binding promise, and therefore that no contract was ever made for the breach of which the plaintiff may claim damages.

Note

It is now accepted that in English law the offer may contemplate that it is not possible to revoke once the offeree has started to perform.

Errington v *Errington & Woods*
[1952] 1 KB 290 (CA)

A father purchased a house with the aid of a building society mortgage. He promised his son and daughter-in-law that if they continued in occupation

and paid all the mortgage instalments he would transfer the house to them. They duly paid the instalments, but when the father died he left the house to his widow who sought possession. The issue in the judgments is whether the couple were tenants at will or had a contractual licence to occupy. Held: they were contractual licensees.

DENNING LJ: It is to be noted that the couple never bound themselves to pay the instalments to the building society; and I see no reason why any such obligation should be implied. It is clear law that the court is not to imply a term unless it is necessary; and I do not see that it is necessary here. Ample content is given to the whole arrangement by holding that the father promised that the house should belong to the couple as soon as they paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, the father would not be bound to transfer the house to them. 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, which they have not done. If that was the position during the father's lifetime, so it must be after his death. If the daughter-in-law continues to pay all the building society instalments, the couple will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if she does not do so, then the building society will claim the instalments from the father's estate and the estate will have to pay them. I cannot think that in those circumstances the estate would be bound to transfer the house to them, any more than the father himself would have been.

. . . [I]t is clear that the father expressly promised the couple that the property should belong to them as soon as the mortgage was paid, and impliedly promised that so long as they paid the instalments to the building society they should be allowed to remain in possession. They were not purchasers because they never bound themselves to pay the instalments, but nevertheless they were in a position analogous to purchasers. They have acted on the promise, and neither the father nor his widow, his successor in title, can eject them in disregard of it. . . .

Notes

1. What do you think is the basis of the decision in *Errington*? Are the words 'acted on the promise' significant? (See promissory estoppel, at pages 139–62.) What difficulties would exist in using promissory estoppel as the basis of this rule?

2. McGovney (1914) 27 Harv L Rev 644, 659, suggested that there are two separate offers in the unilateral offeror's statement, namely an express offer to pay on performance of the act and an implied offer not to revoke once the offeree starts to perform. This implied offer is accepted by beginning performance, and if the offeror attempted to revoke he would be liable for breach of this promise. The problem with this analysis is that it would not prevent revocation but would only mean that damages would be payable for breach of the implied offer not to revoke. *Errington*, however, appears to be based on the view that revocation is not possible once the offeree has started to perform.

3. The other suggested explanation (*Pollock on Contract*) is based on the fact that in a unilateral contract performance of the act requested is both the

acceptance and the consideration. Acceptance is stated to occur when the offeree starts to perform so that revocation cannot occur, but the consideration is the completion of the act, and until that time no reward is payable. This is somewhat difficult to justify since at the point of starting to perform the offeree would also be bound to perform, which defeats the very nature of the unilateral contract.

4. Lord Denning may well have supported this approach. See his comments in *Ward* v *Byham* [1956] 2 All ER 318, page 116.

5. The crucial question is how the courts will determine when an offeree 'enters on performance of the act'. Will it cover preparation to perform, e.g., when walking shoes are purchased in preparation for the walk to York?

There is *obiter* support for the decision in *Errington* in the Court of Appeal's decision in the next case, although the approach taken appears to support McGovney's analysis.

Daulia v *Four Mill Bank Nominees Ltd*
[1978] 2 All ER 557 (CA)

The plaintiffs wished to purchase property. They were told by the defendants that if they attended the next day at 10 a.m. with a banker's draft for the deposit and a signed and engrossed contract, the defendants would exchange. The plaintiffs did this but the defendants refused to exchange because they had found another purchaser at an increased price. Held: the promise amounted to a unilateral offer, and since the plaintiffs had fulfilled the conditions they had accepted the offer.

GOFF LJ: . . . Was there a concluded unilateral contract by the defendants to enter into a contract for sale on the agreed terms?

The concept of a unilateral or 'if' contract is somewhat anomalous, because it is clear that, at all events until the offeree starts to perform the condition, there is no contract at all, but merely an offer which the offeror is free to revoke. Doubts have been expressed whether the offeror becomes bound so soon as the offeree starts to perform or satisfy the condition, or only when he has fully done so. In my judgment, however, we are not concerned in this case with any such problem, because in my view the plaintiffs had fully performed or satisfied the condition when they presented themselves at the time and place appointed with a banker's draft for the deposit and their part of the written contract for sale duly engrossed and signed, and the retendered the same, which I understand to mean proferred it for exchange. Actual exchange, which never took place, would not in my view have been part of the satisfaction of the condition but something additional which was inherently necessary to be done by the plaintiffs to enable, not to bind, the defendants to perform the unilateral contract.

Accordingly, in my judgment, the answer to the . . . question must be in the affirmative.

Even if my reasoning so far be wrong the conclusion in my view is still the same for the following reasons. Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one

important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.

Luxor (Eastbourne) Ltd v *Cooper*
[1941] AC 108 (HL)

The owners (two companies) orally agreed with the agent that if he introduced someone who purchased their cinemas for at least £185,000 they would each pay him £5,000 *on the completion of the sale*. He produced purchasers who were willing to pay the price but a sale did not take place. He brought an action claiming the £10,000 commission, or alternatively £10,000 in damages for breach of the implied term by which the owners undertook not to do anything to prevent him earning his commission. Held: as the commission was payable only on completion, the nature of the offer contemplated that the offeror reserved the right to revoke at any time before completion. The House of Lords refused, in the circumstances of the case, to imply a term that the owners had undertaken not to prevent the sale.

LORD RUSSELL: A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own; the law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. And (3) contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms, are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts, and contracts of employment by which one party binds himself to do certain work, and the other binds himself to pay remuneration for the doing of it.

I do not assent to the view, which I think was the view of the majority in the first *Trollope* case [1934] 2 KB 436, that a mere promise by a property owner to an agent to pay him a commission if he introduces a purchaser for the property at a specified price, or at a minimum price, ties the owner's hands, and compels him (as between himself and the agent) to bind himself contractually to sell to the agent's client who offers that price, with the result that if he refuses the offer he is liable to pay the agent a sum equal to or less than the amount of the commission either (a) on a quantum meruit or (b) as damages for breach of a term to be implied in the commission contract. As to the claim on a quantum meruit, I do not see how this can be justified in the face of the express provision for remuneration which the contract contains. This must necessarily exclude such a claim, unless it can (upon the facts of a particular case) be based upon a contract subsequent to the original contract, and arising from some conduct on the part of the principal.

As to the claim for damages, this rests upon the implication of some provision in the commission contract, the exact terms of which were variously stated in the course of the argument, the object always being to bind the principal not to refuse to complete the sale to the client whom the agent has introduced.

I can find no safe ground on which to base the introduction of any such implied term. Implied terms, as we all know, can only be justified under the compulsion of some necessity. No such compulsion or necessity exists in the case under consideration. The agent is promised a commission if he introduces a purchaser at a specified or minimum price. The owner is desirous of selling. The chances are largely in favour of the deal going through, if a purchaser is introduced. The agent takes the risk in the hope of a substantial remuneration for comparatively small exertion. In the case of the plaintiff his contract was made on September 23, 1935; his client's offer was made on October 2, 1935. A sum of 10,000*l.* (the equivalent of the remuneration of a year's work by a Lord Chancellor) for work done within a period of eight or nine days is no mean reward, and is one well worth a risk. There is no lack of business efficacy in such a contract, even though the principal is free to refuse to sell to the agent's client.

The position will no doubt be different if the matter has proceeded to the stage of a binding contract having been made between the principal and the agent's client. In that case it can be said with truth that a 'purchaser' has been introduced by the agent; in other words the event has happened upon the occurrence of which a right to the promised commission has become vested in the agent. From that moment no act or omission by the principal can deprive the agent of that vested right. . . .

Questions

1. On the facts, the House of Lords refused to imply a promise not to revoke (prevent the sale). Does this support McGovney's analysis and indicate that the implication of a promise will turn on what is contemplated by the wording of the offer?
2. Is Lord Russell suggesting that if the reward is great compared to the actual effort needed to earn it, then the offeree must take the risk of the offer being withdrawn?

C: COMMUNICATION OF REVOCATION IN UNILATERAL CONTRACTS

A unilateral offer *to unascertained offerees* can be revoked through the same channel as the offer was made.

Shuey v *United States*
23 L ed 697 (1875); 92 US 73 (US Supreme Court)

A proclamation dated 20 April 1865 had been published offering a reward of $25,000 for the apprehension of a particular criminal. On 24 November 1865, a notice revoking the offer was published. In 1866, the plaintiff discovered the criminal and informed the authorities. He was unaware that the offer of the reward had been revoked. Held: he had not actually apprehended the criminal as required by the terms of the offer. Strong J also made the following statement on the revocation:

STRONG J: The offer of a reward for the apprehension of Surratt was revoked on the twenty-fourth day of November, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published Proclamation, he should have known that it could be revoked in the manner in which it was made.

Question

What do you think would be covered by the expression 'withdrawn through the same channel in which it was made'? I advertise a reward in a particular national newspaper but I issue a notice of revocation in a different national newspaper — would this be revocation through the same channel?

3 CERTAINTY AND AGREEMENT MISTAKES

There are two separate issues to consider in this chapter: First, the agreement must be sufficiently certain in its terms for the court to enforce it. Secondly, certain types of mistake will 'negative consent' and so prevent a contract coming into existence

SECTION 1: CERTAINTY

Traditionally, the courts have considered that their function is limited to interpreting the words that the parties have used, so that if an agreement is uncertain the courts will not construct a binding contract for the parties.

A: VAGUENESS

Scammell & Nephew Ltd v *Ouston*
[1941] AC 251 (HL)

The respondents agreed to purchase a van on hire-purchase terms over a period of two years. However, before the hire-purchase agreement itself could be entered into, and before any hire-purchase terms could be settled, the appellants refused to proceed. When the respondents brought an action claiming damages for breach of contract, the appellants argued that there was no contract because the agreement was void for uncertainty. Held: there was no enforceable contract because the clause relating to the hire-purchase terms was too vague and uncertain and required further agreement to be reached between the parties.

VISCOUNT MAUGHAM: . . . In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to

hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract: see *Hillas & Co.* v *Arcos, Ld.* . . .

. . . [A] hire-purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth.

Bearing these facts in mind, what do the words as to 'hire-purchase terms' mean in the present case? They may indicate that the hire-purchase agreement was to be granted by the appellants or on the other hand by some finance company acting in collaboration with the appellants; they may contemplate that the appellants were to receive by instalments a sum of 168*l.* spread over a period of two years upon delivering the new van and receiving the old car, or, on the other hand, that the appellants were to receive from a third party a lump sum of 168*l.* and that the third party, presumably a finance company, was to receive from the respondents a larger sum than 168*l.* to include interest and profit spread over a period of two years. Moreover, nothing is said (except as to the two years period) as to the terms of the hire-purchase agreement, for instance, as to the interest payable, and as to the rights of the letter whoever he may be in the event of default by the respondents in payment of the instalments at the due dates. As regards the last matters there was no evidence to suggest that there are any well known 'usual terms' in such a contract; and I think it is common knowledge that in fact many letters though by no means all of them insist on terms which the legislature regards as so unfair and unconscionable that it was recently found necessary to deal with the matter in the recent Act entitled the Hire-Purchase Act, 1938.

These, my Lords, are very serious difficulties, and when we find as we do in this curious case that the trial judge and the three Lords Justices, and even the two counsel who addressed your Lordships for the respondents, were unable to agree upon the true construction of the alleged agreement, it seems to me that it is impossible to conclude that a binding agreement has been established by the respondents. . . .

Note

In a hire-purchase contract the supplier hires the goods to the customer, but on payment of a specified number of 'hire instalments' the hirer will have the option to buy the goods. There are many different types of hire-purchase agreement with different terms, and it was not clear what type of hire-purchase contract was envisaged here.

Where an agreement has been acted upon the courts are reluctant to declare it unenforceable and have sought to imply terms based on 'the parties' intentions'.

Hillas & Co. Ltd v *Arcos Ltd*
(1932) 147 LT 503 (HL)

By an agreement made on 21 May 1930, the plaintiffs agreed 'to buy 22,000 standards of softwood goods of fair specification over the season

1930'. Clause 9 also stated that 'the buyers shall also have the option of entering into a contract with the sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before 1 January 1931'. The option clause did not specify what qualities or type of goods were to be supplied. On 22 December 1930, the plaintiffs purported to exercise the option, but the defendants could not perform as they had already sold their supply to a third party. The plaintiffs sued for damages for breach of contract and the defendants argued that the agreement was void for uncertainty. Held: the agreement was binding and was not dependent on any future agreement for its validity.

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

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

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

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

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

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

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

Reading the document of the 21st May 1930 as a whole, and having regard to the admissible evidence as to the course of the trade, I think that upon their true construction the words 'of fair specification over the season, 1930,' used in connection with the 22,000 standards, mean that the 22,000 standards are to be satisfied in goods distributed over kinds, qualities, and sizes in the fair proportions having regard to the output of the season 1930, and the classifications of that output in respect of kinds,

qualities, and sizes. That is something which if the parties fail to agree can be ascertained just as much as the fair value of a property.

Notes

1. In *Hillas* v *Arcos* the contract had been performed and the option had been exercised by the plaintiffs. In *Scammell* v *Ouston* the respondents were asking the court to enforce an executory contract (one which had not been performed in any respect). In addition, in *Hillas* v *Arcos* the court was able to imply terms based on commercial practice, whereas in *Scammell* v *Ouston* there were no such common terms.

2. Lord Wright made clear how important it was to find the certainty that businessmen intended but had not included in their agreement:

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

B: SEVERING A MEANINGLESS CLAUSE

Nicolene Ltd v *Simmonds*
[1953] 1 All ER 822 (CA)

The acceptance of an offer to sell a quantity of steel bars stated that 'I assume that we are in agreement that the usual conditions of acceptance apply'. There were no 'usual conditions' operating between the parties. The defendant failed to deliver and the plaintiffs brought an action for breach of contract. Held: the clause specifying 'usual conditions' was meaningless and could be severed from the rest of the contract without impairing the sense or reasonableness of the contract as a whole.

DENNING LJ: In my opinion, a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, while still leaving the contract good, whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms. I take it to be clear law that, if one of the parties to a contract inserts into it an exempting condition in his own favour which the other side agrees and it afterwards appears that that condition is meaningless or is so ambiguous that no ascertainable meaning can be given to it, that does not render the whole contract a nullity. The only result is that the exempting condition is a nullity and must be rejected. It would be strange, indeed, if a party could escape every one of his obligations by inserting a meaningless exemption from some of them. . . .

C: INCOMPLETENESS

(a) Agreements to negotiate

Courtney & Fairbairn Ltd v *Tolani Brothers (Hotels) Ltd*
[1975] 1 All ER 716 (CA)

Tolani wished to develop a site and got in touch with Courtney, a property developer, who could obtain finance for the development. It was proposed that Courtney should introduce a financier and Tolani should employ the company which Courtney represented to construct the buildings. Courtney wrote to Tolani 'I would be very happy to know that, if my discussions and arrangements with interested parties lead to a financial arrangement acceptable to both parties you will be prepared to instruct your quantity surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise. (These would incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%) which, I am sure you will agree is, indeed reasonable'. Courtney introduced a financier and Tolani instructed his quantity surveyor to negotiate with Courtney on the price for building works, but no agreement could be reached and negotiations broke down. Courtney claimed there was an enforceable contract to employ them as builders. Held: there was no binding contract. This was only an agreement between the parties to negotiate about the price.

LORD DENNING MR: . . . I can find no agreement on the price or on any method by which the price was to be calculated. The agreement was only an agreement to 'negotiate' fair and reasonable contract sums. The words of the letter are 'your Quantity Surveyor to *negotiate* fair and reasonable contract sums in respect of each of the three projects as they arise.' Then there are words which show that estimates had not yet been agreed, but were yet to be agreed. The words are: 'These [the contract sums] would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%'. Those words show that there were no estimates agreed and no contract sums agreed. All was left to be agreed in the future. It was to be agreed between the parties themselves. If they had left the price to be agreed by a third person such as an arbitrator, it would have been different. But here it was to be agreed between the parties themselves.

Now the price in a building contract is of fundamental importance. It is so essential a term that there is no contract unless the price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves. In a building contract both parties must know at the outset, before the work is started, what the price is to be, or, at all events, what agreed estimates are. No builder and no employer would ever dream of entering into a building contract for over £200,000 without there being an estimate of the cost and an agreed means of ascertaining the price.

There is no machinery for ascertaining the price except by negotiation. In other words, the price is still to be agreed. Seeing that there is no agreement on so fundamental a matter as the price, there is no contract.

But then this point was raised. Even if there was not a contract actually to build, was not there a contract to negotiate? In this case Mr Tolani did instruct his quantity surveyor to negotiate, but the negotiations broke down. . . . If the law does not recognise a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No 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. It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law. . . .

Walford v *Miles*
[1992] 1 All ER 453 (HL)

The defendants, owners of a company, were negotiating for the sale of the company to the plaintiffs. On 17 March 1987, they had entered into an agreement whereby in return for the provision of a comfort letter from the plaintiffs' bank (indicating that loan facilities had been granted to cover the price of £2m), the defendants agreed to terminate any negotiations with third parties, not to entertain offers from any other prospective purchasers and to deal exclusively with the plaintiffs. Although the plaintiffs complied with their side of the agreement, the defendants withdrew from the negotiations and decided to sell to a third party.

The plaintiffs claimed damages for breach of this collateral agreement, which arguably was both a lock-out and a lock-in agreement. The Court of Appeal held that the collateral agreement alleged was only an agreement to negotiate and was therefore unenforceable. The plaintiffs appealed. Held (dismissing the appeal): although a lock-out agreement (not to negotiate with any other person) could be enforceable if it was made for good consideration and covered a fixed period of time, where, as here, it covered an unspecified period of time it was unenforceable. There could be no implied term to negotiate in good faith for a reasonable period of time.

LORD ACKNER: . . . I believe it is helpful to make these observations about a so-called 'lock-out' agreement. There is clearly no reason in English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees for a specified period of time not to negotiate with anyone except A in relation to the sale of his property. There are often good commercial reasons why A should desire to obtain such an agreement from B. B's property which A contemplates

purchasing may be such as to require the expenditure of not inconsiderable time and money before A is in a position to assess what he is prepared to offer for its purchase or whether he wishes to make any offer at all. A may well consider that he is not prepared to run the risk of expending such time and money unless there is a worthwhile prospect, should he desire to make an offer to purchase, of B, not only then still owning the property, but of being prepared to consider his offer. A may wish to guard against the risk that, while he is investigating the wisdom of offering to buy B's property, B may have already disposed of it or, alternatively, may be so advanced in negotiations with a third party as to be unwilling or for all practical purposes unable to negotiate with A. But I stress that this is a negative agreement – B, by agreeing not to negotiate for this fixed period with a third party, locks himself out of such negotiations. He has in no legal sense locked himself *into* negotiations with A. What A has achieved is an exclusive opportunity, for a fixed period, to try and come to terms with B, an opportunity for which he has, unless he makes his agreement under seal, to give good consideration.

The agreement alleged . . . contains the essential characteristics of a basic valid lock-out agreement, save one. It does not specify for how long it is to last. Bingham LJ [in the Court of Appeal] sought to cure this deficiency by holding that the obligation upon the respondents not to deal with other parties should continue to bind them 'for such time as is reasonable in all the circumstances'. He said:

> . . . the time would end once the parties, acting in good faith, had found themselves unable to come to mutually acceptable terms . . . The defendants could not . . . bring the reasonable time to an end by procuring a bogus impasse, since that would involve a breach of the duty of reasonable good faith which parties such as these must, I think, be taken to owe to each other.

However, as Bingham LJ recognised, such a duty, if it existed, would indirectly impose upon the respondents a duty to negotiate in good faith. Such a duty, for the reasons which I have given [see extract below] cannot be imposed. . . .

Note

It was also held that: any lock-in agreement (to negotiate only with a particular party) was unenforceable because it was inherently uncertain (approving *Courtney & Fairbairn Ltd* v *Tolani Bros (Hotels) Ltd*, page 68). The argument that it was necessary to imply a term that the defendants were obliged to negotiate in good faith and only terminate the agreement for subjectively assessed 'proper reasons', was rejected.

Lord Ackner said (at pp. 460–1 of the report):

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own

interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. [Counsel for the plaintiffs] of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.

Question
Do you agree with Lord Ackner's assertion that parties in negotiations are in an adversarial position?

Notes
1. See Brown [1992] JBL 353, Buckley (1993) 6 JCL 58 and Neill (1992) 108 LQR 405.
2. The House of Lords firmly rejected any suggestion of a duty to negotiate in good faith in English Law. Although a distinction was drawn between an obligation to use best endeavours and to negotiate in good faith, that distinction was not explained.
3. The decision of the Court of Appeal in *Pitt* v *PHH Asset Management Ltd* [1993] 4 All ER 961, is an example of an enforceable lock-out agreement for good consideration because the duration of the agreement was fixed at 14 days. This may indicate that the fixed period will itself need to be fairly short. As on the facts of *Pitt*, this device may prove popular with prospective purchasers of land who fear that they may be 'gazumped' and seek some protection. However, if there is a breach of an enforceable lock-out agreement it seems that the remedy will be damages, so that the device will not secure the eventual purchase of that property.

Question
Should an injunction be available to prevent a vendor from considering offers from third parties during the period of the lock-out agreement?

(b) The price

Sale of Goods Act 1979

8. Ascertainment of 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.

(3) What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Supply of Goods and Services Act 1982

15. Implied term about consideration

(1) Where, under a contract for the supply of a service, the consideration for the service is not determined by the contract, left to be determined in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

Note

If the contract provides a mechanism for fixing the price but it has not been implemented, s. 8(2) of the Sale of Goods Act 1979 will not allow the implication of a reasonable price.

May and Butcher Ltd v *R*
[1934] 2 KB 17n (HL)

The parties entered into a contract under which the Government were to sell 'the whole of the tentage which might become available in the UK for disposal up to 31 March 1923'. The relevant terms were:

> (3) The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission. . . .
>
> (10) It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889.

The appellants argued that the agreement should be construed as an agreement to sell at a fair or reasonable price, or alternatively at a price to be fixed under the arbitration clause in the agreement. Held: as there was no agreement on these matters, there was no concluded contract.

VISCOUNT DUNEDIN: To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. In the system of law in which I was brought up, that was expressed by one of those

brocards of which perhaps we have been too fond, but which often express very neatly what is wanted: 'Certum est quod certum reddi potest.' Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract. It may be left to the determination of a certain person, and if it was so left and that person either would not or could not act, there would be no contract because the price was to be settled in a certain way and it has become impossible to settle it in that way, and therefore there is no settlement. No doubt as to goods, the Sale of Goods Act, 1893, says that if the price is not mentioned and settled in the contract it is to be a reasonable price. The simple answer in this case is that the Sale of Goods Act provides for silence on the point and here there is no silence, because there is a provision that the two parties are to agree. . . . Here there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, or it might have been quite good if it was said that it was to be settled by arbitration under the Arbitration Act so as to bring in a material plan by which a certain person could be put in action. The question then arises, has anything of that sort been done? I think clearly not. The general arbitration clause is one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word can this be described as a dispute arising between the parties; it is a failure to agree, which is a very different thing from a dispute.

Note

Where the price is to be fixed by agreement between the parties, it may make a difference that the agreement has been executed.

Foley v *Classique Coaches Ltd*
[1934] 2 KB 1 (CA)

The defendants entered into an agreement to purchase all their petrol requirements from the plaintiff 'at a price to be agreed by the parties in writing and from time to time'. There was also an arbitration clause should disputes arise. After the defendants had purchased their petrol from the plaintiff for three years, the defendants purported to repudiate the agreement on the ground that there was no agreement in writing as to the price. Held: the agreement was valid and binding, and if any dispute arose as to the reasonable price, the parties had provided for it to be determined by arbitration. After considering *May & Butcher* v *R* and *Hillas* v *Arcos*, Scrutton LJ continued:

SCRUTTON LJ: . . . In the present case the parties obviously believed they had a contract and they acted for three years as if they had; they had an arbitration clause which relates to the subject-matter of the agreement as to the supply of petrol, and it seems to me that this arbitration clause applies to any failure to agree as to the price. By analogy to the case of a tied house there is to be implied in this contract a term that the petrol shall be supplied at a reasonable price and shall be of reasonable quality. For these reasons I think the Lord Chief Justice was right in holding that there

was an effective and enforceable contract, although as to the future no definite price had been agreed with regard to the petrol.

Note

Since the parties had acted on this agreement for three years, the court was unwilling to undo it simply to serve the commercial interests of the defendants who had obtained better terms elsewhere. In addition, the petrol agreement was linked to a contract for the sale of land by the plaintiff to the defendants and, arguably, was part of the consideration for that sale.

In *British Bank for Foreign Trade Ltd* v *Novimex Ltd* [1949] 1 All ER 155, an agreement provided that 'an agreed commission' would be payable if the plaintiffs put the defendants in direct contact with a supplier. The plaintiffs did this but were not paid any commission. The Court of Appeal held that the defendants were bound to pay a 'reasonable sum' and stressed the fact that the plaintiffs had executed their part of the agreement. Cohen LJ said (at p. 158 of the report):

> . . . if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then, although, while the matter is still executory there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum is to be paid. . .

Compare *May & Butcher Ltd* v *R* [1934] 2 KB 17, page 72 with the next case.

Sudbrook Trading Estate Ltd v *Eggleton*
[1983] 1 AC 444 (HL)

A lease granted the lessees the option of purchasing the reversion 'at such price not being less than £12,000 as may be agreed by two valuers, one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by . . . valuers'. The lessees exercised the option but the lessors refused to appoint a valuer and claimed that the option was void for uncertainty. Held: where machinery was in place which had broken down and that machinery was simply a means of ensuring that a fair price was paid, as opposed to an essential factor in determining the price, then the court could substitute its own machinery to ascertain a fair and reasonable price.

LORD FRASER OF TULLYBELTON: [The courts have] laid down the principle that where parties have agreed on a particular method of ascertaining the price, and

that method has for any reason proved ineffective, the court will neither grant an order for specific performance to compel parties to operate the agreed machinery, nor substitute its own machinery to ascertain the price, because either of these clauses would be to impose upon parties an agreement that they had not made. . . .

I recognise the logic of the reasoning which has led to the courts' refusing to substitute their own machinery for the machinery which has been agreed upon by the parties. But the result to which it leads is so remote from that which parties normally intend and expect, and is so inconvenient in practice, that there must in my opinion be some defect in the reasoning. I think the defect lies in construing the provisions for the mode of ascertaining the value as an essential part of the agreement. That may have been perfectly true early in the 19th century, when the valuer's profession and the rules of valuation were less well established than they are now. But at the present day these provisions are only subsidiary to the main purpose of the agreement which is for sale and purchase of the property at a fair or reasonable value. In the ordinary case parties do not make any substantial distinction between an agreement to sell at a fair value, without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in the way provided in these leases. The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential. . . .

The present case falls, in my opinion, into the latter category. Accordingly when the option was exercised there was constituted a complete contract for sale, and the clause should be construed as meaning that the price was to be a fair price. On the other hand where an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued, will have special knowledge relevant to the question of value, the prescribed mode may well be regarded as essential. Where, as here, the machinery consists of valuers and an umpire, none of whom is named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out.

LORD RUSSELL OF KILLOWEN (dissenting): Basically the assumption is made that the parties intended that the exercise of the option should involve payment of a 'fair price' or a 'fair value.' Of course parties to such a contract could in terms so agree, and I am not concerned to deny that in such a case a court could enforce the contract by ascertainment of a fair price or fair value, treating specific provisions in the contract for methods (which proved to be unworkable) of ascertaining that fair price or valuation as being inessential. But that is not this case. Why should it be thought that potential vendor and purchaser intended the price to be 'fair'? The former would intend the price to be high, even though 'unfairly' so. And the latter vice versa. Vendors and purchasers are normally greedy.

Questions

1. Is it possible to distinguish an agreement whereby the price will be fixed by the parties themselves and an agreement whereby the price will be fixed by valuers appointed by the parties?

2. Is it correct to say that the parties intended to sell and buy at a fair price? Whose judgment is the more realistic?

D: PAYING FOR PERFORMANCE UNDER AN UNCERTAIN CONTRACT

British Steel Corporation* v *Cleveland Bridge & Engineering Co. Ltd
[1984] 1 All ER 504

The defendants entered into negotiations with the plaintiffs whereby the plaintiffs would manufacture steel nodes. The defendants sent the plaintiffs a letter of intent stating their intention to place an order for the steel nodes, and proposed that the contract be on the defendants' standard terms (providing for unlimited liability of the plaintiffs in respect of consequential loss from late delivery). The letter of intent requested the plaintiffs to commence work immediately pending the issue of the official subcontract. The plaintiffs refused to contract on the proposed terms, and although detailed negotiations took place, no agreement was reached on the question of losses following late delivery and no formal contract was concluded. In the meantime the plaintiffs had gone ahead with the manufacture of the nodes as requested. All but one of the nodes had been delivered but the last one was delayed by an industrial dispute at the plaintiffs' plant. The defendants refused to pay and sought damages on the basis that there had been a breach of a binding contract. The plaintiffs sued for the value of the nodes on a *quantum meruit* basis, contending that there was no binding contract. Held: as the parties had not reached agreement it was impossible to say what the material terms were. Consequently there was no formal contract. Since there was no contract, the work performed under the letter of intent was not referable to any contractual terms as to payment and performance. However, as the defendants had requested the plaintiffs to deliver the nodes, and had therefore received a benefit at the expense of the plaintiffs, it would be unjust for them to retain that benefit without recompensing the plaintiff for the reasonable value of the nodes.

ROBERT GOFF J: No doubt it was envisaged by CBE at the time they sent the letter that negotiations had reached an advanced stage, and that a formal contract would soon be signed; but, since the parties were still in a state of negotiation, it is impossible to say with any degree of certainty what the material terms of that contract would be. I find myself quite unable to conclude that, by starting work in these circumstances, BSC bound themselves to complete the work. In the course of argument, I put to counsel for CBE the question whether BSC were free at any time, after starting work, to cease work. His submission was that they were not free to do so, even if negotiations on the terms of the formal contract broke down completely. I find this submission to be so repugnant to common sense and the commercial realities that I am unable to accept it. . . .

I therefore reject CBE's submission that a binding executory contract came into existence in this case.

In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter,

as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution.

Note

See Ball, 'Work Carried Out in Pursuance of Letters of Intent — Contract or Restitution' (1983) 99 LQR 572.

In *Regalian Properties plc* v *London Dockland Development Corp* [1995] 1 All ER 1005, Rattee J held that there could be no recovery of pre-contractual expenses when a contract did not result between the parties. By using the expression 'subject to contract' in their negotiations the parties had accepted that any pre-contract costs were incurred at that party's own expense. There could also be no recovery on a quantum meruit since, (distinguishing *BSC* v *Cleveland Bridge & Engineering*), the costs that Regalian (a property development company) wanted to recover were costs it had incurred for the purpose of putting itself into a position where it could obtain and perform a proposed contract to build, namely professional fees, site investigations and detailed costings. They were not costs incurred 'by way of accelerated performance of the anticipated contract at the request of LDDC'. (See McKendrick [1995] RLR 100.)

SECTION 2: AGREEMENT MISTAKES

A mistake may occur which will 'negative consent' and prevent agreement. Traditionally, there are two categories of agreement mistakes relating to contractual formation: mutual mistakes (where the parties are at cross purposes) and unilateral mistake (where one party is mistaken and the other knows or ought to know this).

A: MUTUAL MISTAKE

Raffles v *Wichelhaus*
(1864) 2 H & C 906; 159 ER 375 (ExD)

Agreement was reached at Liverpool that the plaintiff should sell the defendants 125 bales of Surat cotton to arrive ex *Peerless* from Bombay. However, there were two ships called *Peerless* sailing from Bombay; one sailed in October and the other sailed in December. The plaintiff brought an action against the defendants for refusing to take delivery of the goods which were shipped on the *Peerless* leaving in December. The defendants argued that there was a latent ambiguity in the contract (i.e., one which does not appear on the face of the contract) and that they should be allowed to adduce evidence of their intention. The defendants alleged that

they understood the ship in the agreement to be the ship sailing in October. The Court found for the defendants. However, as no detailed judgment was given, the only indications of the reasoning underlying this decision must be sought in the questions put to counsel.

. . . Milward, in support of the demurrer [for the plaintiff]. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the *Peerless*. The words 'to arrive ex *Peerless*,' only mean that if the vessel is lost on the voyage, the contract is to be at an end. [Pollock CB It would be a question for the jury whether both parties meant the same ship called the *Peerless*.] That would be so if the contract was for the sale of a ship called the *Peerless*; but it is for the sale of cotton on board a ship of that name. [Pollock CB The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A, that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other *Peerless*. [Martin B It is imposing on the defendant a contract different from that which he entered into. Pollock CB It is like a contract for the purchase of wine coming from a particular estate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [Pollock CB One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea [for the defendants]. There is nothing on the face of the contract to shew that any particular ship called the *Peerless* was meant; but the moment it appears that two ships called the *Peerless* were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of shewing that the defendant meant one *Peerless*, and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract. He was then stopped by the Court.

Notes

1. It appears that the court treated the ship to be used as a term of the contract, and that performance could not be achieved by shipment on a different vessel. Is it correct to argue that this was part of the agreed means of performance?

2. The decision may be limited to the fact that the defendants were allowed to adduce evidence of their intentions due to the latent ambiguity (as an exception to the parol evidence rule, see page 244). It is not clear whether the court accepted the argument that there was no agreement because of the mistake.

3. Although reference is made to the subjective approach to contract formation, the facts of the case can be used to illustrate an objective approach. Having allowed the introduction of evidence of each party's intentions, it would be for the jury to decide which party's interpretation was the more reasonable. If this could not be resolved because the agreement was totally ambiguous, then the mistake would prevent the existence of a contract.

(This case is discussed by Grant Gilmore, *The Death of Contract*, pp. 35–44.)

Scriven Brothers & Co. v *Hindley*
[1913] 3 KB 564

The plaintiffs instructed an auctioneer to sell a number of bales of hemp and of tow. The goods were described in the auctioneer's catalogue as so many bales in different lots with the same shipping marks. However, the catalogue did not indicate that some were hemp and some were tow, although it was extremely rare for different commodities to bear the same shipping marks. The defendants' manager examined only a sample, which was hemp. When the lots of tow were put up for sale the defendants successfully bid for them at a price which was extravagant for tow. The plaintiffs sued for the price of the tow and the defendants alleged a mistake as to the subject matter of the proposed contract. The jury found as facts that the auctioneer intended to sell tow and the defendants intended to bid for hemp. Held: the parties were never *ad idem* as to the subject matter of the proposed sale, so that there was no contract and the defendants did not have to pay the price. The judge (A. T. Lawrence J) appears to have been influenced by the fact that the auctioneers had contributed to the mistake by not identifying the individual lots, and therefore the plaintiffs should not benefit from their agent's mistake. The defendant buyer owed no duty to inspect lots that he did not wish to purchase.

Question
Is this a case of unilateral mistake, in that the auctioneer ought to have known of the mistake because it was unusual for different lots to bear the same shipping marks?

Tamplin v *James*
(1880) 15 ChD 215

Property was sold as 'All that inn with the brewhouse, outbuildings and premises known as *The Ship* together with the saddler's shop and premises adjoining thereto, situated at N., Nos 454 and 455 on the tithe map'. Plans of Nos. 454 and 455 were available for inspection in the sale room. At the back of the property there were two pieces of garden occupied with the inn and saddler's shop which were not owned by the vendor and not included in the plans as part of the land for sale. The defendant knew about the occupation of the pieces of garden and purchased the property, without checking the plan, in the belief that the property purchased included the two pieces of garden. Baggallay LJ and, on appeal, the Court of Appeal held: the defendant could not resist an order of specific performance of the sale on the ground of mistake.

BAGGALLAY LJ: It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the Defendant has entered into it under

a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the Plaintiff (I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud), or where from the ambiguity of the agreement different meanings have been given to it by the different parties. . . . But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. . . .

Court of Appeal
(1880) 15 ChD 219

JAMES LJ: . . . If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all,' or, 'I thought it contained 100 acres and it only contains eighty.' It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a Defendant has escaped on the ground of a mistake not contributed to by the Plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster* v *Cecil* (1861) 30 Beav 62 is a good instance of that. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the Defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

Note
The argument that the parties were at cross purposes and therefore no agreement resulted cannot be used by a party whose own interpretation is not a reasonable one. The defendant here had been reckless and could not be allowed to avoid the contract based upon his subjective intention.

B: UNILATERAL MISTAKE

If there is a mistake by one party as to a *term* of the contract, and the other party knew or ought to have realised, then there will be no binding contract. See *Hartog* v *Colin & Shields* [1939] 3 All ER 566, at page 20, where Singleton J held that the plaintiff must have realised that a mistake was made in the offer and therefore there was no binding contract. The offeree could not be allowed to 'snap up' the offeror's mistake.

However, if it is not a mistake relating to a term of the contract but concerns a 'collateral' matter (Adams & Brownsword, *Understanding Contract Law*, 2nd edn, p. 73) or a matter relating to a quality of the subject matter,

then it will not prevent agreement, and there is no requirement that the offeror correct the offeree's mistake where he knows it has been made.

Smith v *Hughes*
(1871) LR 6 QB 597 (QB)

The plaintiff offered to sell oats to the defendant and showed the defendant a sample. The defendant wrote to say that he would take the whole quantity of oats at 34s per quarter. However, he later refused to accept the oats on the ground that they were new and he thought he was buying old oats. The plaintiff only intended to offer to sell 'green' oats and had no old oats to sell. The plaintiff brought an action for non-acceptance, and the defendant alleged that the plaintiff knew he required old oats as the defendant had expressly said that he was a buyer of 'good old oats'. The appeal concerned the correctness of the judge's direction to the jury. The judge had left two questions to the jury:

(1) Had the word 'old' been used by the plaintiff or the defendant in making the contract? If so, they had to return a verdict for the defendant. However, if they thought it had not been so used, then the second question had to be considered.

(2) Was the evidence that the plaintiff believed the defendant to believe that he was contracting for old oats? If yes, then the verdict was to be for the defendant, but if the evidence was that the plaintiff did not have such a belief, then they would find for the plaintiff. Held: the Court found that there had been a misdirection on the second question and ordered a new trial.

COCKBURN CJ: It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury — or at all events of some of them — may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not. . . .

I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty — as where, for instance, an article is ordered for a specific purpose — and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule caveat emptor applies. If he gets the article he

contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception. He has himself to blame. The question is not what a man of scrupulous morality or nice honour would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding. . . .

Now, in this case, there was plainly no legal obligation in the plaintiff in the first instance to state whether the oats were new or old. He offered them for sale according to the sample, as he had a perfect right to do, and gave the buyer the fullest opportunity of inspecting the sample, which, practically, was equivalent to an inspection of the oats themselves. What, then, was there to create any trust or confidence between the parties, so as to make it incumbent on the plaintiff to communicate the fact that the oats were not, as the defendant assumed them to be, old oats? If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was selling the oats as old oats, the case would have been wholly different; or even if he had said anything which shewed that he was not acting on his own inspection and judgment, but assumed as the foundation of the contract that the oats were old, the silence of the seller, as a means of misleading him, might have amounted to a fraudulent concealment, such as would have entitled the buyer to avoid the contract. Here, however, nothing of the sort occurs. The buyer in no way refers to the seller, but acts entirely on his own judgment.

It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound; and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound one, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel.

The result is that, in my opinion, the learned judge of the county court was wrong in leaving the second question to the jury, and that, consequently, the case must go down to a new trial.

Notes

1. The parties had agreed the terms for the sale and purchase of the oats, and the question of the age had not been mentioned and as such was a

'collateral' matter. Consequently, unlike the mistake in *Hartog* v *Colin & Shields*, this was not a true agreement mistake since it did not relate to offer and acceptance and did not prevent agreement.

2. Brownsword, 'New Note on the Old Oats' (1987) 131 SJ 384, argues that this case supports the principle that a party will not easily be relieved of a bad bargain. If the buyer wanted old oats he should have ensured that he bought old oats. Any other conclusion would encourage imprudent conduct by buyers.

C: UNILATERAL MISTAKE AS TO IDENTITY

One party (commonly termed 'the rogue') may misrepresent his or her identity in order to persuade the other contracting party to contract or allow him or her to take away goods on credit. In the majority of situations the rogue will then sell the goods to an innocent third party.

The mistaken party will normally have to seek to recover the goods and damages for conversion from the innocent third party. This is only possible if the contract is void for mistake as to identity so that the rogue did not acquire any title to pass on.

The courts have been faced with the difficult task of deciding which of two innocent parties should suffer because of the fraud of a third. Since the consequences for the innocent third party are so harsh, the law has sought to protect that party by holding that the contract is *voidable* for the misrepresentation as to identity; and since the right to rescind is lost when an innocent third party purchases the goods, the goods cannot be recovered from the innocent third party (see Sale of Goods Act 1979, s. 23).

In order to show that the contract is void for mistake as to identity, certain matters must be established.

(a) The mistaken party intended to deal with another existing entity

King's Norton Metal Co. Ltd v *Edridge Merrett & Co. Ltd*
(1897) 14 TLR 98 (CA)

The plaintiffs received a letter purporting to come from Hallam & Co. in Sheffield. The letter heading depicted a large factory with a number of chimneys, and included a statement that the company had depots and agencies at Belfast, Lille and Ghent. Hallam & Co. requested a quotation for brass rivet wire, which the plaintiffs sent. Hallam & Co. then sent a written order for the goods. The goods were dispatched to them but never paid for. A rogue named Wallis had in fact fraudulently used the name Hallam & Co. to obtain the goods, and had then sold the goods to the defendants who were innocent purchasers. The plaintiffs brought a damages action for conversion of the wire and alleged that they intended to deal only with Hallam & Co. and had never heard of Wallis. Held: this was not a case of mistaking one person for another because there was only one

person, and the plaintiffs intended to deal with the writer of the letters whoever it was.

The report refers to the judgment of A. L. Smith LJ.

. . . The question was, With whom, upon this evidence, which was all one way, did the plaintiffs contract to sell the goods? Clearly with the writer of the letters. If it could have been shown that there was a separate entity called Hallam and Co. and another entity called Wallis then the case might have come within the decision in *Cundy* v *Lindsay* (1878) 3 App Cas 459. In his opinion there was a contract by the plaintiffs with the person who wrote the letters by which the property passed to him. There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him.

Notes

1. Hall (1995) 24 Anglo-Am L Rev 493, 505, argues that there is 'no good reason to distinguish the case where a man acts under an alias and that where there is a second identifiable person. In both cases the mistaken party believes the person before him is some person other than the one whom he really is'.

2. Counsel for the plaintiffs expressly relied upon the fact that Hallam & Co. were represented as being an international company in arguing that the plaintiffs intended to deal only with the company. This amounts to a mistake as to 'attributes' in that the plaintiffs intended to send goods on credit to the company only because they thought the company was creditworthy. They made an error of judgment which should not negative consent.

Cundy v *Lindsay*
(1878) 3 App Cas 459 (HL)

The plaintiffs, linen manufacturers in Belfast, received a written order for handkerchiefs from a rogue, Blenkarn, who gave his address as 37 Wood Street, Cheapside. The name was written to appear as 'Blenkiron & Co.' which was a highly respected firm carrying on business at 123 Wood Street, Cheapside. The plaintiffs had heard of Blenkiron & Co.'s reputation, although they did not know the number in Wood Street from which they carried on business. The plaintiffs sent the goods on credit to 'Messrs Blenkiron & Co., 37 Wood Street'. They were never paid. Blenkarn sold the goods to bona fide purchasers who included the defendants. The plaintiffs brought an action against the defendants for unlawful conversion of the handkerchiefs, which meant that they had to establish that the defendants had not obtained title to them. Held: the contract was void for mistake as to identity.

LORD CAIRNS LC: . . . Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the meantime, Blenkarn might have conveyed a good title for valuable consideration to the present Appellants.

. . . The principal parties concerned, the Respondents and Blenkarn, never came in contact personally — everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the Respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the Respondents; that by all those means he led, and intended to lead, the Respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Co., doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

If that is so, what is the consequence? It is that Blenkarn — the dishonest man, as I call him — was acting here just in the same way as if he had forged the signature of Blenkiron & Co., the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself but, the firm of Blenkiron & Co. Now, my Lords, stating the matter shortly in that way, I ask the question, how is it possible to imagine that in that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Co. of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case namely in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the Respondents, and the title which was attempted to be given to the Appellants was a title which could not be given to them.

Notes

1. This is one of the few cases where the court was prepared to find the contract void so that the innocent third party was the loser.

It appears to have been important on the facts that the plaintiffs knew of the existence of Blenkiron & Co. so that they were able to show they had mistaken one existing entity for another.

2. The plaintiffs must also show that they regarded the identity of the other contracting party as vitally important (see page 86). In postal contracts, where an identity and address must be given, it will be easier to establish the relevance of identity to the decision to contract.

3. In face-to-face contracts, reasonable steps must be taken to verify an identity. This does not appear to be a requirement for postal contracts. This is probably because in the nineteenth century it would be commercially impracticable to have to ascertain whether an order really was sent by the purported sender. It must be questioned whether this is still the case in this age of instantaneous communications.

Question
Did the plaintiffs send the goods because they thought that the buyers were a highly respected firm and would pay for the goods, i.e., was it a mistake as to attributes?

(b) The mistaken party regarded the identity of the other contracting party as crucially important

In *Boulton* v *Jones* (1857) 2 H & N 564, 157 ER 232, the defendant had sent a written order for leather hose to Brocklehurst because he had a set-off with him. Unknown to the defendant, the plaintiff had bought Brocklehurst's business and stock on that day. The plaintiff supplied the goods without indicating the change of ownership to the plaintiff. The Court of Exchequer held that this was a contract which could only be made with Brocklehurst and which therefore was void for mistake as to identity. (The plaintiff was Brocklehurst's former foreman who must have known of the set-off and that the defendant did not want to contract with him.)

In cases *inter praesentes* (face to face) there is a presumption of an intention to contract with the person who is present.

> [T]he no contract situation, as opposed to a voidable contract, only arises if it is fundamental to the contract that one party to the contract should be who he says that he is. That is easier to establish where contracts are made entirely by documents and is less easy to establish in an *inter praesentes* position. (*Citibank NA* v *Brown Shipley & Co. Ltd* [1991] 2 All ER 690 per Waller J at p. 700 of the report.)

The actual decision to sell does not normally rest on the question of the identity of the buyer, although the decision to allow the goods to be taken on credit will often be influenced by the attributes of the buyer.

Phillips* v *Brooks Ltd
[1919] 2 KB 243

A man called North had entered the plaintiff's jewellery shop and asked to see some pearls and a ring. He selected pearls at a price of £2,550 and a ring at the price of £450. He wrote out a cheque for £3,000, saying, 'You see who I am, I am Sir George Bullough', and he gave an address in St James's Square. The plaintiff knew there was such a person and, having checked the address in a directory, asked the man if he would like to take the articles with him. The man replied that he would like to take the ring with him because it was his wife's birthday the following day. The cheque

was dishonoured, but in the meantime North had pledged the ring with the defendants — pawn brokers who acted without notice. The plaintiff sued the defendants for the return of the ring (or its value) and damages for its detention. Held: the plaintiff intended to contract, and did contract, with the person in the shop. The mistake related to allowing the goods to be taken away on credit.

HORRIDGE J: . . . I have carefully considered the evidence of the plaintiff, and have come to the conclusion that, although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop, and who was not Sir George Bullough, but a man of the name of North, who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough. . . . The following expressions seem to me to fit the facts in this case: 'The minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell.' . . .

Notes

1. It has been argued that the sale in the shop had been concluded before there was any mention of Sir George Bullough (see Viscount Haldane in *Lake* v *Simmons*, page 93) so that the mistake did not induce the contract. (Other reports of this case, e.g., 88 LJKB 952, suggest that North identified himself as Sir George Bullough as soon as he entered the shop.)

2. There is one established exception where, even in a face-to-face contract the mistaken party will be able to prove that the identity of the other party was vital. This is where he wishes to contract with a company and contracts with a person whom he mistakenly thinks is acting on behalf of that company.

Hardman v *Booth*
(1863) 1 H & C 803; 158 ER 1107 (ExD)

The plaintiffs intended to sell cloth to Thomas Gandell & Sons. They negotiated at the firm's offices with Edward Gandell whom they believed to be acting for the firm. In fact, he had no such authority. An order was placed and sent to the firm's place of business, but Edward Gandell intercepted the goods on arrival and sold them to the defendant. Held: there was no contract since the plaintiffs intended to contract only with Thomas Gandell & Sons and they mistakenly thought that Edward Gandell was the firm's authorised representative.

Ingram v *Little*
[1961] 1 QB 31 (CA)

The three elderly plaintiffs, the joint owners of a car, advertised it for sale. A rogue, introducing himself as Hutchinson, offered to buy it. When he

produced his cheque book to pay, the plaintiffs told him that they expected cash and were not prepared to accept payment by cheque. The rogue then said he was P. G. M. Hutchinson, a reputable businessman who lived at Stanstead House, Stanstead Road, Caterham, and that he had business interests in Caterham. The plaintiffs had never heard of this person but one of them slipped out, went to the post office and, on checking the telephone directory, ascertained that there was a P. G. M. Hutchinson living at that address. The plaintiffs, believing the rogue was this person, let him have the car in exchange for the cheque. He was not the real P. G. M. Hutchinson. The rogue's cheque was not met but meanwhile, the rogue had sold the car to the defendant who bought in good faith. The plaintiffs sought the return of the car from the defendant, or alternatively damages for its conversion. Held: (Devlin LJ dissenting) since the plaintiffs had made an offer to the real P. G. M. Hutchinson, the rogue could not accept it.

SELLERS LJ: It [*Phillips* v *Brooks Ltd* [1919] 2 KB 243] is not an authority to establish that where an offer or acceptance is addressed to a person (although under a mistake as to his identity) who is present in person, then it must in all circumstances be treated as if actually addressed to him. I would regard the issue as a question of fact in each case depending on what was said and done and applying the elementary principles of offer and acceptance . . .

The question in each case should be solved, in my opinion, by applying the test, which Slade J applied, 'How ought the promisee to have interpreted the promise' in order to find whether a contract has been entered into. . . .

Phillips v *Brooks Ltd* [1919] 2 KB 243 is the closest authority on which the defendant relies. Once that is distinguished on its facts, without going so far as to say it is wrong, authority leans strongly in favour of the judgment appealed from.

Cundy v *Lindsay* (1878) 3 App Cas 459, on the findings of the Court of Appeal and the House of Lords, was to the same effect as the present case. The plaintiffs intended to sell to Blenkiron & Co. but Blenkarn fraudulently assumed the position of the buyer. Therefore, an offer to sell to Blenkiron & Co. was knowingly 'accepted' by Blenkarn and there was no contract.

. . . There is a difference between the case where A makes an offer to B in the belief that B is not B but is someone else, and the case where A makes an offer to B in the belief that B is X. In the first case B does in fact receive an offer, even though the offeror does not know that it is to B he is making it, since he believes B to be someone else. In the second case, A does not in truth make any offer to B at all; he thinks B is X, for whom alone the offer is meant. There was an offer intended for and available only to X. B cannot accept it if he knew or ought to have known that it was not addressed to him.

PEARCE LJ: I agree. The question here is whether there was any contract, whether offer and acceptance met. . . .

The real problem in the present case is whether the plaintiffs were in fact intending to deal with the person physically present, who had fraudulently endowed himself with the attributes of some other identity, or whether they were intending only to deal with that other identity. If the former, there was a valid but voidable contract and the property passed. If the latter, there was no contract and the property did not pass. . . .

An apparent contract made orally *inter praesentes* raises particular difficulties. The offer is apparently addressed to the physical person present. Prima facie, he, by

whatever name he is called, is the person to whom the offer is made. His physical presence identified by sight and hearing preponderates over vagaries of nomenclature. 'Praesentia corporis tollit errorem nominis' said Lord Bacon (*Law Tracts* (1737), p. 102). Yet clearly, though difficult, it is not impossible to rebut the prima facie presumption that the offer can be accepted by the person to whom it is physically addressed. To take two extreme instances. If a man orally commissions a portrait from some unknown artist who had deliberately passed himself off, whether by disguise or merely by verbal cosmetics, as a famous painter, the impostor could not accept the offer. For though the offer is made to him physically, it is obviously, as he knows, addressed to the famous painter. The mistake in identity on such facts is clear and the nature of the contract makes it obvious that identity was of vital importance to the offeror. At the other end of the scale, if a shopkeeper sells goods in a normal cash transaction to a man who misrepresents himself as being some well-known figure, the transaction will normally be valid. For the shopkeeper was ready to sell goods for cash to the world at large and the particular identity of the purchaser in such a contract was not of sufficient importance to override the physical presence identified by sight and hearing. Thus the nature of the proposed contract must have a strong bearing on the question of whether the intention of the offeror (as understood by his offeree) was to make his offer to some other particular identity rather than to the physical person to whom it was orally offered.

In our case, the facts lie in the debatable area between the two extremes. At the beginning of the negotiations, always an important consideration, the name or personality of the false Hutchinson were of no importance and there was no other identity competing with his physical presence. The plaintiffs were content to sell the car for cash to any purchaser. The contractual conversation was orally addressed to the physical identity of the false Hutchinson. The identity was the man present, and his name was merely one of his attributes. Had matters continued thus, there would clearly have been a valid but voidable contract.

I accept the judge's view that there was no contract at the stage when the man pulled out his cheque book. From a practical point of view negotiations reached an impasse at that stage. For the vendor refused to discuss the question of selling on credit. . . . Payment and delivery still needed to be discussed and the parties would be expecting to discuss them. Immediately they did discuss them it became plain that they were not *ad idem* and that no contract had yet been created. But, even if there had been a concluded agreement before discussion of a cheque, it was rescinded. The man tried to make Miss Ingram take a cheque. She declined and said that the deal was off. He did not demur but set himself to reconstruct the negotiations. For the moment had come, which he must all along have anticipated, as the crux of the negotiations, the vital crisis of the swindle. He wanted to take away the car on credit against his worthless cheque, but she refused. Thereafter, the negotiations were of a different kind from what the vendor had mistakenly believed them to be hitherto. The parties were no longer concerned with a cash sale of goods where the identity of the purchaser was prima facie unimportant. They were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance. . . .

Notes

1. Devlin LJ (dissenting) considered that the presumption in face-to-face contracts had not been rebutted and that this contract was voidable rather than void.

2. The majority appears to have considered that identity was crucial to the formation of the contract, since the plaintiffs would not have contracted without checking the given identity in the telephone directory. Does this mean that the majority considered that there was a term whereby the rogue promised that he was who he said he was, and that the contract was void because of this unilateral mistake as to a term? (See page 80 on unilateral mistakes as to terms.)
3. The decision may be explained on policy grounds. Normally the court is concerned to protect the innocent third-party purchaser, but in *Ingram* this third party was a car dealer, and the Court of Appeal may have felt that the old ladies were more in need of protection.
4. The policy issues behind the distinction between void and voidable contracts where identity is in issue were discussed by Devlin LJ.

DEVLIN LJ *dissenting*: There can be no doubt, as all this difference of opinion shows, that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval. But here, contrary to its habit, the common law, instead of looking for a principle that is simple and just, rests on theoretical distinctions. Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part? The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part. In saying this, I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law. I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

Lewis v *Averay*
[1972] 1 QB 198 (CA)

The plaintiff advertised his car for sale. A rogue came to see the car, introduced himself as 'Richard Green' and made the plaintiff believe that

he was the well-known film actor Richard Greene (of Robin Hood fame). The rogue said he would like to buy the car and take it away that night. He wrote out a cheque, signing it 'R. A. Green'. The plaintiff asked for proof that he was Richard Greene and the rogue showed him a pass to Pinewood Studios in the name of 'Richard A. Green' bearing a photograph of the rogue and an official stamp. The plaintiff was satisfied and let the rogue have the logbook and the car. The cheque had come from a stolen cheque book and was dishonoured. Meanwhile the rogue sold the car to Averay who bought it in good faith. The plaintiff brought an action against Averay for the return of the car, or its value and damages for conversion. Held: approving *Phillips* v *Brooks Ltd*, the presumption that the plaintiff had concluded a contract with the person physically present had not been rebutted. It was a mistake as to creditworthiness, rather than identity, which did not render the contract void. Averay had good title to the car.

LORD DENNING MR: The real question in the case is whether on May 8, 1969, there was a contract of sale under which the property in the car passed from Mr Lewis to the rogue. If there was such a contract, then, even though it was voidable for fraud, nevertheless Mr Averay would get a good title to the car. But if there was no contract of sale by Mr Lewis to the rogue — either because there was, on the face of it, no agreement between the parties, or because any apparent agreement was a nullity and void ab initio for mistake, then no property would pass from Mr Lewis to the rogue. Mr Averay would not get a good title because the rogue had no property to pass to him.

. . . Who is entitled to the goods? The original seller? Or the ultimate buyer? The courts have given different answers. In *Phillips* v *Brooks*, the ultimate buyer was held to be entitled to the ring. In *Ingram* v *Little* the original seller was held to be entitled to the car. . . .

It seems to me that the material facts in each case are quite indistinguishable the one from the other. In each case there was, to all outward appearance, a contract: but there was a mistake by the seller as to the identity of the buyer. This mistake was fundamental. In each case it led to the handing over of the goods. Without it the seller would not have parted with them.

. . . [I]t has been suggested that a mistake as to the identity of a person is one thing: and a mistake as to his attributes is another. A mistake as to identity, it is said, avoids a contract: whereas a mistake as to attributes does not. But this is a distinction without a difference. A man's very name is one of his attributes. It is also a key to his identity. If then, he gives a false name, is it a mistake as to his identity? or a mistake as to his attributes? These fine distinctions do no good to the law.

As I listened to the argument in this case, I felt it wrong that an innocent purchaser (who knew nothing of what passed between the seller and the rogue) should have his title depend on such refinements. After all, he has acted with complete circumspection and in entire good faith: whereas it was the seller who let the rogue have the goods and thus enabled him to commit the fraud. I do not, therefore, accept the theory that a mistake as to identity renders a contract void. I think the true principle is that which underlies the decision of this court in *King's Norton Metal Co. Ltd* v *Edridge Merrett & Co. Ltd* (1897) 14 TLR 98 and of Horridge J in *Phillips* v *Brooks* [1919] 2 KB 243, which has stood for these last 50 years. It is this: When two parties have come to a contract — or rather what appears, on the face of it, to be a contract — the fact that

one party is mistaken as to the identity of the other does not mean that there is no contract, or that the contract is a nullity and void from the beginning. It only means that the contract is voidable, that is, liable to be set aside at the instance of the mistaken person, so long as he does so before third parties have in good faith acquired rights under it.

Applied to the cases such as the present, this principle is in full accord with the presumption stated by Pearce LJ and also Devlin LJ in *Ingram* v *Little* [1961] 1 QB 31, 61, 66. When a dealing is had between a seller like Mr Lewis and a person who is actually there present before him, then the presumption in law is that there is a contract, even though there is a fraudulent impersonation by the buyer representing himself as a different man than he is. There is a contract made with the very person there, who is present in person. It is liable no doubt to be avoided for fraud, but it is still a good contract under which title will pass unless and until it is avoided. In support of that presumption, Devlin LJ quoted, at p. 66, not only the English case of *Phillips* v *Brooks*, but other cases in the United States where 'the courts hold that if A appeared in person before B, impersonating C, an innocent purchaser from A gets the property in the goods against B.' That seems to me to be right in principle in this country also.

In this case Mr Lewis made a contract of sale with the very man, the rogue, who came to the flat. I say that he 'made a contract' because in this regard we do not look into his intentions, or into his mind to know what he was thinking or into the mind of the rogue. We look to the outward appearances. On the face of the dealing, Mr Lewis made a contract under which he sold the car to the rogue, delivered the car and the logbook to him, and took a cheque in return. The contract is evidenced by the receipts which were signed. It was, of course, induced by fraud. The rogue made false representations as to his identity. But it was still a contract, though voidable for fraud. It was a contract under which this property passed to the rogue, and in due course passed from the rogue to Mr Averay, before the contract was avoided.

Though I very much regret that either of these good and reliable gentlemen should suffer, in my judgment it is Mr Lewis who should do so.

MEGAW LJ: For myself, with very great respect, I find it difficult to understand the basis, either in logic or in practical considerations, of the test laid down by the majority of the court in *Ingram* v *Little* [1961] 1 QB 31. That test is, I think, accurately recorded in the headnote, as follows:

> — where a person physically present and negotiating to buy a chattel fraudulently assumed the identity of an existing third person, the test to determine to whom the offer was addressed was how ought the promisee to have interpreted the promise.

The promisee, be it noted, is the rogue. The question of the existence of a contract and therefore the passing of property, and therefore the right of third parties, if this test is correct, is made to depend upon the view which some rogue should have formed, presumably knowing that he is a rogue, as to the state of mind of the opposite party to the negotiation, who does not know that he is dealing with a rogue.

. . . [I]n my view this appeal can be decided on a short and simple point.

. . . The well-known textbook *Cheshire and Fifoot on the Law of Contract* 7th ed. (1969), 213 and 214, deals with the question of invalidity of a contract by virtue of unilateral mistake, and in particular unilateral mistake relating to mistaken identity. The editors describe what in their submission are certain facts that must be established in order to enable one to avoid a contract on the basis of unilateral mistake by him as to the identity of the opposite party. The first of those facts is that at the time

when he made the offer he regarded the identity of the offeree as a matter of vital importance. To translate that into the facts of the present case, it must be established that at the time of offering to sell his car to the rogue, Mr Lewis regarded the identity of the rogue as a matter of vital importance. . . . the mistake of Mr Lewis went no further than a mistake as to the attributes of the rogue. It was simply a mistake as to the creditworthiness of the man who was there present and who described himself as Mr Green. . . .

Notes

1. In *Lewis* v *Averay*, the offer and acceptance had already taken place and identity was crucial only to the method of payment. It is arguable that in *Ingram* v *Little*, however, there was no contract until the plaintiffs had checked the buyer's identity.

This explanation would lead to fine distinctions as to whether a contract had already been concluded when the identity question was raised.

2. Lord Denning stressed the need to protect the innocent third party. He saw the third party as being more innocent than the seller, who he said had allowed the rogue to have the goods in the first place and had thus enabled the rogue to commit the fraud. Unlike the position in *Ingram* v *Little*, in *Lewis* v *Averay* the seller and innocent third party were on an equal footing.

3. The other factor which has influenced the courts has been the need to ensure the certainty of transactions so that an innocent third party need not find himself in the position of having to return the goods when he purchased in good faith.

It would help matters still further if contracts were always voidable in cases of mistake as to identity, as suggested by Lord Denning, since the present position in itself causes uncertainty.

4. In *Lewis* v *Averay* Lord Denning stated that there was no distinction between identity and attributes. Arguably a person's identity is made up of his attributes.

Lake v *Simmons*
[1927] AC 487 (HL)

A woman, Esme Ellison, who had previously bought some articles at the plaintiff's shop, induced the plaintiff to let her have possession of two pearl necklaces by fraudulently representing that she was the wife of Van der Borgh and that she wanted them for the purpose of showing them to her husband with a view to purchase. In fact she was not the wife of Van der Borgh and she disposed of the necklaces. The plaintiff claimed on his insurance policy, but the insurers pleaded an exemption clause stating that there would be no liability for any loss by theft or dishonesty by any customer in respect of goods which the plaintiff had entrusted to them. Held: the plaintiff had not entrusted necklaces to Ellison because he had not consented to *her* having possession of them. She was also not the customer in this transaction since the goods were entered in the plaintiff's books in the husband's name.

VISCOUNT HALDANE: Now it may well be that in this more general sense the appellant entrusted Esmé Ellison with the possession of the necklets. She may well have been his customer on other occasions. But on this particular occasion it is plain from his evidence and from his books that he did not look on her, but only on Mr Van der Borgh and the supposed Commander Digby, as the possible purchasing customers.

Esmé Ellison was a mere intermediary, little more than a porter, so far as any contract was concerned, a person entrusted with the possession for purposes which seem to fall short of all of those specified in the exception. She certainly got no property. Having regard to the circumstances that in contemplation of law she stole the necklets from the appellant, it is only in a qualified sense that she got even the possession. No doubt she got possession physically, but there was no mutual assent to any contract which would give her even the qualified proprietary right to hold it as a bailee proper. The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with the goods. He never intended to contract with the woman in question. It was by a deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. It was only on the footing and in the belief that she was Mrs Van der Borgh that he was willing to deal with her at all. In circumstances such as these, I think that there was no such consensus ad idem as, for example, Lord Cairns, in his judgment in *Cundy v Lindsay* (1878) 3 App Cas 459, declared to be requisite for the constitution of a contract. No doubt physically the woman entered the shop and pretended to bargain in a particular capacity, but only on the footing of being a different person from what she really was. There was never any contract which could afterwards become voidable by reason of a false representation made in obtaining it, because there was no contract at all, nothing excepting the result of a trick practised on the jeweller.

Citibank NA v *Brown Shipley & Co. Ltd*
[1991] 2 All ER 690

A rogue claiming to be a signatory on a company account held with Citibank telephoned Brown Shipley (the paying bank) and asked to buy foreign currency, which was to be paid for by means of a banker's draft made payable to the paying bank and drawn on the company's account at Citibank. The rogue then telephoned Citibank and requested the draft, which was handed to a person who was thought to be a messenger from the company in exchange for what was in fact a forged letter of authority. Before paying the rogue, the paying bank checked with Citibank that it was a genuine draft. The paying bank was then credited by Citibank. When the fraud was discovered, Citibank claimed damages from the paying bank for conversion of, and wrongful interference with, the banker's draft, which meant that they had to establish that the paying bank had received no title to it. Held: the question was which of the innocent parties should bear the loss resulting from the fraud; in the circumstances Citibank should. A contract existed whereby title passed directly to the paying bank and the rogue was a 'mere conduit' through whom title did not have to pass. His identity was not fundamentally important to the transfer of the draft.

WALLER J: . . . [I]t seems to me that the key lies in whether there was any authority to deliver the banker's drafts to Brown Shipley. The presumption is in favour of there being authority. The *Cundy* v *Lindsay* principle could be applied so as to negative that authority (as per *Lake* v *Simmonds* [sic]), but only if the precise identity of the bailee and possibly also the identity of the person to whom the banker's draft was to be delivered were mistaken and proved to be of fundamental importance. Neither Midland nor Citibank were under any mistake or misapprehension as to whom the draft was to be delivered. Furthermore the bailee who physically carried the draft was a messenger whose precise identity was unimportant. Even if it could be suggested that it is going too far to say his precise identity was unimportant, it seems to me that neither Citibank nor Midland have established to the degree required that it was fundamental to them that the bailee was a particular person about whom they were mistaken, as opposed to a person whose attributes did not include authority from their customer as they believed. Once there was authority, title to the banker's drafts was, as I see it, transmitted directly from Citibank or Midland to Brown Shipley, on the drafts becoming valid instruments as a result of delivery through whomever the messenger was.

My conclusion on the first question accordingly is that Brown Shipley did not convert the drafts by presenting them for payment.

Note

Waller J stated that in *Lake* v *Simmons*, page 93, the identity of the bailee was important since the necklaces would not have been entrusted to a postman or messenger. However, the identity of the bailee in *Citibank* was not important and the messenger was a 'mere conduit'. The only important identity was that of the paying bank, and no mistake had been made as to this. The mistake was a mistake as to attributes, i.e. whether the rogue had the authority of the customer.

SECTION 3: DOCUMENT MISTAKES

A: RECTIFICATION

The court may be asked to rectify a written document to reflect accurately what the parties in fact agreed. (This is an exception to the parol evidence rule, see page 244, since oral evidence is admissible to show the error in the written document.)

Frederick E. Rose (London) Ltd v *William H. Pim Junior & Co. Ltd* [1953] 2 All ER 739 (CA)

Buyers asked the plaintiffs to supply them with 'Moroccan horsebeans described as feveroles'. The plaintiffs did not know what feveroles were but were informed by the defendants that feveroles and horsebeans were the same thing. The plaintiffs entered into a contract with the defendants whereby the defendants were to supply them with 'horsebeans' which the plaintiffs would then sell to the buyers, both parties believing that feveroles were just horsebeans. In fact 'feveroles' were a superior type of horsebean, and the buyers had claimed damages from the plaintiffs for not supplying 'feveroles'. The plaintiffs wanted to have their written contract with the

defendants rectified to read 'feveroles' (so that the defendants would have been in breach in supplying the wrong goods). Held: the Court of Appeal refused to rectify the agreement since the parties had agreed on the sale of horsebeans and the agreement correctly reflected this. The problem was that both parties mistakenly thought that horsebeans were feveroles (see page 435).

DENNING LJ: . . . Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice.

. . . There is a passage in *Crane* v *Hegeman-Harris Co. Inc.* ([1939] 1 All ER 664, at 'C'), which suggests that a continuing common intention alone will suffice, but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they *agreed something different*: see *Lovell & Christmas, Ltd* v *Wall* [1911] 104 LT 85, 88, per Lord Cozens-Hardy, MR, and ibid., 93, per Buckley, LJ; but not that they *intended* something different.

The present case is a good illustration of the distinction. The parties, no doubt, intended that the goods should satisfy the inquiry of the Egyptian buyers, namely, 'horsebeans described in Egypt as feveroles.' They assumed that they would do so, but they made no contract to that effect. Their agreement, as outwardly expressed, both orally and in writing, was for 'horsebeans'. That is all that the sellers ever committed themselves to supply, and all they should be bound to. There was, no doubt, an erroneous assumption underlying the contract — an assumption for which it might have been set aside on the ground of misrepresentation or mistake — but that is very different from an erroneous expression of the contract, such as to give rise to rectification.

Note

However, the Court of Appeal *Joscelyne* v *Nissen* [1970] 2 QB 86, made it clear that *Rose* v *Pim* was not authority for the fact that an antecedent complete concluded contract is required. Russell LJ stated that *Rose* v *Pim* 'only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties'.

Joscelyne v *Nissen*
[1970] 2 QB 86 (CA)

The plaintiff father and his daughter, the defendant, shared a house owned by the daughter. They agreed that the father was to transfer his car hire

business to his daughter, and in return the daughter was to pay him a weekly pension and pay certain household expenses such as gas, electricity and coal bills. The contract specified that she was to 'discharge all expenses in connection with the whole premise . . . and shall indemnify [the plaintiff] from and against any claim arising in respect of the same'. At first the defendant paid several of the household bills but then stopped paying. The plaintiff sought rectification of this contract to provide for the payment of gas, electricity and coal bills on the basis that this reflected what had been orally agreed between the parties during negotiations. At first instance the judge had found that although there was no complete concluded antecedent agreement, the agreement should be rectified. Held: dismissing the appeal, it was not necessary to find a concluded contract antecedent to the agreement. Rectification could be ordered as long as there was a common continuing intention (demonstrated by outward expression) regarding a particular provision.

Russell LJ relied on the following statement by Simonds J in *Crane* v *Hegeman-Harris Co. Inc.* [1939] 1 All ER 662, 664:

RUSSELL LJ: . . .

. . . I am clear that I must follow the decision of Clauson J, as he then was in *Shipley Urban District Council* v *Bradford Corpn.* [1936] 1 Ch 375, the point of which is that, in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties. That is what the judge decided, and, as I say, with his reasoning I wholly concur, and I can add nothing to his authority in the matter, except that I would say that, if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law, and, until a higher court tells me it is the law, I shall continue to exercise the jurisdiction which Clauson J, as I think rightly, held might be entertained by this court.

Secondly, I want to say this upon the principle of the jurisdiction. It is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. That is particularly the case where one finds prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers. The assumption is very strong in such a case that the instrument does represent their real intention, and it must be only upon proof which Lord Eldon, I think, in a somewhat picturesque phrase described as 'irrefragable' that the court can act. I would rather, I think, say that the court can only act if it is satisfied beyond all reasonable doubt that the

instrument does not represent their common intention, and is further satisfied as to what their common intention was. For let it be clear that it is not sufficient to show that the written instrument does not represent their common intention unless positively also one can show what their common intention was. It is in the light of those principles that I must examine the facts of this somewhat complicated case.

In our judgment the law is as expounded by Simonds J in *Crane's* case with the qualification that some outward expression of accord is required. We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase 'convincing proof' without echoing an old-fashioned word such as 'irrefragable' and without importing from the criminal law the phrase 'beyond all reasonable doubt.' Remembering always the strong burden of proof that lies on the shoulders of those seeking rectification, and that the requisite accord and continuance of accord of intention may be the more difficult to establish if a complete antecedent concluded contract be not shown, it would be a sorry state of affairs if when that burden is discharged a party to a written contract could, on discovery that the written language chosen for the document did not on its true construction reflect the accord of the parties on a particular point, take advantage of the fact.

The contention in law for the daughter would, we apprehend, involve this proposition, that if all the important terms of an agreement were set out in correspondence with clarity, but expressly 'subject to contract,' and the contract by a slip of the copyist unnoticed by either party departed from what had been 'agreed,' there could not be rectification. . . .

Note

Rectification will, in general, be ordered only if the contractual document fails to record the intention of *both* parties. However, it is also available where the document does not accurately record the intentions of *one* of the parties and the other knew this and failed to draw attention to it.

Commission for the New Towns v *Cooper (GB) Ltd*
[1995] 2 All ER 929 (CA)

In 1986, the plaintiff's predecessor had made four agreements by deed with Edison-Halo Ltd (the tenant of commercial premises). The deeds concerned (i) building works (the plaintiff was to undertake specified repair work on the premises), (ii) a 'put' option, whereby the plaintiff agreed to take an assignment of the underlease without penalty if Edison gave notice of termination on the fifth anniversary of the deed, (iii) the 'larger premises' option, whereby Edison could at any time surrender the lease if it took on the lease of larger premises from the plaintiff, (iv) a 'side land' option, whereby the plaintiff granted an option enabling Edison to acquire the lease of an adjacent site. The right granted in (ii) expressly stated that it could not be assigned.

The defendant (CoopInd) acquired the unexpired residue of the underlease by assignment in December 1988. By 1990, the defendant was considering closing down its business on the site. However, since a substantial penalty would have been payable if the defendant had simply

surrendered the underlease, the defendant wished to obtain the 'put option' in the 1986 deed to enable it to surrender in 1991 without penalty. The defendant held a meeting with the plaintiff at which there was no mention of the 'put option'. Agreement was reached on terms whereby the defendant was to be treated 'in all respects as having the same rights and benefits under the original documentation' as Edison. Once this agreement was confirmed the defendant gave notice of its intention to exercise the 'put option' requiring the plaintiff to take the assignment of the underlease. The plaintiff denied having granted a 'put option' and sought rectification of the agreement. Held: on its construction what had been agreed did not extend to granting the defendant the 'put option'. On that basis it was not strictly necessary to consider the rectification issue, but the Court of Appeal did so.

STUART-SMITH LJ: . . . The commonest circumstance in which rectification is granted is where the written contract does not accurately record the parties' joint agreement. In other words there is a mistake common to both parties. In the case of unilateral mistake, that is to say where only one party is mistaken as to the meaning of the contract, rectification is not ordinarily appropriate. This follows from the ordinary rule that it is the objective intention of the parties which determines the construction of the contract and not the subjective intention of one of them. Also, it would generally be inequitable to compel the other party to execute a contract which he had no intention of making, simply to accord with the mistaken interpretation of the other party (see *Olympia Sauna Shipping Co. SA* v *Shinwa Kaiun Kaisha Ltd, President of India* v *Olympia Sauna Shipping Co. SA, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep 364 at 371 per Bingham J). But the court will intervene if there are—

> additional circumstances that render unconscionable reliance on the document by the party who had intended that it should have effect according to its terms. (See *Spry on Equitable Remedies* (4th edn, 1990) p. 599.)

The debate in this case turns on what amounts to unconscionable conduct. The judge held that nothing less than actual knowledge of MK's mistake was sufficient and although CoopInd's representatives suspected that they were mistaken, it was not proved that they actually did.

. . . [Counsel for the plaintiff] submits, even if there was no actual knowledge and no false representation, CoopInd were guilty of such sharp and unconscionable practice that rectification should be granted. [Counsel] relies upon a dictum of Buckley LJ in *Thomas Bates & Son Ltd* v *Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 at 1086, [1981] 1 WLR 505 at 515, where he said:

> Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies 'some measure' of sharp practice, so be it; but for my part I think that the doctrine is one which depends more on the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake.

. . . But [counsel for the defendant] submits that it is not open to the court to adopt this approach. Nothing short of actual knowledge of the mistake, which creates an

estoppel against the party with knowledge of the mistake or fraud, will suffice, though in this context fraud includes equitable fraud in the sense of undue influence of abuse of a fiduciary relationship. In support of this submission he cited the authority of this court in *Agip SpA* v *Navigazione Alta Italia SpA, The Nai Genova* [1984] 1 Lloyd's Rep 353. After reviewing *A Roberts & Co. Ltd* v *Leicestershire CC* [1961] 2 All ER 545, [1961] Ch 555, *Riverlate Properties Ltd* v *Paul* [1974] 2 All ER 656, [1975] Ch 133 and *Thomas Bates & Son Ltd* v *Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, which were all cases of actual knowledge of the mistake, Slade LJ, with whose judgment Oliver and Robert Goff LJJ agreed, said:

> One significant feature however is common to all of the *Roberts*, *Riverlate* and *Bates* decisions. In all the various formulations of the relevant principle in the judgments in those cases, none of the members of the respective Courts suggested that rectification can properly be granted on account of unilateral mistake unless the defendant had *actual knowledge* of the existence of the plaintiff's mistake at the time when the contract was signed. Since, in the present case, the judge has specifically found that the defendants were not aware of the mistake of IIP at the time of signature of the charter-parties, and there is no appeal against this finding, it is obvious that the plaintiffs, if they are to succeed on this appeal, must in some way succeed in persuading the Court to extend the frontiers of the circumstances in which rectification may be granted on the grounds of mere unilateral mistake beyond the frontiers established by any of the cases cited. The Court, therefore, must in my opinion proceed all the more cautiously before granting rectification of these two written instruments against defendants who at the time when the negotiations first ripened into a binding contract, intended to contract on the terms which were reflected in the written charter-parties and on no other terms. (See [1984] 1 Lloyd's Rep 353 at 361–362; Slade LJ's emphasis.). . . .

Slade LJ expressed his opinion in these terms (at 365):

> While it is not necessary to go so far for the purpose of this present decision, I might perhaps add that I strongly incline to the view that in the absence of estoppel, fraud, undue influence or a fiduciary relationship between the parties, the authorities do not in any circumstances permit the rectification of a contract on the grounds of unilateral mistake, unless the defendant had actual knowledge of the existence of the relevant mistaken belief at the time when the mistaken plaintiff signed the contract. In view of the drastic nature of such an order, so far as the non-mistaken defendant is concerned, the consequences of any such conclusion may not appear unduly harsh. I do not say that even where estoppel, fraud, undue influence or a fiduciary relationship exists rectification will necessarily be an available or appropriate remedy.

It is only with great diffidence that I venture to think that this may not be an exhaustive statement of the law, although it undoubtedly covers the majority of situations. But were it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable, and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient

for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended that B should put upon it. That is so here because, although on the assumption that CoopInd's construction is correct and the put option was included, the contract appeared to be a whole package, in truth CoopInd thought they were getting something for nothing.

(Evans and Farquharson LJJ agreed with this reasoning.)

Notes

1. It would appear that this apparent extension of rectification in the case of unilateral mistakes must be confined to cases where there is an intention to deceive.

2. Counsel for the plaintiff had also disputed the judge's finding that the defendant's representatives did not have actual knowledge of the mistake. Stuart-Smith LJ found that the judge at first instance had not considered the extended definition of actual knowledge given by Peter Gibson J in *Baden* v *Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (1982)* [1992] 4 All ER 161, 235. Peter Gibson J had included 'willfully shutting one's eyes to the obvious' (category (ii) actual knowledge) and 'willfully and recklessly failing to make such inquiries as an honest and reasonable man would make' (category (iii) actual knowledge). Stuart-Smith LJ concluded that:

> . . . In my judgment, it must have been plain that neither Mr Hill nor Mr Barton had any idea that they were dealing with the put option, far less agreeing to grant it to CoopInd. It did not suit CoopInd's plan, as the judge found, to draw attention to this or ask any questions about it. Their (CoopInd's representatives') conduct in raising the smokescreen in relation to the side land was dishonest and intended to deceive. If the question is posed as a jury question, I find it impossible to reach any other conclusion but that an honest and reasonable man would have mentioned the point expressly.
>
> . . . I am persuaded in this case that the judge misdirected himself as to what amounts to actual knowledge and that on his own findings, to which I have referred, the case falls within categories (ii) and/or (iii) of Peter Gibson J's analysis.

B: THE PLEA OF *NON EST FACTUM*

A person will be bound by a written document which he has signed, whether or not he has read or understood it (see *L'Estrange* v *F. Graucob Ltd* [1934] 2 KB 394, at page 247).

Where it is not possible to rely on misrepresentation or mistake, the plea of *non est factum* ('this is not my deed') may be a last resort. A successful plea renders the contract void so that a third party cannot acquire a good title under it. However, as innocent third parties may have relied to their detriment upon this signature as being binding, the plea has been very narrowly construed.

Gallie v *Lee (sub nom Saunders* v *Anglia Building Society)* [1971] AC 1004 (HL)

An elderly widow of 78 had a leasehold interest in a house. She knew her nephew wished to raise money on the house and that his business associate, Lee, was to assist him in obtaining this. The widow wanted to be sure that she could live in the house for the rest of her life. Lee asked her to sign a document, but she had broken her spectacles and could not read it. She asked what the document was and signed it when Lee told her that it was a deed of gift of the house to her nephew. In fact it was an assignment of the house to Lee for £3,000. Lee mortgaged the house for £2,000 to the building society (the innocent third party). When Lee defaulted on the mortgage instalments the building society sought possession of the house. The widow pleaded *non est factum* and asked for a declaration against the building society that the assignment was void. Held: the plea failed because the transaction she had entered into was not fundamentally different in substance from that which she had intended to enable the nephew to raise money on the security of the house. She had also been careless in signing the document.

LORD REID: The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not think he can be heard to say that he signed in reliance on someone he trusted. But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other

trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case. . . .

Finally, there is the question as to what extent or in what way must there be a difference between that which in fact he signed and that which he believed he was signing. In an endeavour to keep the plea within bounds there have been many attempts to lay down a dividing line. . . .

There must, I think, be a radical difference between what he signed and what he thought he was signing — or one could use the words 'fundamental' or 'serious' or 'very substantial.' But what amounts to a radical difference will depend on all the circumstances. If he thinks he is giving property to A whereas the document gives it to B, the difference may often be of vital importance, but in the circumstances of the present case I do not think that it is. I think that it must be left to the courts to determine in each case in light of all the facts whether there was or was not a sufficiently great difference. The plea *non est factum* is in a sense illogical when applied to a case where the man in fact signed the deed. But it is none the worse for that if applied in a reasonable way.

Note

The plea was also rejected by the Court of Appeal in the following case:

Norwich & Peterborough Building Society v ***Steed (No. 2)***
[1993] 1 All ER 330

The appellant, Steed, sought to rely on the plea of *non est factum* on the basis that he had executed a power of attorney in favour of his mother but, as a result of trickery, his mother had then transferred his house to his sister and her husband who had used the house as security for a loan on which they had defaulted. He alleged that his mother thought she was signing a document concerning her own affairs and did not know that she was signing a transfer of the property. She was therefore mistaken as to the essential character of the document signed. Held: the plea could not succeed.

SCOTT LJ: . . . Submissions on these lines . . . placed Mr Steed on a species of Morton's fork. Let it be supposed that Mrs Steed was a lady of sufficient general understanding and capability to be a suitable donee of the power of appointment. Why then did she not inform herself of the purport and effect of the transfer before signing it? . . . On the other hand, let it be supposed that she lacked ordinary competence and capacity. Lord Wilberforce [in *Saunders* v *Anglia BS*] referred to persons 'illiterate, or blind, or lacking in understanding'. If Mrs Steed falls into this category, what was Mr Steed about when he appointed her his attorney? The donor of a power of attorney who appoints as his attorney a person incapable of understanding the import of a simple transfer can hardly be allowed, if the donee signs a transfer without any

understanding of what he or she is doing, to repudiate the transfer on the ground of a lack of understanding on the part of the donee.

As to Mrs Steed's ignorance of the power of attorney, if she was ignorant of it, the ignorance was attributable to Mr Steed's incomprehensible failure to tell her either that he was about to or that he had made the appointment. It is known that he and she spoke on the telephone at about the time the power of attorney was executed. If it was really the case that he did not mention the power of attorney when speaking to her on that occasion and left her in ignorance of her responsibilities and status, his failure shows, in my opinion, such a want of care as to preclude him from relying, in support of his non est factum plea, on her ignorance of the power. As between an innocent third party purchaser such as the building society on the one hand and Mr Steed on the other hand, his failure to take the ordinary precautionary and prudent step of informing his mother of her appointment as his attorney requires, in my judgment, that the building society be preferred. . . .

Avon Finance Co. Ltd v *Bridger*
[1985] 2 All ER 281 (CA)

The defendants, an elderly couple, purchased a house for their retirement for £9,275, the arrangements being conducted by their son. The son was to contribute £2,500 to the purchase price. Without telling the defendants, the son obtained a loan from the plaintiff finance company on the security of the retirement home. He obtained the defendants' signatures to the charge by telling them that the documents they were signing related to their own mortgage with the building society. The son failed to make the finance payments and the finance company sought possession against the defendants. The defendants pleaded *non est factum*. Held: such a plea could not operate because the defendants had not exercised reasonable care in entering into the transaction.

Question

The Court of Appeal held that the contract was nevertheless voidable for undue influence (i.e., it could be set aside by the defendants). Does this mean that in future such cases are more likely to turn on the issue of undue influence? (Such an argument would not have been helpful on the facts in *Norwich & Peterborough BS* v *Steed (No. 2)*, because the alleged transaction would be the initial transfer of the property. Therefore, the appellant could only seek rectification of the register under the Land Registration Act 1925. On the facts this claim also failed.)

4 CONSIDERATION, PROMISSORY ESTOPPEL AND FORM

In addition to any formalities requirements (section 3), a promise must either be expressed in the form of deed or be supported by consideration in order to be enforceable. This is because English contract law assumes that only bargains should be enforced (i.e., the promisor must get something in exchange for his promise).

The case law has been concerned with identifying what can constitute consideration and whether it is possible to enforce a promise in the absence of consideration.

SECTION 1: CONSIDERATION

A: WHAT IS CONSIDERATION?

The traditional approach is to identify consideration as a detriment to the promisee and/or a benefit to the promisor. See, for example, *Currie* v *Misa* (1875) LR 10 Ex 153, where Lush J said (at p. 162):

> A valuable consideration, in the sense of the law, may consist either 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 . . .

The second approach is to define consideration as the price requested by the promisor, in exchange for which the promisor's promise was bought. Such a definition was adopted by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge & Co. Ltd* [1915] AC 847, where he said (at p. 855):

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

B: CONSIDERATION DISTINGUISHED FROM A CONDITION IMPOSED ON RECIPIENTS OF GIFTS

Thomas v *Thomas*
(1842) 2 QB 851; 114 ER 330 (QB)

Shortly before his death, the testator stated before witnesses that he wished his wife, Eleanor Thomas, to have their house during her lifetime and while she remained his widow, or £100 instead. However, there was no provision to this effect in his will. The executors of the will, wishing to comply with the testator's intentions, made an agreement with the plaintiff widow 'in consideration of such desire' to convey the house to her for her life 'provided nevertheless and it is further agreed' that during that time the plaintiff would pay £1 yearly towards the ground rent for the property and keep the house 'in good and tenantable repair'. The plaintiff obtained possession but the defendant executors refused to convey the house and ejected her. The issue was whether any consideration had been provided for the executors' promise. Held: although the testator's desire was only the motive for the agreement and a motive could not be consideration, the widow's promise to pay £1 towards the ground rent and to keep the house in repair was good consideration to support the promise to convey the house to her. The promise to perform these acts had some value in the eyes of the law and the court did not have to inquire as to the adequacy of the widow's promise.

PATTERSON J: . . . 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: it may be some benefit to the plaintiff, or some detriment to the defendant; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift: but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground rent, and which is made payable not to a superior landlord but to the executors. So that this rent is clearly not something incident to the assignment of the house; for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs: these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it: for any thing that appears, the liability to repair is first created by this instrument. The proviso certainly struck me at first . . . that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. . . .

Notes

1. Since there must be a benefit to the promisor moving from the promisee, and the person whose promise it was sought to enforce on the facts in *Thomas*

v *Thomas* was the defendant, the true statement should have been that the consideration must be 'some benefit to the defendant or some detriment to the plaintiff'.

2. In practice it is not easy to distinguish a party's motive from the consideration provided. It may be preferable to regard a motive as consideration provided it is of economic value rather than purely sentimental (see page 109).

3. Consideration must move from the promisee (*Tweddle* v *Atkinson* (1861) B & S 393, page 182). Therefore, the testator's desire could not amount to consideration because it did not move from the promisee, the widow.

Questions

1. Why did the court consider that this was not a gratuitous promise to convey the house conditional on the promise to make this £1 payment and to carry out repairs?

2. Treitel, *The Law of Contract*, pp. 68–69 argues that in *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256, the consideration was using the smoke ball in accordance with the instructions but that the promise was conditional on the user catching influenza. Should a wider interpretation be used so that consideration consists of whatever has been requested by the promisor in exchange for his promise? (See *Chappell & Co. Ltd* v *Nestlé Co. Ltd* [1960] AC 87, below.)

C: CONSIDERATION MUST BE SUFFICIENT BUT NEED NOT BE ADEQUATE

(a) Adequacy

If what is given in exchange for the promise has value in the eyes of the law, the court will not question whether that value is adequate and will not interfere with the fairness of the bargain made by the parties.

Trivial acts have been held to amount to consideration because they have been requested by the promisor.

Chappell & Co. Ltd* v *Nestlé Co. Ltd
[1960] AC 87 (HL)

The plaintiffs owned the copyright in a piece of music, 'Rockin' Shoes'. The defendants, Nestlé, arranged for copies of this tune to be manufactured into records, and they offered these records to the public for 1s 6d plus three wrappers from their 6d chocolate bars. Section 8 of the Copyright Act 1956 permitted the making of records for retail sale provided that a royalty of 6¼ per cent on 'the ordinary retail selling price' was paid to the plaintiffs. The plaintiffs were informed that 1s 6d was the ordinary retail selling price. They sought an injunction claiming breach of copyright. Held: (Viscount Simonds and Lord Keith of Avonholm dissenting) the wrappers were part of the consideration for the sale of the

records, although they were of very trivial economic value and were thrown away by Nestlé. Section 8 of the Copyright Act 1956 was intended to apply where a money sum was the entire consideration for the sale, and since this sale was outside s. 8, there was a breach of copyright.

LORD SOMERVELL: The question, then, is whether the three wrappers were part of the consideration or, as Jenkins LJ held, a condition of making the purchase, like a ticket entitling a member to buy at a co-operative store.

I think they are part of the consideration. They are so described in the offer. 'They,' the wrappers, 'will help you to get smash hit recordings.' They are so described in the record itself — 'all you have to do to get such new record is to send three wrappers from Nestlé's 6d. milk chocolate bars, together with postal order for 1s. 6d.' This is not conclusive but, however described, they are, in my view, in law part of the consideration. It is said that when received the wrappers are of no value to Nestlé's. This I would have thought irrelevant. 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. As the whole object of selling the record, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration.

LORD REID: The respondents [submit] that acquiring and delivering the wrappers was merely a condition which gave a qualification to buy and was not part of the consideration for sale. Of course, a person may limit his offer to persons qualified in a particular way, e.g., members of a club. But where the qualification is the doing of something of value to the seller, and where the qualification only suffices for one sale and must be re-acquired before another sale, I find it hard to regard the repeated acquisitions of the qualification as anything other than parts of the consideration for the sales. The purchaser of records had to send three wrappers for each record, so he had first to acquire them. The acquisition of wrappers by him was, at least in many cases, of direct benefit to the Nestlé Co., and required expenditure by the acquirer which he might not otherwise have incurred. To my mind the acquiring and delivering of the wrappers was certainly part of the consideration in these cases, and I see no good reason for drawing a distinction between these and other cases.

Notes

1. Lord Somervell indicated that there was a benefit to Nestlé through increased chocolate sales by requiring the wrappers (although Atiyah has argued that this was only the motive which inspired the promise). He also considered that the wrappers were part of the consideration because they were asked for. In *Carlill* v *Carbolic Smoke Ball Company* [1893] 1 QB 256 (page 3), catching influenza was a stipulated act and arguably, therefore, should form part of the consideration for the promise of the reward.

2. Viscount Simonds (dissenting) in *Chappell & Co. Ltd* v *Nestlé Co. Ltd* was firmly of the view that the wrappers were not part of the consideration:

In my opinion, my Lords, the wrappers are not part of the selling price. They are admittedly themselves valueless and are thrown away and it was for that reason, no doubt, that Upjohn J was constrained to say that their value lay in the evidence they afforded of success in an advertising campaign. That is what they are. But what, after all, does that mean? Nothing more than that someone, by no means necessarily the

purchaser of the record, has in the past bought not from Nestlé's but from a retail shop three bars of chocolate and that the purchaser has thus directly or indirectly acquired the wrappers. How often he acquires them for himself, how often through another, is pure speculation. The only thing that is certain is that, if he buys bars of chocolate from a retail shop or acquires the wrappers from another who has bought them, that purchase is not, or at the lowest is not necessarily, part of the same transaction as his subsequent purchase of a record from the manufacturers.

I conclude, therefore, that the objection fails, whether it is contended that (in the words of Upjohn J) the sale 'bears no resemblance at all to the transaction to which the section . . . is pointing' or that the three wrappers form part of the selling price and are incapable of valuation. Nor is there any need to take what, with respect, I think is a somewhat artificial view of a simple transaction. What can be easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that? It may be assumed that the manufacturer's motive is his own advantage. It is possible that he achieves his object. But that does not mean that the sale is not a retail sale to which the section applies or that the ordinary retail selling price is not the price at which the record is ordinarily sold, in this case 1s. 6d.

(b) Sufficiency ('of value in the eyes of the law')

The consideration provided must be capable of expression in economic terms.

White* v *Bluett
(1853) 23 LJ Ex 36 (Court of Exchequer)

Bluett had given his father a promissory note for money that his father had lent him. His father's executor sued him on the note, and he claimed in his defence that his father had promised to discharge him from the obligation if he would stop complaining about the father's distribution of his property among his children. (A promissory note is a promise to pay contained in a written document, e.g., a bank note.) Held: Bluett had not provided any consideration for such a promise by his father; the son was not under any legal duty to refrain from complaining; and therefore his forbearance could not amount to consideration.

POLLOCK CB: . . . If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, Now, if you will not make any more complaints, I will not sue you. Such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

Note

White v *Bluett* can be contrasted with the following American case.

Hamer v *Sidway*
(1891) 27 NE 256 (Court of Appeals of New York)

An uncle promised his nephew $5,000 if the nephew would refrain from 'drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become 21 years of age'. The nephew complied but the defendant, the uncle's executor, refused to make the payment. The question was whether the nephew had provided sufficient consideration to support the promise to pay. Held: the promise was enforceable because the nephew had provided consideration by restricting his lawful freedom of action.

PARKER J: . . . The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, — and insists that it follows that, unless the promisor was benefited, the contract was without consideration, — a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. . . '"Consideration" means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first.' Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. . . .

Notes

1. It is difficult to see how this consideration could be classified as having 'economic value'. The decision may rest on policy, in that it is more socially acceptable to enforce this promise than to enforce the father's promise in *White* v *Bluett*. It may also be explained on the ground of the nephew's detrimental reliance.

2. Arguably, there is a benefit to the uncle from ensuring that his nephew refrains from these activities (see *Shadwell* v *Shadwell* (1860) 9 CBNS 159, page 117), although some commentators would argue that this is the uncle's motive *rather* than a benefit to him.

3. An important point on the facts was that the nephew had used tobacco and drunk liquor in the past. In *Arrale* v *Costain Civil Engineering Ltd* [1976]

1 Lloyd's Rep 98, Geoffrey Lane LJ stated that consideration was not provided by refraining from a course of conduct which it was never intended to pursue.

When is forbearance to sue a sufficient consideration?

A promise not to enforce a *valid* claim is a sufficient consideration for a promise given in return. But what is the position if the claim is invalid and the creditor who promises to forbear knows this at the time he makes the promise?

Wade* v *Simeon
(1846) 2 CB 548; 135 ER 1061 (Court of Common Pleas)

The plaintiff had sought to recover £700 and £1,300. On the day before the hearing the defendant promised to pay at the end of a week with interest if the plaintiff would stay the proceedings. The plaintiff did this, but at the end of the week the defendant still did not pay. The defendant pleaded that the plaintiff never had any cause of action against him and that the plaintiff knew this when he promised to forbear. The plaintiff admitted this fact. Held: the defendant was entitled to judgment.

TINDAL CJ: . . . [T]he plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost contra bonos mores, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must shew a good consideration, something beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action: and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails.

Note

What if the claim is invalid but the creditor who promises to forbear in return for a promise believes he has a good claim? Can the creditor enforce the promise? Forbearance in these circumstances has been held to be a good consideration.

Callisher* v *Bischoffsheim
(1870) LR 5 QB 449 (QB)

The plaintiff had alleged that moneys were due to him from the Government of Honduras, and was about to bring proceedings to enforce payment when the defendant promised to deliver certain debentures to him if he did not bring proceedings for an agreed period. The plaintiff complied but the

defendant did not deliver the debentures. In fact, at the time this agreement was made, although the plaintiff honestly believed in the truth of his claim, he was not owed any moneys by the Government. The defendant argued that forbearance to sue in a groundless action could never be a good consideration. Held: the compromise was a good consideration for the promise since it was made bona fide, even though the claim being compromised was in fact invalid.

COCKBURN CJ: . . . The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bonâ fide believes 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. The defendant's contention is unsupported by authority.

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. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

Question

The benefit to the defendant is stated to be that he avoids being sued on an invalid claim. Is this a benefit?

Past consideration

Any act carried out *before* a promise is made cannot be a sufficient consideration to support the promise because it is not carried out in exchange for the promise.

Re McArdle
[1951] Ch 669 (CA)

The testator's widow had a prior life interest in a property which was held upon trust for the testator's five children. In 1943, improvements were carried out to the property which were paid for by the wife of one of the beneficiaries. (She had not been requested to do this.) In 1945, after this work had been completed, the five children signed a document addressed to the wife which stated, 'in consideration of your carrying out certain alterations and improvements to the property. . . . We the beneficiaries under the will of [the testator] hereby agree that the executors . . . shall repay to you from the said estate when so distributed the sum of £488 in settlement of the amount spent on the improvements'. When the testator's

widow died the wife claimed this sum under the agreement. Held: since the work had been completed before the agreement of 1945, the consideration for it was past consideration and the agreement was not enforceable.

Note

There is a device which can be employed by the courts to avoid the literal nature of the past consideration rule and to allow such promises to be enforced. There must be a prior request to carry out the act, which carries with it a promise to pay or benefit the performer of the act in some way. In relation to this earlier promise the act is not past consideration.

Pao On* v *Lau Yiu Long
[1980] AC 614 (PC)

The plaintiffs owned shares in a private company, Shing On, whose principal asset was a building being constructed. The defendants were the majority shareholders in the Fu Chip Investment Company which wished to acquire the building. In February 1973, the plaintiffs agreed with the Fu Chip Company to sell their shares in Shing On to Fu Chip in return for shares in Fu Chip. To avoid depressing the market for shares in Fu Chip, the defendants requested that the plaintiffs retain 60 per cent of their shares until after 30 April 1974, and it was agreed that the defendants would protect the plaintiffs against any loss from a fall in the value of those shares during that period. A subsidiary agreement was entered into by which the defendants agreed to buy and the plaintiffs agreed to sell 60 per cent of the shares on or before 30 April 1974 at $2.50 a share. The plaintiffs realised, however, that with such an agreement they would lose the benefit of any possible rise in the market price of that 60 per cent holding, and they refused to complete the sale of the shares in Shing On to Fu Chip unless the defendants agreed to replace the subsidiary agreement with an indemnity. The defendants signed an indemnity in consideration of the plaintiffs having agreed to sell their shares in Shing On. The plaintiffs later sought to rely on the indemnity and one issue before the court was whether they had provided any consideration for the indemnity. The Privy Council applied *Re Casey's Patents* [1892] 1 Ch 104. Held: the consideration was the plaintiffs' promise not to sell 60 per cent of their Fu Chip shares for one year. Although this promise had been made before the indemnity was given, it had been made at the request of the defendants and on the understanding that the plaintiffs were to be protected against the risk that the value of their shareholding might fall.

LORD SCARMAN: The first question is whether upon its true construction the written guarantee of May 4, 1973, states a consideration sufficient in law to support the defendants' promise of indemnity against a fall in value of the Fu Chip shares. . . . [C]ounsel for the plaintiffs before their Lordships' Board but not below, contends that the consideration stated in the agreement is not in reality a past one. It is to be noted that the consideration was not on May 4, 1973, a matter of history only. The

instrument by its reference to the main agreement with Fu Chip incorporates as part of the stated consideration the plaintiffs' three promises to Fu Chip: to complete the sale of Shing On, to accept shares as the price for the sale, and not to sell 60 per cent of the shares so accepted before April 30, 1974. Thus, on May 4, 1973, the performance of the main agreement still lay in the future. Performance of these promises was of great importance to the defendants, and it is undeniable that, as the instrument declares, the promises were made to Fu Chip at the request of the defendants. It is equally clear that the instrument also includes a promise by the plaintiffs to the defendants to fulfil their earlier promises given to Fu Chip.

The Board agrees with [Counsel for the plaintiffs'] submission that the consideration expressly stated in the written guarantee is sufficient in law to support the defendants' promise of indemnity. 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 promisors' 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. All three features are present in this case. The promise given to Fu Chip under the main agreement not to sell the shares for a year was at the first defendant's request. The parties understood at the time of the main agreement that the restriction on selling must be compensated for by the benefit of a guarantee against a drop in price: and such a guarantee would be legally enforceable. The agreed cancellation of the subsidiary agreement left, as the parties knew, the plaintiffs unprotected in a respect in which at the time of the main agreement all were agreed they should be protected.

[Counsel for the plaintiffs'] submission is based on *Lampleigh* v *Brathwait* (1615) Hobart 105. In that case the judges said, at p. 106:

> First. . . . a meer voluntary courtesie will not have a consideration to uphold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind, for the promise, though it follows, yet it is not naked, but couples it self with the suit before, and the merits of the party procured by that suit, which is the difference.

The modern statement of the law is in the judgment of Bowen LJ in *In re Casey's Patents* [1892] 1 Ch 104, 115–116; Bowen LJ said:

> Even if it were true, as some scientific students of law believe, that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now, the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences or as a positive bargain which fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered. So that here for past services there is ample justification for the promise to give the third share.

. . . [Counsel] for the defendants, does not dispute the existence of the rule but challenges its application to the facts of this case. He submits that it is not a necessary inference or implication from the terms of the written guarantee that any benefit or protection was to be given to the plaintiffs for their acceptance of the restriction on selling their shares. Their Lordships agree that the mere existence or recital of a prior request is not sufficient in itself to convert what is prima facie past consideration into

sufficient consideration in law to support a promise as they have indicated, it is only the first of three necessary preconditions. As for the second of those preconditions, whether the act done at the request of the promisor raises an implication of promised remuneration or other return is simply one of the construction of the words of the contract in the circumstances of its making. Once it is recognised, as the Board considers it inevitably must be, that the expressed consideration includes a reference to the plaintiffs' promise not to sell the shares before April 30, 1974 — a promise to be performed in the future, though given in the past — it is not possible to treat the defendants' promise of indemnity as independent of the plaintiffs' antecedent promise, given at the first defendant's request, not to sell. The promise of indemnity was given because at the time of the main agreement the parties intended that the first defendant should confer upon the plaintiffs the benefit of his protection against a fall in price. When the subsidiary agreement was cancelled, all were well aware that the plaintiffs were still to have the benefit of his protection as consideration for the restriction on selling. Their Lordships, therefore, accept the submission that the contract itself states a valid consideration for the promise of indemnity.

Note

Although it may be possible to imply a promise to remunerate, in each case it must be asked whether it was reasonable in the circumstances for the parties to assume that the act would be remunerated.

There is some strength in the argument that it is more likely that such an implication of remuneration will arise in commercial cases or cases involving professional services (such as *Re Casey's Patents* and *Pao On* v *Lau Yiu Long*) than in cases involving arrangements between friends and family (*Re McArdle*) or where the services are not professional.

If you are drowning and I rescue you, although a request might be inferred from your call for help, because of the nature of the service I provide in rescuing you, it is most unlikely that the request carries with it any understanding that the rescue will be remunerated. The act of rescue cannot be consideration for any promise of reward.

Performance of existing duties

If a person either does or promises to do what they are already legally bound to do in exchange for a promise made to them, they suffer no legal detriment and confer no legal benefit so that, traditionally, this has not been accepted as constituting sufficient consideration.

Until the decision of the Court of Appeal in *Williams* v *Roffey Brothers & Nicholls (Contractors) Ltd* [1990] 1 All ER 512 (see page 125), it was generally held to be insufficient that a factual detriment had been incurred or a factual benefit had been conferred. Lord Denning had been alone in accepting this as sufficient consideration in itself. The device employed to avoid the rule in practice was to hold that a promisee had gone beyond the scope of his existing duty and had thereby provided the necessary consideration.

Performance of a duty imposed by law

In *Collins* v *Godefroy* (1831) 1 B & Ad 950, 109 ER 1040, the Court of King's Bench held that a promise by Godefroy to pay Collins, whom he had subpoenaed, six guineas for attending as a witness was unenforceable,

because if a person was subpoenaed he was under a duty imposed by law to attend and give evidence, and therefore performance of that duty could not support a promise to pay.

If a promisee has done more than he was legally obliged to do, that will constitute consideration for a promise to pay.

Ward v *Byham*
[1956] 2 All ER 318 (CA)

The father of an illegitimate child made the following promise to the child's mother: 'I am prepared to let you have [the child] and pay you up to £1 a week allowance for her providing you can prove that she will be well looked after and happy and also that she is allowed to decide for herself whether or not she wishes to come and live with you'. The father later stopped making these payments and the mother sought to enforce his promise. Held: (Morris and Parker LJJ) although the mother was required by statute to maintain her child, she had gone beyond that statutory duty by complying with the father's request, and this was a sufficient consideration for the father's promise to pay.

Denning LJ considered that the factual benefit to the father was sufficient.

DENNING LJ: I approach the case, . . . on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child.

I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week.

Question

How realistic is the view of the majority that the mother had suffered 'extra detriment'? It could be argued that the mother's promise to ensure that the child was happy was not capable of expression in economic terms.

Lord Denning also repeated his view of the correct principles in the next case.

Williams v *Williams*
[1957] 1 All ER 305 (CA)

In January 1952, a wife deserted her husband, and in March of that year the parties signed an agreement whereby the husband promised to pay the

wife £1 10s a week for their joint lives so long as the wife led a chaste life. The wife promised to use this sum to support and maintain herself, and promised to indemnify the husband against any debts she incurred and not to pledge the husband's credit. The wife later claimed arrears of this maintenance, but the husband argued that she had provided no consideration for his promise to pay since a husband was not bound to maintain a wife who had deserted him and a wife who had deserted her husband was not entitled to pledge her husband's credit. Held: the wife's promise did constitute good consideration since she could return at any time and had therefore only suspended her right to receive maintenance.

DENNING LJ: Now I agree that, in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevetheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the transaction which is contrary to the public interest. Suppose that this agreement had never been made, and the wife had made no promise to maintain herself and did not do so. She might then have sought and received public assistance or have pledged her husband's credit with tradesmen; in which case the National Assistance Board might have summoned him before the magistrates, or the tradesmen might have sued him in the county court. It is true that he would have an answer to those claims because she was in desertion, but nevertheless he would be put to all the trouble, worry and expense of defending himself against them. By paying her 30s. a week and taking this promise from her that she will maintain herself and will not pledge his credit, he has an added safeguard to protect himself from all this worry, trouble and expense. That is a benefit to him which is good consideration for his promise to pay maintenance. . . .

Note

Denning LJ's qualification 'so long as there was nothing in the transaction which was contrary to the public interest' refers to public policy reasons why a promise should not be enforced (e.g., *Collins* v *Godefroy* (1831) 1 B & Ad 950). This might now be covered by the operation of the doctrine of economic duress (page 532).

Performance of an existing contractual duty owed to a third party

If X promises Y that X will do something which he is already bound by a contract with Z to do, then X can rely upon that promise (or his performance of that promise to Z) as consideration to support a promise by Y.

Shadwell* v *Shadwell

(1860) 9 CB NS 159; 142 ER 62 (Court of Common Bench)

After his engagement to Ellen Nicholl, the plaintiff received the following letter from his uncle:

'I am glad to hear of your intended marriage with Ellen Nicholl; and, as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly during my life and until your annual income

derived from your profession of a Chancery barrister shall amount to 600 guineas . . . '

The plaintiff claimed arrears in these yearly sums from the uncle's executors, alleging the consideration for the promise to be his marriage to Ellen Nicholl. Held: (Erle CJ and Keating J) the promise was binding since it was supported by good consideration.

ERLE CJ (giving his own judgment and that of Keating J): Now, do these facts shew that the promise was in consideration either of a loss to be sustained by the plaintiff or a benefit to be derived from the plaintiff to the uncle, at his, the uncle's request? My answer is in the affirmative.

First, do these facts shew a loss sustained by the plaintiff at his uncle's request? When I answer this in the affirmative, I am aware that a man's marriage with the woman of his choice is in one sense a boon, and in that sense the reverse of a loss: yet, as between the plaintiff and the party promising to supply an income to support the marriage, it may well be also a loss. The plaintiff may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld; and, if the promise was made in order to induce the parties to marry, the promise so made would be in legal effect a request to marry.

Secondly, do these facts shew a benefit derived from the plaintiff to the uncle, at his request? In answering again in the affirmative, I am at liberty to consider the relation in which the parties stood and the interest in the settlement of his nephew which the uncle declares. The marriage primarily affects the parties thereto; but in a secondary degree it may be an object of interest to a near relative, and in that sense a benefit to him. This benefit is also derived from the plaintiff at the uncle's request. If the promise of the annuity was intended as an inducement to the marriage, and the averment that the plaintiff, relying on the promise, married, is an averment that the promise was one inducement to the marriage, this is the consideration averred in the declaration; and it appears to me to be expressed in the letter, construed with the surrounding circumstances.

. . . [T]he decision turns upon the question of fact, whether the consideration for the promise is proved as pleaded. I think it is; and therefore my judgment . . . is for the plaintiff.

BYLES J (*dissenting*): . . . I am of opinion that the defendant is entitled to the judgment of the court . . .

The inquiry . . . narrows itself to this question, — Does the letter itself disclose any consideration for the promise? the consideration relied on by the plaintiff's counsel being the subsequent marriage of the plaintiff. I think the letter discloses no consideration. . . .

It is by no means clear that the words 'at starting' mean 'on marriage with Ellen Nicholl,' or with anyone else. The more natural meaning seems to me to be, 'at starting in the profession;' for, it will be observed that those words are used by testator in reciting a prior promise made when the testator had not heard of the proposed marriage with Ellen Nicholl, or, so far as appears, heard of any proposed marriage. This construction is fortified by the consideration that the annuity is not in terms made to begin from the marriage, but, as it should seem, from the date of the letter: neither is it in terms made defeasible if Ellen Nicholl should die before marriage.

But, even on the assumption that the words 'at starting' mean on marriage, I still think that no consideration appears, sufficient to sustain the promise. The promise is one which by law must be in writing; and the fourth plea shows that no consideration or request dehors the letter existed, and therefore that no such consideration or request can be alluded to by the letter.

Marriage of the plaintiff at the testator's express request would be no doubt an ample consideration. But marriage of the plaintiff without the testator's request is no consideration to the testator. It is true that marriage is or may be a detriment to the plaintiff: but detriment to the plaintiff is not enough, unless it either be a benefit to the testator, or be treated by the testator as such by having been suffered at his request. Suppose a defendant to promise a plaintiff, — 'I will give you 500*l*. if you break your leg,' — would that detriment to the plaintiff, should it happen, be any consideration? If it be said that such an accident is an involuntary mischief, would it have been a binding promise if the testator had said, — 'I will give you 100*l*. a year while you continue in your present chambers? I conceive that the promise would not be binding, for want of a previous request by the testator.

Now, the testator in the case before the court derived, so far as appears, no personal benefit from the marriage. The question, therefore, is still further narrowed to this point, — Was the marriage at the testator's request? Express request there was none. Can any request be implied? The only words from which it can be contended that it is to be implied, are the words 'I am glad to hear of your intended marriage with Ellen Nicholl.' But it appears from the fourth plea that the marriage had already been agreed on, and that the testator knew it. These words, therefore, seem to me to import no more than the satisfaction of the testator at the engagement, — an accomplished fact. No request can, as it seems to me, be inferred from them. And, further, how does it appear that the testator's implied request, if it could be implied, or his promise, if that promise alone would suffice, or both together, were intended to cause the marriage or did cause it, so that the marriage can be said to have taken place at the testator's request? or, in other words, in consequence of that request?

It seems to me not only that this does not appear, but that the contrary appears; for, the plaintiff before the letter had already bound himself to marry, by placing himself not only under a moral but under a legal objection to marry; and the testator knew it.

The well-known cases which have been cited at the bar in support of the position that a promise based on the consideration of doing that which a man is already bound to do is invalid, apply in this case. . . . The reason why the doing what a man is already bound to do is no consideration, is, not only because such a consideration is in judgment of law of no value, but because a man can hardly be allowed to say that the prior legal obligation was not his determining motive. But, whether he can be allowed to say so or not, the plaintiff does not say so here. He does, indeed, make an attempt to meet this difficulty by alleging in the replication to the fourth plea that he married relying on the testator's promise: but he shrinks from alleging, that, though he had promised to marry before the testator's promise to him, nevetheless he would have broken his engagement, and would not have married without the testator's promise. A man may rely on encouragements to the performance of his duty, who yet is prepared to do his duty without those encouragements. At the utmost the allegation that he relied on the testator's promise seems to me to import no more than that he believed the testator would be as good as his word.

It appears to me, for these reasons, that this letter is no more than a letter of kindness, creating no legal obligation.

Notes

1. It is highly questionable whether the majority judgments support the principle that the performance by the nephew of his contractual duty owed to Ellen Nicholl (a third party) to marry her, was a good consideration for the uncle's promise. The majority judgments do not refer to the fact that the nephew was already contractually bound to his fiancee to marry her (at this time an action existed for breach of a promise to marry). Is the true reason for enforcement the fact that the nephew had relied on his uncle's promise?

2. Erle CJ refers to the fact that the marriage could be seen as a detriment to the nephew, and stresses that the nephew, might well have relied upon this promise in incurring additional expenses. Erle CJ also considered that there was a benefit to the uncle in seeing his nephew well settled. This so-called benefit is, of course, purely sentimental and is not capable of expression in economic terms.

3. Erle CJ also considered that the uncle's letter had requested the plaintiff to marry Ellen Nicholls, whereas Byles J, dissenting, thought it did not, but had there been such a request, he was clear that the marriage would have been a good consideration for the promise. Byles J was clearly of the opinion that a detriment could be a sufficient consideration only if it was requested by the promisor. Is this a necessary requirement?

4. Byles J considered that on its construction the marriage was a *condition* rather than the intended consideration for the uncle's promise. In any event, he considered that there was no intention to create legal relations (see, page 164).

This dissenting judgment was approved by Salmon LJ in *Jones* v *Padavatton* [1969] 2 All ER 616.

However, the principle has been approved by the Privy Council in two more recent cases, namely *New Zealand Shipping Co. Ltd* v *A. M. Satterthwaite, The Eurymedon* and *Pao On* v *Lau Yiu Long* (pages 120 and 113).

New Zealand Shipping Co. Ltd v *A. M. Satterthwaite, The Eurymedon*
[1975] AC 154 (PC)

The shipper entered into a contract of carriage with the carrier for the carriage of a drilling machine from Liverpool to Wellington in New Zealand. This contract of carriage exempted the carrier from all liability for loss or damage unless the action was brought within one year, and this immunity was extended to the carrier's servants, agents or independent contractors:

> It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act neglect or

default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions in this clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the carrier acting as aforesaid and for the purpose of all the foregoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this bill of lading.

The carrier was a wholly-owned subsidiary company of the stevedores who were employed to unload the machine at Wellington. While unloading the machine, the stevedores were negligent and damaged it. The plaintiff cargo owner brought an action against the stevedores for the cost of repairing the drill. The stevedores pleaded the time limit in the contract of carriage between the cargo owners and the carrier. The Privy Council analysed the clause in the contract of carriage as a promise of exemption made to the stevedores through the carrier as their agent. In order to accept this promise, the stevedores had to provide consideration for the promise, and this was held to be the services of unloading which were of benefit to the shipper. The stevedores were already bound to perform these services under their contract with the carrier, and this could be a good consideration to support the shipper's promise.

LORD WILBERFORCE: If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration, as it must be in the absence of a tertium quid, there can be little doubt which, in commercial reality, this is. The whole contract is of a commercial character, involving service on one side, rates of payment on the other, and qualifying stipulations as to both. The relations of all parties to each other are commercial relations entered into for business reasons of ultimate profit. To describe one set of promises, in this context, as gratuitous, or nudum pactum, seems paradoxical and is prima facie implausible. It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many situations of daily life, e.g., sales at auction; supermarket purchases; boarding an omnibus; purchasing a train ticket; tenders for the supply of goods; offers of rewards; acceptance by post; warranties of authority by agents; manufacturers' guarantees; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration. . . .

There is possibly more than one way of analysing this business transaction into the necessary components; that which their Lordships would accept is to say that the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shipper and the appellant, made through the carrier as agent.

This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading. The conception of a 'unilateral' contract of this kind was recognised in *Great Northern Railway Co.* v *Witham* (1873) LR 9 CP 16 and is well established. This way of regarding the matter is very close to if not identical to that accepted by Beattie J in the Supreme Court: he analysed the transaction as one of an offer open to acceptance by action such as was found in *Carlill* v *Carbolic Smoke Ball Co.* [1893] 1 QB 256. . . .

The following points require mention. 1. In their Lordships' opinion, consideration may quite well be provided by the appellant, as suggested, even though (or if) it was already under an obligation to discharge to the carrier. (There is no direct evidence of the existence or nature of this obligation, but their Lordships are prepared to assume it.) An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration and does so in the present case: the promisee obtains the benefit of a direct obligation which he can enforce. This proposition is illustrated and supported by *Scotson* v *Pegg* (1861) 6 H & N 295 which their Lordships consider to be good law. . . .

Notes

1. The principle was extended to *promises* to perform an existing contractual duty owed to a third party, not just the performance of that duty, in *Pao On* v *Lau Yiu Long* (see page 113). The Privy Council held the consideration for the defendants' promise to be the plaintiffs' promise to the Fu Chip Company (the third party) to retain 60 per cent of their shares for one year. Lord Scarman said: 'Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration.'

2. In *Scotson* v *Pegg* (1861) 6 H & N 295, 158 ER 121, the Court of Exchequer held that it was necessary for the promisee's action, which he was contractually bound to the third party to perform, to also be a benefit to the promisor.

Clearly, the defendants in *Pao On* v *Lau Yiu Long*, as majority shareholders, benefited by seeing the main agreement with the company performed. The Privy Council in *The Eurymedon* also appeared to treat it as a benefit to the shipper to have the goods unloaded by the stevedores. If the stevedores failed to unload the goods, that would inevitably cause loss to the shipper, but the only party with a remedy in breach of contract would be the carrier.

It might be argued that in all these cases the promisor does get a benefit from the performance of a contractual duty owed to a third party, but it is a *factual benefit.* Should this be sufficient? (See page 125.)

3. The difficulty is to find additional detriment to the promisee. If there is none, does it matter? (See the discussion of *Williams* v *Roffey Brothers & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, at page 130.)

Performance of a contractual duty owed to the promisor

This arises in the context of a promise to alter an existing contract between the parties.

Stilk v *Myrick*

The two reports of this case which follow give different explanations of why the claim was unenforceable.

(1809) 2 Camp 317; 170 ER 1168, Campbell's Report

On a voyage from London to the Baltic, two of the seamen deserted and, because the captain could not find replacements at Cronstadt, he promised the remaining crew that he would divide the wages of the deserters between them if they sailed the ship back to London. Was this promise enforceable?

> Garrow for the defendant insisted, that this agreement was contrary to public policy, and utterly void. In West India voyages, crews are often thinned greatly by death and desertion; and if a promise of advanced wages were valid, exorbitant claims would be set up on all such occasions. This ground was strongly taken by Lord Kenyon in *Harris* v *Watson* (1791) Peake 102, where that learned judge held, that no action would lie at the suit of a sailor on a promise of a captain to pay him extra wages, in consideration of his doing more than the ordinary share of duty in navigating the ship; and his Lordship said, that if such a promise could be enforced, sailors would in many cases suffer a ship to sink unless the captain would accede to any extravagant demand they might think proper to make.

LORD ELLENBOROUGH: I think *Harris* v *Watson* was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. 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 that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered 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. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration . . .

Note

This report stresses that the desertions were covered by the agreed terms of the contract, so that by sailing the ship home shorthanded the sailors had not done any more than they were already bound to do. Consequently, the master's promise was not supported by any consideration and was unenforceable.

Espinasse's Report stresses the policy grounds, stated by Lord Kenyon in *Harris* v *Watson* (1791) Peake 102, for refusing enforcement.

(1809) 6 Esp 129; 170 ER 851

Lord Ellenborough ruled, That the plaintiff could not recover this part of his demand. His Lordship said, That he recognised the principle of the case of *Harris* v *Watson* as founded on just and proper policy. When the defendant entered on board the ship he stipulated to do all the work his situation called upon him to do. Here the voyage was to the Baltick and back, not to Cronstadt only: if the voyage had then terminated, the sailors might have made what terms they pleased. If any part of the crew had died, would not the remainder have been forced to work the ship home? If that accident would have left them liable to do the whole work without any extraordinary remuneration, why should not desertion or casualty equally demand it?

Notes

1. Espinasse appeared in this case as counsel for the plaintiff, but his report is not accepted as authoritative.
2. If his report were correct, it might be argued that, in the absence of circumstances of extortion, there is no reason why such a promise should not be enforced. However, Mocatta J in *North Ocean Shipping* v *Hyundai Construction Co. Ltd* [1979] QB 705, accepted *Campbell's Report* as the correct one, and it is also implicit in the judgment of the Court of Appeal in *Williams* v *Roffey Brothers & Nicholls (Contractors) Ltd* (page 125), since the Court did not question the need to establish consideration although there was no extortion on the facts. There also appears to be no evidence of extortion on the facts of *Stilk* v *Myrick* itself, since the initiative for the payment came from the ship's captain and not the crew.
3. Although there was a factual benefit to the captain from the sailors' promise to sail the ship home, that was not accepted as sufficient consideration.

It has always been accepted that if a promisee has done more than he was contractually obliged to do, then the extra performance is consideration to support the promisor's promise.

North Ocean Shipping Co. Ltd* v *Hyundai Construction Co. Ltd, The Atlantic Baron
[1979] QB 705

(The full facts of this case appear at page 534.)

A shipbuilding company agreed to build a tanker for the owners, and opened a letter of credit to provide security for repayment of the instalments paid by the owners in the event of the building company's default. The owners promised to pay an additional 10 per cent in the instalments when the US dollar was devalued, and asked the company to make a corresponding increase in the letter of credit, which the company did. Held: (although with some hesitation) in agreeing to increase the letter of

credit, the company had undertaken an a[illegible]tional contractual obligation which rendered them liable to an increased detriment, and that this constituted consideration for the promise by the owners to increase the instalment payments.

MOCATTA J: [Counsel for the owners'] argument that the agreement to pay the extra 10 per cent was void for lack of consideration was based upon the well-known principle that a promise by one party to fulfil his existing contractual duty towards his other contracting party is not good consideration; he relied upon the well-known case of *Stilk* v *Myrick* (1809) 2 Camp 317; 6 Esp 129 for this submission. Accordingly there was no consideration for the owner's agreement to pay the further 10 per cent, since the Yard were already contractually bound to build the ship and it is common ground that the devaluation of the dollar had in no way lessened the Yard's legal obligation to do this. There has of course been some criticism in the books of the decision in *Stilk* v *Myrick*, which is somewhat differently reported in the two sets of reports, but Campbell's Reports have the better reputation and what I have referred to as being the law on this point is referred to as 'the present rule' in *Chitty on Contracts, General Principles*, 24th ed. (1977), p. 86: see, also, *Cheshire and Fifoot, Law of Contract*, 9th ed. (1976), p. 83. . . .

[Counsel for the ship building company] relied upon what Denning LJ said in two cases dealing with very different subject matters [*Ward* v *Byham*, page 116 and *Williams* v *Williams*, page 116]. . . . I do not . . . think either of these cases successfully enables [counsel] to avoid the rule in *Stilk* v *Myrick*, 2 Camp 317.

What I have, however, found more difficult is whether the Yard did not give some consideration for the extra 10 per cent on the contract price, on which they insisted, in the form of their agreement to increase pro tanto what was for short called in argument 'the return letter of credit.' . . . I remain unconvinced, however, that by merely securing an increase in the instalments to be paid of 10 per cent the Yard automatically became obliged to increase the return letter of credit pro tanto and were therefore doing no more than undertaking in this respect to fulfil their existing contractual duty. I think that here they were undertaking an additional obligation or rendering themselves liable to an increased detriment. I therefore conclude, though not without some doubt, that there was consideration for the new agreement.

The decision of the Court of Appeal in *Williams* v *Roffey Brothers & Nicholls (Contractors) Ltd* demonstrates that, since the recognition of a doctrine of economic duress (page 532), as the protection against extortion, it is no longer necessary to adopt a rule requiring legal benefit or detriment, and that consideration may be found where there is a factual benefit to the promisor or avoidance of a disbenefit arising from a promise to pay more money under an existing contract.

Williams v *Roffey Brothers & Nicholls (Contractors) Ltd*
[1990] 1 All ER 512 (CA)

The defendant building contractors had entered into a contract to refurbish a block of 27 flats. They subcontracted the carpentry work to the plaintiff carpenter for a price of £20,000. When the plaintiff had completed the carpentry work on the roof and only nine of the flats, and carried out only preliminary work on the others, the plaintiff found that he was in financial

difficulties, despite the fact that he had already received interim payments of £16,200. The difficulties were due in part to the fact that he had underestimated the cost of doing the work, and in part because of his failure to supervise the work properly. The defendants were liable under a 'penalty clause' in the main contract if the flats were not completed on time. They were aware of the plaintiff's difficulties and that the subcontract had been under-priced. The defendants called a meeting and agreed to pay the plaintiff an extra £10,300 at the rate of £575 on completion of each flat. The plaintiff completed eight further flats and the defendants made one further payment of £1,500. The plaintiff stopped work and sued the defendants on their promise, which the defendants claimed was unenforceable because it was not supported by any consideration. Held: Although the plaintiff was doing no more than he was already legally obliged to do, as the defendants had obtained a benefit in making this promise, the promise was enforceable against them (in the absence of economic duress or fraud). The Court of Appeal stated that this did not overrule or contravene the principle in *Stilk* v *Myrick* (1809) 2 Camp 317, 6 Esp 129

GLIDEWELL LJ: In his address to us counsel for the defendants outlined the benefits to the defendants which arose from their agreement to pay the additional £10,300 as (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the sub-contract, (ii) avoiding the penalty for delay and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, counsel submits that, though the defendants may have derived, or hoped to derive, practical benefits from their agreement to pay the 'bonus', they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his sub-contract, ie continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement.

Counsel for the defendants relies on the principle of law which, traditionally, is based on the decision in *Stilk* v *Myrick* . . .

In *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd. The Atlantic Baron* [1978] 3 All ER 1170, [1979] QB 705 Mocatta J regarded the general principle of the decision in *Stilk* v *Myrick* as still being good law. . . .

It was suggested to us in argument that, since the development of the doctrine of promissory estoppel, it may well be possible for a person to whom a promise has been made, on which he has relied, to make an additional payment for services which he is in any event bound to render under an existing contract or by operation of law, to show that the promisor is estopped from claiming that there was no consideration for his promise. However, the application of the doctrine of promisory estoppel to facts such as those of the present case has not yet been fully developed: see e.g. the judgment of Lloyd J in *Syros Shipping Co SA* v *Elaghill Trading Co. The Proodos C* [1981] 3 All ER 189 at 191. Moreover, this point was not argued in the court below, nor was it more than adumbrated before us. Interesting though it is, no reliance can in my view be placed on this concept in the present case.

There is, however, another legal concept of relatively recent development which is relevant, namely that of economic duress. Clearly, if a sub-contractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the sub-contractor may be held guilty of securing the contractor's promise by taking unfair

advantage of the difficulties he will cause if he does not complete the wo[illegible]. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before *Stilk* v *Myrick* (1809) 2 Camp 317, 170 ER 1168, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

. . . [T]he present state of the law on this subject can be expressed in the following proposition: (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.

As I have said, counsel for the defendants accepts that in the present case by promising to pay the extra £10,300 the defendants secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress.

If it be objected that the propositions above contravene the principle in *Stilk* v *Myrick*, I answer that in my view they do not: they refine and limit the application of that principle, but they leave the principle unscathed, e.g. where B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.

It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement.

As a subsidiary argument, counsel for the defendants submits that on the facts of the present case the consideration, even if otherwise good, did not 'move from the promisee'. This submission is based on the principle illustrated in the decision in *Tweddle* v *Atkinson* (1861) 1 B & S 393, [1861–73] All ER Rep 369.

My understanding of the meaning of the requirement that 'consideration must move from the promisee' is that such consideration must be provided by the promisee, or arise out of his contractual relationship with the promisor. It is consideration provided by somebody else, not a party to the contract, which does not 'move from the promisee'. This was the situation in *Tweddle* v *Atkinson*, but it is, of course, not the situation in the present case. Here the benefits to the defendants arose out of their agreement of 9 April 1986 with the plaintiff, the promisee. In this respect I would adopt the following passage from *Chitty on Contracts* (25th edn, 1983) para 173, and refer to the authorities there cited:

> The requirement that consideration must move from the promisee is most generally satisfied where some detriment is suffered by him: e.g. where he parts with money or goods, or renders services, in exchange for the promise. But the requirement may equally well be satisfied where the promisee confers a benefit on the promisor without in fact suffering any detriment.' (*Chitty's* emphasis.)

That is the situation in this case.

RUSSELL LJ: Speaking for myself, and I notice it is touched on in the judgment of Glidewell LJ, I would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel and that the defendants, in the circumstances prevailing, were precluded from raising the defence that their undertaking to pay the extra £10,300 was not binding. For example, in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923 at 936–937, [1982] QB 84 at 105 Robert Goff J said:

> . . . it is in my judgment not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. It is sometimes said that an estoppel cannot create a cause of action, or that an estoppel can only act as a shield, not as a sword. In a sense this is true, in the sense that estoppel is not, as a contract is, a source of legal obligation. But, as Lord Denning MR pointed out in *Crabb v Arun District Council* [1975] 3 All ER 865 at 871, [1976] Ch 179 at 187, an estoppel may have the effect that a party can enforce a cause of action which, without the estoppel, he would not be able to do.

[For the speech of Lord Denning MR in the Court of Appeal ([1981] 3 All ER 577 at 584, [1982] QB 84 at 122: see page 156]:

Brandon LJ said ([1981] 3 All ER 577 at 591, [1982] QB 84 at 131–132):

> . . . while a party 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.

These citations demonstrate that while consideration remains a fundamental requirement before a contract not under seal can be enforced, the policy of the law in its search to do justice between the parties has developed considerably since the early nineteenth century when *Stilk v Myrick* (1809) 2 Camp 317, 170 ER 1168 was decided by Lord Ellenborough CJ. In the late twentieth century I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v Myrick* is either necessary or desirable. Consideration there must still be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.

. . . The plaintiff has got into financial difficulties. The defendants, through their employee Mr Cottrell, recognised that the price that had been agreed originally with the plaintiff was less than what Mr Cottrell himself regarded as a reasonable price. There was a desire on Mr Cottrell's part to retain the services of the plaintiff so that the work could be completed without the need to employ another sub-contractor. There was further a need to replace what had hitherto been a haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300. True it was that the plaintiff did not undertake to do any work additional to that which he had originally undertaken to do but the terms on which he was to carry out the work were varied and, in my judgment, that variation was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates.

For my part I wish to make it plain that I do not base my judgment on any reservation as to the correctness of the law long ago enunciated in *Stilk v Myrick*. A gratuitous promise, pure and simple, remains unenforceable unless given under seal.

But where, as in this case, a party undertakes to make a payment because by so doing it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration.

PURCHAS LJ: The point of some difficulty which arises on this appeal is whether the judge was correct in his conclusion that the agreement reached on 9 April failed for lack of consideration within the principle established by the old cases of *Stilk* v *Myrick* (1809) 2 Camp 317, 170 ER 1168, approving *Harris* v *Watson* (1791) Peake 102, [1775–1802] All ER Rep 493. Counsel for the plaintiff was bold enough to submit that . . . this court was bound by neither authority. I feel I must say at once that, for my part, I would not be prepared to overrule two cases of such veneration involving judgments of judges of such distinction except on the strongest possible grounds since they form a corner-stone of the law of contract which has been observed over the years and is still recognised in principle in recent authority: see the reference to *Stilk* v *Myrick* to be found in *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd, The Atlantic Baron* [1978] 3 All ER 1170 at 1177, [1979] QB 705 at 712 per Mocatta J. With respect I agree with his view of the two judgments of Denning LJ in *Ward* v *Byham* [1956] 2 All ER 318, [1956] 1 WLR 496 and *Williams* v *Williams* [1957] 1 All ER 305, [1957] 1 WLR 148 in concluding that these judgments do not provide a sound basis for avoiding the rule in *Stilk* v *Myrick*. Although this rule has been the subject of some criticism it is still clearly recognised in current textbooks of authority: see *Chitty on Contracts* (25th edn, 1983) vol 1, para 185 and *Cheshire Fifoot and Furmston's Law of Contract* (11th edn, 1986) p 87. . .

In my judgment, therefore, the rule in *Stilk* v *Myrick* remains valid as a matter of principle. . . . The modern cases tend to depend more on the defence of duress in a commercial context rather than lack of consideration. In the present case, the question of duress does not arise. The initiative in coming to the agreement of 9 April came from Mr Cottrell and not from the plaintiff. It would not, therefore, lie in the defendants' mouth to assert a defence of duress. Nevertheless, the court is more ready in the presence of this defence being available in the commercial context to look for mutual advantages which would amount to sufficient consideration to support the second agreement under which the extra money is paid. Although the passage cited below from the speech of Lord Hailsham LC in *Woodhouse AC Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271 at 282, [1972] AC 741 at 757–758 was strictly obiter dicta I respectfully adopt it as an indication of the approach to be made in modern times. . . .

> . . . Businessmen know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence.

The question must be posed: what consideration has moved from the plaintiff to support the promise to pay the extra £10,300 added to the lump sum provision? In the particular circumstances . . . there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. The defendants were on risk that as a result of the bargain they had struck the plaintiff would not or indeed possibly could not comply with his existing obligations without further finance. As a result of the agreement the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed on the plaintiff under the original contact. Prima facie this would appear to be a classic *Stilk* v *Myrick* case. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to 'cut his losses' commercially. In normal

circumstances the suggestion that a contracting party can rely on his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought on the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation and comforted by the passage from the speech of Lord Hailsham LC, to which I have referred, I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. In my judgment, on the facts as found by the judge, he was entitled to reach the conclusion that consideration existed and in those circumstances I would not disturb that finding. . . .

Notes

1. The Court of Appeal affirmed the need for consideration to support such a promise but made it much easier to establish its existence, at least in the context of alteration promises to pay more.
2. The 'penalty clause' was in fact an enforceable liquidated damages clause rather than a true penalty clause. The term 'penalty clause' is often used in a very general sense. (For a discussion of liquidated damages and penalty clauses, see page 404.)
3. In future it will be necessary, first, to ensure that the promise was not obtained under duress and, secondly, to ascertain whether there is any factual benefit to the promisor arising from the making of this promise. Coote 'Consideration and benefit in fact and in law' (1990) 3 JCL 23, argues that a promise of further payment would not be made if the performance of the contract would not benefit the promisor, since this would amount to throwing good money after bad.
4. The benefit arose from the fact that the promisor agreed to pay more money in order to secure completion on time, and it was not conferred by anything that the promisee did.

   The Court of Appeal held that the benefit could be generated by the compromise itself. This is the case, e.g., with agreements to discharge a contract, where both parties get the benefit of not having to fulfil their obligations under the contract, and it seems to have been extended to any situation where the courts are seeking to find the necessary benefit.
5. Adams and Brownsword 'Contract, consideration and the critical path' (1990) 53 MLR 536, considered that the decision reflects a change in approach and that, when deciding to enforce a promise, the courts are likely to be guided by considerations such as the fairness and reasonableness of the agreement and the need to reflect commercial realities rather than relying on the technical requirements of the doctrine of consideration. This shifts the burden from consideration onto the doctrine of economic duress, which is a developing doctrine and still requires further refinement (Phang (1991) 107 LQR 21).
6. The Court of Appeal in this case seemed quite willing to relieve the carpenter from the consequences of his own inaccurate tender. Once a

contract has been made at a fixed price, the courts are not normally as willing to disturb it where there is no evidence of duress, mistake or misrepresentation. For example, in *Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696 (page 444), the House of Lords held that where, due to shortages of labour and materials, the building work took longer than planned so that the price tendered did not reflect the value of the work, the contract was not frustrated and the contractors could not claim the additional sums on a *quantum meruit*.

The result of *Williams* v *Roffey* is that if a promise to pay more is actually made, then it is enforceable; but, in the absence of such a promise, the carpenter cannot avoid performance if he finds that he has tendered too low. *7.* It appears that *Williams* v *Roffey* does not apply in the context of alteration promises to accept less. Relevant case law is discussed at pages 134–6 below, where the current standing of this decision is also assessed.

D: PART PAYMENT OF A DEBT

Where a creditor promises to accept a smaller sum than is due from a debtor and promises not to sue for the balance, this is a promise to alter an existing contract (the debt contract). In *Pinnel's Case* (1602) 5 CoRep 117a, the Court of Common Pleas held that in such circumstances the debtor must provide consideration for the creditor's promise to release him. Simply paying a smaller sum than that owed will not be sufficient, since the debtor has done only what he was legally obliged to do anyway under the debt contract. Traditionally, the factual benefit that might accrue to the creditor from securing some payment rather than nothing at all, was not regarded as sufficient and some separate consideration was required. However, the 'gift of a horse, hawk or robe' would be good consideration for a promise to forgo the balance if accepted by the creditor, since the court will not inquire into the adequacy of the consideration.

Payment before the due date is a good consideration, as is payment at a different place (as long as the change of venue is at the creditor's request and not the debtor's since if it were at the debtor's request there would be neither a benefit to the creditor, nor a detriment to the debtor, *Vanbergen* v *St Edmunds Properties Ltd* [1933] 2 KB 223).

The principle in *Pinnel's Case* was confirmed by the House of Lords in the next case.

Foakes v *Beer*
(1884) 9 App Cas 605 (HL)

In August 1875, Julia Beer had obtained a High Court judgment against Dr Foakes for £2,090 19s. It was agreed in writing in December 1876, that if Dr Foakes paid £500 immediately and paid £150 on two occasions each year until the whole sum of £2,090 19s had been paid, then Julia Beer promised that she 'would not take any proceedings whatever on the said judgment'. (As a judgment debtor Dr Foakes was liable for the interest that

had accrued on the judgment debt, but the agreement had not mentioned this.) Dr Foakes paid the judgment debt in accordance with the agreement but Julia Beer then brought an action claiming the interest on the debt. The House of Lords was divided on the question of whether the agreement amounted to a promise to excuse Dr Foakes from payment of the interest. Held: in any event, Dr Foakes had not provided any consideration for Julia Beer's promise not to take any proceedings on the judgment, and therefore the promise was unenforceable. He had only done what he was legally bound to do anyway.

EARL OF SELBORNE LC: . . . [T]he question remains, whether the agreement is capable of being legally enforced. Not being under seal, it cannot be legally enforced against the respondent, unless she received consideration for it from the appellant; or unless, though without consideration, it operates by way of accord and satisfaction, so as to extinguish the claim for interest. What is the consideration? On the face of the agreement none is expressed, except a present payment of £500, on account and in part of the larger debt then due and payable by law under the judgment. The appellant did not contract to pay the future instalments of £150 each, at the times therein mentioned, much less did he give any new security in the shape of negotiable paper, or in any other form. The promise de futuro was only that of the respondent, that if the half-yearly payments of £150 each were regularly paid, she would 'take no proceedings whatever on the jugment.' No doubt if the appellant had been under no antecedent obligation to pay the whole debt, his fulfilment of the condition might have imported some consideration on his part for that promise. But he was under that antecedent obligation; and payment at those deferred dates, by the forbearance and indulgence of the creditor, of the residue of the principal debt and costs, could not (in my opinion) be a consideration for the relinquishment of interest and discharge of the judgment, unless the payment of the £500, at the time of signing the agreement, was such a consideration. As to accord and satisfaction, in point of fact there could be no complete satisfaction, so long as any future instalment remained payable; and I do not see how any mere payments on account could operate in law as a satisfaction ad interim, conditionally upon other payments being afterwards duly made, unless there was a consideration sufficient to support the agreement while still unexecuted. Nor was anything, in fact, done by the respondent in this case, on the receipt of the last payment, which could be tantamount to an acquittance, if the agreement did not previously bind her.

The question, therefore, is nakedly raised by this appeal, whether your Lordships are now prepared, not only to overrule, as contrary to law, the doctine stated by Sir Edward Coke to have been laid down by all the judges of the Common Pleas in *Pinnel's Case* (1602) 5 CoRep 117a, . . . but to treat a prospective agreement, not under seal, for satisfaction of a debt, by a series of payments on account to a total amount less than the whole debt, as binding in law, provided those payments are regularly made; the case not being one of a composition with a common debtor, agreed to, inter se, by several creditors. . . . The doctrine itself, as laid down by Sir Edward Coke, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law. If so, I cannot think that your Lordships would do right, if you were now to reverse, as erroneous, a judgment of the Court of Appeal, proceeding upon a doctrine which has been accepted as part of the law of England for 280 years. . . .

The distinction between the effect of a deed under seal, and ... t of an agreement by parol, or by writing not under seal, may seem arbitrary, but it is established in our law; nor is it really unreasonable or practically inconvenient that the law should require particular solemnities to give to a gratuitous contract the force of a binding obligation. If the question be (as, in the actual state of the law, I think it is), whether consideration is, or is not, given in a case of this kind, by the debtor who pays down part of the debt presently due from him, for a promise by the creditor to relinquish, after certain further payments on account, the residue of the debt, I cannot say that I think consideration is given, in the sense in which I have always understood that word as used in our law. It might be (and indeed I think it would be) an improvement in our law, if a release or acquittance of the whole debt, on payment of any sum which the creditor might be content to receive by way of accord and satisfaction (though less than the whole), were held to be, generally, binding, though not under seal; nor should I be unwilling to see equal force given to a prospective agreement, like the present, in writing though not under seal; but I think it impossible, without refinements which practically alter the sense of the word, to treat such a release or acquittance as supported by any new consideration proceeding from the debtor.

. . . What is called 'any benefit, or even any legal possibility of benefit,' in Mr Smith's notes to *Cumber* v *Wane* (1721) 1 Stra 426, is not (as I conceive) that sort of benefit which a creditor may derive from getting payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal. . . .

Lord Blackburn, however, accepted that in practice, agreements to accept part payment in full satisfaction often have factual benefits for the creditor. His judgment is a recognition of the practical realities.

LORD BLACKBURN: [Lord Blackburn referred to the decision in *Pinnel's Case* and continued:]

There are two things here resolved. First, that where a matter paid and accepted in satisfacton of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved, viz.: 'That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum.' This was certainly not necessary for the decision of the case; but though th. resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake, and though I cannot find that in any subsequent case this dictum has been made the ground of the decision . . . yet there certainly are cases in which great judges have treated the dictum in *Pinnel's Case* as good law.

. . . I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never

been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges. . . .

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognise and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Questions

1. Was the House of Lords in fact bound to follow *Pinnel's Case*?
2. Do you consider that the creditor should be able to sue for the balance where the debtor has relied on the promise to forgo the balance, and has spent it or incurred other obligations in the belief that he was no longer bound to pay it? (See promissory estoppel, at pages 139–62.)

Note

Julia Beer clearly secured a factual benefit in ensuring payment of the judgment debt and avoiding enforcement proceedings. However, the Court of Appeal has stated that *Williams* v *Roffey* cannot apply in this context so that a factual benefit to the creditor will not constitute consideration for an alteration promise to accept less.

Re Selectmove Ltd
[1995] 2 All ER 531 (CA)

In July 1991, a company which owed the Inland Revenue considerable sums in income tax and national insurance contributions had made a proposal at a meeting with the collector of taxes that in future it should pay the tax as it fell due and repay the arrears in instalments (commencing in February 1992). The collector stated that he would have to seek the approval of his superiors and would advise the company if the proposal was unacceptable. The company heard nothing, but the Revenue later demanded payment of the arrears in full and eventually presented a petition for winding up. The company argued that the petition should be dismissed on the ground that the proposal of July 1991 had been accepted by the Revenue, or that the Revenue was estopped from relying on this debt as being due. The judge ordered compulsory winding up on the basis that

there was no such agreement and, in any event, no consideration to support it. The judge also rejected the claim based on estoppel because there was no promise which could give rise to an estoppel. On appeal the company argued, *inter alia*, that its promise to pay an existing debt was a good consideration because it amounted to a practical benefit to the Revenue. Held: there was no agreement by the Revenue to accept the company's proposal since the official in question did not have the authority to bind the Revenue. The comments relating to the arguments based on consideration and promissory estoppel are therefore *obiter*.

PETER GIBSON LJ (with whose judgment Balcombe and Stuart-Smith LJJ agreed): . . . The judge held that the case fell within the principle of *Foakes* v *Beer* (1884) 9 App Cas 605, [1881–5] All ER Rep 106. In that case a judgment debtor and creditor agreed that in consideration of the debtor paying part of the judgment debt and costs immediately and the remainder by instalments the creditor would not take any proceedings on the judgment. The House of Lords held that the agreement was nudum pactum, being without consideration, and did not prevent the creditor, after payment of the whole debt and costs, from proceeding to enforce payment of the interest on the judgment. Although their Lordships were unanimous in the result, that case is notable for the powerful speech of Lord Blackburn, who made plain his disagreement with the course the law had taken in and since *Pinnel's Case* (1602) 5 Co Rep 117a, [1558–1774] All ER Rep 612 and which the House of Lords in *Foakes* v *Beer* decided should not be reversed . . . Yet it is clear that the House of Lords decided that a practical benefit of that nature is not good consideration in law.

Foakes v *Beer* has been followed and applied in numerous cases subsequently . . . [Peter Gibson LJ referred to *Vanbergen* v *St. Edmunds Properties Ltd* [1933] 2 KB 223 and *D. & C. Builders Ltd* v *Rees* [1965] 3 All ER 837 as examples.] [Counsel], however, submitted that an additional benefit to the Crown was conferred by the agreement in that the Crown stood to derive practical benefits therefrom: it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation. He pointed to the fact that the company did in fact pay its further PAYE and NIC liabilities and £7,000 of its arrears. He relied on the decision of this court in *Williams* v *Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512, [1991] 1 QB 1 for the proposition that a promise to perform an existing obligation can amount to good consideration provided that there are practical benefits to the promisee.

[Peter Gibson LJ referred to the propositions expressed by Glidewell LJ in that case, and continued . . .] [Counsel] submitted that although Glidewell LJ in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A, and he referred to an article by Adams and Brownsword 'Contract, Consideration and the Critical Path' (1990) 53 MLR 536 at 539–540 which suggests that *Foakes* v *Beer* might need reconsideration. I see the force of the argument, but the difficulty that I feel with it is that if the principle of *Williams*' case is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes* v *Beer* without any application. When a creditor and a debtor who are at arm's length reach agreement on the payment of the debt by instalments to accommodate the debtor, the creditor will no doubt always see a practical benefit to himself in so doing. In the absence of authority there would be much to be said for the enforceability of such a contract. But that was a matter expressly considered in *Foakes* v *Beer* yet held not to constitute good

consideration in law. *Foakes* v *Beer* was not even referred to in *Williams'* case, and it is in my judgment impossible, consistently with the doctrine of precedent, for this court to extend the principle of *Williams'* case to any circumstances governed by the principle of *Foakes* v *Beer*. If that extension is to be made, it must be by the House of Lords or, perhaps even more appropriately, by Parliament after consideration by the Law Commission.

In my judgment, the judge was right to hold that if there was an agreement between the company and the Crown it was unenforceable for want of consideration.

Notes

1. Although this result was inevitable given the doctrine of precedent, it is nevertheless difficult to justify the arbitrary distinction which now exists between alteration promises to pay more and alteration promises to accept less. *Williams* v *Roffey*, although initially criticised for its refusal to accept that in reality it was striking at the heart of *Stilk* v *Myrick*, was nevertheless welcomed as a pragmatic means of enabling alteration promises to be enforced. (See Adams and Brownsword (1990) 53 MLR 536 and Coote (1990) 3 JCL 23.) It is now the subject of more vocal academic criticism, suggesting that the decision is wrong and that alteration promises should instead be enforceable by extending the doctrine of estoppel following the approach taken in the Australian decision of *Waltons Stores* v *Maher* (discussed at page 158 below). (See Carter, Phang and Poole, 'Reactions to *Williams* v *Roffey*' (1995) 8 JCL 248; Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP, 1995); Hird and Blair, 'Minding Your Own Business — *Williams* v *Roffey* Re-visited: Consideration Re-considered' [1996] JBL 254.)

2. In *Re C (A Debtor)* (1994) *The Times*, 11 May, a differently constituted Court of Appeal in *obiter* remarks also confirmed this restrictive approach to part payments of debts. Bingham MR stressed the fact that the relevant case law had not been referred to in *Williams* v *Roffey*, and he also appears to consider that there are important differences between alteration promises to pay more and alteration promises to accept less. See also O'Sullivan, 'In Defence of *Foakes* v *Beer*' (1996) 55 CLJ 219, although compare Adams and Brownsword (1990) 53 MLR 536, 540, Carter, Phang and Poole (1995) 8 JCL 248, 266–7 and (in Australia) the judgment of Santow J in *Musumeci* v *Winadell Pty Ltd* (1994) 34 NSWLR 723, 747.

3. Counsel for the company had argued that, even if consideration did not exist, promissory estoppel operated to prevent the Revenue from going back on its implied promise not to enforce the debt since the company had acted on this promise and it would be inequitable for the Revenue to go back on it. The Court of Appeal rejected this argument on the basis that the official in question had no authority to make such a promise and, since the company had not complied with the terms of any such 'promise', it was not inequitable for the Revenue to insist on payment.

4. *Foakes* v *Beer* was recently applied by the Court of Appeal in *Ferguson* v *Davies* [1997] 1 All ER 315.

The consequences of *Foakes* v *Beer* will be avoided where the part payment is made by a third party and the creditor promises to accept this in full satisfaction. The creditor cannot then go back on his promise to the third party and sue the debtor for the balance.

Hirachand Punamchand v *Temple*
[1911] 2 KB 330 (CA)

Lieutenant Temple had borrowed money from the plaintiffs, money lenders, and had given them a promissory note. The plaintiffs had pressed Lieutenant Temple for payment on the note but, having had no success, they had informed his father. The father had sent a draft for a smaller sum than that due on the promissory note in full satisfaction of his son's debt. The plaintiffs cashed the draft but then brought an action on the note against Lieutenant Temple for the balance. Held: this action could not be maintained.

VAUGHAN WILLIAMS LJ: The learned judge [Scrutton J] dealt with the case largely on the footing that the question was whether the effect of the transaction between the plaintiffs and the father was that there had been an accord and satisfaction in respect of the debt due upon the note, and he came to the conclusion that there had been no such accord and satisfaction. Personally, I am inclined to agree that prima facie such an accord and satisfaction must be by virtue of an agreement made between a person who is under an obligation to another person, which he ought to have and has not performed, and that other person. I should hesitate to say that there can, properly speaking, be an accord and satisfaction in respect of a contractual obligation as between one of the parties to the contract, who ought to have but has not performed that obligation, and a stranger to the contract. . . . I shall assume that there was such an agreement as I have mentioned entered into between Sir Richard Temple and the plaintiffs by reason of their keeping the draft. They not only kept it, but they cashed it, and, if they changed their minds afterwards, it was too late. Under these circumstances, assuming that there was no accord and satisfaction, what form of defence, if any, could be pleaded by the defendant? In my judgment it would be that the plaintiffs had ceased really to be holders of the negotiable instrument on which they sued. They had ceased to be such holders, because, in effect, in their hands the document had ceased to be a negotiable instrument quite as much as if there had been on the acceptance of the draft by the plaintiffs an erasure of the writing of the signature to the note. There was not in fact such an erasure, but to my mind the case must be considered as standing on the same footing as if there been an erasure of the signature, and a cancellation by reason of that erasure of the promissory note, in which case, I think, the maker of the note would have had a defence, though he was not a party to the transaction in pursuance of which the note was cancelled, in the sense of being a contracting party. His defence would then have been that the document in the circumstances had ceased to be a promissory note. But, alternatively, assuming that this was not so, and that the instrument did not cease to be a negotiable instrument, then, in my judgment, from the moment whom the draft sent by Sir Richard Temple was cashed by the plaintiffs a trust was created as between Sir Richard Temple and the money-lenders in favour of the former, so that any money which the latter might receive upon the promissory note, if they did receive any, would be held by them in

trust for him. I wish to say here that I do not think that it makes any difference under the circumstances that the amount of the draft sent by Sir Richard Temple was not the full amount of the promissory note, but a smaller amount, because, as between Sir Richard Temple and these plaintiffs, there was an agreement by the plaintiffs for good consideration to receive that amount in satisfaction of the note, which agreement arose from their having retained and cashed the draft. . . .

Having said thus much, I desire to add a word or two with regard to the case of *Cook* v *Lister* (1863) 13 CBNS 543 in the Common Pleas. If the judgments in that case are looked at, it will be found that Willes J said, in explaining the grounds of his judgment, that, under circumstances like those of the present case, the debt is gone, because it would be a fraud upon the stranger who pays part of a debt in discharge of the whole, that an action should be brought for the debt. I have founded my judgment upon the grounds which I have already expressed, but I do not wish to be understood as thereby negativing the proposition that a defence might be set up on the alternative basis mentioned by Willes J.

FLETCHER MOULTON LJ: I am of opinion that by that transaction between the plaintiffs and Sir Richard Temple the debt on the promissory note became extinct. I agree with the view expressed by Willes J in *Cook* v *Lister* (1863) 13 CBNS 543. The effect of such an agreement between a creditor and a third party with regard to the debt is to render it impossible for the creditor afterwards to sue the debtor for it. The way in which this is worked out in law may be that it would be an abuse of the process of the Court to allow the creditor under such circumstances to sue, or it may be, and I prefer that view, that there is an extinction of the debt; but, whichever way it is put, it comes to the same thing, namely that, after acceptance by the creditor of a sum offered by a third party in settlement of the claim against the debtor, the creditor cannot maintain an action for the balance. . . .

FARWELL LJ: In my opinion, it is clear that in the events that have happened the debt became extinguished. Assuming that an accord and satisfaction must be by agreement between the debtor and the creditor, it occurs to me from what was said by Willes J in *Cook* v *Lister* (1863) 13 CBNS 543 that the facts in this case might support such a plea. That learned judge there said, 'if a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a fraud on the stranger to proceed. So, in the case of a composition made with a body of creditors, the assent to receive the composition discharges the debt, because otherwise fraud would be committed against the rest of the creditors'. . . . We were pressed with *Day* v *McLea* (1889) 22 QBD 610, where the debtor himself sent a cheque for an amount smaller than that of the debt to the creditor on the terms that it should be in satisfaction of the debt. In that case, there being no consideration for the discharge of the balance of the debt, it was held that the creditor could retain the money, and sue for the balance. The same reasoning does not apply where the money is sent by a stranger, in which case it can only be accepted on the terms upon which it is sent. In the former case the creditor can reply to the debtor, 'you owe me more than this, and, if you sue for a return of this, I shall set off my larger claim against it.' In the latter case, the creditor has no excuse or justification for retaining the stranger's money, unless he complies with the condition on which it was paid. I agree with Fletcher Moulton LJ that the plaintiffs cannot be heard to say that they have acted dishonestly when an honest construction can be put upon their conduct by treating their acceptance and retention of the money as being upon the terms on which it was offered. If there be any difficulty in formulating a defence at common law in such case, I have no

hesitation in saying that a Court of Equity would have regarded the plaintiffs as disentitled to sue except as trustees for the father, and would have restrained them from suing under such circumstances as existed in the present case.

Note

It is not clear what was the precise reason for this decision. The Court of Appeal appeared to consider that in cashing the draft the plaintiffs accepted the father's terms, and this had the effect of extinguishing the promissory note. It was also held to be a fraud on the father for the plaintiffs to go back on their promise, but breach of contract will not normally constitute a fraud.

SECTION 2: PROMISSORY ESTOPPEL

If a creditor promises to accept a smaller sum in full settlement intending the debtor to rely on that promise, and the debtor does rely on it, the debtor may have a defence of promissory estoppel when sued for the balance by the creditor. The promise will in this way be enforceable despite the absence of consideration to support it.

A: ORIGINS OF THE DOCTRINE

Central London Property Trust Ltd v *High Trees House Ltd*
[1947] KB 130

In September 1937, the plaintiffs let a block of flats in London to the defendants for a term of 99 years at a rent of £2,500 a year. In 1940, owing to the war-time conditions and bombing raids over London, only a few of the flats were actually let to tenants, and it became apparent that the defendants would not be able to pay the rent under the main lease. Following discussions, the plaintiffs agreed to reduce the rent from £2,500 to £1,250, and thereafter the defendants paid the reduced rent. By the beginning of 1945, all the flats were let, but the defendants continued to pay the reduced rent. In September 1945, the plaintiffs wrote to the defendants claiming rent at the rate of £2,500 a year, and they brought an action claiming the full rent for the last two quarters of 1945. Held: since the plaintiffs knew that their promise would be acted upon and it had been acted upon, it was enforceable despite the absence of consideration while the conditions giving rise to it continued to exist; and when they ceased to do so in 1945, the plaintiffs were entitled to claim the full rent.

DENNING J: . . . If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500*l.* a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in

the case of a lease required to be in writing would have to be evide[illegible]d by writing), the courts may give effect to it . . . . That equitable doctrine, however, could hardly apply in the present case because the variation here might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in *Jorden* v *Money* (1854) 5 HL 185, 10 ER 868, a representation as to the future must be embodied as a contract or be nothing.

But what is the position in view of developments in the law in recent years? The law has not been standing still since *Jorden* v *Money*. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: *Fenner* v *Blake* [1900] 1 QB 426, *In re Wickham*, (1917) 34 TLR 158, *Re William Porter & Co. Ltd* [1937] 2 All ER 361 and *Buttery* v *Pickard* [1946] WN 25. As I have said they are not cases of estoppel in the strict sense. They are really promises — promises intended to be binding, intended to be acted on, and in fact acted on. *Jorden* v *Money* can be distinguished, because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of *Hughes* v *Metropolitan Ry. Co.* (1877) 2 App Cas 439, *Birmingham and District Land Co.* v *London & North Western Ry. Co.* (1888) 40 ChD 268 and *Salisbury (Marquess)* v *Gilmore* [1942] 2 KB 38, afford a sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in *Foakes* v *Beer* (1884) 9 App Cas 605. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned, that result has now been achieved by the decisions of the courts.

I am satisfied that a promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250*l.* a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing.

That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let . . . . I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Questions

1. Although the plaintiff company did not make a retrospective claim for the full rent for the war years, Denning *obiter* indicated that such a claim would fail because of promissory estoppel. Can this be reconciled with *Foakes* v *Beer*, which held that it was possible to go back on such a promise and sue for the balance?
2. Could the defendants in *High Trees* have sued the plaintiffs if the plaintiffs had not complied with their promise to accept the reduced rent? (See page 143.)

Note

Denning J purported to rely in particular on the decision and statement of principle in *Hughes* v *Metropolitan Railway Company* (1877) 2 App Cas 439, as justifying his use of a doctrine of promissory estoppel. It is interesting, however, that this case was not seen as being relevant in *Foakes* v *Beer*.

Hughes v *Metropolitan Railway Company*
(1877) 2 App Cas 439 (HL)

On 22 October 1874, the landlords gave the tenants six months' notice to repair the premises. However, on 28 November, negotiations began between the parties for the sale of the lease to the landlords. The tenants stated that they would defer commencing the repairs until they had heard whether their proposal was acceptable. After the six months had elapsed, the landlords claimed that the lease was forfeited for breach of covenant and sought to eject the tenants. The tenants sought a stay of execution. Held: the tenants were entitled in equity to be relieved against forfeiture because the negotiations had the effect of suspending the notice, and while they continued the six-month period did not run. It ran again only from the time the negotiations ended.

LORD CAIRNS: . . . It was not argued at your Lordships' Bar, and it could not be argued, that there was any right of a Court of Equity, or any practice of a Court of Equity, to give relief in cases of this kind, by way of mercy, or by way merely of saving property from forfeiture, but it is the first principle upon which all Courts of Equity proceed, that 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. . . .

Notes

1. While the negotiations continued the landlords had impliedly promised not to enforce the notice, and the tenants had relied on this in not carrying out the repairs.

2. The principle in *Hughes* v *Metropolitan Railway Co.* appears to be intended to cover a different situation to that which arose on the facts in *High Trees*. If a landlord tells the tenant that he does not have to perform an obligation under the contract, and consequently the tenant does not do so, then the landlord cannot treat this as a breach of contract (and in *Hughes* could not forfeit the lease). In *High Trees* the landlord was not alleging that the tenant was in breach of contract by paying half the rent.

3. In *Foakes* v *Beer* (1884) 9 App Cas 605 (page 131), the issue was the same as in *High Trees*, namely that if one party tells the other that the other does not have to perform a contractual obligation, that party can change his mind and insist on the performance if performance is still possible. In *High Trees* the landlords were seeking to change their minds and insist on proper performance of the contract.

B: WHEN WILL THE DOCTRINE OPERATE AND IN WHAT WAY?

(a) Clear and unequivocal promise

There must be a clear and unequivocal promise or representation that existing legal rights will not be fully enforced. This representation can be implied, as in *Hughes* v *Metropolitan Railway* (1877) 2 App Cas 439.

Woodhouse A. C. Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co. Ltd
[1972] AC 741 (HL)

A sale contract provided for payment in Nigerian pounds in Lagos. The buyers had asked if the sellers would be prepared to accept sterling in Lagos, and the sellers had replied on 30 September 1967 that 'payment can be made in sterling and in Lagos'. The pound sterling was devalued so that it was worth 15 per cent less than the Nigerian pound. The buyers argued

that the seller's letter amounted either to a variation (supported by consideration) or a representation that they could make payment in sterling in Lagos on the basis of one pound sterling for one Nigerian pound, so that the sellers were estopped from going back on it. Held: to found a promissory estoppel a representation had to be clear and unequivocal (i.e., expressed so that it would be understood in the sense required). The seller's representation was not sufficiently precise either to amount to a variation of the contract terms (i.e., an alteration supported by consideration) or to found an estoppel.

LORD HAILSHAM LC: Counsel for the [buyers] was asked whether he knew of any case in which an ambiguous statement had ever formed the basis of a purely promissory estoppel, as contended for here, as distinct from estoppel of a more familiar type based on factual misrepresentation. He candidly replied that he did not. I do not find this surprising, since it would really be an astonishing thing if, in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract. I share the feeling of incredulity expressed by Lord Denning MR in the course of his judgment in the instant case when he said [1971] 2 QB 23, 59–60:

> If the judge be right, it leads to this extraordinary consequence: A letter which is not sufficient to *vary* a contract is, nevertheless, sufficient to work an *estoppel* — which will have the same effect as a *variation*.

There seem to me to be so many and such conclusive reasons for dismissing this appeal that it may be thought a work of supererogation to add yet another. But basically I feel convinced that there was never here any real room for the doctrine or estoppel at all. If the exchange of letters was not variation, I believe it was nothing. The buyers asked for a variation in the mode of discharge of a contract of sale. If the proposal meant what they claimed, and was accepted and acted upon, I venture to think that the vendors would have been bound by their acceptance at least until they gave reasonable notice to terminate, and I imagine that a modern court would have found no difficulty in discovering consideration for such a promise. Business men know their own business best even when they appear to grant an indulgence, and in the present case I do not think that there would have been insuperable difficulty in spelling out consideration from the earlier correspondence. If, however, the two letters were insufficiently unambiguous and precise to form the basis, if accepted, for a variation in the contract I do not think their combined effect is sufficiently unambiguous or precise to form the basis of an estoppel which would produce the result of reducing the purchase price by no less than 14 per cent against a vendor who had never consciously agreed to the proposition. . . .

(b) A defence and not a cause of action

Combe v *Combe*
[1951] 2 KB 215 (CA)

An ex-husband promised to pay his ex-wife £100 per annum maintenance, free of income tax. However, he failed to pay, and six years later the wife

brought an action claiming the arrears. She had given no consideration for her husband's promise, since she had chosen not to apply to the Divorce Court for maintenance and had not refrained from doing so at her husband's request (her income in fact being greater than her husband's). Nevertheless, Byrne J gave judgment for the wife on the basis of the doctrine in *High Trees*. He held that the husband's promise was clear, it was intended to be binding and acted upon, and it was acted upon by the wife. The Court of Appeal allowed the husband's appeal. Held: the wife had provided no consideration for the husband's promise and could not rely on promissory estoppel which did not give rise to a cause of action.

DENNING LJ: . . . Much as I am inclined to favour the principle stated in the *High Trees* case [1947] KB 130, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. That is the way it was put in *Hughes* v *Metropolitan Railway* (1877) 2 App Cas 439, the case in the House of Lords in which the principle was first stated, and in *Birmingham etc., Land Company* v *London and North-Western Railway Co.* (1888) 40 ChD 268, the case in the Court of Appeal where the principle was enlarged. It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive, if the debtor has carried on business or in some other way changed his position in reliance on the waiver . . . On other occasions it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. . . .

The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideraton but only by his word.

Seeing that the principle never stands 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 the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled Byrne J, in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case: was there sufficient consideration to support the promise? . . .

There was, . . . clearly no promise by the wife, express or implied, to forbear from applying to the court. All that happened was that she did in fact forbear — that is, she did an act in return for a promise. Is that sufficient consideration? Unilateral promises

of this kind have long been enforced, so long as the act or forbearance is done on the faith of the promise and at the request of the promissor, express or implied. . . . my difficulty is to accept the finding of Byrne J, that the promise was 'intended to be acted upon'. I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear. He left her to apply if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the Divorce Court would have then made any order in her favour, seeing that she had a bigger income than her husband. Her forbearance was not intended by him, nor was it done at his request. It was therefore no consideration.

ASQUITH LJ: The judge has decided that, while the husband's promise was unsupported by any valid consideration, yet the principle in *Central London Property Trust Ltd.* v *High Trees House Ltd.* [1947] KB 130 entitles the wife to succeed. It is unnecessary to express any view as to the correctness of that decision, though I certainly must not be taken to be questioning it; and I would remark, in passing, that it seems to me a complete misconception to suppose that it struck at the roots of the doctrine of consideration. But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all. What that case decides is that when a promise is given which (1) is intended to create legal relations, (2) is intended to be acted upon by the promisee, and (3) is in fact so acted upon, the promisor cannot bring an action against the promisee which involves the repudiation of his promise or is inconsistent with it. It does not, as I read it, decide that a promisee can sue on the promise. On the contrary, Denning, J, expressly stated the contrary. . . .

Notes

1. Promissory estoppel is available only where there has been an alteration to an existing contract. It cannot be used to render unnecessary consideration on the formation of a contract.
2. Birkett LJ approved of counsel for the husband's argument that promissory estoppel can be 'used as a shield and not a sword'. It cannot be used to force a party to comply with a promise, and can only be used to prevent a party from ignoring his promise that he would not insist on his strict legal rights. This explains why the tenants in *High Trees* could not have sued on the landlord's promise to enforce their claim to pay reduced rent.
3. Compare these limitations with the scope of the doctrine as enunciated by Denning J in *High Trees* (page 139).

(c) The representation or promise was intended to be binding and acted upon and was in fact acted upon

E. A. Ajayi v *R. T. Briscoe (Nigeria) Ltd*
[1964] 3 All ER 556 (PC)

The defendant had hired a number of lorries from the plaintiffs on hire-purchase and was paying the purchase price in instalments. Some were withdrawn from service because of difficulties with service arrangements. The defendant wrote to the plaintiffs asking that they carry out the repairs and proposing that this would be paid for when the lorries were back in

service. By a letter of 22 July 1957, the plaintiffs replied that they were agreeable to the defendant 'withholding instalments due on [the lorries] as long as they are withdrawn from active service'. The plaintiffs later claimed the full instalments due. On appeal the defendant raised the defence of promissory estoppel, arguing that the estoppel applied because he had relied upon the promise in not putting forward alternative proposals on payment for the repairs, and he had organised his business on the basis that he would not have to make the payments until the lorries were back in service. Held: the defendant had failed to establish the defence of promissory estoppel since he had not altered his position as a result of the plaintiffs' letter. The lorries had been withdrawn from service before the seller's promise.

LORD HODSON: . . . The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualification (a) that the other party has altered his position, (b) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (c) the promise only becomes final and irrevocable if the promisee cannot resume his position. . . .

The question remains whether the hire-purchaser has made good the defence. In their lordships' opinion he has not succeeded in so doing. The hire-purchaser did not alter his position by not putting forward counter proposals after receipt of the letter of July 22, 1957. There is no evidence to support the contention that he did so by organising his business in a different way having regard to the fact that the lorries were out of service, and it cannot be inferred from the evidence given that such reorganisation was necessary.

The hire-purchaser has accordingly failed to establish any defence to the owners' claim. . . .

Question

Was this a clear and unequivocal promise? Does 'withhold' mean that the promisee does not have to pay those instalments at all, or only that the instalments do not have to be paid while the lorries are not in service but can be recovered later?

Note

The requirement that the promisee 'alter his position' was interpreted to mean altered in a detrimental way. However, Lord Denning has confirmed that detrimental reliance is not necessary.

W. J. Alan & Co. Ltd v *El Nasr Export and Import Co.*
[1972] 2 QB 189 (CA)

The sellers in Kenya contracted to sell coffee to the buyers at 262 (Kenyan) shillings per cwt. Two shipments were to be made and payment was to be 'by confirmed irrevocable letter of credit to be opened one month prior to

shipment'. The irrevocable letter of credit was opened in sterling rather than Kenyan shillings, but the sellers operated the credit by presenting invoices in sterling for payment in sterling. The second shipment was made on 16 November 1967, and the sellers made out an invoice in sterling. However, before it could be presented for payment, sterling was devalued on 18 November. Payment under the credit was made against the invoice and the sellers then claimed an additional sum to bring the price they received up to 262 Kenyan shillings. Held: by accepting payment under the sterling letter of credit the sellers had irrevocably 'waived' their right to be paid in Kenyan currency. The majority (Megaw and Stephenson LJJ) considered that this was a variation of the sale contract (supported by consideration), whereas Lord Denning relied on the doctrine of promissory estoppel.

LORD DENNING MR: The principle of waiver is simply this: If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa per Azioni v Davidson (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on ocassion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them: *Tool Metal Manufacturing Co. Ltd* v *Tungsten Electric Co. Ltd* [1955] 1 WLR 761. But there are cases where no withdrawal is possible. It may be too late to withdraw: or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

Instances of these principles are ready to hand in contracts for the sale of goods. A seller may, by his conduct, lead the buyer to believe that he is not insisting on the stipulated time for exercising an option: *Bruner* v *Moore* [1904] 1 Ch 305. A buyer may, by requesting delivery, lead the seller to believe that he is not insisting on the contractual time for delivery: *Charles Rickards Ltd* v *Oppenhaim* [1950] 1 KB 616, 621. A seller may, by his conduct, lead the buyer to believe that he will not insist on a confirmed letter of credit: *Plasticmoda* [1952] 1 Lloyd's Rep. 527, but will accept an unconfirmed one instead: *Panoustsos* v *Raymond Hadley Corporation of New York* [1917] 2 KB 473; *Enrico Furst & Co* v *W.E. Fischer* [1960] 2 Lloyd's Rep 340. A seller may accept a less sum for his goods than the contracted price, thus inducing him to believe that he will not enforce payment of the balance: *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130 and *D. & C. Builders Ltd* v *Rees* [1966] 2 QB 617, 624. In none of these cases does the party who acts on the belief suffer any detriment. It is not a detriment, but a benefit to him, to have an extension of time or to pay less, or as the case may be. Nevertheless, he has conducted his affairs on the basis that he has that benefit and it would not be equitable now to deprive him of it.

The judge rejected this doctrine because, he said, 'there is no evidence of the buyers having acted to their detriment.' I know that it has been suggested in some quarters

that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement of Viscount Simonds in the *Tool Metal* case [1955] 1 WLR 761, 764, that the other must have been led 'to alter his position,' which was adopted by Lord Hodson in *Ajayi* v *R.T. Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330. But that only means that he must have been led to act differently from what he otherwise would have done. And if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have '*acted* on the belief induced by the other party.' That is how Lord Cohen put it in the *Tool Metal* case [1955] 1 WLR 761, 799, and that is how I would put it myself. . . .

MEGAW LJ: As I see it, the necessary consequence of that offer and acceptance of a sterling credit is that the original term of the contract of sale as to the money of account was varied from Kenyan currency to sterling. The payment, and the sole payment, stipulated by the contract of sale was by the letter of credit. The buyers, through the confirming bank, had opened a letter of credit which did not conform because it provided sterling as the money of account. The sellers accepted that offer by making use of the credit to receive payment for a part of the contractual goods. By that acceptance, as the sellers must be deemed to have known, not only did the confirming bank become irrevocably bound by the terms of the offer (and by no other terms), but so also did the buyers become bound. Not only did they incur legal obligations as a result of the sellers' acceptance — for example, an obligation to indemnify the bank — but also the buyers could not thereafter have turned round and said to the sellers (for example, if Kenyan currency had been devalued against sterling) that the bank would thereafter pay less for the contractual goods than the promised sterling payment of £262 per ton. If the buyers could not revert unilaterally to the original currency of account, once they had offered a variation which had been accepted by conduct, neither could the sellers so revert. The contract had been varied in that respect. . . .

In my view, if there were no variation, the buyers would still be entitled to succeed on the ground of waiver. The relevant principle is, in my opinion, that which was stated by Lord Cairns LC in *Hughes* v *Metropolitan Railway Co.* (1877) 2 App Cas 439, 448. . . .

STEPHENSON LJ: By not objecting to the non-conforming letter of credit, by obtaining payment on it in sterling from the bank and by extending it the sellers clearly accepted and agreed to it and were treated as having done so not only by the bank but by the buyers, who may be presumed (although there was no evidence about it) to have paid charges and incurred liabilities such as a liability to indemnify the bank. The sellers never indicated any reservations about the change from Kenya shillings to pounds sterling or asked for any adjustment, probably for the simple reason that they considered sterling as good as Kenya shillings if not better. When after devaluation of sterling they invoiced the balance of the goods against part payment of the balance of the price and claimed the difference created by devaluation from the buyers, they were attempting to assert a liability which, whether by variation or waiver, they had allowed the buyers to alter.

. . . I would leave open the question whether the action of the other party induced by the party who 'waives' his contractual rights can be any alteration of his position, as Lord Denning MR has said, or must, as the judge thought, be an alteration to his detriment, or for the worse, in some sense. In this case the buyers did, I think, contrary to the judge's view, act to their detriment on the sellers' waiver, if that is what

it was, and the contract was varied for good consideration, which may be another way of saying the same thing: so that I need not, and do not, express a concluded opinion on that controversial question. . . .

Question

Stephenson LJ considered that the buyers had acted to their detriment as a result of the seller's representation. This detriment was the possibility that Kenyan shillings might have been devalued and they would have been bound to pay more under the sterling letter of credit. Was this the consideration for the seller's promise so that a binding variation had been made? Does this mean that if a promisee acts to his detriment there will be a binding variation, and therefore promissory estoppel will be irrelevant?

Note

Although detriment is not essential, where the promisee has acted to his detriment it will be easier to establish that it is inequitable for the promisor to go back on that promise (see page 150).

Société Italo-Belge pour le Commerce et l'Industrie SA v *Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser*
[1982] 1 All ER 19

The sellers agreed to sell palm oil to the buyers, who in turn contracted to sell it to sub-buyers. The sellers failed to advise the buyers of the ship used until a month after it had sailed. This would have justified them in refusing to accept the documents. However, the buyers did not protest, and instead requested the sellers to hand the documents relating to the consignment to the sub-buyers. Two days later, when the sub-buyers rejected the documents, the buyers also rejected them, and the sellers were forced to sell the palm oil elsewhere at a loss. The sellers claimed this loss from the buyers, and the crucial question was whether the buyers had waived their right to reject the documents. Held: the buyers had waived their right to reject the documents by requesting that the sellers hand the documents to the sub-buyers, since this was a representation that they were prepared to accept the documents. However, although the sellers had acted on this representation, by presenting the documents as requested, their position had not been prejudiced because of the very short time between the date of the representation and reliance and the date of rejection. Therefore, it was not inequitable for the buyers to enforce their legal right to reject.

ROBERT GOFF J: I approach the matter as follows. The fundamental principle is that stated by Lord Cairns LC [in *Hughes* v *Metropolitan Rlwy Co.*, see page 141], viz that the representor will not be allowed to enforce his rights 'where it would be inequitable having regard to the dealings which have thus taken place between the parties'. To establish such inequity, 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. Take

th facts of *Central London Property Trust Ltd* v *High Trees House Ltd* (1946) [1956] 1 All ER 256, [1947] KB 130, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice. But it does not follow that in every case in which the representee has acted, or failed to act, in reliance on the representation, it will be inequitable for the representor to enforce his rights for the nature of the action, or inaction, may be insufficient to give rise to the equity, in which event a necessary requirement stated by Lord Cairns LC for the application of the doctrine would not have been fulfilled.

(d) It must be inequitable to allow the promisor to go back on his promise

D. & C. Builders Ltd v *Rees*
[1966] 2 QB 617 (CA)

In July 1964, the defendant owed the plaintiffs, a firm of builders, £482. In November the defendant still had not paid. The plaintiffs were in desperate financial straits, and it was alleged that the defendant's wife knew this when she offered to pay the plaintiffs £300 in full settlement, indicating that if they did not accept it they would get nothing. The plaintiffs said they had no choice but to accept, and they received a cheque for £300 'in completion of the account'. The plaintiffs then claimed the balance. Held: there was no binding settlement. Danckwerts and Winn LJJ concentrated on rejecting the argument that consideration had been provided because the payment of a smaller amount had been made by cheque. Lord Denning examined promissory estoppel, but held that it could not operate on these facts because it was not inequitable for the plaintiffs to go back on their promise which was not freely given.

LORD DENNING MR: This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. This was well illustrated during the last war. Tenants went away to escape the bombs and left their houses unoccupied. The landlords accepted a reduced rent for the time they were empty. It was held that the landlords could not afterwards turn round and sue for the balance, see *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130. This caused at the time some eyebrows to be raised in high places. But they have been lowered since. The solution was so obviously just that no one could well gainsay it.

In applying this principle, however, we must note the qualification: The creditor is only barred from his legal rights when it would be *inequitable* for him to insist upon them. Where there has been a *true accord*, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor *acts upon* that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them.

In the present case, on the facts as found by the judge, it seems to me that there was no true accord. The debtor's wife held the creditor to ransom. . . .

In my opinion there is no reason in law or equity why the creditor should not enforce the full amount of the debt due to him. . . .

Question

This promise would now be voidable under the doctrine of economic duress (page 532). It is not clear, however, what the position will be if the pressure is not as explicit as in *D. & C. Builders* v *Rees*. It appears from *Williams* v *Roffey Brothers* (page 125) to make a difference who initiates a compromise. Was any pressure exerted in *High Trees House*?

(e) Does promissory estoppel extinguish rights or merely suspend them?

This is a vital question, since if promissory estoppel is capable of operating to extinguish the right for all time, then it will conflict with *Foakes* v *Beer* (1884) 9 App Cas 605 (page 131) which held that if a promisor represented that he would not insist on his strict contractual rights, in the absence of consideration provided by the promisee, the promisor was free to change his mind.

Tool Metal Manufacturing Co. Ltd v *Tungsten Electric Co. Ltd*
[1955] 2 All ER 657 (HL)

By a contract in 1938, Tool Metal (TMMC) granted Tungsten Electric (TECO) a licence to import, manufacture, use and sell certain hard metal alloys covered by patents owned by TMMC. If TECO's sales exceeded a set quota in any given month they were to pay 'compensation' of 30 per cent to TMMC. After the outbreak of war in 1939, TMMC agreed not to enforce their right to the 'compensation', and no compensation was paid after 31 December 1939. In 1945, TECO commenced an action against TMMC, and in March 1946 TMMC counterclaimed for the compensation in respect of the material used from June 1945 but not for the period before this. The Court of Appeal held that the counterclaim failed, because this temporary arrangement to suspend compensation could be terminated only by giving reasonable notice and this had not been done. In this action in 1950, TMMC claimed the compensation from January 1947, and the issue was whether reasonable notice had been given by TMMC to resume their strict legal rights. Held: TMMC were entitled to the compensation claimed since the delivery of the counterclaim in March 1946 constituted notice by TMMC that they intended to resume their legal rights, and the period of nine months between the date of the counterclaim and the date from which the compensation was claimed was a sufficient period of notice.

LORD TUCKER: . . . The sole question, therefore, before the courts on this issue in the present action has been throughout: Was the counterclaim in the first action a sufficient intimation to terminate the period of suspension which has been found to exist? . . . It is, of course, clear, . . . that there are some cases where the period of suspension clearly terminates on the happening of a certain event, or the cessation of a previously existing state of affairs, or on the lapse of a reasonable period thereafter. In such cases, no intimation or notice of any kind may be necessary. But in other cases, where there is nothing to fix the end of the period which may be dependent on the will of the person who has given or made the concession, equity will, no doubt, require some notice or intimation together with a reasonable period for re-adjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that, in all such cases, the notice must take any particular form or specify a date for the termination of the suspensory period. This is not surprising having regard to the infinite variety of circumstances which may give rise to this principle which was stated in broad terms and must now be regarded as of general application. It should, I think, be applied with great caution to purely creditor and debtor relationships which involve no question of forfeiture or cancellation, and it would be unfortunate if the law were to introduce into this field technical requirements with regard to notice and the like which might tend to penalise or discourage the making of reasonable concessions.

Notes

1. This case confirms the view that promissory estoppel is merely suspensory, and that the promisor can resume his rights under the contract after giving reasonable notice of his intention to do so.

2. Both the *High Trees* and the *Tool Metal* cases concerned individual periodic payments (of rent and monthly compensation), and in both cases it seems that it would not have been possible to claim back the instalments before notice was given or the estoppel ceased. Does this mean that those payments are extinguished but not the general right itself? If this is the case, it would mean that there is an important difference between those who make a single payment and those who pay by instalments.

If, contrary to Denning J's view in *High Trees*, it is possible to reclaim all sums owed once the estoppel ceases, then promissory estoppel has only the very limited effect of allowing a little more time to pay (and this can end by the promisor giving reasonable notice).

Lord Denning MR in *D. & C. Builders Ltd* v *Rees* [1966] 2 QB 617 (page 150) stated (at p. 624): 'It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.' It is possible to reconcile this statement with the case law by arguing that Lord Denning was referring to the individual periodic payments which could be extinguished by promissory estoppel.

C: HOW FAR CAN THE DOCTRINE BE EXTENDED?

The exact scope of promissory estoppel is unclear. In particular, questions have been raised as to whether it can be extended to give rise to a cause of action, whether it can be applied where there is no existing legal relationship

between the parties, the exact scope and meaning of its suspensory effect, and the extent to which the concept of inequitable conduct will affect the estoppel.

Brikom Investments Ltd v Carr
[1979] 2 All ER 753 (CA)

The landlords of four blocks of flats offered to sell 99-year leases to their sitting tenants. The roofs of the blocks were in need of repair, and the landlords made oral representations to the tenants that the landlords would repair the roofs at their own expense. The subsequent leases contained a covenant by the landlords to repair the roofs but also stipulated that the tenants would pay an annual contribution in respect of the maintenance expenses incurred by the landlords. The leases were signed, the landlords repaired the roofs and then claimed contributions from the tenants. The tenants refused to pay, relying on the representations of the landlords. In the action the first defendant admitted that she would have taken the lease in any event, and the second and third defendants were assignees of the original tenants to whom the representations had been made. The majority of the Court of Appeal (Roskill and Cumming-Bruce LJJ) dismissed the landlords' claim on the basis that there was a collateral contract (see page 245) between the landlords and the original tenants, and the tenants had given consideration for the landlords' promise by entering into the leases in reliance upon it. Lord Denning held that the tenants could rely on the defence of promissory estoppel.

LORD DENNING MR: Counsel for the landlords submitted that [the first defendant] could not rely on the principle in the *High Trees* case [1947] KB 130, because it was essential that she should have *acted* on the representation; and here she had not acted on it. On her own admission, he said, she would have gone on and taken the lease even if she had not been told about the roof. In all the cases, said counsel for the landlords, the courts had said that the party must have *acted* on the promise or representation in the sense that he must have altered his position on the faith of it, meaning that he must have been led to act differently from what he would otherwise have done: see *Alan & Co v El Nasr Export & Import Co* [1972] 2 QB 189. This argument gives, I think, too limited a scope of the principle. The principle extends to all cases where one party makes a promise or representation, intending that it should be binding, intending that the other should rely on it, and on which that other does in fact rely, by acting on it, by altering his position on the faith of it, by going ahead with a transaction then under discussion, or by any other way of reliance. It is no answer for the maker to say: 'You would have gone on with the transaction anyway.' That must be mere speculation. No one can be sure what he would, or would not, have done in a hypothetical state of affairs which never took place. . . . Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced.

[Lord Denning then considered the position of the second and third defendants who were assignees and a sub-assignee.]

Counsel for the landlords submitted that the doctrine of promissory estoppel (as enunciated in the *High Trees* case) was personal to the person to whom the

representation or promise was made. So the original tenants could rely on the estoppel, but no one else. Counsel for the landlords said that the assignees could not rely on it. They took their assignments in the usual conveyancing way. They take the benefit and burden of the covenants in the lease itself which run with the land at law or in equity, but not of estoppels such as this.

The judge did not accept that contention. We have had it elaborately argued before us today. It was suggested that if assignees are able to rely on an oral or written representation (not contained in the deeds) it would cause chaos and confusion amongst conveyancers. No one buying property would know where he stood.

I am not disturbed by those forebodings. I prefer to see that justice is done; and let the conveyancers look after themselves. Suppose that the landlords here (before or after doing the repairs to the roofs) had assigned their reversion to a purchaser; and then that purchaser sought to recover the contribution from the tenants, contrary to the promise made by the original landlords. Surely the assignee of the reversion would be bound by the promise made by the original landlords. It would be most unjust and unfair if he could go back on the promise. Equity would not allow him to do it.

Now if the assignee of the reversion takes subject to the *burden* of the estoppel, so also the assignee of the tenant should take subject to the *benefit* of it. So when the original tenant assigns the lease over to an assignee, the benefit of the promise passes to the assignee. The burden and the benefit run down the line of assignor and assignee on each side. Especially in this case, because it is plain (as the judge found) that when the landlords made this promise they intended it to be for the benefit of all those from time to time holding the leases, realising that each in turn would tell their successors that the landlords were going to repair the roofs at their own expense. The landlords, having made a representation of that kind, knowing that it would be passed on, cannot escape from it by simply saying: 'These people are assignees.'

So it seems to me that the judge was quite right in the way he put the case. He held that in all these cases the landlords could not go back to the strict rights under the lease. They had given the tenants their promise or representation to repair the roofs at their own cost, and the tenants relied on it. That gives rise to an equity which makes it unjust and inequitable for the landlords to seek to charge the tenants for a contribution; and the benefit of this equity avails the assignees of the tenants also.

But I may say there is another way in which the cases can be put which seems to me equally valid. Although this is called a 'promise' or 'representation', it seems to me that it might also qualify for what we call a 'collateral contract' or 'collateral warranty'. On the faith of it these tenants signed the leases. After the first day in the county court, [the assignees] took from their predecessors an assignment of the benefit of the collateral contract or warranty. That enables them to take advantage of it as against the landlords. This seems to me a roundabout way of reaching the same result as the *High Trees* principle. It is a technical way of overcoming technical difficulties. I prefer the simple way . . .

ROSKILL LJ: . . . While I agree this appeal should be dismissed, I wish, with respect, to make plain that my reasons differ. I do not rest my decision on any question of promissory estoppel; and I do not think it necessary on the facts of this case to investigate the jurisprudential basis of that doctrine in order to arrive at what I conceive to be the right decision. It is necessary to do no more than to apply that which was said by the House of Lords and especially by Lord Cairns LC in *Hughes* v *Metropolitan Railway Co* (1877) 2 App Cas 439. . . .

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 this back-handed way the doctrine of consideration. . .

It seems to me in the present case that counsel for the tenants' argument (in so far as it rests on promissory estoppel) involves taking that doctrine a great deal further than it has hitherto been taken. With great respect, I would not go as far as Lord Denning MR in saying it is now the law that benefits and burdens arising from a promise made in circumstances such as those presently found by the judge, to quote the phrase he used a few moments ago, 'run down both sides'. It seems to me that the problem is far more complex. Accordingly, I do not rest my conclusion that this appeal should be dismissed on any question of promissory estoppel.

. . . I entertain no doubt . . . that there was a perfectly clear agreement between the landlords and [the tenants] . . . that those who took these 99-year leases from the landlords would not be liable for their share of the cost of repairing the roofs if the time ever came to do those repairs.

. . . I do not see how the landlords can escape from the bond of the promises which were given and which seem to me to have been given for perfectly good consideration.

But if I am wrong about that, I think there was a plain waiver by the landlords of their right to claim the cost of these repairs from these tenants.

. . . If that be right, then it seems to me that that waiver subsists notwithstanding any subsequent assignment of the lease to assignees and sub-assignees from the first assignee; because what was then assigned and reassigned was a lease, the relevant obligation in which had before assignment been waived by the landlords.

I think it necessary to go no further than what Lord Cairns LC said in *Hughes* v *Metropolitan Railway Co.* where the matter was put not as one of promissory estoppel but as a matter of contract law or equity (call it which you will). . .

For my own part, I would respectfully prefer to regard that as an illustration of contractual variation of strict contractual rights. But it could equally well be put as an illustration of equity relieving from the consequences of strict adherence to the letter of the lease.

But, whichever is the right way of putting it, ever since *Hughes* v *Metropolitan Railway Co.*, through a long line of cases of which there are many examples in the books, one finds that where parties have made a contract which provides one thing and where, by a subsequent course of dealing, the parties have worked that contract out in such a way that one party leads the other to believe that the strict rights under that contract will not be adhered to, the courts will not allow that party who has led the other to think the strict rights will not be adhered, suddenly to seek to enforce those strict rights against him. That seems to me to be precisely what the landlords are trying to do here. . . . I do not think that the common law or equity will allow them to take that step; and for my part with profound respect to Lord Denning MR, I do not think it is necessary in order to reach that result to resort to the somewhat uncertain doctrine of promissory estoppel.

(a) Can estoppel found a cause of action?

(i) *Estoppel by convention*

Amalgamated Investment & Property Co. Ltd (in liquidation)* v *Texas Commerce International Bank Ltd
[1982] QB 84 (CA)

The defendant bank agreed to make a loan to the plaintiffs' subsidiary company (ANPP) which was based in the Bahamas. This 'Nassau' loan was to be secured by a guarantee from the plaintiffs. For exchange control purposes the money was lent to Portsoken, a subsidiary company which the

bank acquired in the Bahamas, and Portsoken then lent the money to ANPP. The plaintiffs' guarantee in fact referred only to loans made by the defendant bank rather than the defendant's subsidiary. However, it was assumed by both the plaintiffs and the defendant bank that the guarantee covered this 'Nassau' loan made by the defendant's subsidiary, Portsoken. When the plaintiff company was wound up the liquidator sought a declaration that the guarantee did not cover this 'Nassau' loan. Held: since the parties had acted upon the agreed assumption that the plaintiffs were liable for the 'Nassau' loan, the plaintiffs were estopped by convention from denying that they were bound to discharge any indebtedness of ANPP to the defendant's subsidiary. (In effect the defendant bank was establishing that the guarantee was enforceable. The majority (Lord Denning and Brandon LJ) considered that the estoppel could operate so as to enable a party to succeed on a cause of action.)

LORD DENNING MR: The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

BRANDON LJ: I turn to the second argument advanced on behalf of the plaintiffs, that the bank is here seeking to use estoppel as a sword rather than a shield, and that that is something which the law of estoppel does not permit. Another way in which the argument is put is that a party cannot found a cause of action on an estoppel.

In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by ANPP to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by ANPP to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by ANPP to the bank, and not debts owed by ANPP to Portsoken. Then in their reply the bank would have pleaded that, by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.

In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party 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. That, in my view, is, in substance, the situation of the bank in the present case.

Note

Brandon LJ appears to assume that it would be the contract of guarantee which created the cause of action and not the estoppel. However, if the estoppel was being relied upon to ensure that the guarantee was enforceable, then it must be the estoppel which establishes the cause of action.

(ii) *Proprietary estoppel* This estoppel can arise despite the absence of a clear and unequivocal representation, e.g., in the belief or expectation that the property interest will be granted, and it can give rise to a cause of action.

Crabb v *Arun District Council*
[1976] Ch 179 (CA)

The plaintiff owned land which had an access point (at A) onto the road owned by the defendant council, and he had a right of way along the road. The plaintiff wished to sell his land in two parts, and the defendants' representative indicated that he would be given a second point of access (at B) and a second right of way. The council subsequently fenced the boundary between their road and the plaintiff's land and erected gates at points A and B. The plaintiff sold the land with the access (A) but the defendants removed the access point (at B) so that the plaintiff's land was landlocked. The plaintiff claimed that the defendants were estopped from denying the right of access at B and right of way along the road. Held: the defendants had encouraged the plaintiff to act to his detriment in selling part A without reserving any access. This gave rise to an equity in the plaintiff which would be satisfied by granting him the relevant access point at B and right of way along the road.

LORD DENNING MR: When [counsel] for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in *Moorgate Mercantile Co. Ltd* v *Twitchings* [1976] QB 225 where I said, at p. 242, that the effect of estoppel on the true owner may be that:

> . . . his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct — what he has led the other to believe — even though he never intended it.

The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action.

The basis of this proprietary estoppel — as indeed of promissory estoppel — is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel.' They spoke of it as 'raising an equity.' If I may expand what Lord Cairns LC said in *Hughes* v *Metropolitan Railway Co.* (1877) 2 App Cas 439, 448: 'it is the first principle upon which all courts of equity

proceed,' that it will prevent a person from insisting on his strict legal rights — whether arising under a contract, or on his title deeds, or by statute — when it would be inequitable for him to do so having regard to the dealing which have taken place between the parties.

What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights — then, even though that promise may be unenforceable in point of law for want of consideration . . . — then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise: see *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130 and *Charles Rickards Ltd* v *Oppenhaim* [1950] 1 KB 616, 623. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In *Ramsden* v *Dyson* (1866) LR 1 HL 129, 170 Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged.' In *Birmingham and District Land Co.* v *London and North Western Railway Co.* (1888) 40 ChD 268, 277, Cotton LJ said that '. . . what passed did not make a new agreement, but . . . what took place . . . raised an equity against him.' . . .

The question then is: were the circumstances here such as to raise an equity in favour of the plaintiff? True the defendants on the deeds had the title to their land, free of any access at point B. But they led the plaintiff to believe that he had or would be granted a right of access at point B. . . . The defendants actually put up the gates at point B at considerable expense. That certainly led the plaintiff to believe that they agreed that he should have the right of access through point B without more ado.

It was their conduct which led him to act as he did: and this raises an equity in his favour against them.

Questions

1. Do you consider that the Court of Appeal was enforcing a contract in this case based on the fact that the plaintiff had acted to his detriment? (See Atiyah (1976) 92 LQR 174 and Millett (1976) 92 LQR 342.)
2. Scarman LJ considered that the distinction between promissory estoppel and proprietary estoppel was not a helpful one. Would it be preferable to accept a general doctrine based on the fact that it is unconscionable for the promisor to go back on his promise, e.g., because he had acquiesced in the detrimental conduct or encouraged it?

(b) A new flexibility?

Waltons Stores (Interstate) Ltd* v *Maher
(1988) 164 CLR 387 (High Court of Australia)

Waltons had negotiated with Maher, a land owner, that Maher would demolish a building and construct a new one in accordance with Waltons'

specifications, and then lease the building to Waltons as retail premises. Maher did not wish to start until it was clear that there were no problems with the lease. Maher signed his part of the lease and forwarded it to Waltons' solicitors for execution 'by way of exchange', and then began to demolish the building. Waltons had second thoughts about proceeding and told their solicitors to 'go slow'. Waltons knew that 40 per cent of the work had been completed when they informed Maher that they would not proceed. Maher sought specific performance and, on appeal, sought to argue that Waltons were estopped from going back on their implied promise to complete the lease contract. Waltons argued that even if they had made a representation as to their future conduct, there was no pre-existing legal relationship between the parties and Maher could not use the estoppel to create a cause of action. Held: Waltons knew Maher was exposed to a detriment in carrying out the demolition and building work in reliance on the representation, and since it was unconscionable to adopt a course of inaction encouraging that detriment, they were estopped from denying that they were bound. The majority (Mason CJ, Wilson J and Brennan J) appeared to confirm that promissory estoppel could create a cause of action, and that this could be reconciled with the doctrine of consideration on the ground that the object of the promissory estoppel doctrine was not to enforce promises but to avoid detriment to the promisee resulting from the unconscionable departure by the promisor from the terms of his promise. In addition, it was not necessary to establish a pre-existing relationship between the parties before this estoppel could be relied upon.

MASON CJ AND WILSON J: There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity: *Hughes* v *Metropolitan Railway Co.* (1877) 2 App Cas 439; *Combe* v *Combe* [1951] 2 KB 215 and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword . . . *High Trees* [1947] KB 130 itself was an instance of the defensive use of promissory estoppel. But this does not mean that a plaintiff cannot rely on an estoppel. Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of Denning LJ in *Combe* v *Combe*, the estoppel 'may be part of a cause of action, but not a cause of action in itself'.

But the respondents ask us to drive promissory estoppel one step further by enforcing directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment. For the purposes of discussion, we shall assume that there was such a promise in the present case. The principal objection to the enforcement of such a promise is that it would outflank the principles of the law of contract. Denning LJ in *Combe* v *Combe* after noting that 'The doctrine of consideration is too firmly fixed to be overthrown by a side-wind', said that such a promise could only be enforced if it was supported by sufficient consideration. . . .

There is force in these objections and it may not be a sufficient answer to repeat the words of Lord Denning MR in *Crabb* v *Arun District Council* [1976] 1 Ch 179: 'Equity

comes in, true to form, to mitigate the rigours of strict law.' True it is that in the orthodox case of promissory estoppel, where the promisor promises that he will not exercise or enforce an existing right, the elements of reliance and detriment attract equitable intervention on the basis that it is unconscionable for the promisor to depart from his promise, if to do so will result in detriment to the promisee. And it can be argued that there is no justification for applying the doctrine of promissory estoppel in this situation, yet denying it in the case of a non-contractual promise in the absence of a pre-existing relationship. The promise, if enforced, works a change in the relationship of the parties, by altering an existing legal relationship in the first situation and by creating a new legal relationship in the second. The point has been made that it would be more logical to say that when the parties have agreed to pursue a course of action, an alteration of the relationship by non-contractual promise will not be countenanced, whereas the creation of a new relationship by a simple promise will be recognized: see D. Jackson, 'Estoppel as a Sword', *Law Quarterly Review*, vol. 81 (1965) 223, at p. 242.

[T]he doctrine [of promissory estoppel] extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. *Humphreys Estate* [*AG (Hong Kong)* v *Humphreys Estate Ltd* [1987] 1 AC 114] suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. . . . the crucial question remains: was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality? The mere exercise of its legal right not to exchange contracts could not be said to amount to unconscionable conduct on the part of the appellant. But there were two other factors present in the situation which require to be taken into consideration. The first was the element of urgency that pervaded the negotiation of the terms of the proposed lease . . . The respondents' solicitor had said to the appellant's solicitor on 7 November that it would be impossible for Maher to complete the building within the agreed time unless the agreement were concluded 'within the next day or two'. The outstanding details were agreed within a day or two thereafter, and the work of preparing the site commenced almost immediately.

The second factor of importance is that the respondents executed the counterpart deed and it was forwarded to the appellant's solicitor on 11 November. The assumption on which the respondents acted thereafter was that completion of the necessary exchange was a formality. The next their solicitor heard from the appellant was a letter from its solicitors dated 19 January, informing him that the appellant did not intend to proceed with the matter. It had known, at least since 10 December, that costly work was proceeding on the site.

It seems to us, in the light of these considerations, that the appellant was under an obligation to communicate with the respondents within a reasonable time after receiving the executed counterpart deed and certainly when it learnt on 10 December that demolition was proceeding. . . .

. . . The appellant's inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the

assumption which they had made. It was unconscionable for it, knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted. To express the point in the language of promissory estoppel the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.

Notes

1. It must be doubted whether *Waltons Stores* is strictly speaking a promissory estoppel case, since it appears to support a single general doctrine of estoppel preventing unconscionable conduct. This idea of a unifying estoppel is supported by the judgments in *Commonwealth of Australia* v *Verwayen* (1990) 170 CLR 394, which require that the doctrine should not be seen as a 'series of independent rules'.

2. Duthie 'Equitable estoppel, unconscionability and the enforcement of promises' (1988) 104 LQR 362, argues that the denial of a future right should be treated in the same way as insistence on an existing right, so that if the legal relationship would exist were it not for the unconscionable conduct, the lack of such a relationship should not prevent reliance on the doctrine of promissory estoppel.

3. The decision has not determined the type of conduct which will be unconscionable and prevent a promisor from going back on his promise in these circumstances (although see the judgment of Mason CJ and Wilson J for guidance). It appears, however, that there must be 'detrimental reliance' for a promise to found a cause of action.

3. The advantage of this approach is that it allows the doctrine of consideration to be reconciled with more flexible requirements for the promissory estoppel doctrine. Thus, in theory, Maher was not seeking to enforce an implied promise but to avoid the detriment he would suffer if Waltons were permitted to continue in their unconscionable conduct of not complying with the promise.

5. Although in *Waltons Stores* the High Court gave effect to the estoppel by awarding damages in lieu of specific performance, it seems clear that the remedy available will not necessarily be enforcement of the promise. In cases of 'unconscionable conduct', the remedy available will be limited to the 'minimum equity needed to avoid the detrimental reliance'.

Whether the English courts will be prepared to follow this approach remains to be seen. Although it is advocated as a solution by some academic commentators, it will not be appropriate in all alteration situations since it requires 'detrimental reliance'.

6. Section 90(1) of the American Restatement (2d) Contracts (1979) allows promissory estoppel to operate as a cause of action, but the courts are given a discretion to determine the appropriate remedy so that there may not be full enforcement of the promise:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce

such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

SECTION 3: FORMALITIES

Contrary to what is commonly presumed, contracts do not generally need to be in writing. If, however, a contract is contained in a deed, then consideration need not be shown to support a promise.

(a) Deeds

Section 1(1)(b) of the Law of Property (Miscellaneous Provisions) Act 1989, abolished the requirement that a deed executed by an individual required a seal. The requirements for a valid deed are contained in s. 1(2) and (3).

Law of Property (Miscellaneous Provisions) Act 1989

1. Deeds and their execution

(2) An instrument shall not be a deed unless—

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

(b) it is validly executed as a deed by that person or, as the case may be, one or more of those parties.

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed by him or a person authorised to do so on his behalf.

(b) Contracts supported by consideration which must be made in writing

(i) *Contracts for the sale or other disposition of an interest in land*

Law of Property (Miscellaneous Provisions) Act 1989

2. Contracts for sale etc. of land to be made by signed writing

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

Note
This provision came into force from 27 September 1989 (s. 5(3)) but is not retrospective.

Section 40 of the Law of Property Act 1925, which was repealed by s. 2(8), had stipulated that the contract or *some memorandum or note thereof* had to be in writing. However, it is no longer possible to have an oral contract for the sale of land which is evidenced in writing, since the contract itself must be in writing and must incorporate all the terms that the parties have expressly agreed.

In addition, this document incorporating all the terms must be signed by or on behalf of each of the parties.

(ii) *Bills of exchange, promissory notes and bills of sale must be in writing*
See the Bills of Exchange Act 1882, s. 3(1), the Bills of Exchange Act 1882, s. 17(2) and the Bills of Sale Act (1878) Amendment Act 1882.

(iii) *Regulated consumer credit agreements*
The Consumer Credit Act 1974 requires regulated consumer credit agreements to be in writing, in a specific form and signed.

Consumer Credit Act 1974

61. Signing of agreement

(1) A regulated agreement is not properly executed unless—

(a) a document in the prescribed form itself containing all the prescribed terms and conforming to regulations under section 60(1) is signed in the prescribed manner both by the debtor or hirer and by or on behalf of the creditor or owner, and

(b) the document embodies all the terms of the agreement, other than implied terms, and

(c) the document is, when presented or sent to the debtor or hirer for signature, in such a state that all its terms are readily legible.

(c) Contracts which must be evidenced in writing even where consideration has been provided

Section 4 of the Statute of Frauds 1677, as amended by the Law Reform (Enforcement of Contracts) Act 1954, requires contracts of guarantee to be evidenced in writing.

No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages 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 authorised.

5 INTENTION TO CREATE LEGAL RELATIONS

SECTION 1: DOMESTIC AND SOCIAL AGREEMENTS

There is a presumption in the case of domestic and social agreements that there is no intention to create legal relations.

A: HUSBAND AND WIFE

Balfour* v *Balfour
[1919] 2 KB 571 (CA)

The defendant husband held a post in Ceylon. He and his wife, the plaintiff, returned to England on leave in 1915. However, when the defendant returned to Ceylon in 1916, the plaintiff remained temporarily in England on medical advice. The plaintiff alleged that before the defendant returned to Ceylon they had entered into an oral agreement by which the defendant agreed to pay her £30 a month in consideration for her agreeing not to call upon him for further maintenance. The parties later became estranged and the plaintiff sought to enforce the agreement. Held: since it was a domestic agreement between husband and wife, it was not an enforceable contract.

ATKIN LJ: . . . The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that 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, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite

common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves — agreements such as are in dispute in this action — agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. [T]hey are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30*s*. or 2*l*. a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. . . . it appears to me to be plainly established that the promise here was not intended by either party to be attended by legal consequences. I think the onus was upon the plaintiff, and the plaintiff has not established any contract. The parties were living together, the wife intending to return. The suggestion is that the husband bound himself to pay 30*l*. a month under all circumstances, and she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and alone in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her, whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. . . .

Notes

1. Although Atkin LJ states that objectively the parties did not intend that legal consequences should follow, the decision appears to rest on the argument that such agreements should not be enforceable for reasons of public policy.

Specific reference is made to two policy factors, namely the floodgates argument and the argument that as such agreements are the result of 'natural love and affection which counts for so little in these cold courts', they are outside the jurisdiction of the courts.

2. It has been argued that, given that a criterion for the enforceability of an agreement is the presence of consideration (or a bargain), there is no additional necessity to require intention to create legal relations (see Heppie (1970) CLJ 122). The decision in *Shadwell* v *Shadwell* (1860) 9 CB NS 159, 142 ER 62 (page 117) supports the proposition that consideration should be sufficient. However, Atkin LJ confirms that both requirements are necessary.

Merritt v *Merritt*
[1970] 2 All ER 760 (CA)

After the husband had left the wife, he stated that he would pay the wife £40 a month from which she had to pay the outstanding mortgage payments on the house. He also signed a written note which provided that when the mortgage payments had all been made he would transfer the house to the wife in consideration for her paying all charges in connection with the house. The wife paid off the mortgage using this monthly payment from the husband and her own earnings. However, the husband refused to transfer the house to her. Held: the written agreement was intended to create legal relations between the parties. The presumption against such an intention did not apply when the husband and wife were not living in amity but were separated or about to separate.

LORD DENNING MR: The first point taken on his behalf by counsel for the husband was that the agreement was not intended to create legal relations. It was, he says, a family arrangement such as was considered by the court in *Balfour* v *Balfour* [1919] 2 KB 571 and in *Jones* v *Padavatton* [1969] 1 WLR 328. So the wife could not sue on it. I do not think that those cases have any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

Counsel for the husband then relied on the recent case of *Gould* v *Gould* [1969] 3 All ER 728, when the parties had separated, and the husband agreed to pay the wife £12 a week 'so long as he could manage it'. The majority of the court thought that those words introduced such an element of uncertainty that the agreement was not intended to create legal relations. But for that element of uncertainty, I am sure that the majority would have held the agreement to be binding. They did not differ from the general proposition which I stated [in *Gould* v *Gould*, at p. 730]:

> When . . . husband and wife, at arm's length, decide to separate and the husband promises to pay a sum as maintenance to the wife during the separation, the court does, as a rule, impute to them an intention to create legal relations.

Notes

1. The other important factor stressed by the Court of Appeal was that the terms of the agreement in this case were sufficiently certain to enable it to be enforced, and it appears from *Gould* v *Gould* [1969] 3 All ER 728, that if the

terms are uncertain the language will indicate that the parties do not intend to be bound even if they are separated.

2. The fact that the wife in *Merritt* v *Merritt* relied on the agreement in paying the mortgage repayments is an additional reason why the Court of Appeal held there to be an intention to create legal relations here.

3. *Merritt* v *Merritt* clearly demonstrates that agreements between husband and wife in a 'business context' which are sufficiently certain will rebut the presumption. The same is true of dealings between relatives in a business context, e.g., *Snelling* v *John G. Snelling Ltd* [1973] 1 QB 87 (page 218).

B: PARENT AND CHILD

There is a presumption against an intention to create legal relations in agreements between parent and child. There must be clear evidence of an intention to give rise to legal consequences, reliance on the agreement and certainty of terms, before the presumption can be rebutted.

Jones v *Padavatton*
[1969] 2 All ER 616 (CA)

In August 1962, a daughter accepted her mother's offer to go to England and study for the Bar. The agreement, which was not put in writing, was on terms that the mother was to pay the fees and provide maintenance of $200 a month. The mother had intended this to be in West Indian dollars (£42 a month), whereas the daughter thought it was to be in US dollars (£70 a month). However, when the maintenance payments arrived the daughter accepted them without objection. In 1964, the mother orally agreed to buy a house where the daughter could live, and it was agreed that the rents from letting the other rooms were to provide the maintenance in place of the £42 a month. In 1967, the mother claimed possession of the house. At the date of the hearing the daughter had still not completed her studies for the Bar. The daughter relied upon the agreement as her defence to the possession action. Held: (Danckwerts and Fenton Atkinson LJJ) the mother was entitled to possession because the agreement was a family arrangement and not intended to be legally binding. In addition, it was far too vague and uncertain to be enforceable as a contract.

FENTON ATKINSON LJ: . . . The problem is, in my view, a difficult one, because though one would tend to regard a promise by a parent to pay an allowance to a child during a course of study as no more than a family arrangement, on the facts of this case this particular daughter undoubtedly gave up a great deal on the strength of the mother's promise.

In my judgment it is the subsequent history which gives the best guide to the parties' intention at the material time. There are three matters which seem to me important: (i) The daughter thought that her mother was promising her $(US) 200, or £70 a month, which she regarded as the minimum necessary for her support. The mother promised $200 but she had in mind $(West Indian) 200, £42 a month, and that was

what she in fact paid from November 1962 to December 1964. Those payments were accepted by the daughter without any sort of suggestion at any stage that the mother had legally contracted for the larger sum. (ii) When the arrangements for the purchase of no. 181, Highbury Quadrant were being discussed, and the new arrangement was made for maintenance to come out of the rents, many material matters were left open: How much accommodation was the daughter to occupy; how much money was she to have out of the rents; if the rents fell below expectation, was the mother to make up the difference below £42, or £42 less the sum saved by the daughter in rent; for how long was the arrangement to continue, and so on. The whole arrangement was, in my view, far too vague and uncertain to be itself enforceable as a contract; but at no stage did the daughter bring into the discussions her alleged legal right of £42 per month until her studies were completed, and how that right was to be affected by the new arrangement. (iii) It is perhaps not without relevance to look at the daughter's evidence in cross-examination. She was asked about the occasion when the mother visited the house, and she, knowing perfectly well that the mother was there, refused for some hours to open the door. She said:

> I didn't open the door because a normal mother doesn't sue her daughter in court. Anybody with normal feelings would feel upset by what was happening.

Those answers and the daughter's conduct on that occasion provide a strong indication that she had never for a moment contemplated the possibility of the mother or herself going to court to enforce legal obligations and that she felt it quite intolerable that a purely family arrangement should become the subject of proceedings in a court of law.

At the time when the first arrangement was made the mother and the daughter were, and always had been, to use the daughter's own words, 'very close'. I am satisfied that neither party at that time intended to enter into a legally binding contract, either then or later when the house was bought. The daughter was prepared to trust the mother to honour her promise of support, just as the mother no doubt trusted the daughter to study for the Bar with diligence, and to get through her examinations as early as she could. . . .

Notes

1. Salmon LJ came to the same conclusion by a different route. Although he stressed the daughter's reliance in giving up her job and moving to England, and considered that the agreement as originally made was intended by both parties to have contractual force, Salmon LJ implied a term that the agreement would last for a reasonable time to enable the daughter to complete her studies. The reasonable period was five years, which had elapsed at the time of the action, and so the daughter could not rely on the agreement.
2. Again, certainty of terms and reliance can be identified as factors which may rebut the presumption of no intention to create legal relations. These were both stressed in *Parker* v *Clark* [1960] 1 All ER 93, where an intention to create legal relations was found by Devlin J in an agreement between relatives to share a home. Their agreement contained very detailed terms as to the payment of household expenses, and the plaintiffs had relied upon it in selling their own home and lending the money to their daughter to buy a flat. The defendants had also made a will leaving the house to the female plaintiff, her sister and daughter.

C: LIFTS TO WORK

Coward v *Motor Insurers' Bureau*
[1963] 1 QB 259 (CA)

There was evidence of an arrangement between Coward and Cole, whereby Cole drove Coward to work on Cole's motor cycle in return for a weekly amount of money. Both were killed in an accident owing to the negligence of Cole, and Coward's widow obtained judgment against Cole's personal representatives. This judgment was not satisfied because Coward had been a pillion passenger and Cole's insurance policy did not cover pillion passengers. The widow therefore brought an action against the Motor Insurers' Bureau, which was obliged by statute to pay unsatisfied judgments in respect of a 'liability which is required to be covered by a policy or a security' under the Road Traffic Act 1930. She argued that Coward was a person who was required to be insured because he was carried for 'hire or reward'. The Court of Appeal considered that it was necessary to decide whether there was a contract between Coward and Cole. Held: despite the evidence that Coward had paid regular weekly sums for the lifts, neither person contemplated a legally binding contract.

UPJOHN LJ: . . . [I]f the question had been posed to Coward or Cole: 'Did you intend to enter into a legal relationship?' each would probably have answered 'I never gave it a thought.'

The practice whereby workmen go to their place of business in the motor-car or on the motor-cycle of a fellow-workman upon the terms of making a contribution to the costs of transport is well known and widespread. In the absence of evidence that the parties intended to be bound contractually, we should be reluctant to conclude that the daily carriage by one of another to work upon payment of some weekly (or it may be daily) sum involved them in a legal contractual relationship. The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other to be carried to work. It is made all the more improbable in this case by reason of the fact that alternative means of transport seem to have been available to Coward.

Notes

1. In reality, Upjohn LJ is treating this as a policy question rather than a question of what the parties intended.

2. The majority of the House of Lords in *Albert* v *Motor Insurers' Bureau* [1971] 2 All ER 1345, disapproved of the approach in *Coward* v *MIB* and considered that for the purposes of applying the Road Traffic Act it was not necessary to look for a contract.

The House of Lords assessed whether the giving of lifts was a systematic carrying of passengers which was predominantly a business arrangement rather than a social one. On the facts, the majority found that the driver, Quirk, had engaged in a regular and systematic arrangement for which he expected to be paid. Lord Cross, however, was of the opinion that it was necessary to decide if there was a legally enforceable contract.

Albert v *Motor Insurer's Bureau*
[1971] 2 All ER 1345 (HL)

LORD CROSS: . . . It is not necessary in order that a legally binding contract should arise that the parties should direct their minds to the question and decide in favour of the creation of a legally binding relationship. If I get into a taxi and ask the driver to drive me to Victoria Station it is extremely unlikely that either of us directs his mind to the question whether we are entering into a contract. We enter into a contract not because we form any intention to enter into one but because if our minds were directed to the point we should as reasonable people both agree that we were in fact entering into one. When one passes from the field of transactions of an obviously business character between strangers to arrangements between friends or acquaintances for the payment by the passenger of a contribution towards expenses the fact that the arrangement is not made purely as a matter of business and that if the anticipated payment is not made it would probably never enter into the head of the driver to sue for it disposes one to say that there is no contract; but in fact the answer to the question 'contract' or 'no contract' does not depend on the likelihood of an action being brought to enforce it in case of default.

Suppose that when one of Mr Quirk's fellow workers got in touch with him and asked him whether he could travel in his car to Tilbury and back next day, an 'officious bystander' had asked 'Will you be paying anything for your transport?' the prospective passenger would have answered at once 'Of course I will pay'. If the 'officious bystander' had gone on to ask Mr Quirk whether, if he was not paid, he would sue the man in the county court, Mr Quirk might well have answered in the words used by the driver in *Connell's* case [1969] 2 QB 494 — 'Not bloody likely'. But the fact that if default was made Mr Quirk would not have started legal proceedings but would have resorted to extra-judicial remedies does not mean that an action could not in theory have been brought to recover payment for the carriage. If one imagines such proceedings being brought a plea on the part of the passenger that he never meant to enter into a contract would have received short shrift and so, too, would a plea that the contract was void for uncertainty because no precise sum was mentioned. If the evidence did not establish a regular charge for the Tilbury trip the judge would have fixed the appropriate sum.

Notes

1. It may be that the majority view is preferable as a matter of policy, since if the decision in *Coward* v *MIB* is correct, then the carrier of passengers who receives payment can avoid the obligation to insure against claims by those passengers simply by stipulating that there is no legally binding contract between the parties. Viscount Dilhorne makes the point in *Albert* v *MIB* that this cannot have been Parliament's intention.

2. Lord Cross was clearly of the opinion that it was not possible to judge the existence of a contract by assessing whether it was likely to be enforced by court action in the case of default (see the discussion of *Esso Petroleum* v *Commissioners of Customs & Excise*, at page 175). Indeed, Lord Cross considered that a contract could arise without the parties directing their minds to the possibility of there being a contract; whereas in *Coward* v *MIB*, Upjohn LJ's judgment concentrates on there being evidence that the parties intended to be bound contractually.

3. Stephen Hedley argues ((1985) 5 OJLS 391) that when determining the enforceability of domestic agreements, it appears that the courts are adopting a policy of enforcing an agreement only at the instance of a party who has performed one side of the bargain (i.e., executed contracts). *Merritt* v *Merritt* is an example of this.

In *Coward* v *MIB* there was no contract because the Court of Appeal was concentrating on the question of whether the driver could be compelled to carry others in future, and the courts will not enforce such executory domestic arrangements. However, Lord Cross in *Albert* v *MIB* looked at the issue in terms of a service which *had been* rendered and concluded that the lift, once given, would have to be paid for.

SECTION 2: COMMERCIAL AGREEMENTS

There is a presumption of an intention to create legal relations in commercial agreements.

A mere puff is not enforceable because it is not intended to be taken literally and is not promissory in nature. One of the arguments put forward by counsel for the Smoke Ball Company in *Carlill* v *Smoke Ball Company* [1893] 1 QB 256, was that the advertisement was no more than an advertising gimmick. However, this was rejected by the Court of Appeal because the Company had deposited £1,000 with their bank as proof of their intention to be bound (see Chapter 1).

Bowerman v *Association of British Travel Agents Ltd* [1996] CLC 451 (CA)

The plaintiffs had booked a school skiing holiday through a tour operator who was an ABTA member. Shortly before the date of the holiday the tour operator had become insolvent and had ceased to trade. ABTA reimbursed the cost of the holiday but deducted £10 per head to represent the holiday insurance premium paid on the basis that this sum was excluded from the ABTA protection scheme. The plaintiffs sought the return of these insurance premiums claiming a direct contractual relationship with ABTA entitling them to full reimbursement of the holiday cost, on the basis of an ABTA notice displayed by tour operators, para. 5 of which provided that '(5) Where holidays or other travel arrangements have not yet commenced at the time of failure, ABTA arranges for you to be reimbursed the money you have paid in respect of your holiday arrangements'. The trial judge had accepted, and it was common ground, that the correct approach was to read the notice as the public would understand it. However, he rejected the plaintiffs' claim on the basis that there was no offer, no intention to create legal relations, and that the terms of the notice were too vague and inconsistent to constitute a legally enforceable promise. Held: (Waite and Hobhouse LJJ, Hirst LJ dissenting) there was a direct contractual relationship between ABTA and members of the public who booked their holidays

> with ABTA members. The ABTA notice displayed on the premises of each member tour operator constituted a contractual offer on terms obliging ABTA to reimburse the cost of insurance since it was intended to be read, and would reasonably be read, as an offer which a customer would accept by booking a holiday with an ABTA member.

HOBHOUSE LJ: . . . The relevant consideration is what if anything the document says or offers as between ABTA and the member of the public who reads it and then books with an ABTA member.

Turning to the document itself, it is accepted that the words of Bowen LJ [in *Carlill v Carbolic Smoke Ball Co.*, page 8] are apt:

> It was intended to be issued to the public and to be read by the public. How would an ordinary person reading this document construe it?

The rival contentions, both of which can be persuasively argued for as is demonstrated by the difference of judicial opinion to which this case has given rise, are whether the document is simply telling the public about a scheme which ABTA has for its own members or whether it goes further than this and contains an offer which a member of the public can take up and hold ABTA to should the ABTA member with whom the member of the public is dealing fail financially.

I prefer the latter view. I recognise that the document is headed 'Notice describing ABTA's scheme of protection' and that in para. 4 and 5 the present tense is used — 'ABTA seeks' — 'ABTA ensures' — 'ABTA arranges' — and not the future tense — 'ABTA will ensure' or 'ABTA will arrange'. These points undoubtedly support the view of the judge and the defendants' argument. But the document has to be read as a whole. It is clearly intended to have an effect on the reader and to lead him to believe that he is getting something of value. The scheme is an ABTA scheme in relation to its members but it is a scheme of protection of the customers of ABTA members. It emphasises that it is 'to protect you their customers' and is 'for your benefit'. This is further underlined in para. 3 where the final sentence reads:

> If an ABTA member ceases to belong to ABTA and thereafter fails financially ABTA still protects you if you made the booking before the time when ABTA membership ceased.

ABTA is offering to protect the reader of the notice, the prospective customer. It is an inevitable inference that what ABTA is saying is that it, ABTA, will do something for the customer if the member should fail financially.

. . . In my judgment this document is intended to be read and would be reasonably be read by a member of the public as containing an offer of a promise which the customer is entitled to accept by choosing to do business with an ABTA member. A member of the public would not analyse his situation in legal terms but he would clearly understand that this notice would only apply to him if he should choose to do business with an ABTA member and he would also understand that if he did do so he would be entitled to hold ABTA to what he understood ABTA to be promising in this document. In my judgment it satisfies the criteria for a unilateral contract and contains promises which are sufficiently clear to be capable of legal enforcement. The principles established in the *Carbolic Smoke Ball* case apply. The plaintiffs are entitled to enforce the right of reimbursement given to them in para. 5.

This conclusion also covers ABTA's further argument that it had no intention to create legal relations. The document as reasonably read by a member of the public

would be taken to be an offer of a legally enforceable promise. Given that this is the effect of the document which ABTA has chosen to publish, it does not advance ABTA's case to say that ABTA privately did not intend to expose itself to any legal liability to the public. It suffices that ABTA intentionally published a document which had that effect. A contracting party cannot escape liability by saying that he had his fingers crossed behind his back.

. . . Like in the *Carbolic Smoke Ball* case, we have had urged on us the potential size of the obligations which ABTA would be accepting should a number of its members fail and the difficulty of meeting all the claims which might be made on ABTA. This was a matter for the judgment of ABTA before it chose to issue the notice. It is the job of ABTA and no concern of the customer to see that its bonding and mutual and external insurance arrangements suffice. The argument has no more merit than the equivalent argument which was advanced in the *Carbolic Smoke Ball* case.

The existence of consideration to support the contractual obligation of ABTA is clear. A picture was presented to us, wholly unrealistically, of ABTA as some benevolent body which gained no benefit from and had no interest in travellers choosing to deal with ABTA members. The function of ABTA is to promote its members. It was also argued that as Mr Wallace was required by the local education authority and by the children's parents to buy only ABTA backed holidays that meant that Mr Wallace and those on whose behalf he was acting gave no consideration because, so it was argued, Mr Wallace was already under an obligation to buy an ABTA backed holiday. Mr Wallace was under no obligation to buy any holiday at all nor were the parents. No doubt there are other tour operators and travel agents, not members of ABTA, who are able to undercut ABTA prices. ABTA's members prominently market themselves as members of ABTA and anybody who chooses to do business with them is certainly giving consideration to ABTA for any contract or 'collateral' contract which may ensue. The analogy with such cases as *Shanklin Pier Ltd* v *Detel Products Ltd* [1951] 2 KB 854 (page 202) is fully made out.

I therefore cannot agree with the judgment of Mitchell J and consider that this appeal should be allowed. The plaintiffs were entitled to and did accept the offer contained in the document issued by ABTA and it fills one with disquiet that any organisation in the position of ABTA should after the event, when it finds that its liabilities are greater than it had anticipated, seek to contend otherwise. As counsel pointed out, if ABTA had wished to deny that it was accepting any legal obligation to the traveller or wished to say that it was not making any promises, nothing would have been simpler than for it to have said so in the document. For obvious commercial reasons ABTA did not choose this course. To have included such words would have destroyed the value of the document in the eyes of the public and nullified the very effect which ABTA intended it to, and which it did, achieve — to induce the public to book with and entrust their money to ABTA members.

I would allow the appeal.

Notes

1. Hirst LJ (dissenting) considered that this was a non-promissory notice intended only to reassure:

. . . In his argument [counsel for the plaintiffs] submitted that on its proper construction the language of the notice was the language of contract. He drew particular attention to the two subsidiary headings 'Scheme of protection' and 'The protection is that . . .', which he submitted were indicating a promise; he emphasised

the repeated use of the personal pronoun or adjective 'you' and 'your', and submitted that it was a highly personal notice honing in on the individual customer; he contended that the reference in para. (1) to the provision by the tour operators of bonds guarantees and other securities to ABTA added legitimacy to the binding obligation which he submitted the document conveyed; he drew particular attention to the words 'ensures' and 'arranges' in para. (4) and (5) which he submitted were words of commitment; and he submitted that the final four paragraphs under the heading 'Limitations' reinforced the contractual commitment in the earlier part of the document.

In support of his argument [counsel for the plaintiffs] placed strong reliance on the famous case of *Carlill* v *Carbolic Smoke Ball Co.* [1893] 1 QB 256 [see chapter 1]. . . .

This advertisement, he submitted, was comparable with the ABTA notice in the present case, and I accept without reservation that, if the words of this notice are truly promissory in character, it would be capable of constituting a contractual offer to the public in general.

The crucial point is therefore to determine whether, on its proper construction, the notice is indeed promissory in character, and on this I am unable to accept [counsel for the plaintiffs'] arguments.

First, it is essential in my judgment to give full weight to the main heading, to which I attach great importance, viz.: 'Notice describing ABTA's scheme of protection against the financial failure of ABTA members'. This in my view is an accurate epitome of the terms of the notice as a whole, which is descriptive rather than contractual in character.

The headings 'Scheme of protection' and 'The protection is that . . .' are no more than subheadings characterising the details of the scheme. Equally the language, in particular the verbs used in para. (3) to (5) ('protects', 'seeks to arrange' 'ensures' and 'arranges') are grammatically descriptive, rather than promissory phrases such as, for example, 'will insure', 'will arrange', etc. By the same token the statement in para. (1) that 'all ABTA tour operators are required to provide bonds guarantee or other securities to ABTA', is also essentially descriptive.

Indeed, nowhere in the first five paragraphs of the notice do I find any specific words of promise or any firm commitment, and nothing in the last four paragraph headed 'Limitation' points in a different direction.

By contrast, the crisp wording of the advertisement in the *Carlill* case ('£100 reward *will be paid* . . .') is essentially promissory in character, and indeed to my mind highlights the shortcomings from the appellant's point of view of the wording in the present notice.

My view as to the non-contractual nature of this document is reinforced by the vague and equivocal nature of several of the statements contained in the following numbered paragraphs:

(3) . . . other travel arrangements . . .
(4) . . . seeks to arrange . . .
(5) . . . other travel arrangements . . . your holidays arrangements . . . [and] . . . in some instances ABTA may however be able to arrange . . . or offer . . .

All these considerations to my mind strongly support the view that the ordinary member of the public would not interpret this document as constituting a contractual offer to him personally — and the use of the direct words 'you', and 'your', which carry no contractual commitment, do no more than focus the attention of the customer personally on the information contained in the notice, rather like Lord Kitchener's famous recruiting poster in the First World War.

I wish to make it clear that I do not doubt that the ordinary member of the public would interpret the notice as drawing his attention to something of value to him, but that does not seem to me to assist either way in determining whether its character is informative or contractual.

I also wish to make it clear that in reaching my conclusion I have, I believe correctly, confined my attention solely to the wording of the notice itself, and I have left out of account both the submissions from both sides as to surrounding circumstances, which were unknown to [the second plaintiff, the teacher who had booked the trip]. . . . On similar grounds, I would hold that there was no intention on ABTA's part to create a legal relationship with the individual customer.

In support of her argument on this first and main point [counsel for the defendants] relied on the case of *Kleinwort Benson* v *Malaysia Mining Corp Berhad* [1989] 1 WLR 379; (1989) 5 BCC 337 (page 178, below) in which the Court of Appeal held that a paragraph in a letter of comfort did not have contractual status, but was no more than a representation as to the current policy adopted by the defendant company.

Although as [counsel for the plaintiffs] rightly pointed out that the facts of that case are very different from the present, seeing that the parties involved were two very large commercial enterprises, I think that the judge was right in concluding that the analogy between that case and the present one is sound, in that the essential function of the present notice is to reassure the customer by reference to the existence of the ABTA scheme of protection which it describes.

For these reasons, which are closely in accord with the judge's analysis, I would dismiss this appeal.

The different approaches may be explained by the fact that, whereas the majority considered all the background circumstances and the position of the holiday consumer, Hirst LJ expressly limited himself to considering only the wording of the notice itself.

2. The approach of the majority might rightly be considered as 'consumer-welfarist' and result-orientated. See further Adams and Brownsword, *Understanding Contract Law*, 2nd ed. (1994) (see page 21). In addition, the majority were clearly influenced by the consumers' reliance.

3. This decision is also significant in providing a further practical example of the use of the unilateral collateral contract in order to bind a third party to his statements (assuming these statements to be promissory) where they induced the making of a contract. See the discussions at pages 245–7 and 201.

4. The majority judgments also reinforce the need expressly to exclude any intention to be legally bound if this is the desired objective. See honour clauses, page 178 below.

Esso Petroleum Ltd v *Commissioners of Customs and Excise* [1976] 1 All ER 117 (HL)

Esso had a sales promotion scheme by which garage owners offered a 'free' World Cup coin with every four gallons of petrol. The Customs and Excise Commissioners claimed that the coins were chargeable to purchase tax because they were 'produced in quantity for general sale'. Held: (Lord

Fraser dissenting) that the coins were not being sold since, if there was a contract (an issue on which there was some disagreement), the consideration for the transfer of the coin was not money but the customer's undertaking to enter into a collateral contract to purchase four gallons of petrol. The majority reasoning differed as to whether there was a contract relating to the coins. Whereas Viscount Dilhorne and Lord Russell considered the coins to be a gift on the basis that the coins had little intrinsic value so that there was no intention to create legal relations in such an arrangement, Lords Simon and Wilberforce came to the opposite conclusion on the basis that the arrangement was set in the context of business relations.

LORD RUSSELL: . . . The first question . . . is whether, notwithstanding the liberal references in the documents attending the promotion scheme to 'giving', 'gifts', and 'free', that which would and did take place gave rise to a contract, enforceable by a motorist who bought four gallons from a participating proprietor, that he should receive one of these medals. It is to be borne in mind in this connection that the mere fact that Esso and the garage proprietors undoubtedly had a commercial aim in promoting the scheme does not deprive the delivery of a medal of the quality of a gift as distinct from a sale: for benevolence is not a necessary feature of a gift which may well be motivated by self interest. On the other hand it is trite law that if on analysis a transaction has in law one character, the fact that the parties either accidentally or deliberately frame the transaction in language appropriate to a transaction of a different character will not deny to it its true character.

We have here, my Lords, a promotion scheme initiated by Esso, who procured the production of the medals. Each medal was of negligible intrinsic value, though the incentive to soccer enthusiasts to collect all 30 may have been strong. Plainly it was never in Esso's mind that this negligible intrinsic value should be reflected in an increase in the pump price of petrol, and it never was; indeed the price of a gallon could not be increased by $\frac{1}{16}$ of a penny. In my opinion it would have been thought by Esso, and rightly, that there could have been no occasion, in order to ensure success of the scheme, for an outlet proprietor to subject himself to a contractual liability to deliver a coin to a motorist who had bought four gallons. The subject-matter was trivial: the proprietor was directly interested in the success of the scheme and would be in the highest degree unlikely to renege on the free gift offer, and indeed there is no suggestion that a motorist who qualified and wanted a medal ever failed to get one: from the motorist's viewpoint, if this had ever happened, I cannot think that he would have considered that he had a legal grievance, though he might have said that he would not patronise that outlet again; similarly in my opinion if a garage advertised 'Free Air' and after buying petrol or oil the motorist was told that the machine was out of order that day. In my opinion, the incentive for the garage proprietor to carry out the scheme was such as to make it quite unnecessary to invest, or for Esso to intend to invest, the transaction with the additional compulsion of a contractual obligation, and in all the circumstances of the case I am unable to regard that which under the scheme was intended by Esso to take place in relation to the medals, and did take place, as something which would be intended to or regarded as creating a legal contractual relationship. In forming that opinion I regard the minimal intrinsic value of a medal as important. I would not wish it to be thought that my opinion, if correct, would, in other cases in which a sales promotion scheme involves substantial benefits, give carte blanche to participants to renege on 'free' offers. I am simply of opinion, in agreement with the Court of Appeal, though not I fear with the majority

of your Lordships, that in the instant case, because of the absence of any contractual element, it should not be said that any medal was produced for general sale.

LORD SIMON: I am, however, my Lords, not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage proprietors who adopted it and the motorists who yielded to its blandishments. In the first place, Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations (cf *Carlill* v *Carbolic Smoke Ball Co* [1893] 1 QB 256). The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage in which the garage proprietors also would share. Thirdly, I think that authority supports the view that legal relations were envisaged.

. . . I would venture to add that it begs the question to assert that no motorist who bought petrol in consequence of seeing the promotion material prominently displayed in the garage forecourt would be likely to bring an action in the county court if he were refused a coin. He might be a suburb Hampden who was not prepared to forego what he conceived to be his rights or to allow a tradesman to go back on his word.

Believing as I do that Esso envisaged a bargain of some sort between the garage proprietor and the motorist, I must try to analyse the transaction. The analysis that most appeals to me is one of the ways in which Lord Denning MR considered the case, namely a collateral contract of the sort described by Lord Moulton in *Heilbut, Symons & Co* v *Buckleton* [1913] AC 30:

> . . . there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract . . .

So here. The law happily matches the reality. The garage proprietor is saying, 'If you will buy four gallons of my petrol, I will give you one of these coins'. None of the reasons which have caused the law to consider advertising or display material as an invitation to treat, rather than an offer, applies here. What the garage proprietor says by his placards is in fact and in law an offer of consideration to the motorist to enter into a contract of sale of petrol. Of course, not every motorist will notice the placard, but nor will every potential offeree of many offers be necessarily conscious that they have been made. However, the motorist who does notice the placard, and in reliance thereon drives in and orders the petrol, is in law doing two things at the same time. First, he is accepting the offer of a coin if he buys four gallons of petrol. Secondly, he is himself offering to buy four gallons of petrol: this offer is accepted by the filling of his tank.

. . . Here the coins were not transferred for a money consideration. They were transferred in consideration of the motorist entering into a contract for the sale of petrol. The coins were therefore not produced for sale, and do not fall within the schedule. They are exempt from purchase tax.

Notes

1. Lord Simon takes the same view as Lord Cross in *Albert* v *MIB*, that the determining factor cannot be whether the parties would actually sue to

enforce the agreement. Atiyah has very firmly argued ((1976) 39 MLR 335) that the triviality of the transaction and the unwillingness to litigate are not the tests of an intention to create legal relations.

2. The majority decision was that there was no contract of sale because the consideration for the transfer of the coin was not money but the entering of a contract to purchase the petrol. This is somewhat artificial since, in order to get the coin, the customer had to pay the price of the four gallons of petrol, and the price would appear to be part of the consideration.

3. Lord Fraser (dissenting) considered that it was a single contract of sale to purchase four gallons of petrol and a coin.

(a) Comfort letters

The Court of Appeal in the next case held that comfort letters are not legally enforceable.

Kleinwort Benson Ltd* v *Malaysia Mining Corporation Berhad
[1989] 1 All ER 785 (CA)

A comfort letter was given to the plaintiff merchant bank by the parent company of the subsidiary company MMC Metals Ltd. The comfort letter stated, 'it is our policy to ensure that the business of Metals is at all times in a position to meet its liabilities to you under the above arrangements'. When the subsidiary company went into liquidation, the plaintiff merchant bank sought to recover from the parent company on the basis of the comfort letter. Held: the correct test to determine the status of a comfort letter was to ask whether a promise was being made, rather than the test applied by Hirst J at first instance ([1988] 1 All ER 714) of whether there was an intention to create legal relations. These words amounted to a policy statement only and did not constitute a promise.

Notes

1. Clearly this agreement was a commercial agreement, and thus it appears that the presumption of an intention to create legal relations can be rebutted in relation to comfort letters where the wording used does not amount to a promise. This is likely to lead to fine distinctions dependent on the wording of the comfort letter.

See Brown 'The Letter of Comfort: Placebo or Promise?' [1990] JBL 281.

2. This case was relied upon by Hirst LJ (dissenting) in *Bowerman* v *ABTA Ltd* [1996] CLC 451, page 171, in reaching his conclusion that ABTA's notice was not promissory in nature but merely a statement of policy or reassurance.

(b) Honour clauses

The presumption of intention to create legal relations can also be rebutted by the use of an 'honour clause', which excludes the courts and states that the agreement is binding in honour only.

Rose and Frank Company v *J. R. Crompton and Brothers Ltd*

By an agreement the plaintiffs had been appointed sole United States agents of the defendants. The agreement contained the following clause:

> This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

The defendants terminated the agency agreement without the required notice and refused to execute orders received before termination. The plaintiffs brought an action for breach of contract and non-delivery of the goods for which orders had already been placed. Held: (in the Court of Appeal) there was no binding contract and consequently there could be no action based upon it. A majority (Atkin LJ dissenting) also held that the orders and acceptances of those orders were not legally binding contracts to deliver.

Court of Appeal
[1923] 2 KB 261

ATKIN LJ: . . . To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly. Such an intention ordinarily will be inferred when parties enter into an agreement which in other respects conforms to the rules of law as to the formation of contracts. It may be negatived impliedly by the nature of the agreed promise or promises, as in the case of offer and acceptance of hospitality, or of some agreements made in the course of family life between members of a family as in *Balfour* v *Balfour* [1919] 2 KB 571. If the intention may be negatived impliedly it may be negatived expressly. In this document, construed as a whole, I find myself driven to the conclusion that the clause in question expresses in clear terms the mutual intention of the parties not to enter into legal obligations in respect to the matters upon which they are recording their agreement. I have never seen such a clause before, but I see nothing necessarily absurd in business men seeking to regulate their business relations by mutual promises which fall short of legal obligations, and rest on obligations of either honour or self-interest, or perhaps both. In this agreement I consider the clause a dominant clause, and not to be rejected, as the learned judge thought, on the ground of repugnancy.

The House of Lords agreed that there was no legally binding contract because of the honour clause, but considered (agreeing with Atkin LJ in the Court of Appeal) that the orders had been accepted and delivery was therefore legally required.

House of Lords
[1925] AC 445

LORD PHILLIMORE: According to the course of business between the parties which is narrated in the unenforceable agreement, goods were ordered from time to time, shipped, received, and paid for, under an established system; but the agreement being unenforceable, there was no obligation on the American company to order goods or upon the English companies to accept an order. Any actual transaction between the parties, however, gave rise to the ordinary legal rights; for the fact that it was not of obligation to do the transaction did not divest the transaction when done of its ordinary legal significance. This, my Lords, will, I think, be plain if we begin at the latter end of each transaction.

Goods were ordered, shipped, and received. Was there no legal liability to pay for them? One stage further back. Goods were ordered, shipped, and invoiced. Was there no legal liability to take delivery? I apprehend that in each of these cases the American company would be bound. If the goods were short-shipped or inferior in quality, or if the nature of them was such as to be deleterious to other cargo on board or illegal for the American company to bring into their country, the American company would have its usual legal remedies against the English companies or one of them. Business usually begins in some mutual understanding without a previous bargain. . . .

Note

Clearly the House of Lords was influenced by a desire to hold parties to their obligations under executed agreements, even though there was technically no contractual obligation. This seems to be the same principle which influenced the House of Lords in *Albert* v *MIB* (page 170).

Jones v *Vernon's Pools Ltd*
[1938] 2 All ER 626

The plaintiff alleged that he had sent in a pools coupon to the defendants, and the defendants denied having received it. The conditions on the pools coupon stated that 'the sending in of the coupon or any transaction entered into in respect of the pool should not be attended by or give rise to any legal relationship, rights, duties or consequences whatsoever, or be legally enforceable or the subject of litigation, but that all such arrangements, agreements and transactions should be binding in honour only'. Held: this condition prevented any action relating to the pools coupon.

ATKINSON J: If it means what I think that they intend it to mean, and what certainly everybody who sent a coupon and who took the trouble to read it would understand, it means that they all trusted to the defendants' honour, and to the care they took, and that they fully understood that there should be no claim possible in respect of the transactions.

One can see at once the impossibility of any other basis. I am told that there are a million coupons received every week-end. Just imagine what it would mean if half the people in the country could come forward and suddenly claim that they had posted and sent in a coupon which they never had, bring actions against the pool alleging that, and calling evidence to prove that they had sent in a coupon containing the list

of winning teams, and if Vernons had to fight case after case to decide whether or not those coupons had been sent in and received. The business could not be carried on for a day on terms of that kind. It could only be carried on on the basis that everybody is trusting them, and taking the risk themselves of things going wrong. It seems to me that, even if the plaintiff established that this coupon was received, it was received on the basis of these rules, and that he has agreed in the clearest way that, if anything does go wrong, he is to have no legal claim. In other words, he has agreed that the money which *prima facie* became due to him if that coupon reached them is not to be the subject of an action at law. There is to be no legal liability to pay. He has got to trust to them, and, if something goes wrong, as I say, it is his funeral, and not theirs. I am convinced that that is the position here, and, even if the coupon were received, he has failed to establish that he would have a claim which he could come to the courts to enforce. . . .

(c) Collective agreements

The presumption of intention to create legal relations has also been rebutted in relation to collective agreements, i.e., agreements between trade unions and employers regulating rates of pay, conditions of work, dispute procedures, etc.

Trade Union and Labour Relations (Consolidation) Act 1992

179. Enforceability of collective agreements

(1) A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement—

(a) is in writing, and

(b) contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

(2) A collective agreement which does satisfy those conditions shall be conclusively presumed to have been intended by the parties to be a legally enforceable contract.

6 PRIVITY OF CONTRACT

The doctrine of privity of contract provides that only the parties to a contract can enjoy the benefits of that contract or suffer the burdens of it.

Consideration must move from the promisee, i.e., a person cannot sue on a contract if the consideration is provided by another, even where the contract is made for his benefit.

Tweddle v *Atkinson*
(1861) 1 B & S 393; 121 ER 762 (QB)

John Tweddle and William Guy each agreed to pay a sum of money to the plaintiff (Tweddle's son) in consideration of his marrying Guy's daughter. Guy failed to pay and the plaintiff sought to enforce his promise against Guy's executor. Held: the son could not enforce the promise despite the fact that the contract was for his benefit since he had given no consideration for it.

CROMPTON J: . . . [T]he consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract but that argument ought also to make the son liable upon it. . . .

WIGHTMAN J: . . . [I]t is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

Notes

1. The judgments concentrate on the fact that the consideration for Guy's promise was not provided by the plaintiff but by John Tweddle. However, the plaintiff was also not a party to the contract.

2. Crompton J justified not allowing the plaintiff to enforce a contract expressly made for his benefit on the ground that it would be unfair if a person could enforce a contract under which he could not be sued.

Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd
[1915] AC 847 (HL)

Dew & Co. agreed with the plaintiffs, Dunlop, to buy a specific quantity of the plaintiffs' tyres in consideration for obtaining discounts on the list price. Dew & Co. also agreed not to sell these tyres to trade buyers for less than list price unless a similar undertaking was given by those trade buyers that they would observe the plaintiffs' list price. The defendants ordered Dunlop tyres from Dew & Co. and agreed with Dew & Co., in return for receiving a discount from Dew & Co., that they would not sell or offer these tyres to any private customers at less than list price. The defendants did sell tyres at below list price and the plaintiffs sued them for breach of their undertaking. Held: there was no consideration moving from the plaintiffs to the defendants, and therefore the contract was not enforceable by the plaintiffs. Viscount Haldane LC also recognised the doctrine of privity (i.e., that no stranger to the contract can enforce it).

VISCOUNT HALDANE LC: My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. . . . A third proposition is that a principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it.

My Lords, in the case before us, I am of opinion that the consideration, the allowance of what was in reality part of the discount to which Messrs Dew, the promisees, were entitled as between themselves and the appellants, was to be given by Messrs Dew on their own account, and was not in substance, any more than in form, an allowance made by the appellants. . . .

LORD DUNEDIN: . . . My Lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce. . . .

Now the agreement sued on is an agreement which on the face of it is an agreement between Dew and Selfridge. But speaking for myself, I should have no difficulty in the circumstances of this case in holding it proved that the agreement was truly made by Dew as agent for Dunlop, or in other words that Dunlop was the undisclosed principal, and as such can sue on the agreement. None the less, in order to enforce it he must show consideration, moving from Dunlop to Selfridge.

In the circumstances, how can he do so? The agreement in question is not an agreement for sale. It is only collateral to an agreement for sale; but that agreement for sale is an agreement entirely between Dew and Selfridge. The tyres, the property

in which upon the bargain is transferred to Selfridge, were the property of Dew, not of Dunlop, for Dew under his agreement with Dunlop held these tyres as proprietor, and not as agent. What then did Dunlop do, or forbear to do, in a question with Selfridge? The answer must be, nothing. He did not do anything, for Dew, having the right of property in the tyres, could give a good title to any one he liked, subject, it might be, to an action of damages at the instance of Dunlop for breach of contract, which action, however, could never create a vitium reale in the property of the tyres. He did not forbear in anything, for he had no action against Dew which he gave up, because Dew had fulfilled his contract with Dunlop in obtaining, on the occasion of the sale, a contract from Selfridge in the terms prescribed.

To my mind, this ends the case. That there are methods of framing a contract which will cause persons in the position of Selfridge to become bound, I do not doubt. But that has not been done in this instance; and as Dunlop's advisers must have known of the law of consideration, it is their affair that they have not so drawn the contract.

Notes

1. Viscount Haldane treated the privity doctrine and the rule that consideration must move from the promisee as two separate principles. Although they may produce the same result in a *Tweddle* v *Atkinson* situation where the promise is made to one person, they may not do so where the promise is made to more than one person but the consideration is provided by only one of these promisees. In its 1991 Consultation Paper, the Law Commission considered that the two doctrines were separate since the issue of the promises which are enforceable (consideration) is distinct from the issue of who may enforce a promise (privity). In its 1996 Report, Cm 3329, Part VI (6.1–6.8), the Law Commission accepted that because 'consideration must move from the promisee' can be interpreted to mean 'consideration must move from the plaintiff' its proposals for reform of the privity rule in the context of third-party beneficiaries would be ineffectual if the third party could be prevented from enforcing the contract on the basis that he had not provided consideration. However, the Law Commission considered that this was covered by the central provision of the proposed reform allowing third-party enforcement which necessarily also reformed the consideration rule where this was interpreted to mean consideration moving from the plaintiff. In other words, although consideration had to be provided, it need not be provided by the third party.

2. It was argued that Dew & Co. acted as Dunlop's agent for the purposes of extracting this undertaking from Selfridge. An agency relationship occurs where one party, the agent, is authorised by another, the principal, to negotiate and enter into contracts on behalf of the principal. In this example Dunlop would be the principal, so that technically the contract would be between Dunlop and Selfridge, thereby enabling Dunlop to enforce the contract.

However, the agent must have the authority to act as agent for the principal and consideration must be supplied by the principal himself. On these facts Dunlop had to have provided consideration for Selfridge's promise and the House of Lords held that none had been provided.

SECTION 1: AGENCY

The agency argument has arisen in the case law in the context of whether a third party can enforce a provision (such as an exemption clause) in a contract to which he is not a party when he is sued in tort by one of the contractual parties.

Scruttons Ltd v *Midland Silicones Ltd*
[1962] AC 446 (HL)

The shippers contracted with US Lines, the carrier, for the carriage of a drum containing chemicals from America to London. This contract of carriage contained an exemption clause limiting the liability of the carrier in the event of loss, damage or delay to $500 (£179) per package. Scruttons were stevedores, employed by a contract with the carrier, who negligently dropped and damaged the drum when delivering it to the consignees (Midland Silicones). Midland Silicones sued Scruttons in tort claiming the value of the drum's contents which had been lost, namely £593. Scruttons sought to rely on the clause in the bill of lading between the shippers and US Lines which limited their liability to £179. Held: (Lord Denning dissenting) the stevedores could not rely on the clause in a contract to which they were not parties because:

(a) there was nothing in that clause which expressly or impliedly indicated that the clause was to extend to the stevedores: and

(b) the carrier did not contract as agent for the stevedores for the benefit of the clause.

LORD REID: . . . I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle* v *Atkinson* (1861) 1 B & S 393 and finally established in this House in *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge & Co. Ltd* [1915] AC 847. There are, it is true, certain well-established exceptions to that rule — though I am not sure that they are really exceptions and do not arise from other principles. But none of these in any way touches the present case.

. . . The appellants in this case seek to get round this rule . . . they say that through the agency of the carrier they were brought into contractual relation with the shipper and that they can now found on that against the consignees, the respondents. And thirdly, they say that there should be inferred from the facts an implied contract, independent of the bill of lading, between them and the respondents. . . .

I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as

agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome. . . .

But again there is nothing of that kind in the present case. I agree with your Lordships that 'carrier' in the bill of lading does not include stevedore, and if that is so I can find nothing in the bill of lading which states or even implies that the parties to it intended the limitation of liability to extend to stevedores. Even if it could be said that reasonable men in the shoes of these parties would have agreed that the stevedores should have this benefit, that would not be enough to make this an implied term of the contract. And even if one could spell out of the bill of lading an intention to benefit the stevedore, there is certainly nothing to indicate that the carrier was contracting as agent for the stevedore in addition to contracting on his own behalf. So it appears to me that the agency argument must fail.

Note

The House of Lords rejected the agency argument on these facts but appeared to leave the way open for a suitably drafted clause to succeed. This may be because they were recognising the reality that such clauses are commercially efficient by allocating the risks and the burden of insurance in contracts.

New Zealand Shipping Co. Ltd v *A. M. Satterthwaite & Co. Ltd, The Eurymedon*
[1975] AC 154 (PC)

The facts of this case appear at page 120. Held: (Viscount Dilhorne and Lord Simon of Glaisdale dissenting) the clause in question did protect the third party stevedore.

LORD WILBERFORCE: The question in the appeal is whether the stevedore can take the benefit of the time limitation provision. The starting point, in discussion of this question, is provided by the House of Lords decision in *Midland Silicones Ltd* v *Scruttons Ltd* [1962] AC 446. There is no need to question or even to qualify that case in so far as it affirms the general proposition that a contract between two parties cannot be sued on by a third person even though the contract is expressed to be for his benefit. . . . But *Midland Silicones* left open the case where one of the parties contracts as agent for the third person: in particular Lord Reid's speech spelt out, in four propositions, the prerequisites for the validity of such an agency contract. [Lord Wilberforce referred to the four requirements stipulated by Lord Reid in *Scruttons Ltd* v *Midland Silicones Ltd.*]

The question in this appeal is whether the contract satisfies these propositions.

Clause 1 of the bill of lading, whatever the defects in its drafting, is clear in its relevant terms. The carrier, on his own account, stipulates for certain exemptions and immunities: among these is that conferred by article III, rule 6, of the Hague Rules which discharges the carrier from all liability for loss or damage unless suit is brought within one year after delivery. In addition to these stipulations on his own account, the carrier as agent for, inter alios, independent contractors stipulates for the same exemptions.

Much was made of the fact that the carrier also contracts as agent for numerous other persons; the relevance of this argument is not apparent. It cannot be disputed that among such independent contractors, for whom, as agent, the carrier contracted, is the appellant company which habitually acts as stevedore in New Zealand by arrangement with the carrier and which is, moreover, the parent company of the carrier. The carrier was, indisputably, authorised by the appellant to contract as its agent for the purposes of clause 1. All of this is quite straightforward and was accepted by all the judges in New Zealand. The only question was, and is, the fourth question presented by Lord Reid, namely that of consideration.

(See the extract from this judgment at pages 121–2 where Lord Wilberforce analysed this transaction as a unilateral offer of exemption made by the shipper to the stevedores through the carrier as agent. This unilateral offer was accepted when the stevedores performed services for the benefit of the shipper, i.e., unloading the goods. Since this is a unilateral contract, the act of acceptance is also the consideration.) Lord Wilberforce continued:

. . . A clause very similar to the present was given effect by a United States District Court in *Carle & Montanari Inc.* v *American Export Isbrandtsen Lines Inc.* [1968] 1 Lloyd's Rep 260. The carrier in that case contracted, in an exemption clause, as agent, for, inter alios, all stevedores and other independent contractors, and although it is no doubt true that the law in the United States is more liberal than ours as regards third party contracts, their Lordships see no reason why the law of the Commonwealth should be more restrictive and technical as regards agency contracts. Commercial considerations should have the same force on both sides of the Pacific.

In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence, and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence.

Question

Would this case be decided differently if the recommendations in the Law Commission's 1996 Report are implemented? (See page 233.)

Notes

1. The type of clause used here is often referred to as a 'Himalaya clause'.
2. Viscount Dilhorne and Lord Simon (dissenting) considered that the contract with the stevedores would have to be bilateral and that such a contract was not supported by consideration since the stevedores had not promised the shipper/consignee that they would unload the goods.
3. Since acceptance of the unilateral offer takes place only when the stevedore begins to unload the goods, this agency construction cannot be used by a stevedore who damages the goods *before* starting to unload them. In *Raymond Burke Motors Ltd* v *The Mersey Docks & Harbour Co.* [1986]

1 Lloyd's Rep 155, the goods were at the terminal awaiting the arrival of the ship when they were damaged. At this time no services had been performed which were referable to the carriage contract. Inevitably this will result in fine distinctions.

It should also be noted that the courts appear to be treating an act of starting to unload as sufficient to constitute acceptance for these purposes (see page 60 and criticisms of this).

4. It is not possible to accept an offer that you do not know about since the response must be in exchange for the promise (*R* v *Clarke* (1927) 40 CLR 227, page 41).

Will the stevedores (third party) know of the terms of the bill of lading (contract of carriage) when they start to unload?

This appears not to have been a problem in *The Eurymedon* because the stevedore company and the carrier company were companies in the same group, and therefore the stevedores probably did know of the carriage terms.

5. One further theoretical difficulty with the unilateral contract analysis is that, since there is a contract established between the shipper and the stevedore, there is no obvious reason to seek to rely on agency. Coote 'Pity the Poor Stevedore!' [1981] CLJ 13, suggested that it might be necessary because the terms of the bill of lading indicated an immediate bargain rather than an offer of a future contract, and the contract between the shipper and the stevedore is formed when the services are performed by the stevedore which will be after the bill of lading contract is made.

6. The Privy Council has expressly rejected any attempts to limit the effectiveness of this doctrine by allowing 'fine distinctions' to limit its applicability.

Port Jackson Stevedoring Pty Ltd v *Salmond & Spraggon (Australia) Pty Ltd, The New York Star*
[1980] 3 All ER 257 (PC)

Goods were shipped on terms of a bill of lading which contained a clause similar to that used in *The Eurymedon*. The defendant company stevedores were employed by the carrier, and both were companies in the same group. The consignment was delivered by the stevedores' servants to persons who had no right to receive them. In a negligence action against the stevedores, the consignee argued that it had not been shown that the carrier had authority to act on the stevedores' behalf for the benefit of the exemption clause. Held: the stevedores could have the benefit of the clause because where a stevedore was employed by a carrier, commercial practice required that the stevedore enjoy the benefits of contractual provisions in the bill of lading. Lord Wilberforce (who had also been in the majority in *The Eurymedon*) referred to *The Eurymedon* and continued:

LORD WILBERFORCE: . . . This was a decision, in principle, that the Himalaya clause is capable of conferring on a third person falling within the description 'servant or agent of the Carrier (including every independent contractor from time to time

employed by the Carrier)' defences and immunities conferred by the bill of lading on the carrier as if such persons were parties to the contract contained in or evidenced by the bill of lading. But the decision was not merely a decision on this principle, for it was made clear that in fact stevedores employed by the carrier may come within it, and moreover that they normally and typically will do so. It may indeed be said that the significance of *Satterthwaite's* case lay not so much in the establishment of any new legal principle as in the finding that, in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading. In the words of Mason and Jacobs JJ in the High Court:

> When the circumstances described by Lord Reid [sc in *Scruttons Ltd* v *Midland Silicones Ltd* [1962] 1 All ER 1 at 10, [1962] AC 446 at 474] exist, the stevedore will on the generally accepted principles of the law of contract be entitled to his personal contractual immunity. The importance of [*Satterthwaite's* case] is the manner in which on the bare facts of the case their Lordships were able to discern a contract between the shipper and the stevedore, and, we would add, to do so in a manner which limited the approach to those commercial contexts in which immunity of the stevedore was clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended.

Although, in each case, there will be room for evidence as to the precise relationship of carrier and stevedore and as to the practice at the relevant port, the decision does not support, and their Lordships would not encourage, a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle. . . .

Notes

1. Lord Wilberforce did not doubt that the carrier was authorised to act on the stevedore's behalf on these facts.

2. The potential application of the principle in *The Eurymedon* has been limited in the context of main contractors and subcontractors since it will be difficult to show that the main contractor had been authorised to act as agent for the subcontractors at the time the main contract was entered into.

Southern Water Authority v *Carey*
[1985] 2 All ER 1077

The predecessor of the plaintiff water authority had entered into a contract with the main contractors for the construction of sewage works. This contract provided that 12 months after completion the main contractors, their subcontractors, servants or agents were not to be liable for defects in the works or loss attributable to such defects. It also provided that the main contractors were to be deemed to have contracted on their own behalf and on behalf of their subcontractors, servants and agents. The main contractor employed the defendant subcontractors. The plaintiff brought an action against those subcontractors alleging negligence and the subcontractors sought to rely on the clause in the main contract. Held: they were not entitled to the benefit of a clause in a contract to which they were not parties. They

could not claim that the main contractor acted as their agent in contracting with the plaintiffs, since at the time the main contract was made the subcontractors had not given the main contractor this authority. However, the defendants were not liable in tort because the clause in the main contract negatived the duty of care that they would normally have owed as subcontractors.

JUDGE DAVID SMOUT QC: I must be cautious before extending into a wider field those decisions in so far as they apply the principle of unilateral contract to the specialised practice of carriers and stevedores in mercantile law. To my mind the principle of the unilateral contract does not, taken by itself, fit easily onto the accepted facts in the instant case and it strikes me as uncomfortably artificial.

It is, however, the agency element in *Satterthwaite's* case that is much to the point, [He then referred to Lord Reid's four requirements mentioned in *Scruttons* v *Midland Silicones* (page 185) and continued:]

Let us then consider the four propositions in the context of the instant case. First, does the main contract make it clear that the sub-contractors are intended to be protected by the provisions in it which limit liability? To my mind the answer must be Yes. Second, does it make it clear that the main contractor in addition to contracting for these provisions on his own behalf is also contracting as agent for the sub-contractors that the provisions should also apply to the sub-contractors? Again, I answer Yes: cl 30(vi) so states. The fourth proposition as to consideration poses no difficulty, for this is a contract under seal. It is the third proposition that is debatable in the instance case: had the main contractor authority from the sub-contractor, at the time of making the contract, and, if not, was there any later ratification that would suffice? Unlike *Satterthwaite's* case, there is no evidence here on which I could conclude that the main contractors had prior authority. What as to ratification? Counsel for the plaintiffs contends that there can be no ratification unless the principal was capable of being ascertained at the time when the act was done, i.e. when the deed was signed. Herein lies the defendants' difficulty . . . The fact that the fourth defendants were in the contemplation of the second defendants at the material time, as the documents show, and that it may be that the third defendants were also in contemplation, does not in my view suffice. . . . I turn now away from contract to the argument as it has been put in tort. . . .

No one would doubt that in an ordinary building case as between the sub-contractors and the building owner who has suffered damage there is a sufficient relationship of proximity that in the reasonable contemplation of the sub-contractor carelessness on his part may be likely to cause damage to the building owner. Thus a prima facie duty of care lies on the sub-contractor. So also in this case. But one has to go on to consider whether there are any considerations which ought to negative or to reduce or limit the scope of that duty. And merely to ask the question in the context of this case seems to me to foretell the answer. Did not the plaintiffs' predecessor as building owner, as it were, itself stipulate that the sub-contractors should have a measure of protection following on the issue of appropriate taking-over certificates? We must look to see the nature of such limitation clause to consider whether or not it is relevant in defining the scope of the duty in tort. The contractual setting may not necessarily be overriding, but it is relevant in the consideration of the scope of the duty in tort for it indicates the extent of the liability which the plaintiffs' predecessor wished to impose. To put it more crudely, and I hope I do no injustice to counsel for the third defendants to say that that is how he emphasised the matter, the contractual

setting defines the area of risk which the plaintiffs' predecessor chose to accept and for which it may or may not have sought commercial insurance.

While the terms of cl 30(vi) may, if literally interpreted, exceed the bounds of common sense the intent is clear, namely that the sub-contractor whose works have been so completed as to be the subject of a valid taking-over certificate should be protected in respect of those works from any liability in tort to the plaintiffs. As the plaintiffs' predecessor did so choose to limit the scope of the sub-contractors' liability, I see no reason why such limitation should not be honoured. . . .

Notes

1. Lord Reid in *Scruttons* v *Midland Silicones* (page 185) had indicated that either the agent had to be authorised to act or the contract might be subsequently ratified. Ratification was not possible here since the subcontractors were selected after the main contract was signed, whereas agency requires that the principal be capable of being ascertained at the time of the contract. This represents an important limitation on the usefulness of *The Eurymedon*, since it appears that the subcontract must exist at the time of the main contract.

2. The practical effect of the decision on the duty of care in tort is that although the subcontractors were not a party to the main contract, they were able to rely on its terms to protect them.

Norwich City Council v *Harvey*
[1989] 1 All ER 1180 (CA)

The plaintiffs contracted with the main contractors for an extension of a swimming pool complex. The contract provided that both the existing structure and the work in progress were to be at the sole risk of the plaintiffs as regards loss or damage by fire. The main contractors subcontracted the roofing work to the defendant subcontractors. While using a blow torch, an employee of the subcontractors set fire to the existing buildings and the new extension. The plaintiffs brought an action in tort against the subcontractors. Held: the subcontractors were not liable because the contract terms clearly indicated that the plaintiffs had accepted the risk of fire damage to the premises, and thus had reduced the scope of the duty of care owed by the subcontractors in tort.

London Drugs Ltd v *Kuehne and Nagel International Ltd*
(1993) 97 DLR (4th) 261, Supreme Court of Canada

The plaintiffs delivered a transformer to Kuehne and Nagel (the corporation) for storage upon the terms of their contract, which limited 'the warehouseman's liability' to $40. The transformer was damaged during lifting as a result of the negligence of two of the corporation's employees, and the plaintiffs brought an action against them in tort claiming their full loss of $34,000. The question was whether the employees, who were not parties to the contract containing the limitation clause, could rely upon it.

The Court of Appeal had reached a conclusion favourable to the employees by using two different approaches: (i) *The Eurymedon* analysis, although on the facts it was necessary to imply a term that the protection extended to employees since it did not do so expressly, and (ii) the 'tort analysis', whereby the 'contractual matrix' including the limitation clause qualified the employees' duty of care and ensuing liability to $40. Held: on appeal the majority found the employees could rely on the limitation clause because, since they were acting in the course of their employment and performing the very services contracted for by the plaintiffs, they were implicit third party beneficiaries of the clause.

IACOBUCCI J (L'Heureux-Dube, Sopinka and Cory JJ concurring): . . . For my part, I prefer to deal head-on with the doctrine of privity and to relax its ambit in the circumstances of this case. Some may argue that the same result can (and should) be reached by using a number of approaches which are seemingly less drastic and/or allegedly more theoretically sound . . . Except for a rigid adherence to the doctrine of privity of contract, I do not see any compelling reason based on principle, authority or policy demonstrating that this court, or any other, must embark upon a complex and somewhat uncertain 'tort analysis' in order to allow third parties such as the respondents to obtain the benefit of a contractual limitation of liability clause, once it has been established that they breached a recognized duty of care. In my view, apart from privity of contract, it is contrary to neither principle nor authority to allow such a party, in appropriate circumstances, to obtain the benefit *directly* from the contract i.e., in the same manner as would the contracting party) by resorting to what may be referred to as a 'contract analysis'. . . .

None of the traditional exceptions to privity is applicable in the case at bar. As noted by the appellant, there is no evidence to support a finding of agency or trust, and these matters were not fully argued before the courts below. While the respondents rely to a certain extent on the approach taken by Lambert J.A. in the Court of Appeal, I must say that I have much difficulty in supporting a conclusion that the approach described in *The Eurymedon, supra,* and *ITO-International Terminal Operators* [(1986) 28 DLR (4th) 641] is applicable to the facts of this case. Rather than artificially extending recognized exceptions beyond their accepted limits, I prefer approaching this matter on the basis that privity of contract would otherwise apply so as to preclude the respondents from obtaining the benefit of the limitation of liability clause. The questions I now need to address are whether this doctrine should be relaxed in the circumstances of this case and, if so, on what basis.

Should the doctrine of privity be relaxed?

Without doubt, major reforms to the rule denying third parties the right to enforce contractual provisions made for their benefit must come from the legislature. Although I have strong reservations about the rigid retention of a doctrine that has undergone systematic and substantial attack, privity of contract is an established principle in the law of contracts and should not be discarded lightly. Simply to abolish the doctrine of privity or to ignore it, without more, would represent a major change to the common law involving complex and uncertain ramifications. . . .

[T]he doctrine of privity has come under serious attack for its refusal to recognize the right of a third party beneficiary to enforce contractual provisions made for his or her benefit. Law reformers, commentators and judges have pointed out the gaps that sometimes exist between contract theory on the one hand, and commercial reality and justice on the other. We have also seen that many jurisdictions around the world,

including Quebec and the United States, have chosen from an early point (as early as the doctrine became 'settled' in the English common law) to recognize third party beneficiary rights in certain circumstances. As noted by the appellant, the common law recognizes certain exceptions to the doctrine, such as agency and trust, which enable courts, in appropriate circumstances, to arrive at results which conform with the true intentions of the contracting parties and commercial reality. However, as many have observed, the availability of these exceptions does not always correspond with their need. Accordingly, this court should not be precluded from developing the common law so as to recognize a further exception to privity of contract merely on the ground that some exceptions already exist.

While these comments may not, in themselves, justify doing away with the doctrine of privity, they none the less give a certain context to the principles that this court is now dealing with. This context clearly supports in my view some type of reform or relaxation to the law relating to third party beneficiaries. Again, I reiterate that any substantial amendment to the doctrine of privity is a matter properly left with the legislature. But this does not mean that courts should shut their eyes to criticisms when faced with an opportunity, as in the case at bar, to make a very specific incremental change to the common law.

There are few principled reasons for upholding the doctrine of privity in the circumstances of this case . . . most of the traditional reasons or justifications behind the doctrine are of little application in cases such as this one, when a third party beneficiary is relying on a contractual provision as a defence in an action brought by one of the contracting parties. There are no concerns about double recovery or floodgates of litigation brought by third party beneficiaries. The fact that a contract is a very personal affair, affecting only the parties to it, is simply a restatement of the doctrine of privity rather than a reason for its maintenance. Nor is there any concern about 'reciprocity', that is, there is no concern that it would be unjust to allow a party to sue on a contract when he or she cannot be sued on it.

Moreover, recognizing a right for a third party beneficiary to rely on a limitation of liability clause should have relatively little impact on the rights of contracting parties to rescind or vary their contracts, in comparison with the recognition of a third party right to sue on a contract. In the end, the most that can be said against the extension of exceptions to the doctrine of privity in this case is that the respondent employees are mere donees and have provided no consideration for the contractual limitation of liability.

The doctrine of privity fails to appreciate the special considerations which arise from the relationships of employer-employee and employer-customer. There is clearly an identity of interest between the employer and his or her employees as far as the performance of the employer's contractual obligations is concerned. When a person contracts with an employer for certain services, there can be little doubt in most cases that employees will have the prime responsibilities related to the performance of the obligations which arise under the contract. This was the case in the present appeal, clearly to the knowledge of the appellant . . . I am in no way suggesting that employees are a party to their employer's contracts in the traditional sense so that they can bring an action on the contract or be sued for breach of contract. However, when an employer and a customer enter into a contract for services and include a clause limiting the liability of the employer for damages arising from what will normally be conduct contemplated by the contracting parties to be performed by the employer's employees, and in fact so performed, there is simply no valid reason for denying the benefit of the clause to employees who perform the contractual obligations. The nature and scope of the limitation of liability clause in such a case coincides essentially

with the nature and scope of the contractual obligations performed by the third party beneficiaries (employees).

Upholding a strict application of the doctrine of privity in the circumstances of this case would also have the effect of allowing the appellant to circumvent or escape the limitation of liability clause to which it had expressly consented. . . .

. . . Holding the employees liable in these circumstances could lead to serious injustice especially when one considers that the financial position of the affected employees could vary considerably such that, for example, more well-off employees would be sued and left to look for contribution from the less well-off employees. Such a result creates also uncertainty and requires excessive expenditures on insurance in that it defeats the allocations of risk specifically made by the contracting parties and the reasonable expectations of everyone involved, including the employees. When parties enter into commercial agreements and decide that one of them *and* its employees will benefit from limited liability, or when these parties choose language such as 'warehouseman' which implies that employees will also benefit from a protection, the doctrine of privity should not stand in the way of commercial reality and justice.

How should the doctrine of privity be relaxed?

Regardless of the desirability of making a particular change to the law, I have already noted that complex changes with uncertain ramifications should be left to the legislature. Our power and duty as a court to adapt and develop the common law must only be exercised generally in an incremental fashion . . .

In the end, the narrow question before this court is: in what circumstances should employees be entitled to benefit from a limitation of liability clause found in a contract between their employer and the plaintiff (customer)? Keeping in mind the comments made earlier and the circumstances of this appeal, I am of the view that employees may obtain such a benefit if the following requirements are satisfied:

(1) the limitation of liability clause must, either expressly or impliedly, extend its benefit to the employees (or employee) seeking to rely on it; and

(2) the employees (or employee) seeking the benefit of the limitation of liability clause must have been acting in the course of their employment *and* must have been performing the very services provided for in the contract between their employer and the plaintiff (customer) when the loss occurred. . . .

It is clear that the parties did not choose express language in order to extend the benefit of the clause to employees. For example, there is no mention of words such as 'servants' or 'employees' in s. 11(b) of the contract. As such, it cannot be said that the respondents are express third party beneficiaries with respect to the limitation of liability clause. However, this does not preclude a finding that they are *implied* third party beneficiaries . . .

When all the circumstances of this case are taken into account, including the nature of the relationship between employees and their employer, the identity of interest with respect to contractual obligations, the fact that the appellant knew that employees would be involved in performing the contractual obligations, and the absence of a clear indication in the contract to the contrary, the term 'warehouseman' in s. 11(b) of the contract must be interpreted as meaning 'warehousemen'. As such, the respondents are not complete strangers to the limitation of liability clause. Rather, they are unexpressed or implicit third party beneficiaries with respect to this clause. Accordingly, the first requirement of this new exception to the doctrine of privity is also met.

. . . While neither trust nor agency is applicable, the respondents are entitled to benefit directly from the limitation of liability clause in the contract between their

employer and the appellant. This is so because they are third party beneficiaries with respect to that clause and because they were acting in the course of their employment and performing the very services contracted for by the appellant when the damages occurred. I acknowledge that this, in effect, relaxes the doctrine of privity and creates a limited *jus tertii*. However, when viewed in its proper context, it merely represents an incremental change to the law, necessary to see that the common law develops in a manner that is consistent with modern notions of commercial reality and justice.

Notes

1. See Adams and Brownsword (1993) 56 MLR 722 for a detailed analysis of the reasoning.

2. This decision involves a totally different approach, since the Supreme Court of Canada expressly recognised a new exception allowing third party employees to rely on an exemption clause (albeit a specific and limited exception). The Court refused to extend the 'artificial' *Eurymedon* exception to enable it to apply on these facts.

3. Iacobucci J refers to this approach as 'incremental change' and justifies the exception by the need to make commercial sense and avoid absurd results. Waddams (1993) 109 LQR 349, pp. 350-51, supports this 'incremental' approach to reform of the privity rule, i.e. by the continuing development of exceptions rather than a general reform allowing third parties to enforce benefits which Waddams believes would lead to 'unacceptable results'. See, however, Huscroft (1994) 7 JCL 181, who argues that this 'incremental' response is inadequate and criticises Waddams's view that it is 'now open to any court to establish a new exception wherever justice and commercial convenience require one'.

4. Would the Law Commission's proposed test of enforceability (page 233 below) cover this fact scenario so as to enable such a third party to enforce the contractual provision?

The Mahkutai
[1996] 3 All ER 502 (PC)

The time charterers had sub-chartered the vessel to the shippers for a particular voyage. The bill of lading issued by the time charterers contained a Himalaya clause which stated that servants, agents and subcontractors were to have the benefit of 'all exceptions, limitations, provision, conditions and liberties herein benefiting the carrier as if such provisions were expressly made for their benefit' (cl. 4). There was also a clause granting exclusive jurisdiction to the Indonesian courts (cl. 19). The owners of the cargo on board the vessel claimed that it had been damaged and brought an action in Hong Kong which resulted in the vessel being arrested there. The shipowners sought to stay these proceedings by relying on the exclusive jurisdiction clause in the bill of lading. However, the Hong Kong Court of Appeal held that they could not rely on this clause because they were not parties to the bill of lading. Held: on appeal (even if the

shipowners could qualify as subcontractors of the carriers), in order to rely on the exclusive jurisdiction clause the shipowners needed to show that it fell within the scope of the Himalaya clause so that a contract existed between the consignee and the subcontractor on the basis of *The Eurymedon*. However, that clause covered terms which benefited the carrier only, and since an exclusive jurisdiction clause created mutual rights and obligations, it was not an 'exception, limitation, provision, condition or liberty' benefiting the carrier within the meaning of the Himalaya clause.

LORD GOFF: . . .

Critique of the Eurymedon principle

In *The New York Star* [1980] 3 All ER 257 at 261, [1981] 1 WLR 138 at 144 Lord Wilberforce discouraged 'a search for fine distinctions which would diminish the general applicability, in the light of established commercial practice, of the principle'. He was there, of course, speaking of the application of the principle in the case of stevedores. It has however to be recognised that, so long as the principle continues to be understood to rest upon an enforceable contract as between the cargo owners and the stevedores entered into through the agency of the shipowner, it is inevitable that technical points of contract and agency law will continue to be invoked by cargo owners seeking to enforce tortious remedies against stevedores and others uninhibited by the exceptions and limitations in the relevant bill of lading contract. . . .

Nevertheless, there can be no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores; and the bold step taken by the Privy Council in *The Eurymedon*, and later developed in *The New York Star*, has been widely welcomed. But it is legitimate to wonder whether that development is yet complete. Here their Lordships have in mind not only Lord Wilberforce's discouragement of fine distinctions, but also the fact that the law is now approaching the position where, provided that the bill of lading contract clearly provides that (for example) independent contractors such as stevedores are to have the benefit of exceptions and limitations contained in that contract, they will be able to enjoy the protection of those terms as against the cargo owners. This is because (1) the problem of consideration in these cases is regarded as having been solved on the basis that a bilateral agreement between the stevedores and the cargo owners, entered into through the agency of the shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of performance of their duties as stevedores for the shipowners; (2) the problem of authority from the stevedores to the shipowners to contract on their behalf can, in the majority of cases, be solved by recourse to the principle of ratification; and (3) consignees of the cargo may be held to be bound on the principle in *Brandt & Co.* v *Liverpool Brazil and River Plate Steam Navigation Co. Ltd* [1924] 1 KB 575, [1923] All ER Rep 656. Though these solutions are now perceived to be generally effective for their purpose, their technical nature is all too apparent; and the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and perhaps inevitable, step in this development and recognise in these cases a fully-fledged exception to the doctrine of privity of contract, thus escaping from all the technicalities with which courts are now faced in English law. It is not far from their Lordships' minds that, if the English courts were minded to take that step, they would be following in the footsteps of the Supreme Court of Canada (see *London Drugs Ltd* v *Kuehne & Nagel International Ltd* (1993) 97 DLR (4th) 261) and, in a different context, the High Court of Australia (see *Trident*

General Insurance Co. Ltd v *McNiece Bros Pty Ltd* (1988) 165 CLR 107). Their Lordships have given consideration to the question whether they should face up to this question in the present appeal. However, they have come to the conclusion that it would not be appropriate for them to do so, first, because they have not heard argument specifically directed towards this fundamental question, and second because, as will become clear in due course, they are satisfied that the appeal must in any event be dismissed.

Application of the Eurymedon principle in the present case

Their Lordships now turn to the application of the principle in *The Eurymedon* to the facts of the present case. Two questions arose in the course of argument which are specific to this case. The first is whether the shipowners qualify as 'sub-contractors' within the meaning of the Himalaya clause (cl. 4 of the bill of lading). The second is whether, if so, they are entitled to take advantage of the exclusive jurisdiction clause (cl. 19). Their Lordships have come to the conclusion that the latter question must be answered in the negative. It is therefore unnecessary for them to answer the first question; and they will proceed to address the question of the exclusive jurisdiction clause on the assumption that the shipowners can be regarded as sub-contractors for this purpose.

The exclusive jurisdiction clause

The Himalaya clause provides that, among others, sub-contractors shall have the benefit of 'all exceptions, limitations, provision, conditions and liberties herein benefiting the Carrier as if such provisions were expressly made for their benefit'. The question therefore arises whether the exclusive jurisdiction clause (cl. 19) falls within the scope of this clause.

In *The Eurymedon* [1974] 1 All ER 1015 at 1021, [1975] AC 154 at 169 and *The New York Star* [1980] 3 All ER 257 at 261, [1981] 1 WLR 138 at 143 Lord Wilberforce stated the principle to be applicable, in the case of stevedores, to respectively 'exemptions and limitations' and 'defences and immunities' contained in the bill of lading. This is scarcely surprising. Most bill of lading contracts incorporate the Hague-Visby Rules, in which the responsibilities and liabilities of the carrier are segregated from his rights and immunities, the latter being set out primarily in art. IV, rr. 1 and 2, exempting the carrier and the ship from liability or responsibility for loss of or damage to the goods in certain specified circumstances; though the limitation on liability per package or unit is to be found in art. IV, r. 5, and the time bar in art. III, r. 6. Terms such as these are characteristically terms for the benefit of the carrier, of which sub-contractors can have the benefit under the Himalaya clause as if such terms were expressly made for their benefit.

It however by no means follows that the same can be said of an exclusive jurisdiction clause . . . Such a clause can be distinguished from terms such as exceptions and limitations in that it does not benefit only one party, but embodies a mutual agreement under which both parties agree with each other as to the relevant jurisdiction for the resolution of disputes. It is therefore a clause which creates mutual rights and obligations. Can such a clause be an exception, limitation, provision, condition or liberty benefiting the carrier within the meaning of the clause?

First of all, it cannot in their Lordships' opinion be an exception, limitation, condition or liberty. But can it be a provision? That expression has, of course, to be considered in the context of the Himalaya clause; and so the question is whether an exclusive jurisdiction clause is a provision benefiting the carrier, of which servants, agents and sub-contractors of the carrier are intended to have the benefit, as if the

provision was expressly made for their benefit. Moreover, the word 'provision' is to be found at the centre of a series of words, viz 'exceptions, limitations . . . conditions and liberties', all of which share the same characteristic, that they are not as such rights which entail correlative obligations on the cargo owners.

In considering this question, their Lordships are satisfied that some limit must be placed upon the meaning of the word 'provision' in this context. In their Lordships' opinion, the word 'provision' must have been inserted with the purpose of ensuring that any other provision in the bill of lading which, although it did not strictly fall within the description 'exceptions, limitations . . . conditions and liberties', nevertheless benefited the carrier in the same way in the sense that it was inserted in the bill for the carrier's protection, should enure for the benefit of the servants, agents and sub-contractors of the carrier. It cannot therefore extend to include a mutual agreement, such as an exclusive jurisdiction clause, which is not of that character.

Their Lordships draw support for this view from the function of the Himalaya clause. That function is, as revealed by the authorities, to prevent cargo owners from avoiding the effect of contractual defences available to the carrier (typically the exceptions and limitations in the Hague-Visby Rules) by suing in tort persons who perform the contractual services on the carrier's behalf. To make available to such a person the benefit of an exclusive jurisdiction clause in the bill of lading contract does not contribute to the solution of that problem. Furthermore, to construe the general words of the Himalaya clause as effective to make available to servants, agents or sub-contractors a clause which expressly refers to disputes arising under the contract evidenced by the bill of lading, to which they are not party, is not easy to reconcile with those authorities (such as *T W Thomas & Co. Ltd* v *Portsea Steamship Co. Ltd* [1912] AC 1) which hold that general words of incorporation are ineffective to incorporate into a bill of lading an arbitration clause which refers only to disputes arising under the charter.

Furthermore, it is of some significance to observe how adventitious would have been the benefit of the exclusive jurisdiction clause to the shipowners in the present case. Such a clause generally represents a preference by the carrier for the jurisdiction where he carries on business. But the same cannot necessarily be said of his servants, agents or sub-contractors. It could conceivably be true of servants, such as crew members, who may be resident in the same jurisdiction; though if sued elsewhere they may in any event be able to invoke the principle of forum non conveniens. But the same cannot be said to be true of agents, still less of sub-contractors. Take, for example, stevedores at the discharging port, who provide the classic example of independent contractors intended to be protected by a Himalaya clause. There is no reason to suppose that an exclusive jurisdiction clause selected to suit a particular carrier would be likely to be of any benefit to such stevedores; it could only conceivably be so in the coincidental circumstance that the discharging port happened to be in the country where the carrier carried on business. Exactly the same can be said of a shipowner who performs all or part of the carrier's obligations under the bill of lading contract, pursuant to a time or voyage charter. In such a case, the shipowner may very likely have no connection with the carrier's chosen jurisdiction . . . . [T]heir Lordships have come to the conclusion that the Himalaya clause does not have the effect of enabling the shipowners to take advantage of the exclusive jurisdiction clause in the bill of lading in the present case.

Notes

1. Lord Goff refers to the contract in *The Eurymedon* as 'bilateral'. This may be because a bilateral contract was used in the analysis of Barwick CJ in the

High Court of Australia in *The New York Star* and Barwick's analysis was endorsed by the Privy Council in that case. It has been argued that agency is in fact only necessary where the contract is bilateral, so that it is only on that basis that all of Lord Reid's four requirements in *Scruttons* v *Midland Silicones* are necessary.

2. Lord Goff's comments illustrate the problems that might follow if reform were to be left to the courts, namely waiting for an 'appropriate' case to arise for the reform question to be fully argued and for the court in question to be prepared to accept such an argument.

SECTION 2: JOINT PROMISEES

Where a promise is made to joint promisees but only one of them provides the consideration, can both enforce the contract?

Coulls v *Bagot's Executor & Trustee Co. Ltd*
(1967) 119 CLR 460; [1967] ALR 385 (High Court of Australia)

By an agreement headed 'Agreement between Arthur Coulls and O'Neil Construction Company', Coulls granted the company quarrying rights over his land in return for royalties. The agreement also provided that Coulls could instruct the company to pay these royalties to him and his wife as joint tenants. (This meant that the survivor would be solely entitled.) This agreement was signed by the company and by both Coulls and his wife. After the death of Coulls, a dispute arose between his executors and his widow as to who was entitled to these royalty payments. Held: (McTiernan, Taylor and Owen JJ) the company was bound to pay the royalties to the husband's estate on his death because the wife was not a party to the agreement and when he died the mandate to pay the money to the wife was revoked.

Barwick CJ and Windeyer J dissented on the ground that the husband and wife were joint promisees. The problem was that the wife had not provided any consideration for the company's promise to make the payments in this way. Barwick CJ held that there would need to be a joint action with the husband's executor for her to be able to enforce the promise.

BARWICK CJ: Before turning to discuss its enforceability it is convenient to determine with whom the promise was made. As I have already said, there is nothing in the writing to indicate expressly to whom the promise of the company was given. But, bearing in mind the matters to which I have already referred, the grant of a licence to quarry for a cash consideration, the participation of the company's representative in the discussion as to the payees and the signature of all three parties in what was regarded as a single arrangement, I have come to the conclusion that not only was the promise to pay a promise to pay the deceased and the respondent during their joint lifetime and thereafter the survivor of them but that it was a promise given to both of them to make those payments.

It must be accepted that, according to our law, a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations. For my part, I find no difficulty or embarassment in this conclusion. Indeed, I would find it odd that a person to whom no promise was made could himself in his own right enforce a promise made to another. But that does not mean that it is not possible for that person to obtain the benefit of a promise made with another for his benefit by steps other than enforcement by himself in his own right: see the recent case of *Beswick* v *Beswick* [1966] Ch 538; [1968] AC 58. I would myself, with great respect, agree with the conclusion that where A promises B for a consideration supplied by B to pay C then B may obtain specific performance of A's promise, at least where the nature of the consideration given would have allowed the debtor to have obtained specific performance. I can see no reason whatever why A in those circumstances should not be bound to perform his promise. That C provided no part of the consideration seems to me irrelevant. Questions of consideration and of privity are not always kept distinct. Indeed, on some occasions when lack of privity is the real reason for not allowing a plaintiff to succeed on a promise not made with him, an unnecessary and irrelevant reason is given that the plaintiff was a stranger to the consideration; that is to say, that he was not merely not a party to the agreement but was not a party to the bargain. In *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge & Co. Ltd* [1915] AC 847 privity was not lacking because it was assumed, but the promise made by the defendant to the plaintiff was as between them gratuitous. But in this case whether the promise was made by the company to the deceased alone or to the deceased and the respondent, it was not as between promisor and promisee a gratuitous promise.

But as I construe this writing, we have here not a promise by A with B for consideration supplied by B to pay C. It was, in my opinion, a promise by A made to B and C for consideration to pay B and C. In such a case it cannot lie in the mouth of A, in my opinion, to question whether the consideration which he received for his promise moved from both B and C or, as between themselves, only from one of them. His promise is not a gratuitous promise as between himself and the promisees as on the view I take of the agreement it was a promise in respect of which there was privity between A on the one hand and B and C on the other. Such a promise, in my opinion, is clearly enforceable in the joint lifetime of B and C: But it is only enforceable if both B and C are parties to the action to enforce it. B, though he only supplied the consideration, could not sue alone. If C were unwilling to join in the action as plaintiff, B no doubt, after suitable tender of costs, could join C as a defendant. And A's promise could be enforced. But the judgment would be for payment to B and C. If B would not join in an action to enforce A's promise, I see no reason why C should not sue joining B as a defendant. Again, in my opinion, A's promise would be enforced and a judgment in favour of B and C would result. In neither of these cases could A successfully deny either privity or consideration. I find nothing in *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge & Co. Ltd* [1915] AC 847 to suggest that he could.

Upon the death of one of the joint promisees the promise remains on foot and remains enforceable but it is still the same promise given to B and C though, because of the death of one and the right of survivorship, the promise is now to pay the survivor. C, it seems to me, being the survivor, may enforce the promise by an action to which both B's estate and C are parties. However, C could not, in any event, in my opinion, be the sole plaintiff against A because A's promise was not made with C alone. Consequently, B's personal representative would need to be either a co-plaintiff or joined as a defendant, though in this case the judgment would be for C alone, the promise with B and C being to pay the survivor of them. . . .

Windeyer J considered that as long as consideration had been provided by one joint promisee they could both enforce the promise, and the wife alone could do so on the death of her husband because of the survivorship terms.

WINDEYER J: My reasons for saying that the promise by the construction company was made to Coulls and Mrs Coulls as joint promisees are as follows. Mrs Coulls was present when the agreement was drawn up: she wrote the document from dictation: she, Coulls and O'Neil all took part in a discussion of how an arrangement for payment to the deceased and herself jointly and then to the survivor solely should be expressed. . . . taken with the fact of Mrs Coulls being one of the signatories to the document, and with the fact that the promise was to pay the deceased and her jointly during their lives, . . . she and he were joint promisees. On that basis she was not a stranger to the contract, but a party to it with him.

Still, it was said, no consideration moved from her. But that, I consider, mistakes the nature of a contract made with two or more persons jointly. The promise is made to them collectively. It must, of course, be supported by consideration, but that does not mean by considerations furnished by them separately. It means a consideration given on behalf of them all, and therefore moving from all of them. In such a case the promise of the promisor is not gratuitous; and, as between him and the joint promisees, it matters not how they were able to provide the price of his promise to them. That is the position as I see it. It accords with the very old decision in *Rookwood's Case* (1589) Cro Eliz 164, 78 ER 421 and with general principle.

On this view, that Coulls and Mrs Coulls were joint promisees, an action against the construction company would, during their joint lives, have had to be brought in the names of both. If one had refused to be joined as a plaintiff, he or she could, after an offer of indemnity against costs, have been made a defendant. After the death of either of two joint promisees an action on a contract can be brought by the survivor alone: see *Halsbury's Laws of England*, 3rd ed., vol. 8, p. 67. Therefore Mrs Coulls, on the basis that she is a surviving joint promisee, could now bring an action on the contract; and in respect of moneys becoming due and payable under it since the death of her husband recover them for herself alone.

Notes

1. Four members of the court (Barwick CJ, Taylor, Windeyer and Owen JJ) considered that *if* both the husband and wife were parties to the contract as joint promisees, the wife could enforce the promise to make payments to her even though she had provided no consideration. McTiernan J did not express an opinion on this issue. See Coote (1978) 37 CLJ 301.

2. The Law Commission's Report (1996) Cm 3329 considered that a joint promisee could not be treated as a third party for the purposes of its proposed reform since he was privy to the contract. However, the Law Commission did not resolve the precise rights of a joint promisee, preferring to leave appropriate reform to the courts. Clearly if, under these recommendations, a third party's right of enforcement could not be defeated on the ground that the third party had not provided consideration, a joint promisee should not be in a more disadvantageous position.

SECTION 3: THE COLLATERAL CONTRACT

If a court can find the existence of a separate (collateral) contract (page 245) between the promisor and the third party, it can avoid the difficulties of privity.

Shanklin Pier v *Detel Products Ltd*
[1951] 2 KB 854

Contractors were employed by the plaintiffs, owners of a pier, to paint the pier. The contract permitted the plaintiffs to specify the paint the contractors were to use. The defendant company told the plaintiffs that the paint they manufactured, known as DMU, would be suitable for the work and that two coats would have a life of at least seven years. On the faith of these statements the plaintiffs instructed the contractors to use two coats of DMU, and the contractors purchased the paint from the defendants. In fact the paint lasted only three months. The plaintiffs brought an action in breach of contract against the defendants. The problem was that the plaintiffs were not party to the purchase contract between the contractors and the defendants. Held: the plaintiffs could succeed because there was a collateral contract between the defendants and the plaintiffs that the paint would last at least seven years. The consideration for this contract was the plaintiffs' action in instructing the contractors to buy DMU from the defendants.

Notes

1. This device has proved to be of particular use in combating the privity difficulties arising from hire-purchase agreements.

In hire-purchase agreements the dealer may make statements, say, about a car but the actual contract of hire-purchase is made between the finance company and the customer. There is no contract between the dealer and the customer. If the dealer makes a warranty to induce the contract with the finance company, a collateral contract will allow the customer to enforce that warranty against the dealer (*Andrews* v *Hopkinson* [1957] 1 QB 229).

2. In *Wells (Merstham) Ltd* v *Buckland Sand & Silica Ltd* [1964] 1 All ER 41, the plaintiffs, chrysanthemum growers, asked the defendants, who were sand merchants, whether their sand would be suitable for growing chrysanthemums. The defendants confirmed that it was suitable. The plaintiffs then bought this sand from a third party. Edmund Davies J held that the defendants were liable in contract (following *Shanklin Pier* v *Detel*) when the sand did not conform to the warranty, since they had given a 'collateral undertaking' and the plaintiffs had acquired the sand in reliance on it.

At the time of the undertaking the plaintiffs did not contemplate making any specific main contract but Edmund Davies J considered it sufficient that it was within the plaintiffs' and defendants' contemplation that a contract based upon the promise would be entered into shortly.

3. A further example of the application of this principle is provided by the decision of the majority of the Court of Appeal in *Bowerman* v *ABTA Ltd* [1996] CLC 451, page 171.

SECTION 4: TRUSTS OF CONTRACTUAL OBLIGATIONS

A trust is an equitable obligation placed on a trustee to hold property on behalf of another, the beneficiary. Is it possible to avoid the privity doctrine

by showing that the contractual party holds the benefit of the promise on trust for the third party?

At one time this device was frequently used to evade privity where a third party was intended to have the benefit of a contract. There is no requirement that the third-party beneficiary must provide any consideration for the promise.

Les Affréteurs Réunis SA v *Leopold Walford (London) Ltd*
[1919] AC 801 (HL)

In a charterparty contract the shipowners promised the charterer that they would pay the broker 3 per cent commission. They later refused to pay this to the broker. The broker's action was treated as if the charterers had been added as plaintiffs. Held: the broker was entitled to the commission since the charterers, as trustees for the broker, could enforce the clause against the shipowners.

Note

However, there must now be a clear expression of intent to create a trust; a trust will not be implied. This is undoubtedly more realistic, since the difficulty with using a trust is that it is irrevocable and the parties cannot vary the terms of their agreement in the future. It must be doubtful if contracting parties would intend this, and if they do, they must make that intention clear.

Re Schebsman
[1944] Ch 83 (CA)

Mr Schebsman was employed by a Swiss company and its English subsidiary. His employment ended and he entered into an agreement with the two companies whereby the English company agreed to pay him £5,500 as compensation for loss of his employment, in six annual instalments. If Schebsman died the payments were to be made to his widow and daughter. During the period of the agreement Schebsman was adjudicated bankrupt and then died. His trustee in bankruptcy claimed that the amounts to be paid under the agreement were part of Schebsman's estate and available to pay his creditors. Held: the manifest intention of the agreement was that the widow should benefit, and therefore the company was bound to make the payments to her. However, it was also held that the contract did not create a trust in favour of the widow and daughter.

LORD GREENE MR: The first question which arises is whether or not the debtor was a trustee for his wife and daughter of the benefit of the undertaking given by the English company in their favour. An examination of the decided cases does, it is true, show that the courts have on occasions adopted what may be called a liberal view on questions of this character, but in the present case I cannot find in the contract anything to justify the conclusion that a trust was intended. It is not legitimate to import into the contract the idea of a trust when the parties have given no indication

that such was their intention. To interpret this contract as creating a trust would, in my judgment, be to disregard the dividing line between the case of a trust and the simple case of a contract made between two persons for the benefit of a third. That dividing line exists, although it may not always be easy to determine where it is to be drawn. In the present case I find no difficulty. . . .

DU PARCQ LJ: . . . It is true that, by the use possibly of unguarded language, a person may create a trust . . . without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention. I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's life-time injustice might have been done by holding that a trust had been created and that those terms were accordingly unalterable. . . .

SECTION 5: ACTION BY THE CONTRACTING PARTY AS A MEANS OF AVOIDING PRIVITY

What remedies can the contracting party secure?

A: SPECIFIC PERFORMANCE

Specific performance is a court order compelling the promisor to carry out his promise. However, it is a discretionary remedy and is available only if damages would be an inadequate remedy.

Beswick* v *Beswick
[1968] AC 58 (HL)

Peter Beswick agreed in writing with his nephew, the defendant, that he would transfer his coal round business to the nephew. It was further agreed that the nephew would employ him as a consultant at £6 10s a week for the rest of his life and on his death would pay his widow an annuity of £5 a week for life. The nephew took over the business but when Peter Beswick died the nephew paid only one sum of £5 to his widow and refused to pay any more. The widow brought an action to compel the nephew to continue making the payments. She did so in two capacities:

(a) as administratrix of her late husband's estate; and
(b) in her personal capacity.

Held: she was entitled to an order of specific performance of the promise in her capacity as administratrix. There was no problem of privity or consideration since it was as if Peter Beswick himself had been suing. However, she could not enforce the promise in her personal capacity because she was not a party to the contract.

If damages were awarded they would be nominal (but see Lord Pearce, below) since Peter Beswick's estate had not suffered any loss. To avoid the

injustice to the widow, the House of Lords exercised its discretion and ordered specific performance.

LORD REID: For clarity I think it best to begin by considering a simple case where, in consideration of a sale by A to B, B agrees to pay the price of £1,000 to a third party X. . . . what is the nature of B's obligation and who is entitled to enforce it? . . .

Lord Denning's view, expressed in this case not for the first time, is that X could enforce this obligation. But the view more commonly held in recent times has been that such a contract confers no right on X and that X could not sue for the £1,000. Leading counsel for the respondent based his case on other grounds, and as I agree that the respondent succeeds on other grounds, this would not be an appropriate case in which to solve this question. It is true that a strong Law Revision Committee recommended so long ago as 1937 (Cmd. 5449):

> That where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name . . . (p. 31).

And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter. But if legislation is probable at any early date I would not deal with it in a case where that is not essential. So for the purposes of this case I shall proceed on the footing that the commonly accepted view is right.

What then is A's position? I assume that A has not made himself a trustee for X, because it was not argued in this appeal that any trust had been created. So, if X has no right, A can at any time grant a discharge to B or make some new contract with B. If there were a trust the position would be different. X would have an equitable right and A would be entitled and, indeed, bound to recover the money and account for it to X. And A would have no right to grant a discharge to B. If there is no trust and A wishes to enforce the obligation, how does he set about it? He cannot sue B for the £1,000 because under the contract the money is not payable to him, and, if the contract were performed according to its terms, he would never have any right to get the money. So he must seek to make B pay X.

The argument for the appellant is that A's only remedy is to sue B for damages for B's breach of contract in failing to pay the £1,000 to X. Then the appellant says that A can only recover nominal damages of 40s. because the fact that X has not received the money will generally cause no loss to A: he admits that there may be cases where A would suffer damage if X did not receive the money but says that the present is not such a case.

Applying what I have said to the circumstances of the present case, the respondent in her personal capacity has no right to sue, but she has a right as administratrix of her husband's estate to require the appellant to perform his obligation under the agreement. He has refused to do so and he maintains that the respondent's only right is to sue him for damages for breach of his contract. If that were so, I shall assume that he is right in maintaining that the administratrix could then only recover nominal damages because his breach of contract has caused no loss to the estate of her deceased husband.

If that were the only remedy available the result would be grossly unjust. It would mean that the appellant keeps the business which he bought and for which he has only paid a small part of the price which he agreed to pay. He would avoid paying the rest of the price, the annuity to the respondent, by paying a mere 40s. damages. . . .

The respondent's second argument is that she is entitled in her capacity of administratrix of her deceased husband's estate to enforce the provision of the

agreement for the benefit of herself in her personal capacity, and that a proper way of enforcing that provision is to order specific performance. That would produce a just result, and, unless there is some technical objection, I am of opinion that specific performance ought to be ordered. For the reasons given by your Lordships I would reject the arguments submitted for the appellant that specific performance is not a possible remedy in this case.

LORD PEARCE: . . . My Lords, if the annuity had been payable to a third party in the lifetime of Beswick senior and there had been default, he could have sued in respect of the breach. His administratrix is now entitled to stand in his shoes and to sue in respect of the breach which has occured since his death.

It is argued that the estate can only recover nominal damages and that no other remedy is open, either to the estate or to the personal plaintiff. Such a result would be wholly repugnant to justice and commonsense. And if the argument were right it would show a very serious defect in the law.

In the first place, I do not accept the view that damages must be nominal. Lush LJ in *Lloyd's* v *Harper* (1880) 16 ChD 290 said:

> Then the next question which, no doubt, is a very important and substantial one, is, that Lloyd's, having sustained no damage themselves, could not recover for the losses sustained by third parties by reason of the default of Robert Henry Harper as an underwriter. That, to my mind, is a startling and alarming doctrine, and a novelty, because I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.

I agree with the comment of Windeyer J in the case of *Coulls* v *Bagot's Executor and Trustee Co. Ltd* (1967) 119 CLR 460 in the High Court of Australia that the words of Lush LJ cannot be accepted without qualification and regardless of context and also with his statement:

> I can see no reason why in such cases the damages which A would suffer upon B's breach of his contract to pay C $500 would be merely nominal: I think that in accordance with the ordinary rules for the assessment of damages for breach of contract they could be substantial. They would not necessarily be $500; they could I think be less or more.

In the present case I think that the damages, if assessed, must be substantial. It is not necessary, however, to consider the amount of damages more closely since this is a case in which, as the Court of Appeal rightly decided, the more appropriate remedy is that of specific performance.

The administratrix is entitled, if she so prefers, to enforce the agreement rather than accept its repudiation, and specific performance is more convenient than an action for arrears of payment followed by separate actions as each sum falls due. Moreover, damages for breach would be a less appropriate remedy since the parties to the agreement were intending an annuity for a widow; and a lump sum of damages does not accord with this. And if (contrary to my view) the argument that a derisory sum of damages is all that can be obtained be right, the remedy of damages in this case is manifestly useless.

The present case presents all the features which led the equity courts to apply their remedy of specific performance. The contract was for the sale of a business. The defendant could on his part clearly have obtained specific performance of it if Beswick

senior or his administratrix had defaulted. Mutuality is a ground in favour of specific performance.

Moreover, the defendant on his side has received the whole benefit of the contract and it is a matter of conscience for the court to see that he now performs his part of it, Kay J said in *Hart* v *Hart* (1881) 18 ChD 670:

> . . . when an agreement for valuable consideration . . . has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance.

What, then, is the obstacle to granting specific performance?

It is argued that since the widow personally had no rights which she personally could enforce the court will not make an order which will have the effect of enforcing those rights. I can find no principle to this effect. The condition as to payment of an annuity to the widow personally was valid. The estate (though not the widow personally) can enforce it. Why should the estate be barred from exercising its full contractual rights merely because in doing so it secures justice for the widow who, by a mechanical defect of our law, is unable to assert her own rights? Such a principle would be repugnant to justice and fulfil no other object than that of aiding the wrongdoer. I can find no ground on which such a principle should exist.

Notes

1. Lord Reid referred in his judgment to Lord Denning's view. Lord Denning in *Smith and Snipes Hall Farm Ltd* v *River Douglas Catchment Board* [1949] 2 KB 500, had expressed the view that a promise deliberately made was enforceable by the person intended to be benefited by the promise, even though that person was not a party to the contract.

2. Would Mrs Beswick be able directly to enforce the nephew's promise under the Law Commission's recommended test of enforceability? (See page 233.)

3. Specific performance will not be granted if a contract has already been performed fully but in a defective manner.

4. Lord Pearce was of the opinion that substantial rather than nominal damages should be recoverable by the contracting party in this situation.

B: PROMISEE'S ACTION FOR DAMAGES

Can the promisee recover substantial damages for the loss suffered by the third party?

Jackson v *Horizon Holidays Ltd*
[1975] 3 All ER 92 (CA)

The plaintiff booked a holiday with the defendants, for himself, his wife and his two small children at a price of £1,200. The plaintiff made it quite clear that he wished the holiday to be of the highest standard and specifically requested that the meals be four course with a choice of three or four dishes per course. The brochure issued by the defendants described the hotel as having excellent facilities. However, there were various breaches of these

contractual terms. The plaintiff sought damages for the loss of the holiday and disappointment and distress for himself, his wife and children. The defendants did not contest liability but appealed against the judge's award of £1,100 damages. Held: since the plaintiff had contracted for the benefit of himself and his family, as well as recovering for his own loss he could also recover for that suffered by his family as a result of the breach of contract. Therefore the damages award was not excessive.

LORD DENNING MR: We have had an interesting discussion as to the legal position when one person makes a contract for the benefit of a party. In this case it was a husband making a contract for the benefit of himself, his wife and children. Other cases readily come to mind. A host makes a contract with a restaurant for a dinner for himself and his friends. The vicar makes a contract for a coach trip for the choir. In all these cases there is only one person who makes the contract. It is the husband, the host or the vicar, as the case may be. Sometimes he pays the whole price himself. Occasionally he may get a contribution from the others. But in any case it is he who makes the contract. It would be a fiction to say that the contract was made by all the family, or all the guests, or all the choir, and that he was only an agent for them. Take this very case. It would be absurd to say that the twins of three years old were parties to the contract or that the father was making the contract on their behalf as if they were principals. It would equally be a mistake to say that in any of these instances there was a trust. The transaction bears no resemblance to a trust. There was no trust fund and no trust property. No, the real truth is that in each instance, the father, the host or the vicar, was making a contract himself for the benefit of the whole party. In short, a contract by one for the benefit of third persons.

What is the position when such a contract is broken? At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, what damages can he recover? Is he limited to his own loss? Or can he recover for the others? Suppose the holiday firm puts the family into a hotel which is only half built and the visitors have to sleep on the floor? Or suppose the restaurant is fully booked and the guests have to go away, hungry and angry, having spent so much on fares to get there? Or suppose the coach leaves the choir stranded half-way and they have to hire cars to get home? None of them individually can sue. Only the father, the host or the vicar can sue. He can, of course, recover his own damages. But can he not recover for the others? I think he can. The case comes within the principle stated by Lush LJ in *Lloyd's* v *Harper* (1880) 16 ChD 290:

> . . . I consider it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself.

It has been suggested that Lush LJ was thinking of a contract in which A was trustee for B. But I do not think so. He was a common lawyer speaking of the common law. His words were quoted with considerable approval by Lord Pearce in *Beswick* v *Beswick* [1968] AC 58. I have myself often quoted them. I think they should be accepted as correct, at any rate so long as the law forbids the third persons themselves to sue for damages. It is the only way in which a just result can be achieved. Take the instance I have put. The guests ought to recover from the restaurant their wasted fares. The choir ought to recover the cost of hiring the taxis home. There is no one to recover for them except the one who made the contract for their benefit. He should

be able to recover the expense to which they have been put, and pay it over to them. Once recovered, it will be money had and received to their use. (They might even, if desired, be joined as plaintiffs.) If he can recover for the expense, he should also be able to recover for the discomfort, vexation and upset which the whole party have suffered by reason of the breach of contract, recompensing them accordingly out of what he recovers.

Applying the principles to this case, I think that the figure of £1,100 was about right. It would, I think, have been excessive if it had been awarded only for the damage suffered by Mr Jackson himself. But when extended to his wife and children, I do not think it is excessive. People look forward to a holiday. They expect the promises to be fulfilled. When it fails, they are greatly disappointed and upset. It is difficult to assess in terms of money; but it is the task of the judges to do the best they can. I see no reason to interfere with the total award of £1,100. . . .

Note

Orr LJ agreed with Lord Denning's judgment and James LJ delivered a brief judgment indicating that this was a contract for a family holiday and *the plaintiff* had not received this.

Woodar Investment Development Ltd v *Wimpey Construction UK Ltd*

[1980] 1 WLR 277 (HL)

Wimpey contracted to buy land for £850,000 and agreed to pay £150,000 on completion to a third party, Transworld Trade Ltd. The contract allowed the purchaser to rescind the contract if before completion a statutory authority 'shall have commenced' to acquire the property by compulsory purchase. At the date of the contract both parties knew that a draft compulsory purchase order had been made. Wimpey purported to terminate relying on this provision, and Woodar sought damages alleging that this amounted to a wrongful repudiation. Their damages claim included the loss suffered by the third party. Held: there was not a wrongful repudiation where a party was relying on a contract term to repudiate (page 350). The majority considered it necessary to examine the damages question in the light of *Jackson* v *Horizon Holidays*. (These remarks are necessarily *obiter*.)

LORD WILBERFORCE: The second issue in this appeal is one of damages. Both courts below have allowed Woodar to recover substantial damages in respect of condition I under which £150,000 was payable by Wimpey to Transworld Trade Ltd on completion. On the view which I take of the repudiation issue, this question does not require decision, but in view of the unsatisfactory state in which the law would be if the Court of Appeal's decision were to stand I must add three observations:

1. The majority of the Court of Appeal followed, in the case of Goff LJ with expressed reluctance, its previous decision in *Jackson* v *Horizon Holidays Ltd* [1975] 1 WLR 1468. I am not prepared to dissent from the actual decision in that case. It may be supported either as a broad decision on the measure of damages (per James LJ) or possibly as an example of a type of contract — examples of which are persons contracting for family holidays, ordering meals in restaurants for a party, hiring a taxi for a group — calling for special treatment. As I suggested in *New Zealand Shipping*

Co. Ltd v *A.M. Satterthwaite & Co. Ltd* [1975] AC 154, 167, there are many situations of daily life which do not fit neatly into conceptual analysis, but which require some flexibility in the law of contract. *Jackson's* case may well be one.

I cannot however agree with the basis on which Lord Denning MR put his decision in that case. The extract on which he relied from the judgment of Lush LJ in *Lloyd's* v *Harper* (1880) 16 ChD 290, 321 was part of a passage in which the Lord Justice was stating as an 'established rule of law' that an agent (sc. an insurance broker) may sue on a contract made by him on behalf of the principal (sc. the assured) if the contract gives him such a right, and is no authority for the proposition required in *Jackson's* case, still less for the proposition, required here that, if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non-payment of that sum. That would certainly not be an established rule of law, nor was it quoted as such authority by Lord Pearce in *Beswick* v *Beswick* [1968] AC 58.

2. Assuming that *Jackson's* case was correctly decided (as above), it does not carry the present case, where the factual situation is quite different. I respectfully think therefore that the Court of Appeal need not, and should not have followed it.

3. Whether in a situation such as the present — viz. where it is not shown that Woodar was agent or trustee for Transworld, or that Woodar itself sustained any loss, Woodar can recover any damages at all, or any but nominal damages, against Wimpey, and on what principle, is, in my opinion, a question of great doubt and difficulty — no doubt open in this House — but one on which I prefer to reserve my opinion.

LORD KEITH: . . . That case [*Jackson* v *Horizon Holidays*] is capable of being regarded as rightly decided upon a reasonable view of the measure of damages due to the plaintiff as the original contracting party, and not as laying down any rule of law regarding the recovery of damages for the benefit of third parties. There may be a certain class of cases where third parties stand to gain indirectly by virtue of a contract, and where their deprivation of that gain can properly be regarded as no more than a consequence of the loss suffered by one of the contracting parties. In that situation there may be no question of the third parties having any claim to damages in their own right, but yet it may be proper to take into account in assessing the damages recoverable by the contracting party an element in respect of expense incurred by him in replacing by other means benefits of which the third parties have been deprived or in mitigating the consequences of that deprivation. The decision in *Jackson* v *Horizon Holidays Ltd* is not, however, in my opinion, capable of being supported upon the basis of the true ratio decidendi in *Lloyd's* v *Harper*, 16 ChD 290, which rested entirely on the principles of agency.

I would also associate myself with the observations of my noble and learned friend, Lord Scarman, as to the desirability of this House having an opportunity of reviewing, in some appropriate future case, the general attitude of English law towards the topic of jus quaesitum tertio.

LORD SCARMAN: . . . [B]ecause of its importance, I propose to say a few words on the question of damages.

The plaintiff company agreed to sell the land to the defendants for £850,000. They also required the defendants to pay £150,000 to a third party. The covenant for this payment was in the following terms:

> 1, Upon completion of the purchase of the whole or any part of the land the purchaser shall pay to Transworld Trade Ltd of 25 Jermyn Street, London, SW1 a sum of £150,000.

No relationship of trust or agency was proved to exist between the plaintiff company and Transworld Trade Ltd. No doubt, it suited Mr Cornwell to split up the moneys payable under the contract between the two companies: but it is not known, let alone established by evidence (though an intelligent guess is possible) why he did so, or why the plaintiffs desired this money to be paid to Transworld Trade. It is simply a case of B agreeing with A to pay a sum of money to C.

B, in breach of his contract with A, has failed to pay C. C, it is said, has no remedy, because the English law of contract recognises no 'jus quaesitum tertio': *Tweddle* v *Atkinson* (1861) 1 B & S 393. No doubt, it was for this reason that Transworld Trade is not a party to the suit. A, it is acknowledged, could in certain circumstances obtain specific performance of the promise to pay C: *Beswick* v *Beswick* [1968] AC 58. But, since the contract in the present case is admitted (for reasons which do not fall to be considered by the House) to be no longer in existence, specific performance is not available. A's remedy lies only in an award of damages to himself. It is submitted that, in the absence of any evidence that A has suffered loss by reason of B's failure to pay C, A is only entitled to nominal damages.

I wish to add nothing to what your Lordships have already said about the authorities which the Court of Appeal cited as leading to the conclusion that the plaintiff company is entitled to substantial damages for the defendants' failure to pay Transworld Trade. I agree that they do not support the conclusion. But I regret that this House has not yet found the opportunity to reconsider the two rules which effectually prevent A or C recovering that which B, for value, has agreed to provide.

First, the 'jus quaesitum tertio.' I respectfully agree with Lord Reid that the denial by English law of a 'jus quaesitum tertio' calls for reconsideration. In *Beswick* v *Beswick* [1968] AC 58, 72 Lord Reid, after referring to the Law Revision Committee's recommendation in 1937 (Cmnd. 5449) p. 31 that the third party should be able to enforce a contractual promise taken by another for his benefit, observed:

> And, if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter.

The committee reported in 1937: *Beswick* v *Beswick* was decided in 1967. It is now 1979: but nothing has been done. If the opportunity arises, I hope the House will reconsider *Tweddle* v *Atkinson* and the other cases which stand guard over this unjust rule.

Likewise, I believe it open to the House to declare that, in the absence of evidence to show that he has suffered no loss, A, who has contracted for a payment to be made to C, may rely on the fact that he required the payment to be made as prima facie evidence that the promise for which he contracted was a benefit to him and that the measure of his loss in the event of non-payment is the benefit which he intended for C but which has not been received. Whatever the reason, he must have desired the payment to be made to C and he must have been relying on B to make it. If B fails to make the payment, A must find the money from other funds if he is to confer the benefit which he sought by his contract to confer upon C. Without expressing a final opinion on a question which is clearly difficult, I think the point is one which does require consideration by your Lordships' House.

Certainly the crude proposition for which the defendants contend, namely that the state of English law is such that neither C for whom the benefit was intended nor A who contracted for it can recover it, if the contract is terminated by B's refusal to perform, calls for review: and now, not forty years on.

Notes

1. The facts in *Woodar* v *Wimpey* did not fall within the categories of contracts made by one person for the benefit of a group of people. There was

also no evidence that Woodar had suffered any loss as a result of the non-payment to Transworld Trade Ltd, whereas in *Jackson* v *Horizon Holidays* Mr Jackson had also suffered loss.

Lord Scarman appeared to indicate that there might be ways of including the loss of the payment to the third party within the loss suffered by Woodar. This would presumably be the case if Woodar would otherwise have to satisfy that debt.

2. While the result in *Jackson* v *Horizon Holidays* has been confirmed, the principle has been restricted to limited circumstances, namely contracts calling for 'special treatment'.

3. The House of Lords expressed its dissatisfaction with the privity doctrine and wished it to be reconsidered at the first available opportunity.

Linden Gardens Trust Ltd v *Lenesta Sludge Disposals Ltd*
[1993] 3 All ER 417

In this case (the 'St Mart[illegible]roperty' Appeal), there had been a transfer of property and an as[illegible]nefit of a building contract regarding that property. I[illegible]he [illegible]found that the assignment of the benefit of the building contract w[illegible] was in breach of a valid prohibition on assignment. As owner of the property it was the assignee who suffered d[illegible]age as a result of breach of the building contract, but technically contractual rights remai[illegible]d with the assignor who no longer owned the pr[illegible]d no loss. Nevert[illegible], it was held that the assignor could recover [illegible]ubstantial d[illegible]e basis that it had been contemplated all along that the p[illegible] development would be sold or leased, and therefore the building contract had been entered into on the basis that the assignor (first plaintiff) could enforce the contractual rights for the benefit of those suffering from defective performance (the second plaintiff, assignee); and the terms of the contract (prohibiting assignment) meant that the acquirer of the property would not be able to acquire rights to hold the defendant (McAlpines) liable for breach.

Counsel for the defendant (McAlpines) had argued that only nominal damages could be recovered by the first plaintiff, and he relied on case law concerning breaches of contracts for the carriage of goods such as *The Albazero* [1976] 3 All ER 129.

LORD BROWNE-WILKINSON: . . . Notwithstanding the apparent logic of [this] submission, I have considerable doubts whether it is correct. A contract for the supply of goods or of work, labour and materials (a supply contract) is not the same as a contract for the carriage of goods. A breach of a supply contract involves a failure to provide the very goods or services which the defendant had contracted to supply and for which the plaintiff has paid or agreed to pay. If the breach is discovered before payment of the contract price, the price is abated by the cost of making good the defects . . . [counsel] accepted that this right to abatement of the price does not depend on ownership by the plaintiff of the goods and it would be odd if the plaintiff's rights arising from breach varied according to whether the breach was discovered before or after the payment of the price. . . .

In contracts for the sale of goods, the purchaser is entitled to damages for delivery of defective goods assessed by reference to the difference between the contract price and the market price of the defective goods, irrespective of whether he has managed to sell on the goods to a third party without loss: *Slater* v *Hoyle & Smith Ltd* [1920] 2 KB 11, [1918-19] All ER Rep 654; see also as to non-delivery *Williams Bros* v *E T Agius Ltd* [1914] AC 510. In those cases the judgments contained no consideration of the person in whom the property in the goods was vested although it appears that some of the subcontracts had been made prior to the breach of contract.

If the law were to be established that damages for breach of a supply contract were not quantifiable by reference to the beneficial ownership of goods or enjoyment of the services contracted for but by reference to the difference in value between that which was contracted for and that which is in fact supplied, it might also provide a satisfactory answer to the problems raised where a man contracts and pays for a supply to others, e.g. a man contracts with a restaurant for a meal for himself and his guests or with a travel company for a holiday for his family. It is apparently established that, if a defective meal or holiday is supplied, the contracting party can recover damages not only for his own bad meal or unhappy holiday but also for that of his guests or family: see *Jackson* v *Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468 as explained in *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 All ER 576, 585, 588, 591, [1980] 1 WLR 277 at 283-284, 293-294, 297, 300-301.

There is therefore much to be said for drawing a distinction between cases where the ownership of goods or property is relevant to prove that the plaintiff has suffered loss through the breach of a contract other than a contract to supply those goods or property and the measure of damages in a supply contract where the contractual obligation itself requires the provision of those goods or services. I am reluctant to express a concluded view on this point since it may have profound effects on commercial contracts which effects were not fully explored in argument. In my view the point merits exposure to academic consideration before it is decided by this House. Nor do I find it necessary to decide the point since, on any view, the facts of this case bring it within the class of exceptions to the general rule to which Lord Diplock referred in *The Albazero*. . . .

In addition, the decision in *The Albazero* itself established a further exception. This House was concerned with the status of a long-established principle based on the decision in *Dunlop* v *Lambert* (1839) 6 Cl & F 600, 7 ER 824 that a consignor of goods who had parted with the property in the goods before the date of breach could even so recover substantial damages for the failure to deliver the goods. Lord Diplock identified the rationale of that rule as being—

> The only way in which I find it possible to rationalise the rule in *Dunlop* v *Lambert* so that it may fit into the pattern of the English law is to treat it as an application of the principle, accepted also in relation to policies of insurance on goods, that in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interests in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they are lost or damaged, and is entitled to recover by way of damages for breach of contract the actual loss sustained by those for whose benefit the contract is entered into. (See [1976] 3 All ER 129 at 137, [1977] AC 774 at 847.)

In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both Corporation and McAlpines, was going to be occupied, and possibly purchased, by third parties and not by Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpines. On the contrary, McAlpines had specifically contracted that the rights of action under the building contract could *not* without McAlpines' consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of the carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpines liable for breach. It is truly a case in which the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it'.

. . . I would therefore hold that Corporation is entitled to substantial damages for any breach by McAlpines of the building contract.

Notes

1. There were two possible grounds for entitling the assignor (first plaintiff) to recover substantial damages, namely the broad ground (which Lord Browne-Wilkinson considered required further academic consideration) and the narrow ground (on which he actually decided the case). Lord Griffiths preferred the broad ground. Lord Keith concurred with Lord Browne-Wilkinson but also stated that he had sympathy with the broad ground. Lord Bridge concurred and stated that he was 'much attracted' by the broad ground.

2. See Duncan Wallace (1994) 110 LQR 42, Berg [1994] JBL 129.

3. Would the new property owner be able to enforce the building contract directly if the recommendations in the Law Commission's Report are implemented? See the test of enforceability, page 233 below.

4. The 'St Martin's Property' exception was applied in the following case:

Darlington Borough Council v *Wiltshier Northern Ltd*
[1995] 3 All ER 895 (CA)

The building contractor, Wiltshier, had entered into a contract with Morgan Grenfell (Local Authority Services) (MG) to construct a recreation centre for the benefit of the council who owned the land on which it was to be built. It was necessary to employ MG because of restrictions on local authority expenditure, but MG validly assigned its contractual rights to the council. The council sought to bring a breach of contract action against the contractor alleging that there were serious defects which would cost £2m to remedy. The council faced a problem in that a person cannot

assign greater rights than he actually has. It was argued successfully at first instance that MG only had a right to recover nominal damages, since it had no property interest in the recreation centre, so that the council was also restricted to nominal damages. Held: on appeal, applying the 'St Martin's Property' exception, the assignor (MG) had the right to recover substantial damages since it was clear to the contractor from the outset that the centre was being constructed for the benefit of the council and that the contractual rights were to be assigned to the council. Since these contractual rights had been validly assigned to the council, it followed that the council could recover substantial damages.

STEYN LJ: . . . The council, as the assignees of Morgan Grenfell, is seeking to recover substantial damages for breach of the building contract against Wiltshier, namely the cost of the remedial works to the Darlington Centre. The council accepts that, as assignees, they can recover no more in damages than Morgan Grenfell could have recovered. In other words, the question is what the assignor (Morgan Grenfell) could have recovered against the builder (Wiltshier) had the assignment not taken place: see *Dawson* v *Great Northern and City Rly Co.* [1905] 1 KB 260, [1904–7] All ER Rep 913.

The council invokes in the first place the narrower principle relied on by Lord Browne-Wilkinson *Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* [1993] 3 All ER 417 at 436–437, [1994] 1 AC 85 at 112–115, and in particular that part of his speech which dealt with the *McAlpine* appeal. In the alternative the council invokes the wider principle enunciated by Lord Griffiths in his speech which deals mainly with the *McAlpine* appeal.

. . . [Counsel for Wiltshier] submits that Morgan Grenfell, the party in contractual relationship with Wiltshier, suffered no loss and could transfer no claim for substantial damages. And the council, who, suffered the loss, is precluded by the privity rule from claiming the damages which it suffered. He submits that established doctrine deprives the council of a remedy and allows the contract-breaker to go scot-free. Recognising that this is hardly an attractive result, he reminds us of our duty to apply the law as it stands.

That brings me to the speech of Lord Browne-Wilkinson in the *Linden Gardens* case. In his speech Lord Browne-Wilkinson rested his decision on the exception to the rule that a plaintiff can only recover damages for his own loss, which was enunciated in *The Albazero, Albacruz (cargo owners)* v *Albazero (owners)* [1976] 3 All ER 129, [1977] AC 774 in the context of carriage of goods by sea, bills of lading and bailment. [Steyn LJ quoted the passage cited in Lord Browne-Wilkinson's judgment in *Linden Gardens* from the judgment of Lord Diplock in *The Albazero*, page 213 above, and continued:] Clearly, this passage did not exactly fit the material facts in the *Linden Gardens* case. But Lord Browne-Wilkinson extracted the rationale of the decision and, by analogy, applied it to the purely contractual situation in *Linden Gardens*. He particularly justified this extension of the exception in *The Albazero* by invoking Lord Diplock's words in that case:

> . . . there may still be occasional cases in which the rule would provide a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who has caused it. (See [1993] 3 All ER 417 at 436, [1994] 1 AC 85 at 114.)

Lord Browne-Wilkinson's conclusion was supported by all members of the House of Lords although, it is right to say, Lord Griffiths wished to go further. Relying on

the exception recognised in the *Linden Gardens* case, as well as on the need to avoid a demonstrable unfairness which no rational legal system should tolerate, I would rule that the present case is within the rationale of Lord Browne-Wilkinson's speech. I do not say that the relevant passages in his speech precisely fit the material facts of the present case. But it involves only a very conservative and limited extension to apply it by analogy to the present case. For these reasons I would hold that the present case is covered by an exception to the general rule that a plaintiff can only recover damages for his own loss.

The exception contained in Lord Griffith's speech

The rationale of Lord Griffith's wider principle is essentially that, if a party engages a builder to perform specified work and the builder fails to render the contractual service, the employer suffers a loss. He suffers a loss of bargain or of expectation interest. And that loss can be recovered on the basis of what it would cost to put right the defects. While other members of the House of Lords expressed sympathy with this view, they did not decide the point. The point has now been argued in some depth before us. We have also had the benefit of some academic comment on the point: John Cartwright 'Remedies in Respect of Defective Buildings after Linden Gardens' (1993) 9 Con LJ 281 and I N Duncan Wallace 'Assignment of Rights to Sue: Half a Loaf' (1994) 110 LQR 42. Subject to one qualification, it will be clear from what I said earlier that I am in respectful agreement with the wider principle. It seems to me that Lord Griffiths has based his principle on classic contractual theory. The qualification is, however, important. Lord Griffiths observed ([1993] 3 All ER 417 at 422, [1994] 1 AC 85 at 97):

> The court will of course wish to be satisfied that the repairs have been or are likely to be carried out but if they are carried out the cost of doing them must fall upon the defendant who broke his contract.

There was apparently no argument on this point in the House of Lords. For my part I would hold that in the field of building contracts, like sale of goods, it is no concern of the law what the plaintiff proposes to do with his damages. It is also no precondition to the recovery of substantial damages that the plaintiff does propose to undertake the necessary repairs. In this field English law adopts an objective approach to the ascertainment of damages for breach of contract. On this point I am in agreement with the observations of Kerr LJ in *Dean* v *Ainley* [1987] 3 All ER 748 at 754, [1987] 1 WLR 1729, at 1737–1738 and Staughton LJ in *Ruxley Electronics and Construction Ltd* v *Forsyth* [1994] 3 All ER 801 at 807–808, [1994] 1 WLR 650 at 656–657. Subject to this qualification, I am in respectful agreement with Lord Griffith's wider principle. And I gratefully adopt it as part of my reasoning.

Notes

1. Dillon and Waite LJJ considered that on these facts — which included a provision obliging MG to transfer all 'rights' it had against the contractor — if, before the assignment, MG had itself brought an action for breach, it could have succeeded in recovering damages for the losses of the council and would have held such damages as constructive trustee for the council.

2. There is some support in the judgment of Steyn LJ for the 'broad ground' discussed by Lord Griffiths in *Linden Gardens.* Dillon LJ found that it was not necessary to consider it and that he preferred not to do so.

3. While the Law Commission Report Cm 3329 preserves the promisee's right to enforce the contract despite the fact that the third party may also have

that right, it does not deal with the question of reform of the remedies available to a promisee but has recommended that this be left to the courts (para. 5.17). See Cartwright (1996) 10 JCL 244.

4. Steyn LJ's observations on the relevance of establishing what a plaintiff intends to do with his damages are discussed in the context of the decision in *Ruxley Electronics and Construction Ltd* v *Forsyth* [1995] 3 All ER 268, page 377 below.

C: STAYING THE ACTION

It appears that if A makes an express promise to B that A will not sue C, then, although C cannot use A's promise to B as a defence when sued by A (because of privity), B may ask the court to exercise its discretion (Supreme Court Act 1981, s. 49(3)) to stay A's action against C. It may also be possible to do this where B was under a legal obligation to reimburse C for any damages he would have to pay A.

Gore v *Van der Lann*
[1967] 2 QB 31 (CA)

Liverpool Corporation issued free bus passes to old age pensioners. The plaintiff applied for a pass and signed an application form which provided that neither the Corporation nor its servants were to be liable for any injury or loss. The pass itself contained a similar clause. While the plaintiff was boarding a bus at a bus stop the bus moved away and she was injured. The plaintiff brought an action against the Corporation's conductor, alleging that her injury was caused by his negligence. Liverpool Corporation asked the court to stay the proceedings on the ground that the plaintiff was bound by the terms of the pass. The plaintiff argued that the agreement for the pass constituted 'a contract for the conveyance of a passenger in a public service vehicle' and such contracts were void under the Road Traffic Act 1960, s.151. Held: the contract was rendered void by s. 151 of the Road Traffic Act 1960 so that the Corporation had no ground for seeking to prevent the plaintiff's action. In addition (Willmer and Salmon LJJ, Harman LJ expressing no opinion) the Corporation were not under any contractual obligation to indemnify the conductor against sums he had to pay to the plaintiff, and the plaintiff had not promised the Corporation that she would not institute proceedings against the employee, so the Corporation had no interest entitling them to stay the action.

WILLMER LJ: . . . It is true that the conditions accepted by the plaintiff when she accepted the offer of a free pass included a provision that the employees of the corporation were not to be liable to her for any injury or loss. But I cannot construe this provision as a promise by the plaintiff not to institute proceedings against an employee. If the corporation desired such a promise from a holder of a free pass, they could have said so in clear and unambiguous terms. In my judgment the conditions are to be construed strictly against the corporation who put them forward. It is not

enough to say that a promise not to sue the employee is to be implied. At the best for the corporation, the condition relied on is ambiguous, and any ambiguity must be resolved in favour of the plaintiff.

In these circumstances the corporation has not satisfied me that it has any justification for interfering with the plaintiff's prima facie right at common law to bring proceedings against the conductor whom she accuses of negligence. . . .

Notes

1. It appears from this judgment that the intervening party (Liverpool Corporation) would *either* have to show an express promise by the plaintiff not to sue the Corporation's servants, *or* that the Corporation were legally obliged to reimburse the conductor for any damages he had to pay to the plaintiff.

2. See also *The Elbe Maru* [1978] 1 Lloyd's Rep 206.

Snelling v *John G. Snelling Ltd*
[1973] 1 QB 87

Three brothers were directors of a family company. They agreed in writing that if any one of them voluntarily resigned his directorship he would immediately forfeit all moneys due to him from the company. Later, Brian Snelling, the plaintiff, resigned and the company cancelled his loan account. He then issued a writ against the company claiming the money he argued that the company owed to him. The plaintiff's brothers, Peter and Barrie Snelling, on their application, were joined as defendants in the action. They sought to rely on their agreement with the plaintiff (to which the company was not a party) and counterclaimed for a declaration that the plaintiff had forfeited the money. Held: although the company could not rely on the agreement because it was not a party to it, the brothers were entitled to a declaration that the plaintiff was bound by the terms of the agreement so that it would have been a proper case for a stay of proceedings. As all the parties were before the court and the claim had failed, the action was dismissed.

Note

Ormrod J only emphasised the need to show a promise not to sue, and there was no discussion about whether the brothers were obliged to indemnify the company if it was sued by the plaintiff. The promise itself was stated to be a necessary implication of the agreement made, whereas in *Gore* v *Van der Lann* the Court of Appeal refused to imply a promise by the plaintiff not to sue the Corporation or its servants.

SECTION 6: PRIVITY AND BURDENS

The privity doctrine provides that a third party cannot be made subject to a burden by a contract to which he is not a party.

A: EXEMPTION CLAUSES

Can a third party be bound by an exemption clause in a contract to which he is not a party?

Morris v *C. W. Martin & Sons Ltd*
[1965] 2 All ER 725 (CA)

The plaintiff sent a mink stole to the furrier for cleaning. She agreed that it should be passed to the defendants for cleaning. The furrier contracted with the defendants for the cleaning on current trade conditions which provided that 'goods belonging to customers were held at the customer's risk' and that the defendants were not to be responsible for loss or damage during processing. M, the defendants' employee, was given the cleaning task and stole the fur while it was in his custody. The plaintiff sued the defendants for damages. Held: (Diplock and Salmon LJJ) the defendants were bailees for reward, and therefore they owed a duty to the plaintiff to take care of the fur. However, the exemption clauses in the defendants' contract of cleaning with the furrier did not extend on their wording to cover liability to the plaintiff. (They were therefore able to avoid the more difficult privity question.) Lord Denning found that the clauses on their wording did not extend to cover the plaintiff but considered that the plaintiff had impliedly consented to the furrier contracting for the cleaning on usual terms so that in principle the defendants might rely on the exemptions in the bailment contract.

LORD DENNING MR: . . . [C]an the plaintiff sue the cleaners direct for the misappropriation by their servant? And if she does, can she ignore the exempting conditions?

. . . [I]f the sub-bailment is for reward, the sub-bailee owes to the owner all the duties of a bailee for reward: and the owner can sue the sub-bailee direct for loss of or damage to the goods; and the sub-bailee (unless he is protected by any exempting conditions) is liable unless he can prove that the loss or damage occurred without his fault or that of his servants. So the plaintiff can sue the defendants direct for the loss of the goods by the misappropriation by their servant, and the cleaners are liable unless they are protected by the exempting conditions.

Now comes the question: Can the defendants rely, as against the plaintiff, on the exempting conditions although there was no contract directly between them and her? There is much to be said on each side. On the one hand, it is hard on the plaintiff if her just claim is defeated by exempting conditions of which she knew nothing and to which she was not a party. On the other hand, it is hard on the defendants if they are held liable to a greater responsibility than they agreed to undertake. As long ago as 1601 Lord Coke advised a bailee to stipulate specially that he would not be responsible for theft. It would be strange if his stipulation was of no avail to him. The answer to the problem lies, I think, in this: the owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise. Suppose the owner of a car lets it out on hire, and the hirer sends it for repair, and the repairer holds it for a lien. The owner is bound by

the lien because he impliedly consented to the repairs being done, since they were reasonably incidental to the use of the car; see *Tappenden (trading as English & American Autos)* v *Artus* [1964] 2 QB 185. So also if the owner of a ship accepts goods for carriage on a bill of lading containing exempting conditions (i.e. a 'bailment upon terms') the owner of the goods (although not a party to the contract) is bound by those conditions if he impliedly consented to them as being in 'the known and contemplated form'; . . .

In this case the plaintiff agreed that Mr Beder should send the fur to the cleaners, and by so doing I think she impliedly consented to his making a contract for cleaning on the terms usually current in the trade. But when I come to study the conditions I do not think that they are sufficient to protect the defendants. We always construe such conditions strictly. Clause 9 applies only to 'goods belonging to customers', that is, goods belonging to Mr Beder, and not to goods belonging to his customers such as the plaintiff. The conditions themselves draw a distinction between 'customer' and 'his own customer'; see cl. 16. Clause 14 only applies to 'the loss of or damage to the goods during processing'. The loss here was not during processing. It was before or after processing. Seeing that the conditions do not protect the defendants, I am of opinion that they are liable for the loss due to the theft by their servant.

Notes

1. Salmon LJ stated that he was 'strongly attracted by this view'. Lord Denning's approach was adopted in *Singer Co. (UK) Ltd* v *Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164.

2. Bailment involves the delivery of goods under a contract by a bailor to the bailee for some purpose and, after that purpose has been fulfilled, their return to the bailor.

3. In the following case the Privy Council applied and clarified Lord Denning's principle in *Morris* v *Martin*.

K.H. Enterprise v *Pioneer Container, The Pioneer Container* [1994] 2 All ER 250 (PC)

The K.H. Enterprise, a ship owned by the defendant carriers, was in collision with another ship on a journey from Taiwan to Hong Kong and was lost. Action was taken in the courts of Hong Kong by those interested in the cargo against the defendants, and this led to the arrest of another ship owned by them, namely *The Pioneer Container*. The defendants objected to the arrest and wanted a stay of action on the ground that the cargo was carried by them under contracts which exclusively stated that disputes were to be determined in Taiwan. The plaintiff cargo owners had contracted with other carriers (Hanjin and Scandutch) for the carriage of their goods, but the contract had entitled their carriers to subcontract the carriage on any terms, and carriage had been subcontracted to the defendants. Held: the plaintiffs were bound by the exclusive jurisdiction clause in the contract between their carriers and the defendants because they had consented to their cargo being sub-bailed on terms including the jurisdiction clause and the defendants had known that the cargo belonged to the plaintiffs and not to Hanjin and Scandutch, the carriers.

LORD GOFF: In order to decide whether, like Steyn J [in *Singer Co. (UK) Ltd* v *Tees and Hartlepool Port Authority*] to accept the principle so stated by Lord Denning MR, it is necessary to consider the relevance of the concept of 'consent' in this context. It must be assumed that, on the facts of the case, no direct contractual relationship has been created between the owner and the sub-bailee, the only contract created by the sub-bailment being that between the bailee and the sub-bailee. Even so, if the effect of the sub-bailment is that the sub-bailee voluntarily receives into his custody the goods of the owner and so assumes towards the owner the responsibility of a bailee, then to the extent that the terms of the sub-bailment are consented to by the owner, it can properly be said that the owner has authorised the bailee so to regulate the duties of the sub-bailee in respect of the goods entrusted to him, not only towards the bailee but also towards the owner. (Their Lordships add in parenthesis that for this purpose it is not, in their opinion, necessary to have recourse to the doctrine of estoppel (cf *Hispanica de Petroleos SA* v *Vencedora Oceanica Navigacion SA, The Kapetan Markos (No. 2)* [1987] 2 Lloyd's Rep 321 at 336, 340 per Nicholls and Dillon LJJ). Even where there is express or implied consent to the relevant terms by the owner of the goods, there can be no estoppel without some holding out on his part. Estoppel may however be relevant if recourse is to be had to the doctrine of ostensible authority.)

Such a conclusion, finding its origin in the law of bailment rather than the law of contract, does not depend for its efficacy either on the doctrine of privity of contract or on the doctrine of consideration . . . as bailee, he has to accept all the terms of the sub-bailment, warts and all; for either he will have consented to the sub-bailment on those terms or, if not, he will (by holding the sub-bailee liable to him as bailee) be held to have ratified all the terms of the sub-bailment. A negative answer to the question is however supported by other writers, notably by *Palmer's Bailment* pp. 31 ff, where Professor Palmer cites a number of examples of bailment without the consent of the owner, and by Professor Tay in her article 'The essence of bailment' (1966) 5 Syd LR 239. On this approach, a person who voluntarily takes another person's goods into his custody holds them as bailee of that person (the owner); and he can only invoke, for example, terms of a sub-bailment under which he received the goods from an intermediate bailee as qualifying or otherwise affecting his responsibility to the owner if the owner consented to them. It is the latter approach which, as their Lordships have explained, has been adopted by English Law and, with English law, the law of Hong Kong.

Their Lordships wish to add that this conclusion, which flows from the decisions in *Morris* v *C W Martin & Son* . . ., produces a result which in their opinion is both principled and just. They incline to the opinion that a sub-bailee can only be said for these purposes to have voluntarily taken into his possession the goods of another if he has sufficient notice that a person other than the bailee is interested in the goods so that it can properly be said that (in addition to his duties to the bailee) he has, by taking the goods into his custody, assumed towards that other person the responsibility for the goods which is characteristic of a bailee. This they believe to be the underlying principle. Moreover, their Lordships do not consider this principle to impose obligations on the sub-bailee which are onerous or unfair, once it is recognised that he can invoke against the owner terms of the sub-bailment which the owner has actually (expressly or impliedly) or even ostensibly authorised. . . .

Notes

1. Devonshire [1996] JBL 329 and Phang (1995) 58 MLR 422.

2. Lord Goff in *The Mahkutai* [1996] 3 All ER 502 (page 195), distinguished *The Pioneer Container*. *The Pioneer Container* was concerned with the enforceability of a term in a sub-bailment against the bailor which turned on the scope of authority of the carriers to subcontract so as to bind the bailor, the plaintiff cargo owners. On the facts, the plaintiffs were bound by the terms of the sub-bailment because they had authorised the carrier to subcontract 'on any terms'. However, *The Mahkutai* dealt with the different issue of agreement and whether a subcontractor (the shipowner) could have the benefit of a term in the main bill of lading contract as against the goods owners or consignees.

3. The Law Commission Report Cm 3329 (1996) makes recommendations in relation to benefits and does not extend to burdens imposed on third parties.

B: RESTRICTIONS ON THE USE OF CHATTELS

If there is a restriction on a chattel in a contract between A and B, and C purchases the chattel with notice of the restriction, is C bound by the restriction?

Lord Strathcona Steamship Company Ltd v *Dominion Coal Company Ltd*
[1926] AC 108 (PC)

The owners of a steamship chartered her to the plaintiffs for 10 successive seasons. The ship went into the plaintiffs' service in 1916 but at the end of that season was requisitioned by the British Government until 1919. The owners had sold the ship in 1917 and it had been resold in 1919. When the defendants purchased it in 1920, they had notice of the terms of the charterparty and covenanted with the sellers to perform and accept all responsibilities under it. However, they then refused to perform the charterparty for the 1920 season. The plaintiffs sought a declaration that the defendants were bound to carry out the charterparty and an injunction to restrain them from using the vessel in any way inconsistent with the charterparty. The defendants argued that they were not privy to the contract containing the restriction so that it was not binding on them. Held: (applying an *obiter dictum* of Knight Bruce LJ in *De Mattos* v *Gibson* (1858) 4 De G & J 276) since the defendants had purchased with notice of the terms of the charterparty relating to the use of the ship, the charterers could obtain an injunction to restrain them from employing the ship in any way inconsistent with the charterparty.

LORD SHAW: The position of the case is that the appellants are possessed of a ship with regard to which a long running charterparty is current, the existence of which was fully disclosed, together, indeed, with an obligation which the appellants appear to have accepted to respect and carry out that charterparty. The proposal of the appellants and the argument submitted by them is to the effect that they are not bound

to respect and carry forward this charterparty either in law or in equity, but that, upon the contrary, they can, in defiance of its terms, of which they had knowledge, use the vessel at their will in any other way. It is accordingly, when the true facts are shown, a very simple case raising the question of whether an obligation affecting the user of the subject of sale, namely, a ship, can be ignored by the purchaser so as to enable that purchaser, who has bought a ship notified to be not a free ship but under charter, to wipe out the condition of purchase and use the ship as a free ship. It was not bought or paid for as a free ship, but it is maintained that the buyer can thus extinguish the charterer's rights in the vessel, of which he had notice, and that the charterer has no means, legal or equitable, of preventing this in law.

In the opinion of the Board the case is ruled by *De Mattos* v *Gibson* (1858) 4 De G & J 276 . . . Their Lordships think that the judgment of Knight Bruce LJ plainly applies to the present case:

> Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.

. . . The general character of the principle on which a Court of equity acts was explained in *Tulk* v *Moxhay* (1848) 2 Ph 774, 41 ER 1143. . . . [*Tulk* v *Moxhay*] analyses the true situation of a purchaser who having bought upon the terms of the restriction upon free contract existing, thereafter when vested in the lands, attempts to divest himself of the condition under which he had bought: 'it is said that the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.'

In the opinion of the Board these views, much expressive of the justice and good faith of the situation, are still part of English equity jurisprudence, and an injunction can still be granted thereunder to compel, as in a court of conscience, one who obtains a conveyance or grant sub conditione from violating the condition of his purchase to the prejudice of the original contractor. Honesty forbids this; and a Court of equity will grant an injunction against it.

. . . [T]he person seeking to enforce such a restriction must, of course, have, and continue to have, an interest in the subject matter of the contract. For instance, in the case of land he must continue to hold the land in whose favour the restrictive covenant was meant to apply. That was clearly the state of matters in the case of *Tulk* v *Moxhay* applicable to the possession of real estate in Leicester Square. It was also clearly the case in *De Mattos* v *Gibson*, in which the person seeking to enforce the injunction had an interest in the user of the ship. In short, in regard to the user of land or of any chattel, an interest must remain in the subject matter of the covenant before a right can be conceded to an injunction against the violation by another of the covenant in question. . . . [T]he present is, as has been seen, a case as to the user of a ship, with

regard to the subject matter of which, namely, the vessel, the respondent has, and will have during the continuance of the period covered by the charterparty, a plain interest so long as she is fit to go to sea. Again, to adopt the language of Knight Bruce LJ in the *De Mattos* v *Gibson* case:

> Why should it (the Court) not prevent the commission or continuance of a breach of such a contract, when, its subject being valuable, as for instance, a trading ship or some costly machine, the original owner and possessor, or a person claiming under him, with notice and standing in his right, having the physical control of the chattel, is diverting it from the agreed object, that object being of importance to the other? A system of laws in which such a power does not exist must surely be very defective. I repeat that, in my opinion, the power does exist here.

Notes

1. A person who takes with notice of the restriction, and who probably pays a lower price in consequence, should not then be able to disregard that restriction.

2. The difficulty with this decision is its reliance on *Tulk* v *Moxhay* as establishing the principle, since the charterers lacked the independent proprietary interest which would be necessary to enforce a restrictive covenant under *Tulk* v *Moxhay*.

It is not the case, despite what Lord Shaw suggested, that the charterparty itself could give that right, because a contract of hire gives only a personal right. In addition, as the interest is conferred by the very contract which it is sought to enforce, it could hardly be described as independent.

The decision has therefore been heavily criticised as contrary to principle. (See Tettenborn 'Contracts, privity of contract and the purchaser of personal property' [1982] CLJ 58.)

3. In *Port Line Ltd* v *Ben Line Steamers Ltd* [1958] 2 QB 146, Diplock J refused to follow *Strathcona* because he considered that it was wrongly decided:

> It seems, therefore, that it is in this case for the first time after more than 30 years that an English court has to grapple with the problem of what principle was really laid down in the *Strathcona* case, and whether that case was rightly decided. The difficulty I have found in ascertaining its ratio decidendi, the impossibility which I find of reconciling the actual decision with well-established principles of law, the unsolved and, to me, insoluble problems which that decision raises combine to satisfy me that it was wrongly decided. I do not propose to follow it, I naturally express this opinion with great diffidence, but having reached a clear conclusion it is my duty to express it.
>
> If I am wrong in my view that the case was wrongly decided, I am certainly averse from extending it one iota beyond that which, as I understand it, it purported to decide. In particular, I do not think that it purported to decide (1) that anything short of actual knowledge by the subsequent purchaser at the time of the purchase of the charterer's rights, the violation of which it is sought to restrain, is sufficient to give rise to the equity; (2) that the charterer has any remedy against the subsequent purchaser with notice except a right to restrain the use of the vessel by such purchaser in a manner inconsistent with the terms of the charter; (3) that the charterer has any positive right against the subsequent purchaser to have the vessel used in accordance with the terms of his charter. The third proposition follows from the second; ubi jus,

ibi remedium. For failure by the subsequent purchaser to use the vessel in accordance with the terms of the charter entered into by his seller there is no remedy by specific performance as was held in the *Strathcona* case itself. There is equally no remedy in damages, a consideration which distinguishes the *Strathcona* case from such cases as *Lumley* v *Wagner* (1852) 1 De GM & G 604 and *Lumley* v *Gye* (1853) 2 E & B 216. The charterer's only right is coterminous with his remedy, namely, not to have the ship used by the purchaser in violation of his charter.

Diplock J considered that even if *Strathcona* was correctly decided, it would apply only if the purchaser took with *actual notice* of the terms of the restriction.

4. In the next case Browne-Wilkinson J followed *Strathcona*.

Swiss Bank Corporation v *Lloyds Bank Ltd*
[1979] Ch 548

The plaintiff agreed to lend money to IFT to enable IFT to acquire shares in FIBI. One of the terms of the loan agreement was that IFT should comply with the Bank of England's conditions attached to exchange control consents, including the conditions that the loan had to be used to acquire the FIBI securities and that interest and repayment of the loan should be made out of the proceeds of sale of those securities. Without exchange control consent, IFT purported to grant a charge over those securities to Lloyds Bank who, at the time, did not have actual notice of the terms of the exchange control consents. The securities were later sold without the knowledge of the plaintiff, and the plaintiff claimed damages and repayment of the loan out of the proceeds of sale. Held: if a person took a charge on property with *actual knowledge* of a contractual obligation in favour of another person; that person could be restrained by injunction from exercising his rights so as to interfere with the performance of that contractual obligation. Lloyds Bank had only constructive knowledge which was not sufficient.

BROWNE-WILKINSON J: . . . [I]n my judgment the authorities establish the following propositions. (1) The principle stated by Knight Bruce LJ in *De Mattos* v *Gibson*, 4 De G & J 276, is good law and represents the counterpart in equity of the tort of knowing interference with contractual rights. (2) A person proposing to deal with property in such a way as to cause a breach of a contract affecting that property will be restrained by injunction from so doing if when he acquired that property he had actual knowledge of that contract. (3) A plaintiff is entitled to such an injunction even if he has no proprietary interest in the property: his right to have his contract performed is a sufficient interest. (4) There is no case in which such an injunction has been granted against a defendant who acquired the property with only constructive, as opposed to actual, notice of the contract. In my judgment contructive notice is not sufficient, since actual knowledge of the contract is a requisite element in the tort.

Note

The equitable counterpart of the tort of knowing interference with contractual rights is the principle in *Lumley* v *Gye* (1853) 2 E & B 216. The plaintiff,

a theatre owner, entered into a contract with Wagner whereby she was to sing at his theatre for a season and was not to sing elsewhere during that period without his written consent. The defendant, the owner of a rival theatre, persuaded Wagner to break this contract with the plaintiff by promising to pay her more. The plaintiff brought an action for damages against the defendant, alleging that the defendant had induced Wagner to break her contract with him. Held: the plaintiff was entitled to damages since the defendant had committed the tort of intentionally procuring a breach of contract.

Strathcona may well be based on this principle rather than *Tulk* v *Moxhay* because the tort of knowing interference with another's contractual rights requires the person who interferes to have actual knowledge of the contract, whereas constructive notice is all that is required in *Tulk* v *Moxhay*. This would also remove the difficulties of establishing an independent proprietary interest as required by *Tulk* v *Moxhay*. However, this principle is not as wide as *Lumley* v *Gye* since it is limited to protection in the form of an injunction.

Law Debenture Trust Corp plc v *Ural Caspian Oil Co. Ltd* [1993] 2 All ER 355; [1995] 1 All ER 157 (CA)

The share capital of four companies which had carried on business in Russia before the 1917 Revolution was purchased in 1986 by L Ltd ('Overseas') under a contract containing a 'negative pledge', whereby L Ltd covenanted with the companies that it would pay any compensation received from the Soviet authorities to the plaintiff as trustee for the existing shareholders and would not transfer ownership of the companies except on terms that the transferee entered into a similar undertaking.

Subsequently L Ltd transferred its shareholding to H Ltd, but no such undertaking was entered into by H Ltd. H Ltd later transferred its shareholding to C Ltd. The Russian companies were paid £13.2m in compensation which C Ltd refused to pay to the plaintiff.

The plaintiff sought to argue that H and C were liable in tort for causing or procuring the breach of L Ltd's covenant with knowledge of the agreement between the Russian companies and L Ltd (i.e. the principle in *Lumley* v *Gye*). The plaintiff also sought to amend the statement of claim to argue that since H and C took the shares with knowledge of the covenant, they were under an obligation to perform the covenant and a positive injunction should issue (i.e. the principle of *De Mattos* v *Gibson*).

Hoffmann J accepted the equitable principle in *De Mattos* but considered that it was not a principle of general application and that it could not apply on these facts when what was being sought was a compelling remedy.

Hoffman J said:

> The plaintiff's difficulty, as it seems to me, is not whether the principle applies but the extent of the remedy which it provides. One thing is beyond doubt: it

does not provide a panacea for outflanking the doctrine of privity of contract. In the *Strathcona* case [1926] AC 108 at 119, [1925] All ER Rep at 92 Lord Shaw said:

> It has sometimes been considered that *Tulk* v *Moxhay* (1848) 2 Ph 774 at 777, 41 ER 1143 at 1144) and *De Mattos* v *Gibson* (4 De G & J 276, 45 ER 108) carried forward to and laid upon the shoulders of an alienee with notice the obligations of the alienor, and, therefore, that the former is liable to the covenantee in specific performance as by the law of contract, and under a species of implied privity. This is not so; the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired.

Thus the *De Mattos* principle permits no more than the grant of a negative injunction, to restrain the third party from doing acts which would be inconsistent with performance of the contract by the original contracting party. The terms of the injunction must be such that refraining altogether from action would constitute compliance. A time charter, as Diplock J pointed out in *Port Line Ltd* v *Ben Line Steamer Ltd*, is a contract under which the owner is under a positive obligation to provide the vessel. It is clear that Lord Shaw did not intend to order the purchaser to fulfil this obligation. The injunction only prohibited him from doing an inconsistent act, namely chartering the vessel to someone else. In practice, the Board thought that this would provide the owner with an economic incentive to perform the charter: as Lord Shaw said ([1926] AC 108 at 125, [1925] All ER Rep 87 at 95); 'it is incredible that the owners will lay up the vessel rather than permit its use under the contract.' But such dog-in-the-manger behaviour would not have been a breach of the injunction.

In the *Swiss Bank* case Browne-Wilkinson J analysed the other cases in which it appeared that the *De Mattos* principle had been applied and showed that in each case the remedy was a purely negative restraint. . .

On the question of the tort of inducing the breach of contract, Hoffman J accepted that in taking the shares H Ltd was knowingly assisting in the breach of contract by L Ltd, but that C could not have participated in a breach of contract on the transfer to C by H since there was no contract between H and the plaintiff. However, he was prepared to extend the principle to interference with a remedy which would otherwise have been available on the basis that, because H knew of the breach of covenant, H could have been ordered to transfer the shares back to L in order to prevent the contractual obligation between L and the plaintiff being defeated. The transfer to C had deprived the plaintiff of this remedy and therefore there was a cause of action in tort against C.

The Court of Appeal allowed C's appeal. In order to fall within the principle in *Lumley* v *Gye* there needed to be a right in the plaintiff which was violated by an actionable wrong on the transfer between H and C. Held: there was no actionable wrong.

SIR THOMAS BINGHAM MR: It is not in dispute that Hilldon could, on timely application, have been ordered to retransfer the shares to Overseas and restrained from transferring them on to Caspian or anyone else. It is said that Hilldon could only

be restrained from acting unlawfully and that it would not be liable to such restraint if such onward transfer were lawful. Therefore onward transfer is to be regarded as unlawful, as violating Law Debenture's right that it should not take place. As a party to this onward transfer Caspian is party to the unlawfulness and so liable.

To my mind this chain of reasoning harbours a fallacy. It is of course true that the courts restrain the commission of unlawful acts such as threatened breaches of contract or torts or breaches of trust and grant mandatory orders for the doing of things which it would be unlawful not to do. But all injunctive orders are not of this kind. The court will restrain a defendant and potential judgment debtor from making himself judgment-proof by dissipating his assets and may order him to give disclosure of assets in support of the injunction. But the defendant violates no legal right of the plaintiff if he makes himself judgment-proof by dissipating his assets before he is enjoined from doing so and he does not act unlawfully in failing to give disclosure before he is ordered to do so. . . .

Caspian can be liable to Law Debenture if and only if Hilldon's transfer of the shares to it was tortious. But at the time this transfer was made Hilldon was the full legal and beneficial owner of the shares. It had no contractual relationship of any kind with Law Debenture. It was liable to Law Debenture for its tortious conduct in procuring Overseas' breach of its contract with Law Debenture, but that was all. It was open to Law Debenture to seek an interlocutory injunction restraining Hilldon from making onward transfer and a final injunction ordering retransfer, but application had not been made and injunctions had not been granted. Until some injunction was granted Hilldon was in my judgment entitled to do what it would with its own. I cannot regard the onward transfer as an actionable wrong, and it would in my view defeat the ingenuity of any pleader to frame a plausible statement of claim based on that transfer alone.

[Counsel] for Caspian criticised the judgment of Hoffmann LJ on the ground that, although the judge listed an actionable wrong as one of the ingredients of the cause of action, he failed to identify any relevant actionable wrong on the part of Hilldon and Caspian. That seems to be a fair criticism. In concentrating on the right, it seems to me that the judge did take his eye off the wrong.

Notes

1. This case rests on the assumption that the *De Mattos* and *Lumley* v *Gye* principles are not the same and that they may be pleaded as alternatives.
2. See Cane (1995) 111 LQR 400.

SECTION 7: REFORM OF THE PRIVITY DOCTRINE

It has been argued that where a third party is intended to benefit, he should be able to enforce the contract. To deny this would defeat the parties' intentions which are normally paramount in contract law. (See Flannigan 'The End of an Era (Error)' (1987) 103 LQR 564.)

In *Darlington BC* v *Wiltshier Northern Ltd* [1995] 3 All ER 895 (page 214), Steyn LJ commented (at pp. 903–905):

The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party

without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organise their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract. I will not struggle further with the point since nobody seriously asserts the contrary; but see a valuable article by Jack Beatson, a law commissioner, now Rouseball Professor of English Law at Cambridge, 'Reforming the Law of Contracts for the Benefit of Third Parties: a Second Bite at the Cherry' (1992) 45 CLP 1.

The genesis of the privity rule is suspect. It is attributed to *Tweddle* v *Atkinson* (1861) B & S 393, [1861–73] All ER Rep 369. It is more realistic to say that the rule originated in the misunderstanding of *Tweddle* v *Atkinson*: see *Atiyah's Rise and Fall of Contract* (1979) p. 414 and *Simpson's History of Law of Contract: the Rise of the Action of Assumpsit* (1975) p. 475. While the privity rule was barely tolerable in Victorian England, it has been recognised for half a century that it has no place in our more complex commercial world. Indeed, as early as *Dunlop Pneumatic Tyre Co. Ltd* v *Selfridge & Co. Ltd* [1915] AC 847 at 855, [1914–15] All ER Rep 333 at 335 when the House of Lords restated the privity rule, Lord Dunedin observed in a dissenting speech that the rule made—

> it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce.

Among the majority Viscount Haldane LC asserted as a self-evident truth that 'only a person who is a party to a contract can sue on it' (see [1915] AC 847 at 853, [1914–15] All ER Rep 333 at 334). Today the doctrinal objection to the recognition of a stipulatio alteri continues to hold sway. While the rigidity of the doctrine of consideration has been greatly reduced in modern times, the doctrine of privity of contract persists in all its artificial technicality.

In 1937 the Law Revision Committee in its Sixth Interim Report 'Statute of Frauds and the Doctrine of Consideration' (Cmd 5449, paras 41–48) proposed the recognition of a right of a third party to enforce the contract which by its express terms purports to confer a benefit directly on him. In 1967 *Beswick* v *Beswick* [1967] 2 All ER 1197 at 1201, [1968] AC 58 at 72, Lord Reid observed that if there was a long period of delay in passing legislation on the point the House of Lords might have to deal with the matter. Twelve years later Lord Scarman, who as a former chairman of the Law Commission usually favoured legislative rather than judicial reform where radical change was involved, reminded the House that it might be necessary to review all the cases which 'stand guard over this unjust rule' (see *Woodar Investment Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 All ER 571 at 591 and 598, [1980] 1 WLR 277 at 300 and 297–298 per Lord Scarman and Lord Keith). In *Forster* v *Silvermere Golf and Equestrian Centre Ltd* (1981) 125 Sol Jo 397 Dillon J described the rule as — 'a blot on our law and thoroughly unjust'. In 1983 Lord Diplock described the rule as 'an anachronistic shortcoming that has for many years been regarded as a reproach to English private law': see *Swain* v *Law Society* [1982] 2 All ER 827 at 832, [1983] 1 AC 598 at 611.

But as important as judicial condemnations of the privity rule is the fact that distinguished academic lawyers have found no redeeming virtues in it: see e.g. Markesinis 'An Expanding Tort Law — the Price of a Rigid Contract Law' (1987) 103 LQR 354, Reynolds 'Privity of Contract, the Boundaries of Categories and the

Limits of the Judicial Function.' (1989) 105 LQR 1, Beatson (1992) 45 CLP 1 and Adams and Brownsword 'Privity of Contract — that Pestilential Nuisance' (1993) 56 MLR 722. And we do well to remember that the civil law legal systems of other members of the European Union recognise such contracts. That our legal system lacks such flexibility is a disadvantage in the single market. Indeed it is a historical curiosity that the legal system of a mercantile country such as England, which in other areas of the law of contract (such as, for example, the objective theory of the interpretation of contracts) takes great account of the interests of third parties, has not been able to rid itself of this unjust rule deriving from a technical conception of a contract as a purely bilateral vinculum juris.

In 1991 the Law Commission revisited this corner of the law. In cautious language appropriate to a consultation paper the Law Commission has expressed the provisional recommendation that 'there should be a [statutory] reform of the law to allow third parties to enforce contractual provisions made in their favour': see 'Privity of Contract: Contracts for the Benefit of Third Parties' (Law Com Consultation Paper No. 121), p. 132. The principal value of the consultation paper lies in its clear analysis of the practical need for the recognition of a contract for the benefit of third parties, and the explanation of the unedifying spectacle of judges trying to invent exceptions to the rule to prevent demonstrable unfairness. No doubt there will be a report by the Law Commission in the not too distant future recommending the abolition of the privity of contract rule by statute. What will then happen in regard to the proposal for legislation? The answer is really quite simple: probably nothing will happen.

But on this occasion I can understand the inaction of Parliament. There is a respectable argument that it is the type of reform which is best achieved by the courts working out sensible solutions on a case by case basis, e.g., in regard to the exact point of time when the third party is vested with enforceable contractual rights: see Consultation Paper, No. 121, para. 5.8. But that requires the door to be opened by the House of Lords reviewing the major cases which are thought to have entrenched the rule of privity of contract. Unfortunately, there will be few opportunities for the House of Lords to do so. After all, by and large, courts of law in our system are the hostages of the arguments deployed by counsel. And [counsel] for the council, the third party, made it clear to us that he will not directly challenge the privity rule if this matter should go to the House of Lords. He said that he is content to try to bring his case within exceptions to the privity rule or what Lord Diplock in *Swain* v *The Law Society* [1983] 1 AC 598, 611D, described as 'juristic subterfuges . . . to mitigate the effect of the lacuna resulting from the non-recognition of a jus quaesitum tertio . . .'

In other Commonwealth jurisdictions there is evidence of a more relaxed approach to the privity doctrine, both in terms of statutory reform of the third party rule and in terms of case law. The decision of the High Court of Australia in *Trident General Insurance Co. Ltd* v *McNiece Brothers Pty Ltd* is a useful example of this approach, and the judgments are helpful in discussing the difficulties faced when reforming the third party rule.

Trident General Insurance Co. Ltd v *McNiece Brothers Proprietary Ltd*

(1988) 165 CLR 107; (1988) 80 ALJR 574 (High Court of Australia)

In 1977, Blue Circle took out a policy of insurance with Trident covering the public liability of Blue Circle, all its subsidiaries, associated and related

companies, and all its contractors and subcontractors and/or suppliers. In 1978, McNiece Bros. were employed as subcontractors on one of Blue Circle's construction contracts, and due to their alleged negligence an employee of a labour subcontractor was injured. McNiece sought an indemnity from Trident under the policy. Trident denied liability, arguing that McNiece Bros. were not Blue Circle's contractors at the date of the policy. A majority of a seven member High Court of Australia (5:2) thought that McNiece Bros. were entitled to this indemnity against their liability to pay damages. However, only three of the majority (Mason CJ, Wilson J and Toohey J) based their decision on privity, and the decision may well be restricted to the special case of insurance contracts.

MASON CJ AND WILSON J: [This judgment identifies some of the difficulties presented by allowing third parties to enforce contractual benefits.] In order to justify the privity and consideration rules, three practical policy considerations are sometimes invoked. First, they preclude the risk of double recovery from the promisor by the third party as well as the promisee. If the third party is permitted to sue the risk of double recovery arises from the possibility that the one party may seek specific performance after another has recovered damages. The risk is insignificant; joinder of all parties in the first action will make the resulting decision binding on all.

The second point is that the privity requirement imposes an effective barrier to liability on the part of a contracting party to a vast range of potential plaintiffs. This may be significant in the case of government contracts intended to benefit a class of persons. But it is difficult to justify the existence of a rule by reference to one of its indirect results, if in other respects its operation is unsatisfactory.

The third matter is more important. The recognition of an unqualified entitlement in a third party to sue on the contract would severely circumscribe the freedom of action of the parties, particularly the promisee. He may rescind or modify the contract with the assent of the promisor, arrive at a compromise or assign has contractual rights. He may even modify the contract so that he diverts to himself the benefit initially intended for the third party. Professor Corbin suggested that any entitlement in the third party to enforce the provision in his favour would necessarily exist at the expense of the rights, privileges and liberties that the contracting parties enjoy under the common law rules: 'Third Party Beneficiary Contracts in England', *University of Chicago Law Review*, vol 35 (1968) 544, at p. 549. But this does not entirely follow. The entitlement of the third party to enforce the provision in his favour can be subordinated to the right of the contracting parties to rescind or modify the contract, in which event the third party would lose his rights except in so far as he relied on the promise to his detriment. . . . To subordinate the third party's entitlement in this way would accord with legal principle and with the protection of the interests of the parties to the contract. There is to our minds no compelling reason why the interests of the third party should be preferred. . . .

Should it be a sufficient foundation for the existence of a third party entitlement to sue on the contract that there is a contractual intention to benefit a third party? Or, should an intention that the third party should be able to sue on the contract be required? Under s. 48 of the Insurance Contracts Act 1984 (Cth) and in the United States an intention to benefit a third party alone is necessary and that seems to be the position in Western Australia. But in Queensland (Property Law Act 1974, ss. 55(1), 55(6)(c)(ii)) and in New Zealand (Contracts (Privity) Act 1982, ss. 4, 8) an intention that the third party should be able to sue is required. This requirement again seems

to have its origin in the recommendations of the English Law Revision Committee. As the contracting parties are unlikely to turn their attention to the enforcement by the third party, the ascertainment of this intention may well be fraught with similar problems to those that have surrounded the trust concept.

The variety of these responses to the problems arising from contracts to benefit a third party indicate the range of the policy choices to be made and that there is room for debate about them. A simple departure from the traditional rules would lead to third party enforceability of such a contract, subject to the preservation of a contracting party's right to rescind or vary, in the absence of reliance by the third party to his detriment, and to the availability in an action by the third party of defences against a contracting party. The adoption of this course would represent less of a departure from the traditional exposition of the law than other legislative choices which have been made . . . Regardless of the layers of sediment which may have accumulated, we consider that it is the responsibility of this Court to reconsider in appropriate cases common law rules which operate unsatisfactorily and unjustly. . . .

In the ultimate analysis the limited question we have to decide is whether the old rules apply to a policy of insurance. The injustice which would flow from such a result arises not only from its failure to give effect to the expressed intention of the person who takes out the insurance but also from the common intention of the parties and the circumstance that others, aware of the existence of the policy, will order their affairs accordingly. We doubt that the doctrine of estoppel provides an adequate protection of the legitimate expectations of such persons and, even if it does, the rights of persons under a policy of insurance should not be made to depend on the vagaries of such an intricate doctrine. In the nature of things the likelihood of some degree of reliance on the part of the third party in the case of a benefit to be provided for him under an insurance policy is so tangible that the common law rule should be shaped with that likelihood in mind.

This argument has even greater force when it is applied to an insurance against liabilities which is expressed to cover the insured and its sub-contractors. It stands to reason that many sub-contractors will assume that such an insurance is an effective indemnity in their favour and that they will refrain from making their own arrangements for insurance on that footing. That, it seems, is what happened in the present case. But why should the respondent's rights depend entirely on its ability to make out a case of estoppel?

In the circumstances, notwithstanding the caution with which the Court ordinarily will review earlier authorities and the operation of long-established principle, we conclude that the principled development of the law requires that it be recognized that McNiece was entitled to succeed in the action.

Notes

1. McNiece Bros. were able to obtain the benefit of a contract to which they were not a party without having to resort to agency or trust arguments.
2. The case facts pre-dated an Australian statute allowing third parties to sue on insurance contracts. This factor clearly influenced the judgments.
3. Brennan J and Dawson J considered that the privity rule could not be modified judicially. Gaudron J held Trident liable in restitution on the basis of unjust enrichment. Deane J would have preferred a trust argument (which had not been pleaded).

In 1996, the Law Commission published its Report, *Privity of Contract: Contracts for the Benefit of Third Parties* (Law Com. No. 242, Cm 3329). The

Report favours a detailed legislative scheme which will allow a third party to enforce a contractual provision (including an exemption clause) where the test of enforceability is satisfied (see Part VII of the Report). The recommended test (para. 7.6) is as follows:

(a) a third party shall have the right to enforce a contractual provision where that right is given to him — and he may be identified by name, class or description — by an express term of the contract (the 'first limb');

(b) a third party shall also have the right to enforce a contractual provision where that provision purports to confer a benefit on the third party, who is expressly identified as a beneficiary of that provision, by name, class or description (the 'second limb'); but there shall be no right of enforceability under the second limb where on the proper construction of the contract it appears that the contracting parties did not intend the third party to have that right (the 'proviso').

If this test is satisfied, the third party will not need to be in existence at the time of the contract (para. 8.6).

For a critical assessment of the Law Commission Report, see Adams, Beyleveld and Brownsword (1997) 60 MLR 238.

7 TERMS

The next step is to consider what it is that the parties have undertaken to do, i.e. the terms of the contract.

SECTION 1: PRE-CONTRACTUAL STATEMENTS — TERMS OR MERE REPRESENTATIONS?

If a mere representation is false, it gives rise to remedies in the law of misrepresentation (see pages 474–527); if a term is broken, remedies are for breach of contract.

If there is a breach of contract there is an automatic right to claim damages. However, damages for misrepresentation can only be claimed on proof of fault.

The measure of damages recoverable for breach of contract aims to put the plaintiff into the position that he would have been in had the contract been properly performed; the tortious measure of damages for misrepresentation puts the plaintiff into the position that he would have been in had the contract not been made.

A plaintiff in a claim for breach of contract can recover for all losses which were within both parties' reasonable contemplation when they made the contract as the probable result of the breach of it. This is a far more restrictive test than the remoteness test for misrepresentation which, for fraudulent misrepresentation and negligent misrepresentation under the Misrepresentation Act 1967, s. 2(1), allows the recovery of all direct loss regardless of whether it was foreseeable (page 506).

The distinction between terms and representations rests upon the intentions of the parties as objectively ascertained, i.e. did the parties intend that the statement maker was making a binding promise as to the truth of the statement? The courts have determined some guidelines to assist in ascertaining this intention. Lord Moulton in *Heilbut, Symons & Co.* v *Buckleton* [1913] AC 30, warned that these guidelines are not decisive tests of intention.

[T]hey cannot be said to furnish decisive tests, because it cannot be said as a matter of law that the presence or absence of those features is conclusive of the intention of the parties. The intention of the parties can only be deduced from the totality of the evidence and no secondary principles of such a kind can be universally true.

(a) Accepting responsibility or advising on verification

Schawel v *Reade*
[1913] 2 IR 81 (HL)

The plaintiff required a stallion for stud purposes and went to the defendant's stables where he began examining a horse. He was told by the defendant, 'You need not look for anything, the horse is perfectly sound. If there was anything the matter with the horse I would tell you.' Therefore the plaintiff did not continue the examination. The price was agreed a few days later and the delivery of the horse took place after three weeks. The horse was found to be totally unfit for stud purposes, and the question in the case was whether the defendant's statement amounted to a term or a representation. The jury had answered 'yes' to the questions: Did the defendant represent to the plaintiff, in order that the plaintiff might purchase the horse, that the horse was fit for stud purposes, and did the plaintiff act upon that representation in purchasing the horse? Held: the jury had found that it was a warranty.

LORD MOULTON: Now, it would be impossible, in my mind, to have a clearer example of an express warranty where the word 'warrant' was not used. The essence of such warranty is that it becomes plain by the words and the action of the parties that it is intended that in the purchase the responsibility of the soundness shall rest upon the vendor; and how in the world could a vendor more clearly indicate that he is prepared and intends to take upon himself the responsibility of the soundness than by saying, 'You need not look at that horse, because it is perfectly sound,' and sees that the purchaser thereupon desists from his immediate independent examination?

My Lords, it seems to me, as found by the jury in their answer to the first question, we have clearly and unmistakably all the elements of an express warranty . . .

Notes

1. The courts generally use the word 'warranty' to mean a term of the contract. A warranty is also a particular type of term (see section 5, page 268).

2. In *Hopkins* v *Tanqueray* (1854) 15 CB 130, 139 ER 369, the plaintiff purchased the defendant's horse at auction. The previous day the defendant had found the plaintiff examining the horse's legs and had said, 'You need not examine his legs: you have nothing to look for. I assure you that he is perfectly sound in every respect'. The Court of Common Pleas held that the defendant's statement was not a warranty, only a representation.

How can these cases be reconciled? Arguably, the important fact was the evidence of the defendant in *Hopkins* v *Tanqueray* that horses that were sold at auction were never warranted unless this was expressly stated in the catalogue.

In *Harling* v *Eddy* [1951] 2 KB 739, Evershed MR distinguished these cases on the ground that in *Hopkins* v *Tanqueray* the statement was made the day before the contract, whereas in *Schawel* v *Reade* the statement was made the same day. If there is a delay between the time the statement was made and the formation of the contract, then it is less likely that it would be intended as a term.

4. If the statement indicates that the recipient of the statement should check it, then the statement maker is indicating that the statement is not intended to be a contractual term since he is explicitly refusing to take responsibility for its truth.

Ecay v *Godfrey*
(1947) 80 Lloyd's Rep 286

The plaintiff orally agreed to buy the defendant's motor cruiser for £750. There was evidence of a conversation between the parties in which the plaintiff had asked questions relating to the condition of the cruiser, and the defendant had asked whether the plaintiff was going to have a survey completed and the plaintiff replied that he would not. The cruiser was in fact unsound, and the plaintiff claimed damages for breach of warranty. Held: it had to be shown that there was an undertaking by the defendant that the boat was a sound boat. Looking at the whole of the conversation, including the question about the survey, it amounted to no more than an innocent misrepresentation, so that the plaintiff's claim failed.

LORD GODDARD CJ: . . . I often think that a very useful test in these cases is one that Mr Justice Horridge . . . used . . . when he was trying cases in which a warranty was set out. He said:

> What you have got to think of is: If the parties sat down here and wrote out their contract, would you find in that contract an undertaking by the defendant that so and so existed or so and so was the fact?

If we apply that test to the case here, having heard all the evidence, I think it is impossible to come to the conclusion that if these two parties had sat down and written out their contract, intending thereby to put down on paper exactly what they bargained about and all the terms of their bargain, Mr Godfrey would have said, 'And I promise you' (or 'And I undertake') 'that the vessel is in good condition.' It would be quite inconsistent, I think, with his statement to the plaintiff at the time, 'Aren't you going to have a survey?' or 'Are you intending to have a survey?', because if he was intending to warrant at the time that this boat was in good condition, there would be no point in having a survey. I will not go quite so far as that, because a man might say: 'Although you are willing to warrant, I am not going to be satisfied with that, because your warranty may turn out to be wrong and if I am going to part with £750 I should like to have your warranty confirmed by a survey'; but I think that the conversation with regard to the survey is material in coming to the conclusion whether there was a warranty or not.

Whatever was said here no doubt was said in the course of the negotiations leading up to the sale, but the sale did not in fact take place on that day. It did not take place

until the next day, because after the meeting at the boat the plaintiff had not made up his mind and went away to think about it. Then, without any further communication with Mr Godfrey, he bought the boat. It may very likely be that the plaintiff does not understand, or did not understand — there are a great many buyers who do not understand — the difference between a representation and a warranty: but if he wanted a warranty, I think he should have got it and got it in very much more precise terms than anything that was said, or is alleged to have been said, here. . .

(c) Importance attached test

Bannerman* v *White
(1861) 10 CB NS 844; 142 ER 685
(Court of Common Pleas)

A prospective buyer of hops asked the seller if any sulphur had been used in the growth or treatment of the hops, adding that he would not even ask the price if sulphur had been used. The seller replied that sulphur had not been used when in fact it had. *Held*: this statement was a term of the contract entitling the buyer to terminate for breach.

Couchman* v *Hill
[1947] KB 554 (CA)

The plaintiff bought the defendant's heifer at auction. The catalogue described the heifer as unserved and the plaintiff required an unserved heifer for service by his bull. The catalogue also stated that the auctioneers were not responsible for the correct description or any fault or defect in any lot and were not giving any warranty. Before the sale, the plaintiff asked the defendant and the auctioneer to confirm that the heifer was unserved, which they did. Seven weeks later the heifer suffered a miscarriage and died. The plaintiff brought an action for damages for breach of warranty. Held: that the statement amounted to a warranty by the defendant which overrode the condition in the printed terms.

SCOTT LJ: . . . There was no contract in existence until the hammer fell. The offer was defined, the auctioneer's authority was defined, but it was in law open to any would-be purchaser to intimate in advance before bidding for any particular heifer offered from the rostrum that he was not willing to bid for the lot unless the defendant modified the terms of sale contained in the two documents in some way specified by him. There is no doubt that the plaintiff did make some attempt of the kind in order to protect himself from the risk of buying an animal that was not of the kind described.

The real question is,: What did the parties understand by the question addressed to and the answer received from both the defendant and the auctioneer? It is contended by the defendant that the question meant 'having regard to the onerous stipulations which I know I shall have to put up with if I bid and the lot is knocked down to me, can you give me your honourable assurance that the heifers have in fact not been served? If so, I will risk the penalties of the catalogue.' The alternative meaning is: 'I am frightened of contracting on your published terms, but I will bid if

you will tell me by word of mouth that you accept full responsibility for the statement in the catalogue that the heifers have not been served, or, in other words, give me a clean warranty. That is the only condition on which I will bid.' If that was the meaning there was clearly an oral offer of a warranty which over-rode the stultifying condition in the printed terms, that offer was accepted by the plaintiff when he bid, and the contract was made on that basis when the lot was knocked down to him. . . .

Questions

1. Is it correct that one bidder at an auction should be able to negotiate for a warranty in advance where the auction is to be one without warranty?

In *Hopkins* v *Tanqueray* in such circumstances it was held that a representation made the day before the auction was not a contractual term. There is an editorial note to the report of *Couchman* v *Hill* indicating that if this authority had been cited in *Couchman* the result may well have been different.

On the other hand, the statement in *Couchman* v *Hill* was made on the same day as the auction, whereas that in *Hopkins* v *Tanqueray* was made the previous day.

2. Is this a case of a collateral warranty (page 243) since the warranty existed before the contract itself and was the consideration for entering into the main sale contract?

(c) Special knowledge of the statement maker

Oscar Chess Ltd v *Williams*
[1957] 1 All ER 325 (CA)

In June 1955, the defendant sold a secondhand Morris car to the plaintiffs, motor dealers, for £290. The registration book, which was examined by the plaintiffs' representative, showed that the car was first registered in 1948, and the defendant honestly believed that it was a 1948 model. The purchase price was calculated on this basis. In January 1956, the plaintiffs discovered from the manufacturers that the car was a 1939 model (so the true price was £175) and claimed damages for breach of warranty. Held: the defendant was not liable to the plaintiffs in damages for breach of warranty because, as the plaintiffs knew, the defendant had no personal knowledge of the date of the manufacture of the car and the plaintiffs were in at least as good a position to know this. The defendant had made an innocent misrepresentation i.e. non-fraudulent. (Damages were only available at this time if the misrepresentation was fraudulent.)

DENNING LJ: . . . The crucial question is: Was it a binding promise or only an innocent misrepresentation? The technical distinction between a 'condition' and a 'warranty' is quite immaterial in this case, because it is far too late for the buyer to reject the car. He can, at best, only claim damages. The material distinction here is between a statement which is a term of the contract and a statement which is only an innocent misrepresentation. This distinction is best expressed by the ruling of Holt CJ, 'Was it intended as a warranty or not?' using the word 'warranty' there in its ordinary English meaning: because it gives the exact shade of meaning that is required. It is something to which a man must be taken to bind himself.

In applying this test, however, some misunderstandng has arisen by the use of the word 'intended'. It is sometimes supposed that the tribunal must look into the minds of the parties to see what they themselves intended. That is a mistake. Lord Moulton made it quite clear, in *Heilbut, Symons & Co.* v *Buckleton* ([1913] AC at p. 51), that 'The intention of the parties can only be deduced from the totality of the evidence . . .'. The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. And this, when the facts are not in dispute, is a question of law. . . .

It is instructive to take some recent instances to show how the courts have approached this question. When the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant, intending that the buyer should act on it and he does so, it is easy to infer a warranty: see *Couchman* v *Hill* ([1947] 1 All ER 103), where a farmer stated that a heifer was unserved, and *Harling* v *Eddy* ([1951] 2 All ER 212), where he stated that there was nothing wrong with her. So also if the seller makes a promise about something which is or should be within his own control: see *Birch* v *Paramount Estates, Ltd* ((1956), 16 Estates Gazette 396), decided on Oct. 2, 1956, in this court, where the seller stated that the house would be as good as the show house. If, however, the seller, when he states a fact, makes it clear that he has no knowledge of his own but has got his information elsewhere, and is merely passing it on, it is not so easy to imply a warranty. Such a case was *Routledge* v *McKay* ([1954] 1 All ER 855), where the seller stated that a motor cycle combination was a 1942 model, and pointed to the corroboration of that statement to be found in the registration book, and it was held that there was no warranty.

Turning now to the present case, much depends on the precise words that were used. If the seller says: 'I believe the car is a 1948 Morris. Here is the registration book to prove it', there is clearly no warranty. It is a statement of belief, not a contractual promise. If, however, the seller says: 'I guarantee that it is a 1948 Morris. This is borne out by the registration book, but you need not rely solely on that. I give you my own guarantee that it is', there is clearly a warranty. The seller is making himself contractually responsible, even though the registration book is wrong.

. . . What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most that he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant that the car was a 1948 model. If the seller was asked to pledge himself to it, he would at once have said 'I cannot do that. I have only the log-book to go by, the same as you'.

. . . It seems to me clear that the plaintiffs, the motor dealers who bought the car, relied on the year stated in the log-book. If they had wished to make sure of it, they could have checked it then and there, by taking the engine number and chassis number and writing to the makers. They did not do so at the time, but only eight months later. They are experts, and; as they did not make that check at the time, I do not think that they should now be allowed to recover against the innocent seller who produced to them all the evidence which he had, namely, the registration book. I agree that it is hard on the plaintiffs to have paid more than the car is worth, but it would be equally hard on the seller to make him pay the difference. He would never have bought the Hillman car unless he had received the allowance of £290 for the

Morris car. The best course in all these cases would be to 'shunt' the difference down the train of innocent sellers until one reached the rogue who perpetrated the fraud; but he can rarely be traced, or if he can, he rarely has the money to pay the damages. Therefore, one is left to decide between a number of innocent people who is to bear the loss. That can only be done by applying the law about representations and warranties as we know it, and that is what I have tried to do. If the rogue can be traced, he can be sued by whosoever has suffered the loss: but, if he cannot be traced, the loss must lie where it falls. It should not be inflicted on innocent sellers, who sold the car many months, perhaps many years before, and have forgotten all about it and have conducted their affairs on the basis that the transaction was concluded. Such a seller would not be able to recollect after all this length of time the exact words which he used, such as whether he said 'I believe it is a 1948 model', or 'I warrant it is a 1948 model'. The right course is to let the buyer set aside the transaction if he finds out the mistake quickly and comes promptly before other interests have irretrievably intervened, otherwise the loss must lie where it falls: and that is, I think, the course prescribed by law. . . .

MORRIS LJ *dissenting*: . . . The statement that the car was a 1948 car was not a mere representation in respect of the subject-matter of the contract: the statement was adopted as the foundation of the contract which they made. The promise to pay £290 for that particular car (a figure arrived at by reference to the value of 1948 cars) was the counterpart of a term of the contract that that particular car was a 1948 model.

. . . In my judgment, it was a stipulation of the contract which was a condition. But by the time that the plaintiffs ascertained that the car was a 1939 car, it was too late for them to take any other course than to treat the breach of condition as a breach of warranty (see Sale of Goods Act, 1893, s. 11). On this basis the learned judge held that the plaintiffs were relegated to a right to claim damages, which he assessed at £115, being the difference between the value which the car would have had if it had been a 1948 car and its actual true value, which he found was £175.

. . . The statement related to a vitally important matter: it described the subject-matter of the contract then being made and directed the parties to, and was the basis of, their agreement as to the price to be paid or credited to the defendant. In the language of Scott LJ [in *Couchman* v *Hill*], it seems to me that the statement made by the defendant was 'an item in [the] description' of what was being sold and that it constituted a substantial ingredient in the identity of the thing sold. It is with diffidence that I arrive at a conclusion differing from that of my Lords, but I cannot see that the learned judge in any way misdirected himself or misapplied any principle of law, and I see no reason for disturbing his conclusion.

Notes

1. See page 268 for the meaning of 'condition'.

2. The decision of the majority may well be the result of a desire to protect a layman who had acted in good faith on the basis of the registration book.

3. This case involved the question of which of two innocent parties should suffer for the loss caused by a third party (the person who altered the registration book). Was the loss correctly placed on the party who was better able to bear it (the motor dealers)?

4. If we apply the importance attached test here, had the plaintiffs known the true age of the car they would probably still have offered to part exchange it at the 1939 valuation because they wanted the sale of the new car. This

would indicate that their decision to contract did not turn on the age of manufacture of the car; only the price did. This test was not mentioned by the Court of Appeal.

Compare the following case.

Dick Bentley Productions Ltd v *Harold Smith (Motors) Ltd*
[1965] 2 All ER 65 (CA)

The plaintiff asked the defendants, who were car dealers, to find him a 'well vetted' Bentley car. A car was found. The defendants informed the plaintiff that they were in a position to find out the history of cars and this car had been fitted with a replacement engine and gear box and had done only 20,000 miles since then. The defendants relied on the odometer reading and had not checked the details. The plaintiff bought the car and discovered that this representation as to the mileage was untrue. The plaintiff sued the defendants seeking damages for breach of contract. Held: the statement amounted to a warranty, and therefore the plaintiff was entitled to damages.

LORD DENNING MR: The first point is whether this representation, namely that the car had done twenty thousand miles only since it had been fitted with a replacement engine and gearbox, was an innocent misrepresentation (which does not give rise to damages), or whether it was a warranty. It was said by Holt CJ and repeated in *Heilbut, Symons & Co.* v *Buckleton* [1913] AC 30:

> An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended.

But that word 'intended' has given rise to difficulties. I endeavoured to explain in *Oscar Chess, Ltd* v *Williams* [1957] 1 All ER 325 that the question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice. What conduct, then? What words and behaviour, lead to the inference of a warranty?

Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it. In the *Oscar Chess* case the inference was rebutted. There a man had bought a second-hand car and received with it a log-book, which stated the year of the car, 1948. He afterwards resold the car. When he resold it he simply repeated what was in the log-book and passed it on to the buyer. He honestly believed on reasonable grounds that it was true. He was completely innocent of any fault. There was no warranty by him but only an innocent misrepresentation. Whereas in the present case

it is very different. The inference is not rebutted. Here we have a dealer, Mr Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so. Indeed it was done later. When the history of this car was examined, his statement turned out to be quite wrong. He ought to have known better. There was no reasonable foundation for it.

Notes

1. Is this another example of consumer protection, since had the statement not been held to be a term of the contract, there would have been no remedy in damages? (The statement was made negligently, and before the Misrepresentation Act 1967 damages were available only for fraudulent misrepresentations.)

2. Applying the importance attached test, the plaintiff made it clear that he wanted a car that was 'well vetted', and it is unlikely that he would have purchased the car had its actual mileage been disclosed.

3. Lord Denning suggests that the test of whether there is a warranty depends upon whether the seller is actually at fault. The dealer here was negligent in not checking the mileage, whereas in *Oscar Chess* v *Williams* there was no such requirement for the individual seller to check the registration book. Unfortunately, the wording of this test is too closely tied to misrepresentation, and the true test is surely that the dealer was in a better position to discover the truth.

Esso Petroleum Co. Ltd v *Mardon*
[1976] QB 801 (CA)

In 1961, the plaintiffs' employee, with 40 years' experience, calculated that the potential throughput of a petrol station was likely to reach 200,000 gallons by the third year of operation of the station. The local planning authority refused permission for the pumps to front on to the street so they had to be placed at the back of the site. In 1963, the defendant, a prospective tenant for the petrol station, was given the same estimate of throughput by the plaintiffs' employee. The defendant suggested that 100,000 or 150,000 gallons was a more likely figure, but his doubts were quelled by his trust in the greater experience of the plaintiffs' employee. The defendant entered into a three-year tenancy. In the first 15 months the throughput was only 78,000 gallons. The losses continued, and eventually the plaintiffs cut off the defendant's supply of petrol because of non-payment. They sought possession of the station and moneys they were owed. The defendant claimed damages, *inter alia*, for breach of warranty as to the potential throughput of the station. Held: the statement was a contractual warranty because it was a factual statement on a crucial matter by a party professing to have special knowledge in order to induce the defendant to enter into the contract. This warranty was not a promise that the station would in fact have this throughput but a warranty that the forecast had been made with reasonable care and skill. The plaintiffs were

liable in damages for the amount that the defendant had lost by being induced to enter into the contract.

LORD DENNING MR:

Collateral warranty

Ever since *Heilbut, Symons & Co.* v *Buckleton* [1913] AC 30, we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege — I often did it myself — that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty. We had to reckon, of course, with the dictum of Lord Moulton, at p. 47, that 'such collateral contracts must from their very nature be rare.' But more often than not the court elevated the innocent misrepresentation into a collateral warranty: and thereby did justice — in advance of the Misrepresentation Act 1967. I remember scores of cases of that kind, especially on the sale of a business. A representation as to the profits that had been made in the past was invariably held to be a warranty. Besides that experience, there have been many cases since I have sat in this court where we have readily held a representation — which induces a person to enter into a contract — to be a warranty sounding in damages. . . . [This] was not a warranty — in this sense — that it did not *guarantee* that the throughput *would be* 200,000 gallons. But, nevertheless, it was a forecast made by a party — Esso — who had special knowledge and skill. It was the yardstick . . . by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their disposal. They were in a much better position than Mr Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it — and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill. It is just as if Esso said to Mr Mardon: 'Our forecast of throughput is 200,000 gallons. You can rely upon it as being a sound forecast of what the service station should do. The rent is calculated on that footing.' If the forecast turned out to be an unsound forecast such as no person of skill or experience should have made, there is a breach of warranty. . . .

In the present case it seems to me that there was a warranty that the forecast was sound, that is, Esso made it with reasonable care and skill. That warranty was broken.

Notes

1. Now that damages are available for negligent misrepresentation (on a very favourable basis) under the Misrepresentation Act 1967, there will be no need to resort to the collateral warranty in order to secure a damages award in such circumstances.

2. In *Howard Marine* v *Ogden & Sons* [1978] QB 574 (for facts see page 503), the defendants argued that the marine manager's statement amounted to a collateral oral warranty as to the carrying capacity of the barges which had induced them to hire the barges. The Court of Appeal held that it was not a warranty because it was not given in circumstances indicating that a contractual promise was being made. (Compare Lord Denning's test in *Dick Bentley* v *Harold Smith* with that in *Howard Marine* v *Ogden* some 13 years later. In *Howard Marine* v *Ogden* the test is whether the statement was intended to be binding rather than whether the statement maker is at fault.)

SECTION 2: WRITTEN CONTRACTS

Contracts can be written or oral, or partly written and partly oral.

A: THE PAROL EVIDENCE RULE

The parol evidence rule applies to written contracts and prevents the parties adducing extrinsic evidence to add to, vary or contradict the writing. However, a party cannot rely on a written contract when he has only secured the other's consent by means of an oral assurance.

(a) Contracts partly written and partly oral

Construing a contract as partly written and partly oral will always enable the courts to avoid the parol evidence rule, which applies only to those contracts where the writing was intended to contain the whole of the agreement.

J. Evans & Son (Portsmouth) Ltd v *Andrea Merzario Ltd*
[1976] 2 All ER 930 (CA)

The plaintiffs, importers of machines, contracted with the defendants for carriage of machines to England. The contract was on the standard conditions of the forwarding trade, giving the defendants complete freedom as to the method of transportation unless the plaintiffs gave express written instructions. The conditions exempted the defendants from liability for loss or damage of the goods. Prior to 1967, because the machines were liable to rust if carried on deck, the defendants had arranged for the transportation of the machines in crates or trailers below deck. In 1967, the defendants proposed changing over to containers and, in discussions on the matter between the plaintiffs and the defendants, the defendants gave the plaintiffs an oral assurance that these containers would be shipped below deck. The plaintiffs therefore agreed to containerised transportation of the machines. Due to an oversight by the defendants, a container was shipped on deck and fell overboard. The plaintiffs claimed damages from the defendants for loss of the machine, alleging that the carriage of the container on deck had been a breach of the carriage contract. Held: (Roskill and Geoffrey Lane LJJ) the oral assurance was an express term of the contract, and as the contract was partly oral and partly written, evidence of the oral term was admissible. The defendants were therefore liable for breach of this oral promise unless they could rely on the printed conditions (see page 309).

ROSKILL LJ: . . . The real question as I venture to think, is not whether one calls this an assurance or a guarantee, but whether that which was said amounted to an enforceable contractual promise by the defendants to the plaintiffs that any goods thereafter entrusted by the plaintiffs to the defendants for carriage from Milan to the United Kingdom via Rotterdam and thence by sea to England would be shipped under deck. The matter was apparently argued before the learned judge on behalf of

the plaintiffs on the basis that the defendants' promise (if any) was what the lawyers sometimes call a collateral oral warranty . . . But that doctrine, as it seems to me, has little or no application where one is not concerned with a contract in writing (with respect I cannot accept counsel for the defendants' argument that there was here a contract in writing) but with a contract which, as I think, was partly oral, partly in writing and partly by conduct. In such a case the court does not require to have recourse to lawyers' devices such as collateral oral warranty in order to seek to adduce evidence which would not otherwise be admissible. The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties . . . When one does that, one finds first, as I have already mentioned, that these parties had been doing business in transporting goods from Milan to England for some time before; secondly, that transportation of goods from Milan to England was always done on trailers which were always under deck; thirdly, that the defendants wanted a change in the practice — they wanted containers used instead of trailers; fourthly, that the plaintiffs were only willing to agree to that change if they were promised by the defendant that those containers would be shipped under deck, and would not have agreed to the change but for that promise. The defendants gave such a promise which, to my mind against this background plainly amounted to an enforceable contractual promise. In those circumstances it seems to me that the contract was this: 'If we continue to give you our business, you will ensure that those goods in containers are shipped under deck'; and the defendants agreed that this would be so. Thus there was a breach of that contract by the defendants when this container was shipped on deck; and it seems to me to be plain that the damage which the plaintiffs suffered resulted from that breach. . . .

Note

Wedderburn [1959] CLJ 58, has argued that this device means that the parol evidence rule is no more than a 'self evident tautology'. It will always be correct, because if there is a written contract the rule applies and oral evidence cannot be admitted. If the contract is not completely written, then the rule does not apply and the oral evidence is admissible.

(b) Collateral contract

The court may hold that in fact there are two contracts — the written contract to which the parol evidence rule applies, and the oral collateral contract (without which the main written contract would not have been made) to which the rule does not apply.

Lord Moulton's statement in *Heilbut Symons & Co.* v *Buckleton* [1913] AC 30, relating to collateral contracts, is restrictive and confusing because the distinction between a collateral warranty (page 243) and a collateral contract is not preserved:

> [T]here may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract. But such collateral contracts must from their very nature be rare. The effect of a collateral contract such as that which I have instanced would be to increase the consideration

of the main contract by 100*l.*, and the more natural and usual way of carrying this out would be by so modifying the main contract and not by executing a concurrent and collateral contract. Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an animus contrahendi on the part of all the parties to them must be clearly shewn. Any laxity on these points would enable parties to escape from the full performance of the obligations of contracts unquestionably entered into by them and more especially would have the effect of lessening the authority of written contracts by making it possible to vary them by suggesting the existence of verbal collateral agreements relating to the same subject-matter.

Lord Denning MR adopted the device of the collateral contract in *J. Evans v Andrea Merzario* (for facts see page 244):

[T]he forwarding agent said there was no contractual promise that the goods would be carried under deck. Alternatively, if there was, they relied on the printed terms and conditions. The judge held there was no contractual promise that these containers should be carried under deck. He thought that, in order to be binding, the initial conversation ought to be contemporaneous, and that here it was too remote in point of time from the actual transport; furthermore that, viewed objectively, it should not be considered binding. The judge quoted largely from the well-known case of *Heilbut, Symons & Co v Buckleton* [1913] AC 30 in which it was held that a person is not liable in damages for an innocent misrepresentation; and that the courts should be slow to hold that there was a collateral contract. I must say that much of what was said in that case is entirely out of date. We now have the Misrepresentation Act 1967 under which damages can be obtained for innocent misrepresentation of fact. This Act does not apply here because we are concerned with an assurance as to the future. But even in respect of promises as to the future, we have a different approach nowadays to collateral contracts. When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding: see *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65. That case was concerned with a representation of fact, but it applies also to promises as to the future. Following this approach, it seems to me plain that Mr Spano gave an oral promise or assurance that the goods in this new container traffic would be carried under deck. He made the promise in order to induce Mr Leonard to agree to the goods being carried in containers. On the faith of it, Mr Leonard accepted the quotations and gave orders for transport. In those circumstances the promise was binding. There was a breach of that promise and the forwarding agents are liable — unless they can rely on the printed conditions.

The terms of the collateral contract may even override conflicting terms in the main written contract.

City and Westminster Properties (1934) Ltd v Mudd
[1959] Ch 129

The defendant was a tenant of a lock up shop and had slept in the office at the back of the shop. In 1947, during negotiations for a new lease, the defendant was sent a draft contract containing a covenant by the lessee 'not

to permit or suffer the demised premises or any part thereof to be used as a place for lodging, dwelling or sleeping'. The plaintiffs' agent told the defendant that if he signed the lease, the plaintiffs would not object to his continuing to live in the shop. The defendant therefore executed the lease. In 1956, the plaintiffs sought forfeiture of the lease on the ground of breach of this covenant. The defendant denied that he was in breach, claiming that the plaintiffs had waived the covenant or were estopped from relying on it (see the discussion of promissory estoppel, at page 139). Held: as the defendant had signed the lease only because of the promise by the plaintiffs' agent, he was entitled to rely on that promise as long as he was in occupation of the shop.

HARMAN J: . . . This is not a case of a representation made after contractual relations existed between the parties to the effect that one party to the contract would not rely on his rights. If the defendant's evidence is to be accepted, as I hold it is, it is a case of a promise made to him before the execution of the lease that, if he would execute it in the form put before him, the landlord would not seek to enforce against him personally the covenant about using the property as a shop only. The defendant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot be allowed to resile. . . . The promise was that so long as the defendant personally was tenant, so long would the landlords forbear to exercise the rights which they would have if he signed the lease. He did sign the lease on this promise and is therefore entitled to rely on it so long as he is personally in occupation of the shop.

Notes

1. It was not a case based on the promissory estoppel doctrine, because it was a promise to induce a contract rather than a promise to induce an alteration to an existing contract.
2. The collateral contract device gave more effective protection than the doctrine of promissory estoppel, since it is possible to go back on an estopped promise after giving reasonable notice of an intention to do so (page 152).

(c) **Reform**

See the Law Commission Working Paper (1976) No. 70 and the Law Commission Report (No. 154 Cmnd 9700 (1986)), Marston [1986] CLJ 192.

B: THE EFFECT OF SIGNATURE

If a person signs a contractual document, he will be bound by its terms even if he has not read the document.

L'Estrange v *F. Graucob Ltd*
[1934] 2 KB 394 (Divisional Court)

The plaintiff bought an automatic cigarette vending machine from the defendants. She signed an order form which contained the following term

in small print, 'any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded'. The defendants gave her a printed confirmation of this order. When the machine was delivered it did not work satisfactorily and the plaintiff sought damages for breach of the implied statutory term that the machine was fit for the purpose for which it was sold. The defendants sought to rely on the exemption clause, but the plaintiff argued that she had not read the order form and did not know what it contained. Held: as the plaintiff had signed the written contract and had not been induced to do so by any misrepresentation, she was bound by its terms. It was wholly immaterial that she had not read the document and did not know its contents.

SCRUTTON LJ: . . . In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

Notes

1. Section 6(3) of the Unfair Contract Terms Act 1977 would now govern this exemption clause. The implied condition that goods are fit for the purpose can be excluded as against a person dealing otherwise than as consumer only if the exclusion satisfies the reasonableness requirement. Schedule 2(c) provides that a relevant factor in assessing reasonableness is 'whether the customer knew or ought reasonably to have known of the existence and extent of the term'.

2. The decision in *Grogan v Robin Meredith Plant Hire* [1996] CLC 1127, page 252, makes it clear that terms on a document which is not a formation document, e.g., a time sheet, will not simply be incorporated by signature.

3. Scrutton LJ makes it quite clear that a person will not be bound by a signed document if the other party misrepresented its effect.

Curtis v *Chemical Cleaning & Dyeing Co.*
[1951] 1 KB 805 (CA)

The plaintiff took a white satin wedding dress to the defendants' shop to be cleaned. The shop assistant asked her to sign a 'receipt', which in fact contained a condition excluding the defendants' liability for any damage however arising. When the plaintiff asked why she had to sign, the assistant told her that the defendants would not accept liability for damage to the beads and sequins with which the dress was trimmed. The plaintiff signed. When the dress was returned it was stained. The defendants argued that the clause excluded their liability. Held: the defendants could not rely on the exemption clause because of the assistant's innocent misrepresentation

which had misled the plaintiff as to the extent of the exemption and thereby induced her to sign the receipt.

DENNING LJ: In my opinion, 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. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation; but either is sufficient to disentitle the creator of it to the benefit of the exemption. . . . When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document. The present case is a good illustration. The customer said in evidence: 'When I was asked to sign the document I asked "why?" The assistant said I was to accept any responsibility for damage to beads and sequins. I did not read it all before I signed it'. In those circumstances, by failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to the beads and sequins, and that it did not extend to the material of which the dress was made. It was done perfectly innocently, but nevertheless a false impression was created.

Note

The decision of the Court of Appeal in *Interfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 indicates that onerous terms will need to be expressly disclosed if they are to be incorporated (page 254).

SECTION 3: ORAL CONTRACTS — INCORPORATION OF WRITTEN TERMS

A: REASONABLE NOTICE

Parker v *South Eastern Railway*
(1877) 2 CPD 416 (CA)

The plaintiff deposited his bag in the defendants' cloakroom, paid 2d and received a ticket. On the face of the ticket the words 'see back' were printed, and on the back a notice stated that the company would not be responsible for any package exceeding £10. A notice containing the same condition was displayed in the cloakroom. The plaintiff's bag was lost or stolen and he claimed its value, which was more than £10. He argued that he had taken the ticket without reading it and thought it was only a receipt for 2d or evidence that the company had possession of his bag. He had not seen the notice in the cloakroom. Held: the trial judge had misdirected the jury since he had not asked them whether the defendants had taken reasonable steps to give the plaintiff notice of the condition.

MELLISH LJ: . . . The question then is, whether the plaintiff was bound by the conditions contained in the ticket. In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by

proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents. The parties may, however, reduce their agreement into writing, so that the writing constitutes the sole evidence of the agreement, without signing it; but in that case there must be evidence independently of the agreement itself to prove that the defendant has assented to it. In that case, also, if it is proved that the defendant has assented to the writing constituting the agreement between the parties, it is, in the absence of fraud, immaterial that the defendant had not read the agreement and did not know its contents. Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are. . . .

Now, I am of opinion that we cannot lay down, as a matter of law, either that the plaintiff was bound or that he was not bound by the conditions printed on the ticket, from the mere fact that he knew there was writing on the ticket, but did not know that the writing contained conditions. I think there may be cases in which a paper containing writing is delivered by one party to another in the course of a business transaction, where 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. For instance, if a person driving through a turnpike-gate received a ticket upon paying the toll, he might reasonably assume that the object of the ticket was that by producing it he might be free from paying toll at some other turnpike-gate, and might put it in his pocket unread. On the other hand, if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards in an action against the shipowner for the loss of the goods, he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage, and that the shipowner was protected by the exceptions contained in it. Now the reason why the person receiving the bill of lading would be bound seems to me to be that in the great majority of cases persons shipping goods do know that the bill of lading contains the terms of the contract of carriage; and the shipowner, or the master delivering the bill of lading, is entitled to assume that the person shipping goods has that knowledge. It is, however, quite possible to suppose that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but in my opinion such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.

Now the question we have to consider is whether the railway company were entitled to assume that a person depositing luggage, and receiving a ticket in such a way that he could see that some writing was printed on it, would understand that the writing contained the conditions of contract, and this seems to me to depend upon whether people in general would in fact, and naturally, draw that inference. The railway company, as it seems to me, must be entitled to make some assumptions respecting the person who deposits luggage with them: I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform

people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness. But if what the railway company do is not sufficient to convey to the minds of people in general that the ticket contains conditions, then they have received goods on deposit without obtaining the consent of the persons depositing them to the conditions limiting their liability. I am of opinion, therefore, that the proper direction to leave to the jury in these cases is, that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.

Note
Mellish LJ refers to the fact that *the terms must be contained in or referred to in a contractual document.* If the document is a 'mere receipt' for money paid, it will not be a contractual document.

Chapelton v *Barry Urban District Council*
[1940] 1 KB 532 (CA)

The plaintiff wished to hire a deck chair to sit on the beach. The defendant Council had left a pile of deck chairs with a notice giving the hire charge and stating that tickets were obtainable from the deck chair attendant. The notice itself contained no exempting conditions. The plaintiff obtained two chairs from the attendant and received two tickets. The plaintiff did not know that the tickets contained conditions because he simply glanced at them and put them into his pocket. In fact, on the reverse side of the ticket were the words: 'The council will not be liable for any accident or damage arising from the hire of the chair.' Due to the negligence of the defendant Council, the canvas on the plaintiff's chair gave way when he sat on it. The Council argued that the clause on the ticket exempted them from liability. Held: the ticket was a mere voucher or receipt. Only the notice was capable of containing conditions, and that made no mention of an exemption. Slesser LJ stressed that there was no reason why a person taking a chair should obtain the ticket at the moment of taking the chair. They might sit on the chair for an hour or more before the attendant came for the money.

Notes
1. In *Chapelton* v *Barry UDC*, the pile of deck chairs was held to constitute a standing offer so that a contract was formed when a deck chair was removed from the pile. The ticket might be obtained some time later and could not therefore be seen as a 'contractual document' because notice of any terms it contained would be given too late.

2. The fact that a document is called a 'receipt' is not conclusive.
3. In *Grogan* v *Robin Meredith Plant Hire* [1996] CLC 1127, the Court of Appeal held that a condition on a time sheet was not incorporated into the hire contract. The hire contract had already been made when the time sheet was signed. In addition, the signed time sheet did not vary the original contract because it was not a document which a reasonable man would expect to contain relevant contractual conditions. Auld LJ stated that documents such as a time sheet, an invoice or a statement of account do not normally have contractual purpose as a document making or varying a contract. They are normally intended to record the performance of an existing contractual obligation rather than evidencing its terms.

It is sufficient that reasonable steps have been taken to bring the clause to the notice of people in general.

Thompson v *London, Midland & Scottish Railway* [1930] 1 KB 41 (CA)

The plaintiff's excursion ticket contained a notice on its reverse side stating that it was issued subject to the conditions in the defendant company's timetables. The timetables, which could be obtained for 6d, stated (on p. 552) that the ticket was issued subject to the condition that no action would lie against the company 'in respect of injury (fatal or otherwise) ... however caused'. The plaintiff, who could not read, was injured when she got off the train when, due to the defendant's negligence, it was not safe to do so. She sought damages and the defendant company relied on the exemption clause. Held: the fact that the plaintiff could not read did not alter the fact that she was bound by the condition on the ticket. An indication of where a condition could be found in another document was sufficient notice of the existence of the clause so that it was validly incorporated.

Note
This particular clause would now be unenforceable as a result of the legislative regulation of exemption clauses by s. 2(1) of UCTA 1977 (page 328) and the Unfair Terms in Consumer Contract Regulations 1994, reg. 4 and sch. 3, 1(a) (page 346).

Before or at the time of contracting
In *Olley* v *Marlborough Court Ltd* [1949] 1 KB 532, a contract was made at a hotel reception desk. In the hotel room upstairs there was a notice excluding the hotel's responsibility for articles lost or stolen unless they were deposited for safe custody. When the plaintiff's furs and jewellery were stolen she brought a damages action against the hotel. The Court of Appeal held that since the contract was made at the reception desk, the terms of the notice in the bedroom came too late and were not incorporated.

Thornton v *Shoe Lane Parking Ltd*
[1971] 2 QB 163 (CA)

The plaintiff went to park his car in the defendants' automatic car park. A notice at the entrance to the car park gave details of the charges and stated that all cars were 'parked at owner's risk'. When a car was driven up to it, a machine dispensed a ticket. The plaintiff took the ticket which gave the car's time of arrival and stated in small print that it was 'issued subject to conditions displayed on the premises'. Inside the car park there was a notice which stated, *inter alia*, that the defendants would not be liable for any injury to customers which occurred when their cars were on the premises. The plaintiff was injured in the car park, and in a negligence action the defendants relied on the exemption in the ticket. Held: the ticket came too late since the contract was concluded when the motorist drove up to the machine. The ticket exemption was the only one wide enough to exempt from liability for personal injury.

LORD DENNING MR: . . . [T]he company seek by this condition to exempt themselves from liability, not only for damage to the car, but also for injury to the customer howsoever caused. The condition talks about insurance. It is well known that the customer is usually insured against damage to the car. But he is not insured against damage to himself. If the condition is incorporated into the contract of parking, it means that Mr Thornton will be unable to recover any damages for his personal injuries which were caused by the negligence of the company.

We have been referred to the ticket cases of former times from *Parker* v *South Eastern Railway Co.* (1877) 2 CPD 416 to *McCutcheon* v *David MacBrayne Ltd* [1964] 1 WLR 125. They were concerned with railways, steamships and cloakrooms where booking clerks issued tickets to customers who took them away without reading them. In those cases the issue of the ticket was regarded as an *offer* by the company. If the customer took it and retained it without objection, his act was regarded as an acceptance of the offer: see *Watkins* v *Rymill* (1833) 10 QBD 178, 188 and *Thompson* v *London, Midland and Scottish Railway Co.* [1930] 1 KB 41, 47. These cases were based on the theory that the customer, on being handed the ticket, could refuse it and decline to enter into a contract on those terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions. If he had stopped to do so, he would have missed the train or the boat.

None of those cases has any application to a ticket which is issued by an automatic machine. The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine. The contract was concluded at that time. It can be translated into offer and acceptance in this way: the offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice before-hand, but not otherwise. He is not bound by the terms printed on the ticket if they differ from the notice, because the ticket comes too late. The contract has already been made: see *Olley* v *Marlborough Court*

Ltd [1949] 1 KB 532. The ticket is no more than a voucher or receipt for the money that has been paid (as in the deckchair case, *Chapelton* v *Barry Urban District Council* [1940] 1 KB 532) on terms which have been offered and accepted before the ticket is issued.

In the present case the offer was contained in the notice at the entrance giving the charges for garaging and saying 'at owner's risk,' i.e., at the risk of the owner so far as damage to the car was concerned. The offer was accepted when Mr Thornton drove up to the entrance and, by the movement of his car, turned the light from red to green, and the ticket was thrust at him. The contract was then concluded, and it could not be altered by any words printed on the ticket itself. In particular, it could not be altered so as to exempt the company from liability for personal injury due to their negligence.

Notes

1. Lord Denning thought it was possible to declare a clause void for unreasonableness. However, it was generally considered that there was no such doctrine at common law.

2. Lord Denning's judgment sets out the process of offer and acceptance in ticket cases (which is based on a fiction) and the process of offer and acceptances using automatic machines.

Automatic machines have altered over the years, and it is now possible to purchase a railway ticket from such a machine. If I buy a ticket at Paddington station to travel to Cardiff, is the offer and acceptance position different depending on whether I buy my ticket from the automatic machine or the ticket office?

3. Another controversial statement made by Lord Denning was that the clause exempting from personal injury was too wide and took away important rights. He suggested that in such cases the clause would need explicitly to be drawn to the car park user's attention.

Interfoto Picture Library Ltd v *Stiletto Visual Programmes Ltd* [1988] 1 All ER 348 (CA)

The defendants ordered photographic transparencies from the plaintiffs. The transparencies were sent packed in a bag with a delivery note. This delivery note stated that the transparencies had to be returned by 19 March and that a holding fee of £5 per day plus VAT would be charged for each day they were retained beyond that. The defendants did not use the transparencies and completely forgot about them. They were eventually returned on 2 April. The plaintiffs sent an invoice for £3,783.50 (the holding charge per transparency per day from 19 March to 2 April). The defendants refused to pay. Held: if the condition is a particularly onerous or unusual one which would not generally be known to the other party, then the party seeking to enforce it had to show that it had fairly and reasonably been brought to the other party's attention. Condition 2 was unreasonable and extortionate, and the plaintiffs had not brought it to the attention of the defendants. Instead, the plaintiffs were entitled to an award of £3.50 per transparency per week.

DILLON LJ: . . . The question is therefore whether condition 2 was sufficiently brought to the defendants' attention to make it a term of the contract which was only concluded after the defendants had received, and must have known that they had received the transparencies and the delivery note. . . .

This sort of question was posed, in relation to printed conditions, in the ticket cases, such *Parker* v *South Eastern Rly Co* (1877) 2 CPD 416, [1874–80] All ER Rep 166, in the last century. At that stage the printed conditions were looked at as a whole and the question considered by the courts was whether the printed conditions as a whole had been sufficiently drawn to a customer's attention to make the whole set of conditions part of the contract; if so the customer was bound by the printed conditions even though he never read them.

More recently the question has been discussed whether it is enough to look at a set of printed conditions as a whole. When for instance one condition in a set is particularly onerous does something special need to be done to draw customers' attention to that particular condition? In an obiter dictum in *J Spurling Ltd* v *Bradshaw* [1956] 2 All ER 121 at 125, [1956] 1 WLR 461 at 466 (cited in *Chitty on Contracts* (25th edn, 1983) vol 1, para 742, p. 408) Denning LJ stated:

> Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

Then in *Thornton* v *Shoe Lane Parking Ltd* [1971] 1 All ER 686, [1971] 2 QB 163 both Lord Denning MR and Megaw LJ held as one of their grounds of decision, as I read their judgments, that where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party. Lord Denning restated and applied what he had said in the *Spurling* case, and held that the court should not hold any man bound by such a condition unless it was drawn to his attention in the most explicit way. . . .

At the time of the ticket cases in the last century it was notorious that people hardly ever troubled to read printed conditions on a ticket or delivery note or similar document. That remains the case now. In the intervening years the printed conditions have tended to become more and more complicated and more and more one-sided in favour of the party who is imposing them, but the other parties, if they notice that there are printed conditions at all, generally still tend to assume that such conditions are only concerned with ancillary matters of form and are not of importance. In the ticket cases the courts held that the common law required that reasonable steps be taken to draw the other parties' attention to the printed conditions or they would not be part of the contract. It is in my judgment a logical development of the common law into modern conditions that it should be held, as it was in *Thornton* v *Shoe Lane Parking Ltd*, that, if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party.

In the present case, nothing whatever was done by the plaintiffs to draw the defendants' attention particularly to condition 2; it was merely one of four columns' width of conditions printed across the foot of the delivery note. Consequently condition 2 never, in my judgment, became part of the contract between the parties.

Notes

1. It is difficult to see why such a rule affecting incorporation is needed in the light of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994.

2. Was this condition invalid as a penalty? (See page 404.)
3. The difficulty resulting from *Interfoto* v *Stiletto* is how to decide whether a clause is onerous or unreasonable.

B: COURSE OF DEALING

Incorporation by this method is not easy to establish because of the requirement that it be a *consistent* course of dealing.

McCutcheon v *David MacBrayne Ltd*
[1964] 1 All ER 430 (HL)

The respondents carried goods by sea from the western Isles of Scotland to the mainland. The appellant asked his brother-in-law, McSporran, to arrange for the appellant's car to be shipped to the mainland. The usual practice of the respondents was to ask customers to sign a risk note by which they agreed to be bound by the conditions printed on it. The conditions included a statement that the goods were shipped at the owner's risk. On this occasion the risk note had been made out but McSporran had not been asked to sign it. McSporran had shipped goods in a similar manner on previous occasions. He had sometimes signed risk notes but had never read the conditions. The ship sank due to the negligence of the respondents and the car was lost. The respondents argued that the exclusion clause on the risk note was incorporated by reason of the previous dealings. Held: there was no consistent course of dealing by which the clause could have been incorporated. Lords Pearce, Hodson and Guest considered that this was because the pattern of dealings was inconsistent; the past dealings had all involved written terms (incorporation via signing the risk note), whereas this contract was entirely oral. Lord Reid considered that there was no need for the present transaction to be consistent in this sense with the previous transactions. However, it was inconsistent because on some occasions McSporran had been asked to sign the risk note and on others he had not.

LORD REID: . . . The only other ground on which it would seem possible to import these conditions is that based on a course of dealing. If two parties have made a series of similar contracts each containing certain conditions, and then they make another without expressly referring to those conditions it may be that those conditions ought to be implied. If the officious bystander had asked them whether they had intended to leave out the conditions this time, both must, as honest men, have said 'of course not'. But again the facts here will not support that ground. According to Mr McSporran, there had been no consistent course of dealing; sometimes he was asked to sign and sometimes not. And, moreover, he did not know what the conditions were. This time he was offered an oral contract without any reference to conditions, and he accepted the offer in good faith. . . .

The judicial task is not to discover the actual intentions of each party: it is to decide what each was reasonably entitled to conclude from the attitude of the other. [Gloag: *Law of Contract*]

In this case I do not think that either party was reasonably bound or entitled to conclude from the attitude of the other as known to him that these conditions were intended by the other party to be part of this contract.

Notes

1. The reasoning of Lord Reid has been accepted as correct. The approach taken by Lords Pearce, Hodson and Guest has been criticised as taking 'consistency too far'.

2. It is very difficult to establish a consistent course of dealing where the terms in question are being relied upon as against a consumer. In *Hollier* v *Rambler Motors (AMC) Ltd* [1972] 2 QB 71 (page 304), the plaintiff (consumer) had had his car repaired at the defendants' garage on three or four occasions over a 5 year period. On at least two of these occasions he had signed a form containing an exemption clause which he had not read. The Court of Appeal held that this was not a sufficient course of dealing for the clause to be incorporated.

Hollier v *Rambler Motors* can be contrasted with the decision in the following case.

Henry Kendall & Sons v *William Lillico & Sons Ltd*

(Appeals from *Hardwick Game Farm* v *Suffolk Agricultural Poultry Producers Association)*

[1969] 2 AC 31 (HL)

The sellers had sold goods to the buyers under an oral contract. The next day the sellers had sent the buyers a 'sold note' containing a clause stating that the buyer took responsibility for latent defects in the goods. There had been three or four transactions a month between the parties over a three-year period using the same 'note', although the buyers never read the clause. Held: the clause did not cover the breach. However, *obiter*, it was found to have been validly incorporated by a consistent course of dealing (the buyers had received well over 100 sold notes containing the condition). *McCutcheon* v *David MacBrayne* was distinguished on the ground that in both past and present transactions in *Kendall* v *Lillico*, the same document had been sent.

Note

In *Hollier* v *Rambler Motors*, Salmon LJ had distinguished *Kendall* v *Lillico* with the following comment:

That case is obviously very different from the present case. The *Hardwick Game Farm* case seems to be a typical case where a consistent course of dealing between the parties makes it imperative for the court to read into the contract the condition for which the sellers were contending. Everything that the buyer had done, or failed to do, would have convinced any ordinary seller that the buyer was agreeing to the terms in question. The fact that the buyer had not read the term is beside the point. The seller could not be expected to know that the buyer had not troubled to acquaint himself

with what was written in the form that had been sent to him so often, year in and year out during the previous three years, in transactions exactly the same as the transaction then in question.

C: COMMON UNDERSTANDING OF THE PARTIES

British Crane Hire Corporation v *Ipswich Plant Hire Ltd* [1974] 1 All ER 1059 (CA)

Both the plaintiffs and the defendants hired out heavy earth-moving equipment. The defendants hired a dragline crane by telephone from the plaintiffs. After delivery the plaintiffs sent the defendants a printed form setting out the conditions of hire, which were similar to those used by all plant-hiring firms and which stated that the defendants were liable to indemnify the plaintiffs against all expenses in connection with the use of the crane. Before this form was signed by the defendants, the crane sank in marshy ground. The plaintiffs sought to recover the cost of the crane, and the defendants claimed that the conditions had not been incorporated. Held: the defendants knew that printed conditions in similar terms to the plaintiffs' were in common use in the business, and the plaintiffs were therefore entitled to conclude that the defendants were accepting the crane on the terms in their conditions.

LORD DENNING MR: In support of the course of dealing, the plaintiffs relied on two previous transactions in which the defendants had hired cranes from the plaintiffs. One was 20th February 1969; and the other 6th October 1969. Each was on a printed form which set out the hiring of a crane, the price, the site, and so forth; and also the setting out the conditions the same as those here. There were thus only two transactions many months before and they were not known to the defendants' manager who ordered this crane. In the circumstances I doubt whether those two would be sufficient to show a course of dealing.

In *Hollier* v *Rambler Motors (AMC) Ltd* [1972] 2 QB 71 Salmon LJ said he knew of no case—

> in which it has been decided or even argued that a term could be implied into an oral contract on the strength of a course of dealing (if it can be so called) which consisted at the most of three or four transactions over a period of five years.

That was a case of a private individual who had had his car repaired by the defendants and had signed forms with conditions on three or four occasions. The plaintiff there was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated.

But here the parties were both in the trade and were of equal bargaining power. Each was a firm of plant hirers who hired out plant. The defendants themselves knew that firms in the plant-hiring trade always imposed conditions in regard to the hiring of plant; and that their conditions were on much the same lines. The defendants' manager, Mr Turner (who knew the crane), was asked about it. He agreed that he had seen these conditions or similar ones in regard to the hiring of plant. He said that most of them were, to one extent or another, variations of a form which he called 'the Contractors' Plant Association form'. The defendants themselves (when they let out

cranes) used the conditions of that form. The conditions on the plaintiffs' form were in rather different words, but nevertheless to much the same effect. . . .

From that evidence it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that, if the crane sank in soft ground, it was the hirer's job to recover it; and that there was an indemnity clause. In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions.

. . . It seems to me that, in view of the relationship of the parties, when the defendants requested this crane urgently and it was supplied at once — before the usual form was received — the plaintiffs were entitled to conclude that the defendants were accepting it on the terms of the plaintiffs' own printed conditions — which would follow in a day or two. It is just as if the plaintiffs had said, 'We will supply it on our usual conditions', and the defendants said, 'Of course, that is quite understood'.

Questions

1. Considerable stress was put on the fact that this was not a case involving business reliance on a clause against a consumer. The knowledge of business practice required to establish common understanding is far more likely to be held by a businessman than a consumer.

This case is said to turn on the fact that the parties were 'of equal bargaining power'. However, is the crucial point that they were both in the same business, since only on that basis could such common knowledge of terms used in the business be attributed?

2. In *Grogan* v *Robin Meredith Plant Hire* [1996] CLC 1127, page 252, the judge at first instance had disputed the conclusion that the Contractors' Plant Association conditions were common knowledge within the industry. Was it important that the parties in *Grogan* were not in exactly the same business? (Triact were a civil engineering company laying pipes and Meredith were in the plant hire business.)

SECTION 4: IMPLIED TERMS

See Phang 'Implied Terms Revisited' [1990] JBL 394.

A: TERMS IMPLIED AT COMMON LAW BY THE COURTS

Liverpool City Council v *Irwin*
[1977] AC 239 (HL)

A local authority owned the tower block in which the appellants lived. The tenancy agreement contained a list of obligations imposed on the tenants and made no mention of any obligations imposed on the landlords. The appellants withheld their rent as a protest against conditions in the block. The local authority sought possession, and the appellants counterclaimed

for nominal damages alleging that the local authority were in breach of their duty to repair and maintain the common parts of the building. They alleged that the lifts did not work, that the lighting on the stairs was inadequate and that the rubbish chutes were blocked. The question was whether there was any implied duty to this effect in the absence of any express provision. Held: the nature of the contract required a term to be implied that there was an obligation to take reasonable care to keep the common parts in reasonable repair and in use. However, on the facts the local authority had taken reasonable care in the circumstances and there was no breach. The House of Lords expressly rejected the suggestion of Lord Denning in the Court of Appeal that a term could be implied if it was reasonable.

LORD WILBERFORCE: . . . [T]here are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where this is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work — this is the case, if not of *The Moorcock* (1889) 14 PD 64 itself on its facts, at least of the doctrine of *The Moorcock* as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test — though the degree of strictness seems to vary with the current legal trend — and I think that they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning MR favours, or at least did favour in this case, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority.

The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade on a continuous spectrum. The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied.

What then should this contract be held to be? There must first be implied a letting, that is, a grant of the right of exclusive possession to the tenants. With this there must, I would suppose, be implied a covenant for quiet enjoyment, as a necessary incident of the letting. The difficulty begins when we consider the common parts. We start with the fact that the demise is useless unless access is obtained by the staircase; we can add that, having regard to the height of the block, and the family nature of the dwellings, the demise would be useless without a lift service; we can continue that, there being rubbish chutes built into the structures and no other means of disposing of light rubbish, there must be a right to use the chutes. The question to be answered — and it is the only question in this case — is what is to be the legal relationship between landlord and tenant as regards these matters.

There can be no doubt that there must be implied (i) an easement for the tenants and their licensees to use the stairs, (ii) a right in the nature of an easement to use the lifts, (iii) an easement to use the rubbish chutes.

But are these easements to be accompanied by any obligation upon the landlord, and what obligation? There seem to be two alternatives. The first, for which the council contends, is for an easement coupled with no legal obligation, except such as

may arise under the Occupiers' Liability Act 1957 as regards the safety of those using the facilities, and possibly such other liability as might exist under the ordinary law of tort. The alternative is for easements coupled with some obligation on the part of the landlords as regards the maintenance of the subject of them, so that they are available for use.

My Lords, in order to be able to choose between these, it is necessary to define what test is to be applied, and I do not find this difficult. In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more, no less: a test, in other words, of necessity. The relationship accepted by the corporation is that of landlord and tenant: the tenant accepts obligations accordingly, in relation inter alia to the stairs, the lifts and the chutes. All these are not just facilities, or conveniences provided at discretion: they are essentials of the tenancy without which life in the dwellings, as a tenant, is not possible. To leave the landlord free of contractual obligation as regards these matters, and subject only to administrative or political pressure, is, in my opinion, inconsistent totally with the nature of this relationship. The subject matter of the lease (high rise blocks) and the relationship created by the tenancy demand of their nature some contractual obligation . . .

I do not think that this approach involves any innovation as regards the law of contract. The necessity to have regard to the inherent nature of a contract and of the relationship thereby established was stated in this House in *Lister* v *Romford Ice and Cold Storage Co. Ltd* [1957] AC 555. That was a case between master and servant and of a search for an 'implied term.' Viscount Simonds, at p. 579, makes a clear distinction between a search for an implied term such as might be necessary to give 'business efficacy' to the particular contract and a search, based on wider considerations, for such a term as the nature of the contract might call for, or as a legal incident of this kind of contract. If the search were for the former, he says, '. . . I should lose myself in the attempt to formulate it with the necessary precision.' (p. 576.) We see an echo of this in the present case, when the majority in the Court of Appeal, considering a 'business efficacy term' — i.e., a '*Moorcock*' term (*The Moorcock*, 14 PD 64) — found themselves faced with five alternative terms and therefore rejected all of them. But that is not, in my opinion, the end, or indeed the object, of the search. . . .

It remains to define the standard. My Lords, if, as I think, the test of the existence of the term is necessity the standard must surely not exceed what is necessary having regard to the circumstances. To imply an absolute obligation to repair would go beyond what is a necessary legal incident and would indeed be unreasonable. An obligation to take reasonable care to keep in reasonable repair and usability is what fits the requirements of the case. Such a definition involves — and I think rightly — recognition that the tenants themselves have their responsibilities. What it is reasonable to expect of a landlord has a clear relation to what a reasonable set of tenants should do for themselves.

. . . it has not been shown in this case that there was any breach of [the] obligation. . . .

My Lords, it will be seen that I have reached exactly the same conclusion as that of Lord Denning MR, with most of whose thinking I respectfully agree. I must only differ from the passage in which, more adventurously, he suggests that the courts have power to introduce into contracts any terms they think reasonable or to anticipate legislative recommendations of the Law Commission. A just result can be reached, if I am right, by a less dangerous route.

Notes

1. Lord Denning in *Shell UK Ltd* v *Lostock Garage Ltd* [1977] 1 All ER 481 (page 263), explained this decision:

As I read the speeches, there are two broad categories of implied terms.

(i) The first category
The first category comprehends all those relationships which are of common occurrence, such as the relationship of seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contractor for building works, and so forth. In all those relationships the courts have imposed obligations on one party or the other, saying they are implied terms. These obligations are not founded on the intention of the parties, actual or presumed, but on more general considerations: see *Luxor (Eastbourne) Ltd* v *Cooper* [1941] AC 108 per Lord Wright; *Lister* v *Romford Ice and Cold Storage Co* [1957] AC 555 per Viscount Simonds and Lord Tucker (both of whom give interesting illustrations); *Liverpool City Council* v *Irwin* [1976] 2 All ER 39 per Lord Cross of Chelsea and Lord Edmund-Davies. In such relationships the problem is not solved by asking: what did the parties intend? or, would they have unhesitatingly agreed to it, if asked? It is to be solved by asking: has 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 (see per Lord Cross of Chelsea) and then say what the obligation shall be. The House in *Liverpool City Council* v *Irwin* went through that very process. They examined the existing law of landlord and tenant, in particular that relating to easements, to see if it contained the solution to the problem; and, having found that it did not, they imposed an obligation on the landlord to use reasonable care. In these relationships the parties can exclude or modify the obligation by express words, but unless they do so, the obligation is a legal incident of the relationship which is attached by the law itself and not by reason of any implied term. . . .

(ii) The second category
The second category comprehends those cases which are not within the first category. These are cases, not of common occurrence, in which from the particular circumstances a term is to be implied. In these cases the implication is based on an intention imputed to the parties from their actual circumstances: see *Luxor (Eastbourne) Ltd* v *Cooper* [1941] AC 108 per Lord Wright. Such an imputation is only to be made when it is necessary to imply a term to give efficacy to the contract and make it a workable agreement in such manner as the parties would clearly have done if they had applied their mind to the contingency which has arisen. These are the 'officious bystander' type of case: see *Lister* v *Romford Ice & Cold Storage Co* [1957] AC 555 per Lord Tucker. In such cases a term is not to be implied on the ground that it would be reasonable, but only when it is necessary and can be formulated with a sufficient degree of precision.

There are two categories of terms implied by the courts: First, a term can be implied if it is a necessary incident of this type of contract. (Treitel, *The Law of Contract*, refers to this as 'terms implied in law'.) Such a term is implied into all contracts of a particular type as a matter of policy rather than because that is what the parties intended. Such a term must be a reasonable one to imply. Secondly, a term can be implied on a 'one off' basis because it is necessary to give business efficacy to the particular contract. (Treitel refers to this as 'terms implied in fact'.) The implication of this type of term is based on what the parties must have intended. The test was first formulated by Scrutton LJ in *Reigate* v *Union Manufacturing Co.* [1918] 1 KB 592, at p. 605:

A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' . . .

In *Scally* v *Southern Health and Social Services Board* [1991] 4 All ER 563, Lord Bridge stated that:

A clear distinction is drawn in the speeches of Viscount Simonds in *Lister* v *Romford Ice and Cold Storage Co. Ltd* [1957] 1 All ER 125 at 132-133, [1957] AC 555 at 576 and Lord Wilberforce in *Liverpool City Council* v *Irwin* [1976] 2 All ER 39 at 44, [1977] AC 239 at 255 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. . . .

2. *Liverpool City Council* v *Irwin* is an example of a term implied in law into all contracts of a particular type because it is necessary. Another example is *Scally* v *Southern Health and Social Services Board.*

In this category of implication of a term, the term must be a reasonable one to imply as well as being necessary in this type of contract. However, a term cannot be implied simply on the basis that it is reasonable. As Lord Bridge stated in *Scally* v *Southern Health and Social Services Board,* 'I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness'.

3. Terms implied in fact can only be applied if both parties would have considered it to be necessary.

Shell UK Ltd v *Lostock Garage Ltd*
[1977] 1 All ER 481 (CA)

Lostock operated a 'tied' garage (it could sell only petrol supplied by Shell). In December 1975, a petrol price 'war' began, and in Lostock's neighbourhood, two garages which were not tied to Shell reduced their petrol price. As a result Shell introduced a support scheme, whereby it subsidised two Shell garages in that neighbourhood so that they could compete. Lostock's garage was excluded from the support scheme and was forced to trade at a loss. Lostock obtained petrol from another supplier. Shell brought an action seeking damages for breach of contract and an injunction against Lostock. Lostock argued, *inter alia,* that the agreement was subject to an implied obligation placed upon Shell not to discriminate abnormally against Lostock in favour of competing and neighbouring garages so as to render Lostock's petrol uneconomic, and that Shell were in breach of that term by operating the support scheme and excluding Lostock from it. Held: (Bridge LJ dissenting) the court refused to imply the term on the basis that it was not necessary to give efficacy to the agreement and that

such a term could not be formulated with sufficient precision. However, they held that no injunction could be issued to restrain a breach of the tie provision while the support scheme was in place.

LORD DENNING MR: Into which of the two categories does the present case come? I am tempted to say that a solus agreement between supplier and buyer is of such common occurence nowadays that it could be put into the first category; so that the law could imply a term based on general considerations. But I do not think this would be found acceptable. Nor do I think the case can be brought within the second category. If Shell had been asked at the beginning: 'Will you agree not to discriminate abnormally against the buyer' I think they would have declined. It might be a reasonable term, but it is not a necessary term. Nor can it be formulated with sufficient precision. . . .

In the circumstances, I do not think any term can be implied.

Note

In *Hughes* v *Greenwich London Borough Council* [1993] 3 WLR 821, the House of Lords rejected an argument for a term implied in fact on the basis that the term in question had to be 'essential' and that there had to be a 'compelling reason' for it to be included. (See Phang [1994] JBL 255.)

The Moorcock
(1886–90) All ER Rep 530 (CA)

The defendants had contracted to allow the plaintiffs to load and unload at the defendants' wharf on the River Thames. It was known to both parties that at low tide any vessel at the wharf would be grounded but there was no express provision governing this in the contract. The plaintiffs' ship moored alongside the wharf, settled on the ground and was damaged because of the condition of the river bed. The defendants had taken no steps to ascertain the condition of the river bed. The plaintiffs brought an action for damages in respect of the damage done to the ship. The Court of Appeal implied a term whereby the defendants warranted that they had taken reasonable care to see that the berth was safe. Held: they were in breach of such term.

BOWEN LJ: . . . The question which arises in this case is whether, when a contract is made to let the use of this jetty to a ship which can only use it, as is known to both parties, by her taking the ground, there is any implied warranty on the part of the wharfingers, and if so what is the extent of that warranty.

An implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in every instance founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which 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 of the parties. I believe that if one were to take all the instances, which are many, of implied warranties and covenants in law which occur in the earlier cases which deal with real property, passing through the instances which relate to the warranties of title and of quality, and the cases of executory contracts of sale and other classes of implied warranties like the implied authority of an agent to make contracts, it will be seen that

in all these cases 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 it should have. If that is so, the reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from all the burdens, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for.

What did each party in the present case know? because, if we are examining into their presumed intention, we must examine into their minds as to what the transaction was. Both parties knew that the jetty was let for the purpose of profit, and knew that it could only be used by the ship taking the ground and lying on the ground. They must have known that it was by grounding that she would use the jetty. They must have known, both of them, that unless the ground was safe the ship would be simply buying an opportunity of danger and buying no convenience at all, and that all consideration would fail unless the ground was safe. In fact, the business of the jetty could not be carried on unless, I do not say the ground was safe, it was supposed to be safe. The master and crew of the ship could know nothing, whereas the defendants or their servants might, by exercising reasonable care, know everything. The defendants or their servants were on the spot at high and low tide, morning and evening. They must know what had happened to the ships that had used the jetty before, and with the slightest trouble they could satisfy themselves in case of doubt whether the berth was or not safe. The ship's officers, on the other hand, had no means of verifying the state of the berth, because, for aught I know, it might be occupied by another ship at the time the *Moorcock* got there.

The question is how much of the peril or the safety of this berth is it necessary to assume in order to get the minimum of efficacy to the business consideration of the transaction which the ship consented to bear, and which the defendants took upon themselves. Supposing that the berth had been actually under the control of the defendants, they could, of course, have repaired it and made it fit for the purpose of loading and unloading. . . . The berth here was not under the actual control of the defendants. The berth is in the bed of the river, and it may be said that those owning the jetty have no duty cast upon them by statute or common law to repair the bed of the river, and that they have no power to interfere with it except with the licence of the conservators. . . .

. . . [I]t may well be said that the law will not imply that the defendants, who had not control of the place, ought to have taken reasonable care to make the berth good, but it does not follow that they are relieved from all responsibility, a responsibility which depends not merely on the control of the place, which is one element as to which the law implies a duty, but on other circumstances. The defendants are on the spot. They must know the jetty cannot be safely used unless reasonable care is taken. No one can tell whether reasonable safety has been secured except themselves, and I think that, if they let out their jetty for use, they at all events imply that they have taken reasonable care to see that the berth, which is the essential part of the use of the jetty, is safe, and, if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so. . . .

Notes

1. It appears that the decision is based upon the term being one implied in fact, based on the presumed intentions of the parties to give business efficacy

to the contract. It concerns only this transaction and was a term implied on a 'one off' basis. The fact that there are references to reasonableness relates, with one exception, to the nature of the obligation imposed, and should not obscure the fact that the term was imposed in fact.

2. The decision in the next case confirms that a term cannot be implied if it will be incompatible with an express term in the contract.

Johnstone v *Bloomsbury Health Authority*
[1991] 2 All ER 293 (CA)

The plaintiff, a junior hospital doctor, contracted to work for 40 hours a week for the health authority. It was an express term of this contract that the doctor would also be available on call for up to an average of a further 48 hours a week. The doctor claimed that he should not be required to work in excess of 72 hours a week, since this damaged his health and meant that the health authority would be in breach of their implied duty to take reasonable care not to injure his health. The majority of the Court of Appeal (Leggatt LJ dissenting) concluded that this express term did not preclude the implication by law of the suggested implied term, since the health authority had a discretion over how many hours on call were required and they were not bound to call the doctor for the full 48 hours. This discretion had to be exercised so as not foreseeably to injure the doctor's health.

B: TERMS IMPLIED BY STATUTE

(a) Terms implied into a contract for the sale of goods

Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994)

12. Implied terms about title, etc.

(1) In a contract of sale, . . . there is an implied term 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.

(2) In a contract of sale there is also an implied term 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.

. . .

(5A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition and the terms implied by subsections (2) . . . above are warranties.

13. Sale by description

(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.

14. Implied terms about quality or fitness

(1) Except as provided by this section and section 15 below and subject to any other enactment, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale.

(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

(2A) For the purposes of this Act, 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 the other relevant circumstances.

(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,

(b) appearance and finish,

(c) freedom from minor defects,

(d) safety, and

(e) durability.

(2C) The term implied by subsection (2) above does not extend to any matter making the quality of goods unsatisfactory—

(a) which is specifically drawn to the buyer's attention before the contract is made,

(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal, or

(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

(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 term 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.

. . .

(6) As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions.

15. Sale by sample

(1) A contract of sale is a contract for sale by sample where there is an express or implied term to that effect in the contract.

(2) In the case of a contract for sale by sample there is an implied term—

(a) that the bulk will correspond with the sample in quality;

(b) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

(3) As regards England and Wales and Northern Ireland, the term implied by subsection (2) above is a condition.

(b) Terms implied into contracts of hire-purchase

A contract of hire-purchase is defined at page 65. See the Supply of Goods (Implied Terms) Act 1973, ss. 8–11, as amended by sch. 2, s. 4 of the Sale and Supply of Goods Act 1994.

(c) Terms implied into contracts for work and materials in relation to the materials supplied

These are contracts which primarily relate to the provision of work but under which goods are also supplied, e.g., car repairs, building contracts.

The Supply of Goods and Services Act 1982, ss. 2–5 (as amended by sch. 2, s. 6(3) and (4) of the Sale and Supply of Goods Act 1994) relating to the materials supplied, are in similar terms to the above provisions.

(d) Terms implied into hire contracts

These are contracts where the hirer gains possession but not ownership. See Supply of Goods and Services Act 1982, ss. 7–10 as amended by sch. 2, s. 6(7) and (8) of the Sale and Supply of Goods Act 1994.

(e) Terms implied into contracts for the supply of a service

These are contracts whereby a supplier agrees to carry out a service. In a contract for work and materials the service element will be combined with a transfer of property in goods (see (c) above for implied obligations in relation to the materials supplied).

For implied obligations relating to contracts for the supply of a service, see the Supply of Goods and Services Act 1982, ss. 13–15 (s. 13 appears at page 347 and s. 15 at page 72 of this casebook).

SECTION 5: TYPES OF CONTRACTUAL TERMS

See Brownsword, 'Retrieving Reasons, Retrieving Rationality? A New Look at the Right to Withdraw for Breach of Contract' (1992) 5 JCL 83.

The traditional distinction is between two types of contractual terms: conditions and warranties. A condition is an important term 'going to the root of the contract'; a warranty is a less important term not going to the substance of the contract, the breach of which can be compensated for adequately by the payment of money.

As a general principle a breach of a condition gives the innocent party the option of either terminating the performance of the contract and obtaining damages for his loss caused by the breach, or affirming the contract and recovering damages for the breach. However, if a warranty is broken, it gives rise only to a right for the innocent party to claim damages, and both parties must continue to perform their obligations under the contract.

A: IS THE TERM A CONDITION?

Does statute classify the term? See, for example, the Sale of Goods Act 1979, ss. 12–15. However, note new s. 15A of the Sale of Goods Act 1979, introduced by s. 4 of the Sale and Supply of Goods Act 1994, which applies to breaches of ss. 13, 14 or 15 of the Sale of Goods Act 1979 where the buyer does *not* deal as consumer.

Sale of Goods Act 1979 (as amended by the Sale and Supply of Goods Act 1994)

15A.

(1) Where in the case of a contract of sale —

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

(b) the breach is so slight that it would be unreasonable for him to reject them,

then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

(2) This section applies unless a contrary intention appears in, or is to be implied from, the contract.

(3) It is for the seller to show that a breach fell within subsection (1)(b) above.

Notes

1. See also the Supply of Goods (Implied Terms) Act 1973, s. 11A (as amended), the Supply of Goods and Services Act 1982, ss. 5A and 10A (as amended).

2. This will inevitably lead to uncertainty in individual cases over whether the breach of a condition will be treated as giving rise to the right to reject in relation to ss. 13–15 breaches in a non-consumer contract. The consequences normally attributed to a breach of condition will not now automatically follow.

While flexibility may be no bad thing, this provision does not assist the clarity of the law in this area. Significantly, even if the breach is so slight that it would be unreasonable for the non-consumer buyer to reject, it does not necessarily follow that the only remedy will be damages because the section is drafted so as to give the court a discretion. Section 15A(1) provides that although the breach is not to be treated as a breach of condition (with an automatic right to reject), it 'may be treated as a breach of warranty' (damages only).

3. Section 15A(2), however, provides for the uncertainty to be excluded by the terms of the contract, for example, by including an express provision that there is to be a right to reject.

Question

Does this change amount to no more than an extension of the *de minimis* principle in *Arcos Ltd* v *Ronaasen & Son* [1933] AC 470?

Have the parties classified the term? If they have, does it operate as a condition?

Lombard North Central plc v *Butterworth* [1987] 1 All ER 267 (CA)

The plaintiffs leased a computer to the defendant. Clause 2(a) of the agreement made punctual payment of each instalment of hire *of the essence* of the agreement, and under clause 5 failure to make due and punctual payment entitled the plaintiffs to terminate the agreement. The defendant was late in paying the third, fourth and fifth instalments, and when the sixth instalment was six weeks overdue the plaintiffs terminated the agreement and sought damages for breach of contract. The Court of Appeal stressed that the parties were free to classify the relative importance of the terms of their contract. Held: clause 2(a) made prompt payment a condition of the contract, so that if any payment was not made on time there was a breach of the agreement entitling the plaintiffs to terminate the contract and recover damages for the loss of the transaction, even though the breach itself was not regarded as giving rise to serious consequences.

MUSTILL LJ: The reason why I am impelled to hold that the plaintiffs' contentions are well-founded can most conveniently be set out in a series of propositions. (1) Where a breach goes to the root of the contract, the injured party may elect to put an end to the contract. Thereupon both sides are relieved from those obligations which remain unperformed. (2) If he does so elect, the injured party is entitled to compensation for (a) any breaches which occurred before the contract was terminated and (b) the loss of his opportunity to receive performance of the promisor's outstanding obligations. (3) Certain categories of obligation, often called conditions, have the property that any breach of them is treated as going to the root of the contract. On the occurrence of any breach of condition, the injured party can elect to terminate and claim damages, whatever the gravity of the breach. (4) It is possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision. (5) A stipulation that time is of the essence, in relation to a particular contractual term, denotes that timely performance is a condition of the contract. The consequence is that delay in performance is treated as going to the root of the contract, without regard to the magnitude of the breach. (6) It follows that where a promisor fails to give timely performance of an obligation in respect of which time is expressly stated to be of the essence, the injured party may elect to terminate and recover damages in respect of the promisor's outstanding obligations, without regard to the magnitude of the breach . . .

Notes

1. See Bojczuk, 'When is a condition not a condition?' [1987] JBL 353.

2. Diplock LJ in *Hong Kong Fir* v *Kawasaki* (page 276), and Lord Wilberforce in *Bunge Corporation* v *Tradax SA* (page 280) also indicated that the parties were free to make a particular term a condition. *Lombard* v *Butterworth* appears to have provided a simple formulation to achieve this. It can also be achieved by expressly stipulating that the remedy is to be the right to terminate (or reject the goods). See Ormrod LJ in *The Hansa Nord*, page 283.

3. However, in the next case, the House of Lords considered that a term described as a 'condition' could not have been intended by the parties to have this effect.

L. Schuler AG v Wickman Machine Tool Sales
[1974] AC 235 (HL)

Wickman, the English company, were given the sole selling rights for the German company's panel presses for four and a half years. Clause 7(b) of the distributorship contract provided that 'It shall be [a] condition of the agreement that (i) [Wickman] shall send its representative to visit (the six largest UK motor manufacturers) at least once in every week' to solicit orders. Wickman failed to make a number of these visits and Schuler terminated the agreement under clause 11(a) on the basis that Wickman had committed a material breach of its obligations which it had failed to remedy within 60 days of being required in writing to do so. Wickman claimed damages for wrongful repudiation. Held: (Lord Wilberforce dissenting) clause 7(b) was not a condition in the sense that a single breach, however trivial, would entitle the innocent party to terminate the contract.

LORD REID: Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect. Blackburn J said in *Bettini* v *Gye* (1876) 1 QBD 183, 187: 'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; . . .'

In the present case it is not contended that Wickman's failures to make visits amounted in themselves to fundamental breaches. What is contended is that the terms of clause 7 'sufficiently express an intention' to make any breach, however small, of the obligation to make visits a condition so that any breach shall entitle Schuler to rescind the whole contract if they so desire.

Schuler maintains that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word 'condition' is an indication — even a strong indication — of such an intention but it is by no means conclusive.

The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Clause 7(b) requires that over a long period each of the six firms shall be visited every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week. And it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular week. So if the parties gave any thought to the matter at all they must have realised the probability that in a

few cases out of the 1,400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right, failure to make even one visit entitle them to terminate the contract however blameless Wickman might be.

This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation. . . . If I have to construe clause 7 standing by itself then I do find difficulty in reaching any other interpretation. But if clause 7 must be read with clause 11 the difficulty disappears. The word 'condition' would make any breach of clause 7(b), however excusable, a material breach. That would then entitle Schuler to give notice under clause 11(a)(i) requiring the breach to be remedied. There would be no point in giving such a notice if Wickman were clearly not in fault but if it were given Wickman would have no difficulty in showing that the breach had been remedied. If Wickman were at fault then on receiving such a notice they would have to amend their system so that they could show that the breach had been remedied. If they did not do that within the period of the notice then Schuler would be entitled to rescind.

In my view, that is a possible and reasonable construction of the contract and I would therefore adopt it. The contract is so obscure that I can have no confidence that this is its true meaning but for the reasons which I have given I think that it is the preferable construction. It follows that Schuler was not entitled to rescind the contract as it purported to do. . . .

Notes

1. Lord Wilberforce (dissenting) was of the opinion that it was clearly a condition because that was the word that the parties had used. He also stressed that if it was not a condition, then Schuler would find themselves in breach, having wrongfully repudiated.

2. The majority of the House of Lords, in interpreting what the parties intended, appears to have ignored the clear use of the word 'condition', arguably on the basis that they considered this interpretation was so unreasonable that it could not have been intended by the parties. Could the majority of the House of Lords be accused of rewriting the parties' agreement?

3. If the word 'condition' is not conclusive of the fact that a right to terminate was intended, then much uncertainty will exist over what form of wording will be effective to achieve this objective. One particular problem resulting from uncertainty is that the innocent party has to judge whether he has the right to terminate for the breach. As noted above, it may later be decided that there was no such right because it was not a breach of a condition, so that the repudiating party will have wrongfully repudiated and find himself in breach of contract.

What if the parties have not made a clear clarification?

The courts must seek to ascertain the parties' intentions by looking at the relative importance of the term in the context of the contract as a whole, to see whether it 'goes to the root of the contract' (as the majority of the House of Lords did in *Schuler* v *Wickman Machine Tool Sales*, page 271).

In *Couchman* v *Hill* [1947] KB 554 (page 237) the term was classified as a condition because the heifer being unserved was 'a substantial ingredient in

the identity of the thing sold'. A similar principle can be seen in *Bannerman* v *White* (1861) 10 CB NS 844 (page 237) since if the term was so important to the buyer that he would not have purchased without it, it is more likely to be construed as a condition.

In *Barber* v *NWS Bank plc* [1996] 1 All ER 906, the Court of Appeal held that in a conditional sale agreement for the purchase of a car, whereby the property in the car remained vested in the finance company until the hirer had paid the balance and all sums owing, it was a condition that the finance company was the owner of the car at the date of the agreement. The Court of Appeal ruled out the possibility that such a term was innominate (see page 276) because it was clearly fundamental to the transaction and could only be broken in one way which would necessarily be serious. Sir Roger Parker stated (at p. 911) that 'This term is not one which admits of different breaches, some of which are trivial, for which damages are an adequate remedy, and others of which are sufficiently serious to warrant rescission. There is here one breach only'.

The need for certainty has, in the main, resulted in time stipulations in mercantile contracts being classified as conditions without it having to be established that they go to the root of the contract. Where the term is used in a standard form, subsequent parties can rely on it and know in advance what the remedies for breach will be.

Maredelanto Compania Naviera SA v *Bergbau-Handel GmbH, The Mihalis Angelos*
[1971] 1 QB 164 (CA)

By a charterparty dated 25 May 1965, the *Mihalis Angelos* was chartered to proceed to Haiphong and load a cargo there. The charterparty described the vessel as 'expected ready to load under this charter about 1 July 1965'. On 23 June, the vessel arrived at Hong Kong to discharge a cargo from the previous voyage, and was still there on 17 July 1965 when the charterers purported to cancel the charterparty. They did so on the grounds of *force majeure* (page 443) because there was no cargo at Haiphong due to conditions of war. The owners accepted this action as a repudiation of the contract and claimed damages for their loss of profit. The arbitrator had found that there were no grounds to terminate for *force majeure*, so the question was whether the charterers nevertheless had the right to terminate. Held: the expected readiness to load clause was a condition which the owners had broken, since on 25 May, when the contract was made, they could not reasonably have expected that the ship would be ready to load in Haiphong on 1 July. Therefore, the charterers did have the right to terminate on 17 July.

MEGAW LJ: In my judgment, such a term in a charterparty ought to be regarded as being a condition of the contract, in the old sense of the word 'condition': that is, that when it has been broken, the other party can, if he wishes, by intimation to the party

in breach, elect to be released from performance of his further obligations under the contract; and he can validly do so without having to establish that on the facts of the particular case the breach has produced serious consequences which can be treated as 'going to the root of the contract' or as being 'fundamental,' or whatever other metaphor may be thought appropriate for a frustration case. . . .

. . . One of the essential elements of law is some measure of uniformity. One of the important elements of the law is predictability. At any rate in commercial law, there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship: for example, as here, the legal categorisation of a particular, definable type of contractual clause in common use. It is surely much better, both for shipowners and charterers (and, incidentally, for their advisers), when a contractual obligation of this nature is under consideration, and still more when they are faced with the necessity for an urgent decision as to the effects of a suspected breach of it, to be able to say categorically: 'If a breach is proved, then the charterer can put an end to the contract,' rather than that they should be left to ponder whether or not the courts would be likely, in the particular case, when the evidence has been heard, to decide that in the particular circumstances the breach was or was not such as 'to go to the root of the contract.' Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle.

Notes

1. The need for commercial certainty (and efficiency) was stressed by the House of Lords in *Compagnie Commerciale Sucres et Denrées* v *C. Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, in the context of a readiness to load clause in a mercantile contract which was construed as a condition. See also *Bunge Corporation* v *Tradax SA*, page 280.

2. The drawback with this approach is that once a term is classified as a condition it will always give rise to a right to terminate if it is broken, even if the particular breach causes little or no damage. The *Mihalis Angelos* illustrates how a party can escape from a contract which he will not be able to perform or which has become more expensive, simply on the ground that the other party has committed a breach of a condition.

3. The House of Lords has, however, stated that timely redelivery of a vessel at the end of a time charterparty is not a condition but an innominate term, despite the fact that it is essentially a time stipulation in a mercantile contract.

Torvald Klaveness A/S v *Arni Maritime Corp, The Gregos*
[1994] 4 All ER 998 (HL)

Under the terms of the time charterparty the last date for redelivery of the vessel by the charterers to the owners was 18 March 1988. On 9 February, the charterers ordered the vessel from Matanzas in Venezuela to the port of Palua in order to load a cargo for delivery to Fos in Italy prior to redelivery to the owners by 18 March. The order of readiness to load in Palua was given on 25 February, but the Orinoco River was blocked by another vessel so that the owners considered that if a cargo was loaded the vessel would not be redelivered in time. They therefore requested fresh orders from the charterers but the charterers refused.

The owners claimed that the order was therefore a repudiatory breach and accepted it as terminating the contract. Held: The charterers had committed a repudiatory breach. The majority (Lord Mustill, with whom Lords Ackner, Slynn and Woolf agreed) held that the obligation to redeliver on time was innominate, so that the issuing of the order for the voyage did not in itself constitute a repudiatory breach, but that the charterers' persistence in the order which had become illegitimate amounted to a renunciation of the contract, i.e. a repudiatory breach. However, Lord Templeman considered that the obligation to redeliver at the end of a time charter is of the essence of the contract, and that since the charterers had given an order which would prevent the vessel being redelivered on time, the owners could accept that repudiatory breach as terminating the contract.

LORD MUSTILL: . . . I find it hard to accept that timely redelivery is a condition of the contract. The classification of an obligation as a condition or an 'innominate' term is largely determined by its practical importance in the scheme of the contract, and this is not easily judged in relation to the obligation to redeliver, since the occasions for the cancellation of a charter on the ground of a few days' delay at the end of the chartered service are likely to be few. If the ship is laden when the final date arrives the shipowner will often have obligations to third party consignees which make it impossible for him to cut short the voyage, quite apart from the improbability that he will go to the trouble and expense of arranging for the discharge and receipt of the cargo at an alternative destination, just to save a few days' delay. These problems will not arise if the vessel is ballasting to the redelivery port, but even if the shipowner really wants the vessel back on time, rather than a few days late, he will not usually need to have recourse to a cancellation, since the charterer will have no motive to keep the charter in being, with its obligation to pay hire for an empty ship. Even acknowledging the importance given in recent years to time clauses in mercantile contracts (see e.g. *Bunge Corp* v *Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711 and *Cie Commerciale Sucres et Denrées* v *C Czarnikow Ltd* [1990] 3 All ER 641, [1990] 1 WLR 1337). I would incline to the view that this particular obligation is 'innominate' and that a short delay in redelivery would not justify the termination of the contract.

LORD TEMPLEMAN: My Lords, in a time charter the time for redelivery of the vessel by the charterer to the owner at the end of the charter is of the essence of the contract, absent any provision in the contract to the contrary. If the charterer in the course of the charterparty evinces an intention not to redeliver the vessel by the date or last date fixed for redelivery, the charterer will evince an intention no longer to be bound by the contract and will thus repudiate the contract. The owner may ignore the repudiation and claim damages resulting from breach of contract by any late delivery or accept the repudiation, withdraw the vessel from the control of the charterer and claim damages resulting from repudiation.

. . .

There was a good deal of discussion about legitimate and illegitimate last voyages, but to my mind this appeal falls to be determined by the application of elementary principles of contract. The charterer agrees to redeliver on time and must therefore give orders which ensure that the vessel will be redelivered on time. If the charterer gives an order which will not enable the vessel to be redelivered on time, the owner

may treat that order as a repudiatory breach of contract. If the owner complies with the order he loses his right to repudiate but is entitled to damages for any late delivery. In the present case, the crucial date was 25 February when the charterers could have given an order which would have enabled redelivery on time but insisted on an order which did not allow the vessel to be redelivered on time. The order to load at Palua on 25 February was a repudiatory breach of contract. If the Gregos had been loaded, pursuant to that order, the owners would have lost their right to repudiate but would have remained entitled to damages for late delivery. The owners accepted the repudiation and withdrew the vessel. . . .

Notes

1. This decision is indicative of the tensions in approach in this area between certainty and flexibility.

2. It may be advisable to judge the decision of the majority in the light of the background facts, namely a rising market and evidence that the owners wished to recharter at the earliest possible opportunity to take advantage of these higher rates of charter. Lord Mustill expressly commented on the dangers of concluding that this term was a condition when he stated (at p. 1009): 'My Lords, although it is well established that certain obligations under charterparties do have the character of conditions I would not for my part wish to enlarge the category unduly, given the opportunity which this provides for a party to rely on an innocuous breach as a means of escaping from an unwelcome bargain'.

3. See Girvin [1995] JBL 200.

B: MORE FLEXIBILITY AT A PRICE

Hong Kong Fir Shipping Co. Ltd v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA)

The charterers hired a ship for 24 months, 'being in every way fitted for ordinary cargo service'. The ship was delivered on 13 February 1957, and sailed that day to pick up a cargo in the United States and take it to Osaka. Because of the age of the ship's machinery it needed to be maintained by an experienced, competent, careful and adequate engine room staff. There were insufficient numbers of staff and the chief engineer was incompetent. As a result, there were many serious breakdowns in the machinery. On the voyage at sea for eight and a half weeks the ship was off hire for five weeks for repairs and, on reaching Osaka on 25 May, required 15 weeks of repairs to make her seaworthy. In June 1957, the charterers repudiated the charterparty (freight rates having fallen in the interim). There were no reasonable grounds for thinking that the ship would not be seaworthy in mid-September, and in fact she was seaworthy on 15 September, which left 17 months of the original charter period. The owners sought damages for wrongful repudiation. Held: although there was a breach of the charterparty because the ship was unseaworthy, seaworthiness was not a condition of the charterparty entitling the charterer to terminate. The delay caused

by the breakdowns and the repairs was not so great as to frustrate the commercial purpose of the charterparty.

DIPLOCK LJ: Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done? The contract may itself expressly define some of these events, as in the cancellation clause in a charterparty; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts such as sale of goods, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to bills of exchange, Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not.

The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.

This branch of the common law has reached its present stage by the normal process of historical growth, and the fallacy in [counsel for the charterers'] contention that a different test is applicable when the event occurs as a result of the default of one party from that applicable in cases of frustration where the event occurs as a result of the default of neither party lies, in my view, from a failure to view the cases in their historical context. The problem: in what event will a party to a contract be relieved of his undertaking to do that which he has agreed to do but has not yet done? has exercised the English courts for centuries . . .

Once it is appreciated that it is the event and not the fact that the event is a result of a breach of contract which relieves the party not in default of further performance of his obligations, two consequences follow. (1) The test whether the event relied upon has this consequence is the same whether the event is the result of the other party's breach of contract or not, as Devlin J pointed out in *Universal Cargo Carriers Corporation* v *Citati* [1957] 2 QB 401. (2) The question whether an event which is the result of the other party's breach of contract has this consequence cannot be answered by treating all contractual undertakings as falling into one of two separate categories: 'conditions' the breach of which gives rise to an event which relieves the party not in default of further performance of his obligations, and 'warranties' the breach of which does not give rise to such an event.

Lawyers tend to speak of this classificaton as if it were comprehensive, partly for the historical reasons which I have already mentioned and partly bcause Parliament itself

adopted it in the Sale of Goods Act, 1893, as respects a number of implied terms in contracts for the sale of goods and has in that Act used the expressions 'condition' and 'warranty' in that meaning. But it is by no means true of contractual undertakings in general at common law.

No doubt there are many simple contractual undertakings, sometimes express but more often because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition.' So too there may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a 'warranty,'

There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties,' if the late nineteenth-century meaning adopted in the Sale of Goods Act, 1893, and used by Bowen LJ in *Bentsen* v *Taylor, Sons & Co.* [1893] 2 QB 274 be given to those terms. 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 that he should obtain from the contract; and the legal consequences of a breach of such an 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.' For instance, to take Bramwell B's example in *Jackson* v *Union Marine Insurance Co. Ltd.* (1874) LR 10 CP 125 itself, breach of an undertaking by a shipowner to sail with all possible dispatch to a named port does not necessarily relieve the charterer of further performance of his obligation under the charterparty, but if the breach is so prolonged that the contemplated voyage is frustrated it does have this effect. . . .

As my brethren have already pointed out, the shipowners' undertaking to tender a seaworthy ship has, as a result of numerous decisions as to what can amount to 'unseaworthiness,' become one of the most complex of contractual undertakings. It embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself. It can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel.

Consequently the problem in this case is, in my view, neither solved nor soluble by debating whether the shipowner's express or implied undertaking to tender a seaworthy ship is a 'condition' or a 'warranty.' It is like so many other contractual terms an undertaking one breach of which may give rise to an event which relieves the charterer of further performance of his undertakings if he so elects and another breach of which may not give rise to such an event but entitle him only to monetary compensation in the form of damages. . . .

What the judge had to do in the present case, as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, and the contract itself makes no express provision as to this, was to look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charterparty and to decide whether the

occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charterparty that the charterers should obtain from the further performance of their own contractual undertakings. . . .

The question which the judge had to ask himself was, as he rightly decided, whether or not at the date when the charterers purported to rescind the contract, namely, June 6, 1957, or when the shipowners purported to accept such rescission, namely, August 8, 1957, the delay which had already occurred as a result of the incompetence of the engine-room staff, and the delay which was likely to occur in repairing the engines of the vessel and the conduct of the shipowners by that date in taking steps to remedy these two matters, were, when taken together, such as to deprive the charterers of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel under the charterparty. . . .

UPJOHN LJ: 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. Thus, to take examples from the judgments in some of the cases I have mentioned above, 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. . . .

It is open to the parties to a contract to make it clear either expressly or by necessary implication that a particular stipulation is to be regarded as a condition which goes to the root of the contract, so that it is clear that the parties contemplate that any breach of it entitles the other party at once to treat the contract as at an end. That matter has to be determined as a question of the proper interpretation of the contract. . . . Where, however, upon the true construction of the contract, the parties have not made a particular stipulation a condition, it would in my judgment be unsound and misleading to conclude that, being a warranty, damages is necessarily a sufficient remedy.

In my judgment the remedies open to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely upon the nature of the breach and its foreseeable consequences. Breaches of stipulation fall, naturally, into two classes. First there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; in that case, of course, the charterer may accept the repudiation and treat the contract as at an end. The second class of case is, of course, the more usual one and that is where, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract try he never so hard to remedy it. In that case the question to be answered is, does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

If I have correctly stated the principles, then as the stipulation as to the seaworthiness is not a condition in the strict sense the question to be answered is, did the initial unseaworthiness as found by the judge, and from which there has been no appeal, go so much to the root of the contract that the charterers were then and there entitled to

treat the charterparty as at an end? The only unseaworthiness alleged, serious though it was, was the insufficiency and incompetence of the crew, but that surely cannot be treated as going to the root of the contract for the parties must have contemplated that in such an event the crew could be changed and augmented. . . .

Notes

1. Diplock LJ suggested the introduction of a third category of term — the intermediate or innominate term. However, the approach of Upjohn LJ has more to commend it. Upjohn LJ argues that the crucial test is to see if the term is a condition, and if it is not, then it should not be assumed that the remedy for breach of this non-condition is always damages. Instead, the effects of the breach should be examined, and if they were nevertheless serious effects, then the contract could be terminated. This approach avoids the uncomfortable task of distinguishing an intermediate term from a warranty. (See Reynolds (1981) 97 LQR 541 and Treitel, *The Law of Contract*, pp. 712–16, on the question of whether there are two or three types of terms.)

2. Diplock LJ also suggested that a term would only be a condition if every breach of the particular term would deprive the innocent party of substantially the whole benefit of the contract. However, this test was rejected by the House of Lords in *Bunge Corporation* v *Tradax SA*.

Bunge Corporation v *Tradax SA*

The buyers agreed to purchase 15,000 tons of soya bean meal from the sellers. The terms of the shipment contract required three shipments of 5,000 tons each from a port in the Gulf of Mexico to be nominated by the sellers. The parties agreed that one shipment would be made in June 1975 and the buyers would provide a vessel at the nominated port. Clause 7 of the standard form stated that the buyers were to 'give at least 15 consecutive days' notice' of their probable readiness to load the vessel. In order for the goods to be shipped in June, this notice had to be given by 13 June. The notice was not given until 17 June, and the sellers claimed that the late notice was a breach of contract amounting to a repudiation of the contract. They claimed damages from the buyers on the basis that by that time the market price of the soya bean meal had fallen by over $US 60 a ton. The buyers contended that the term as to notice was an intermediate term and the effect of the breach was not sufficiently serious for the sellers to treat the contract as repudiated.

Court of Appeal
[1981] 2 All ER 513

Held: it was not an intermediate term.

MEGAW LJ: . . . Parker J was of the opinion that the term could not be a condition because of what he regarded as being 'the principles established in the *Hong Kong Fir* case' (*Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 1 All ER 474, [1962] 2 QB 26) and *The Hansa Nord, Cehave NV* v *Bremer Handelsgesellschaft mbH* [1975] 3 All ER 739, [1976] QB 44. In the latter case, Roskill LJ, while

recognising that some terms of a contract of sale may be conditions, expressed the view that 'a court should not be over ready, unless required by statute or authority so to do, to construe a term in a contract as a "condition" . . .' (see [1975] 3 All ER 739 at 755, [1976] QB 44 at 70).

The passage in the *Hong Kong Fir* case, to which Parker J referred, was that where Diplock LJ said this ([1962] 1 All ER 474 at 487, [1962] 2 QB 26 at 69):

> No doubt there are many simple contractual undertakings, sometimes express, but more often because of their very simplicity ('It goes without saying') to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a 'condition'.

If that statement is intended to be a definition of the requirements which must always be satisfied, in all types of contract and all types of clauses, in order that a term may qualify as a condition, I would very respectfully express the view that it is not a correct statement of the law. . . . I think it can fairly be said that in mercantile contracts stipulations as to time not only may be, but usually are, to be treated as being 'of the essence of the contract', even though this is not expressly stated in the words of the contract. It would follow that in a mercantile contract it cannot be predicated that, for time to be of the essence, any and every breach of the term as to time must necessarily cause the innocent party to be deprived of substantially the whole of the benefit which it was intended that he should have. . . .

In my opinion in the term with which we are concerned the provision as to time is of the essence of the contract. The term is a condition.

It is, I believe, a factor which is not without weight in that conclusion that, at least, it tends towards certainty in the law. Lord Hailsham LC has said: '. . . in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. I adhere to what I said in that respect in *Maredelanto Compania Naviera SA* v *Bergbau-Handel GmbH, The Mihalis Angelos* [1970] 3 All ER 125 at 138, [1971] 1 QB 164 at 205. The parties, where time is of the essence, will at least know where they stand when the contractually agreed time has passed and the contract has been broken. They will not be forced to make critical decisions by trying to anticipate how serious, in the view of arbitrators or courts, in later years, the consequences of the breach will retrospectively be seen to have been, in the light, it may be, of hindsight.

I must, however, return to the *Hong Kong Fir* case [1962] 1 All ER 474, [1962] 2 QB 26. No one now doubts the correctness of that decision: that there are 'intermediate' terms, breach of which may or may not entitle the innocent party to treat hmself as discharged from the further performance of his contractual obligation. No one now doubts that a term as to seaworthiness in a charterparty, in the absence of express provision to the opposite effect, is not a condition, but is an 'intermediate' term. The question arising on that case which I think we are compelled to examine in the present case is the test by which it falls to be decided whether a term is a condition.

I have previously quoted a passage from the judgment of Diplock LJ ([1962] 1 All ER 474 at 487, [1962] 2 QB 26 at 29). In its literal sense, the words there used would mean that the test whether a term is a condition is whether *every* breach of such an undertaking *must* give rise to an event which will deprive the party not in default of *substantially the whole benefit which it was intended that he should obtain from the contract.* If this is a definition of the requirements which, in English law, must always be

fulfilled before any contractual term (in the absence, of course, of express words) can achieve the legal status of a condition, then the term with which we are here concerned would not pass the test. The view which I have expressed that it is a condition would necessarily be wrong.

There are various reasons why I do not think that this was intended to be a literal, definitive and comprehensive statement of the requirements of a condition; and also, if it were, why, with great respect, I do not think that it represents the law as it stands today.

First, if it were intended to cover terms as to time in mercantile contracts, how could the requirements be said to be met in respect of stipulations in contracts of types in which . . . time may be of the essence . . . It could never be said, as I see it, in any real sense, that *any* breach of such a stipulation *must necessarily cause the innocent* party to be deprived of *substantially all the benefit.*

. . . I do not see how any contractual term, whether as to time or otherwise, could ever pass the test. Conditions would no longer exist in the English law of contract. For it is always possible to suggest hypothetically some minor breach or breaches of any contractual term which might, without undue use of the imagination, be wholly insufficient to produce serious effects for the innocent party, let alone the loss of substantially all the benefit.

. . . [I]t is clear law, reaffirmed by the House of Lords since *Hong Kong Fir* was decided, that where there has been a breach of a condition the innocent party is entitled to elect whether or not to treat the contracts as repudiated. . . . How could this right of election be anything other than a legal fiction, a chimera, if the election can arise only in circumstances in which, as a result of the breach, an event has happened which will deprive the innocent party of substantially the whole benefit which it was intended that he should receive? This test, it is to be observed, is regarded (*Hong Kong Fir* [1962] 1 All ER 474 at 489, [1962] 2 QB 26 at 72) as applying also where the term is an intermediate term, except that you then look to what has actually happened in order to see if the innocent party has lost substantially all the benefit. So, again, if the test be right, the former principle of English law that the innocent party has the right to elect is no longer anything but an empty shadow. For a right to elect to continue a contract, with the result that the innocent party will be bound to continue to perform his own contractual obligations, when he will, by definition, have lost substantially all his benefit under the contract, does not appear to me to make sense.

(Megaw LJ applied the test given in the judgment of Sellers LJ in *Hong Kong Fir*:]

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.

Applying that test, for the reasons which I have sought to give, I would hold that the term here in question is a condition.

House of Lords
[1981] 2 All ER 513

Held: it was a condition since it was a stipulation as to time in a mercantile contract.

LORD WILBERFORCE: . . . As to such a clause there is only one kind of breach possible, namely to be late, and the questions which have to be asked are: first, what importance have the parties expressly ascribed to this consequence? and, second, in the absence of expressed agreement, what consequence ought to be attached to it having regard to the contract as a whole?

The test suggested by the appellants was a different one. One must consider, they said, the breach actually committed and then decide whether that default would deprive the party not in default of substantially the whole benefit of the contract. . . . One may observe in the first place that the introduction of a test of this kind would be commercially most undesirable. It would expose the parties, after a breach of one, two, three, seven and other numbers of days, to an argument whether this delay would have left time for the seller to provide the goods. It would make it, at the time, at least difficult, and sometimes impossible, for the supplier to know whether he could do so. It would fatally remove from a vital provision in the contract that certainty which is the most indispensable quality of mercantile contracts, and lead to a large increase in arbitrations. It would confine the seller, perhaps after arbitration and reference through the courts, to a remedy in damages which might be extremely difficult to quantify. These are all serious objections in practice. But I am clear that the submission is unacceptable in law. . . . It remains true, as Roskill LJ has pointed out in *Cehave NV* v *Bremer Handelsgesellschaft mbH* [1975] 3 All ER 739 at 755, [1976] QB 44 at 70–71, that the courts should not be too ready to interpret contractual clauses as conditions. And I have myself commended, and continue to commend, the greater flexibility in the law of contracts to which *Hong Kong Fir* points the way (see *Reardon Smith Line Ltd* v *Hansen-Tangen* [1976] 3 All ER 570 at 576, [1976] 1 WLR 989 at 998). But I do not doubt that, in suitable cases, the courts should not be reluctant, if the intentions of the parties as shown by the contract so indicate, to hold that an obligation has the force of a condition, and that indeed they should usually do so in the case of time clauses in mercantile contracts. To such cases the 'gravity of the breach' approach of *Hong Kong Fir* would be unsuitable. . . .

Note

With the innominate term approach a party cannot use a minor breach by the other party to justify terminating a contract which has proved to be a bad bargain. For example in *Reardon Smith Line Ltd* v *Hansen Tangen* [1976] 3 All ER 570, the fact that there was an error in stating the yard where a vessel was built did not enable the charterers to avoid the contract which had turned out to be unprofitable.

Relying upon *Cehave NV* v *Bremer Handelsgesellschaft mbH, The Hansa Nord*, Weir has argued ((1976) CLJ 33) that the *Hong Kong Fir* v *Kawasaki* approach 'rewards incompetence'.

Cehave NV v *Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 (CA)

The German sellers agreed to sell to Dutch buyers 12,000 tons of US citrus pulp pellets for use as animal feed. The contract provided 'shipment to be made in good condition'. Following payment of the price of £100,000 by the buyers and receipt of shipping documents, a shipment arrived at the destination port with 1,260 tons in one hold of the *Hansa Nord* and 2,053

tons in the second hold. By this time the market price of citrus pulp pellets had fallen. Much of the cargo in the first hold was found to be damaged, while the goods in the second hold were undamaged. The buyers rejected the whole cargo from both holds, and claimed the repayment of the price on the ground that shipment was not made in good condition. The goods had been sold for £30,000 to an importer, who had resold them on the same day to the buyers at the same price of £30,000. The buyers then used the entire cargo to manufacture cattle feed (the original purpose). Held: the term 'shipment in good condition' was an intermediate term which did not give a right to reject unless the breach went to the root of the contract. Since the entire cargo was used for its intended purpose as animal feed, the breach did not go to the root of the contract and the buyers, though entitled to damages, were not entitled to reject the goods.

ORMROD LJ: . . . [Counsel for the sellers] relying on section 11(i)(b) [sic] [Sale of Goods Act], argued that in a contract of sale, the court was required to categorise all relevant stipulations as conditions or warranties, that this must be done by way of construction of the contract, and that, once done, the buyer's remedy for breach was determined; if a condition, he could reject, subject to the other provisions of the Act; if a warranty, he had no right to reject in any circumstances, his only remedy being damages. Construction, at least in theory, means ascertaining the intention of the parties in accordance with the general rules. If this submission is right, it means that a buyer can always reject for breach of a condition, however trivial the consequences, subject only to the so-called de minimis rule, and never reject for breach of warranty, however serious the consequences. So, on a falling market the buyer can take advantage of a minor breach of condition and, on a rising market, waive the breach and sue for damages. It also means, as Mocatta J pointed out . . . that if breach of a stipulation could have potentially serious consequences for a buyer, the court may be obliged, whatever the results in the instant case, to construe the stipulation as a condition. Moreoever, where the contract is in a standard form as in this case, a decision in one case will, in effect, categorise the stipulation for other cases in which the same form is used. . . .

If one asks oneself the question in the form, 'Did the parties intend that the buyer should be entitled to reject the goods if they were not shipped in good condition?' the answer must be that it depends on the nature and effects of the breach. This is directly in line with Diplock LJ's approach in the *Hong Kong Fir Shipping Co.* case [1962] 2 QB 26, 69–70, not surprisingly, since there can be very little difference in principle between whether the ship is seaworthy and whether goods are in good condition. There is obviously a strong case for applying the general principle of the *Hong Kong Fir Shipping Co.* case to contracts for the sale of goods. The question remains, however and it is the kernel of [counsel for the sellers'] submission, whether it is open to the court to do so. The parties themselves, of course, can do it by express agreement . . . If it can be done expressly, it can be done by implication, unless it is in some way prohibited. [Counsel for the sellers] argues that section 11(1)(b) compels the court to choose between condition and warranty. I do not think that the subsection was intended to have any prohibitory effect. It is essentially a definition section, defining 'condition' and 'warranty' in terms of remedies. Nor is the classification absolutely rigid, for it provides that a buyer may treat a condition as a warranty if he wishes, by accepting the goods. It does not, however, envisage the possibility that a breach of warranty might go to the root of the contract, and so, in certain circumstances, entitle

the buyer to treat the contract as repudiated. But the law has developed since the Act was passed. It is now accepted as a general principle since the *Hong Kong Fir Shipping Co.* case [1962] 2 QB 26 that it is the events resulting from the breach, rather than the breach itself, which may destroy the consideration for the buyer's promise and so enable him to treat the contract as repudiated.

The problem is how to integrate this principle with section 11(1)(b). In practice it may not arise very often. Faced with a breach which has had grave consequences for a buyer, the court may be disposed to hold that he was entitled ex post facto, to rescind, or reject the goods, without categorising the broken stipulation, applying the general principles of the law of contract. The difficulty only arises if the court had already categorised the stipulation as a warranty. The present case provides an example. If the relevant part of clause 7 is construed as a warranty in this case, and later, another dispute occurs in relation to another contract in the same form, between the same parties, for the sale of similar goods, in which the breach of clause 7 has produced much more serious consequences for the buyer, is the court bound by its decision in this case to hold that the buyer is precluded from rejecting the goods under the later contract because, as a matter of construction, it has already categorised the stipulation as a warranty? This is the converse of *The Mihalis Angelos* [1971] 1 QB 164 situation. If the answer is in the affirmative section 11(1)(b) has, by implication, excluded one of the general common law rules of contract. It was clearly not intended to have this effect and I agree with Lord Denning MR, for the reasons that he has given in his judgment, that the Act should not, if it can be avoided, be construed in this way. Section 61(2) seems to provide an answer. If this view is correct it is bound to have important repercussions on the way in which courts in future will approach the construction of stipulations in contracts for the sale of goods. It will no longer be necessary to place so much emphasis on the potential effects of a breach on the buyer, and to feel obliged, as Mocatta J did in this case, to construe a stipulation as a condition because in other cases or in other circumstances the buyer ought to be entitled to reject. Consequently, the court will be freer to regard stipulations, as a matter of construction, as warranties, if what might be called the 'back-up' rule of the common law is available to protect buyers who ought to be able to reject in proper circumstances. I doubt whether, strictly speaking, this involves the creation of a third category of stipulations; rather, it recognises another ground for holding that a buyer is entitled to reject, namely, that, de facto, the consideration for his promise has been wholly destroyed.

The result may be summarised in this way. When a breach of contract has taken place the question arises: 'Is the party who is not in breach entitled in law to treat the contract as repudiated or, in the case of a buyer, to reject the goods? The answer depends on the answers to a series of other questions. Adopting Upjohn LJ's judgment in the *Hong Kong Fir Shipping Co.* case [1962] 2 QB 26, 64, the first question is: 'Does the contract expressly provide that in the event of the breach of the term in question the other party is entitled to terminate the contract or reject the goods?' If the answer is No, the next question is: 'Does the contract when correctly construed so provide?' The relevant term, for example, may be described as a 'condition.' The question then arises whether this word is used as a code word for the phrase 'shall be entitled to repudiate the contract or reject the goods,' or in some other sense, as in *Wickman Machine Tool Sales Ltd* v *L. Schuler AG* [1972] 1 WLR 840. The next question is whether the breach of the relevant term creates a right to repudiate or reject. This may arise either from statute or as a result of judicial decision on particular contractual terms. For example, if the requirements of section 14(1) or (2) of the Sale of Goods Act 1893 are fulfilled, the buyer will be entitled to reject the goods, as a result of this section, read with section 11(2). In fact, in all those sections of the Sale of Goods Act

1893 which create implied conditions the word 'condition' is, by definition a code word for 'breach of this term will entitle the buyer to reject the goods,' subject to any other relevant provision of the Act. In other cases, the courts have decided that breach of some specific terms, such as, for example, an 'expected ready to load' stipulation, will ipso facto give rise to a right in the other party to repudiate the contract: *The Mihalis Angelos* [1971] 1 QB 164, 194, *per* Lord Denning MR. In these two classes of case the consequences of the breach are irrelevant or, more accurately, are assumed to go to the root of the contract, and to justify repudiation. There remains the non-specific class where the events produced by the breach are such that it is reasonable to describe the breach as going to the root of the contract and so justifying repudiation.

If this approach is permissible in the present case I would unhesitatingly hold that the stipulation in clause 7 that the goods were to be shipped in good condition was not a condition, and that on the facts of this case the breach did not go to the root of the contract, and that, consequently, the buyers were not entitled to reject the goods.

Notes

1. Weir's argument is that, because the Court of Appeal did not want the buyers to get the cargo for substantially less than its true value, they made the buyers pay the true value of the spoilt cargo (and the sellers' profit) even though the initial breach was by the sellers in shipping goods which were not in good condition. The buyers were punished for wrongfully rejecting the goods. Weir argued that the guilty party gets all that he bargained for, unless there is a breach of a condition so that he gets no part of what he bargained for. (Ormrod LJ's judgment must now be read in the light of new s. 15A of the Sale of Goods Act 1979, inserted by the Sale and Supply of Goods Act 1994, page 269.)

2. The next case is one of the rare examples where the effects of the breach of an intermediate term were sufficiently serious to justify termination.

Federal Commerce & Navigation Co. Ltd v *Molena Alpha Inc.* [1979] AC 757 (HL)

Clause 9 of a charter provided that the charterers were to sign bills of lading stating that the freight had been correctly paid. After a dispute arose concerning deductions made by the charterers, the shipowners withdrew this authority contrary to the terms of the charter. The master was instructed not to sign bills of lading with the indorsement 'freight pre paid' or which did not contain an indorsement giving the owners a lien over the cargo for freight. This meant that the charterers were put in an impossible position commercially. The charterers treated the owner's actions as a repudiation of the charter. Held: although the term broken was not a condition, the breach went to the root of the contract by depriving the charterers of virtually the whole benefit of the contract because the issue of such bills was essential to the charterers' trade.

Aerial Advertising Co. v *Batchelors Peas Ltd (Manchester)* [1938] 2 All ER 788

The plaintiffs and the defendants entered into a contract whereby the plaintiffs were to advertise the defendants' goods by flying over various

towns trailing a banner reading 'Eat Batchelors' Peas'. The pilot was to telephone the defendants each day to get their approval for what he proposed to do that day. He failed to do this on 11 November 1937, and flew over the main square in Salford during the two minutes silence on Armistice Day, towing his banner, much to the indignation of the thousands of people there. The defendants received many letters announcing that their goods would be boycotted, and there was a marked drop in demand for their goods. The defendants sought damages and a declaration that they would no longer be bound by the contract. Atkinson J released them on the ground that it was commercially wholly unreasonable to continue with the contract. However, this was based on the seriousness of the consequences of the breach.

Note
This last case pre-dates *Hong Kong Fir* v *Kawasaki*.

SECTION 6: ENTIRE OBLIGATIONS

A contractual obligation may be construed as 'entire'. This means that it must be completely and precisely performed before the other party is obliged to perform his side of the contract.

Cutter v *Powell*
(1795) 6 Term Rep 320; 101 ER 573 (Court of King's Bench)

Cutter was employed as second mate for a sea voyage from Jamaica to Liverpool. It was agreed that 10 days after the ship's arrival in Liverpool, Cutter was to receive 'thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool'. The ship sailed on 2 August 1793, but Cutter died on 20 September, before the ship arrived in Liverpool on 9 October. Cutter's widow sought wages for the work he had completed before his death on a *quantum meruit* basis (i.e., reasonable value of work done). The usual wages of a second mate were £4 a month and this voyage usually took eight weeks. Held: Cutter's obligation in respect of the voyage was entire and the defendant's promise depended upon the condition precedent being performed. Emphasis was placed on the fact that a second mate would normally expect to earn £8 on such a voyage, whereas Cutter had been promised £30 if he fulfilled these conditions.

ASHHURST J: . . . This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive any thing under it. It has been argued however that the plaintiff may now recover on a quantum meruit: but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate

was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him any thing; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

Notes

1. In the light of the fact that the promised sum was considerably in excess of the market rate for the job, it is hardly surprising that the court interpreted this express stipulation as meaning that Cutter was to receive 30 guineas if he performed and nothing if he did not. The contract placed the risk of non-completion on Cutter.
2. The courts lean against construing obligations as entire, so that such obligations are the exception rather than the rule. If an obligation is severable or divisible, then the defaulting party can recover at the stipulated rate for each instalment provided, subject to a set-off or counterclaim for damages for breach (for example, the Apportionment Act 1870 provides that 'salaries' and 'other periodical payments in the nature of income' are severable).
3. A contract can have both entire and severable obligations.
4. Building contracts which provide for a lump sum payment on completion will be construed as entire, because it is not possible to apportion the price over the work completed.
5. Statute provides that the obligation to deliver the correct quantity in a sale of goods contract, which is not an instalment contract and where the buyer is a consumer, is entire (Sale of Goods Act 1979, s. 30 as amended by the Sale and Supply of Goods Act 1994), so that if a seller delivers too much or too little the buyer is entitled to refuse to accept the goods and pay for them (subject to the *de minimis* rule, i.e., minor discrepancies). However, if goods supplied are defective in quality, that is not a breach of an entire obligation.

It is possible to recover on a *quantum meruit* for work done if the injured party had the option to accept or reject the partial performance and voluntarily accepted it.

Sumpter v *Hedges*
[1898] 1 QB 673 (CA)

The plaintiff builder contracted with the defendant to build two houses and stables on the defendant's land for a lump sum of £565. The plaintiff did work amounting to £333 in value, but then informed the defendant that he had no money and could not go on with the work. The defendant finished the building himself, using building materials belonging to the plaintiff which the plaintiff had left on the defendant's land. Held: the obligation to do the building work was entire. The defendant had not voluntarily adopted the partial performance, so that there was no new implied contract to pay for the partial performance on a *quantum meruit* basis.

COLLINS LJ: . . . There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land. I am therefore of opinion that the plaintiff was not entitled to recover for the work which he had done. . . .

Note

The injured party must have the option whether to accept the partial performance. In cases of unfinished buildings on the injured party's land, there is no practical choice. However, the defendant did not have to accept the materials left on his land but decided to do so. Bruce J, at first instance, held that the defendant had to pay for these materials.

If the party in breach has 'substantially performed' his obligations as to quality under the contract, then he can claim the price less damages in respect of the defective performance.

Hoenig v *Isaacs*
[1952] 2 All ER 176 (CA)

The defendant employed the plaintiff to decorate and furnish the defendant's flat for the sum of £750 'net cash as the work proceeds and the balance on completion'. The defendant refused to pay the balance of £350 on the ground that certain of the work done and articles supplied were defective. The defendant contended that the plaintiff could not recover the balance since this was an entire obligation which the plaintiff had not performed. The official referee found that a wardrobe door needed replacing and a bookcase required alterations and assessed the cost of remedying the defects at £55. Held: in the case of an entire contract, the defendant cannot repudiate liability on the ground that the work, though substantially performed, is in some respects not in accordance with the contract. The defendant was therefore liable for the balance, less a deduction for the cost of putting right the defects.

SOMERVELL LJ: . . . Each case turns on the construction of the contract. [*Cutter* v *Powell*] clearly decided that his continuing as mate during the whole voyage was a condition precedent to payment. It did not decide that if he had completed the main

purpose of the contract, namely, serving as mate for the whole voyage, the defendant could have repudiated his liability by establishing that in the course of the voyage the sailor had, possibly through inadvertence, failed on some occasion in his duty as mate whereby some damage had been caused. . . .

The principle that fulfilment of every term is not necessarily a condition precedent in a contract for a lump sum is usually traced back to a short judgment of Lord Mansfield CJ in *Boone* v *Eyre* (1779) 1 Hy Bl 273n — the sale of the plantation with its slaves. Lord Mansfield said:

> . . . where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages; there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.

The learned official referee regarded *H. Dakin & Co., Ltd* v *Lee* [1916] 1 KB 566 as laying down that the price must be paid subject to set-off or counterclaim if there was a substantial compliance with the contract. I think on the face of this case where the work was finished in the ordinary sense, though in part defective, this is right. It expresses in a convenient epithet what is put from another angle in the Sale of Goods Act, 1893. The buyer cannot reject if he proves only the breach of a term collateral to the main purpose. . . .

DENNING LJ: In determining this issue the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price. It is, of course, always open to the parties by express words to make entire performance a condition precedent. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but for retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money, but not, of course, to the progress payments. The contractor is entitled to payment pro rata as the work proceeds, less a deduction for retention money. But he is not entitled to the retention money until the work is entirely finished, without defects or omissions. In the present case the contract provided for 'net cash, as the work proceeds; and balance on completion.' If the balance could be regarded as retention money, then it might well be that the contractor ought to have done all the work correctly, without defects or omissions, in order to be entitled to the balance. But I do not think the balance should be regarded as retention money. Retention money is usually only ten per cent, or fifteen per cent, whereas this balance was more than fifty per cent. I think this contract should be regarded as an ordinary lump sum contract. It was substantially performed. The contractor is entitled, therefore, to the contract price, less a deduction for the defects.

ROMER LJ: . . . In certain cases it is right that the rigid rule for which the defendant contends should be applied, for example, if a man tells a contractor to build a ten foot wall for him in his garden and agrees to pay £x for it, it would not be right that he should be held liable for any part of the contract price if the conractor builds the wall to two feet and then renounces further performance of the contract, or builds the wall of a totally different material from that which was ordered, or builds it at the wrong end of the garden. The work contracted for has not been done and the corresponding obligation to pay consequently never arises. But when a man fully performs his contract in the sense that he supplies all that he agreed to supply but what he supplies is subject to defects of so minor a character that he can be said to have substantially performed his promise, it is, in my judgment, far more equitable to apply the *H. Dakin & Co. Ltd* v *Lee* [1916] 1 KB 566 principle than to deprive him wholly of his contractual rights and relegate him to such remedy (if any) as he may have on a quantum meruit. . . .

Notes

1. *Hoenig* v *Isaacs* concerned defective performance, whereas *Cutter* v *Powell* concerned the order of performance. In *Cutter* v *Powell*, although the obligation to serve as second mate for the entire voyage was entire, Cutter could have recovered the 30 guineas less a deduction for breach if in serving in that capacity he was guilty of any breach of duty.

Although the obligation to deliver the correct quantity in a sale of goods contract where the buyer is a consumer is entire, the obligation that the goods should be fit for the purpose and of satisfactory quality is not entire. If the correct quantity of goods is delivered but they are defective, then the consumer buyer can terminate the contract because of the breach of the s. 14 condition, so that he does not have to pay, but that has nothing to do with the entire obligation rule.

In *Hoenig* v *Isaacs*, the obligation to decorate and furnish the flat was entire but the quality obligation was not entire. It may therefore be the case that the substantial performance doctrine is being applied to the quality obligation and not to the entire obligation itself.

2. In *Williams* v *Roffey Brothers & Nicholls (Contractors) Ltd* [1990] 1 All ER 512 (page 125) it was argued by the defendants that the alteration provided that the plaintiff would be paid on completion of each of the flats. The Court of Appeal, relying on *Hoenig* v *Isaacs*, held that the plaintiff had 'substantially completed' and was entitled to the payment for the eight flats, less a deduction for defects and incomplete work.

Was there any incomplete work in *Hoenig* v *Isaacs*? It appears that the Court of Appeal in *Williams* v *Roffey* failed to appreciate that the obligation actually to finish the work is entire.

Bolton v *Mahadeva*
[1972] 2 All ER 1322 (CA)

The plaintiff agreed with the defendant that he would install central heating in the defendant's house for a lump sum of £560. When the work was

completed, the defendant complained that it was defective and refused to pay. The judge found that the flue was defective so that it gave off fumes making the rooms uncomfortable, and the system was inefficient in that the amount of heat varied from one room to another. The cost of rectifying these defects was £174. Held: the plaintiff was not entitled to recover as there had been no substantial performance.

CAIRNS LJ: The main question in the case is whether the defects in workmanship found by the judge to be such as to cost £174 to repair — i.e. between one-third and one-quarter of the contract price — were of such a character and amount that the plaintiff could not be said to have substantially performed his contract. That is, in my view, clearly the legal principle which has to be applied to cases of this kind.

In considering whether there was substantial performance I am of opinion that it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price. It would be wrong to say that the contractor is only entitled to payment if the defects are so trifling as to be covered by the de minimis rule.

The main matters that were complained of in this case were that, when the heating system was put on, fumes were given out which made some of the living rooms (to put it at the lowest) extremely uncomfortable and inconvenient to use; secondly, that by reason of there being insufficient radiators and insufficient insulation, the heating obtained by the central heating system was far below what it should have been. . . .

Now, certainly it appears to me that the nature and amount of the defects in this case were far different from those which the court had to consider in *H. Dakin & Co Ltd* v *Lee* [1916] 1 KB 566 and *Hoenig* v *Isaacs* [1952] 2 All ER 176. For my part, I find it impossible to say that the judge was right in reaching the conclusion that in those circumstances the contract had been substantially performed. The contract was a contract to install a central heating system. If a central heating system when installed is such that it does not heat the house adequately and is such, further, that fumes are given out, so as to make living rooms uncomfortable, and if the putting right of those defects is not something which can be done by some slight amendment of the system, then I think that the contract is not substantially performed.

Notes

1. This type of breach clearly goes to the root of the contract, and it appears that on that basis the performance could not be 'substantial'. It is very similar to the nature of the effects of the breach approach adopted in *Hong Kong Fir* v *Kawasaki*, page 276. If the actual defects are serious, the contract is repudiated; if they are trivial, it is not.

2. The Law Commission's Report No. 121, *Pecuniary Restitution for Breach of Contract* (1983) (Burrows (1984) 47 MLR 76), recommended that a party who partly performs an entire contract should be permitted to recover in respect of benefits he has conferred on the other as a result of that part performance. These recommendations have not been implemented.

8 EXEMPTION CLAUSES

As a general definition, an exemption clause is a term in a contract or notice which either seeks to exclude liability or remedies for breach of contract and/or negligence (referred to as 'exclusion clauses' in this casebook), or which seeks to limit that liability to a specified sum (referred to as 'limitation clauses').

SECTION 1: THE NATURE OF EXEMPTION CLAUSES

Do exemption clauses operate purely as a defence once the breach of contract or negligence has been established, or are they to be construed with all the other terms of the contract so as to define the initial obligations of the parties?

The general approach of the courts has been to treat an exclusion clause as a defence, i.e., as removing liability for breach of an existing obligation. The definitional approach involves construing all of the terms together so that the party is not taken to have accepted this liability at all. Lord Diplock adopts this approach in *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827, at pp. 850 and 851 (for the full facts and discussion of this case, see page 312):

> My Lords, an exclusion clause is one which excludes or modifies an obligation, whether primary, general secondary or anticipatory secondary that would otherwise arise under the contract by implication of law. Parties are free to agree to whatever exclusion or modification of all types of obligations as they please within the limits that the agreement must retain the legal characteristics of a contract . . . in the absence of the exclusion clause which Lord Wilberforce has cited, a primary obligation of Securicor under the contract, which would be implied by law, would be an absolute obligation to procure that the visits by the night patrol to the factory were conducted by natural persons who would exercise reasonable skill and care for the safety of the factory. That primary obligation is modified by the exclusion clause. Securicor's obligation to do this is not to be absolute, but is limited to exercising due diligence in its capacity as employer of the natural persons by whom the visits are conducted, to

procure that those persons shall exercise reasonable skill and care for the safety of the factory.

SECTION 2: THE GENERAL APPROACH TO EXEMPTION CLAUSES

There are some distinct advantages in the use of exemption clauses to allocate risk, e.g., the avoidance of duplicate insurance and lower pricing. However, at common law, the courts were very concerned to protect a party against an exemption clause imposed without negotiation by a party who had superior bargaining power. They could achieve this by finding that the clause had not been incorporated as a term of the contract, e.g. *Thornton* v *Shoe Lane Parking Ltd* [1971] 2 QB 163, page 253, although this option was not available in the majority of cases where the weaker party had signed a standard form contract without reading it (*L'Estrange* v *Graucob Ltd* [1934] 2 KB 394, see page 247). More frequently, they resorted to construing the clause so that it did not provide protection for the stronger party in the circumstances which had occurred. To achieve this, the courts often construed the clause artificially (*Hollier* v *Rambler Motors (AMC) Ltd* [1972] 2 QB 71, see page 304).

Since the Unfair Contract Terms Act 1977 (and the Unfair Terms in Consumer Contracts Regulations 1994), there is no longer a need for the courts to adopt such restrictive approaches to incorporation and construction. Lord Diplock stated in *Photo Production Ltd* v *Securicor Transport Ltd* (at p. 851).

> My Lords, the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion. As Lord Wilberforce has pointed out, any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977. In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.

SECTION 3: REQUIREMENTS THAT MUST BE SATISFIED BEFORE AN EXEMPTION CLAUSE CAN BE RELIED UPON

A party seeking to rely on an exemption clause must show:

(a) that it has been incorporated as a term of the contract (see the discussion of incorporation of terms at pages 244–59);

(b) that, on its natural and ordinary meaning, it covers the event(s) which has/have occurred (see section 4, below);

(c) that it is not rendered unenforceable by the Unfair Contract Terms Act 1977 (UCTA 1977) or the Unfair Terms in Consumer Contracts Regulations 1994 (see section 5, below).

SECTION 4: CONSTRUCTION — ON ITS NATURAL AND ORDINARY MEANING THE CLAUSE COVERED WHAT HAPPENED

Before UCTA 1977, the courts adopted a restrictive and often artificial approach to construction in order to protect the weaker party. Lord Denning admitted this in the Court of Appeal in *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] QB 284 (at p. 297):

The heyday of freedom of contract

None of you nowadays will remember the trouble we had — when I was called to the Bar — with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of 'freedom of contract.' But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order form or invoice. The big concern said, 'Take it or leave it.' The little man had no option but to take it. The big concern could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, 'You must put it in clear words,' the big concern had no hesitation in doing so. It knew well that the little man would never read the exemption clauses or understand them.

It was a bleak winter for our law of contract. It is illustrated by two cases, *Thompson* v *London, Midland and Scottish Railway Co.* [1930] 1 KB 41 (in which there was exemption from liability, not on the ticket, but only in small print at the back of the timetable, and the company were held not liable) and *L'Estrange* v *F. Graucob Ltd* [1934] 2 KB 394 (in which there was complete exemption in small print at the bottom of the order form, and the company were held not liable).

The secret weapon

Faced with this abuse of power — by the strong against the weak — by the use of the small print of the conditions — the judges did what they could to put a curb upon it. They still had before them the idol, 'freedom of contract.' They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called 'the true construction of the contract.' They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances the big concern was not entitled to rely on the exemption clause. . . .

When examining most of the cases that follow, it is important to bear in mind that the courts are unlikely to adopt such a restrictive approach to the question of construction after UCTA 1977 and the Unfair Terms in Consumer Contracts Regulations 1994.

A: *CONTRA PROFERENTEM*

Any ambiguity in an exemption clause will be resolved against the party seeking to rely upon it.

Houghton v Trafalgar Insurance Co. Ltd
[1954] 1 QB 247 (CA)

A car insurance policy excluded liability for damage 'caused or arising whilst the car is conveying any load in excess of that for which it was constructed'. At the time of an accident there were six people in a car with seating accommodation for five and the insurers denied liability claiming that this was a load in excess of that for which the car was constructed. Held: the word 'load' only covered cases where there was a specified weight which must not be exceeded, as in the case of lorries or vans.

ROMER LJ: . . . I think that it would be most regrettable if a provision of this kind were held to have the force for which the defendants contend. It would be a serious thing for a motorist involved in a collision if he were told that the particular circumstances of the accident excluded him from the benefit of the policy. I think that any clause or provision that purports to have that effect ought to be clear and unambiguous so that the motorist knows exactly where he stands. This provision is neither clear nor unambiguous. If applied to a private motor-car I have not the least idea what it means. . . .

Notes

1. As Romer LJ appears to be suggesting, policy reasons may also have caused the Court of Appeal to reject the insurers' suggested interpretation, since it would have had a devastating effect on the ability of innocent third parties to recover on car insurance policies in those circumstances.
2. In *Andrews Brothers (Bournemouth) Ltd* v *Singer & Co. Ltd* [1934] 1 KB 17, the exemption covered all implied obligations, but the Court of Appeal held that the defendants could not rely on this as exempting them from liability for breach of the express obligation that the car be 'new'.
3. Regulation 6 of the Unfair Terms in Consumer Contracts Regulations 1994 incorporates *contra proferentem* in legislative form and imposes a duty to avoid ambiguity.

Unfair Terms in Consumer Contracts Regulations 1994

6. Construction of written contracts

A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.

B: LIABILITY FOR NEGLIGENCE

It is often difficult to grasp the concept that in an action in negligence, the defendant may seek to rely on an exemption clause in a contract to which he is a party in order to protect himself (as to the position where a third party seeks to do this see page 185).

The approach of the courts has been to limit the scope of the exemption clause so that it covers only contractual liability unless the clause expressly covers negligence.

In *Canada Steamship Lines Ltd* v *R* [1952] AC 192, at p. 208 Lord Morton of Henryton laid down a construction test to ascertain whether the clause covers negligence liability:

> Their Lordships think that the duty of a court in approaching the consideration of such clauses may be summarized as follows:—
>
> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence of the negligence of his own servants, effect must be given to that provision. . . .
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens . . .
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence,' to quote again Lord Greene, in the *Alderslade* case [1945] KB 189. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants. . . .

Notes

1. The first possibility is that the clause expressly refers to negligence or a synonym of negligence. Most clauses will use more general words.

2. Are the words wide enough to cover negligence? In *Lamport & Holt Lines Ltd* v *Coubro & Scrutton (M & I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42, the words 'any act or omission' were held to be words that were wide enough to cover negligence.

3. Is there any other liability which exists on these facts, e.g., breach of an absolute contractual obligation? If so, then the clause will be confined to this alternative liability and will not apply to cover the liability in negligence.

White v *John Warwick & Co. Ltd*
[1953] 2 All ER 1021 (CA)

The plaintiff contracted with the defendants for the hire of a tradesman's tricycle. The tricycle supplied under the agreement had a defective saddle. The plaintiff was thrown off the tricycle when the saddle tipped up, and was injured. Clause 11 of their agreement provided that the defendants would not be liable 'for any personal injuries to the riders of the machines hired'. The plaintiff sought damages, alleging (i) that the defendants were strictly liable in supplying a tricycle which was not reasonably fit for the purpose for which it was required, and (ii) they were negligent in that they had failed to take care to ensure that the tricycle supplied was in a proper state of repair and in working condition. Counsel for the plaintiff argued that although clause 11 might apply to the breach of contract claim, it did

not, and could not, apply to the negligence. The Court of Appeal agreed. Held: the clause applied only to exempt the defendants from liability under the contract.

DENNING LJ: . . . In this type of case, two principles are well settled. The test is that, if a person desires to exempt himself from a liability which the common law imposes on him, he can only do so by a contract freely and deliberately entered into by the injured party in words that are clear beyond the possibility of misunderstanding. The second is that, if there are two possible heads of liability on the defendant, one for negligence, and the other a strict liability, an exemption clause will be construed, so far as possible, as exempting the defendant only from his strict liability and not as relieving him from his liability for negligence.

In the present case, there are two possible heads of liability on the owners, one for negligence, the other for breach of contract. The liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine even though they were not negligent: see *Hyman* v *Nye* (1881) 6 QBD 685. In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability for negligence. Counsel for the owners admitted that, if the negligence was a completely independent tort, the exemption clause would not avail, but he said that the negligence here alleged was a breach of contract, not an independent tort. The facts which give rise to the tort are, he said, the same as those which give rise to the breach of contract, and the plaintiff should not be allowed to recover merely by framing his action in tort instead of contract. That was the view which appealed to Parker J, but I cannot agree with it.

In my opinion, the claim for negligence in this case is founded in tort and not on contract. That can be seen by considering what would be the position if instead of the plaintiff himself, it was his servant who had been riding the tricycle and had been injured. If the servant could show that the owners had negligently sent out a defective machine for immediate use, he would have had a cause of action in negligence on the principle stated in *M'Alister (or Donoghue)* v *Stevenson* [1932] AC 562, and, as against the servant, the exemption clause would be no defence. That shows that the owners owed a duty of care to the servant. A fortiori they owed a like duty to the hirer himself. In either case a breach of that duty is a tort which can be established without relying on any contract at all. It is true that the hirer could also rely on a contract, if he had wished, but he is not bound to do so, and if he can avoid the exemption clause by framing his claim in tort he is, in my judgment, entitled to do so.

Notes

1. The net effect was that the clause could not operate in a negligence action. Since UCTA 1977, even if the clause is wide enough to cover negligence, it will still need to satisfy s. 2 (see page 328). Section 2 of UCTA 1977 provides wide protection, and it may no longer be necessary to adopt such a restrictive approach to construction and negligence liability in order to protect the weak.

2. It appears from the comments of Denning LJ that in order to avoid the exemption clause the claim in negligence must be founded upon breach of a duty of care in tort, even though there may also be liability for contractual negligence (breach of a qualified contractual obligation). It is necessary to

look at the position of, in this case, a third party who rode the tricycle, and ask whether he would have been owed a duty of care in the circumstances. If he is owed the duty of care, then a duty is also owed to the contractual party, and it is not necessary to rely on the contract to establish it.

By comparison, Gower (1954) 17 MLR 155, at p. 157, argues that the parties cannot have intended to contract out of negligence liability pleaded in tort but not contractual negligence.

3. In *Ailsa Craig Fishing Co. Ltd* v *Malvern Fishing Co. Ltd* [1983] 1 WLR 964, at p. 970, Lord Fraser indicated that the test in *Canada Steamship Lines Ltd* v *R* [1952] AC 192, would not be applied as strictly to limitation clauses as it was to exemption and indemnity clauses (see page 307). Whether it is correct to make this distinction is another matter.

EE Caledonia Ltd v *Orbit Valve plc* [1995] 1 All ER 174 (CA)

The plaintiffs operated an oil drilling platform and entered into a contract with the defendants whereby the defendants provided a service engineer to work on the platform. There was an indemnity clause (art. 10(b)) in the contract whereby each party was to indemnify the other in respect of 'any claim, demand, cause of action, loss, expense or liability' arising from the death of an employee of the indemnifying party in the performance of the contract. The defendants' employee died due to the negligence of the plaintiffs, who were also in breach of health and safety regulations. The plaintiffs settled the claim brought by the employee's estate and sought to rely on the indemnity clause to recover from the defendants. They argued that it covered negligence, but that in any event the indemnity applied because they could also have been held liable for breach of statutory duty. Held: the plaintiffs were not entitled to claim the indemnity. Each party had assumed a risk in respect of their own employees, subject to the proviso that each had agreed to bear the risk in respect of their own negligence. Accordingly a party could not avoid that assumption of risk by seeking to rely on breach of statutory duty so that the indemnity did not cover the breach of statutory duty where, as here, there was also negligence.

STEYN LJ: *The first question: does art. 10(b) cover negligence?*

The question before us is not to divine what the parties in fact intended. Our task is to determine what the words of art. 10(b) mean. The plaintiffs argue that the language of art. 10(b) covers negligence. The judge accepted the defendants' submission to a contrary effect. Our task is to decide which is the best interpretation.

. . . In art. 10(b) there is no reference to negligence nor words to a like effect. It is plain that neither the other parts of art. 10 nor the rest of the agreement assist the plaintiffs' interpretation. That brings me back to art. 10(b). Given that the words of art. 10(b), although not indicative of an intent to cover negligence, are, nevertheless, wide enough to cover the negligence of the parties, Lord Morton's second proposition is satisfied. Lord Morton's third proposition must therefore be considered. The question is whether liability may be based on some other ground than negligence.

The answer is plainly Yes. But that leaves the question whether such other heads of liability were fanciful or remote. The judge dealt with this matter at first instance. He said ([1993] 4 All ER 165 at 173, [1994] 1 WLR 221 at 228):

> In art. 10(b) there is no express reference to negligence; therefore there is no express provision that the right to an indemnity should cover a liability arising out of negligence of the party seeking the indemnity. However the words used are wide enough potentially to cover a liability arising from negligence. The words are 'any claim . . . or liability'. Clearly such liability could, and will often be, a liability which has arisen from the negligence of the party liable or of those for whom he is responsible. But the liability need not arise from such negligence. It could arise as a result of a breach of a statutory duty which has occurred without any negligence of the party liable or his servants. This could be the situation with regard to both the company and the contractor; both are subject to statutory duties which could give rise to civil liabilities for death or personal injury. The examples are not fanciful; in an environment such as an offshore platform in an oilfield where a strict statutory regime operates, the possibility of a strict liability arising is a real one and is directly within the contemplation of this contract. Accordingly it is clear that art. 10(b), like (a) and (c), is capable of applying to situations where there has been no actual negligence of the relevant party or his own servants. This could have been the situation in the present case. The breaches of the regulations could in fact have been solely those of the employees of independent contractors working on the platform. In fact the disaster was also a result of the actual negligence of one of the plaintiffs' own servants.
>
> . . . It follows that Lord Morton's third proposition is applicable. Reading art. 10(b) against this well-established aid to construction, it seems to me that art. 10(b) should be construed as not covering the consequences of the negligence of the parties and their servants.
>
> . . . in my judgment, even in the case of a bilateral clause such as the one before us, it is prima facie implausible that the parties would wish to release one another from the consequences of the other's negligence and agree to indemnify the other in respect of such consequences. . . .

The second question: does art. 10(b) cover breach of a statutory duty even if there is negligence?

[Counsel for the plaintiffs] argued, at first instance and on this appeal, that since art. 10(b) is wide enough to cover the plaintiffs' breaches of statutory duties it followed that the indemnity is applicable. He said that all that mattered was that the plaintiffs were liable for breaches of statutory duties. He said it was irrelevant that they were also liable in negligence.

The judge did not accept this argument. He said that the second question was closely related to the first. He then observed ([1993] 4 All ER 165 at 176, [1994] 1 WLR 221 at 231):

> The question is one of construction but is not one which derives much assistance from a detailed analysis of the language of art. 10(b). That clause makes no reference to statutory duties or to negligence. The question which I have to consider arises from the rules of construction which I have to apply to that clause and the principles upon which those rules of construction are based.
>
> I consider that the plaintiffs' arguments cannot be accepted. Where there are concurrent causes, each cause is a cause of the consequent event. If the event would

have occurred in the absence of a particular fault, that fault is not a cause of the event. Accordingly, it is not correct to say in the present case that the plaintiffs were liable in respect of the death of Mr Quinn because of the breaches of statutory duty; they were liable because of the breaches of statutory duty *and* the negligence of their servant. It was the concurrent effect of both those causes that gave rise to the death of Mr Quinn and without either of those causes the death would not have occurred and the plaintiffs would not have been liable. Therefore the correct question remains whether the plaintiffs have a right to an indemnity from the defendants in respect of a liability of which *a* cause was the negligence of one of their servants. It is still necessary to ask whether, as a matter of the construction of the clause, it does cover such a liability.

For the purposes of considering the first question I have already quoted from judgments which state the principle to be applied. The principle is that in the absence of clear words parties to a contract are not to be taken to have intended that an exemption or indemnity clause should apply to the consequences of a party's negligence. Applying that principle and adopting a correct understanding of causation, the parties to a contract such as that with which I am concerned should not be taken to have intended that a party whose servant has been negligent should be entitled to an exemption or an indemnity although there has also been, as a concurrent cause of the relevant loss, a breach of a strict statutory duty. The principle still applies. (Hobhouse J's emphasis.)

. . .

I agree with the judge that on the supposition that art. 10(b) does not apply to negligence, there is still a question of interpretation to be addressed, namely whether, despite their negligence, the plaintiffs are nevertheless entitled to an indemnity by the defendants. I further agree that the judge answered that question correctly. I would, however, express my reasons for that conclusion somewhat differently.

. . . On the assumed facts there were two concurrent causes, each of which was in the eye of the law effective to cause the event which led to Mr Quinn's death. The plaintiffs' negligence was an effective cause of Mr Quinn's death and the plaintiffs' breaches of statutory duty were also an effective cause of Mr Quinn's death.

That brings me directly to the issue of construction. It seems to me right to approach the interpretation of art. 10(b) not in a technical way but in the way in which the commercial parties to the agreement would probably have approached it. The observations of Lord Diplock in *Photo Production Ltd* v *Securicor Transport Ltd* [1980] 1 All ER 556 at 568, [1980] AC 827 at 851 encourage me to think that such an approach to the construction of art. 10(b) is realistic. And the supposition is that art. 10(b) does not apply to negligence. Given this premise it seems realistic to view art. 10(b), operating as it does by way of reciprocal exceptions and indemnities, as an agreed distribution or allocation of risks. The rationale was that each party would bear the risk in respect of his own property and employees. To the extent that they released each other from liability they thereby contractually assumed the risk. But art. 10(b) should be construed as containing a reservation of each party's right to sue the other in negligence and a correlative agreement that the indemnities would not avail either if so sued in negligence. Properly construed, art. 10(b) provides that each party shall bear and assume the risk of his own negligence. If the approach I have adopted is correct, as I believe it is, the consequence is that art. 10(b) should be construed as providing that the indemnities are not applicable if the event in question has been caused not only by a party's breach of statutory duty but also by his negligence. The short point is that the plaintiffs have contractually assumed the risk of their own

negligence and cannot seek to avoid the consequences of that assumption of risk by seeking to rely on a breach of statutory duty . . . I would add that this interpretation also better matches the reasonable expectations of the parties than the somewhat technical approach of the plaintiffs. Given that art. 10(b) must be construed as not covering negligence, the judge's interpretation is in my view the more reasonable interpretation. After all, it is inherently improbable even in a bilateral clause such as art. 10(b) that a party would be willing to assume a risk of loss caused by the negligence of the other, notably when there is probably an imbalance and inequality in the risks of negligence by the one employee of the defendants and the many employees of the plaintiffs.

Notes

1. This decision adds further strength to the proposition that clauses will be construed to prevent a party transferring responsibility for his own negligence.

2. Steyn LJ's comment that the plaintiff's argument was 'somewhat technical' may indicate a willingness to be less mechanical in the application of the *Canada Steamship* principles. On a literal interpretation, since there was some other liability on the facts, the indemnity should cover the other liability, and not the negligence. Hoffmann J had regarded the liabilities as concurrent to avoid this consequence, but such a conclusion would fit uneasily with *White* v *John Warwick*. The Court of Appeal's approach is to avoid such technical difficulties by simply regarding the clause as allocating risk in a general way.

3. One factor influencing this decision may have been that s. 4 of UCTA 1977 would not have been relevant as a final line of defence, since s. 4 does not apply to commercial indemnity clauses.

Where the only basis of liability is negligence, the courts are more willing to construe the clause to cover that negligence.

Alderslade v *Hendon Laundry Ltd*
[1945] 1 KB 189 (CA)

The plaintiff left 10 large Irish linen handkerchiefs with the defendants to be washed. The laundry lost the handkerchiefs, but in an action by the plaintiff for damages for £2 1s 5d (the cost of replacement handkerchiefs), the defendants sought to rely on condition 3 of the conditions on which the handkerchiefs had been accepted. This provided that 'The maximum amount allowed for lost or damaged articles is 20 times the charge made for laundering' (calculated as 11s 5½d here). Held: the only liability that could arise from the loss of the handkerchiefs by the defendants was by establishing that the defendants were negligent. They owed only *a duty to take reasonable care* of the handkerchiefs, so that there could be no strict liability for such loss. As a result, the condition could be applied to limit that negligence liability and the damages payable to the plaintiff.

LORD GREENE MR: It was argued before us for the defendants that the clause did apply and was effective to limit liability for lost articles; and reliance was placed on a

well-known line of authority dealing with clauses of this description. The effect of those authorities can I think be stated as follows: where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence. A common illustration of the principle is to be found in the case of common carriers. A common carrier is frequently described, though perhaps not quite accurately, as an insurer, and his liability in respect of articles entrusted to him is not necessarily based on negligence. Accordingly if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit it in respect of his liability for negligence, then the clause will be construed as extending only to his liability on grounds other than negligence. If, on the other hand, a carrier not being a common carrier, makes use of such a clause, then unless it is construed so as to cover the case of negligence there would be no content for it at all seeing that his only obligation is to take reasonable care. That, broadly speaking, is the principle which falls to be applied in this case.

It was argued by counsel for the plaintiff that the clause must be construed in the present case so as to exclude loss by negligence. . . . It was said that the loss of a customer's property might take place for one of two reasons, namely, negligence and mere breach of contract, and that in the absence of clear words referring to negligence, loss through negligence cannot be taken to be covered by the clause. In my opinion that argument fails. It is necessary to analyse the legal relationship between the customer and the defendants. What I may call the hard core of the contract, the real thing to which the contract is directed, is the obligation of the defendants to launder. That is the primary obligation. It is the contractual obligation which must be performed according to its terms, and no question of taking due care enters into it. The defendants undertake, not to exercise due care in laundering the customer's goods, but to launder them, and if they fail to launder them it is no use their saying, 'We did our best, we exercised due care and took reasonable precautions, and we are very sorry if as a result the linen is not properly laundered.' That is the essence of the contract, and in addition there are certain ancillary obligations into which the defendants enter if they accept goods from a customer to be laundered. The first relates to the safe custody of the goods while they are in the possession of the defendants. The customer's goods may have to wait for a time in the laundry premises to be washed, and while they are so waiting there is an obligation to take care of them, but it is in my opinion not the obligation of an insurer but the obligation to take reasonable care for the protection of the goods. If while they are waiting to be washed in the laundry a thief, through no fault of the defendants, steals them, the defendants are not liable. The only way in which the defendants could be made liable for the loss of articles awaiting their turn to be washed would, I think, quite clearly be if it could be shown that they had been guilty of negligence in performing their duty to take care of the goods. That is one ancillary obligation which is inherent in a contract of this kind. Another relates to the delivery of the goods. The laundry company in most cases, and indeed in this case, make a practice of delivering the goods to the customer, and in the ordinary way the customer expects to receive that service. But what is the

precise obligation of the laundry in respect of the return of the goods after the laundering has been completed? In my opinion it stands on the same footing as the other ancillary obligation that I have mentioned, namely, the obligation to take reasonable care in looking after and safeguarding the goods. It cannot I think be suggested that the obligation of the laundry company in the matter of returning the goods after they have been laundered is the obligation of an insurer. To say that they have undertaken by contract an absolute obligation to see that they are returned seems to me to go against common sense. Supposing the defendants are returning the goods by van to their customer and while the van is on its way a negligent driver of a lorry drives into it and overturns it with the result that it is set on fire and the goods destroyed. No action would lie by the customer for damages for the loss of those goods any more than it would lie against any ordinary transport undertaking which was not a common carrier. To hold otherwise would mean that in respect of that clearly ancillary service the defendants were undertaking an absolute obligation that the goods would, whatever happened, be returned to the customer. It seems to me that the only obligation on the defendants in the matter of returning the goods is to take reasonable care.

In the present case all that we know about the goods is that they are lost. There seems to me to be no case of lost goods in respect of which it would be necessary to limit liability, unless it be a case where the goods are lost by negligence. Goods sent to the laundry will not be lost in the act of washing them. On the other hand, they may be lost while they are in the custody of the defendants before washing or after washing has been completed. They may be lost in the process of returning them to the customer after they have been washed, but in each of those two cases, if my view is right, the obligation of the defendants is an obligation to take reasonable care and nothing else. Therefore, the claim of a customer that the defendants are liable to him in respect of articles that have been lost must, I think, depend on the issue of due care on their part. If that be right, to construe this clause, so far as it relates to loss, in such a way as to exclude loss occasioned by lack of proper care, would be to leave the clause so far as loss is concerned — I say nothing about damage — without any content at all. The result is in my opinion is that the clause must be construed as applying to the case of loss through negligence. . . .

Notes

1. Since the laundry company would be supplying a service in the course of a business, it would impliedly undertake 'to carry out the service with reasonable care and skill' (Supply of Goods and Services Act 1982, s. 13). Therefore it seems that Lord Greene's identification of a strict obligation to launder properly would need to be amended in the light of this provision. However, s. 16 of the 1982 Act leaves open the possibility that a court may imply terms which are stricter than the qualified standard in s. 13.

2. Lord Greene indicated that it was an *automatic* conclusion that where negligence is the only liability that can arise, the exemption clause *must* be construed as applying to it. However, this was not accepted by the Court of Appeal in the next case.

Hollier v *Rambler Motors (AMC) Ltd*
[1972] 2 QB 71 (CA)

The plaintiff's car was being repaired at the defendants' garage when it was damaged by a fire caused by the defendants' negligence. The plaintiff

claimed damages for breach of the implied term that the defendant would take reasonable care of his car. The defendants sought to rely on a clause in their standard form for repair that 'The Company is not responsible for damage caused by fire to customers' cars on the premises'. Held: the clause had not been incorporated because there was not a consistent course of dealing (see page 257). It was also held that in any event, the language of this clause did not exclude liability for the defendants' negligence but was merely a 'warning' that the defendants would not be liable for fire damage which was not attributable to their own negligence.

SALMON LJ: . . . It is well settled that a clause excluding liability for negligence should make its meaning plain on its face to any ordinarily literate and sensible person. The easiest way of doing that, of course, is to state expressly that the garage, tradesman or merchant, as the case may be, will not be responsible for any damage caused by his own negligence. No doubt merchants, tradesmen, garage proprietors and the like are a little shy of writing in an exclusion clause quite so bluntly as that. Clearly it would not tend to attract customers, and might even put many off. I am not saying that an exclusion clause cannot be effective to exclude negligence unless it does so expressly, but in order for the clause to be effective the language should be so plain that it clearly bears that meaning. I do not think that defendants should be allowed to shelter behind language which might lull the customer into a false sense of security by letting him think — unless perhaps he happens to be a lawyer — that he would have redress against the man with whom he was dealing for any damage which he, the customer, might suffer by the negligence of that person.

The principles are stated by Scrutton LJ with his usual clarity in *Rutter* v *Palmer* [1922] 2 KB 87, 92:

> For the present purposes a rougher test will serve. In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him.

Scrutton LJ was far too great a lawyer, and had far too much robust common sense, if I may be permitted to say so, to put it higher than 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.' He does not say that 'if the only liability of the party pleading the exemption is a liability for negligence, the clause will necessarily exempt him.' After all, there are many cases in the books dealing with exemption clauses, and in every case it comes down to a question of construing the alleged exemption clause which is then before the court. It seems to me that in *Rutter* v *Palmer*, although the word 'negligence' was never used in the exemption clause, the exemption clause would have conveyed to any ordinary, literate and sensible person that the garage in that case was inserting a clause in the contract which excluded their liability for the negligence of their drivers. The clause being considered in that case — and it was without any doubt incorporated in the contract — was: 'Customers' cars are driven by your staff at customers' sole risk.' Any ordinary man knows that when a car is damaged it is not infrequently damaged because the driver has driven it negligently. He also knows, I suppose, that if he sends it to a garage and a driver in the employ

of the garage takes the car on the road for some purpose in connection with the work which the customer has entrusted the garage to do, the garage could not conceivably be liable for the car being damaged in an accident unless the driver was at fault. It follows that no sensible man could have thought that the words in that case had any meaning except that the garage would not be liable for the negligence of their own drivers. That is a typical case where, on the construction of the clause in question, the meaning for which the defendant was there contending was the obvious meaning of the clause.

The next case to which I wish to refer is the well-known case of *Alderslade* v *Hendon Laundry Ltd* [1945] 1 KB 189. . . . Again, this was a case where negligence was not expressly excluded. The question was: what do the words mean? I have no doubt that they would mean to the ordinary housewife who was sending her washing to the laundry that, if the goods were lost or damaged in the course of being washed through the negligence of the laundry, the laundry would not be liable for more than 20 times the charge made for the laundering. I say that for this reason. It is, I think, obvious that when a laundry loses or damages goods it is almost invariably because there has been some neglect or default on the part of the laundry. I think that the ordinary sensible housewife, or indeed anyone else who sends washing to the laundry, who saw that clause must have appreciated that almost always goods are lost or damaged because of the laundry's negligence, and therefore this clause could apply only to limit the liability of the laundry, when they were in fault or negligent.

But [counsel for the defendants] has drawn our attention to the way in which the matter was put by Lord Greene MR in delivering the leading judgment in this court, and he contends that Lord Greene MR was in fact making a considerable extension to the law as laid down by Scrutton LJ in the case to which I have referred. . . .

I do not think that Lord Greene MR was intending to extend the law in the sense for which [counsel for the defendants] contends. If it were so extended, it would make the law entirely artificial by ignoring that rules of construction are merely our guides and not our masters; in the end you are driven back to construing the clause in question to see what it means. Applying the principles laid down by Scrutton LJ, they lead to the result at which the court arrived in *Alderslade* v *Hendon Laundry Ltd* [1945] 1 KB 189. In my judgment these principles lead to a very different result in the present case. The words are: 'The company is not responsible for damage caused by fire to customers' cars on the premises.' What would that mean to any ordinarily literate and sensible car owner? I do not suppose that any such, unless he is a trained lawyer, has an intimate or indeed any knowledge of the liability of bailees in law. If you asked the ordinary man or woman: 'Supposing you send your car to the garage to be repaired, and there is a fire, would you suppose that the garage would be liable?' I should be surprised if many of them did not answer, quite wrongly: 'Of course they are liable if there is a fire.' Others might be more cautious and say: 'Well, I had better ask my solicitor,' or, 'I do not know. I suppose they may well be liable.' That is the crucial difference, to my mind, between the present case and *Alderslade* v *Hendon Laundry Ltd* and *Rutter* v *Palmer* [1922] 2 KB 87. In those two cases, any ordinary man or woman reading the conditions would have known that all that was being excluded was the negligence of the laundry, in the one case, and the garage, in the other. But here I think the ordinary man or woman would be equally surprised and horrified to learn that if the garage was so negligent that a fire was caused which damaged their car, they would be without remedy because of the words in the condition. I can quite understand that the ordinary man or woman would consider that, because of these words, the mere fact that there was a fire would not make the garage liable. Fires can occur from a large variety of causes, only one of which is negligence on the part of the occupier of the premises, and that is by no means the most frequent cause. The

ordinary man would I think say to himself: 'Well, what they are telling me is that if there is a fire due to any cause other than their own negligence they are not responsible for it.' To my mind, if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used. . . .

Note
This decision has been severely criticised (see Barendt (1972) 35 MLR 644).

Question
Do you consider that this case would be decided the same way today?

If the clause is held to cover negligence UCTA 1977, s. 2(2) would apply so that the clause would have to satisfy the reasonableness requirement. Would it satisfy this requirement? (See page 334 on reasonableness.) In addition, the Unfair Terms in Consumer Contracts Regulations 1994 would apply. Would this term be 'unfair'? (See pages 345–6.)

C: LIMITATION CLAUSES

Ailsa Craig Fishing Co. Ltd v *Malvern Fishing Co. Ltd*
[1983] 1 WLR 964 (HL)

Securicor had agreed to provide a security service in Aberdeen harbour for the fishing boats of the members of an association which were berthed there. Ailsa Craig's vessel fouled another boat in the harbour and sank. Clause 2(f) purported to limit Securicor's liability to £1,000. Ailsa Craig claimed damages against Securicor, alleging that the loss was caused by breach of contract and/or negligence. The trial judge awarded damages of £55,000. Securicor appealed against this award, alleging that condition 2(f) applied. Held: the limitation clause operated to limit liability to £1,000. Limitation clauses were not to be construed by the exacting standards applicable to exclusion clauses, and since this clause was clear and unambiguous, it was wide enough to cover liability in negligence.

LORD WILBERFORCE: Whether a clause limiting liability is effective or not is a question of construction of that clause in the context of the contract as a whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed contra proferentem. I do not think that there is any doubt so far. But I venture to add one further qualification, or at least clarification: one must not strive to create ambiguities by strained construction, as I think that the appellants have striven to do. The relevant words must be given, if possible, their natural, plain meaning. Clauses of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they 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.

LORD FRASER: . . . In my opinion these principles [per Lord Morton of Henryton in *Canada Steamship Lines Ltd* v *R* [1952] AC 192] are not applicable in their full rigour when considering the effect of clauses merely limiting liability. Such clauses will of course be read contra proferentem and must be clearly expressed, but there is no

reason why they should be judged by the specially exacting standards which are applied to exclusion and indemnity clauses. The reason for imposing such standards on these clauses is the inherent improbability that the other party to a contract including such a clause intended to release the proferens from a liability that would otherwise fall upon him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when . . . 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. It is enough in the present case that the clause must be clear and unambiguous.

Notes

1. It appears that a limitation clause can provide protection against liability in negligence in circumstances where an exclusion clause might not, since the negligence construction test is whether the clause is clear and unambiguous.

This distinction in treatment for construction purposes has been endorsed by Lord Bridge in *George Mitchell* v *Finney Lock Seeds* [1983] 2 AC 803, at p. 814 (see page 316) and in *EE Caledonia Ltd* v *Orbit Valve plc* [1995] 1 All ER 174, *per* Steyn LJ at p. 180.

2. Is this special approach to the construction of limitation clauses justifiable? UCTA 1977 applies equally to limitation and exclusion clauses, and it may just be that many limitation clauses are more likely to satisfy the reasonableness requirement in s. 11 of UCTA 1977. The High Court of Australia in *Darlington Futures Ltd* v *Delco Australia Pty Ltd* (1986) 161 CLR 500, (1986) 61 ALJR 76, considered this distinction in construction to be unsupportable, since if the limitation clause sets the figure for recovery at a very low level, its effects would be much the same as those applicable to total exclusion clauses.

D: INCONSISTENT TERMS

If an exemption clause is inconsistent with another express term of the contract or an oral undertaking given at or before the time of contracting, then the exemption clause will be overridden by that term or undertaking.

Mendelssohn v *Normand Ltd*
[1970] 1 QB 177 (CA)

The plaintiff, wishing to park his car, was told by the car park attendant that the rules required the car to be left unlocked. The plaintiff explained that he had a suitcase in the car containing valuables, and the attendant agreed to lock the car as soon as he had moved it. The plaintiff was then given a ticket exempting the garage from responsibility for loss or damage to vehicles or their contents, however caused. On his return the plaintiff found the car unlocked and later discovered that his suitcase was missing. Were the defendants liable for the loss of the suitcase? Held: the defendants were liable, since the attendant's promise (to lock up the car, which implied that he would see that the contents were safe) took priority over the printed condition because the printed condition was repugnant to that express promise.

LORD DENNING MR: . . . Such a statement is binding on the company. It takes priority over any printed condition. There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see *Couchman* v *Hill* [1947] KB 554; *Curtis* v *Chemical Cleaning and Dyeing Co.* [1951] 1 KB 805; and *Harling* v *Eddy* [1951] 2 KB 739; nor is he allowed to go back on his promise by reliance on a written clause, see *City and Westminster Properties (1934) Ltd* v *Mudd* [1959] Ch 129, 145 by Harman J. The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation. As Devlin J said in *Firestone Tyre and Rubber Co. Ltd* v *Vokins & Co. Ltd* [1951] 1 Lloyd's Rep 32, 39: 'It is illusory to say: "We promise to do a thing, but we are not liable if we do not do it".' To avoid this illusion, the law gives the oral promise priority over the printed clause.

Note

Another example is provided by the Court of Appeal's decision in *J. Evans & Son (Portsmouth)* v *Andrea Merzario Ltd* [1976] 2 All ER 930, page 244. The printed conditions gave the defendants complete freedom to decide the method of transportation of goods and exempted the defendants for loss of or damage to the goods. However, the plaintiffs had been given an oral assurance that the containers would be stored below deck. It was held that the defendants were not entitled to rely upon the printed conditions to exempt them from liability for this breach because this would render the oral promise illusory. (See also *Couchman* v *Hill* [1947] KB 554, at page 237.)

E: FUNDAMENTAL BREACH

In the 1950s and early 1960s, as part of their restrictive approach to construction, the courts took particular exception to the use of an exemption clause to protect against liability where the breach in question was 'fundamental' (particularly serious), and held in a series of cases that exemption clauses could not operate to exclude liability for such breaches.

While this device was designed to protect the weak from the strong, it operated in all cases, including situations where the clause in question was freely negotiated between two parties of equal bargaining power.

In *Suisse Atlantique Société d'Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale* the House of Lords held *obiter* that there was no such rule of law applicable to fundamental breaches.

Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale
[1967] 1 AC 361 (HL)

The respondents agreed to charter a ship from the appellants 'for a total of two years' consecutive voyages'. The charter provided for fixed periods

within which the respondents had to load and discharge on each voyage (laytime). If they exceeded this, they had to pay 'demurrage' at $1,000 per day. There were considerable delays, and between October 1957 and the end of the charter the ship made eight round voyages, whereas the appellants alleged that a further six voyages could have been performed if the respondents had kept within laytime. The appellants brought an action to claim the freight that they would have earned on these extra voyages, claiming that the demurrage clause was a limitation clause and the delays were so extensive that they amounted to a fundamental breach entitling them to repudiate the contract. Held: there was no fundamental breach by detaining the ship beyond the laytime and, in any event, the demurrage clause was a liquidated damages clause (page 404) and not a limitation clause. It was not possible for the appellants to recover any more than the liquidated damages amount. The House of Lords also decided (as has been subsequently confirmed in *Photo Production Ltd* v *Securicor Transport Ltd*, page 312) that it was a question of construction whether an exemption clause covered a fundamental breach, or any breach, of contract.

LORD REID: The new contention submitted by the appellants is that the breaches of contract which caused these delays amounted to fundamental breach or breach going to the root of the contract so that at some time during the currency of the agreement the appellants would have been entitled to treat the breaches as a repudiation, to terminate or rescind the contract and to claim damages at common law. It is, I think, clear that if they did have that right they must be held to have elected not to treat the breaches as repudiatory. But they argue that nevertheless the fact that there was a fundamental breach prevents the respondents from relying on the demurrage clause as limiting their responsibility.

So the first question must be whether these delays can be regarded as involving fundamental breach. . . . General use of the term 'fundamental breach' is of recent origin and I can find nothing to indicate that it means either more or less than the well known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract. The appellants allege that the respondents caused these delays deliberately (i.e., with the wilful intention of limiting the number of contractual voyages). They do not allege fraud or bad faith. This allegation would appear to cover a case where the charterers decided that it would pay them better to delay loading and discharge and pay the resulting demurrage at the relatively low agreed rate, rather than load and discharge more speedily and then have to buy more coal and pay the relatively high agreed freight on the additional voyages which would then be possible. If facts of that kind could be proved I think that it would be open to the arbitrators to find that the respondents had committed a fundamental or repudiatory breach. One way of looking at the matter would be to ask whether the party in breach has by his breach produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made. Then one would have to ask not only what had already happened but also what was likely to happen in future. And there the fact that the breach was deliberate might be of great importance.

If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do

not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term. But that is not the situation in the present case, where in my view the appellants elected that the contract should continue in force.

Where the contract has been affirmed by the innocent party, at first sight the position is simple. You must either affirm the whole contract or rescind the whole contract: you cannot approbate and reprobate by affirming part of it and disaffirming the rest — that would be making a new contract. So the clause excluding liability must continue to apply. But that is too simple and there is authority for two quite different ways of holding that, in spite of affirmation of the contract as a whole by the innocent party, the guilty party may not be entitled to rely on a clause in it. One way depends on construction of the clause. The other way depends on the existence of a rule of substantive law.

As a matter of construction it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed. Such clauses must be construed strictly and if ambiguous the narrower meaning will be taken. Or it may appear that the terms of the clause are so wide that they cannot be applied literally: that may be because this would lead to an absurdity or because it would defeat the main object of the contract or perhaps for other reasons. And where some limit must be read into the clause it is generally reasonable to draw the line at fundamental breaches. There is no reason why a contract should not make a provision for events which the parties do not have in contemplation or even which are unforeseeable, if sufficiently clear words are used. But if some limitation has to be read in it seems reasonable to suppose that neither party had in contemplation a breach which goes to the root of the contract. Then the true analysis seems to me to be that the whole contract, including the clause excluding liability, does survive after election to affirm it, but that does not avail the party in breach. The exclusion clause does not change its meaning: as a matter of construction it never did apply and does not after election apply to this type of breach, and therefore is no answer to an action brought in respect of this type of breach.

But applying a strict construction to these clauses is not sufficient to exclude them in all cases of fundamental breach. It cannot be said as a matter of law that the resources of the English language are so limited that it is impossible to devise an exclusion clause which will apply to at least some cases of fundamental breach without being so widely drawn that it can be cut down on any ground by applying ordinary principles of construction. So, if there is to be a universal rule that, no matter how the exclusion clause is expressed, it will not apply to protect a party in fundamental breach, any such rule must be a substantive rule of law nullifying any agreement to the contrary and to that extent restricting the general principle of English law that parties are free to contract as they may see fit.

There is recent authority for the existence of such a rule of law but I cannot find support for it in the older authorities. . . . In my view no such rule of law ought to be adopted. I do not take that view merely because any such rule is new or because it goes beyond what can be done by developing or adapting existing principles. Courts have often introduced new rules when, in their view, they were required by public policy. . . . But my main reason is that this rule would not be a satisfactory solution of the problem which undoubtedly exists.

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in the complex standard conditions which are now so common. In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same. Freedom to contract must surely imply some choice or room for bargaining.

At the other extreme is the case where parties are bargaining on terms of equality and a stringent exemption clause is accepted for a quid pro quo or other good reason. But this rule appears to treat all cases alike. There is no indication in the recent cases that the courts are to consider whether the exemption is fair in all the circumstances or is harsh and unconscionable or whether it was freely agreed by the customer. And it does not seem to me to be satisfactory that the decision must always go one way if, e.g., defects in a car or other goods are just sufficient to make the breach of contract a fundamental breach, but must always go the other way if the defects fall just short of that. This is a complex problem which intimately affects millions of people and it appears to me that its solution should be left to Parliament. If your Lordships reject this new rule there will certainly be a need for urgent legislative action but that is not beyond reasonable expectation.

Notes

1. While there are clear statements in the judgments that there is no such rule of law applicable to fundamental breaches, and it is a question of construction of the clause as to whether it covers the breach, there was also a need to address the arguments put before the House, so that the fundamental breach rule, which had just been rejected, also seems to be applied.

In particular, the judgments of Lord Reid and Lord Upjohn seem to imply that where a contract is terminated, any exemption clause in that contract can no longer apply. In *Suisse Atlantique* the contract was affirmed.

2. The inconclusive nature of the judgments allowed the Court of Appeal in *Harbutts' 'Plasticine' Ltd* v *Wayne Tank & Pump Co. Ltd* [1970] 1 QB 447, to continue to deny the operation of an exemption clause where there was a fundamental breach and the contract had been terminated.

The House of Lords was finally able to confirm the construction approach in the next case.

Photo Production Ltd v *Securicor Transport Ltd*
[1980] AC 827 (HL)

The plaintiffs, factory owners, entered into a contract with the defendants whereby the defendants would patrol the factory at a cost of £8 15s 0d per week. The contract was on the defendants' standard form, which included the following clause:

> Under no circumstances shall the company [Securicor] be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer; nor, in any

event, shall the company be held responsible for (a) any loss suffered by the customer through burglary, theft, fire or any other cause, except insofar as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment. . . .

One of the defendants' employees was patrolling the factory when he deliberately started a fire by discarding a lighted match. The flames spread and the factory was destroyed, causing a loss of £615,000. The plaintiffs claimed damages from the defendants. The Court of Appeal applied the 'fundamental breach rule' and held that the contract had been brought to an end so that the defendants were not able to rely on this clause as excluding their liability. The House of Lords allowed the defendants' appeal. Held:

(a) It was not good law to say that on termination of a contract for a fundamental breach the contract terms (including any exemption clauses) came to an end.

(b) The question whether and to what extent an exemption clause was to be applied to any breach of contract was a question of construction of the contract.

(c) Normally, when the parties were bargaining on equal terms they should be free to apportion the risks as they saw fit.

(d) On their true construction, the words of the exclusion clause covered deliberate acts, and therefore the defendants were relieved from responsibility for breach of their implied duty to operate with due regard to the safety of the premises.

LORD WILBERFORCE: It is first necessary to decide upon the correct approach to a case such as this where it is sought to invoke an exception or limitation clause in the contract. The approach of Lord Denning MR in the Court of Appeal was to consider first whether the breach was 'fundamental.' If so, he said, the court itself deprives the party of the benefit of an exemption or limitation clause ([1978] 1 WLR 856, 863). Shaw and Waller LJJ substantially followed him in this argument.

Lord Denning MR in this was following the earlier decision of the Court of Appeal, and in particular his own judgment in *Harbutt's 'Plasticine' Ltd* v *Wayne Tank & Pump Co. Ltd* . . .

My Lords, whatever the intrinsic merit of this doctrine, as to which I shall have something to say later, it is clear to me that so far from following this House's decision in the *Suisse Atlantique* it is directly opposed to it and that the whole purpose and tenor of the *Suisse Atlantique* was to repudiate it. The lengthy, and perhaps I may say sometimes indigestible speeches of their Lordships, are correctly summarised in the headnote — holding No. 3 [1967] 1 AC 361, 362 — 'That the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract.' That there was any rule of law by which exceptions clauses are eliminated, or deprived of effect, regardless of their terms, was clearly not the view of Viscount Dilhorne, Lord Hodson, or of myself. The passages invoked for the contrary view of a rule of law consist only of short extracts from two of the speeches — on any view a minority. But the case for the doctrine does

not even go so far as that. Lord Reid, in my respectful opinion, and I recognise that I may not be the best judge of this matter, in his speech read as a whole, cannot be claimed as a supporter of a rule of law. . . . I am convinced that, with the possible exception of Lord Upjohn whose critical passage, when read in full, is somewhat ambiguous, their Lordships, fairly read, can only be taken to have rejected those suggestions for a rule of law which had appeared in the Court of Appeal and to have firmly stated that the question is one of construction, not merely of course of the exclusion clause alone, but of the whole contract.

Much has been written about the *Suisse Atlantique* case. Each speech has been subjected to various degrees of analysis and criticism, much of it constructive. Speaking for myself I am conscious of imperfections of terminology, though sometimes in good company. But I do not think that I should be conducing to the clarity of the law by adding to what was already too ample a discussion a further analysis which in turn would have to be interpreted. I have no second thoughts as to the main proposition that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contract, is a matter of construcion of the contract. Many difficult questions arise and will continue to arise in the infinitely varied situations in which contracts come to be breached — by repudiatory breaches, accepted or not, by anticipatory breaches, by breaches of conditions or of various terms and whether by negligent, or deliberate action or otherwise. But there are ample resources in the normal rules of contract law for dealing with these without the superimposition of a judicially invented rule of law. I am content to leave the matter there with some supplementary observations.

1. The doctrine of 'fundamental breach' in spite of its imperfections and doubtful parentage has served a useful purpose. There was a large number of problems, productive of injustice, in which it was worse than unsatisfactory to leave exception clauses to operate. Lord Reid referred to these in the *Suisse Atlantique* case [1967] 1 AC 361, 406, pointing out at the same time that the doctrine of fundamental breach was a dubious specific. But since then Parliament has taken a hand: it has passed the Unfair Contract Terms Act 1977. This Act applies to consumer contracts and those based on standard terms and enables exception clauses to be applied with regard to what is just and reasonable. It is significant that Parliament refrained from legislating over the whole field of contract. After this Act, in commercial matters generally, when the parties are not of unequal bargaining power, and when risks are normally borne by insurance, not only is the case for judicial intervention undemonstrated, but there is everything to be said, and this seems to have been Parliament's intention, for leaving the parties free to apportion the risks as they think fit and for respecting their decisions.

At the stage of negotiation as to the consequences of a breach, there is everything to be said for allowing the parties to estimate their respective claims according to the contractual provisions they have themselves made, rather than for facing them with a legal complex so uncertain as the doctrine of fundamental breach must be. What, for example, would have been the position of the respondents' factory if instead of being destroyed it had been damaged, slightly or moderately or severely? At what point does the doctrine (with what logical justification I have not understood) decide, ex post facto, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of 'termination' to be fixed? Is it the date of the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it.

At the judicial stage there is still more to be said for leaving cases to be decided straightforwardly on what the parties have bargained for rather than upon analysis, which becomes progressively more refined, of decisions in other cases leading to inevitable appeals. The learned judge was able to decide this case on normal principles of contractual law with minimal citation of authority. I am sure that most commercial judges have wished to be able to do the same . . . In my opinion they can and should.

2. The case of *Harbutt* [1970] 1 QB 447 must clearly be overruled. It would be enough to put that upon its radical inconsistency with the *Suisse Atlantique* case [1967] 1 AC 361. But even if the matter were res integra I would find the decision to be based upon unsatisfactory reasoning as to the 'termination' of the contract and the effect of 'termination' on the plaintiffs' claim for damage. I have, indeed, been unable to understand how the doctrine can be reconciled with the well accepted principle of law, stated by the highest modern authority, that when in the context of a breach of contract one speaks of 'termination,' what is meant is no more than that the innocent party or, in some cases, both parties, are excused from further performance. Damages, in such cases, are then claimed under the contract, so what reason in principle can there be for disregarding what the contract itself says about damages — whether it 'liquidates' them, or limits them, or excludes them? These difficulties arise in part from uncertain or inconsistent terminology. A vast number of expressions are used to describe situations where a breach has been committed by one party of such a character as to entitle the other party to refuse further performance: discharge, rescission, termination, the contract is at an end, or dead, or displaced; clauses cannot survive, or simply go. I have come to think that some of these difficulties can be avoided; in particular the use of 'rescission,' even if distinguished from rescission ab initio, as an equivalent for discharge, though justifiable in some contexts (see *Johnson* v *Agnew* [1980] AC 367) may lead to confusion in others. To plead for complete uniformity may be to cry for the moon. But what can and ought to be avoided is to make use of these confusions in order to produce a concealed and unreasoned legal innovation: to pass, for example, from saying that a party, victim of a breach of contract, is entitled to refuse further performance, to saying that he may treat the contract as at an end, or as rescinded, and to draw from this the proposition, which is not analytical but one of policy, that all or (arbitrarily) some of the clauses of the contract lose, automatically, their force, regardless of intention.

In this situation the present case has to be decided. As a preliminary, the nature of the contract has to be understood. Securicor undertook to provide a service of periodical visits for a very modest charge which works out at 26p per visit. It did not agree to provide equipment. It would have no knowledge of the value of the plaintiffs' factory: that, and the efficacy of their fire precautions, would be known to the respondents. In these circumstances nobody could consider it unreasonable, that as between these two equal parties the risk assumed by Securicor should be a modest one, and that the respondents should carry the substantial risk of damage or destruction.

The duty of Securicor was, as stated, to provide a service. There must be implied an obligation to use due care in selecting their patrolmen, to take care of the keys and, I would think, to operate the service with due and proper regard to the safety and security of the premises. The breach of duty committed by Securicor lay in a failure to discharge this latter obligation. Alternatively it could be put upon a vicarious responsibility for the wrongful act of Musgrove — viz., starting a fire on the premises: Securicor would be responsible for this upon the principle stated in *Morris* v *C. W. Martin & Sons Ltd* [1966] 1 QB 716, 739. This being the breach, does condition 1 apply? It is drafted in strong terms, 'Under no circumstances' . . . 'any injurious act

or default by any employee.' These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrongdoing, or that of one's servant, clear words are necessary. I think that these words are clear. The respondents in fact relied upon them for an argument that since they exempted from negligence they must be taken as not exempting from the consequence of deliberate acts. But this is a perversion of the rule that if a clause can cover something other than negligence, it will not be applied to negligence. Whether, in addition to negligence, it covers other, e.g., deliberate, acts, remains a matter of construction requiring, of course, clear words. I am of opinion that it does, and being free to construe and apply the clause, I must hold that liability is excluded. . . .

Notes

1. This confirms that there is now a general construction test and it is no longer necessary to distinguish a fundamental breach. It appears that the only relevance of a fundamental breach is that clearer words will be required for the clause to cover it.

2. Lord Wilberforce rejects any substantive rule applicable to fundamental breach on the ground that it leads to uncertainty, since it is difficult to determine whether a breach is serious enough to be fundamental and it is difficult to determine the point at which the contract is terminated.

3. The House of Lords also recognised the misconception in *Harbutts' Plasticine Ltd* v *Wayne Tank & Pump Co. Ltd* [1970] 1 QB 447 that the effect of termination for fundamental breach was to bring the contract to an end so that the contractual terms no longer applied. On the contrary, although future performance is no longer required, the contract is *not* treated as being void *ab initio*. The terms are still relevant, for example, for the purposes of assessing the measure of damages, and any exemption clause is still relevant for the purposes of assessing if liability has been excluded or limited. (Section 9(1) of UCTA 1977 confirms that termination does not destroy exemption clauses in the contract.)

4. The House of Lords seems to have been greatly influenced by the fact that the parties were 'of equal bargaining power', ar 1 so must be taken to have allocated the risk and, consequently, the burden of securing insurance cover. The other relevant factor was that the House viewed the cost of the service provided by Securicor as being very modest.

Question

Is it true to say that the parties were of equal bargaining power when the plaintiffs contracted on the defendants' standard terms? See Nicol and Rawlings, 'Substantive Fundamental Breach Burnt Out' (1980) 43 MLR 567.

George Mitchell (Chesterhall) Ltd v *Finney Lock Seeds Ltd* [1983] 2 AC 803 (HL)

The plaintiffs ordered 30lbs of Finney's Late Dutch special cabbage seed at a price of £201.60 from the defendant seed merchants with whom they

had contracted for many years. The defendants delivered the seed. The conditions of sale on the back of the invoice limited liability to replacement of the goods or a refund of the purchase price. The seed supplied was not late cabbage seed but autumn cabbage seed of inferior variety. The plaintiffs had planted the seed in 63 acres, but it did not grow into true cabbage plants and had to be ploughed in. The plaintiffs' loss was over £61,000. They claimed damages. Parker J held that since what was delivered was wholly different in kind from what had been ordered and agreed to be supplied, the clause could not operate. The majority of the Court of Appeal (Oliver and Kerr LJJ: [1983] 1 QB 284) agreed, although they also found that the clause was unenforceable by virtue of the Sale of Goods Act 1979, s. 55, since it was not 'fair and reasonable' to allow reliance on it. The House of Lords agreed with Lord Denning MR, in the minority in the Court of Appeal, that the task of the judge was to give the clause its natural meaning, and on their true construction the conditions did cover the loss which had occurred. However, the House agreed with the Court of Appeal that it would not be 'fair and reasonable' to allow reliance on them. (On the question of the reasonableness of the clause, see page 336.)

LORD BRIDGE: My Lords, it seems to me, with all due deference, that the judgments of the learned trial judge and of Oliver LJ on the common law issue come dangerously near to re-introducing by the back door the doctrine of 'fundamental breach' which this House in *Securicor 1* [1980] AC 827, had so forcibly evicted by the front. The learned judge discusses what I may call the 'peas and beans' or 'chalk and cheese' cases, sc. those in which it has been held that exemption clauses do not apply where there has been a contract to sell one thing, e.g. a motor car, and the seller has supplied quite another thing, e.g. a bicycle. . . .

In my opinion, this is not a 'peas and beans' case at all. The relevant condition applies to 'seeds.' Clause 1 refers to seeds 'sold' and 'seeds agreed to be sold.' Clause 2 refers to 'seeds supplied.' As I have pointed out, Oliver LJ concentrates his attention on the phrase 'seeds agreed to be sold.' I can see no justification, with respect, for allowing this phrase alone to dictate the interpretation of the relevant condition, still less for treating clause 2 as 'merely a supplement' to clause 1. Clause 2 is perfectly clear and unambiguous. The reference to 'seeds agreed to be sold' as well as to 'seeds sold' in clause 1 reflects the same dichotomy as the definition of 'sale' in the Sale of Goods Act 1979 as including a bargain and sale as well as a sale and delivery. The defective seeds in this case were seeds sold and delivered, just as clearly as they were seeds supplied, by the appellants to the respondents. The relevant condition, read as a whole, unambiguously limits the appellants' liability to replacement of the seeds or refund of the price. It is only possible to read an ambiguity into it by the process of strained construction which was deprecated by Lord Diplock [1980] AC 827, 851C in *Securicor 1* and by Lord Wilberforce in *Securicor 2* [1983] 1 WLR 964, 966G.

In holding that the relevant condition was ineffective to limit the appellants' liability for a breach of contract caused by their negligence, Kerr LJ applied the principles stated by Lord Morton of Henryton giving the judgment of the Privy Council in *Canada Steamship Lines Ltd* v *The King* [1952] AC 192, 208. The learned Lord Justice stated correctly that this case was also referred to by Lord Fraser of Tullybelton in *Securicor 2* [1983] 1 WLR 964, 970. He omitted, however, to notice that, as appears

from the passage from Lord Fraser's speech which I have already cited, the whole point of Lord Fraser's reference was to express his opinion that the very strict principles laid down in the *Canada Steamship Lines* case as applicable to exclusion and indemnity clauses cannot be applied in their full rigour to limitation clauses. Lord Wilberforce's speech contains a passage to the like effect, and Lord Elwyn-Jones, Lord Salmon and Lord Lowry agreed with both speeches. Having once reached a conclusion in the instant case that the relevant condition unambiguously limited the appellants' liability, I know of no principle of construction which can properly be applied to confine the effect of the limitation to breaches of contract arising without negligence on the part of the appellants. In agreement with Lord Denning MR, I would decide the common law issue in the appellants' favour.

Note

See Adams, 'Fundamental Breach — Positively Last Appearance' (1983) 46 MLR 771.

It is clear that any argument based upon the 'peas and beans' cases is unlikely to succeed in future as a method of preventing reliance on an exemption clause, since, given that there are to be no strained constructions, a court may not construe what has been delivered as being wholly different from what was ordered. The House of Lords construed this contract as a contract to deliver seed, and seed had been delivered.

SECTION 5: THE CLAUSE IS NOT RENDERED UNENFORCEABLE BY THE UNFAIR CONTRACT TERMS ACT 1977 OR THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1994

A: SCOPE OF UCTA 1977

See Adams and Brownsword, 'The Unfair Contract Terms Act: A Decade of Discretion' (1988) 104 LQR 94 and Macdonald [1994] JBL 441, 441–56.

UCTA 1977 places statutory restrictions on the extent to which liability can be '*excluded or restricted*' by means of exemption clauses.

(a) Section 13(1)

Section 13(1) extends this somewhat limited definition. (See Macdonald (1992) 12 *Legal Studies* 277.)

Unfair Contracts Terms Act 1977

13. Varieties of exemption clause

(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents—

(a) making the liability or its enforcement subject to restrictive or onerous conditions;

(b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;

(c) excluding or restricting rules of evidence or procedure;
and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

Stewart Gill Ltd v *Horatio Myer & Co. Ltd*
[1992] 2 All ER 257 (CA)

The plaintiffs were to supply the defendants with an overhead conveyor system. Payment was in stages, with the final 10 per cent payable as to 5 per cent on completion and 5 per cent 30 days thereafter. The plaintiffs' general conditions of sale provided that the defendants could not withhold payment of any amount due on grounds of set off or counterclaim in respect of incorrect or defective goods. The defendants withheld the final 10 per cent and argued that the plaintiffs had committed various breaches of contract and that these losses could be set off against the amount claimed. Held: the clause was unenforceable. Section 13(1)(b) extended the meaning of ss. 3 and 7 to cover this clause since it excluded a right that would otherwise be available. Therefore, the clause had to be shown to be reasonable. A term preventing an overpayment being set off against a claim for the price was prima facie unreasonable, and since the offending parts could not be severed, the whole clause was unenforceable.

LORD DONALDSON MR: Section 3 of the 1977 Act applies where, as here, one party to a contract deals with the other on that other's written standard terms of business. However, it is limited to terms excluding or restricting liability or entitling the party concerned to render no contractual performance or a performance which is substantially different from that which was reasonably expected of him. Clause 12.4 is not such a clause, but the section is relevant to a consideration of s. 13, although it is not there referred to in express terms.

Section 7 applies where, as here, the contract transfers the ownership of goods otherwise than under a contract for the sale or hire purchase of goods. Unlike s. 3, it is referred to in s. 13 but, like s. 3, it is concerned with exclusion or restriction of liability.

[Lord Donaldson then referred to s. 13:]

It is a trite fact (as contrasted with being trite law) that there are more ways than one of killing a cat. Section 13 addresses this problem. On behalf of the plaintiffs it was submitted that it only did so to the extent of rendering ineffective any unreasonable term which by, for example, introducing restrictive or onerous conditions indirectly achieved the exclusion or restriction of liability which, if achieved directly, would fall within the scope of other sections. The plaintiffs rightly say that cl. 12.4 does not have this effect. On behalf of the defendants it was submitted that it had a wider scope.

The answer is, of course, to be found in the wording of the section, but it does not exactly leap out of the print and hit one between the eyes. Analysing the section and disregarding words which are irrelevant, it seems to deal with the matter as follows:

(1) To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents . . .

This seems to me to do no more than give expression to the 'cat' approach. Both ss. 3 and 7 would render ineffective any clause in the plaintiffs' written standard terms of business which excluded or restricted liability in respects which are here material and s. 13 extends this in some way. In order to find out in what way, one must read on:

> it also prevents — (a) making the liability or its enforcement subject to restrictive or onerous conditions; (b) excluding or restricting any right or remedy in respect of the liability . . . (c) excluding or restricting rules of . . . procedure . . .

Now cl. 12.4 can perhaps be said to make the enforcement of the plaintiffs' liability subject to a condition that the defendants shall not have sought to set off their own claims against their liability to pay the price and this might well be said to be onerous. However, I do not think it necessary to pursue this, because it is quite clear that cl. 12.4 excludes the defendants' 'right' to set off their claims against the plaintiffs' claim for the price and further excludes the remedy which they would otherwise have of being able to enforce their claims against the plaintiffs by means of a set-off (see para. (b)). It also excludes or restricts the procedural rules as to set off (see para. (c)). Thus far, therefore, the defendants can bring themselves within the section.

We then get to the words:

> and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.

Although I find this obscure, I do not think that these words restrict the ambit of the preceding words. I think that they constitute an extension and that what is intended to be covered is an exclusion or restriction of liability not by contract but by reference to notices or terms of business which are not incorporated in a contract. If this is correct, it is irrelevant to the present case.

Note

In *Fastframe Ltd* v *Lohinski* (unreported), 3 March 1993, noted Adams (1994) 57 MLR 960, the Court of Appeal held that a 'no deduction or set off' clause in a franchise agreement was one-sided and unreasonable.

Section 13(1) provides that clauses are subject to ss. 2, 5, 6 or 7 of UCTA if they are worded as clauses which exclude or restrict the obligation or duty.

Smith v *Eric S. Bush*
[1989] 2 All ER 514 (HL)

A prospective purchaser applied for a building society mortgage and the building society instructed the defendants to value the property. The applicant signed a form containing a disclaimer which stated that neither the building society nor its surveyor warranted that the report and valuation would be accurate, and the report and valuation were supplied without any acceptance of responsibility. The report also contained a similar disclaimer. The valuation stated that no essential repairs were required. It was negligently prepared and the purchaser claimed damages in tort from the defendants. The defendants argued that the disclaimer was effective to

protect them and was not subject to UCTA 1977, s. 2(2) (page 328) because it was not a clause which excluded liability. Held: a duty of care was owed by the valuers to the prospective purchaser. The disclaimer was subject to UCTA 1977, s. 2, in that the last part of s. 13(1) stated that s. 2 applied to clauses which purported to prevent the duty ever arising.

LORD TEMPLEMAN: In *Harris* v *Wyre Forest DC* [1988] 1 All ER 691 the Court of Appeal . . . accepted an argument that the 1977 Act did not apply because the council by their express disclaimer refused to obtain a valuation save on terms that the valuer would not be under any obligation to Mr and Mrs Harris to take reasonable care or exercise reasonable skill. The council did not exclude liability for negligence but excluded negligence so that the valuer and the council never came under a duty of care to Mr and Mrs Harris and could not be guilty of negligence. This construction would not give effect to the manifest intention of the 1977 Act but would emasculate the Act. The construction would provide no control over standard form exclusion clauses which individual members of the public are obliged to accept. A party to a contract or a tortfeasor could opt out of the 1977 Act by declining, in the words of Nourse LJ, to recognise 'their own answerability to the plaintiffs' (see [1988] 1 All ER 691 at 697, [1988] QB 835 at 845). Caulfield J said that the Act 'can only be relevant where there is on the facts a potential liability' (see [1988] 1 All ER 691 at 704, [1988] QB 835 at 850). But no one intends to commit a tort and therefore any notice which excludes liability is a notice which excludes a potential liability. Kerr LJ sought to confine the Act to 'situations where the existence of a duty of care is not open to doubt' or where there is 'an inescapable duty of care' (see [1988] 1 All ER 691 at 702, [1988] QB 835 at 853). I can find nothing in the 1977 Act or in the general law to identify or support this distinction. In the result the Court of Appeal held that the Act does not apply to 'negligent misstatements where a disclaimer has prevented a duty of care from coming into existence' (see [1988] 1 All ER 691 at 699–700, [1988] QB 835 at 848 per Nourse LJ). My Lords, this confuses the valuer's report with the work which the valuer carries out in order to make his report. The valuer owed a duty to exercise reasonable skill and care in his inspection and valuation. If he had been careful in his work, he would not have made a 'negligent misstatement' in his report.

Section 11(3) of the 1977 Act provides that, in considering whether it is fair and reasonable to allow reliance on a notice which excludes liability in tort, account must be taken of 'all the circumstances obtaining when the liability arose or (but for the notice) would have arisen'. Section 13(1) of the Act prevents the exclusion of any right or remedy and (to that extent) s. 2 also prevents the exclusion of liability 'by reference to . . . notices which exclude . . . the relevant obligation or duty'. Nourse LJ dismissed s. 11(3) as 'peripheral' and made no comment on s. 13(1). In my opinion both these provisions support the view that the 1977 Act requires that all exclusion notices which would in common law provide a defence to an action for negligence must satisfy the requirement of reasonableness.

The answer to the second question involved in these appeals is that the disclaimer of liability made by the council on its own behalf in *Harris's* case and by the Abbey National on behalf of the appellant surveyors in *Smith's* case constitute notices which fall within the 1977 Act and must satisfy the requirement of reasonableness.

Notes

1. It is far from clear *which* clauses excluding or restricting a duty are covered by UCTA 1977. See MacDonald (1992) 12 *Legal Studies* 277, the 'but for' test and the 'expectations test'.

2. On the question of the application of s. 2(2) and the reasonableness of the clause, see page 340.

(b) Clauses transferring liability from the tortfeasor to a third party are not subject to UCTA

Thompson* v *T. Lohan (Plant Hire) Ltd & J. W. Hurdiss Ltd
[1987] 2 All ER 631 (CA)

The defendants, a plant hire company, hired an excavator and driver to Hurdiss for use by Hurdiss at its quarry. The hire was on the terms and conditions of the Contractors' Plant Association, condition 8 of which provided:

> When a driver or operator is supplied by the Owner with the plant, the Owner shall supply a person competent in operating the plant and such person shall be under the direction and control of the Hirer. Such drivers or operators shall for all purposes in connection with their employment in the working of the plant be regarded as the servants or agents of the Hirer who alone shall be responsible for all claims arising in connection with the operation of the plant by the said drivers or operators. The Hirer shall not allow any other person to operate such plant without the Owner's previous consent to be confirmed in writing.

Condition 13 provided that the hirer was to 'fully and completely indemnify the owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the use of the plant'. The plaintiff's husband was killed in an accident caused by the negligence of the driver in operating the excavator at the quarry. The plaintiff succeeded in her claim for damages in tort from the defendants, and the defendants sought to rely on conditions 8 and 13 to recover the damages from Hurdiss. Hurdiss argued, *inter alia*, that the conditions were contrary to s. 2(1) of UCTA 1977 (page 328) and could not be relied upon. Held: condition 8 transferred liability for the driver's negligence to the third party, Hurdiss, who therefore had to indemnify the defendants under condition 13. Section 2 of UCTA was intended to prevent the *exclusion* of liability in negligence to the victim of the negligence (the plaintiff) and was not concerned with arrangements, such as those made in condition 8, for sharing or transferring the burden of compensating the victim.

The Court of Appeal in *Thompson* v *Lohan* had been referred to the following case.

Phillips Products Ltd* v *Hyland
[1987] 2 All ER 620 (CA)

The plaintiffs hired an excavator and a driver from the defendants to carry out building work at the plaintiffs' factory. The contract of hire

protect them and was not subject to UCTA 1977, s. 2(2) (page 328) because it was not a clause which excluded liability. Held: a duty of care was owed by the valuers to the prospective purchaser. The disclaimer was subject to UCTA 1977, s. 2, in that the last part of s. 13(1) stated that s. 2 applied to clauses which purported to prevent the duty ever arising.

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[1987] 2 All ER 631 (CA)

The defendants, a plant hire company, hired an excavator and driver to Hurdiss for use by Hurdiss at its quarry. The hire was on the terms and conditions of the Contractors' Plant Association, condition 8 of which provided:

> When a driver or operator is supplied by the Owner with the plant, the Owner shall supply a person competent in operating the plant and such person shall be under the direction and control of the Hirer. Such drivers or operators shall for all purposes in connection with their employment in the working of the plant be regarded as the servants or agents of the Hirer who alone shall be responsible for all claims arising in connection with the operation of the plant by the said drivers or operators. The Hirer shall not allow any other person to operate such plant without the Owner's previous consent to be confirmed in writing.

Condition 13 provided that the hirer was to 'fully and completely indemnify the owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the use of the plant'. The plaintiff's husband was killed in an accident caused by the negligence of the driver in operating the excavator at the quarry. The plaintiff succeeded in her claim for damages in tort from the defendants, and the defendants sought to rely on conditions 8 and 13 to recover the damages from Hurdiss. Hurdiss argued, *inter alia*, that the conditions were contrary to s. 2(1) of UCTA 1977 (page 328) and could not be relied upon. Held: condition 8 transferred liability for the driver's negligence to the third party, Hurdiss, who therefore had to indemnify the defendants under condition 13. Section 2 of UCTA was intended to prevent the *exclusion* of liability in negligence to the victim of the negligence (the plaintiff) and was not concerned with arrangements, such as those made in condition 8, for sharing or transferring the burden of compensating the victim.

The Court of Appeal in *Thompson* v *Lohan* had been referred to the following case.

Phillips Products Ltd* v *Hyland
[1987] 2 All ER 620 (CA)

The plaintiffs hired an excavator and a driver from the defendants to carry out building work at the plaintiffs' factory. The contract of hire

incorporated condition 8 of the Contractors' Plant Association conditions (see page 322). The driver negligently drove the excavator into a wall and caused considerable damage to the plaintiffs' property. The plaintiffs claimed damages from the defendants who sought to rely on condition 8. The plaintiffs alleged that condition 8 was subject to s. 2(2) of UCTA since it purported to 'exclude or restrict' liability in negligence. Held: in deciding whether a clause had excluded or restricted liability, the court had to look at the substance and effect of the term rather than its form. In the circumstances, the effect of condition 8 was to negative the common-law duty in tort which otherwise would have been owed by the defendants. Therefore, condition 8 had the *effect* of excluding liability and fell within s. 2(2) of UCTA.

SLADE LJ (delivering the judgment of the Court): . . . The argument for Hamstead is that they do not, by reference to condition 8, '*exclude or restrict*' their liability for negligence. Condition 8, it is stressed, is not an 'excluding' or 'restricting' clause. It may have an *effect* on the liability for negligence which would otherwise have existed if there were, as there was in the present case, negligence. (For 'may' we would substitute 'must' assuming that Hamstead's submission as to the validity of condition 8 is correct.) Nevertheless, the condition does not, it is said, amount to an attempt by either party to the contract to '*exclude or restrict*' liability: it is simply an attempt on their part to divide and allocate the obligations or responsibilities arising in relation to the contract by *transferring* liability for the acts of the operator from the plant owners to the hirers. A transfer, it is suggested, is not an exclusion; hence the hirers fail at the s. 2(2) hurdle.

. . . We are unable to accept that, in the ordinary sensible meaning of words in the context of s. 2 and the 1977 Act as a whole, the provisions of condition 8 do not fall within the scope of s. 2(2). A transfer of liability from A to B necessarily and inevitably involves the exclusion of liability so far as A is concerned. On the particular facts of this case the effect of condition 8, if valid, is to negative a common law liability in tort which would otherwise admittedly fall on the plant-owner. The effect of condition 8 making 'the hirer alone responsible for all claims' necessarily connotes that by the condition the plant-owner's responsibility is excluded. In applying s. 2(2), it is not relevant to consider whether the form of a condition is such that it can aptly be given the label of an 'exclusion' or 'restriction' clause. There is no mystique about 'exclusion' or 'restriction' clauses. To decide whether a person 'excludes' liability by reference to a contract term, you look at the effect of the term. You look at its substance. The effect here is beyond doubt. Hamstead does most certainly purport to exclude its liability for negligence by *reference* to condition 8. Furthermore, condition 8 purports to 'exclude or restrict the relevant obligation or duty' within the provisions of s. 13(1) of the 1977 Act.

Notes

1. In *Thompson* v *Lohan Ltd*, *Phillips Products* v *Hyland* was distinguished by Fox LJ who said (at pp. 638–9):

In the *Phillips* case there was a tortfeasor, Hamstead, which was vicariously liable to Phillips for the damage done by its servant, Hyland. Thus Hamstead was liable to Phillips for negligence, but was seeking to exclude that liability by relying on condition

8. If that reliance were successful, the result in the *Phillips* case would be that the victim would be left with no remedy by virtue of the operation of condition 8. Prima facie the victim was entitled to damages for negligence against Hamstead, because Hamstead was vicariously liable in negligence for the acts of its own servant. So one starts from that point. There was a plain liability by Hamstead to Phillips.

That was, as Slade LJ said, a case of a plant-owner excluding his liability for negligence in the relevant sense by reference to the contract term, condition 8. . . .

If one then turns to the present case, the sharp distinction between it and the *Phillips* case is this, that whereas in the *Phillips* case there was a liability in negligence by Hamstead to Phillips (and that was sought to be excluded), in the present case there is no exclusion or restriction of the liability sought to be achieved by reliance on the provisions of condition 8. The plaintiff has her judgment against Lohan and can enforce it. The plaintiff is not prejudiced in any way by the operation sought to be established of condition 8. All that has happened is that Lohan and the third party have agreed between themselves who is to bear the consequences of Mr Hill's negligent acts. I can see nothing in s. 2(1) of the 1977 Act to prevent that. In my opinion, s. 2(1) is concerned with protecting the victim of negligence, and of course those who claim under him. It is not concerned with arrangements made by the wrongdoer with other persons as to the sharing or bearing of the burden of compensating the victim. In such a case it seems to me there is no exclusion or restriction of the liability at all. The liability has been established by Hodgson J. It is not in dispute and is now unalterable. The circumstance that the defendants have between themselves chosen to bear the liability in a particular way does not affect that liability; it does not exclude it, and it does not restrict it. The liability to the plaintiff is the only relevant liability in the case, as it seems to me, and that liability is still in existence and will continue until discharge by payment to the plaintiff. Nothing is excluded in relation to the liability, and the liability is not restricted in any way whatever. The liability of Lohan to the plaintiff remains intact. The liability of Hamstead to Phillips was sought to be excluded.

The loss in *Phillips Products* v *Hyland* was incurred by the hirer so that the clause could easily be seen as excluding liability, whereas in *Thompson* it was the loss of a third party. They are consistent in that in both it is the position of the victim which is all important.

2. Despite the indication that it is the substance of the clause which matters rather than its form, it is not clear how this distinction will be made. In *Johnstone* v *Bloomsbury Health Authority* [1991] 2 All ER 293 (for facts see page 266), the alternative argument of the junior doctor was that if the express term had prevented the implication of a term, then the express term was unenforceable under UCTA 1977, s. 2(1) as a clause excluding liability for personal injury arising from negligence. All three members of the Court of Appeal considered that UCTA 1977 would apply to the express term. Unfortunately, only Stuart-Smith LJ gave brief reasons. He referred to s. 13(1) and continued:

When considering the operation of section 2 of the Act the court is concerned with the substance and not the form of the contractual provision. . . .

If, contrary to my opinion, the defendants are entitled to succeed on the submissions they advanced in support of the appeal in relation to the statement of claim, it is arguable that they can only do so because the effect of paragraph 4(b) of the

contract must be construed as an express assumption of risk by the plaintiff (a plea of volenti non fit injuria) or because it operates to restrict or limit the ambit and scope of the duty of care owed by the defendants. If that is the correct analysis, then the substance and effect, though not the form, of the term is such that it can properly be argued to fall within . . . the Act.

(c) Evasion by means of secondary contract

Unfair Contract Terms Act 1977

10. Evasion by means of secondary contract

A person is not bound by any contract term prejudicing or taking away rights of his which arise under, or in connection with the performance of, another contract, so far as those rights extend to the enforcement of another's liability which this Part of this Act prevents that other from excluding or restricting.

Tudor Grange Holdings Ltd v *Citibank NA*
[1991] 4 All ER 1

Tudor Grange brought an action against Citibank. Citibank sought to have it struck out on the ground that Tudor Grange had agreed a deed of release which prevented the action. This deed of release released the bank from 'all claims, demands and causes of action whether or not presently known or suspected'. Tudor Grange claimed that this deed of release was unenforceable under s. 10 of UCTA 1977. They argued that the release took away their rights under the banking contract with Citibank, including their right to complain of breaches of the duty of care owed in the banking contract, which the bank was precluded by UCTA from excluding or restricting unless the release was shown to be reasonable. Held: section 10 did not apply to a contract to settle disputes which had arisen concerning the performance of an earlier contract. It could also not apply where the parties to both contracts were the same, so that the release was binding on Tudor Grange.

BROWNE-WILKINSON V-C: This argument that s. 10 of the Act may apply to compromises or settlement of existing disputes has been foreseen by a number of textbook writers as an unfortunate possibility. They are unanimous in their hope that the courts will be robust in resisting it. If [counsel for the plaintiffs'] construction is correct, the impact will be very considerable. The 1977 Act is normally regarded as being aimed at exemption clauses in the strict sense, that is to say clauses in a contract which aim to cut down prospective liability arising in the course of the performance of the contract in which the exemption clause is contained. If [counsel for the plaintiffs'] argument is correct, the Act will apply to all compromises or waivers of existing claims arising from past actions. Any subsequent agreement to compromise contractual disputes falling within s. 2 or s. 3 of the Act will itself be capable of being put in question on the grounds that the compromise or waiver is not reasonable. Even an action settled at the door of the court on the advice of solicitors and counsel could be reopened on the grounds that the settlement was not reasonable within the meaning of the Act.

If I am forced to that conclusion by the words of s. 10 properly construed, so be it. But, in my judgment, it is improbable that Parliament intended that result: it would be an end to finality in seeking to resolve disputes.

The starting point in construing s. 10 is, in my judgment, to determine the mischief aimed at by the Act itself. For this purpose, it is legitimate to look at the second report of the Law Commission on *Exemption Clauses* (Law Com no. 69) (see per Lord Griffiths in *Smith* v *Eric S Bush (a firm)* [1989] 2 All ER 514 at 530, [1990] AC 831 at 857). This report was the genesis of the 1977 Act. The report is wholly concerned with remedying injustices which are caused by exemption clauses in the strict sense. So far as I can see, the report makes no reference of any kind to any mischief relating to agreements to settle disputes.

Next, the marginal note to s. 10 reads as follows: 'Evasion by means of secondary contract.' Although the marginal note to a section cannot control the language used in the section, it is permissible to have regard to it in considering what is the general purpose of the section and the mischief at which it is aimed: see *Stephens* v *Cuckfield RDC* [1960] 2 All ER 716, [1960] 2 QB 372. This sidenote clearly indicates that it is aimed at devices intended to *evade* the provisions of Pt 1 of the 1977 Act by the use of another contract. In my judgment, a contract to settle disputes which have arisen concerning the performance of an earlier contract cannot be described as an evasion of the provisions in the Act regulating exemption clauses in the earlier contract. Nor is the compromise contract 'secondary' to the earlier contract.

The textbooks, to my mind correctly, identify at least one case which s. 10 is designd to cover. Under contract 1, the supplier (S) contracts to supply a customer (C) with a product. Contract 1 contains no exemption clause. However, C enters into a servicing contract, contract 2, with another party (X). Under contract 2, C is precluded from exercising certain of his rights against S under contract 1. In such a case s. 10 operates to preclude X from enforcing contract 2 against C so as to prevent C enforcing his rights against S under contract 1. The extent of the operation of s. 10 in such circumstances may be doubtful (see Treitel *Law of Contract* (7th edn, 1987) p. 206). But there is no doubt that such a case falls squarely within the terms of s. 10.

In the case that I have just postulated, the references in s. 10 to 'another's liability' and 'that other' are references to someone other than X, i.e. to the original supplier, S. On [counsel for the plaintiffs'] construction the words 'another' and 'that other' are taken as referring to someone other than C, the customer whose rights are restricted, so as to make the section apply to a case such as the present where there is no third party, X. Although as a matter of language the words of the section are capable of referring to anyone other than C, in my judgment, read in context and having regard to the purpose both of the Act and of the section itself, the reference to 'another' plainly means someone other than X, that is to say someone other than the party to the secondary contract. In my judgment, s. 10 does not apply where the parties to both contracts are the same.

This view is reinforced by a further factor. If the Act were intended to apply to terms in subsequent compromise agreements between the same parties as the original contract, s. 10 would be quite unnecessary. Under ss. 2 and 3 there is no express requirement that the contract term excluding or restricting S's liability to C has to be contained in the same contract as that giving rise to S's liability to C. If S and C enter into two contracts, it makes no difference if the exemption clause is contained in a different contract from that under which the goods are supplied. Sections 2 and 3 by themselves will impose the test of reasonableness. Why then should Parliament have thought that in s. 10 there was some possibility of evasion in such circumstances?

In my judgment, the 1977 Act is dealing solely with exemption clauses in the strict sense (i.e. clauses in a contract modifying prospective liability) and does not affect

retrospective compromises of existing claims. Section 10 is dealing only with attempts to evade the Act's provisions by the introduction of such an exemption clause into a contract with a third party. . . . Accordingly, for those reasons, s. 10 cannot apply to the release.

Note
Section 10 is therefore limited to attempts to avoid the operation of UCTA's provisions by the use of an exemption clause in a secondary contract with a third party.

(d) Business liability
The main provisions of the Act (ss. 2–7) apply only to 'business liability'.

Unfair Contract Terms Act 1977

1. Scope of Part I

(3) In the case of both contract and tort, sections 2 to 7 apply (except where the contrary is stated in section 6(4)) only to business liability, that is liability for breach of obligations or duties arising—

(a) from things done or to be done by a person in the course of a business (whether his own business or another's); or

(b) from the occupation of premises used for business purposes of the occupier; and references to liability are to be read accordingly.

Note
'Business' is defined by s. 14 as including 'a profession and the activities of any government department or local or public authority'. (See, e.g., the local authority in *St Albans City and District Council* v *International Computers Ltd* [1996] 4 All ER 481, 490, which was dealing 'in the course of a business'.) Section 6(4) extends the liabilities in s. 6 beyond business liability.

B: BASIC SCHEME OF UCTA 1977

UCTA 1977 deals with exemption clauses in one of two ways: either the clause will be rendered totally unenforceable in the circumstances; or the clause will be unenforceable unless it is established that it is reasonable. (It is important to note, therefore, that not every clause is subject to the reasonableness requirement).

The first step is to find the section applicable to the liability sought to be excluded. This will then tell us whether the clause is totally unenforceable or subject to the reasonableness requirement.

(a) Negligence liability

Unfair Contract Terms Act 1977

1. Scope of Part I

(1) For the purposes of this Part of this Act, 'negligence' means the breach—

(a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;

(b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);

(c) of the common duty of care imposed by the Occupiers' Liability Act 1957 or the Occupiers' Liability Act (Northern Ireland) 1957.

This means that for the purposes of the Act, a breach of contract is treated as negligence (i.e., breaches of qualified contractual obligations to take reasonable care or exercise reasonable skill).

Unfair Contract Terms Act 1977

2. Negligence liability

(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.

Note

Clauses which purport to exclude or restrict negligence liability for death or personal injury are rendered totally unenforceable.

'Other loss or damage' means loss or damage other than death or personal injury, and would include property damage and economic loss. Clauses falling within s. 2(2) are enforceable only if shown to be reasonable.

(b) Contractual liability

This is dealt with in two places in the Act. There are special rules in ss. 6 and 7 covering certain implied obligations (e.g., as to title, description, fitness for purpose, satisfactory quality and correspondence with sample) in sale of goods and hire-purchase contracts, and contracts for work and materials and hire contracts (for details of these contracts and terms, see page 266). There is also a general provision covering contractual liability if qualifying conditions are met (s. 3).

(i) *Contracts covered by ss. 6 and 7*

Unfair Contract Terms Act 1977

6. Sale and hire-purchase

(2) As against a person dealing as consumer, liability for breach of the obligations arising from—

(a) section 13, 14 or 15 of the 1893 Act (seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose);

(b) section 9, 10 or 11 of the 1973 Act (the corresponding things in relation to hire-purchase),
cannot be excluded or restricted by reference to any contract term.

(3) As against a person dealing otherwise than as consumer, the liability specified in subsection (2) above can be excluded or restricted by reference to a contract term, but only in so far as the term satisfies the requirement of reasonableness.

Notes

1. Exclusion or restriction of the implied terms in s. 6 was previously governed by the Supply of Goods (Implied Terms) Act 1973.

2. Section 6(1) provides that the implied obligations as to title cannot be excluded or restricted. Section 7(3A) of UCTA provides that liability for breach of s. 2 of the Supply of Goods and Services Act 1982 (relating to the transfer of goods in a work and materials contract) cannot be excluded or restricted. However, liability for breach of s. 7 of the 1982 Act (implied obligation concerning the right to transfer possession of goods in a hire contract) can be excluded or restricted if the clause is shown to satisfy the reasonableness test (UCTA 1977, s. 7(4)).

3. Section 6(2) and (3) and s. 7(2) and (3) are to similar effect and draw an important distinction between a party 'dealing as consumer' (who is given absolute protection against the exclusion of the implied obligations as to description, fitness for purpose, satisfactory quality and correspondence with sample) and a non-consumer (against whom this liability can be excluded provided the clause is a reasonable one).

4. Section 12(1) provides a definition of 'dealing as a consumer'.

Unfair Contract Terms Act 1977

12. 'Dealing as consumer'

(1) A party to a contract 'deals as consumer' in relation to another party if—

(a) he neither makes the contract in the course of a business nor holds himself out as doing so; and

(b) the other party does make the contract in the course of a business; and

(c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

Note

Section 12(3) provides that 'it is for those claiming that a party does not deal as consumer to show that he does not'.

When will the making of a contract be 'in the course of a business'?

R. & B. Customs Brokers Co. Ltd v *United Dominions Trust Ltd*
[1988] 1 All ER 847 (CA)

A company which had only two directors and shareholders (Mr and Mrs Bell) and which operated as a freight forwarding agent, bought a car on

conditional sale terms from the defendant finance house. Clause 2(a) of the agreement purported to exclude any implied conditions as to the condition or quality of the car, or its fitness for any particular purpose in relation to business transactions. The car was for the personal and business use of the Bells. A serious leak was discovered in the vehicle so that it was rendered unfit for use on the roads (a breach of the implied term in the Sale of Goods Act 1979, s. 14(3)). The plaintiff company brought an action against the defendants to recover the amount they had paid under the conditional sale agreement. The Court of Appeal examined whether the contract was made 'in the course of a business' by relying on the meaning of 'trade or business' in the Trade Descriptions Act 1968. Held: either the contract must be an integral part of the business (which here would meant the freight forwarding business), or, if it is merely incidental to the business, it must be carried out with sufficient regularity to render it a contract in the course of a business. Since this car was only the second or third vehicle acquired by the plaintiffs on credit terms, there was not a sufficient degree of regularity to establish that this contract was anything more than a consumer transaction. The plaintiff company had dealt as a consumer and clause 2(a) did not apply.

DILLON LJ: . . . Did the company neither make the contract with the defendants in the course of a business nor hold itself out as doing so?

In the present case there was no holding out beyond the mere facts that the contract and the finance application were made in the company's corporate name and in the finance application the section headed 'Business Details' was filled in to the extent of giving the nature of the company's business as that of shipping brokers, giving the number of years trading and the number of employees, and giving the names and addresses of the directors. What is important is whether the contract was made in the course of a business.

. . . Section 12 does not require that the business in the course of which the one party, referred to in the condition in para (a), makes the contract must be of the same nature as the business in the course of which the other party, referred to in the condition in para (b), makes the contract, e.g., that they should both be motor dealers.

. . . [W]e have been referred to decisions under the Trade Descriptions Act 1968, and in particular to the decision of the House of Lords in *Davies* v *Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301.

Under the Trade Descriptions Act 1968 any person who in the course of a trade or business applies a false trade description to goods is, subject to the provisions of that Act, guilty of an offence. It is a penal Act, whereas the 1977 Act is not, and it is accordingly submitted that decisions on the construction of the 1968 Act cannot assist on the construction of s. 12 of the 1977 Act. Also the legislative purposes of the two Acts are not the same. The primary purpose of the 1968 Act is consumer protection, and the course of business referred to is the course of business of the alleged wrongdoer. But the provisions as to dealing as a consumer in the 1977 Act are concerned with differentiating between two classes of innocent contracting parties (those who deal as consumers and those who do not) for whom differing degrees of protection against unfair contract terms are afforded by the 1977 Act. Despite these distinctions, however, it would, in my judgment, be unreal and unsatisfactory to conclude that the fairly ordinary words 'in the course of business' bear a significantly

different meaning in, on the one hand, the 1968 Act and, on the other hand, s. 12 of the 1977 Act. In particular, I would be very reluctant to conclude that these words bear a significantly wider meaning in s. 12 than in the 1968 Act.

I turn therefore to *Davies* v *Sumner* [1984] 3 All ER 831, [1984] 1 WLR 1301. That case was not concerned with a company, but with an individual who had used a car for the purposes of his business as a self-employed courier. When he sold the car by trading it in in part exchange for a new one, he had applied a false trade description to it by falsely representing the mileage the car had travelled to have been far less than it actually was. Lord Keith who delivered the only speech in the House of Lords, commented that it was clear that the transaction (sc of trading in the car on the purchase of a new one) was reasonably incidental to the carrying on of the business, but he went on to say ([1984] 3 All ER 831 at 833–834, [1984] 1 WLR 1301 at 1305):

> Any disposal of a chattel held for the purposes of a business may, in a certain sense, be said to have been in the course of that business, irrespective of whether the chattel was acquired with a view to resale or for consumption or as a capital asset. But in my opinion s. 1(1) of the 1968 Act is not intended to cast such a wide net as this. The expression 'in the course of a trade or business' in the context of an Act having consumer protection as its primary purpose conveys the concept of some degree of regularity, and it is to be observed that the long title to the Act refers to 'misdescriptions of goods, services, accommodation and facilities provided in the course of trade'. Lord Parker CJ in the *Havering* case [*Havering London Borough* v *Stevenson* [1970] 3 All ER 609, [1970] 1 WLR 1375] clearly considered that the expression was not used in the broadest sense. The reason why the transaction there in issue was caught was that in his view it was 'an integral part of the business carried on as a car-hire firm'. That would not cover the sporadic selling off of pieces of equipment which were no longer required for the purposes of a business. The vital feature of the *Havering* case appears to have been, in Lord Parker's view, that the respondent's business *as part of its normal practice* bought and disposed of cars. The need for some degree of regularity does not, however, involve that a one-off adventure in the nature of trade, carried through with a view to profit, would not fall within s. 1(1) because such a transaction would itself constitute a trade. [Lord Keith's emphasis.]

Lord Keith then held that the requisite degree of regularity had not been established on the facts of *Davies* v *Sumner* because a normal practice of buying and disposing of cars had not yet been established at the time of the alleged offence. He pointed out for good measure that the disposal of the car was not a disposal of stock in trade of the business, but he clearly was not holding that only a disposal of stock in trade could be a disposal in the course of a trade or business.

Lord Keith emphasised the need for some degree of regularity, and he found pointers to this in the primary purpose and long title of the 1968 Act. I find pointers to a similar need for regularity under the 1977 Act, where matters merely incidental to the carrying on of a business are concerned, both in the words which I would emphasise, 'in the course of' in the phrase 'in the course of a business' and in the concept, or legislative purpose, which must underlie the dichotomy under the 1977 Act between those who deal as consumers and those who deal otherwise than as consumers.

This reasoning leads to the conclusion that, in the 1977 Act also, the words 'in the course of business' are not used in what Lord Keith called 'the broadest sense'. I also

find helpful the phrase used by Lord Parker CJ and quoted by Lord Keith, 'an integral part of the business carried on'. The reconcilation between that phrase and the need for some degree of regularity is, as I see it, as follows: there are some transactions which are clearly integral parts of the business concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade where the transaction itself would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at the highest only incidental to the carrying on of the relevant business; here a degree of regularity is required before it can be said that they are an integral part of the business carried on and so entered into in the course of that business.

Applying the test thus indicated to the facts of the present case, I have no doubt that the requisite degree of regularity is not made out on the facts. Mr Bell's evidence that the car was the second or third vehicle acquired on credit terms was in my judgment and in the context of this case not enough. Accordingly, I agree with the judge that, in entering into the conditional sale agreement with the defendants, the company was 'dealing as consumer'. The defendants' cl. 2(a) is thus inapplicable and the defendants are not absolved from liability under s. 14(3).

There is a different approach which I would wish to leave open for a future case since it was not argued before us. If the company had never been incorporated and Mr Bell had bought the car personally for personal (or domestic) and business use it would, I apprehend, have been difficult to argue that he had not been dealing as a consumer in buying the car. On facts such as those of the present case it would seem anomalous and in some measure disquieting if a different result were reached if the car was bought by a company for the personal and business use of its two directors. It occurs to me that in such circumstances it could well be appropriate to pierce the corporate veil and look at the realities of the situation as in *DHN Food Distributors Ltd v Tower Hamlets London Borough* [1976] 3 All ER 462 esp at 467–468, [1976] 1 WLR 852 esp at 860–861 per Lord Denning MR and Goff LJ.

Notes

1. Dillon LJ rejected the argument that the plaintiffs were holding themselves out as contracting in the course of a business within s. 12(1) merely by representing that they were a company. More than this is required.

2. In circumstances such as these, the company was in the same need of protection when buying the car as an individual consumer since it was not in the business of buying cars and did not regularly purchase cars on credit so as to be in a position of knowledge. However, it is possible to consider circumstances where a company might not be in need of the same protection, e.g., a large public company.

3. It seems that 'regularly' in this context means frequently, and it is not necessary to establish a set pattern for purchases, e.g., every six months.

4. A company can therefore 'deal as a consumer' within UCTA 1977. Can a company seek protection under the Unfair Terms in Consumer Contracts Regulations 1994? See regs 2 and 3(1).

(ii) *Section 3 (general contractual liability)* Any clauses which attempt to exclude or restrict liability for *absolute obligations* arising under a contract, other than those covered by ss. 6 and 7 may be covered by this section.

Unfair Contract Terms Act 1977

3. Liability arising in contract

(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.

(2) As against that party, 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 (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness.

Notes

1. Section 3(1) states the conditions under which s. 3(2) will operate. It does not cover general contractual liability between two businesses unless one of the parties is dealing 'on the other's written standard terms of business', which is not defined by the Act. In *St Albans City and District Council* v *International Computers Ltd* [1995] FSR 686, Scott Baker J at first instance considered that it would be necessary for the other party to have drafted the *relevant exempting terms*, but that as long as there had not been any negotiation on those crucial terms, there could have been negotiation over other terms, e.g., price, quality. In the Court of Appeal ([1996] 4 All ER 481) Nourse LJ explained the position (at pp. 490–91) as follows:

> The first question is whether, as between the plaintiffs and the defendant, the plaintiffs dealt as consumer or on the, defendant's written standard terms of business within s. 3(1). In the light of s. 12(1)(a) and the definition of 'business' in s. 14, it is accepted on behalf of the plaintiffs that they did not deal as consumer. So the question is reduced to this. Did the plaintiffs 'deal' on the defendant's written standard terms of business?
>
> [Counsel for the defendant] submitted that the que tion must be answered in the negative, on the ground that you cannot be said to deal on another's standard terms of business if, as was here the case, you negotiate with him over those terms before you enter into the contract. In my view that is an impossible construction for two reasons: first, because as a matter of plain English 'deals' means 'makes a deal', irrespective of any negotiations that may have preceded it; secondly, because s. 12(1)(a) equates the expression 'deals as consumer' with 'makes the contract'. Thus it is clear that in order that one of the contracting parties may deal on the other's written standard terms of business within s. 3(1) it is only necessary for him to enter into the contract on those terms.
>
> [Counsel for the defendant] sought to derive support for his submission from observations of Judge Thayne Forbes QC in *Salvage Association* v *CAP Financial Services Ltd* [1995] FSR 654 at 671–672. In my view, those observations do not assist the defendant. In that case the judge had to consider, in relation to two contracts, whether certain terms satisfied the description 'written standard terms of business' and also whether there had been a 'dealing' on those terms. In relation to the first contract he said (at 671):

> I am satisfied that the terms in question were ones which had been written and produced in advance by CAP as a suitable set of contract terms for use in many of its future contracts of which the first contract with [the Salvage Association] happened to be one. It is true that Mr Jones felt free to and did negotiate and agree certain important matters and details relating to the first contract at the meeting of February 27, 1987. However, although he had read and briefly considered CAP's conditions of business, he did not attempt any negotiation with regard to those conditions, nor did he or Mr Ellis consider that it was appropriate or necessary to do so. The CAP standard conditions were terms that he and Mr Ellis willingly accepted as incorporated into the first contract in their predetermined form. In those circumstances, it seems to me that those terms still satisfy the description 'written standard terms of business' and, so far as concerns the first contract, the actions of Mr Jones and Mr Ellis constituted 'dealing' on the part of [the Salvage Association] with CAP on its written standard terms of business within the meaning of section 3 of the [Unfair Contract Terms Act 1977].

It is true that the judge found that the Salvage Association did not negotiate with CAP over the latter's standard terms and that he held that, in entering into the contract, the Salvage Association dealt with CAP on those terms within s. 3. I do not, however, read his observations as indicating a view that the 'dealing' depended on the absence of negotiations. I think that even if there had been negotiations over the standard conditions his view would have been the same.

Scott Baker J dealt with this question as one of fact, finding that the defendant's general conditions remained effectively untouched in the negotiations and that the plaintiffs accordingly dealt on the defendant's written standard terms for the purposes of s. 3(1) (see [1995] FSR 686 at 706). I respectfully agree with him. . . .

2. Section 3(2)(b)(i) is designed to cover the possibility that the clause may allow the contractual performance to be altered in some way, e.g., a clause in a package holiday contract allowing the company to change the ship, the cruise details and itineraries from those which had been booked (see *Anglo-Continental Holidays* v *Typaldos (London) Ltd* [1967] 2 Lloyd's Rep 61). Although the 'consumer' has agreed to this term which is incorporated in the contract, it is objectionable because it conflicts with what was 'reasonably expected' of the other party. How are the reasonable expectations to be established?

3. Clauses covered by s. 3(2)(b) are clauses which define the obligation in a more limited way, so that a breach is less likely. (This is necessary because the last part of s. 13 does not apply to s. 3, see page 318.)

4. If section 3 applies, the clause in question must satisfy the reasonableness requirement in s. 11 in order to be enforceable.

(c) The reasonableness requirement

Note: Apply this test only if the applicable section requires this, e.g., s. 2(2), s. 3, s. 6(3).

Unfair Contract Terms Act 1977

11. The 'reasonableness' test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act . . . is that the term shall have been a fair and

reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(2) In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract.

(3) In relation to a notice (not being a notice having contractual effect), the requirment of reasonablenes under this Act is that it should be fair and reasonable to allow reliance on it, having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.

(4) Where by reference to a contract term or notice a person seeks to restrict liability to a specified sum of money, and the question arises (under this or any other Act) whether the term or notice satisfies the requirement of reasonableness, regard shall be had in particular (but without pejudice to subsection (2) above in the case of contract terms) to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term or notice satisfies the requirement of reasonableness to show that it does.

Notes

1. The reasonableness of the clause is to be judged as at the time the contract was made. (Some of the case law on reasonableness was actually decided on the basis of the test used in the Supply of Goods (Implied Terms) Act 1973 (Sale of Goods Act 1979, s. 55), i.e., whether it is fair and reasonable to allow reliance on the term. In these cases, reasonableness was judged after the breach had occurred.) The Sale of Goods Act 1979, s. 55 (set out in sch. 1, para. 11) applied to contracts made between the date when the 1973 Act came into force and the date when UCTA 1977 came into force.

2. What factors are relevant in determining reasonableness? Section 11(4) states two factors which are particularly relevant to the reasonableness of clauses limiting the compensation available. The availability and cost of insurance is one of these factors, but it has been used more generally by the courts (e.g., *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827).

3. Section 11(2) makes reference to guidelines in Sch. 2 which are stated to be relevant to reasonableness in ss. 6 and 7. Due to their factual relevancy, however, they have been used more widely.

Unfair Contract Terms Act 1977

SCHEDULE 2
'GUIDELINES' FOR APPLICATION OF REASONABLENESS TEST

The matters to which regard is to be had in particular for the purposes of sections 6(3), 7(3) and (4), 20 and 21 are any of the following which appear to be relevant—

(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.

Note

The most fundamental factor in practice has been the question of the parties' bargaining positions. It is clearly more reasonable to use such a clause where the parties' bargaining position is equal.

Condition (c) appears to indicate that factors relevant to incorporation of the clause can also be significant in assessing its reasonableness. Staughton J, in particular, has viewed the presentation of the clause as being relevant to its reasonableness. In *Stag Line Ltd* v *Tyne Ship Repair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211, the most important factor affecting reasonableness was the fact that the parties were of equal bargaining power, but *obiter* Staughton J stated (at p. 222):

I would have been tempted to hold that all the conditions are unfair and unreasonable for two reasons: first, they are in such small print that one can barely read them; secondly, the draughtsmanship is so convoluted and prolix that one almost needs an LL.B. to understand them. However, neither of those arguments was advanced before me, so I say no more about them.

(See now reg. 6 of the Unfair Terms in Consumer Contracts Regulations 1994, page 296.)

How should the courts approach this reasonableness requirement and what factors have been relevant?

George Mitchell (Chesterhall) Ltd v *Finney Lock Seeds Ltd* [1983] 2 AC 803 (HL)

The facts of this case appear at page 316. Held: although on its true construction the clause applied to what had happened, it was not fair and reasonable to allow reliance on the clause (within s. 55 of the Sale of Goods Act 1979). A number of factors were stressed:

(a) It had been the defendants' practice to settle claims in excess of the limitation if they considered them to be justified. It therefore appeared that the defendants did not always consider the clause to be fair and reasonable.

(b) The defendants could have insured against crop failure without materially increasing the price of the seed.

(c) The supply of incorrect seed was due to negligence, and this was important in relation to the 'reasonableness' of the clause.

LORD BRIDGE: My Lords, at long last I turn to the application of the statutory language to the circumstances of the case. Of the particular matters to which attention is directed by paragraphs (a) to (e) of section 55(5), only those in (a) to (c) are relevant. As to paragraph (c), the respondents admittedly knew of the relevant condition (they had dealt with the appellants for many years) and, if they had read it, particularly clause 2, they would, I think, as laymen rather than lawyers, have had no difficulty in understanding what it said. This and the magnitude of the damages claimed in proportion to the price of the seeds sold are factors which weigh in the scales in the appellants' favour.

The question of relative bargaining strength under paragraph (a) and of the opportunity to buy seeds without a limitation of the seedsman's liability under paragraph (b) were inter-related. The evidence was that a similar limitation of liability was universally embodied in the terms of trade between seedsmen and farmers and had been so for very many years. The limitation had never been negotiated between representative bodies but, on the other hand, had not been the subject of any protest by the National Farmers' Union. These factors, if considered in isolation, might have been equivocal. The decisive factor, however, appears from the evidence of four witnesses called for the appellants, two independent seedsmen, the chairman of the appellant company, and a director of a sister company (both being wholly-owned subsidiaries of the same parent). They said that it had always been their practice, unsuccessfully attempted in the instant case, to negotiate settlements of farmers' claims for damages in excess of the price of the seeds, if they thought that the claims were 'genuine' and 'justified.' This evidence indicated a clear recognition by seedsmen in general, and the appellants in particular, that reliance on the limitation of liability imposed by the relevant condition would not be fair or reasonable.

Two further factors, if more were needed, weight the scales in favour of the respondents. The supply of autumn, instead of winter, cabbage seeds was due to the negligence of the appellants' sister company. Irrespective of its quality, the autumn variety supplied could not, according to the appellants' own evidence be grown commercially in East Lothian. Finally, as the trial judge found, seedsmen could insure against the risk of crop failure caused by supplying the wrong variety of seeds without materially increasing the price of seeds.

My Lords, even if I felt doubts about the statutory issue, I should not, for the reasons explained earlier, think it right to interfere with the unanimous original decision of that issue by the Court of Appeal. As it is, I feel no such doubts. If I were making the original decision, I should conclude without hesitation that it would not be fair or reasonable to allow the appellants to rely on the contractual limitation of their liability.

Note

Lord Bridge gave guidance on how the question of reasonableness should be approached.

This is the first time your Lordships' House has had to consider a modern statutory provision giving the court power to override contractual terms excluding or restricting

liability, which depends on the court's view of what is 'fair and reasonable.' The particular provision of the modified section 55 of the Act of 1979 which applies in the instant case is of limited and diminishing importance. But the several provisions of the Unfair Contract Terms Act 1977 which depend on 'the requirement of reasonableness,' defined in section 11 by reference to what is 'fair and reasonable,' albeit in a different context, are likely to come before the courts with increasing frequency. It may, therefore, be appropriate to consider how an original decision as to what is 'fair and reasonable' made in the application of any of these provisions should be approached by an appellate court. It would not be accurate to describe such a decision as an exercise of discretion. But a decision under any of the provisions referred to will have this in common with the exercise of a discretion, that, in having regard to the various matters to which the modified section 55(5) of the Act of 1979, or section 11 of the Act of 1977 direct attention, the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down. There will sometimes be room for a legitimate difference of judicial opinion as to what the answer shoud be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow, in my view, that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.

It will therefore be very difficult to give advice on whether a clause is likely to pass the reasonableness requirement in s. 11.

R. W. Green Ltd v *Cade Brothers Farms*
[1978] 1 Lloyd's Rep 602

The sellers, seed potato merchants, sold the buyers, who were farmers, 20 tons of uncertified King Edward potatoes at a price of £28 per ton. The sale was made on the standard terms of the National Association of Seed Potato Merchants, clause 5 of which provided that:

> . . . Time being the essence of this Contract . . . notification of rejection, claim or complaint must be made to the Seller giving a statement of the grounds for such rejection claim or complaint within three days after the arrival of the seed at its destination . . . It is specifically provided and agreed that compensation and damages payable under any claim or claims arising out of this Contract under whatsoever pretext shall not under any circumstances amount in aggregate to more than the Contract price of the potatoes forming the subject of the claim or claims.

In fact, it was later discovered that the potatoes were infected with a potato virus which could be detected only by examining the growing crop and which was not discoverable by inspecting the seeds. The sellers brought an action to recover monies owed for seed supplied, and the buyers counterclaimed to set off against this their loss of profit on the crop (£6,000). The sellers argued that they were protected from such a claim by their conditions of sale and that the buyers could recover only the price of the

potatoes (£634). Held: it was not fair and reasonable (within s. 55 of the Sale of Goods Act 1979) to allow reliance on that part of the clause imposing a three-day time limit for complaints, since it was not possible to discover the defect within that time. However, the part of the clause limiting liability to the cost of the potato seeds was reasonable because the parties were of equal bargaining power, the clause had been in use for many years and had evolved as a result of trade practice and discussion between the Seed Potato Merchants Association and the National Farmers Union. In addition, the buyers could have purchased certified seed at a higher price and would have been guaranteed against the virus.

GRIFFITHS J: . . . This contract, like any commercial contract, must be considered and construed against the background of the trade in which it operates. The plaintiffs' conditions are based upon a standard form of conditions produced by the National Association of Seed Potato Merchants. They are used by a large majority of seed potato merchants and they have been in use in their present form for over 20 years. They have evolved over a much longer period as the result both of trade practice and discussions between the Association and the National Farmers' Union. They are therefore not conditions imposed by the strong upon the weak; but are rather a set of trading terms upon which both sides are apparently content to do business.

It is also important to have in mind the distinction between certified and uncertified seed. The Ministry of Argiculture provides a service whereby its inspectors will inspect a potato crop during the growing season, and if it appears healthy will issue a certificate to that effect. There are various grades of certificate indicating the percentage of virus infected plants in the growing crop, ranging from an H certificate based on a tolerance of 2 per cent, to an FS certificate, based on a tolerance of 0.001 per cent. If a farmer buys certified seed, he pays a little more for it to cover the costs of the inspection and certification. The certificate cannot be an absolute guarantee that the seed will not be infected, but it is on the whole a fairly reliable system, and I have no doubt provides a very real safeguard against buying an infected batch of seed. The farmer who buys uncertified seed does not have this safeguard which is provided by the independent examination of the Ministry, and must as a general rule be taking a greater risk of buying infected seed, but of course he gets it at a cheaper price. . . .

On my findings no complaint was made about the potatoes until 13 days after delivery. The plaintiffs therefore say that the claim is out of time and barred by the condition that it must be made within three days of delivery. The plaintiffs' directors, in their evidence, explained that such a term was necessary in the trade because potatoes are a very perishable commodity and may deteriorate badly after delivery, particularly if they are not properly stored. So it was thought reasonable to give the farmer three days to inspect and make his complaint. This appears to me to be a very reasonable requirement in the case of damage that is discoverable by reasonable inspection. But the presence of virus Y in the potatoes was not discoverable by inspection, and the complaint that was made did not relate to this defect, which neither the farmer nor the potato merchant suspected.

At the time this contract was made no one would expect it to have been practicable for the farmer to complain of virus Y in the potatoes within three days of delivery, for the simple reason that he would not know of its presence. It would therefore, in my judgment, not be fair or reasonable that this claim should be defeated because no complaint was made within three days of delivery. I therefore declare that that part of cl. 5 is unenforceable in this action and provides no defence to the plaintiffs.

Is the claim to be limited to the contract price of the potatoes?

Should I exercise my discretion under s. 55, as amended, of the Sale of Goods Act and declare it to be unenforceable, because it would not be fair or reasonable to let the plaintiffs rely upon it?

I have considered the matters to which I am particularly directed to have regard by s. 55(5), in so far as they are relevant in this case. The parties were of equal bargaining strength; the buyer received no inducement to accept the term. True, it appears that he could not easily have bought potatoes without this term in the contract, but he had had the protection of the National Farmers' Union to look after his interests as the contract evolved and he knew that he was trading on these conditions.

No moral blame attaches to either party; neither of them knew, nor could be expected to know, that the potatoes were infected. There was of course a risk; it was a risk that the farmer could largely have avoided by buying certified seed, but he chose not to do so. To my mind the contract in clear language places the risk in so far as damage may exceed the contract price, on the farmer. The contract has been in use for many years with the approval of the negotiating bodies acting on behalf of both seed potato merchants and farmers, and I can see no grounds upon which it would be right for the Court to say in the circumstances of this case that such a term is not fair or reasonable.

Notes

1. A number of the sch. 2 guidelines were applicable in this case:

(a) The parties were of equal bargaining power, since, although they contracted on the sellers' standard terms, these terms had been negotiated by the relevant trade bodies. It was also possible to purchase certified seed and the buyers had chosen not to do so.

(b) It was not possible to contract for the purchase of uncertified seeds and avoid this clause but this was offset by the factors in (a) above.

(c) The parties had dealt on these terms for five or six years and the buyers ought to have been aware of them.

(d) The first part of the clause requiring defects to be notified within three days of delivery is a condition affecting liability, and the test in condition (d) is whether compliance with this was reasonably practicable. Griffiths J held that it was not.

2. In *Stewart Gill Ltd* v *Horatio Myer & Co. Ltd* [1992] 2 All ER 257 (page 319), the Court of Appeal refused to sever unreasonable words in a clause when assessing reasonableness. The clause in *R. W. Green* v *Cade Bros. Farms* does, however, appear to be separable into two distinct issues.

Smith v *Eric S. Bush*
[1989] 2 All ER 514 (HL)

The facts of this case appear at page 320.

Since s. 2(2) applied to the disclaimer of the surveyors' liability, the House of Lords had to decide whether it was reasonable in these circumstances. Held: it was not fair and reasonable for mortgagees (such as the

potatoes (£634). Held: it was not fair and reasonable (within s. 55 of the Sale of Goods Act 1979) to allow reliance on that part of the clause imposing a three-day time limit for complaints, since it was not possible to discover the defect within that time. However, the part of the clause limiting liability to the cost of the potato seeds was reasonable because the parties were of equal bargaining power, the clause had been in use for many years and had evolved as a result of trade practice and discussion between the Seed Potato Merchants Association and the National Farmers Union. In addition, the buyers could have purchased certified seed at a higher price and would have been guaranteed against the virus.

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It is also important to have in mind the distinction between certified and uncertified seed. The Ministry of Argiculture provides a service whereby its inspectors will inspect a potato crop during the growing season, and if it appears healthy will issue a certificate to that effect. There are various grades of certificate indicating the percentage of virus infected plants in the growing crop, ranging from an H certificate based on a tolerance of 2 per cent, to an FS certificate, based on a tolerance of 0.001 per cent. If a farmer buys certified seed, he pays a little more for it to cover the costs of the inspection and certification. The certificate cannot be an absolute guarantee that the seed will not be infected, but it is on the whole a fairly reliable system, and I have no doubt provides a very real safeguard against buying an infected batch of seed. The farmer who buys uncertified seed does not have this safeguard which is provided by the independent examination of the Ministry, and must as a general rule be taking a greater risk of buying infected seed, but of course he gets it at a cheaper price. . . .

On my findings no complaint was made about the potatoes until 13 days after delivery. The plaintiffs therefore say that the claim is out of time and barred by the condition that it must be made within three days of delivery. The plaintiffs' directors, in their evidence, explained that such a term was necessary in the trade because potatoes are a very perishable commodity and may deteriorate badly after delivery, particularly if they are not properly stored. So it was thought reasonable to give the farmer three days to inspect and make his complaint. This appears to me to be a very reasonable requirement in the case of damage that is discoverable by reasonable inspection. But the presence of virus Y in the potatoes was not discoverable by inspection, and the complaint that was made did not relate to this defect, which neither the farmer nor the potato merchant suspected.

At the time this contract was made no one would expect it to have been practicable for the farmer to complain of virus Y in the potatoes within three days of delivery, for the simple reason that he would not know of its presence. It would therefore, in my judgment, not be fair or reasonable that this claim should be defeated because no complaint was made within three days of delivery. I therefore declare that that part of cl. 5 is unenforceable in this action and provides no defence to the plaintiffs.

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Should I exercise my discretion under s. 55, as amended, of the Sale of Goods Act and declare it to be unenforceable, because it would not be fair or reasonable to let the plaintiffs rely upon it?

I have considered the matters to which I am particularly directed to have regard by s. 55(5), in so far as they are relevant in this case. The parties were of equal bargaining strength; the buyer received no inducement to accept the term. True, it appears that he could not easily have bought potatoes without this term in the contract, but he had had the protection of the National Farmers' Union to look after his interests as the contract evolved and he knew that he was trading on these conditions.

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Notes

1. A number of the sch. 2 guidelines were applicable in this case:

(a) The parties were of equal bargaining power, since, although they contracted on the sellers' standard terms, these terms had been negotiated by the relevant trade bodies. It was also possible to purchase certified seed and the buyers had chosen not to do so.

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(c) The parties had dealt on these terms for five or six years and the buyers ought to have been aware of them.

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The facts of this case appear at page 320.

Since s. 2(2) applied to the disclaimer of the surveyors' liability, the House of Lords had to decide whether it was reasonable in these circumstances. Held: it was not fair and reasonable for mortgagees (such as the

building society) and valuers to impose the risk of loss due to their incompetence or carelessness on purchasers, given the high cost of houses and the high interest rates payable by purchasers.

LORD GRIFFITHS. Finally, the question is whether the exclusion of liability contained in the disclaimer satisfies the requirement of reasonableness provided by s. 2(2) of the 1977 Act. The meaning of reasonableness and the burden of proof are both dealt with in s. 11(3) . . . It is clear, then, that the burden is on the surveyor to establish that in all the circumstances it is fair and reasonable that he should be allowed to rely on his disclaimer of liability.

I believe that it is impossible to draw up an exhaustive list of the factors that must be taken into account when a judge is faced with this very difficult decision. Nevertheless, the following matters should, in my view, always be considered.

(1) Were the parties of equal bargaining power? If the court is dealing with a one-off situation between parties of equal bargaining power the requirement of reasonableness would be more easily discharged than in a case such as the present where the disclaimer is imposed on the purchaser who has no effective power to object.

(2) In the case of advice, would it have been reasonably practicable to obtain the advice from an alternative source taking into account considerations of costs and time? In the present case it is urged on behalf of the surveyor that it would have been easy for the purchaser to have obtained his own report on the condition of the house, to which the purchaser replies that he would then be required to pay twice for the same advice and that people buying at the bottom end of the market, many of whom will be young first-time buyers, are likely to be under considerable financial pressure without the money to go paying twice for the same service.

(3) How difficult is the task being undertaken for which liability is being excluded? When a very difficult or dangerous undertaking is involved there may be a high risk of failure which would certainly be a pointer towards the reasonableness of excluding liability as a condition of doing the work. A valuation, on the other hand, should present no difficulty if the work is undertaken with reasonable skill and care. It is only defects which are observable by a careful visual examination that have to be taken into account and I cannot see that it places any unreasonable burden on the valuer to require him to accept responsibility for the fairly elementary degree of skill and care involved in observing, following up and reporting on such defects. Surely it is work at the lower end of the surveyor's field of professional expertise.

(4) What are the practical consequences of the decision on the question of reasonableness? This must involve the sums of money potentially at stake and the ability of the parties to bear the loss involved, which, in its turn, raises the question of insurance. There was once a time when it was considered improper even to mention the possible existence of insurance cover in a lawsuit. But those days are long past. Everyone knows that all prudent, professional men carry insurance, and the availability and cost of insurance must be a relevant factor when considering which of two parties should be required to bear the risk of a loss. We are dealing in this case with a loss which will be limited to the value of a modest house and against which it can be expected that the surveyor will be insured. Bearing the loss will be unlikely to cause significant hardship if it has to be borne by the surveyor but it is, on the other hand, quite possible that it will be a financial catastrophe for the purchaser who may be left with a valueless house and no money to buy another. If the law in these circumstances denies the surveyor the right to exclude his liability, it may result in a few more claims but I do not think so poorly of the surveyors' profession as to believe that the

floodgates will be opened. There may be some increase in surveyors' insurance premiums which will be passed on to the public, but I cannot think that it will be anything approaching the figures involved in the difference between the Abbey National's offer of a valuation without liability and a valuation with liability discussed in the speech of my noble and learned friend Lord Templeman. The result of denying a surveyor, in the circumstances of this case, the right to exclude liability will result in distributing the risk of his negligence among all house purchasers through an increase in his fees to cover insurance, rather than allowing the whole of the risk to fall on the one unfortunate purchaser.

The evaluation of the foregoing matters leads me to the clear conclusion that it would not be fair and reasonable for the surveyor to be permitted to exclude liability in the circumstances of this case. I would therefore dismiss this appeal.

It must, however, be remembered that this is a decision in respect of a dwelling house of modest value in which it is widely recognised by surveyors that purchasers are in fact relying on their care and skill. It will obviously be of general application in broadly similar circumstances. But I expressly reserve my position in respect of valuations of quite different types of property for mortgage purposes, such as industrial property, large blocks of flats or very expensive houses. In such cases it may well be that the general expectation of the behaviour of the purchaser is quite different. With very large sums of money at stake prudence would seem to demand that the purchaser obtain his own structural survey to guide him in his purchase and, in such circumstances with very much larger sums of money at stake, it may be reasonable for the surveyors valuing on behalf of those who are providing the finance either to exclude or limit their liability to the purchaser. . . .

Notes

1. It is interesting that, given the fact that an alternative was available, the House of Lords was prepared to go further and consider its practical value. Most purchasers did not instruct an independent survey to be conducted but relied on that supplied through the building society because they simply could not afford to pay twice.

2. Lord Griffiths also considered the practical consequences of the decision, given that this decision had far-reaching implications. The provision of insurance was relevant to this. Either the burden would fall on the poor unfortunate victim of the negligence, or the valuers could insure against this risk, which would lead to a small increase in the price of valuations which would affect all purchasers equally.

3. If the property is not a modest dwelling house, then it appears that the burden shifts, so that it will be more reasonable for a valuer to exclude his liability in these circumstances and more reasonable to expect the purchaser to obtain an independent survey.

St Albans City and District Council v *International Computers Ltd*
[1995] FSR 686; [1996] 4 All ER 481 (CA)

The plaintiff, a local authority, had contracted with the defendants for the provision and installation of software to enable the local authority to create a database of eligible poll tax payers. The software contained an error so

that the figure submitted to central government was overstated and the local authority therefore suffered loss. The local authority brought an action for damages and the defendants sought to rely on a limitation clause in the contract limiting their liability to £100,000. Scott Baker J, at first instance, held that the limitation clause was not reasonable and could not be relied upon.

Section 7(3) was applicable because this was a contract for goods (the software) and services and the software was not of merchantable quality or fit for the purpose. Section 3 applied to a breach of contract by the defendants' manager.

The following factors were identified as leading to the conclusion that the limitation was unreasonable:

(a) The defendant company was very substantial and, as a wholly-owned subsidiary of a multinational, had ample resources to meet any liability.

(b) The defendant company had product liability insurance cover of £50 million and could not justify the limit of liability to £100,000 which was small compared to the potential risk and the actual loss.

(c) The defendant company was in a very strong bargaining position relative to the plaintiff since it was one of a limited number of companies who could fulfil the local authority's requirements. The alternative companies also dealt on similar standard conditions.

(d) The practical consequence of a contrary finding of reasonableness would be that the loss would be borne by the local authority's population, either through increased taxation or by reduced services, whereas the defendants were covered by insurance and should carry the risk since they were the party which stood to make the profit on the contract.

(On appeal the Court of Appeal was mainly concerned with the measure of the damages award and, in part, allowed the appeal on this issue.)

Notes

1. These factors outweighed the factors on the other side of the balance, namely, that this contract was made between two 'businesses' who should be free to contract on whatever terms they chose, that the local authority was aware of the limitation when it contracted and that limitations of this kind were commonplace in the industry.

2. This decision is significant in that it involves a finding of unreasonableness of a limitation clause in a contract between two 'businesses', when it had previously been considered that such clauses were likely to be held to be reasonable. However, the judge adopts a protectionist attitude towards the local authority which, although technically a non-consumer under UCTA 1977, is in a distinct position and is arguably in greater need of protection than a large public limited company.

3. On the first instance decision of Scott Baker J, see Macdonald (1995) 58 MLR 585.

4. When assessing reasonableness in the Court of Appeal, Nourse LJ (with whose judgment Hirst LJ and Sir Iain Glidewell agreed) referred to the approach to be taken on appeal which had been discussed by Lord Bridge in *George Mitchell* v *Finney Lock Seeds*, page 337, and concluded that he was not satisfied that there were any grounds to upset the decision of Scott Baker J that the clause was unreasonable; and to reinforce the point, Nourse LJ added that he would have come to the same conclusion.

C: THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1994

These Regulations (SI 1994 No. 3159, in force 1 July 1995) are intended to implement the EC Directive on Unfair Terms in Consumer Contracts (93/13/EC). (See MacDonald [1994] JBL 441 on the Directive and Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in *Good Faith and Fault in Contract Law*, Beatson and Friedmann (eds) (OUP, 1995).)

The Directive is intended to harmonise laws on unfair terms in contracts between a seller or supplier and a consumer. There is some overlap in terms of scope between UCTA 1977 and the Directive, but the UK Government in its consultation documents of October 1993 and September 1994 indicated that it did not propose a single piece of legislation combining UCTA and the Directive but would instead implement the Directive separately (the 1994 Regulations), so that there are now two pieces of legislation with the potential to regulate exemption clauses. This will inevitably lead to complexity and uncertainty.

However, whereas UCTA 1977 can cover contracts between two businesses (and see *R & B Customs Brokers* v *UDT*, page 329, where a company was held to be dealing as a consumer), the Regulations cover consumer contracts which have not been individually negotiated, and 'consumer' is defined to mean 'a natural person who, in making a contract to which these Regulations apply, is acting for purposes which are outside his business'. UCTA 1977 may extend to business contracts and negotiated contracts. On the other hand, the Regulations apply to any non-negotiated term in the relevant contract, other than terms covered by reg. 3(2), and therefore are not limited to exclusion or limitation clauses.

Unfair Terms in Consumer Contracts Regulations 1994

3. Terms to which these Regulations apply

(1) Subject to the provisions of Schedule 1, these Regulations apply to any term in a contract concluded between a seller or supplier and a consumer where the said term has not been individually negotiated.

(2) In so far as it is in plain, intelligible language, no assessment shall be made of the fairness of any term which —

(a) defines the main subject matter of the contract, or

(b) concerns the adequacy of the price or remuneration, as against the goods or services sold or supplied.

(3) For the purposes of these Regulations, a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term.

(4) Notwithstanding that a specific term or certain aspects of it in a contract has been individually negotiated, these Regulations shall apply to the rest of a contract if an overall assessment of the contract indicates that it is a pre-formulated standard contract.

(5) It shall be for any seller or supplier who claims that a term was individually negotiated to show that it was.

4. Unfair terms

(1) In these Regulations, subject to paragraphs (2) and (3) below, 'unfair term' means any term which contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

(2) An assessment of the unfair nature of a term shall be made taking into account the nature of the goods or services for which the contract was concluded and referring, as at the time of the conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

(3) In determining whether a term satisfies the requirement of good faith, regard shall be had in particular to the matters specified in Schedule 2 to these Regulations.

(4) Schedule 3 to these Regulations contains an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Notes

1. These Regulations introduce the concept of 'good faith' into English contract law.

2. Regulation 4(3) refers to the factors mentioned in Sch. 2, which are similar to those in Sch. 2 of UCTA 1977, and the UK Government considers that 'good faith' and reasonableness can be equated:

SCHEDULE 2
ASSESSMENT OF GOOD FAITH

In making an assessment of good faith, regard shall be had in particular to —

(a) the strength of the bargaining positions of the parties;

(b) whether the consumer had an inducement to agree to the term;

(c) whether the goods or services were sold or supplied to the special order of the consumer, and

(d) the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

Paragraph (d) above is different and involves considering the general contractual context.

3. Schedule 3 contains a list of terms which may be regarded as unfair. Examples include the following:

SCHEDULE 3
INDICATIVE AND ILLUSTRATIVE LIST OF TERMS WHICH MAY BE REGARDED AS UNFAIR

1. Terms which have the object or effect of —

(a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

(b) inappropriately excluding or limiting the legal rights of the consumer vis-a-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

(c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

(f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

(g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

. . .

4. If a term is regarded as 'unfair' then it will not be binding on the consumer.

5. By reg. 8 (which was intended to implement Article 7 of the Directive) a statutory duty is imposed on the Director-General of Fair Trading to consider complaints of unfairness relating to terms in general use. If the Director-General considers that the term is unfair, he has a discretion to bring proceedings to ensure that such use is discontinued. This is a significant power and involves the Director-General making an assessment of unfairness in the absence of an actual dispute. He has been extremely active to date in the performance of this task. See the Office of Fair Trading's *Bulletins on Unfair Contract Terms*, Issue 1 (May 1996), Issue 2 (September 1996) and Issue 3 (March 1997) for the general policy approach adopted, in addition to details of specific complaints and action taken.

6. See Brownsword and Howells, 'The Implementation of the EC Directive on Unfair Terms in Consumer Contracts — Some Unresolved Questions' [1995] JBL 243, Geraint Howells, *Consumer Contract Legislation* (Blackstone Press, London, 1995) and Adams and Brownsword, *Key Issues in Contract Law*, pp. 281–91 (Butterworths, London, 1995).