Chapter 4
Consideration

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1 Function and definition

In the previous chapter we saw that agreement, or at least the outward appearance of agreement, was an essential ingredient of a contract. But it is likely that few legal systems treat all agreements as enforceable contracts. In early systems the distinction between unenforceable and enforceable agreements is often one of form and signs of that can be found in English law in the survival of the rule that a promise by deed is legally binding.

In developed English law, that is since the sixteenth century, the crucial factor is the presence or the absence of 'consideration'. It is natural to assume that the adoption of this test is related to some underlying theory about why agreements are enforced.[1] It has therefore been forcefully argued that 'consideration' is a word long rooted in the language of English law and denotes its fundamental attitude to contract and that when, in the middle of the sixteenth century, the lawyers evolved, through the action of assumpsit, a general contractual remedy, they decided at the same time that it would not avail to redress the breach of any and every promise, whatever its nature. In particular, it has been said that it was decided that assumpsit was not to be used to enforce a gratuitous promise so that the plaintiff must show that the defendant's promise, upon which he was suing, was part of a bargain to which

1 The literature on why contracts are legally enforced is extensive. See eg Hughes Parry *The Sanctity of Contracts in English Law*; Cohen and Cohen *Readings in Jurisprudence and Legal Philosophy* pp 100-195; Atiyah *Promises, Morals and Law* (usefully reviewed by Raz 95 Harvard LR 916 and Simpson 98 LQR 470); Fried *Contract as Promise A Theory Of Contractual Obligations* (reviewed Atiyah 95 Harvard LR 509); Atiyah *Essays on Contract* especially essays 6 and 7; Coote 1 JCL 91, 185

he himself had contributed.[2] So it has been persuasively argued that the doctrine of considerations represents the adoption by English law of the notion that only bargains should be enforced.[3]

This view has not gone unchallenged. The history of consideration is still not completely clear but it seems inherently unlikely that sixteenth century English judges would ever have asked themselves a highly abstract question such as 'Should we enforce bargains or promises?' The pragmatic habits of the English and the absence of institutional writing make it probable that in the sixteenth and seventeenth centuries there was no single *doctrine* of consideration, but a number of considerations which were recognised as adequate to support an action for breach of a promise.[4] So consideration probably meant at this stage the reason for the promise being binding, fulfilling something like the role of *causa* or *cause* in continental systems.[5]

Lord Mansfield's attack on consideration.

The doctrine of consideration was accepted throughout the seventeenth and in the first half of the eighteenth century as an integral part of the new law of contract. But when Lord Mansfield became Chief Justice of the King's Bench in 1756 its pride of place was challenged. At first Lord Mansfield refused to recognise it as the vital criterion of a contract and treated it merely as evidence of the parties' intention to be bound. If such an intention could be ascertained by other means, such as the presence of writing, consideration was unnecessary.[6] This direct assault was repelled with ease. In *Rann v Hughes* in 1778[7] it was proclaimed that:

> ... all contracts are, by the laws of England, distinguished into agreements by specialty, and agreements by parol; nor is there any such third class ... as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved.

Lord Mansfield's second approach was more insinuating. Accepting the concept of consideration as essential to English contract, he defined it in terms of moral obligation.

> Where a man is under a moral obligation, which no Court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration ... The ties of conscience upon an upright mind are a sufficient consideration.[8]

According to this view, whenever a man is under a moral duty to pay money and subsequently promises to pay, the pre-existing moral duty furnishes

2 Fifoot *History and Sources of the Common Law* pp 395 ff.
3 See eg Hamson 54 LQR 233; Shatwell 1 Sydney L Rev 289.
4 See Simpson *History* chs IV-VII.
5 Simpson 91 LQR 247 at 267. On the relationship between consideration and cause see Windeyer J in *Smith v Jenkins* (1969) 44 ALJR 78 at 83. Von Mehren 72 Harvard L Rev 1009; Markesinis [1978] CLJ 53. Atiyah has argued that this is still the function of consideration, *Essays on Contract* essay 8. Cf Treitel 50 ALJ 439. The equation of consideration and bargain is also criticised by Pound 33 Tulane L Rev 455. See also Chloros 17 ICLQ 137. On the other hand in the history of ideas what is believed is often more important than what is true. Whatever its historical validity, the equation between consideration and bargain has had a powerful influence on twentieth-century writing.
6 *Pillans v Van Mierop* (1765) 3 Burr 1664. For the varied fortunes of the doctrine of consideration between 1765 and 1840, see Fifoot *History and Sources of the Common Law* pp 406-411.
7 (1778) 7 Term Rep 350, n.
8 *Hawkes v Saunders* (1782) 1 Cowp 289 at 290.

consideration for the promise. The equation of consideration and moral obligation was accepted, though with increasing distrust, for nearly sixty years, and was finally repudiated only in 1840. In *Eastwood v Kenyon*:[9]

> On the death of John Sutcliffe, his infant daughter, Sarah, was left as his sole heiress. The plaintiff, as the girl's guardian, spent money on her education and for the benefit of the estate, and the girl, when she came of age, promised to reimburse him. She then married the defendant, who also promised to pay. The plaintiff sued the defendant on this promise.

Lord Denman dismissed the action and condemned the whole principle of moral obligation upon which it was founded. Such a principle was an innovation of Lord Mansfield, and to extirpate it would be to restore the pure and original doctrine of the common law. Moreover, as he pointed out, the logical inference from the acceptance of moral duty as the sole test of an actionable promise was the virtual annihilation of consideration. The law required some factor additional to the defendant's promise, whereby the promise became legally binding; but, if no more was needed than the pressure of conscience, this would operate as soon as the defendant voluntarily assumed an undertaking. To give a promise was to accept a moral obligation to perform it.[10]

Attempts to define consideration

As a result of *Eastwood v Kenyon* it was clear that consideration was neither a mere rule of evidence nor a synonym for moral obligation. How then was it to be defined? In the course of the nineteenth century it was frequently said that a plaintiff could establish the presence of consideration in one of two ways. He might prove either that he had conferred a benefit upon the defendant in return for which the defendant's promise was given or that he himself had incurred a detriment for which the promise was to compensate.[11]

9 (1840) 11 Ad & El 438. Extra-judicial criticism had been offered by the reporters Bosanquet and Puller in 1802 (see the note to *Wennall v Adney* (1802) 3 Bos & P 247), and Lord Tenterden had expressed some doubts in 1831 (*Littlefield v Shee* (1831) 2 B & Ad 811). But no decisive rejection occurred until 1840.

10 Simpson *History* p 323, argues that far from being an aberration of Lord Mansfield, the 'moral obligation' consideration lies at the heart of the early history of the doctrine. Some exceptional cases survived *Eastwood v Kenyon*. See eg *Flight v Reed* (1863) 1 H & C 703, where the plaintiff advanced money to the defendant against promissory notes void under the usury statutes. After the repeal of the statutes and without any further advances, the defendant executed new promissory notes which were held binding, the only consideration being the moral obligation to repay the void loans. This case was not followed in *Sharp v Ellis* [1972] VR 137. See also the cases of past consideration discussed below.

11 'A consideration of loss or inconvenience sustained by one party at the request of another is as good a consideration in law for a promise by such other as a consideration of profit or convenience to himself': Lord Ellenborough in *Bunn v Guy* (1803) 4 East 190. 'Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant': Patteson J in *Thomas v Thomas* (1842) 2 QB 851. 'A valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some fore bearance, detriment, loss or responsibility given, suffered or undertaken by the other': *Currie v Misa* (1875) LR 10 Exch 153. 'The general rule is that an executory agreement, by which the plaintiff agrees to do something on the terms that the defendant agrees to do something else, may be enforced, if what the plaintiff has agreed to do is either for the benefit of the defendant or to the trouble or prejudice of the plaintiff': per Lord Blackburn in *Bolton v Madden* (1873) LR 9 QB 55.

The antithesis of benefit and detriment, though reiterated in the courts, is not altogether happy. The use of the word 'detriment', in particular, obscures the vital transformation of assumpsit from a species of action on the case to a general remedy in contract. So long as it remained tortious in character, it was necessary to prove that the plaintiff had suffered damage in reliance upon the defendant's undertaking. When it became contractual, the courts concentrated, not on the consequences of the defendant's default, but on the facts present at the time of the agreement and in return for which the defendant's promise was given. 'Detriment' is clearly a more appropriate description of the former than of the latter situation. Nor is this criticism of merely antiquarian interest. The typical modern contract is the bargain struck by the exchange of promises. If A orders goods on credit from B both A and B are bound from the moment of agreement, and, if the one subsequently refuses to execute his part of it, the other may sue at once. The consideration for each party's promise is the other party's promise. It is difficult to see that at this stage either party has suffered benefit or detriment unless each party is said to have received the benefit of the other's promise and suffered the detriment of making his own. But such benefit and detriment assumes that the promises are binding, which is precisely what it is sought to prove.[12] A further disadvantage to the use of the word 'detriment' is that it has to be understood in a highly technical sense. So a promise to give up smoking is capable of being a detriment in the law of consideration even though smoking is bad for the promisor. This is technically sound but likely to confuse.

A different approach to the problem of consideration may be made through the language of purchase and sale. The plaintiff must show that he has bought the defendant's promise either by doing some act in return for it or by offering a counter-promise. Sir Frederick Pollock summarised the position in words adopted by the House of Lords in 1915:

> 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.[13]

This definition of consideration as the price paid by the plaintiff for the defendant's promise is preferable to the nineteenth-century terminology of benefit and detriment. It is easier to understand, it corresponds more happily to the normal exchange of promises and it emphasises the commercial character of the English contract.

2 Consideration—executory, executed and past

Here and in the next two sections will be examined the technical rules which the judges have evolved for the application of their doctrine of consideration.

The accepted classification of consideration is into the two categories, *executory* and *executed*. The classification reflects the two different ways in which

12 *Harrison v Cage* (1698) 5 Mod Rep 411.

13 *Pollock on Contracts* (13th edn) p 133; *Dunlop v Selfridge* [1915] AC 847 at 855. See also Law Revision Committee, Sixth Interim Report, para 17. The conception of consideration as the price of the promise is similarly stressed by the *American Restatement of Contracts* 2nd para 71. See *Farnsworth on Contracts* 2.2. See also Salmond and Williams' *Law of Contract* p 101, and Denning 15 MLR 1.

the plaintiff may buy the defendant's promise. Consideration is called *executory* when the defendant's promise is made in return for a counter-promise from the plaintiff, *executed* when it is made in return for the performance of an act. An agreement between seller and buyer for the sale of goods for further delivery on credit is an example of the former. At the time when the agreement is made, nothing has yet been done to fulfil the mutual promises of which the bargain is composed. The whole transaction remains *in futuro*. Of the latter the best example is the offer of a reward for an act. If A offers £5 to anyone who shall return his lost dog, the return of the dog by B is at once the acceptance of the offer and the performance of the act constituting the required consideration. B has earned the reward by his services, and only the offeror's promise remains outstanding. But whether the plaintiff relies upon an executory or on an executed consideration, he must be able to prove that his promise or act, together with the defendant's promise, constitute one single transaction and are causally related the one to the other.[14]

If the defendant makes a further promise, subsequent to and independent of the transaction, it must be regarded as a mere expression of gratitude for past favours or as a designated gift, and no contract will arise. It is irrelevant that he may have been induced to give the new promise because of the previous bargain. In such a case the promise is declared, in traditional language, to be made upon *past* consideration; or, more accurately, to be made without consideration at all. Two illustrations may be offered, one from a classical and one from a modern case. In *Roscorla v Thomas*:[15]

> The declaration stated that, 'in consideration that the plaintiff at the request of the defendant, *had* bought of the defendant a certain horse, at and for a certain price, the defendant promised the plaintiff that the said horse was sound and free from vice'. The plaintiff sued for breach of this promise.

The court held (1) that the fact of the sale did not itself imply a warranty that the horse was sound and free from vice, and (2) that the express promise was made after the sale was over and was unsupported by fresh consideration. The plaintiff could show nothing but a 'past' consideration and must fail. In *Re McArdle*:[16]

> A number of children, by their father's will, were entitled to a house after their mother's death. During the mother's life, one of the children and his wife lived with her in the house. The wife made various improvements to the house, and at a later date all the children signed a document addressed to her, stating that 'in consideration of your carrying out certain alterations and improvements to the property, we hereby agree that the executors shall repay to you from the estate, when distributed, the sum of £488 in settlement of the amount spent on such improvements'.

The Court of Appeal held that, as all the work on the house had in fact been completed before the document was signed, this was a case of past consideration and that the document could not be supported as a binding contract.

The distinction between executed and past consideration, while comparatively easy to state in the abstract, is often difficult to apply in practice, and a long and subtle line of cases has marked its interpretation in the courts.

14 *Wigan v English and Scottish Law Life Insurance Association* [1909] 1 Ch 291.
15 (1842) 3 QB 234.
16 [1951] Ch 669, [1951] 1 All ER 905.

Both the distinction and the difficulty were appreciated by the judges before the close of the sixteenth century. They were required to consider the position where the plaintiff had performed services for the defendant without any agreement for remuneration and the defendant had subsequently promised to pay for them. They decided that assumpsit would lie if, but only if, the services were originally performed at the defendant's request.[17] The law was settled in this senses in 1615 in the case of *Lampleigh v Brathwait*.[18]

> Thomas Brathwait had killed Patrick Mahume and had then asked Anthony Lampleigh to do all he could to get a pardon for him from the King. Lampleigh exerted himself to this end, 'riding and journeying to and from London and Newmarket' at his own expense, and Brathwait afterwards promised him £100 for his trouble. He failed to pay it and Lampleigh sued in assumpsit.

It was argued, inter alia, that the consideration was past, but the court gave judgment for the plaintiff on the ground that his services had been procured by the previous request of the defendant.

> It was agreed that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy 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 itself with the suit before.

The previous request and subsequent promise were thus to be treated as part of the same transaction.

This extended definition was applied at the end of the seventeenth century to cases where the defendant promised to pay a debt which was not enforceable at the time of his promise owing to some technical rule of law. Thus in *Ball v Hesketh*[19] the defendant, when an infant, had borrowed money from the plaintiff and, after coming of age, had promised to repay it. In accordance with the general immunity conferred by the law upon infants, he could not have been made liable on the original loan. But it was held that his subsequent promise entitled the plaintiff to sue him in assumpsit. So, too, in *Hyleing v Hastings*[20] it was held that a debt, the recovery of which was barred by the Statute of Limitations, was revived by a subsequent promise of payment. At the same time, the influence of commercial practice, felt with increasing urgency, familiarised the courts with the idea that a plaintiff, who sued on a negotiable instrument, need only show that value had once been given for it by some previous holder and was himself absolved from the necessity of proving fresh consideration. All these developments threatened to obliterate the distinction between executed and past consideration. It is not surprising, therefore, that they should have been used by Lord Mansfield to support his doctrine of moral obligation.[1]

But when, in the nineteenth century, this doctrine was rejected it became necessary to delimit afresh the boundaries of past and executed consideration. This was achieved by accepting the test of *Lampleigh v Brathwait* that the plaintiff's services must have been rendered at the defendant's request, but

17 See *Hunt v Bate* (1568) 3 Dyer 272a, and *Sidenham and Workington's Case* (1584) 2 Leon 224. See also Simpson *History* pp 452-458.
18 (1615) Hob 105.
19 (1697) Comb 381.
20 (1699) 1 Ld Raym 389
1 See pp 80-81, above.

emphasising the further fact that both parties must have assumed throughout their negotiations that the services were ultimately to be paid for.[2] They must have been performed in the way of business, not as an office of friendship. This 'revised version' was adopted by the court in *Re Casey's Patents, Stewart v Casey*.[3]

> A and B, the joint owners of certain patent rights, wrote to C as follows: 'In consideration of your services as the practical manager in working our patents, we hereby agree to give you one-third share of the patents.'

In an action which turned upon the effect of this agreement it was argued for A and B that their promise was made only in return for C's past services as manager and that there was therefore no consideration to support it. Bowen LJ refused to accept this argument.

The rule was succinctly stated by Lord Scarman:[4]

> An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated further 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.

The other exceptional cases discussed above have been removed or confirmed by statute. By section 2 of the Infants Relief Act 1874, no action is allowed upon any promise made after full age to pay a debt contracted during infancy.[5] By the Limitation Act 1980, if the debtor, after the debt has been barred, acknowledges the creditor's claim, the plaintiff may sue on this acknowledgment. No promise, express or implied, is necessary, and no consideration need be sought.[6] The third class of case, where the defendant is sued upon a negotiable instrument, survives as a genuine exception to the ban upon past consideration. It is to be explained as a concession to long-standing commercial custom, and it has been confirmed by section 27 of the Bills of Exchange Act 1882. By this section, 'valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract, (b) an antecedent debt or liability'.[7]

3 Consideration must move from the promisee

As long as consideration, under Lord Mansfield's influence, could be identified with moral duty, it was possible to support an action by a person for whose benefit a promise had been given even if the consideration had been supplied by someone else.[8] But once this identification was repudiated, the judges insisted that only he could sue on a promise who had paid the price

2 This further fact, though it was not expressed by the court in *Lampleigh v Brathwait*, seems on the whole to be implicit in the language of the judgment.
3 [1892] 1 Ch 104. See also *Kennedy v Broun* (1863) 13 CBNS 677.
4 *Pao On v Lau Yiu Long* [1980] AC 614 at 629, [1979] 3 All ER 65 at 74.
5 See pp 488–489, below.
6 See pp 711–713, below.
7 It has been ruled that the 'antecedent debt or liability' must be that of the maker or negotiator of the instrument and not of a stranger: *Oliver v Davis* [1949] 2 KB 727, [1949] 2 All ER 353.
8 See *Dutton v Poole* (1677) 2 Lev 210. See Simpson *History* pp 475–485.

of it. How otherwise could the plaintiff prove his share in the bargain upon which his action was based? Thus in *Price v Easton*[9] the defendant promised X that if X did certain work for him he would pay a sum of money to the plaintiff. X did the work, but the defendant did not pay the money. The court of Queen's Bench held that the plaintiff could not sue the defendant and explained their decision in two different ways. Lord Denman said that the plaintiff could not 'show any consideration for the promise moving from him to the defendant'. Littledale J said that 'no privity is shown between the plaintiff and the defendant'. In *Tweddle v Atkinson* in 1861[10] the judges, while endorsing the decision in *Price v Easton*, preferred the first of these reasons. 'It is now established', said Wightman J 'that no stranger to the consideration can take advantage of a contract, although made for his benefit.'

Relation of consideration to the doctrine of privity

It has long been a controversial question whether the rule that consideration must move from the promisee and the doctrine of privity of contract are fundamentally distinct or whether they are merely variations on a common theme. Two different factual situations may indeed arise. The plaintiff may be a party to an agreement without furnishing any consideration.

> A, B and C may all be signatories to an agreement whereby C promises A and B to pay A £100 if B will carry out work desired by C.

On the other hand, the person anxious to enforce the promise may not be a party to the agreement at all.

> B and C may make an agreement whereby B promises to write a book for C and C promises to pay £100 to A.

Historically A could not sue C in either case. But must he be said to fail in the first situation because consideration has not moved from him, and in the second because he is not privy to the contract? The nineteenth-century judges distinguished the two situations in law as well as in fact. So, too, in 1915[11] Viscount Haldane declared two principles to be 'fundamental in the law of England'. The first was that 'only a person who is a party to a contract can sue on it', and the second that 'only a person who has given consideration may enforce a contract not under seal'. The distinction was endorsed by the Law Revision Committee in 1937.[12]

This view, however, has been questioned.[13] It has been persuasively argued that there is no basic distinction between the two principles stated by Lord Haldane: they are but different ways of saying the same thing. The underlying assumption of English law is that a contract is a bargain. If a person furnishes no consideration, he takes no part in a bargain: if he takes no part in a bargain, he takes no part in a contract. In the second of the hypothetical cases stated above it is obvious that A is a stranger to the contract. But he is equally a stranger in the first: he is a party to an agreement, but he is not a party

9 (1833) 4 B & Ad 433.
10 (1861) 1 B & S 393.
11 *Dunlop v Selfridge* [1915] AC 847 at 853: see p 500, below.
12 Sixth Interim Report, p 22.
13 See Smith and Thomas *A Casebook on Contract* (11th edn) pp 279-283; Salmond and Williams *The Law of Contracts* pp 99-100; Furmston 23 MLR 373 at 382-384.

to a contract. It is true that, if the doctrine of consideration were abolished, the problem of privity would remain, as it still remains in other legal systems.

The question was discussed by the High Court of Australia in 1967 in *Coulls v Bagot's Executor and Trustee Co Ltd.*[14]

> C agreed to grant to the O'Neil Construction Co Ltd the exclusive right to quarry on his land in return for a minimum royalty of £12 a week for a period of ten years. C also 'authorised the company' to pay all money arising from this agreement to himself and his wife jointly. The agreement was in writing (not under seal) and was signed by C, by his wife and by O'Neil. Eighteen months later, C died. The O'Neil company in fact paid the royalty to C's wife; and the High Court was now asked, in an action between the wife and C's executors, to decide whether the company was bound or entitled to make such payment to her.

The High Court was divided upon the construction of the agreement.[15] But four of the judges were of opinion that if, on its true interpretation, the wife was a party to the agreement, she was entitled to receive the royalties payable after her husband's death even though she personally had given no consideration for the company's promise.

The High Court did not define with precision the relationship of privity of contract to the rule that consideration must move from the promisee. Barwick CJ seems to have treated the two rules as separate requirements:[16]

> 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 embarrassment in this conclusion. Indeed, I would find it odd that a person to whom no promise was made could himself enforce a promise made by another.

Windeyer J on the other hand, asked if there were any 'useful distinction between denying a right of action to a person because no promise was made to him, and denying a right of action to a person to whom a promise was made because no consideration for it moved from him'.[17]

In the present case, the wife was a party to the agreement; but had consideration moved from her? At first sight it would seem that her husband was the only person who had given consideration for the company's promise. Nevertheless Barwick CJ and Windeyer J found a way round the difficulty. Husband and wife were joint promisees.

Windeyer J said:[18]

> The promise is made to them collectively. It must, of course, be supported by consideration, but that does not mean by consideration furnished by them separately. It means a consideration given on behalf of them both, and therefore moving from both 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.

14 [1967] ALR 385.

15 Three judges held that the clause 'authorising the company' to pay C's wife was merely a revocable mandate which had been revoked by C's death.

16 [1967] ALR at 394-395.

17 Ibid at 405. See also the discussion in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 62 ALJR 508 at 511 per Mason CJ and Wilson J.

18 Ibid.

The solution is neat and would simply require the rule to be restated so as to insist that consideration must move either from a single promisee or from one of a number of joint promisees.

The point was raised in *McEvoy v Belfast Banking Co Ltd*:[19]

> A father, who had £10,000 on deposit with the Belfast Bank, transferred it to a deposit account in the names of himself and of his infant son. Soon afterwards he died. The executors were allowed by the bank to withdraw the money and put it into an account in their own names. The money was in fact lost in attempts to keep the family business alive; and the son sued the bank.

The Bank argued, inter alia, that no rights accrued to the son over the deposit account because he had furnished no consideration. The argument was rejected by Lord Atkin:

> The contract on the face of it purports to be made with A and B, and I think with them jointly and severally. A purports to make the contract on behalf of B as well as himself, and the consideration supports such a contract.[20]

The doctrine of consideration has not been abolished but the doctrine of privity has been subjected to major change by the Contract (Rights of Third Parties) Act 1999. This Act is discussed in chapter 14. The Act does not specifically refer to the rule that consideration must move from the promisee but it is clear that whenever a third party acquires rights under the Act, it will not be open to the defendant to argue that consideration has not moved from the third party.

4 Sufficiency of consideration

Consideration has been defined as the act or promise offered by the one party and accepted by the other as the price of that other's promise. The question now arises whether any act and any promise, regardless of their content, will satisfy this definition. Ames, indeed, argued that, with obvious reservations in the interests of morality and public policy, the question must be answered in the affirmative.[1] A survey of decided cases, however, will show that his argument, whatever its logical merits, does not represent the actual position. Certain acts and promises, it will be seen, are deemed incapable in law of supporting an action for breach of contract by the person who has supplied them. But, while most jurists have been forced by the results of litigation to accept this conclusion, there has been great divergence of opinion as to the test of such capacity. Two main lines of divergence may be observed.

There is doubt, in the first place, as to whether the criterion, whatever it may be, is equally applicable to acts and to promises. That such is the case was

19 [1935] AC 24.

20 Ibid at 43. Lord Thankerton (at 52) said that he would have agreed with this statement if he had thought that the father had designed to make the son a contracting party. See Cullity 85 LQR 530, especially at 531-534 and *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 at 180, [1974] 1 All ER 1015 at 1030, per Lord Simon of Glaisdale. On the other hand, there are formidable arguments the other way, as is shown by Coote [1978] CLJ 301.

1 See Ames *Lectures on Legal History* pp 323 ff.

asserted by Chief Justice Holt three centuries ago[2] and reasserted by Leake in his book on Contracts in the middle of the nineteenth century:

> It may be observed that whatever matter, if executed, is sufficient to form a good executed consideration, if promised, is sufficient to form a good executory consideration.[3]

The adoption of a single test would clearly simplify the problem: once determine its character in the case of an act and it could be applied automatically in the case of a promise. Sir Frederick Pollock, however, denied the possibility of a single test and declared that, in certain cases, a promise may, while an actual performance may not, afford a consideration to support a counter-promise.[4]

In the second place, whether the test be single or double, little success has attended the efforts of jurists to express it in language at once definite and comprehensive. Williston, who has devoted particular care to the problem, can only state it in terms of the formula of benefit and detriment current in the nineteenth century which has already been shown to be unsatisfactory. Executed consideration, according to his view, consists of 'a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor': executory consideration consists of 'mutual promises in each of which the promisor undertakes some act or forbearance that will be, *or apparently may be*, detrimental to the promisor or beneficial to the promisee'.[5] This language, it is suggested, restates the problem rather than solves it, and, as will be seen, is to be applied to actual cases only with difficulty and with a certain sense of strain.

It is, indeed, not without significance that these controversies are, for the most part, carried on outside the courts. The judges have been content to deny the name of consideration to certain acts or promises without attempting to generalise the grounds of their prohibition; and it may well be that the process of judicial thought is purely empirical and does not lend itself to *ex post facto* rationalisation. It will be well, at least, to discuss in turn the individual rules applied by the courts and then to ask if any comprehensive test can be adopted.

These rules may, for the sake of exposition, be grouped into two classes:

(a) those rules which forbid the courts to upset a bargain merely because the act or promise supplied by the plaintiff is an inadequate recompense for the defendant's promise;
(b) those rules which expressly declare that certain acts or promises do not constitute consideration.

Here, as in other aspects of contract, the choice of appropriate terminology to describe a particular legal position is a matter of difficulty. The word 'adequacy' has long been associated with the reluctance of the courts lightly to interfere with an agreement which the parties themselves have deemed fair and

2 'Where the doing a thing will be a good consideration, a promise to do that thing will be so too': *Thorpe v Thorpe* (1701) 12 Mod Rep 455.
3 *Leake on Contracts* (1st edn) p 314.
4 *Pollock on Contracts* (13th edn) pp 147-150; and see pp 117-120, below. Williston seems to take a middle view: *Williston on Contracts* (3rd edn) para 103.
5 *Williston on Contracts* (3rd edn) paras 102 and 103. The italics are ours. Williston uses the terms 'unilateral' and 'bilateral' to express the antithesis 'executed' and 'executory'. But the latter words have been adopted here as more in consonance with English usage.

reasonable, and some other word must be chosen to indicate the cases in which, perhaps as an exceptional measure, the courts reserve the right of interference. For this latter purpose the epithet 'sufficient' has been sanctioned, if not hallowed, by more than three centuries of judicial usage. It was adopted by the Elizabethan judges when they established the doctrine of consideration and repeated by their successors in the seventeenth century. It was assumed to be appropriate both by Lord Mansfield and by his opponents, and it was accepted by Lord Denman in *Eastwood v Kenyon*.[6] In the present chapter, therefore, though there is a conscious artificiality in contrasting such words as 'adequacy' and 'sufficiency' which in popular use are regarded as synonyms, consideration will be described as 'sufficient' or 'insufficient' according as the judges allow or disallow the validity of particular acts or promises.

A ADEQUACY OF CONSIDERATION

It has been settled for well over three hundred years that the courts will not inquire into the 'adequacy of consideration'. By this is meant that they will not seek to measure the comparative value of the defendant's promise and of the act or promise given by the plaintiff in exchange for it, nor will they denounce an agreement merely because it seems to be unfair. The promise must, indeed, have been procured by the offer of some return capable of expression in terms of value. A parent, who makes a promise 'in consideration of natural love and affection' or to induce his son to refrain from boring him with complaints, cannot be sued upon it, since the essential elements of a bargain are lacking.[7] But if these elements be present the courts will not balance the one side against the other. The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium. In 1587 it was said that, 'when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action';[8] and this rejection of a quantitative test has been constantly reiterated. In *Thomas v Thomas*:[9]

> The plaintiff's husband had expressed the wish that the plaintiff, if she survived him, should have the use of his house. After his death the defendant, his executor, agreed to allow her to occupy the house (a) because of the husband's wishes, (b) on the payment by her of £1 a year.

The court declined to be influenced by the husband's wishes: motive was 'not the same thing with consideration'. But they accepted the plaintiff's promise to pay the £1 a year as affording consideration for the defendant's promise, and defendant's counsel admitted that he could not rest any argument upon its manifest inadequacy.[10]

6 From examples too numerous for citation in a footnote the following cases may be selected: *Richards' and Bartlet's Case* (1584) 1 Leon 19; *Knight v Rushworth* (1596) Cro Eliz 469; *Bret v JS* (1600) Cro Eliz 756; *Grisley v Lother* (1613) Hob 10; *Davis v Reyner* (1671) 2 Lev 3; *Rann v Hughes* (1778) 7 Term Rep 350n; *Hawkes v Saunders* (1782) 1 Cowp 289; *Eastwood v Kenyon* (1840) 11 Ad & El 438. It may also be observed that the phrase 'sufficient consideration' is used in this sense by *Williston on Contracts* (3rd edn) para 101; and see American *Restatement of the Law of Contracts* paras 76 ff.

7 See *Bret v JS* (1600) Cro Eliz 756; and *White v Bluett* (1853) 23 LJ Ex 36.

8 *Sturlyn v Albany* (1587) Cro Eliz 67.

9 (1842) 2 QB 851.

10 A modern illustration is afforded by the case of *Alexander v Rayson* [1936] 1 KB 169.

The principle may be studied in its application to cases where a person seeks to stay the prosecution of a legal claim with which he is threatened. Such agreements may take a variety of forms. The person against whom the claim is made may admit the claim but ask the claimant to give him more time to pay. Such an agreement is often described as a forbearance. Alternatively he may dispute the claim (or while accepting that there is a claim, dispute the amount) but offer to settle the dispute for less than the amount claimed.[11] Such an agreement is usually described as a compromise. It would appear however that all these situations are subject to the same principles. They will here be discussed as examples of a single category.

It was originally held that a promise not to pursue a claim which in truth was without legal basis could not be good consideration. If it had been submitted to the arbitrament of the courts the promisor must have failed, and it could not be a 'detriment' to be saved from a losing hazard.[12] But in the nineteenth century this position was abandoned, and the compromise of a doubtful claim was upheld by the courts. The change was justified on grounds of convenience. In the words of Bowen LJ:

> The reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise you would have to try the whole cause to know if the man had a right to compromise it.[13]

In the modern law, the consideration in such cases is said to be the surrender, not of a legal right, which may or may not exist and whose existence, at the time of the compromise, remains untested, but of the *claim* to such a right.

This attitude is sensible. It is true that if the claim is baseless, the claimant may appear to have got something for nothing or that, contrariwise, if a claimant settles a good claim for less than its true value he may appear to have given up something for nothing but this is to ignore the cost, both monetary and psychic, of litigation. It is in the public interest to encourage reasonable settlements,[14] indeed the legal system could not operate at all if the vast majority of civil disputes were not settled out of court. The rule has however to be surrounded by certain safeguards. A plaintiff who relies upon the surrender of a claim to support a contract must prove:

(a) that the claim is reasonable in itself, and not 'vexatious or frivolous',
(b) that he himself has an honest belief in the chance of its success, and
(c) that he has concealed from the other party no fact which, to his knowledge, might affect its validity.[15]

11 If A claims £100 from B and B says that only £50 is owed and pays £50 there is no consideration when A accepts the £50. The position would be different if B admitted that £50 was owed and offered £51 *Ferguson v Davies* [1997] 1 All ER 315.

12 *Stone v Wythipol* (1588) Cro Eliz 126; *Jones v Ashburnham* (1804) 4 East 455. See the useful historical discussion by Beatson [1974] CLJ 97 at 100-103.

13 *Miles v New Zealand Alford Estate Co* (1886) 32 ChD 266 at 291. See also *Callisher v Bischoffsheim* (1870) LR 5 QB 449.

14 *D v NSPCC* [1978] AC 171 at 232, [1977] 1 All ER 589 at 606, per Lord Simon of Glaisdale.

15 Such would seem to be the conclusions to be drawn from the language of the judgments in *Callisher v Bischoffsheim* and *Miles v New Zealand Alford Estate Co* (above). See also *Owners of Portofino Tan Steamer v Berlin Derunaptha* (1934) 39 Com Cas 330. In *Miles v New Zealand Alford Estate Co* (above) at 291, Bowen LJ said: 'It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value.' In an interesting article, in which these words are cited, Kelly points out that the surrender of a defence may furnish consideration no less than the surrender of a claim: 27 MLR 540.

In *Horton v Horton (No 2)*:[16]

> The parties were husband and wife. In March 1954, by a separation agreement under seal, the husband agreed to pay the wife £30 a month. On the true construction of the deed the husband should have deducted income tax before payment, but for nine months he paid the money without deduction. In January 1955 he signed a document, not under seal, agreeing that, instead of 'the monthly sum of £30', he would pay such a monthly sum as 'after the deduction of income tax should amount to the clear sum of £30'. For over three years he paid this clear sum, but then stopped payment. To an action by his wife he pleaded that the later agreement was unsupported by consideration and that the wife could sue only on the earlier deed.

The Court of Appeal held that there was consideration to support the later agreement. It was clear that the original deed did not implement the intention of the parties. The wife, therefore, might have sued to rectify the deed, and the later agreement represented a compromise of this possible action. Whether such an action would have succeeded was irrelevant:[17] it sufficed that it had some prospect of success and that the wife believed in it.

Upon this principle and subject to these safeguards a compromise of a claim and a forbearance to sue will each be upheld, and, as how been suggested above, there is no intrinsic difference of principle between them. In the latter case, however, it is irrelevant whether the time of forbearance be long or short or even whether it is for any specified time at all. Nor need there be any actual promise to forbear, if such an understanding can be inferred from the circumstances and is followed by a forbearance in fact.[18]

It is possible that there remain some cases where although the parties believe in good faith that they are compromising a doubtful claim, the court will hold that the claim was manifestly bad and the compromise therefore ineffectual. This can hardly happen where the facts are doubtful, since the court would scarcely investigate the facts in order to strike down a compromise but it might happen where there was ignorance or misapprehension of the law. Even with questions of law, however, it would usually be possible to discover sufficient doubt to support the agreement.[19] In *Magee v Pennine Insurance Co Ltd*[20] the majority of the Court of Appeal held that a compromise though valid at common law could be set aside in equity because it was based on a common mistake, since it was clear that the defendants had a complete answer to the plaintiff's claim.

The boundaries of these principles were tested in the important and difficult case of the *Bank of Credit & Commerce International SA v Ali*.[1]

In 1990 the respondent was made redundant by the appellant bank. The redundancy notice stated that he would receive his statutory redundancy payment and an *ex gratia* payment. In addition the respondant was offered and accepted a payment of a further month's gross salary if he would sign a document stating that this payment:

16 [1961] 1 QB 215, [1960] 3 All ER 649.
17 Cf *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913.
18 *Alliance Bank Ltd v Broom* (1864) 2 Drew & Sm 289.
19 See *Haigh v Brooks* (1839) 10 Ad & El 309, discussed more fully in the 8th edn of this work, pp 72-73.
20 [1969] 2 QB 507, [1969] 2 All ER 891, discussed at p 266, below.
1 [2001] UKHL 8, [2001] 1 All ER 961.

> ... was in full and final settlement of all or any claim whether under statute, common law or in equity of whatsoever nature that exists or may exist....

At this time the respondent did not know though the higher management of the bank knew that the bank was in fact a fraudulent and insolvent shell. Neither the respondent nor the bank could have known in 1990 that in 1997 the House of Lords would hold in *Malik v Bank of Credit and Commerce International SA*[2] that other BCCI employees could have a claim for damages on the basis that there had been a breach of an implied term of mutual confidence between the bank and its employees and that in principle employees could recover damages for the damage that having been employed by the bank had done to their careers (so called stigma damages[3]).

The respondent brought an action claiming stigma damages. The bank argued that the claim was barred by the agreement made in 1990.

The document signed in 1990 has all the appearance of having being drafted by a lawyer and it looks as if the draftsmen intended to exclude any claims which might turn up. Indeed Lightman J and Lord Hoffmann dissenting in the House of Lords held that this was indeed its effect. However the majority of the House of Lords held that although:

> A party may at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he was unaware and of which he could not be aware..... the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.[4]

A modern illustration of the premise that it is for the parties to make their own bargain is afforded by the current practice of manufacturers to recommend the sale of their goods by offering, as an inducement to buy, something more than the goods themselves. In *Chappell & Co Ltd v Nestlé Co Ltd*:[5]

> The plaintiffs owned the copyright in a dance tune called 'Rockin' Shoes'. The Hardy Co made records of the tune which they sold to the Nestlé Co for 4d each, and the Nestlé Co offered them to the public for 1s 6d each, but required, in addition to the money, three wrappers of their sixpenny bars of chocolate. When they received the wrappers, they threw them away. Their main object was to advertise their chocolate, but they also made a profit on the sale of the records.

The plaintiffs sued the defendants for infringement of copyright, and the defendants were admittedly liable unless they could rely on section 8 of the Copyright Act 1956. Under this section a person may make a record of a musical work provided that this is designed for retail sale and provided that he pays to the copyright owner a royalty of 6¼ per cent 'of the ordinary retail selling price'. The defendants offered the statutory royalty based on the price of 1s 6d per record. The plaintiffs refused the offer, contending that the money price was only part of the consideration for the record and that the balance was represented by the three wrappers. The House of Lords by a majority gave judgment for the plaintiffs. It was unrealistic to hold that the

2 [1998] AC 20, [1997] 3 All ER 1.
3 For further discussion see below p 675.
4 [2001] 1 All ER 965, 966 per Lord Bingham.
5 [1960] AC 87, [1959] 2 All ER 701.

wrappers were not part of the consideration. The offer was to supply a record in return, not simply for money, but for the wrappers as well.

Lord Somervell said:

> The question[6] is whether the three wrappers were part of the consideration ... I think that they are part of the consideration. They are so described in the offer. 'They', the wrappers, 'will help you to get smash hit recordings.' ... It is said that, when received, the wrappers are of no value to the respondents, the Nestlé Co Ltd. This I would have thought to be 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.

Consideration in relation to bailments

The necessity, sometimes assumed, of discovering a consideration to support a bailment presents another aspect of the search for a bargain. A bailment is a delivery of goods on condition that the recipient shall ultimately restore them to the bailor: they may thus be hired or lent or pledged or deposited for safe custody. So natural a transaction must be recognised at an early date by every system of law. In English law it was protected by the writ of detinue long before the evolution of a general contractual remedy, and it was only the pressure of procedural convenience which led to the supersession of this writ by *indebitatus assumpsit*. But, once the rights of the bailor were secured by a form of action normally identified with contract, there was an inevitable temptation to discuss the problems of bailment in terms of contract and to demand the presence of consideration. Thus in *Bainbridge v Firmstone* in 1838:[7]

> The plaintiff, at the defendant's request, had consented to allow the defendant to remove and weigh two boilers, and the defendant had, at the same time, promised to return them in their original sound condition. The plaintiff sued for breach of this promise, and the defendant pleaded lack of consideration.

The Court of Queen's Bench rejected the plea. Patteson J thought that, whether there was a benefit to the defendant or not, there was 'at any rate a detriment to the plaintiff from his parting with the possession for even so short a time'. Lord Denman avoided the language of benefit and detriment.

> The defendant had some reason for wishing to weigh the boilers; and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition.

By one or other of these lines of argument it is, of course, possible to find a consideration, though the description of the transaction as a bargain struck by the exchange of a promise on the one side and a permission on the other wears a somewhat artificial appearance. But it is not difficult to suggest cases where such language is wholly inappropriate. If B gratuitously accepts goods which A deposits with him for safe custody, B may undoubtedly be liable if he injures or fails to return them. But there is no benefit to B, and, as the delivery

6 Ibid at 87 and 701, respectively. Analogous problems arise where a tradesman gives trading stamps. See *Bulpitt & Sons Ltd v S Bellman* (1962) LR 3 RP 62. Another example is to be found in *Esso Petroleum Ltd v Customs and Excise Comrs* [1976] 1 All ER 117, [1976] 1 WLR 1, discussed more fully at p 130, below.

7 (1838) 8 Ad & El 743. See also *Hart v Miles* (1858) 4 CBNS 371.

was to secure A's advantage, no detriment to A: nor is there any price paid for B's promise, express or implied, to take care of the goods.

The leading case of *Coggs v Bernard*, decided in 1703,[8] illustrates at once the unique conception of bailment and the misleading inferences drawn from its fortuitous association with the writ of assumpsit.

> The plaintiff declared that the defendant had undertaken to remove several hogsheads of brandy from one cellar to another, and that he had done the work so carelessly that one of the casks was staved and a quantity of brandy was spilt. The defendant argued that the declaration was bad as disclosing no consideration for the undertaking.

Chief Justice Holt, rejecting the argument, was, indeed, at pains to find a consideration. 'The owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management.'[9] But that this tribute to the doctrine was mere lip-service is shown by the ensuing passages in his judgment:

> If the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for assumpsit does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

The defendant was liable, not because he had agreed to carry the casks, but only because he had actually started to move them. The case was not one of contract at all, but turned upon the peculiar status of the bailee.

At the present day, no doubt, in most instances where goods are lent or hired or deposited for safe custody or as security for a debt, the delivery will be the result of a contract. But this ingredient, though usual, is not essential. An infant may be liable as a bailee, whereas, had the transaction to be based on contract, the Infants Relief Act 1874 would have protected him:[10] a railway company owes a duty, independently of contract, to an owner whose goods it has accepted for carriage.[11] Confusion will be avoided only if it is remembered that bailment is a relationship *sui generis* and that, unless it is sought to increase or diminish the burdens imposed upon the bailee by the very fact of the bailment, it is not necessary to incorporate it into the law of contract and to prove a consideration.

This was clearly stated by Lord Denning MR in *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office*.[12]

8 (1703) 2 Ld Raym 909.

9 Such 'trusting' is clearly not in truth a good consideration. It is not the price of any promise; it is not a benefit to the defendant; and, as it was designed to effectuate the plaintiff's sole purposes, it was no detriment to him.

10 See p 489, below.

11 See *R v McDonald* (1885) 15 QBD 323; and *Meux v Great Eastern Rly Co* [1895] 2 QB 387.

12 [1966] 1 QB 247 at 260-261, [1965] 1 All ER 163 at 167. See also per Diplock LJ in *Morris v C W Martin & Sons* [1966] 1 QB 716 at 731, [1965] 2 All ER 725 at 734; and *Chesworth v Farrar* [1967] 1 QB 407, [1966] 2 All ER 107. Palmer *Bailment* (2nd edn) pp 26-31.

> At common law, bailment is often associated with a contract, but this is not always the case ... An action against a bailee can often be put, not as an action in contract, nor in tort, but as an action on its own, *sui generis*, arising out of the possession had by the bailee of the goods.

Liability for improper performance of gratuitous service

A somewhat similar position may arise where loss has been caused in the performance of a gratuitous service. The legal consequences of such a situation were discussed in the case of *De La Bere v Pearson.*[13]

> The defendants advertised in their paper that their city editor would answer inquiries from readers desiring financial advice. The plaintiff wrote, asking for the name of a good stockbroker. The editor recommended an 'outside broker', who was in fact an undischarged bankrupt. This circumstance was not known to the editor, but could have been discovered by him without difficulty. Relying on the recommendation, the plaintiff sent sums of money to the broker for investment and the broker misappropriated them. The Court of Appeal held the defendants liable in contract.

It is not at first sight easy to see how the facts of this case can be made to satisfy the doctrine of consideration. The plaintiff doubtless paid money for a copy of the paper, but did he pay for the recommendation? The mere act of inquiring the name of a stockbroker can hardly be described with any sense of reality as the price of the editor's reply. It may indeed be urged that the plaintiff paid not only for the physical fact of the paper but for all its contents—news, articles, advertisements and financial advice; and that the payment might thus be regarded as consideration for the whole service offered by the defendants. Colour is lent to this interpretation by the fact that the plaintiff had long been a reader of the paper and knew that one of its features was the provision of financial advice. The case was not, however, argued on this basis nor was the point taken by the Court of Appeal, whose members were content substantially to assume the existence of a contract. While, therefore, it is possible to support the decision on the ground of contract, it is not surprising that Sir Frederick Pollock should have suggested that the cause of action might be better regarded 'as arising from default in the performance of a voluntary undertaking independent of contract'.[14] The question, in other words, should be approached as a problem in tort, and, viewed from this angle, it would turn upon the scope of the duty of care. To discuss this duty in any detail is outside the ambit of the present book; but, in view of the judgments of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[15] it is at least possible that, if the facts of *De la Bere v Pearson* were to recur, the plaintiff might succeed in an action of negligence.

Distinction between gift and sale not always obvious

The refusal of the courts to discuss the adequacy of consideration may make it difficult, on occasion, to distinguish a gift and a sale. If A promises

13 [1908] 1 KB 280. See also *Elsee v Gatward* (1793) 5 Term Rep 143, and *Skelton v London North Western Rly Co* (1867) LR 2 CP 631.

14 See *Pollock on Contracts* (13th edn) p 140.

15 [1964] AC 465, [1963] 2 All ER 575. See especially per Lord Devlin at 527-528 and 610, respectively. See pp 303-307, below.

B to give him his new Rolls-Royce car for nothing, there is obviously no consideration and no contract. If A promises B to give him his new Rolls-Royce car, if B will fetch it from the garage, there is still no consideration and no contract. The requirement that B is to fetch the car is not the price of the promise, but the condition precedent to the operation of A's generosity. The transaction is not a sale, but a conditional gift.[16] But, if A promises B to give him his new Rolls-Royce car if B will give him one shilling, there is consideration and there is a contract. Such a conclusion has inspired the comment that the doctrine of consideration corresponds as little with reality and is as much a formality as the rule that a gratuitous promise becomes binding by the mere affixing of a seal.[17] But this view is surely an over-bold generalisation upon extreme cases. The fact that the courts will enforce such a transaction as that envisaged in the third hypothesis stated above or in the actual case of *Thomas v Thomas*,[18] though it may appear a legal quibble, is a logical inference from two assumptions, neither of which is unreasonable: that in every parol contract the plaintiff must show that he has bought the defendant's promise, and that the courts will not negative as disproportionate the price which the parties themselves have fixed. If a mere token payment is named, a transaction virtually gratuitous may well be invested with the insignia of contract, but, in the absence of dishonesty, there is no reason why persons should not take advantage of existing legal rules and adapt them to their own requirements. Such adaptations are the commonplace of legal history.[19]

B INSUFFICIENCY OF CONSIDERATION

It is now necessary to discuss cases where, though a bargain has been struck, the consideration may yet be deemed, in the technical sense already indicated, 'insufficient'. The judges, when they exercise this power of interference, are applying an extrinsic test which frustrates the expectations of the parties. It does not follow, however, that such a test is necessarily harsh, still less that it is illogical. In some of the cases the law is settled, others are shrouded in controversy; but in all of them the grounds of interference seem to be the same. The plaintiff has procured the defendant's promise by discharging or by promising to discharge a duty already imposed upon him for other reasons. Now consideration need not be adequate and may, on occasion, be extremely tenuous, but it must comprise some element which can be regarded as the price of the defendant's promise; and merely to repeat an existing obligation may well seem to offer nothing at all. The cases in which this argument has been urged may be grouped into four classes. In each of them the essential question is whether the courts can discover the promise or performance of something more than the plaintiff is already bound to do.

16 For a case where the judges experienced great difficulty in deciding whether they had to deal with a contract or a conditional gift, see *Wyatt v Kreglinger* [1933] 1 KB 793. A more recent example is *Dickinson v Abel* [1969] 1 All ER 484, [1969] 1 WLR 295.

17 See Holmes *The Common Law* p 278; Markby *Elements of Law* ch XV; Buckland and McNair *Roman Law and Common Law* (2nd edn) p 276.

18 Pp 90, above.

19 It is worth observing that the Roman law, untrammelled by a doctrine of consideration, found a similar difficulty in distinguishing gifts and sales. See *Digest* 18.1.36, 18.1.38.

1 WHERE A PUBLIC DUTY IS IMPOSED UPON THE PLAINTIFF BY LAW

It may be appreciated that a person, who by his official status or through the operation of the law is under a public duty to act in a certain way, is not regarded as furnishing consideration merely by promising to discharge that duty. No one, for example, would expect a policeman to bargain with a citizen for the price of his protection. The position was stated in 1831 in *Collins v Godefroy*.[20] The plaintiff had attended on subpœna to give evidence on the defendant's behalf in a case in which the defendant was a litigant, and he alleged that the defendant had promised to pay him six guineas for his trouble. Lord Tenterden held that there was no consideration for this promise.

> If it be a duty imposed by law upon a party regularly *subpœnaed*, to attend from time to time to give his evidence, then a promise to give him any remuneration for loss of time incurred in such attendance is a promise without consideration.

In spite or, perhaps, because of the obvious character of the argument, the cases in which it has been raised are few; and some of them at least disclose a tendency to uphold the agreement by assuming that something more was undertaken than the bare discharge of the duty. Thus in *England v Davidson*,[1] the defendant offered a reward to anyone who should give information leading to the conviction of a felon. The plaintiff, a police constable, gave such evidence. The defendant pleaded, not only that the plaintiff had merely done his duty, but that the contract was against public policy. Lord Denman's judgment, rejecting these pleas, consists of two sentences.

> I think there may be services which the constable is not bound to render, and which he may therefore make the ground of a contract. We should not hold a contract to be against the policy of the law, unless the grounds for so deciding were very clear.

Similar arguments were considered and again rejected in the more modern case of *Glasbrook Bros v Glamorgan County Council*.[2] The question had arisen as to how best to protect a coal mine during a strike. The police authorities thought it enough to provide a mobile force, the colliery manager wanted a stationary guard. It was ultimately agreed to provide the latter at a rate of payment which involved the sum of £2,200. The company refused to pay and, when sued, pleaded the absence of consideration. The House of Lords gave judgments for the plaintiffs. The police were bound to afford protection, but they had a discretion as to the form it should take, and an undertaking to provide more protection than in their discretion they deemed necessary was consideration for the promise of reward. Viscount Cave LC said:

> If in the judgment of the police authorities, formed reasonably and in good faith, the garrison was necessary for the protection of life and property, then they were not entitled to make a charge for it.

20 (1831) 1 B & Ad 950. See also *Morris v Burdett* (1808) 1 Camp 218, where it was held that, in so far as a high bailiff or a sheriff is required by law to do certain acts and incur certain expense in the course of a parliamentary election, there is no consideration for a promise by the successful candidate to reimburse him.

1 (1840) 11 Ad & El 856.

2 [1925] AC 270.

In *Harris v Sheffield United Football Club Ltd*[3] the defendants argued that this meant that they were not obliged to pay for the large number of policemen who attended their ground at home matches because, in present conditions of crowd behaviour, a major police presence at the ground was necessary to preserve law and order. The Court of Appeal thought that there was a fundamental difference on the facts. In the *Glasbrook* case the threat to law and order was external to the parties since neither could call off the strike. In the present case, the defendants had voluntarily chosen to put on their matches at times, typically Saturday afternoons, when large attendances and therefore large possibilities of disorder were likely and when a substantial police presence could only be achieved by calling policemen off their rest days and paying large sums of overtime. The police authority were therefore entitled to be paid.

The readiness of the judges thus to find a consideration if this be humanly possible is illustrated by the case of *Ward v Byham*.[4]

> A man and a woman, though not married, lived together from 1949 to 1954. In 1950 a child was born to them. In 1954 the man, the defendant in the case, turned the woman out of his house but kept and looked after the child. Some months later the woman, the plaintiff in the case, asked for the child. The defendant wrote offering to let her have the child and to pay £1 a week for its maintenance provided (a) the plaintiff could 'prove that she will be well looked after and happy', and (b) 'that she is allowed to decide for herself whether or not she wishes to live with you'. The plaintiff then took the child. For seven months the defendant paid the weekly sum as agreed, but the plaintiff then married another man and the defendant stopped payment.

The plaintiff sued for breach of contract and the defendant pleaded the absence of consideration. By section 42 of the National Assistance Act 1948, the mother of an illegitimate child was bound to maintain it; and it was therefore argued that the mother had done no more than promise to fulfil her statutory duty. But the Court of Appeal gave judgment for the plaintiff. The majority of the court (Morris and Parker LJJ) held that she had exceeded the duty cast upon her by the Act by promising, in accordance with the terms of the defendant's letter, both to 'look after the child well' and satisfy the defendant that it was 'happy', and to allow the child to decide which home it preferred. There was thus 'sufficient' consideration for the defendant's promise to pay. Denning LJ was prepared to go further and hold that the father's promise was binding even if the mother had done no more than she was already bound to do since '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'.[5]

3 [1988] QB 77, [1987] 2 All ER 838. The action was in form a claim under the Police Act 1964 for payment for 'special police services' but the test applied by the court was exactly the same as that applied under the general law of contract.

4 [1956] 2 All ER 318, [1956] 1 WLR 496. Cf *Horrocks v Forray* [1976] 1 All ER 737, [1976] 1 WLR 230.

5 Ibid at 319, 498, respectively. See also *Williams v Williams* [1957] 1 All ER 305, [1957] 1 WLR 148, where Denning LJ repeated this statement but added the qualification, 'so long as there is nothing in the transaction which is contrary to the public interest'.

2 WHERE THE PLAINTIFF IS BOUND BY AN EXISTING CONTRACTUAL DUTY TO THE DEFENDANT[6]

The somewhat obvious rule, that there is no consideration if all that the plaintiff does is to perform, or to promise the performance of, an obligation already imposed upon him by a previous contract between him and the defendant, is illustrated by a group of cases in the first half of the nineteenth century. In *Stilk v Myrick*[7] a seaman sued for wages alleged to have been earned on a voyage from London to the Baltic and back. In the course of the voyage two sailors had deserted, and, as the captain could not find any substitutes, he promised the rest of the crew extra wages if they would work the ship home short-handed. In the earlier case of *Harris v Watson*[8] Lord Kenyon had rejected a similar claim because it savoured of blackmail; but Lord Ellenborough in *Stilk v Myrick*, though he agreed that the action would not lie, preferred to base his decision on the absence of consideration. The crew were already bound by their contract to meet the normal emergencies of the voyage and were doing no more than their duty in working the ship home. Had they exceeded their duty, or if the course of events, by making the ship unseaworthy, had relieved them from its performance, the case would have been different. Thus in *Hartley v Ponsonby*[9] the shortage of labour was so great as to make the further prosecution of the voyage exceptionally hazardous, and, by discharging the surviving members of the crew from their original obligation, left them free to enter into a new contract. Both the general rule and the qualification to it were regarded as still good law by Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd.*[10] *Stilk v Myrick* was reconsidered by the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*[11] In this case the defendants were a firm of building contractors who entered into a contract for the refurbishment of a block of 27 flats. They sub-contracted the carpentry work to the plaintiff for £20,000. Although there was no formal arrangement to this effect, the plaintiff was paid money on account. After the contract had been running for some months and the plaintiff had finished the carpentry at nine of the flats and done some preliminary work in all the rest, for which he had received some £16,200 on account, he found that he was in financial difficulties. These difficulties arose partly because the plaintiff had underestimated the cost of doing the work in the first place and partly because of faulty supervision of his workmen. The plaintiff and the defendants had a meeting at which the defendants agreed to pay the plaintiff a further £10,300 at a rate of £575 per flat to be paid as each flat was completed. The plaintiff carried on work and finished some eight further flats but only one further payment of £1,500 was made.

The plaintiff stopped work and brought an action for damages. The defendants argued that they were not liable as they had simply promised to pay the plaintiff extra for doing what he was in any case obliged to do, that is to finish the contract. The Court of Appeal might perhaps have found

6 Reynolds and Treitel 7 Malaya L Rev 1.
7 (1809) 2 Camp 317.
8 (1791) Peake 102.
9 (1857) 7 E & B 872.
10 [1979] QB 705, [1978] 3 All ER 1170. This case is discussed more fully at p 342, below. See also *The Proodos C* [1981] 3 All ER 189.
11 [1990] 1 All ER 512. Halson 106 LQR 183; Phang 107 LQR 21; Adams & Brownsword 53 MLR 536.

consideration in what Russell LJ described as the replacement of 'a haphazard method of payment by a more formalised scheme involving the payment of the specified sum on the completion of each flat' since it was clear that under the original contract there was no express agreement for stage payments. However, all three members of the Court of Appeal appear to have concurred in the leading judgment which was delivered by Glidewell LJ who said:

> The 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 of B is capable of being consideration for B's promise, so that the promise will be legally binding.[12]

It is clear that where one party to a contract refuses to go on unless he is paid more, this will often be improper and in modern cases has been characterised as economic duress. This topic is discussed in a later chapter.[13] In the present case, however, there was no suggestion that the plaintiff had ever made any improper threat. Glidewell LJ thought that in the circumstances the critical question was whether the defendants had received a benefit. It is clear that in cases of this kind there are often good commercial reasons why a promisor would choose to promise more to ensure the performance. If the promisee were to go out of business or become insolvent it would almost inevitably cost a good deal more to engage somebody to complete the work. Good and reliable trading partners are hard to find and it may be sensible to help them keep afloat rather than look for a new partner.

This decision has been forcefully criticised by Coote as 'remote from received learning'.[14] Alternatively, it may be regarded as no more than the realistic acceptance that the true rationale of *Stilk v Myrick* is that the promise to pay extra was procured by threats. However, the situation cannot be quite so simple. Presumably if the promisor, without any solicitation or discussion with the promisee, simply writes to the promisee to say that he has spontaneously decided to pay a bonus at the end of the contract, that is a gratuitous promise and not enforceable since he receives no benefit for it. On the other hand, if the promisee goes so far as to suggest that he will not perform unless he is paid extra then the matter goes off to be considered as one of economic duress. This leaves a rather narrow track in which he brings his difficulties to the attention of the promisor and enables the promisor to realise that he may not complete performance unless he is paid more but without coming anywhere near threatening not to perform. It is not clear that this would prove an easy distinction to apply in practice.

12 This proposition was considered and reworded by Santow J in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 747.

13 See pp 341-345, below.

14 3 JCL 23 at 24. See also *Anangel Atlas v IHI Co Ltd (No 2)* [1990] 2 Lloyd's Rep 526 at 545.

A very similar problem which has given rise to very extensive litigation is this:

> If A owes B a debt and pays or promises to pay part of it in return for B's promise to forgo the balance, can A hold B to this promise?

The problem differs slightly from that propounded in *Stilk v Myrick*. There a person sought fresh remuneration for the performance of an existing contractual duty: here he seeks to avoid the duty.[15] The problem was familiar to the common lawyers before the development of assumpsit as a contractual remedy and therefore before the doctrine of consideration had been envisaged. Its implications were examined within the sphere of debt in 1455 and again in 1495.[16] In the latter year Chief Justice Brian stated a rule which, if set in an archaic environment, has still a modern connotation.

> The action is brought for £20, and the concord is that he shall pay only £10, which appears to be no satisfaction for the £20; for payment of £10 cannot be payment of £20. But if it was of a horse which was to be paid according to the concord, this would be good satisfaction, for it does not appear that the horse be worth more or less than the sum in demand.

The writ of debt rested on the idea not of promise but of duty, and a partial performance could not be received as a discharge of that duty. Even to allow a substituted performance might seem to offend against the principle upon which the writ was based, and was, at any rate, the utmost relaxation which the law could permit.

The rule enunciated by Chief Justice Brian was adopted in 1602 in *Pinnel's Case*.[17]

> Pinnel sued Cole in debt for £8 10s due on a bond on 11 November 1600. Cole's defence was that, at Pinnel's request, he had paid him £5 2s 6d on 1 October, and that Pinnel had accepted this payment in full satisfaction of the original debt.

Judgment was given for the plaintiff on a point of pleading, but the court made it clear that, had it not been for a technical flaw, they would have found for the defendant, on the ground that the part payment had been made on an earlier day than that appointed in the bond. The debt could be discharged, not by a merely partial performance of the original obligation, but only through the introduction, at the creditor's request, of some new element—the tender of a different chattel or part payment at a fresh place or on an earlier date.

> Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for 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. But the gift of a horse, hawk or robe, etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe, etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction ... The payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of

15 The agreement to discharge a previous debt is often discussed under the title of *accord and satisfaction*. The *accord* is the agreement to discharge the existing obligation, the *satisfaction* is the consideration required to support it. See p 627, below.

16 *Anon* (1455) YB 33 Hy 6, fo 48, pl 32; *Anon* (1495) YB 10 HY 7, fo 4, pl 4.

17 (1602) 5 Co Rep 117a. Simpson *History* pp 103-107.

> circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material. So if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10, it is a good satisfaction for the whole: for the expenses to pay it at York is sufficient satisfaction.

It will be observed that the plaintiff sued in *Pinnel's Case* not in assumpsit but in debt, so that no question of consideration arose. But the problem had already been discussed in the new contractual environment in *Richards v Bartlet* in 1584.[18] A buyer, sued in assumpsit for the price of goods, pleaded a promise by the seller to accept 3s 4d in the pound. The plea was held bad on the ground that there was no consideration for this promise. 'For no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it.' The decision was followed in subsequent cases, and a rule, originating in the peculiar requirements of debt, was thus acclimatised in the alien soil of assumpsit. This transference of thought has been severely criticised.[19] A plaintiff who sued in assumpsit was required to prove consideration for the defendant's undertaking, but there was no logical need to lay a similar burden upon a party who sought to use a promise only by way of defence. The presence of consideration was vital to the formation of a contract, but irrelevant to its discharge. The decision in *Richards v Bartlet*, however, while by no means inevitable and certainly unfortunate in its results, was not unintelligible. Assumpsit rested on promise as conspicuously as debt on duty, and the judges not unnaturally reacted by treating the promise, on which the defendant relied, as binding only on the same conditions as the original promise on which the plaintiff sued. But if this argument were once accepted, the defendant must prove a consideration for the plaintiff's promise to discharge the contract, and he could hardly satisfy this requirement by performing or promising to perform no more than a part of what he was already bound to do.

Whatever the merits of these rival arguments, the rule laid down in *Richards v Bartlet* or, as it is generally if less appropriately called, the rule in *Pinnel's Case*, was accepted and applied by the courts. Not, indeed, until 1884 was it challenged in the House of Lords in the case of *Foakes v Beer*.[20]

> Mrs Beer had obtained a judgment against Dr Foakes for £2,090. Dr Foakes asked for time to pay. The parties agreed in writing that, if Dr Foakes paid £500 at once and the balance by instalments, Mrs Beer would not 'take any proceedings whatever on the judgment'. A judgment debt bears interest as from the date of the judgment. The agreement made no reference to the question of interest. Dr Foakes ultimately paid the whole amount of the judgment debt itself, and Mrs Beer then claimed the interest. Dr Foakes refused to pay it and Mrs Beer applied 'to be allowed to issue execution or otherwise proceed on the judgment in respect of the interest'. Dr Foakes pleaded the agreement and Mrs Beer replied that it was unsupported by consideration.

18 (1584) 1 Leon 19. Simpson *History* pp 447-448, 470-475.

19 See Pollock *Principles of Contract* (13th edn) p 150); Ames *Lectures on Legal History* pp 329 ff; Corbin 27 Yale LJ 535. *Contra*, *Williston on Contracts* (3rd edn) para 120.

20 (1884) 9 App Cas 605.

The House of Lords gave judgment in favour of Mrs Beer for the amount of the interest. The question, 'nakedly raised by the appeal', was whether the so-called rule in *Pinnel's Case* should be rejected.

Lord Selborne said:

> The doctrine itself ... may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially over-ruled; 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 decision by the House of Lords may be criticised. Lord Blackburn, indeed, had prepared a dissenting judgment, and it was with reluctance that he ultimately acquiesced in the views of his colleagues. 'All men of business', he pointed out, 'everyday 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.'[1] There is however something to be said on the other side. It is tempting to think of a creditor as like a villain in a Victorian melodrama, twiddling his wax moustache at the thought of foreclosing the mortgage on the heroine's ancestral home. This vision tends to obscure the fact that in real life, it is often the debtor who behaves badly, fobbing off the creditor with excuses and using every device to avoid repayment so that in the end the creditor is driven to accept less than is due. The real criticism of *Foakes v Beer* is perhaps that it provides no means by which such cases can be treated differently from genuine bargains.

In *Re Selectmove Ltd*[2] the taxpayer company owed the Revenue substantial amounts of income tax and national insurance contributions and the company's managing director at a meeting in July 1991 with the collector of taxes suggested that the company should pay the tax and national insurance contributions as they fell due and repay the arrears at the rate of £1,000 per month from 1 February 1992. The collector said that the proposal went further than he would have liked and that he would seek the approval of his superiors and revert to the company if it was unacceptable. The company heard nothing further until 9 October 1991 when the Revenue demanded payment of the arrears in full. In due course, the Revenue served a statutory demand and presented a winding-up petition. The company sought to resist this on the grounds that the debt was disputed by the company in good faith and on substantial grounds.

It is clear that by October 1991 the company had failed to keep up with the payments which it had itself proposed. Even if the meeting in July had therefore given rise to a binding agreement, it would have been very doubtful whether the company could hold the Revenue to the bargain since they had not kept their own side of it.

The Court of Appeal, however, considered whether the July arrangement did give rise to a binding agreement in the first place. This obviously presented a number of problems such as, for instance, whether the collector

1 Ibid at 622.
2 [1995] 2 All ER 531. Peel 110 LQR 358

had done enough to indicate a concluded agreement[3] and whether he had actual or apparent authority to bind the Revenue to such an agreement. The central question which was discussed, however, was whether or not, assuming all these difficulties could be overcome, an arrangement of this kind would be binding or whether it would fail for lack of consideration. Counsel for the taxpayer argued that the decision of the Court of Appeal in *Williams v Roffey Bros*[4] provided authority for the proposition that a promise to perform an existing obligation can amount to good consideration provided there are practical benefits to the promisee. The Court of Appeal rejected this argument. Peter Gibson LJ said:

> 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*.

Exceptions to the rule

The decision in *Foakes v Beer* has been criticised but not yet abrogated.[5] There are however important qualifications to it. The first is as old as the rule itself. The rule does not apply where the debtor does something different, for example, where, with the creditor's consent, he delivers a horse in full settlement of the debt. Just as where A sells a horse to B for £100, the court will not inquire whether the horse is worth more or less than £100, so if A delivers a horse to B in discharge of a debt of £100, the court will again not inquire as to its value. So an agreed payment of a peppercorn will do and, a fortiori, £50 plus a peppercorn will do. So too early payment of a smaller sum or payment at a different place will do.[6]

If any new element in the debtor's promise should be regarded as constituting consideration for the discharge of the original debt, it was tempting to urge that the tender of a promissory note was a sufficient novelty for the purpose. By accepting the peculiar obligation inherent in a negotiable security, the debtor would be doing something which he was not already bound to do. The point was taken in 1846 in *Sibree v Tripp*.[7]

> The defendant owed the plaintiff £1,000 and was sued for this sum. The action was settled on the terms that the defendant would give the plaintiff

3 See p 100, above.

4 [1990] 1 All ER 512.

5 The Law Revision Committee proposed such abrogation in 1937, but the proposal has not so far been implemented.

6 Early payment is always of some value to the creditor. Payment at another place may be simply for the convenience of the debtor, in which case, it would not amount to consideration: *Vanbergen v St Edmund's Properties Ltd* [1933] 2 KB 223.

7 (1846) 15 M & W 23, having been previously rejected in *Cumber v Wane* (1721) 1 Stra 426.

promissory notes for £300 in full satisfaction. One of the notes was not met, and the plaintiff then sued (inter alia) for the original £1,000.

The Court of Exchequer gave judgment for the defendant. Baron Alderson re-examined the whole position.

> It is undoubtedly true, that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is payment only in part; because it is not one bargain, but two; namely, payment of part and an agreement, without consideration, to give up the residue. The Courts might very well have held the contrary and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute a piece of paper or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give, in satisfaction of a debt of £100, a horse of the value of £5, but not £5. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to.

The decision in *Sibree v Tripp* was applied by the divisional court in *Goddard v O'Brien*[8] in 1882 to a payment by cheque, and its rationale was accepted in an obiter dictum by Lord Selborne in *Foakes v Beer*.[9] To give negotiable paper was to furnish fresh consideration.

A layman would no doubt be surprised to find that a promissory note for £300 would discharge a debt of £1,000 whereas payment of £300 in cash would not do. Granted the premises however the rule was logical enough, since negotiable instruments do have some advantages over cash (eg greater ease of portability and transferability) for which a creditor might be willing to pay. The extension to payment by cheque was another matter since creditors do not usually accept payment by cheque in order to obtain the advantages of a negotiable instrument. Normally payment by cheque, even of the full sum, affects only a conditional discharge of the debt so that the debt is extinguished only when the cheque is honoured and it would be inconsistent with normal business practice to have different rules for payment by cheque and by cash. In 1965 in *D & C Builders Ltd v Rees*[10] the Court of Appeal refused to recognise the distinction.

> The plaintiffs were a small firm. They did work for the defendant, for which the defendant owed them £482. For months they pressed for payment. At length the defendant's wife, acting for her husband and knowing that the plaintiffs were in financial difficulties, offered them £300 in settlement. If they refused this offer, she said, they would get nothing. The plaintiffs reluctantly agreed. They were given a cheque for £300, which was duly honoured. Then they sued for the balance of the original debt.

The Court of Appeal gave judgment for the plaintiffs. The position was stated in the forceful terms by Lord Denning.[11]

> It is a daily occurrence that a merchant or tradesman, who is owed a sum of money, is asked to take less. The debtor says he is in difficulties. He offers a lesser sum in settlement, cash down. He says he cannot pay more. The creditor is

8 (1882) 9 QBD 37.
9 (1884) 9 App Cas 605.
10 [1966] 2 QB 617, [1965] 3 All ER 837.
11 Ibid at 623 and 839-840, respectively.

> considerate. He accepts the proffered sum and forgives him the rest of the debt. The question arises: is the settlement binding on the creditor? The answer is that, in point of law, the creditor is not bound by the settlement. He can the next day sue the debtor for the balance, and get judgment ... Now suppose that the debtor, instead of paying the lesser sum in cash, pays it by cheque. He makes out a cheque for the amount. The creditor accepts the cheque and cashes it. Is the position any different? I think not. No sensible distinction can be taken between payment of a lesser sum by cash and payment of it by cheque. The cheque, when given, is conditional payment. When honoured, it is actual payment. It is then just the same as cash. If a creditor is not bound when he receives a payment by cash, he should not be bound when he receives payment by cheque.

The Court of Appeal thus overruled the decision of the divisional court in *Goddard v O'Brien*. *Sibree v Tripp*, as it had been decided by a tribunal of equal standing with themselves, could not be rejected but was distinguished. In *Sibree v Tripp* the promissory notes were taken not as conditional payment but in absolute discharge of the original debt. Clearly if the notes had been given only as conditional payment, the plaintiff's claim would have succeeded in any event, since one of the notes had not been honoured.[12]

A second exception was suggested by Denning J as he then was, in *Central London Property Trust Ltd v High Trees House Ltd.*[13]

> In September 1939, the plaintiffs leased a block of flats to the defendants at a ground rent of £2,500 per annum. In January 1940, the plaintiffs agreed in writing to reduce the rent to £1,250, plainly because of war conditions, which had caused many vacancies in the flats. No express time limit was set for the operation of this reduction. From 1940 to 1945 the defendants paid the reduced rent. In 1945 the flats were again full, and the receiver of the plaintiff company then claimed the full rent both retrospectively and for the future. He tested his claim by suing for rent at the original rate for the last two quarters of 1945.

Denning J was of opinion that the agreement of January 1940 was intended as a temporary expedient only and had ceased to operate early in 1945. The rent originally fixed by the contract was therefore payable, and the plaintiffs were entitled to judgment. But he was also of opinion that, had the plaintiffs sued for arrears for the period 1940 to 1945, the agreement made in 1940 would have operated to defeat their claim.

The reasoning of the learned judge is interesting. He agreed that there was no consideration for the plaintiff's promise to reduce the rent. If, therefore, the defendants had themselves sued upon that promise, they must have failed. Their claim would have depended upon a contract of which one of the essential elements was missing. But where the promise was used merely as a defence, why should the presence or absence of consideration be relevant? The defendants were not seeking to enforce a contract and need not prove one. Was there, then, any technical rule of English law whereby the plaintiffs could be prevented from ignoring their promise and insisting upon the full measure of their original rights? At first sight, the doctrine of estoppel would seem to supply the answer. By this doctrine, if one person makes to another a clear and unambiguous representation of fact intending that other to act on it, if the representation

12 See Chorley 29 MLR 317 and his *Gilbart Lectures on Banking* (1967).
13 [1947] KB 130.

turns out to be untrue, and if that other does act upon it to his prejudice, the representor is prevented or 'estopped' from denying its truth. He cannot, as it were, give himself the lie and leave the other party to take the consequences. The doctrine would meet admirably the situation in the *High Trees* case but for one difficulty. In 1854 in *Jorden v Money*,[14] a majority of the House of Lords held that estoppel could operate only on a misrepresentation of existing fact. Upon this basis it was improper to apply it where, as in the *High Trees* case, a party sought to rely on a promise of future conduct.[15]

To avoid this difficulty, Denning J sought to tap a slender stream of authority which had flowed in equity since the judgment of Lord Cairns in 1877 in *Hughes v Metropolitan Rly Co.*[16]

> In October 1874, a landlord gave his tenant six months' notice to repair the premises. If the tenant failed to comply with it, the lease could be forfeited. In November the landlord started negotiations with the tenant for the sale of the reversion, but these were broken off on 31 December. Meanwhile the tenant had done nothing to repair the premises. On the expiry of six months from the date of the original notice the landlord claimed to treat the lease as forfeited and brought an action of ejectment.

The House of Lords held that the opening of negotiations amounted to a promise by the landlord that, as long as they continued, he would not enforce the notice, and it was in reliance upon this promise that the tenant had remained quiescent. The six months allowed for repairs were to run, therefore, only from the failure of the negotiations and the consequent withdrawal of the promise, and the tenant was entitled in equity to be relieved against the forfeiture. Lord Cairns said:[17]

> 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 negotiations 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.

Taken at their full width and without regard to the facts of the case, these observations might appear in conflict with the decision in *Jorden v Money* but

14 (1854) 5 HL Cas 185.

15 Professor Atiyah subjected *Jorden v Money* to a searching analysis in *Essays on Contracts* pp 231-239. He suggests that, had the judgments in that case been properly interpreted and applied, there would have been no need for the later development of a distinct doctrine of 'promissory estoppel'. He reluctantly concedes, however, that the doctrine 'has now itself grown so strong and vigorous that it may be too late for the courts to recognise what they have actually done'. Certainly *Jorden v Money* has been treated in many later cases as authority for the proposition in the text. See eg *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352; *Maddison v Alderson* (1883) 8 App Cas 467; Spencer Bower and Turner *Estoppel by Representation* (3rd edn, 1977) pp 31-35.

16 (1877) 2 App Cas 439. This case was followed and applied in *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268; *Salisbury v Gilmore* [1942] 2 KB 38, [1942] 1 All ER 457.

17 (1877) 2 App Cas 439 at 448.

that case was not cited and no mention of estoppel was made in the judgments. It seems unlikely that the House of Lords had forgotten *Jorden v Money* which had been followed with approval only four years before.[18] It is much more probable that the decision was recognised as entirely consistent with *Jorden v Money*. Two additional factors, at least, were present. The first was that the landlord sought to enforce a right, that to forfeit the lease, which only arose because the tenant, relying on the landlord, had not repaired. If the decision had gone the other way the landlord's right to have the premises repaired would have been transmuted into a much more valuable right to forfeit the lease. It is easy to see that this would be grossly unfair. The second distinction was that the decision of the House of Lords simply suspended and did not extinguish the landlord's right to have the premises repaired. The tenant was given extra time to repair but not relieved of his obligation to do so.

If we apply the principle of *Hughes v Metropolitan Rly Co* to the facts of the *High Trees* case it can readily be seen that the landlords, having accepted part of the rent in full settlement one quarter day, could not next day purport to distrain for the balance and that if they decided to claim the balance, they must at least give extra time for payment. But Denning J stated that he would have been prepared to hold the landlord's right to the balance of the rent extinguished and was clearly therefore seeking to take the principle a stage further.

Since 1947 the precise status of the doctrine has been a subject of much speculation[19] and Lord Hailsham LC has stated[20] that:

> The time may soon come when the whole sequence of cases based on promissory estoppel since the war, beginning with *Central London Property Trust Ltd v High Trees House Ltd*, m[illegible] need to be reviewed and reduced to a coherent body of doctrine by the courts. I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored.

A major difficulty in stating the law in this area is that many of the leading cases can be explained as involving either the present doctrine or a consensual variation supported by consideration[1] or as examples of waiver.[2] In most cases this does no more than cause inconvenience to writers of textbooks but exceptional situations do occur where doctrinal purity produces practical results. In principle one ought first to consider whether the transaction is contractually binding for 'even if an estoppel may give rise to a contractual

18 *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352.

19 Spencer Bower and Turner *Estoppel by Representation* (3rd edn) ch XIV; Denning 15 MLR 1, 5 JSPTL 77; Sheridan 15 MLR 325; Bennion 16 MLR 441; Wilson 67 LQR 330, [1965] CLJ 93; Gordon [1968] CLJ 222; Jackson 81 LQR 84, 223; Clarke [1974] CLJ 260; Seddon 24 ICLQ 438; Stoljar 3 JCL 1. Lord Denning's own extra-judicial account of the doctrine is contained in *The Discipline of Law* Pt 5.

20 *Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 758, [1972] 2 All ER 271 at 282.

1 See p 619, below; Stoljar 35 Can Bar Rev 485; Dugdale and Yates 39 MLR 680; Adams 36 Conv 245; Reiter 27 U Toronto LJ 439.

2 See p 624, below. Lord Denning MR has suggested in a number of judgments and in his book that estoppel and waiver are the same doctrine but this seems very doubtful. *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753. See also *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India, The Kanchenjunga* [1990] 1 Lloyd's Rep 391.

obligation, it does not follow, and it would be a strange doctrine, that a contract gives rise to an estoppel'.[3]

We will consider first those aspects of the doctrine which appear well settled and then discuss the areas of uncertainty.

(1) There is now substantial judicial support for describing the doctrine, whatever its precise content, as one of 'promissory estoppel'.[4] In some earlier discussions the title 'equitable estoppel' was employed but as Megarry J has pointed out[5] equitable estoppel includes both proprietary estoppel[6] and promissory estoppel.[7]

(2) The doctrine operates only by way of defence and not as a cause of action.

This was made clear by the judgments of the Court of Appeal in *Combe v Combe*.[8]

> A wife started proceedings for divorce and obtained a decree *nisi* against her husband. The husband then promised to allow her £100 per annum free of tax as permanent maintenance. The wife did not in fact apply to the Divorce Court for maintenance, but this forbearance was not at the husband's request. The decree was made absolute. The annual payments were never made and ultimately the wife sued the husband on his promise to make them.

Byrne J gave judgment for the wife. He held, indeed, that there was no consideration for the husband's promise. It had not been induced by any undertaking on the wife's part to forgo maintenance; and, in any case, since it was settled law that maintenance was exclusively a matter for the court's discretion, no such undertaking would have been valid or binding.[9] But he thought that the principle enunciated in the *High Trees* case enabled the wife to succeed, since the husband had made an unequivocal promise to pay the annuity, intending the wife to act upon it, and she had in fact so acted.

3 *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1979] 2 All ER 1077 at 1082, [1979] ICR 706 at 711.

4 See eg Lord Hailsham LC, above, n 14; per Buckley J in *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 324, [1960] 1 WLR 549 at 560; per Lord Hodson in *Emmanuel Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330; per Megarry J in *Slough Estates Ltd v Slough Borough Council* (1967) 19 P & CR 326 at 362.

5 *Re Vandervell's Trusts, White v Vandervell Trustees Ltd (No 2)* [1974] Ch 269 at 300-301, [1974] 1 All ER 47 at 74-75; reversed on other grounds [1974] Ch 269, [1974] 3 All ER 205.

6 That is the line of cases running from *Dillwyn v Llewelyn* (1862) 4 De GF & J 517 to *E R Ives Investments Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504. See Spencer Bower and Turner *Estoppel by Representation* (3rd edn) ch XII.

7 A different objection is that the name equitable estoppel may obscure the fact that the rule in *Jorden v Money* was in itself an equitable one, the case going on appeal to the House of Lords from the Court of Chancery. Yet a third objection is that it is no longer appropriate to try to distinguish between the rules of common law and equity in this area: per Lord Simon of Glaisdale in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 945, [1977] 2 All ER 62 at 84. In *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 875, Scarman LJ did not find the distinction between proprietary and promissory estoppel valuable.

8 [1951] 2 KB 215, [1951] 1 All ER 767. See also *The Proodos C* [1981] 3 All ER 189.

9 See *Hyman v Hyman* [1929] AC 601. The common law position is now modified by statute so that a wife, despite her promise not to sue for maintenance in return for her husband's promise of an allowance, may sue for that allowance, though the husband may not enforce her promise. See Cretney *Principles of Family Law* (5th edn) pp 448-456. This does not overturn the principle in *Hyman v Hyman*. See p 447, below.

This decision was clearly an illegitimate extension of a principle which, if it is to be reconciled with orthodox doctrine, must be used only as a defence and not as a cause of action. To allow a plaintiff to sue upon such a promise is simply to ignore the necessity of consideration. The Court of Appeal therefore reversed the decision; and Denning LJ took the opportunity to restate the position.

> The principle stated in the *High Trees* case ... 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.

The other two judges in the Court of Appeal, Birkett and Asquith LJJ, were clear that the principle must be 'used as a shield and not as a sword'.[10] This striking metaphor should not be sloppily mistranslated into a notion that only defendants can rely on the principle. There is no reason why a plaintiff should not rely on it, provided that he has an independent cause of action. So, if upon the facts of *Hughes v Metropolitan Rly Co* the landlord had gone into possession, putting the tenant into the position of plaintiff, the result would surely be the same. On such facts the tenant's cause of action would be the lease and the doctrine would operate to negative a possible defence by the landlord that he was entitled to forfeit. As Spencer Bower says 'Estoppel may be used either as a minesweeper or a minelayer, but never as a capital ship'.[11]

(3) Finally it is settled that there must be a promise, either by words or by conduct, and that its effect must be clear and unambiguous.[12] An interesting example of this principle in operation is the decision of the Supreme Court of Canada in *John Burrows Ltd v Subsurface Surveys Ltd.*[13]

> A contract of loan provided for monthly repayments and gave the creditor a right to demand repayment of the whole sum if any instalment were paid more than ten days late. Of the first eighteen payments, eleven were more than ten days late without objection. It was held that this did not disentitle the creditor from exercising his right of acceleration when the nineteenth instalment was late.[14]

We now turn to consider those aspects of the doctrine which remain unsettled.

10 Cf Jackson 81 LQR 84, 223; *Re Wyvern Developments Ltd* [1974] 2 All ER 535, [1974] 1 WLR 1097; Atiyah 38 MLR 65 at 67. Cf *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444. Promissory estoppel can be a cause of action in the United States: *Restatement of Contracts* art 90. Henderson 78 Yale LJ 343. In the important case of *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, the High Court of Australia has allowed promissory estoppel to be used as a cause of action. Bagot 62 ALJ 926. See also *Austotel Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582; Parkinson 3 JCL 50, Mescher 64 ALJ 536, Duthie 104 LQR 362.

11 See per Luckhoo JA in *Jamaica Telephone Co Ltd v Robinson* (1970) 16 WIR 174 at 179. It seems that proprietary as opposed to promissory estoppel may in some cases support a cause of action. See *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865. The reasoning of the Court of Appeal in this case is criticised by Atiyah 92 LQR 174 on the basis that the facts would have supported a finding of contract but this is convincingly refuted by Millett 92 LQR 342.

12 *Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271.

13 (1968) 68 DLR (2d) 354. See also *Legione v Hateley* (1983) 152 CLR 406; Sutton 1 JCL 205.

14 Cf *Garlick v Phillips* 1949 (1) SA 121 at 135, per Watermeyer CJ.

(1) We have already seen that in *Hughes v Metropolitan Rly Co* the House of Lords held that the landlord's right to have the premises repaired was suspended and not extinguished. It has been widely thought that the distinction between suspension and extinction is an essential aspect of the doctrine. It is certainly factually present in many of the leading cases including the decision of the House of Lords in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd.*[15]

> The appellants were the registered proprietors of British letters patent. In April 1938, they made a contract with the respondents whereby they gave the latter a licence to manufacture 'hard metal alloys' in accordance with the inventions which were the subject of the patents. By the contract the respondents agreed to pay 'compensation' to the appellants if in any one month they sold more than a stated quantity of the alloys.
>
> Compensation was duly paid by the respondents until the outbreak of war in 1939, but thereafter none was paid. The appellants agreed to suspend the enforcement of compensation payments pending the making of a new contract. In 1944 negotiations for such new contract were begun but broke down. In 1945 the respondents sued the appellants inter alia for breach of contract and the appellants counter-claimed for payment of compensation as from 1 June 1945. The respondents' action was substantially dismissed, and all the arguments then centred on the counter-claim. The Court of Appeal held in the first action[16] that the agreement operated in equity to prevent the appellants demanding compensation until they had given reasonable notice to the respondents of their intention to resume their strict legal rights and that such notice had not been given.
>
> In September 1950, the appellants themselves started a second action[17] against the respondents claiming compensation as from 1 January 1947. The only question in this section action was whether the appellants' counter-claim in the first action amounted to reasonable notice of their intention to resume their strict legal rights.

At first instance, Pearson J held that the counter-claim in the first action in 1945 amounted to such notice. The Court of Appeal reversed this decision but the House of Lords disagreed with the Court of Appeal and restored the judgment of Pearson J.[18]

It seems to have been regarded as an essential ingredient by the Privy Council in *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd.*[19]

> The defendant had contracted with the plaintiffs for the hire purchase of eleven lorries. The plaintiffs sued to recover instalments due under the contract and obtained judgment. The defendant appealed to the Federal Supreme Court of Nigeria and for the first time pleaded a promissory

15 [1955] 2 All ER 657, [1955] 1 WLR 761.
16 (1950) 69 RPC 108.
17 Obviously everything decided by the Court of Appeal in the first action was *res judicata* in the second action.
18 In his judgment, Lord Simonds expressed the view that the principle to be found in *Combe v Combe* 'may well be far too widely stated': [1955] 2 All ER at 660, [1955] 1 WLR at 764.
19 [1964] 3 All ER 556, [1964] 1 WLR 1326. See also *Brickwoods Ltd v Butler and Walters* (1969) 21 P & CR 256; *Offredy Developments Ltd v Steinbock* (1971) 221 Estates Gazette 963.

estoppel. He alleged that the plaintiffs had voluntarily promised to suspend the payment of the instalments until certain conditions had been fulfilled and that this promise had not been kept.

The Privy Council dismissed the appeal on the ground that the appellant had not proved failure to fulfil the conditions. But Lord Hodson, in giving the advice of the Judicial Committee stated that the doctrine of promissory estoppel was subject to the following qualifications.[20]

> (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 view that promissory estoppel is only suspensory in operation (except in cases where it is no longer possible to restore the promisee to his original position) is attractive because it provides a ready means of reconciling the decisions in *Jorden v Money*, *Hughes v Metropolitan Rly Co* and *Foakes v Beer*. On the other hand Denning J in the *High Trees* case thought the doctrine operated to extinguish the landlord's right to the balance of the rent[1] and he repeated the view that promissory estoppel can operate to extinguish a debt after part payment in *D & C Builders Ltd v Rees*.[2] On the face of it, this view can only be reconciled with *Foakes v Beer* by arguing that that case was decided on purely common law grounds and that the House had overlooked its own decision in *Hughes v Metropolitan Rly Co*, decided only seven years earlier.[3] The notion of suspension has to be applied with particular care if we are dealing with a situation of continuing obligations, such as that to pay rent under a lease. At any particular moment we may have to consider the position with regard to past rent, presently due rent and rent which is due in the future. If we consider the facts of the *High Trees* case, the following alternatives appear logically possible:

(1) that as each underpayment was made, the right to the balance was lost for ever; or
(2) that underpayment with consent did not give rise to the legal consequences normally attached to non-payment of rent but that the appropriate steps could be taken to revive the right to receive payment by reasonable notice.

The second alternative is clearly suspensory but the first appears not to be. It is perfectly consistent however with a further rule that the right to *future* rent can be revived by reasonable notice. Suppose that on the first quarter day of 1942, the landlords had intimated that they would require the full rent to be paid from the second quarter day of 1942, would they have been entitled to do so? The tenor of Denning J's judgment suggests not, but on the whole the reasoning of the authorities suggests the contrary.

20 Ibid at 559 and 1330, respectively.
1 In the case the landlord's right to the rent after the war was revived but in Denning J's analysis this was because the promise was only to last while the flats were not fully occupied. He does not discuss the question of whether the landlord might have changed his mind in, say 1943, and claimed the full rent thenceforth.
2 [1966] 2 QB 617, [1965] 3 All ER 837.
3 It is not clear that even such an oversight would render the decision in *Foakes v Beer* *per incuriam*. See *Cassell & Co v Broome* [1972] AC 1027, [1972] 1 All ER 801.

(2) It is still not clear what conduct by the promisee must follow the promise before it becomes binding. In the doctrine of estoppel by representation of fact, the representor is only estopped if the representee has acted on the representation to his detriment.[4] It is not surprising that by analogy it has been argued that a similar requirement applies to promissory estoppel.

Such detrimental reliance was factually present in *Hughes v Metropolitan Rly Co*; indeed the tenant had not only acted to his detriment but acted to his detriment vis-à-vis the promisor (the landlord) by omitting to repair. Such action vis-à-vis the promisor is present in many of the other cases where the doctrine has been applied.[5] It is perhaps no coincidence that these are also cases where the doctrine has operated suspensively, since it will usually be much easier to restore the promisee to his original position where he has altered it vis-à-vis the promisor than where he has altered it vis-à-vis a third party.

Action by the promisee to his detriment was regarded as essential by McVeigh J in *Morrow v Carty*.[6] In *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd*,[7] the Privy Council stated that the promisee must have altered his position and it has been commonly assumed that this means altered *for the worse*. On the other hand this has been consistently denied by Lord Denning MR, who restated his views in *W J Alan & Co Ltd v El Nasr Export and Import Co*[8] where he said:[9]

> 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, that the other must have been led to alter his position, which was adopted by Lord Hodson in *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd*. But that only means that he must have been led to act differently from what he otherwise would have done.

However in that case the other two members of the Court of Appeal left the question open, Stephenson LJ because he held the promisee had acted to his detriment[10] and Megaw LJ because he held that there had been a consensual variation of the contract for consideration.[11] Lord Denning MR repeated his views in *Brikom Investments Ltd v Carr*[12] but again the other members of the court decided the case on other grounds.[13]

Another approach was adopted in the New Zealand case of *P v P*:[14]

4 Spencer Bower and Turner *Estoppel by Representation* (3rd edn) pp 101-111.
5 Eg *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268; *Salisbury v Gilmore* [1942] 2 KB 38, [1942] 1 All ER 457; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761.
6 [1957] NI 174.
7 P 112, above. See also *Jamaica Telephone Co Ltd v Robinson* (1970) 16 WIR 174.
8 [1972] 2 QB 189, [1972] 2 All ER 127.
9 Ibid at 213 and 140, respectively.
10 Ibid at 221 and 147, respectively.
11 Ibid at 217-218 and 143, respectively. Stephenson LJ agreed that there was a consensual variation. Clarke [1974] CLJ 260 at 278-280, doubts whether there was consideration for such a variation but for present purposes the important point is that two members of the court thought it necessary to find it.
12 [1979] QB 467 at 482, [1979] 2 All ER 753 at 758, 759.
13 See discussion at p 627, below.
14 [1957] NZLR 854; Sheridan 21 MLR 185. For other New Zealand cases, see the 8th New Zealand edition of this work, pp 127-129.

> A husband and wife had separated, and by the deed of separation the husband agreed to pay a monthly sum to the wife. Later the parties were divorced and the court ordered the husband to pay to the wife one shilling a year as maintenance. The wife was insane; and her administrator, the Public Trustee, told the husband (a) that the court order cancelled the provisions of the separation deed, (b) that if he paid the arrears due under the deed he would be under no further liability. The husband accordingly paid the arrears but paid no more instalments. More than four years later the Public Trustee found that he had wrongly interpreted the effect of the court order and sued for the monthly instalments. The husband pleaded the principle set out in the *High Trees* case and in *Combe v Combe.*

McGregor J gave judgment for the defendant. The latter had been induced by the statement of the Public Trustee not to proceed, as he might have done, to take steps under an Act of 1928 to set aside the separation deed. The Public Trustee, therefore, should not be allowed to enforce his legal claim.

McGregor J thought that the governing test was 'whether it would be inequitable to allow the party seeking so to do to enforce the strict rights which he had induced the other party to believe will not be enforced'. Clearly on the facts of this case the husband had acted to his detriment and it seems likely that the tests of inequity and detrimental reliance would in practice substantially overlap.

This approach was followed by Robert Goff J in *The Post Chaser*[15] who said:

> The fundamental principle is that stated by Lord Cairns LC, 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 ... But it does not follow that in every case in which the representee had 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.

(3) A final doubt is whether the promisee must have acted equitably if he is to rely on the doctrine. Such a requirement was stated by Lord Denning MR in *D & C Builders Ltd v Rees*[16] the facts of which have already been discussed.[17] This is a case which illustrated perfectly our earlier suggestion that the rule in *Foakes v Beer* was not devoid of virtue since the merits were clearly on the side of the plaintiff creditors.[18] Winn LJ simply applied the principle of *Foakes v Beer* and did not consider the application of promissory estoppel but Lord Denning MR had in earlier cases stated the principle in a form sufficiently wide to cover the defendants. He did not resile from the width of his earlier

15 [1982] 1 All ER 19 at 27. See also the observation of the same judge in *Amalgamated Investments and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 1 All ER 923 approved on different grounds by Court of Appeal [1982] QB 84, [1981] 3 All ER 577. For further discussion of the *Texas* case and estoppel by convention see *Kenneth Allison Ltd v A E Limehouse & Co* [1991] 4 All ER 500 at 514 per Lord Goff. See too *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n, [1981] 1 All ER 897.

16 [1966] 2 QB 617, [1965] 3 All ER 837.

17 P 106, above.

18 P 104, above.

statements but qualified them by a rider that a promise can only be relied on when it has been given with full consent and not if it has been extracted by threats. If the courts do eventually hold that the doctrine of promissory estoppel has outflanked *Foakes v Beer*, it would appear necessary to have some such saving clause. This will clearly involve the gradual working out of what conduct by the promisee should be regarded as inequitable in this context.[19] In *Adams v R Hanna & Son Ltd*[20] it was suggested that a debtor who seeks to persuade a creditor to accept less than is owed, only acts equitably when he makes full and frank disclosure of his financial position.

3 COMPOSITIONS WITH CREDITORS

It has long been a common practice for the creditors of an impecunious debtor to make an arrangement with him whereby each agrees to accept a stated percentage of his debt in full satisfaction. The search for a sufficient consideration to support so reasonable an agreement has caused the courts much embarrassment. It would appear at first sight to fall under the ban in *Pinnel's Case*, and such was the view adopted in 1804 by Lord Ellenborough. 'It is impossible to contend that acceptance of £17 10s is an extinguishment of a debt of £50.'[1] But the inconvenience of such a conclusion was so manifest that it could not be accepted.

Two alternative suggestions have been proffered. The first was the second thought of Lord Ellenborough himself. There was consideration for the composition, he suggested in 1812, in the fact that each individual creditor agreed to forgo part of his debt on the hypothesis that all the other creditors would do the same.[2] A moment's reflection will expose the weakness of this argument. Such a consideration would, no doubt, suffice to support the agreement as between the creditors themselves. But, if the debtor sought to rely upon it, he would be met by the immediate objection that he himself had furnished no return for the creditors' promises to him, and, as already observed, it is a cardinal rule of the law that the consideration must move from the promisee.[3] A second solution is to say that no creditor will be allowed to go behind the composition agreement, to the prejudice either of the other creditors or of the debtor himself, because this would be a fraud upon all the parties concerned. The solution was suggested by Lord Tenterden in 1818 and supported by Willes J in 1863, and it has since won general approbation.[4] But it is frankly an argument *ab inconvenienti* and evades rather than meets the difficulty.

Similar difficulties arise with a second situation.

> Suppose that A owes B £100 and that C promises B £50 on condition that B will discharge A. If the £50 is paid and B still sues A for the balance, how is A to resist the action?

19 Winder 82 LQR 165; Cornish 29 MLR 428.
20 (1967) 11 WIR 245.
1 *Fitch v Sutton* (1804) 5 East 230.
2 *Boothbey v Sowden* (1812) 3 Camp 175. The argument was adopted, though obiter, by the court in *Good v Cheesman* (1831) 2 B & Ad 328.
3 See p 86, above.
4 See *Wood v Roberts* (1818) 1 Stark 417; and *Cook v Lister* (1863) 13 CBNS 543 at 595. See also *Couldery v Bartrum* (1881) 19 ChD 394, where Sir George Jessel, amid a substained invective against the rule in *Pinnel's Case*, can say no more than the law 'imports' a consideration to support the composition agreement; and *Hirachand Punamchand v Temple* [1911] 2 KB 330.

No promise of discharge was given to him, nor, if it had been, would he have supplied any consideration for it. The question arose in 1825 in *Welby v Drake*.[5]

> The defendant had drawn a bill for £18, which had been returned unaccepted and which had come into the hands of the plaintiff. The defendant's father then made an agreement with the plaintiff, whereby he promised to pay him £9 in return for the plaintiff's promise to receive it in full satisfaction of his claim. The money was duly paid, but the plaintiff still sued the defendant.

Lord Tenterden directed judgment for the defendant.

> If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because, by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

The plea of fraud was approved by Willes J in *Cook v Lister*[6] and applied by the Court of Appeal in *Hirachand Punamchand v Temple*,[7] and reliance was placed upon the analogy of composition agreements. Both classes of cases, therefore, may be said to rest upon this basis, and should be treated as exceptions to the general requirement of consideration.

4 WHERE THE PLAINTIFF IS BOUND BY AN EXISTING CONTRACTUAL DUTY TO A THIRD PARTY

The next type of case is where the plaintiff performs, or promises to perform, an obligation already imposed upon him by a contract previously made, not between him and the defendant, but between himself and a third party. The question whether such a promise or performance affords sufficient consideration has provoked a voluminous literature—more generous, indeed, than the practical implications would seem to warrant.[8]

The problems involved may thus be stated. If A and B have made a contract under which an obligation remains to be performed by A and A now makes this obligation the basis of a new agreement with C, there are two possibilities. C's promise may have been induced either by A's promise to perform his outstanding obligation under the contract with B, or by A's actual performance of it. In other words, A may seek to support the validity of his agreement with C by reliance either on executory or on executed consideration. There is, as has already been remarked, divergence of juristic opinion as to the identity of the test applicable to determine the sufficiency of the one type of consideration and of the other.[9]

How far is this distinction between executory and executed consideration to be regarded as relevant? Sir Frederick Pollock thought that, in principle

5 (1825) 1 C & P 557.

6 (1868) 13 CBNS 543 at 595.

7 [1911] 2 KB 330. See also *Re L G Clarke, ex p Debtor v Ashton & Son* [1967] Ch 1121, [1966] 3 All ER 622. The courts have usually shown greater reluctance to allow A to use a contract between B and C as a defence to an action by B. See pp 182-189, below. See also Gold 19 Can Bar Rev 165. In *Welby v Drake* the creditor sued for the full amount of the original debt; in *Hirachand Punamchand v Temple* only for the balance.

8 Davis [1937] CLJ 203; Ballantine 11 Mich L Rev 423; Pollock *Principles of Contract* (13th edn) pp 147-150; Holdsworth *HEL* vol VIII, pp 40-41; *Williston On Contracts* (3rd edn) paras 131, 131A.

9 See p 88, above.

at least, it should be decisive.[10] In his opinion the *promise* might be good consideration, for it involved the promisor in two possible actions for breach of contract instead of one, and thus was a detriment within the meaning of the law.[11] The *performance* should not be accepted as good consideration, since, as it discharged the previous contract, it was not a detriment at all. This theory, however, is not altogether convincing. The validity of the promise may be accepted: the insufficiency of the performance is open to criticism. In the first place, it assumes that the only test of consideration is a detriment to the promisee. The assumption may be historically sound: the idea of detriment at least recalls the early association of assumpsit and case. But the complementary idea of benefit was soon introduced into the language of the courts, and has been constantly emphasised by the judges. While, therefore, the performance may not be a detriment to the promisee, it is certainly a benefit to the promisor.[12] In the second place, the distinction involves a practical absurdity. If the mere promise of an act is sufficient consideration to induce a counter-promise, surely the complete performance of that act should be accepted. To hold the contrary, it has been well said, seems to assert 'that a bird in the hand is worth less than the same bird in the bush'.[13] Once more, the conflict between principle and technicality comes to the surface, and once more the difficulties inherent in the use of the terms 'detriment' and 'benefit' would be avoided if the element of bargain were stressed and the language of sale adopted. Promise and performance may equally be regarded as the price of a counter-promise.

Although the question has often been said to be an open one, the cases have with one exception uniformly upheld either promise or performance as sufficient consideration. This seems to be the effect of some seventeenth-century cases, though no doubt the court did not there see the problem in modern terms.[14]

The one discordant case is *Jones v Waite*.[15]

> In this case the defendant agreed to pay money to the plaintiff in return for the plaintiff's promise (a) to execute a separation deed and (b) to pay his (the plaintiff's) debts to a third party. The promise to execute the separation deed raised questions of public policy[16] but was held good consideration. The Court of Exchequer Chamber held however that the plaintiff's promise to pay his own debts was no consideration.

Lord Abinger CB said:[17]

> A man is under a moral and legal obligation to pay his just debts. It cannot therefore be stated as an abstract proposition, that he suffers any detriment from

10 *Principles of Contract* (13th edn) pp 147-150. Holdsworth appears to agree: *HEL* vol VIII, pp 40-41.

11 To this argument it has sometimes been objected that it assumes what it seems to prove. The promisor exposes himself to two suits only if he can be sued by the new party. But the new party can sue only if the promisor has given consideration. It seems, however, that Pollock meets the objection fairly by pointing out that this assumption must necessarily be made in the case of all mutual promises.

12 See *Williston on Contracts* (3rd edn) paras 131 and 131A.

13 See Ballantine 11 Mich L Rev 423 at 427.

14 Eg *Bagge v Slade* (1616) 3 Bulst 162; Simpson *History* pp 451-452.

15 (1839) 5 Bing NC 341.

16 See p 448, below.

17 Ibid at 356.

the discharge of that duty; and the declaration does not show in what way the defendant could have derived any advantage from the plaintiff paying his own debts. The plea therefore shows the insufficiency of that part of the consideration.

This is no doubt a strong authority but it should be noted that the plaintiff's failure on this point was due, at least in part, to his failure to allege any benefit to the defendant. This leaves open the possibility of upholding the contract where a benefit to the promisor can be shown. In fact the case was not as influential as might have been expected since it was lost sight of for over a hundred years, no doubt because when the case was taken to the House of Lords only the separation agreement point was taken.[18]

Jones v Waite was not therefore cited or discussed in a trilogy of cases in the 1860s, of which the first is *Shadwell v Shadwell*.[19]

The plaintiff, who was engaged to marry Ellen Nicholl, received the following letter from his uncle:

> '11th August, 1838. Gray's Inn.
>
> My dear Lancey - 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 one hundred and fifty pounds yearly during my life, and until your annual income derived from your profession of a chancery barrister shall amount to six hundred guineas, of which your own admission shall be the only evidence that I shall receive or require.
>
> Your ever affectionate uncle,
> Charles Shadwell.'

The plaintiff married Ellen Nicholl and never earned as much as six hundred guineas a year as a barrister. The instalments promised by the uncle were not all paid during his life, and after his death, the plaintiff brought an action to recover the arrears from the personal representatives.

The defendants pleaded that, as the plaintiff was already bound to marry Ellen Nicholl before the uncle wrote his letter, there was no consideration for his promise.

On these facts it might well have been held that there was no more than a conditional promise of a gift by the uncle and indeed that was the dissenting view of Byles J.[20] The majority of the court held that the letter was intended contractually and that there was consideration for it.

Erle CJ, giving the opinion of Keating J, and himself, thought that there was both a detriment to the plaintiff and a benefit to the uncle: a detriment because 'the plaintiff may have made the most material changes in his position and have incurred pecuniary liabilities resulting in embarrassment, which would be in every sense a loss if the income which had been promised should be withheld', and a benefit, because the marriage was 'an object of interest with a near relative'.

18 (1842) 9 Cl & Fin 101.

19 (1860) 9 CBNS 159, 30 LJCP 145.

20 Cf *Jones v Padavatton* [1969] 2 All ER 616, [1969] 1 WLR 328, discussed pp 124-125, below. Though logically it should make no difference, the court is perhaps more likely to strain to discover a contract where the action lies against the executors than against the promisor.

The facts and the decision in *Chichester v Cobb*[1] were for practical purposes identical and we need only note that Blackburn J experienced no difficulty in discovering consideration on such facts.

The third case is *Scotson v Pegg*.[2]

> The plaintiffs had contracted with a third party, X, to deliver a cargo of coal to X or *to the order of* X. X sold this cargo to the defendant and directed the plaintiffs, in pursuance of their contract, to deliver it to the defendant. The defendant then made an agreement with the plaintiffs in which, 'in consideration that the plaintiffs, at the request of the defendant, would deliver to the defendant' the cargo of coal, the defendant promised to unload it at a stated rate.

For breach of this promise the plaintiffs sued, and the defendant once more pleaded lack of consideration. If, it was argued, the plaintiffs were already bound by the contract with X to deliver the coal to the defendant in accordance with X's order, what were they now giving in return for the defendant's promise to unload at a certain rate? However, the two judges present at the hearing, Martin and Wilde BB both gave judgment for the plaintiffs. Martin B was content to say that the delivery of the coal was a benefit to the defendant. Wilde B thought there was also a detriment to the plaintiffs. It might have suited them, as against X, to break their contract and pay damages, and the delivery to the defendant had prevented this possible course of conduct.[3]

Although these three cases are not entirely satisfactory, they at least all point in the same way and one further along which principle directs us. All doubts on the matter may now be regarded as resolved by the decision of the Privy Council in *New Zealand Shipping Co v A M Satterthwaite & Co, The Eurymedon*.[4] The facts and issues of this case are complex and are discussed more fully later.[5] For present purposes we may say that the essential facts were that the plaintiff made an offer to the defendant that if the defendant would unload the plaintiff's goods from a ship (which the defendant was already bound to do by a contract with a third party), the plaintiff would treat the defendant as exempt from any liability for damage to the goods. The majority of the judicial committee of the Privy Council had no doubt[6] that the defendant's act of unloading the ship was good consideration.[7]

1 (1866) 14 LT 433.
2 (1861) 6 H & N 295, 3 LT 753.
3 This argument is only found in 3 LT.
4 [1975] AC 154, [1974] 1 All ER 1015. Reynolds 90 LQR 301. Followed on this point *Pao On v Lau Yiu Long* [1979] 3 All ER 65, [1979] 3 WLR 435.
5 See pp 182-189, below.
6 The minority expressed no concluded view for they did not think the transaction could be construed as an offer of this kind.
7 Ibid at 168 and 1021, respectively.

Chapter 5

Intention to create legal relations

SUMMARY

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The question now to be discussed is whether a contract necessarily results once the court has ruled that the parties must be taken to have made an agreement and that it is supported by consideration.[1] This conclusion is commonly denied. The law, it is said, does not proclaim the existence of a contract merely because of the presence of mutual promises. Agreements are made every day in domestic and in social life, where the parties do not intend to invoke the assistance of the courts should the engagement not be honoured. To offer a friend a meal is not to invite litigation. Contracts, in the words of Lord Stowell,

> ... must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect whatever.[2]

It is therefore contended that, in addition to the phenomena of agreement and the presence of consideration, a third contractual element is required—the intention of the parties to create legal relations.

This view, commonly held in England,[3] has not passed unchallenged; and the criticism of it made by Professor Williston demands attention, not only as emanating from a distinguished American jurist, but as illuminating the whole subject now under discussion. In his opinion, the separate element of intention is foreign to the common law, imported from the Continent by academic influences in the nineteenth century[4] and useful only in systems which lack the test of consideration to enable them to determine the boundaries of contract:

> The common law does not require any positive intention to create a legal obligation as an element of contract ... A deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability.[5]

His own views may be reduced to three propositions:

1 It is assumed here that the contract cannot be challenged on the ground that it violates public policy or is avoided by statute. Such flaws are discussed in ch 11, below.
2 *Dalrymple v Dalrymple* (1811) 2 Hag Con 54 at 105.
3 Eg *Pollock on Contract* (13th edn) p 3; Law Revision Committee, Sixth Interim Report, p 15.
4 Historically this would appear correct. Simpson 91 LQR 263-265.
5 *Williston on Contracts* (3rd edn) s 21. Williston has not lacked support: see Tuck 21 Can Bar Rev 123; Hamson 54 LQR 233; Shatwell 1 Sydney L Rev 289; Unger 19 MLR 96; Hepple [1970] CLJ 122; Hedley 5 Oxford LJS 391. Cf Chloros 33 Tulane L Rev 607.

(1) If reasonable people would assume that there was no intention in the parties to be bound, there is no contract.
(2) If the parties expressly declare or clearly indicate their rejection of contractual obligations, the law accepts and implements their intention.
(3) Mere social engagements, if accompanied by the requisite technicalities, such as consideration, may be enforced as contracts.

English lawyers may well be prepared to accept the first two of these propositions: decided cases refute the third.[6] But their acceptance does not necessarily justify the complete rejection of intention to create legal relations as an independent element in the formation of contract. It is certainly true, and of great significance, that the very presence of consideration normally implies the existence of such an intention. To make a bargain is to assume liability and to invite the sanction of the courts. Professor Williston performed a valuable service by insisting that the emphasis laid by foreign systems on this element of intention is out of place in the common law, where it follows naturally from the very nature of contract. Consideration, bargain, legal consequences—these are interrelated concepts. But it is possible for this presumption to be rebutted. If A and B agree to lunch together and A promises to pay for the food if B will pay for the drink, it is difficult to deny the presence of consideration and yet equally clear that no legal ties are contemplated or created.[7] It seems necessary, therefore, to regard the intention to create legal relations as a separate element in the English law of contract, though, by the preoccupation of that law with the idea of bargain, one which does not normally obtrude upon the courts.

The cases in which a contract is denied on the ground that there is no intention to involve legal liability may be divided into two classes. On the one hand there are social, family or other domestic agreements, where the presence or absence of an intention to create legal relations depends upon the inference to be drawn by the court from the language used by the parties and the circumstances in which they use it.[8] On the other hand there are commercial agreements where this intention is presumed and must be rebutted by the party seeking to deny it. In either case, of course, intention is to be objectively ascertained.

A DOMESTIC AGREEMENTS

Agreements between husband and wife

In the course of family life many agreements are made, which could never be supposed to be the subject of litigation. If a husband arranges to make a

6 Eg *Balfour v Balfour* [1919] 2 KB 571; p 123, below. See also *Lens v Devonshire Club* (1914) Times, 4 December, discussed by Scrutton LJ in *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261.

7 It may be objected that there is only consideration if the promises are given in exchange for each other but some test of intention is needed to discover whether this is so.

8 It is not irrelevant to notice that by s 1(1) of the Law Reform (Miscellaneous Provisions) Act 1970, 'an agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights, and no action shall lie in England or Wales for breach of such an agreement, whatever the law applicable to the agreement'.

monthly allowance to his wife for her personal enjoyment, neither would normally be taken to contemplate legal relations. On the other hand, the relation of husband and wife by no means precludes the formation of a contract, and the context may indicate a clear intention on either side to be bound. Whether any given agreement between husband and wife falls on the one side of the borderline or the other is not always easy to determine. Two contrasting cases may illustrate the position.

In *Merritt v Merritt*:[9]

> The husband left the matrimonial home, which was in the joint names of husband and wife and subject to a building society mortgage, to live with another woman. The husband and wife met and had a discussion in the husband's car during which the husband agreed to pay the wife £40 a month out of which she must pay the outstanding mortgage payments on the house. The wife refused to leave the car until the husband recorded the agreement in writing and the husband wrote and signed a piece of paper which stated 'in consideration of the fact that you will pay all charges in connection with the house ... until such time as the mortgage repayments has been completed I will agree to transfer the property in to your sole ownership'. After the wife had paid off the mortgage the husband refused to transfer the house to her.

It was held by the Court of Appeal that the parties had intended to affect their legal relations and that an action for breach of contract could be sustained.

In *Balfour v Balfour*:[10]

> The defendant was a civil servant stationed in Ceylon. His wife alleged that, while they were both in England on leave and when it had become clear that she could not again accompany him abroad because of her health, he had promised to pay her £30 a month as maintenance during the time that they were thus forced to live apart. She sued for breach of this agreement.

The Court of Appeal held that no legal relations had been contemplated and that the wife's action must fail.[11]

Atkin LJ had no doubt that, while consideration was present, the evidence showed that the parties had not designed a binding contract.[12]

> 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 ... To my mind those agreements, or many of them, do not result in contracts at

9 [1970] 2 All ER 760, [1970] 1 WLR 1211. See also *McGregor v McGregor* (1888) 21 QBD 424; *Pearce v Merriman* [1904] 1 KB 80. *Re Windle* [1975] 3 All ER 987, [1975] 1 WLR 1628.

10 [1919] 2 KB 571.

11 Tuck 21 Can Bar Rev 97, rests the decision in this case on the absence of consideration. Duke LJ certainly took this view: but the whole tenor both of counsel's arguments and of the judgments of Warrington and Atkin LJJ shows that the decision turned on the lack of intention to contract.

12 Ibid at 578-579.

> all ... even though there may be what as between other parties would constitute consideration ... They are not contracts because the parties did not intend that they should be attended by legal consequences.

In *Pettitt v Pettitt*,[13] several members of the House of Lords, though accepting the principle enunciated in *Balfour v Balfour*, thought the decision on the facts very close to the line.[14] It was also observed that though many agreements between husband and wife are not intended to be legally binding, performance of such agreements may well give rise to legal consequences.

So Lord Diplock said:[15]

> Many of the ordinary domestic arrangements between man and wife do not possess the legal characteristics of a contract. So long as they are executory they do not give rise to any chose in action, for neither party intended that non-performance of their mutual promises should be the subject of sanctions in any court (see *Balfour v Balfour*). But this is relevant to non-performance only. If spouses do perform their mutual promises the fact that they could not have been compelled to do so while the promises were executory cannot deprive the acts done by them of all legal consequences upon proprietary rights; for these are within the field of the law of property rather than of the law of contract. It would, in my view, be erroneous to extend the presumption accepted in *Balfour v Balfour* that mutual promises between man and wife in relation to their domestic arrangements are prima facie not intended by either to be legally enforceable to a presumption of a common intention of both spouses that *no* legal consequences should flow from acts done by them in performance of mutual promises with respect to the acquisition, improvement or addition to real or personal property—for this would be to intend what is impossible in law.

Agreements between parent and child

Agreements between parent and child may present problems similar to those of husband and wife. An illustration is afforded by the case of *Jones v Padavatton*:[16]

> Mrs Jones lived in Trinidad. Her daughter had a post in the Indian Embassy in Washington. She had been married and had a young son, but was now divorced. Mrs Jones wished her to go to England and become a barrister, and offered to make her a monthly allowance while she read for the Bar. The daughter reluctantly accepted the offer and went to England in 1962. In 1964 Mrs Jones bought a house in London. The daughter lived with her child in part of it, and the rest was let to tenants, whose rent covered expenses and the daughter's maintenance. In 1967, Mrs Jones and her daughter quarrelled, and Mrs Jones issued a summons claiming possession of the house. At the time of the hearing, the daughter had passed only a portion of Part I of the Bar examinations.

Two agreements fell to be considered. By the first the daughter agreed to leave Washington and read for the Bar in London, and her mother agreed

13 [1970] AC 777, [1969] 2 All ER 385.

14 Per Lord Hodson, ibid at 806 and 400 respectively; per Lord Upjohn, ibid at 816 and 408, respectively.

15 Ibid at 822 and 413-414, respectively. See also per Lord Reid, ibid at 796 and 391, respectively: see Lesser 23 U of Toronto LJ 148 at 162-164. That it is easy to lose sight of the distinction between contract and property is shown by the decision in *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, discussed by Diamond 24 MLR 789.

16 [1969] 2 All ER 616, [1969] 1 WLR 328.

to pay her a fixed monthly sum. By the second the mother allowed the daughter to live in the house which the mother had bought, and the rent received from the tenants provided for the daughter's maintenance. In each agreement there was an exchange of promises, but in neither were the terms put into writing, nor was the duration of the agreement precisely defined. The question was whether in either case the parties had intended to create legal relations.

At the hearing in the county court, the judge dismissed the mother's claim for possession of the house, but his decision was reversed by the Court of Appeal. Danckwerts and Fenton Atkinson LJJ thought that neither agreement was intended to create legal relations. 'The present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding arrangements.'[17] Salmon LJ agreed that the appeal should be allowed, but on different grounds. In his opinion the first agreement was a contract designed to last for a period reasonably sufficient to enable the daughter to pass the Bar examinations. For this purpose the five years which had elapsed since the date of the agreement was a reasonable time, and the contract had therefore come to an end. The second agreement, involving the possession of the house, was so imprecise and left so many details unsettled that it was impossible to construe it as a contract. Nothing in the agreement nor in the available evidence suggested that the mother had intended to renounce her right to dispose of her house as and when she pleased. The daughter was a mere licensee.[18]

Other domestic arrangements

A further group of cases involve domestic agreements which are made neither between husband and wife nor between parent and child. In *Simpkins v Pays*:[19]

> The defendant owned a house in which she lived with X, her granddaughter, and the plaintiff, a paying boarder. The three took part together each week in a competition organised by a Sunday newspaper. The entries were made in the defendant's name, but there was no regular rule as to the payment of postage and other expenses. One week the entry was successful and the defendant obtained a prize of £750. The plaintiff claimed a third of this sum, but the defendant refused to pay on the ground that there was no intention to create legal relations but only a friendly adventure.

Sellers J gave judgment for the plaintiff. He agreed that 'there are many family associations where some sort of rough and ready statement is made which would not establish a contract'. But on the present facts he thought that there was a 'mutuality in the arrangement between the parties'. It was a joint enterprise to which each contributed in the expectation of sharing any prize that was won.

17 Ibid at 620 and 332. Both Danckwerts and Fenton Atkinson LJJ cited and applied *Balfour v Balfour*.

18 Ibid at 623 and 335, respectively. Cf *Hardwick v Johnson* [1978] 2 All ER 935, [1978] 1 WLR 683.

19 [1955] 3 All ER 10, [1955] 1 WLR 975. For a simple case where there was no intention to create legal relations, see *Buckpitt v Oates* [1968] 1 All ER 1145. See also *Parker v Clark* [1960] 1 All ER 93, [1960] 1 WLR 286. Cf *Osorno v Cardona* (1984) 15 DLR (4th) 619.

B COMMERCIAL AGREEMENTS[20]

In commercial agreements it will be presumed that the parties intended to create legal relations and made a contract. But the presumption may be rebutted.

(1) It is common enough to advertise goods by flamboyant reports of their efficacy and to support these by promises of a more or less vague character if they should fail of their purpose. If a plaintiff, induced to buy on the faith of such reports and promises, finds that they are not borne out by the facts and sues for breach of contract, the defendant may attempt to plead that there was no intention to create legal relations and that only the most gullible customer would think otherwise.

The point arose in the case of *Carlill v Carbolic Smoke Ball Co*,[1] where the defendants advertised their preparation by offering to pay £100 to any purchaser who used it and yet caught influenza within a given period, and by declaring that they had deposited £1,000 with their bankers 'to show their sincerity'. The plaintiff bought the preparation, used it and caught influenza. Among the many ingenious defences raised to her action was the plea that no legal relations were ever contemplated. The advertisement, it was said, was 'a mere puff', 'a mere statement by the defendants of the confidence they reposed in their remedy', 'a promise in honour'. The Court of Appeal rejected this plea. The fact of the deposit was cogent evidence that the defendants had contemplated legal liability when they issued their advertisement. What would have been the view of the court in the absence of any such deposit is a matter of speculation, and it is not to be concluded that all advertisements are to be treated as serious offers.[2]

In *Carlill v Carbolic Smoke Ball Co* the plaintiff did not buy the smoke ball from the defendant but from a retailer. The question before the court was therefore whether there was a contract with the defendant. A more modern example is *Bowerman v Association of British Travel Agents Ltd.*[3]

> The claimant booked a holiday with a tour operator who was member of the Defendant Association (ABTA). The tour operator displayed on its wall an ABTA notice which stated that in the event of the financial failure of an ABTA member before a holiday:
>
> ABTA arranges for you to be reimbursed the money you have paid in respect of your holiday arrangement.
>
> The tour operator became insolvent shortly before the claimant's holiday. The claimant made a claim against ABTA who argued that the notice was not intended to give rise to a contract with the claimant. The majority of the Court of Appeal rejected this contention.
>
> Hobhouse LJ said:
>
> This document is intended to be read and would 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.

20 There can of course be commercial agreements between members of a family, eg *Snelling v John G Snelling Ltd* [1973] QB 87, [1972] 1 All ER 79.

1 [1893] 1 QB 256.

2 Cf p 34, n 18, above.

3 [1996] CLC 451, [1995] NLJR 1815, McMeel 113 LQR 47.

A more common factual situation arises where there is undoubtedly a contract but there is dispute as to whether a statement made by one of the parties before the contract forms part of the contract. This question is discussed more fully later[4] and it will suffice for the moment to say that here too, the governing test is the parties' intention.[5]

(2) The parties may make an agreement on a matter of business or of some other transaction normally the subject of contract, but may expressly declare that it is not to be binding in law. If such a declaration is made, it will, like other unambiguous expressions of intention, be accepted by the courts.[6]

Perhaps the most remarkable instance of a clause expressly outlawing an agreement is to be found in the case of *Rose and Frank v Crompton*.[7] The plaintiffs were a New York firm which dealt in tissues for carbonising papers. The defendants manufactured such tissues in England. In July 1913, the parties made a written agreement whereby the defendants gave the plaintiffs certain rights of selling their tissues in the United States and in Canada for a period of three years with an option to extend the time. The agreement contained the following clause, described as 'the Honourable Pledge 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 parties concerned, to which they each honourably pledge themselves.

The agreement was subsequently extended so as to last until March 1920; but in 1919 the defendants terminated it without giving the appropriate notice specified in the agreement, and they further refused to execute orders which had been received and accepted by them before the termination. The plaintiffs sued for damages for breach of the agreement and for non-delivery of the goods comprised in these orders. To appreciate the decision reached by the courts, it is necessary to separate these two claims.

The first was for breach of the agreement contained in the written document of July 1913, whereby the defendants granted selling rights to the plaintiffs. Here the plaintiffs failed. The document doubtless contemplated that orders for goods were from time to time to be given by the plaintiffs and fulfilled by the defendants. But, as the parties had specifically declared that the document was not to impose legal consequences, there was no obligation to give orders or to accept them or to stand by any clause in the agreement. Scrutton LJ said in the Court of Appeal:[8]

> It is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject-matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties

4 See pp 139-145, below.
5 See eg *Heilbut Symons & C v Buckleton* [1913] AC 30, *J Evans & Son (Portsmouth) Ltd v Andrea Merzario* [1976] 2 All ER 930 [1976] 1 WLR 1078; *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 BLR 1.
6 *Jones v Vernon's Pools Ltd* [1938] 2 All ER 626; *Appleson v H Littlewood Ltd* [1939] 1 All ER 464.
7 [1923] 2 KB 261; revsd [1925] AC 445.
8 [1923] 2 KB at 288.

> should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean.

The second claim, on the other hand, was based, not on the promises comprised in the original document, but on the specific orders actually accepted by the defendants before they terminated the agreement. Here the plaintiffs succeeded. As each individual order was given and accepted, this constituted a new and separate contract, inferred by the courts from the conduct of the parties and enforceable without reference to the original memorandum. In the words of Lord Phillimore:[9]

> 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 where done of its ordinary legal significance.

Words inserted by one party in an agreement and devised, or subsequently used, to exclude legal relations may be ambiguous. In such a case the onus of proving this intention lies heavily upon the party who asserts it. A helpful example is to be found in *Edwards v Skyways Ltd.*[10]

> The plaintiff was employed by the defendants as an aircraft pilot. In January 1962, the defendants told him that they must reduce their staff and gave him three months' notice to terminate his employment. By his contract he was a member of the defendants' contributory pension fund and was thereby entitled, on leaving their service, to choose one of two options: (a) to withdraw his own total contributions to the fund, (b) to take the right to a paid-up pension payable at the age of fifty. He was a member of the British Air Line Pilots Association. Their officials had a meeting with the defendants, and it was agreed that, if the plaintiff chose option (a), the defendants would make him an 'ex gratia' payment equivalent or approximating to the defendants' contributions to the pension fund. The plaintiff, relying on this agreement, chose option (a). The defendants paid him the amount of his own contributions but refused to make the 'ex gratia' payment.

The plaintiff sued the defendants for breach of contract. It was admitted that the Association had acted as the plaintiff's agents and that there was consideration for the defendants' promise. But the defendants argued that the use of the words 'ex gratia' showed that there was no intention to create legal relations. Megaw J gave judgment for the plaintiff. As this was a business and not a domestic agreement, the burden of rebutting the presumption of legal relations lay upon the defendants: it was a heavy burden and they had not discharged it.[11]

9 [1925] AC at 455.

10 [1964] 1 All ER 494, [1964] 1 WLR 349.

11 Ibid at 500 and 357, respectively. Cf the use of the word 'understanding' in *J H Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894, [1966] 1 WLR 1582; and of the phrase 'without prejudice' in *Tomlin v Standard Telephones and Cables Ltd* [1969] 3 All ER 201, [1969] 1 WLR 1378. The Court of Appeal appear to have gone very far in discovering a contract in *Gore v Van Der Lann* [1967] 2 QB 31, [1967] 1 All ER 360, discussed p 184, below, and cogently criticised by Odgers 86 LQR 69 and Harris 30 MLR 584.

There is an overlap here between arguments that the agreement is or is not intended to create legal relations and arguments that the agreement is or is not sufficiently certain to be enforced. This is illustrated by the decision in *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd.*[12]

> The plaintiff's bank had agreed to make a loan facility of up to £10,000,000 available to the defendants wholly owned subsidiary, MMC Metals Ltd, which was trading in tin on the London Metal Exchange. The bank was not willing to lend the money simply on the basis of the subsidiary's creditworthiness. The defendants, however, were not willing to enter into a full guarantee of the subsidiary's engagements. After lengthy negotiations the defendants agreed to issue a 'Letter of Comfort' which stated amongst other things that 'it is our policy to ensure that the business of [MMC] is at all times in a position to meet its liabilities to you [under the loan facility agreement]'. During the negotiations the plaintiffs indicated that they were willing to accept this Letter of Comfort rather than a guarantee but that they would charge a somewhat higher rate of interest as a result. In due course the subsidiary became insolvent owing to the collapse of the World Tin Market and the plaintiffs claimed that the defendants should reimburse them for the subsidiary's outstanding indebtedness.

At first instance, Hirst J treated the question as one of intention to create legal relations and held that since the transaction was clearly highly commercial there was nothing to rebut the presumption that it was intended to be legally binding.[13] The Court of Appeal disagreed. They thought that the question turned on the legal meaning to be attached to the precise form of words used. There were other clauses in the Letter of Comfort which probably did impose a promissory obligation but the relevant words were carefully drafted so as simply to be a statement of the defendant's existing intention. If it had been an untrue statement of the defendant's intention at the time it was made it would, in principle, have given rise to liability in misrepresentation[14] but it did not amount to a promise that the defendants would not change their policy. On this view, the legal effect of a Letter of Comfort depends on the precise wording used and not on some preconceived notion of the legal effects of Letters of Comfort.[15]

The decision of the Court of Appeal was vigorously criticised as commercially unrealistic by Rogers CJ sitting in the Commercial Division of the Supreme Court of New South Wales in *Banque Brussels Lambert v Australian National Industries Ltd.*[16]

> Spedley Securities wished to obtain a loan facility of US $5,000,000 from the plaintiff. Spedley Securities was a wholly owned subsidiary of Spedley Holdings Ltd, 45% of the shares of which were held by the defendant. There were elaborate negotiations as to what form of assurance the defendants would give to the bank in return for the bank advancing credit to Spedley Securities. Eventually a letter was issued by the defendants in which they undertook, amongst other things, to give the plaintiffs 90 days' notice of any decision to dispose of or reduce their shareholding and giving the bank a right to give 30 days' notice for re-payment of loans if they received such a notice.

12 [1989] 1 All ER 785, [1989] 1 WLR 379.
13 [1988] 1 All ER 714, [1988] 1 WLR 799.
14 See pp 294-295, below.
15 See also *Chemco Leasing Spa v Rediffusion* [1987] 1 FTLR 201.
16 (1989) 21 NSWLR 502. Tvree 2 JCL 279.

The practical thrust of this undertaking was that, in practice, it would be extremely difficult for the defendants to dispose of their shareholding if it was known to a potential buyer that the loans of the subsidiary company were being called up by its bankers. In fact some years later the defendants did dispose of their shareholding without giving notice to the bank and Rogers CJ held that this amounted to a breach of contract. These decisions appear clearly reconcilable on the facts since the undertaking to give notice of the potential disposal of the shares was much more naturally characterised as promissory than the statement about policy in the *Kleinwort Benson* case. It is clear, however, that Rogers CJ was not content simply to distinguish the two cases. He said:

> There should be no room in the proper flow of commerce for some purgatory where statements made by a businessman, after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. The whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason that uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains.

Of course it is often the case that parties entering into agreements do not expect to encounter legal difficulties and if they thought about the matter would often think that it would be too expensive to resolve any legal difficulties that did arise in the courts. It by no means follows that they lack the intention to create legal relations. The point was neatly tested in *Esso Petroleum Ltd v Customs and Excise Comrs.*[17]

> The appellants devised a sales promotion scheme linked to the 1970 World Cup, which involved the production of many millions of 'coins' bearing the likenesses of various members of the England squad. The intention was that the coins would be distributed to Esso retailers and that an elaborate marketing scheme would be mounted to encourage members of the public to buy Esso petrol in order to collect sets of the coins. The scheme was advertised in the press and on television and posters were displayed at Esso filling stations stating 'one coin given with every four gallons of petrol'. The technical question before the House of Lords was whether the coins were chargeable to purchase tax as having been 'produced in quantity for general sale' and this turned on the correct analysis of the transaction that took place at the petrol pump. Esso argued that the advertisement of the coins was not intended to create legal relations. It was no doubt true that the coins were of little intrinsic value and that it was unlikely that any motorist who bought four gallons of petrol and was then refused a coin would resort to litigation but the majority of the House of Lords (Viscount Dilhorne and Lord Russell of Killowen dissenting) had no doubt that this was irrelevant.[18]

Agreements between industrial corporations and trade unions have raised the question of intention to create legal relations. Thus in *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers:*[19]

17 [1976] 1 All ER 117, [1976] 1 WLR 1; Atiyah 39 MLR 335.

18 Esso succeeded on a second argument since of the three Lords of Appeal who thought that the coins were supplied under a contract only one (Lord Fraser of Tullybelton) thought that they were supplied under a contract of sale. Lord Wilberforce and Lord Simon of Glaisdale thought that there were two contracts; a contract to sell petrol and a collateral contract to transfer one coin for every four gallons of petrol.

19 [1969] 2 All ER 481, [1969] 1 WLR 339.

> An agreement was made in 1955 between the Ford Motor Co on the one side and nineteen trade unions on the other side. The agreement was in writing and was drafted with careful precision. It contained a term providing that 'at each stage of the procedure set out in this agreement every attempt will be made to resolve issues raised, and until such procedure has been carried through there shall be no stoppage of work or other unconstitutional action'. In 1969, despite this provision, some unions which were parties to the agreement issued notices declaring a strike. The Ford Motor Co applied for interlocutory injunctions to restrain the calling of such a strike.

Offer, acceptance and consideration were present. Was there also an intention to create legal relations? Geoffrey Lane J thought that there was not. He relied mainly on 'the climate of opinion voiced and evidenced by the extra-judicial authorities'.

> Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are in my judgment not contracts in the legal sense and are not enforceable at law. Without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour.[20]

This decision was obviously of great importance in labour law, where, however, it has been overtaken by statute. The Industrial Relations Act 1971, section 34(1) (introduced by the Conservative government) provided that collective agreements in writing should be presumed to have been intended to be legally enforceable. It is believed that this provision had little practical effect, since the vast majority of collective agreements were expressly stated not to be intended to be legally enforceable, and it was in its turn reversed by the Trade Union and Labour Relations Act 1974, section 18, which enacted a contrary presumption.

The decision remains of interest to contract lawyers since at first sight collective agreements fall into the category of commercial agreements[1] and one might expect them to be legally binding. Further it is agreed that provisions of collective agreements may be incorporated into individual contracts of employment where they will be legally binding.[2] Geoffrey Lane J relied substantially on evidence that experts in industrial relations regarded collective agreements as not intended to create legal relations.[3] This view has been criticised[4] but on balance it appears correct[5] and substantially validated by practical experience between 1971 and 1974.[6]

20 Ibid at 496 and 356, respectively.

1 Isadore Katz described a collective agreement as 'at once a business compact, a code of relations and a treaty of peace', quoted by Wedderburn *The Worker and the Law* (2nd edn, 1971) p 177.

2 Eg *National Coal Board v Galley* [1958] 1 All ER 91, [1958] 1 WLR 16; Wedderburn *The Worker and the Law* (3rd edn) pp 329-343.

3 See especially Kahn-Freund in *The System of Industrial Relations in Great Britain* (ed Flanders and Clegg, 1954) and Report of the Royal Commission on Trade Unions (the Donovan Report) (1968, Cmnd 3623), ch VII, especially paras 465-474. Cf McCartney in *Labour Relations and the Law* (ed Kahn-Freund, 1965).

4 Selwyn 32 MLR 377; Hepple [1970] CLJ 122.

5 See Wedderburn *The Worker and the Law* (3rd edn) ch 4; Clark 33 MLR 117.

6 See Weekes, Mellish, Dickson and Lloyd *Industrial Relations and the Limits of Law*, especially ch 6.

Chapter 6

The contents of the contract

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Scope of this chapter

Although it may be clear that a valid contract has been made, it will still be necessary to determine the extent of the obligations that it creates. Its map must be drawn, its features delineated and its boundaries ascertained. It must first be discovered what terms the parties have expressly included in their contract.

The contents of the contract are not necessarily confined to those that appear on its face. The parties may have negotiated against a background of commercial or local usage whose implications they have tacitly assumed, and to concentrate solely upon their express language may be to minimise or to distort the extent

of their liabilities. Evidence of custom may thus have to be admitted. Additional consequences, moreover, may have been annexed by statute to particular contracts, which will operate despite the parties' ignorance or even contrary to their intention. Finally, the courts may read into a contract some further term which alone makes it effective and which the parties must be taken to have omitted by pure inadvertence. All these implications, customary, statutory or judicial, may be as important as the terms expressly adopted by the parties.

Even when the terms have been established, it does not follow that they are all of equal importance. One undertaking may be regarded as of major importance, the breach of it entitling the injured party to end the contract; the breach of another, though demanding compensation, may leave the contract intact. Rules of valuation have therefore to be elaborated.

Finally it will be necessary to consider the important and difficult problems which arise when the contract contains provisions which purport to exclude or limit the liability of one of the parties in certain events.

1 Express terms

A WHAT DID THE PARTIES SAY OR WRITE?

If the extent of the agreement is in dispute, the court must first decide what statements were in fact made by the parties either orally or in writing. In exceptional circumstances English law demands a degree of formality either as a substantive or as a procedural requirement of contract. As a general rule, however, no formality is needed.[1] A contract may be made wholly by word of mouth, or wholly in writing, or partly by word of mouth and partly in writing.

If the contract is wholly by word of mouth, its contents are a matter of evidence normally submitted to a judge sitting as a jury. It must be found as a fact exactly what it was that the parties said, as, for example, in *Smith v Hughes*[2] where the question was whether the subject matter of a contract of sale was described by the vendor as 'good oats' or as 'good old oats'.

If the contract is wholly in writing, the discovery of what was written normally presents no difficulty, and its interpretation is a matter exclusively within the jurisdiction of the judge.[3] But on this hypothesis the courts have long insisted that the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement. Neither of them may adduce evidence to show that his intention has been misstated in the document.

> It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that ... parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties.[4]

1 Ch 7, below.
2 (1871) LR 6 QB 597
3 See Bowen LJ in *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274. So the court is not bound by concessions made by a party as to the meaning of the contract: *Bahamas International Trust Co Ltd v Threadgold* [1974] 3 All ER 881, [1974] 1 WLR 1514.
4 *Jacobs v Batavia and General Plantations Trust* [1924] 1 Ch 287, per P O Lawrence J at 295. See *Cross & Tapper on Evidence* (8th edn, 1995) pp 765-774.

So in *Hawrish v Bank of Montreal*:[5]

> A solicitor, acting for a company, signed a form proffered by the company's bank, by which he personally gave a 'continuing guarantee' up to $6,000 'of all present and future debts' of the company. He wished to give evidence that the guarantee was intended to be only of a then current overdraft of $6,000.

The Supreme Court of Canada held that such evidence was inadmissible.

This rule, which is often called the 'parol evidence' rule (though the evidence excluded by it is not merely oral), is a general rule applicable to all written instruments and not merely to contracts, but it can, within its proper limitations, be regarded as an expression of the objective theory of contract, that is, that the court is usually concerned not with the parties' actual intentions but with their manifested intention. In a complex commercial situation, it will often happen that the documents to which the parties eventually put their hands will not fully realise the hopes and aspirations of either party but that should not make the contract any less binding. So evidence of the parties' negotiations before the contract is excluded[6] and similarly evidence of the parties' post-contractual behaviour is not admissible to show their intention,[7] though it might be to show a variation of the contract or to found an estoppel.

Of course there may be no effective dispute as to what was said but still a fundamental disagreement as to what it meant. In principle the meaning of what was said has to be solved by applying the objective test[8] Both this rule and the difficulties of applying it are well illustrated by *Thake v Maurice*.[9] In this case Mr and Mrs Thake had five children and did not wish to have any more. The defendant carried out a vasectomy on Mr Thake. In due course Mrs Thake became pregnant but because she did not suspect that she might be pregnant no question of her having an abortion arose until it was too late to have one safely. It was agreed that it was an implied term of the contract between the plaintiff and defendant that the sterilisation would be carried but with reasonable professional care and skill and that indeed reasonable professional care and skill had been exercised. The Thakes argued that the defendant had undertaken not merely to use reasonable care and skill but to guarantee that the operation would be successful in permanently sterilising Mr Thake.[10] This argument was based on what had been said by the defendant in the consultations with Mr and Mrs Thake. It was accepted that the defendant had emphasised the irreversible nature of the operation, that is that the Thakes

5 (1969) 2 DLR (3d) 600.

6 *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381. Cf *LCC v Henry Boot & Sons* [1959] 3 All ER 636, [1959] 1 WLR 1069. In some circumstances it may be permissible to show that the parties have struck out part of a standard form of contract. See eg *Louis Dreyfus et Cie v Parnaso Cia Naviera SA* [1960] 2 QB 49, [1960] 1 All ER 759; *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd* [1975] 2 Lloyd's Rep 197. *Punjab National Bank v De Boinville* [1992] 3 All ER 104.

7 *Schuler AG v Wickman Machine Tool Sales* [1974] AC 235, [1973] 2 All ER 39.

8 See Lord Steyn in *Deutsche Genossenschaftsbank v Burnhope* [1996] 1 Lloyd's Rep 113 at 122 and Staughton LJ in *Charter Reinsurance Co Ltd v Fagan* [1996] 1 Lloyd's Rep 261 at 265. Lewison, *The Interpretation of Contracts* (2nd edn 1997).

9 [1986] QB 644, [1986] 1 All ER 497; see also *Eyre v Measday* [1986] 1 All ER 488.

10 In fact the plaintiff succeeded on the alternative theory that the defendant was negligent in having failed to warn the Thakes of the possibility of spontaneous recanalisation.

would not be able to change their minds after the operation had been carried out with any significant chance of success. The Thakes understood this conversation as stating that there was no chance of the operation falling to make Mr Thake sterile if it was carried out with reasonable care and skill. In fact the defendant well knew that there was a not insignificant possibility of spontaneous recanalisation which, as happened in the case, would make Mr Thake fertile once more without his knowing it. The trial judge and one of the members of the Court of Appeal thought the effect of this conversation, objectively construed, was that the defendant had warranted that the operation would make Mr Thake sterile: the majority of the Court of Appeal thought that objectively construed, the conversation did not have this effect since 'in medical science all things, or nearly all things, are uncertain [since] that knowledge is part of the general experience of mankind'.

In practice much of the time of the courts is taken up with the process of deciding what the words used by the parties mean. Although the question of what a contract in writing means is undoubtedly technically a legal question, it is today clear that the process is no different from that by which the meaning of words is discovered in other contexts.

The leading modern explanation is that by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[11] where he said:

> My Lords, I will say at once that I prefer the approach of the learned judge. But I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240-242, [1971] 1 WLR 1381 at 1384-1386 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> 1. Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> 2. The background was famously referred by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
> 3. The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation defers from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

11 [1998] 1 All ER 98 at 114-115. Staughton [1999] CLJ 303.

4. The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of the words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945.
5. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in the formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

The exclusion of oral evidence to 'add to, vary or contradict' a written document has often been pronounced in peremptory language but in practice its operation is subject to a number of exceptions. In the first place, the evidence may be admitted to prove a custom or trade usage and thus to 'add' terms which do not appear on the face of the document and which alone give it the meaning which the parties wished it to possess.[12] In the second place, there is no reason why oral evidence should not be offered to show that, while on its face the document purports to record a valid and immediately enforceable contract, it had been previously agreed to suspend its operation until the occurrence of some event, such as the approval of a third party, and that this event had not yet taken place. The effect of such evidence is not to 'add to, vary or contradict' the terms of a written contract, but to make it clear that no contract has yet become effective.[13] Thirdly, there is a limited equitable jurisdiction to rectify a written document where it can be shown that it was executed by both parties under a common mistake. This will be discussed more fully later.[14]

Finally, the exclusion of oral evidence is clearly inappropriate where the document is designed to contain only part of the terms—where, in other words, the parties have made their contract partly in writing and partly by word of mouth. This situation is so comparatively frequent as in effect to deprive the ban on oral evidence of the strict character of a 'rule of law' which has been attributed to it. It will be presumed, 'that a document which *looks* like a contract is to be treated as the *whole* contract'.[15] But this presumption, though strong,

12 P 145, below.

13 *Pym v Campbell* (1856) 6 E & B 370.

14 Pp 267-270, below.

15 Wedderburn [1959] CLJ 58, esp at 59-64, citing Lord Russell of Killowen CJ in *Gillespie Bros v Cheney, Eggar & Co* [1896] 2 QB 59 at 62. Written contracts quite often contain clauses stating that the written contract is the whole of the agreement between the parties. It seems that at least between two parties who have had legal advice such a clause will be treated as meaning what it says. *Deepak Fertilisers and Petrohemicals v Davy McKee (London) Ltd* (1998) 62 Con LR 86 *Inntrepeneur Pub Co Ltd v East Crown Ltd* [2000] Lloyd's Rep 611. *McGrath v Shah* (1987) 57 P & CR 452; *Leyland Motor Corpn of Australia v Wauer* [1981] 104 LSJS 460 (South Australia); *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573 at 595-597. However where one party to the contract is a consumer, the Director-General of Fair Trading in exercising his powers under the Unfair Terms in Consumer Contracts Regulations (see below p 216) has objected vigorously to such clauses.

is not irrebuttable. In each case the court must decide whether the parties have or have not reduced their agreement to the precise terms of an all-embracing written formula. If they have, oral evidence will not be admitted to vary or to contradict it; if they have not, the writing is but part of the contract and must be set side by side with the complementary oral terms. The question is at bottom one of intention and, like all such questions, elusive and conjectural. It would seem, however, that the more recent tendency is to infer, if the inference is at all possible, that the parties did not intend the writing to be exclusive but wished it to be read in conjunction with their oral statements.[16]

Thus in *Walker Property Investments (Brighton) Ltd v Walker*:[17]

> The defendant in 1938, then in treaty for the lease of a flat in a house belonging to the plaintiffs, stipulated that, if he took the flat, he was to have the use of two basement rooms for the storage of his surplus furniture and also the use of the garden. Subsequently, a written agreement was drawn up for the lease of the flat, which made no reference either to the storage rooms or to the garden.

The Court of Appeal held that the oral agreements should be read with the written instrument so as to form one comprehensive contract.

So, too, in *Couchman v Hill*:[18]

> The defendant's heifer was put up for auction. The sale catalogue described it as 'unserved', but added that the sale was 'subject to the auctioneers' usual conditions' and that the auctioneers would not be responsible for any error in the catalogue. The 'usual conditions' were exhibited at the auction and contained a clause that 'the lots were sold with all faults, imperfections and errors of description'. The plaintiff, before he bid, asked both the auctioneer and the defendant if they could confirm that the heifer was 'unserved', and they both said 'Yes'. On this understanding he bid for and secured the heifer. It was later found that the heifer was in calf, and it died as a result of carrying its calf at too young an age.

On these facts the Court of Appeal held that the plaintiff was entitled to recover damages for breach of contract. The documents in the case, in their opinion, formed not the whole but part only of the contract, and the oral assurance could be laid side by side with them so as to constitute a single and binding transaction.

Yet another illustration is offered by the case of the *SS Ardennes (Cargo Owners) v Ardennes (Owners)*.[19]

> The plaintiffs were growers of oranges in Spain and the defendants were shipowners. The plaintiffs wished to export their oranges to England and shipped them on the defendants' vessel on the faith of an oral promise by the defendants' agent that the vessel would sail straight to London. In fact she went first to Antwerp, so that the oranges arrived late in London and the plaintiffs lost a favourable market. When the plaintiffs claimed damages

16 But see *Hutton v Watling* [1948] Ch 398, [1948] 1 All ER 803.
17 (1947) 177 LT 204. Cf *Henderson v Arthur* [1907] 1 KB 10.
18 [1947] KB 554, [1947] 1 All ER 103.
19 [1951] 1 KB 55, [1950] 2 All ER 517.

for breach of contract, the defendants relied on the bill of lading which expressly allowed them to proceed 'by any route and whether directly or indirectly' to London.

Judgment was given for the plaintiffs. The bill of lading, while it was evidence of the contract between shipper and shipowner,[20] was not in the present case exclusive evidence. The oral promise made on behalf of the defendants was equally part of the contract and was binding upon them.

The practical effect of decisions such as this is to emasculate the parol evidence rule, since a party can always get such evidence before the court by pleading that the contract is not wholly in writing and modern courts are reluctant to limit the contract to a written document where to do so would cause injustice. There remain only the restrictions on the kinds of evidence which can be led to explain the *meaning* of contract. These are very important but are perhaps better regarded as a distinct doctrine since they apply equally to an oral contract.[1]

B ARE THE STATEMENTS OF THE PARTIES TERMS OF THE CONTRACT?

What the parties said or wrote may be clearly established; but it does not necessarily follow that all their words have become part of the contract. Their statements may be classified either as terms of the contract or as 'mere representation'. The distinction was long of great practical importance, but new developments have reduced its effect without lessening its conceptual significance.

If a statement is a term of the contract, it creates a legal obligation for whose breach an appropriate action lies at common law. If it is a 'mere representation', the position is more complicated.[2] It is clear that, if a party has been induced to make a contract by a fraudulent misrepresentation, he may sue in tort for deceit and may also treat the contract as voidable. But it was long believed to be a principle of the common law that there should be 'no damages for innocent misrepresentation', and that, in this context, 'innocent' meant any misrepresentation which was not fraudulent.[3] In the nineteenth century, equity indeed allowed the right of rescission to a party who had been induced to make a contract by such an 'innocent' misrepresentation, but this remedy was limited in a number of ways.[4] In 1963 in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[5] the House of Lords held that in some circumstances damages could be obtained for negligent misstatement. The precise effect of this decision on the law of contract is not clear;[6] but, by the Misrepresentation Act

20 It should be noted that situations such as this can be analysed either as one contract, partly oral, partly in writing, or as two contracts, one in writing, the second an oral collateral contract. Both analyses are to be found in the cases. See pp 144-145, below.

1 The Law Commission considered whether the parol evidence rule should be amended or abolished and decided that no change was necessary (Law Com No 154, 1986) Carter 1 JCL 33.

2 The effect of misrepresentation is discussed fully in ch 9, below.

3 See per Lord Moulton in *Heilbut Symons & Co v Buckleton* [1913] AC 30 at 48.

4 Pp 315-319, below.

5 [1964] AC 465, [1963] 2 All ER 575.

6 Pp 303-307, below.

1967, representees acquired a remedy which in most cases will be preferable to an action of negligence. Section 2(1) of this Act in effect gives a right to damages to anyone induced to enter a contract by a negligent misrepresentation, and casts upon the representor the burden of disproving negligence.[7] But, where a statement is made neither fraudulently nor negligently, the injured party can still obtain damages only by showing that it forms part of his contract. Contractual cartography thus remains important.

To draw the map of the contract, at least where it is not wholly committed to writing, has proved as difficult as it is important. In the copious litigation which the problem has provoked, three subsidiary tests have been suggested as possible aids to its solution.

(a) *At what stage of the transaction was the crucial statement made?* It must, in the opinion of the court, have been designed as a term of the contract and not merely be an incident in the preliminary negotiations. Two cases may be contrasted.

In *Bannerman v White*:[8]

> A prospective buyer, in the course of negotiating for the purchase of hops, asked the seller if any sulphur had been used in their treatment, adding that, if it had, he would not even trouble to ask the price. The seller answered that no sulphur had been used. The negotiations thereupon proceeded and resulted in a contract of sale. It was later discovered that sulphur had been used in the cultivation of a portion of the hops—5 acres out of 300—and the buyer, when sued for the price, claimed that he was justified in refusing to observe the contract.

The buyer's claim could not be upheld unless the statement as to the absence of sulphur was intended to be part of the contract, for the jury found that there was no fraud on the part of the seller. The buyer contended that the whole interview was one transaction, that he had declared the importance he attached to his inquiry, and that the seller must have known that if sulphur had been used there could be no further question of a purchase of the hops. The seller, on the other hand, contended that the conversation was merely preliminary to, and in no sense a part of, the contract. The jury found that the seller's statement was understood and intended by both parties to be part of the contract, and their finding was unanimously confirmed by the Court of Common Pleas.

In *Routledge v McKay*:[9]

> The plaintiff and defendant were discussing the possible purchase and sale of the defendant's motorcycle. Both parties were private persons. The defendant, taking the information from the registration book, said on 23 October that the cycle was a 1942 model. On 30 October a written contract of sale was made, which did not refer to the date of the model. The actual date was later found to be 1930. The buyer's claim for damages failed in the Court of Appeal.

In this case, the interval between the negotiations and the contract was well-marked. But the facts are not always so accommodating; and the courts, in their

7 Pp 307-310, below.
8 (1861) 10 CBNS 844.
9 [1954] 1 All ER 855, [1954] 1 WLR 615.

anxiety to reach a result which may reasonably reflect the presumed intention of the parties, have more than once treated the making of the contract as a protracted process. An instance is offered by *Schawel v Reade*, an Irish case which came on appeal to the House of Lords in 1913.[10]

> The plaintiff, who wanted a stallion for stud purposes, started to examine a horse advertised for sale by the defendant. The defendant interrupted him, saying 'You need not look for anything: the horse is perfectly sound'. The plaintiff therefore stopped his examination. A few days later the price was agreed, and three weeks later still the sale was concluded. The horse in fact was unfit for stud purposes.

The trial judge asked the jury two questions: (1) 'Did the defendant, at the time of the sale, represent to the plaintiff that it was fit for stud purposes?' (2) 'Did the plaintiff act on that representation in the purchase of the horse?' The vital factor was whether the representation had been made 'at the time of the sale'. The jury found that it had, and the House of Lords held that the defendant's statement was a term of the contract.

(b) *Was the oral statement followed by a reduction of the terms to writing?* If it was so followed, the court must decide whether it was the intention of the parties that the contract should be comprised wholly in their document or whether the contract was to be partly written and partly oral.[11] The exclusion of an oral statement from the document may suggest that it was not intended to be a contractual term. The facts of *Routledge v McKay* tend to support such a construction.[12] But in other cases the courts have not shrunk from reading together an earlier oral statement and a later document so as to unite them in a single comprehensive contract. In *Birch v Paramount Estates Ltd*:[13]

> The defendants, who were developing an estate, offered a house they were then building to the plaintiff, saying 'it would be as good as the show house'. The plaintiff later agreed to buy the house, and the written contract of sale contained no reference to this particular representation. The house was not as good as the show house.

The Court of Appeal treated the defendants' statement as part of the concluded contract and allowed the plaintiff's claim for damages.

(c) *Had the person who made the statement special knowledge or skill as compared with the other party?* If this is the case, the court may be more willing to infer an intention to make the statement a term of the contract. Such was the position in *Birch v Paramount Estates Ltd* and in *Schawel v Reade*;[14] and such was at least a contributory factor in the decision of the Court of Appeal in *Harling v Eddy*.[15]

10 [1913] 2 IR 81. Cf *Hopkins v Tanqueray* (1854) 15 CB 130.
11 P 137, above.
12 P 140, above.
13 (1956) 167 Estates Gazette 396, cited in *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 329. Cf *Heilbut Symons & Co v Buckleton* [1913] AC 30, critically analysed by Greig in 87 LQR 179 at 185-190.
14 N 10, above.
15 [1951] 2 KB 739, [1951] 2 All ER 212. See also *Coffey v Dickson* [1960] NZLR 1135.

> The defendant offered his heifer for sale by auction. The auction catalogue contained a clause that 'no animal is ... sold with a warranty unless specially mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account'. The heifer had an 'unpromising appearance' and buyers held aloof until the defendant said that there was 'nothing wrong with her' and that he would 'absolutely guarantee her in every respect'. The plaintiff then bid for her and bought her. She was in fact tubercular and she died.

The defendant's guarantee was, in the language of the catalogue, 'specially mentioned at the time of offering', but it did not 'appear on the purchaser's account'. But the defendant had exclusive means of knowing the heifer's condition, and the Court of Appeal allowed the plaintiff to recover damages.

The third test may perhaps offer a less dubious guide to the intention of the parties than either of the two previous tests. But none of them is to be regarded as decisive. In the words of Lord Moulton:

> [they] may be criteria of value in guiding a jury in coming to a decision whether or not a warranty was intended; but they 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. [This] can only be deduced from the totality of the evidence, and no secondary principles of such a kind can be universally true.[16]

These three criteria must therefore be received only as possible aids to the interpretation of the facts. Their impact upon the members of a court is vividly illustrated by the case of *Oscar Chess Ltd v Williams*.[17]

> The plaintiffs were car dealers, and the defendant wished to obtain from them on hire purchase a new Hillman Minx and to offer a secondhand Morris car in part exchange. The sum available for the Morris depended on its age. According to the registration book its date was 1948; the defendant in good faith confirmed this, and the plaintiffs believed him. On this assumption the sum to be allowed for it was £290. The parties then orally agreed that the plaintiffs would arrange for the hire purchase of the new Hillman, would take the Morris and allow £290 for it. This agreement was carried out. Eight months later the plaintiffs found that the date of the Morris was not 1948 but 1939, the trade-in price for which year was only £175. The registration book had presumably been altered by a previous holder before reaching the defendant's hands. The plaintiffs now sued the defendant for the difference between the two allowances ie £115.

The county court judge held that the statement as to the age of the car was a term in the contract and gave judgment for the plaintiffs. This decision was reversed by a majority in the Court of Appeal (Denning and Hodson LJJ). Morris LJ dissented. It is instructive to apply each of the suggested tests to the facts. There was no apparent or substantial interval between the statement as to the age of the car and the agreement of hire purchase. The first and chronological test should therefore have helped the plaintiffs. As Morris LJ said, 'there was a statement made at the time of the transaction'. The second test was also in the plaintiff's favour. Nothing had been reduced to writing and no point could therefore have been made of the superior claims of a document

16 *Heilbut Symons & Co v Buckleton* [1913] AC 30 at 50-51.
17 [1957] 1 All ER 325, [1957] 1 WLR 370.

over mere word of mouth. Hodson LJ was driven to say that 'the distinction is a fine one, and one which I shall be reluctant to draw unless compelled to do so'; and Denning LJ emphasised the undoubted truth that there is no basic difference between a written and an oral contract. The third test, on the other hand, so far as it was applicable to the facts, told in the defendant's favour. It was not he, the maker of the statement, but the plaintiffs, as car dealers, who possessed special knowledge and skill and who, if anyone, could have discovered in time the true age of the car.

In this case it may seem unfortunate that a serious statement of manifest importance to the parties was not held to be a term of the contract. Some such impression is left by many of the decisions; and the anxiety of the judges to escape from a perennial dilemma may be illustrated by the subsequent case of *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd.*[18]

> The plaintiffs told the defendants that they were looking for a 'well-vetted' Bentley car. The defendants said that they had such a car. One morning Mr Bentley went to see it, and the defendants told him that it had done only 20,000 miles since fitted with a replacement engine and gearbox. In the afternoon Mr Bentley took the car for a short run and bought it. The plaintiffs later found that the car was unsatisfactory and that the statement as to mileage was untrue. They sued for damages.

The Court of Appeal held that the defendants' statement was a term of the contract and that the plaintiffs were entitled to damages. This decision may readily be accepted; but it was necessary to distinguish *Oscar Chess Ltd v Williams*. Lord Denning, who was a member of the court in both cases, found the distinction in the presence or absence of negligence. In *Oscar Chess Ltd v Williams* the defendant had not been negligent. In *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* negligence was present: the defendants 'ought to have known better'.

It is difficult to understand why a statement should be a term of the contract if it is negligent and a 'mere representation' if it is not.[19] It might have been safer to have based the decision upon the existence of a 'collateral' contract. This approach seems to have been envisaged by Salmon LJ.

> In effect, Mr Smith said: 'If you will enter into a contract to buy this motor car from me for £1,850, I undertake that you will be getting a motor car which has done no more than twenty thousand miles since it was fitted with a new engine and a new gearbox.'[20]

18 [1965] 2 All ER 65, [1965] 1 WLR 623. Sealy [1965] CLJ 178. See also *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193, where the vintage of the car was held to be part of its description within s 13 of Sale of Goods Act 1893. On the other hand in *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] QB 564, [1990] 1 All ER 737 a statement as to the attribution of a painting was treated as not part of the description because the seller knew less about the alleged painter than the buyer even though the seller charged a price appropriate to a genuine article. It is an odd feature of the overlap between general contract law and the law of sale of goods that it is possible to argue that such statements are either express terms or implied terms or representations.

19 The presence of negligence may, of course, be significant both in opening the possibility of an action in tort and in proceedings under the Misrepresentation Act 1967: p 139, above and pp 303-307, below.

20 [1965] 2 All ER 65 at 68, [1965] 1 WLR at 629. See also *Esso Petroleum Co Ltd v Mardon*, [1976] QB 801, [1976] 2 All ER 5.

There is ample authority for the use of a 'collateral' contract to avoid the dilemma of 'term' or 'representation'. A significant case is that of *City and Westminster Properties (1934) Ltd v Mudd.*[1]

> The defendant had been for six years the tenant of the plaintiffs' shop, to which a small room was annexed and in which, as they knew, he was accustomed to sleep. In 1947 he was negotiating for a new lease, and the plaintiffs inserted a clause restricting the use of the premises to 'showrooms, workrooms and offices only'. The plaintiffs' agent orally assured the defendant that, if he accepted the lease with this clause intact, he would still be allowed to sleep on the premises. On this understanding he signed the lease. The plaintiffs now brought an action against him for forfeiture of the lease on the ground that he had broken the covenant restricting the use of the premises.

Harman J held that the defendant had indeed broken this covenant but that, in answer to the breach, he could plead the collateral contract made before the lease was signed. This, he said, 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 the 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 on by the tenant to his detriment and from which the landlords cannot be allowed to resile.[2]

The contract protecting the defendant was clearly separate from the tenancy agreement and may thus be stated: 'if you will promise me not to enforce this particular clause in the lease I will promise to execute it'.

It will be seen that where parties enter into a written contract after one party has made oral assurances there are at least three possibilities:

(1) the contract is contained wholly in the written document;[3]
(2) the contract is partly written and partly oral;[4] or
(3) there are two contracts, there being an oral collateral contract as well as the written contract.[5]

In the first case, it is possible that the assurances will give rise to liability under the law relating to misrepresentation, where they amount to a statement of fact.[6]

In many cases, the second and third alternatives appear to be treated as interchangeable. So in *Evans (J) & Sons (Portsmouth) Ltd v Andrea Merzario Ltd:*[7]

> The plaintiffs were in the habit of importing machines from Italy and for this purpose they used the services of the defendants forwarding agents, business being conducted on the standard conditions of the forwarding

1 [1959] Ch 129, [1958] 2 All ER 733. For collateral contracts, see p 69, above.
2 Ibid at 145-146 and 742-743, respectively.
3 Eg *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615.
4 Eg *Couchman v Hill* [1947] KB 554, [1947] 1 All ER 103.
5 Eg *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733.
6 See pp 294-298, below.
7 [1976] 2 All ER 930, [1976] 1 WLR 1078.

trade. Prior to 1967 it had always been arranged that the goods would be carried below deck because of the risk of corrosion. In 1967 the defendants decided to change over to transportation in containers and there were discussions with the plaintiffs, who were orally assured that the goods would be carried below deck.[8] On this basis the plaintiffs continued to employ the defendants under printed standard conditions which permitted the defendants to arrange for the goods to be carried on deck. On one voyage goods belonging to the plaintiffs were carried on deck and lost when they slid into the sea. The Court of Appeal held that the defendants could not rely on the printed conditions. Lord Denning MR analysed the oral assurance as amounting to a collateral contract. Roskill and Geoffrey Lane LJJ held that there was a single contract, partly written and partly oral.

The differences in analysis often, as here, produce no difference in result but there are cases where the difference appears significant. One is where the contract is required to be in writing as in a lease. Another is where the rights under the written contract are likely to be transferred as in leases or bills of lading. If there are two contracts, it is possible to argue that the rights under the written contract have been transferred and that those under the oral collateral contract have not.

2 Implied terms[9]

The normal contract is not an isolated act, but an incident in the conduct of business or in the framework of some more general relation such as that of landlord and tenant. It will frequently be set against a background of usage familiar to all who engage in similar negotiations and which may be supposed to govern the language of a particular agreement. In addition, therefore, to the terms which the parties have expressly adopted, there may be others imported into the contract from its context. These implications may be derived from custom or they may rest upon statute or they may be inferred by the judges to reinforce the language of the parties and realise their manifest intention.

A TERMS IMPLIED BY CUSTOM

It is a well-established rule that a contract may be subject to terms that are sanctioned by custom, whether commercial or otherwise, although they have not been expressly mentioned by the parties. In *Hutton v Warren* in 1836[10] it was proved that, by a local custom, a tenant was bound to farm according to a certain course of husbandry and that, at quitting his tenancy, he was entitled to a fair allowance for seed and labour on the arable land. The Court of Exchequer held that the lease made by the parties must be construed in the light of this custom. The judgment of Baron Parke is illuminating both on the possibility of importing terms into a contract and on the underlying rationale.

8 Far more cargo is carried above deck in container ships than in ships designed for conventional carrying.

9 Phang [1993] JBL 242.

10 (1836) 1 M & W 466.

> It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages. Whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal, may well be doubted; but the contrary has been established by such authority, and the relation between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience, if this practice were now to be disturbed.
>
> The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the Courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation which custom and usage have established in each district to be the most beneficial to all parties.[11]

A later illustration of the place of custom in contracts is offered by *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* in 1916.[12]

> A written agreement for the sale of goods provided that 'all disputes *arising out of this contract* shall be referred to arbitration'. A dispute was submitted to arbitrators who in their award insisted on taking into consideration a particular custom of the trade.

The House of Lords held that they were right to do so. Lord Sumner said:[13]

> The real question ... is the definition of the limits as expressed in the submission [to arbitration]. If 'this contract' in the arbitration clause means the real bargain between the parties, expressed in the written and printed terms, though, where trade customs exist and apply, not entirely so expressed, then the jurisdiction [of the arbitrators] is complete. The custom, if any, was part of the bargain ... If the bargain is partly expressed in ink and partly implied by the tacit incorporation of trade customs, the first function submitted to the arbitrators is to find out what it is: to read the language, to ascertain the custom, to interpret them both, and to give effect to the whole ... The dispute, which arose in fact and which raised a question of custom, did not arise out of the contract *and* something else; it arose *out of the contract itself*, and involved the contract by raising the custom, and so was within the submission.

The importation of usage, as it rests on the assumption that it represents the wishes of the parties, must be excluded if the express language of the contract discloses a contrary intention. The parties must then be supposed, while appreciating the general practice, to have chosen to depart from it. *Expressum facit cessare tacitum.* The position, which, indeed, might be considered self-evident, was vigorously stated by Lord Birkenhead in *Les Affréteurs Réunis Société Anonyme v Walford.*[14]

11 (1836) 1 M & W 466 at 475-476.

12 [1916] 1 AC 314. See also *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421.

13 Ibid at 330-331.

14 [1919] AC 801; affirming [1918] 2 KB 498. See p 504, below, as to the right of the broker to sue upon a contract to which he was not a party.

> Walford, as broker, had negotiated a charterparty between the owners of the SS 'Flore' and the Lubricating and Fuel Oils Co Ltd. By a clause in the charterparty the owners promised the charterers to pay Walford, *on signing the charter*, a commission of 3 per cent on the estimated gross amount of hire. The owners, defending an action brought by Walford for this commission, pleaded, inter alia, a custom of the trade that commission was payable only when hire had actually been earned. The 'Flore' had been requisitioned by the French Government before the charterparty could be operated and no hire had in fact been earned.

Despite the incompatibility of any such custom with the clause in the contract requiring payment as soon as the parties signed, Bailhache J accepted the plea and gave judgment for the defendants. Lord Birkenhead, reversing the decision, castigated an unhappy error.[15]

> The learned judge ... has in effect declared that a custom may be given effect to in commercial matters which is entirely inconsistent with the plain words of an agreement into which commercial men, certainly acquainted with so well-known a custom, have nevertheless thought proper to enter.

Custom thus comes not to destroy but to fulfil the law. It must not contradict the express terms of a contract but must serve rather to reinforce them and assist their general purpose and policy. Lord Jenkins has emphasised both the negative and the positive test to be applied before it is to be admitted.

> An alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole.[16]

If, however, a custom satisfies these tests, its operation may be far-reaching. This has certainly been the case in the past. It is not too much to say that the greater part of modern commercial law, and, as Baron Parke stated in *Hutton v Warren*, no small portion of the law governing landlord and tenant, have been constructed upon its basis. The development of the law exhibits a fairly constant process. A particular practice is shown to exist and the parties to a contract are proved to have relied upon it. In course of time it is assumed by the courts to be so prevalent in a trade or locality as to form the foundation of all contracts made within that trade or locality, unless expressly excluded. Finally, it is often adopted by the legislature as the standard rule for the conduct of the business in question. The law in such cases is not so much imposed *ab extra* by judges or Parliament as developed by the pressure of commercial convenience or local idiosyncrasy.

This process of development can be traced in many branches of the commercial law. As soon as the common law courts busied themselves with the problems of marine insurance, they accepted the necessity of construing the words of a policy in the light of the surrounding circumstances. In *Pelly v Royal Exchange Assurance*[17] in 1757:

> The plaintiff had insured his ship and tackle during the whole voyage from London to China and back again to London. On arrival in the River Canton,

15 [1919] AC at 809.

16 *London Export Corpn Ltd v Jubilee Coffee Roasting Co* [1958] 2 All ER 411 at 420, [1958] 1 WLR 661 at 675. See also *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439.

17 1 Burr 341; and see *Salvador v Hopkins* (1765) 3 Burr 1707.

> the tackle, according to the usage of the ship-masters, was removed and put into a warehouse where it was accidentally burnt.

To claim on the policy it was objected that, as the loss had occurred on shore at the end of the outward journey, it was not within the compass of the voyage and fell outside the insured risks. Lord Mansfield refused the contention.

> What is usually done by such a ship, with such a cargo and in such a voyage, is understood to be referred to by every policy; and to make a part of it, as much as it was expressed.

Various terms came to be implied as a matter of course in all policies, some vital and some subsidiary; though, with the inveterate tendency, both of businessmen and of lawyers, to confuse the issues by careless phraseology, the word 'warranty' was obstinately established in the law of marine insurance where, at least in modern speech, 'condition' was more appropriate. Thus, to give only one example, it was regarded as vital that an insured ship should be seaworthy, and the courts therefore implied a 'warranty' to this effect in every policy. In the words of Baron Parke:[18]

> In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be sea-worthy, by which it is meant that she shall be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it.

This and other terms are now implied in policies by sections 33 to 41 of the Marine Insurance Act 1906, which incidentally perpetuates the terminological confusion by providing that 'a warranty is a condition which must be exactly complied with, whether it be material to the risk or not', and that its breach discharges the insurer as from the moment of its occurrence.[19] The contractual basis of the liability is sustained by the proviso that the 'warranty' shall be excluded by an express term, if the two are inconsistent.[20]

B TERMS IMPLIED BY STATUTE

The provisions of the Marine Insurance Act offer an obvious example of terms implied by statute as the culmination of a long process of development. But the translation of usage into agreement and of agreement into statutory language is most evident in the history of contracts for the sale of goods. Buyers and sellers frequently fail to express themselves with regard to matters that may later provoke a dispute. Two illustrations may be given.

> Suppose that the seller is in fact not the owner of the goods which he has purported to sell. Must he be taken to have tacitly guaranteed the fact of his ownership?

> Suppose that the goods are useless for the purpose for which the buyer requires them. Is it a tacit term of the contract that they shall be suitable for that purpose?

18 In *Dixon v Sadler* (1839) 5 M & W 405 at 414.
19 Marine Insurance Act 1906, s 33 (3).
20 Ibid. s 35(3).

At first the common law judges refused to recognise any term which had not been expressly inserted in the contract. Thus, in the second hypothesis propounded above, the foundation of the common law, as of Roman law,[1] was the maxim *caveat emptor*. In the absence of fraud, and provided that the goods were open to inspection, the buyer could not complain of defects in the article bought. He should have used his own judgement and not have expected the seller to depreciate his own wares, for he was always free to protect himself by exacting an express warranty.

The original rule, however, was gradually modified by the usage of the market, which recognised that there were several cases in which a contract of sale was subject to a tacit undertaking by the seller; and, during the first half of the nineteenth century, these modifications were recognised by the courts and adopted as normal implications in such contracts. Thus, in a sale *by sample* it was an implied term of the contract that the bulk should correspond with the sample, and that the buyer should, by examination, be able to satisfy himself of such correspondence.[2] In a sale *by description*, the goods must not only answer the description but must be of 'merchantable quality'.[3] If, moreover, a buyer explained that he required goods for a particular purpose and that he relied on the seller's skill and judgement to provide such goods, then the seller, unless he expressly guarded himself, was taken to have accepted this additional responsibility.[4] There was more hesitation in deciding whether, upon the sale of goods, the seller impliedly undertook to transfer a good title. The implication was denied by Baron Parke as late as 1849,[5] but in 1864 Erle CJ asserted its existence, and his view prevailed.[6]

By 1868, when Benjamin published the first edition of his *Treatise on the Sale of Personal Property*, he was able to assume that the courts had completed their absorption of commercial practice. By that date the list of tacit undertakings to be read into a contract for the sale of goods was virtually closed. The time was ripe for codification, and the various implications which the judges had gradually accepted were ultimately adopted as normal terms of the contract by the Sale of Goods Act 1893, wherever the parties had not evinced a contrary intention.

The Sale of Goods Act 1893, was substantially a codification of the common law of sale as the draftsman, Sir Mackenzie Chalmers, perceived it.[7] It consists, for a large part, of rules which are to be applied unless the parties provide otherwise. As far as the seller's obligations as to title and as to the quality of the goods are concerned, the relevant sections are sections 12-15,[8] which operate by implying terms into the contract. These terms could however be

1 Mackintosh *Roman Law of Sale*, note D.
2 *Parker v Palmer* (1821) 4 B & Ald 387; *Lorymer v Smith* (1822) 1 B & C 1.
3 *Gardiner v Gray* (1815) 4 Camp 144.
4 *Jones v Bright* (1829) 5 Bing 533.
5 *Morley v Attenborough* (1849) 3 Exch 500.
6 *Eichholz v Bannister* (1864) 17 CBNS 708.
7 Later writers have sometimes doubted whether his perception of the common law was correct. See eg the difficulties over s 6, discussed below. The Act is by no means identical with Chalmers' draft bill: see the first (1890) and the second (1894) editions of Chalmers *Sale of Goods*.
8 Earlier editions of this work contained a much fuller account of this topic but although of great interest and importance, it is more appropriately discussed in works on sale. See *Benjamin's Sale of Goods* (4th edn, 1992) ch 11; Atiyah *The Sale of Goods* (9th edn, 1995) chs 8-12; Furmston, *Sale and Supply of Goods* (3rd Edn, 2000).

excluded by contrary intention[9] and it became not unusual for sellers to seek to exclude the undertakings which would otherwise be implied.[10] The example provided by the Sale of Goods Act 1893 was developed by legislation dealing with the related contract of hire purchase.

It is over a hundred years since manufacturers and traders first sought to reach potential customers who could not afford at once to pay the price of their goods.[11] They began to make contracts whereby the price was payable in instalments and the possession of the goods passed at once to the customer, but the supplier retained the ownership until the last instalment had been paid. By this means they hoped to protect themselves even if the customer, before completing payment, improperly sold the goods to an honest buyer. But by section 9 of the Factors Act 1889, substantially reproduced in section 25(2) of the Sale of Goods Act 1979, a person who has agreed to buy goods and who has obtained possession of them with the seller's consent may, by delivering them to a *bona fide* purchaser or pledgee, pass a good title. In *Lee v Butler*:[12]

> The plaintiff let furniture on a 'hire and purchase agreement' to X. X was to pay £1 at once and the balance of £96 in monthly instalments from May to August. The furniture was to become X's property only when the last instalment was paid. Before this condition was satisfied X sold and delivered the furniture to the defendant.

The Court of Appeal held that, on the proper construction of the agreement, X was under an absolute obligation to pay all the instalments and that he had therefore 'agreed to buy' the furniture. He had accordingly passed a good title to the defendant, who could not be sued by the plaintiff.

To avoid this result a new device was adopted and was tested in *Helby v Matthews (Olivetti)*:[13]

> The plaintiff, a dealer, agreed to hire a piano to X at a monthly rent. If the rent was duly paid for 36 months the ownership would pass to X; but X was entitled to terminate the hiring whenever he pleased. After paying four instalments X improperly pledged the piano to the defendant.

The House of Lords held that, as X could determine the hiring at any time, he was not under any obligation to buy the piano but had only an option of purchase. He had therefore not 'agreed to buy it', neither section 9 of the Factors Act nor section 25(2) of the Sale of Goods Act applied, and no title passed to the defendant. Henceforth manufacturers and dealers preferred to adopt not the first but the second form of contract—a bailment coupled with an option to purchase. 'Hire purchase' was not yet a term of art, but it was a potent commercial instrument.

9 There was a dispute as to whether the seller could exclude his implied undertakings as to title under s 12, but this is now of purely historical interest.

10 Such attempts were perhaps less frequent than sometimes suggested. A seller would be most likely to seek to exclude his implied obligations in a consumer transaction. But most consumer sales are made without a written contract, the usual vehicle for exclusion clauses. For this reason exclusion clauses were much more common in hire-purchase transactions, where there is always a written contract.

11 See Thornely [1962] CLJ 39. The major works are Goode *Hire Purchase Law and Practice* (2nd edn, 1970) and Guest *The Law of Hire Purchase* (1966). A valuable introduction is Diamond *Commercial and Consumer Credit* (3rd edn, 1985).

12 [1893] 2 QB 318.

13 [1895] AC 471.

The present century has seen an enormous extension of this type of business, covering an ever-widening range of goods. The diversity of transactions has demanded a corresponding diversity of legal machinery; and, with the growth not only of the total volume of hire purchase but of the cost of the individual articles involved, the monetary resources of dealers have had to be reinforced by the formation of finance companies. In addition to the earlier and simpler 'hire-purchase contract' between supplier and customer there has been evolved a complex arrangement between supplier, customer and finance company. Thus, if a customer wishes to obtain a car from a dealer on hire-purchase terms, the dealer will not, as a rule, make the hire-purchase contract directly with the customer. He will sell the car to a finance company, and the finance company will let it on hire purchase to the customer. Three contracts may thus be involved: a 'collateral' or 'preliminary' contract between the dealer and the customer, a contract of sale between the dealer and the finance company, and a contract of hire purchase between the finance company and the customer. The extent to which economic reality has thus been divorced from legal mechanics has more than once been exposed by the courts. In *Yeoman Credit Ltd v Apps* Lord Justice Harman said:[14]

> The difficulty and the artificiality about hire-purchase cases arise from the fact that the member of the public involved imagines himself to be buying the article by instalments from the dealer, whereas he is in law the hirer of the article from a finance company with whom he has been brought willy-nilly into contact, of whom he knows nothing and which, on its part, has never seen the goods which are the subject-matter of the hire.

In *Bridge v Campbell Discount Co Ltd*, Lord Denning[15] translated the facts into legal forms or fictions.

> If you were able to strip off the legal trappings in which [the present transaction] has been dressed and see it in its native simplicity, you would discover that [the appellant] agreed to buy a car from a dealer for £405, but could only find £105 towards it. So he borrowed the other £300 from a finance house and got them to pay it to the dealer; and he gave the finance house a charge on the car as security for repayment. But if you tried to express the transaction in those simple terms, you would soon fall into troubles of all sorts under the Bills of Sale Acts, the Sale of Goods Act and the Moneylenders Acts. In order to avoid these legal obstacles, the finance house has to discard the rôle of a lender of money on security and it has to become an owner of goods who let them out on hire ... So it buys the goods from the dealer and lets them out on hire to [the appellant]. [The appellant] has to discard the rôle of a man who has agreed to buy goods and he has to become a man who takes them on hire with only an option of purchase ... And when these new rôles have been assumed, the finance house is not a moneylender but a hire-purchase company free of the trammels of the Moneylenders Acts.

The dominant party in this transaction is the finance company; and the comparative weakness of the customer, combined with the insidious temptation to improvidence, has forced Parliament to come to the customer's aid. The first Hire Purchase Act was passed in 1938.

It was followed by further Acts in 1954, 1964, and 1965. None of these Acts applied to all contracts of hire purchase but only to those where the 'hire-

14 [1962] 2 QB 508 at 522, [1961] 2 All ER 281 at 291.
15 [1962] AC 600 at 627, [1962] 1 All ER 385 at 398.

purchase price'[16] was below a certain figure. There were therefore two sets of rules applicable to contracts of hire purchase; a statutory set for those within the financial ambit of the relevant statute and a common law set for those falling outside. The relative importance of common law and statute varied as inflation eroded the real value of the current limit. In particular many hire-purchase transactions concerning cars fell outside the statute during the 1950s and early 1960s when the limit was still the £300 settled in 1938.

Whether a hire-purchase contract fell under statute or common law, terms would normally be implied in it. The courts in implying terms into common law hire-purchase transactions relied on the helpful analogies provided by the Sale of Goods Act 1893 while the draftsman of the various Hire Purchase Acts also built upon the models provided by the earlier Act. The terms implied at common law or under the statute were therefore similar but not identical. So for instance both followed section 12 of the Sale of Goods Act in holding that the owner (seller) had implied obligations as to title but while under the Hire Purchase Act 1965[17] the term implied was that the owner shall have 'a right to sell the goods *at the time when property is to pass*', at common law the courts implied a term that the owner should have a right to sell the goods both at the time when the hiring commences and at the time when the property is to pass.[18]

There was however a most important difference between the position at common law and under the Hire Purchase Acts. At common law the implied terms, like those in the Sale of Goods Act 1893, could in principle be excluded by contrary agreement[19] but under the Hire Purchase Acts the owner was either prohibited from contracting out of his implied obligations[20] or allowed to do so only in certain strictly defined conditions.[1]

The position in regard to both sale and hire purchase was carried a stage further by the Supply of Goods (Implied Terms) Act 1973.[2] This Act made a number of very important changes. First, it amended the implied terms contained in sections 12, 13, 14 of the Sale of Goods Act 1893. The new implied terms are very much in historical prolongation of the old, but the opportunity was taken to fill gaps and remedy deficiencies which eighty years of experience had revealed.

Secondly, the new implied terms (and also section 15 of the Sale of Goods Act 1893, dealing with sales by sample which was not amended by the 1973 Act) have been extended to all contracts of hire-purchase, irrespective of the ambit of the Hire Purchase Act.

16 Ie 'the total sum payable by the hirer under a hire-purchase agreement in order to complete the purchase of goods to which the agreement relates, exclusive of any sum payable as a penalty or as compensation or damages for a breach of the agreement': Hire Purchase Act 1965, s 58(1).

17 S 17(1).

18 *Karflex Ltd v Poole* [1933] 2 KB 251.

19 Subject to the various common law rules as to such exclusions. Discussed pp 171-195, below.

20 Eg Hire Purchase Act 1965, 17(1), 18(3), 19(2) and 29(3) (implied terms as to title and description).

1 Eg Hire Purchase Act 1965, ss 17(2), (3), (4), 18(1), (2), (3) (implied terms as to merchantability and fitness for purchase).

2 This gives effect, subject to some modifications, to the first report of the Law Commission on exemption clauses in contracts (Law Com No 24, 1969). See Carr 36 MLR 519; Lurpin [1973] CLJ 203.

Finally, the Act contained comprehensive provisions, prohibiting or limiting the power of the seller (owner) to exclude these implied obligations. These will be discussed more fully later.[3]

The Sale of Goods Act 1893 together with its later amendments has now been consolidated in the Sale of Goods Act 1979. The statutory regime for sale of goods coexisted with a common law regime for similar contracts for the supply of goods.

Thus in *Samuels v Davis*:[4]

> The plaintiff was a dentist who agreed with the defendant to make a set of false teeth for the defendant's wife. The teeth were made and delivered, but the defendant refused to pay for them on the ground that they were so unsatisfactory that his wife could not use them.

There was controversy as to whether the contract was for the sale of goods or for work and materials, but the Court of Appeal held that, in the circumstances of the case, the question was irrelevant. If it were the former, the provisions of the Sale of Goods Act applied; if the latter, they would import into the contract, on the analogy of the Act, a term that the teeth should be reasonably fit for their purpose. The implied terms for such contracts as work and materials, exchange and hire are now laid down by the Supply of Goods and Services Act 1982 in terms which follow very closely those of the Sale of Goods Act 1979. Further amendments have been made by the Sale and Supply of Goods Act 1994 to the formulation of the implied terms both in contracts for the sale of goods and other contracts for the supply of goods.

C TERMS IMPLIED BY THE COURTS[5]

Other terms have been judicially implied in a number of transactions. For well over a hundred years there has thus been imported into a contract for the lease of a furnished house a term that it shall be reasonably fit for habitation at the date fixed for the beginning of the tenancy. So if the house is infested with bugs or if the drainage is defective or if a recent occupant suffered from tuberculosis, the tenant will be entitled to repudiate the contract and to recover damages.[6] A similar term is implied if a person contracts to sell land and to build, or to complete the building of, a house upon the land.[7] But the term may be excluded, in accordance with the general principle of the common law, either by clear and unambiguous

3 Pp 196-215, below.

4 [1943] KB 526, [1943] 2 All ER 3. The House of Lords discussed the extent and nature of the terms which may be implied in contracts for work and materials in *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169; and *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181.

5 Burrows 31 MLR 390.

6 *Smith v Marrable* (1843) 11 M & W 5; *Wilson v Finch Hatton* (1877) 2 Ex D 336; *Collins v Hopkins* [1923] 2 KB 617.

7 *Perry v Sharon Development Co Ltd* [1937] 4 All ER 390; see also *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317. There is no such implication on the sale of a completed house: *Hoskins v Woodham* [1938] 1 All ER 692. But see now Defective Premises Act 1972, discussed Spencer [1974] CLJ 307, [1975] CLJ 48.

language or if its implication would be inconsistent with an express term of the contract. Thus in *Lynch v Thorne*:[8]

> The defendant contracted to sell the plaintiff a plot of land on which was a partially erected house and to complete its construction. The contract provided that the walls were to be of nine-inch brick. The defendant built the house in accordance with this specification, but it was in fact unfit for human habitation because the walls would not keep out the rain.

The Court of Appeal gave judgment for the defendant. They could not imply a term which would 'create an inconsistency with the express language of the bargain'.

A fruitful source of controversy is to be found in the relationship of master and servant, where express contractual terms are often absent or prescribe inadequately the reciprocal rights and duties of the parties. The position here was examined by the House of Lords in *Lister v Romford Ice and Cold Storage Co Ltd.*[9]

> The appellant Lister was employed by the respondents as a lorry driver. His father was his mate. While backing his lorry, he drove negligently and injured his father. The father sued the respondents, who were held vicariously liable for the son's negligence. The respondents now sued the son, inter alia, for breach of contract.

They urged the implication in his contract of service of a term that he would use reasonable care and skill in driving the lorry. The son replied with a battery of implications: that the respondents, as employers, should not require him to do anything unlawful, that they should insure him against any personal liability he might incur in the course of his employment, that they should indemnify him 'against all claims or proceedings brought against him for any act done in the course of employment'.

The House of Lords, by a majority, gave judgment for the respondents. There was authority for implying in the master's favour that the servant would 'serve him with good faith and fidelity'[10] and that he would use reasonable care and skill in the performance of his duties.[11]

This latter undertaking the son in the present case had clearly broken. There were certainly reciprocal terms to be implied in the servant's favour. The master for his part must use due care in respect of the premises where the work was to be done, the way in which it should be done and the plant involved; and he must not require the servant to do an unlawful act.[12] But the

8 [1956] 1 All 744, [1956] 1 WLR 303. Later cases suggest that in appropriate cases a builder may be under a duty to warn his customer that the design of the house is defective. *Brunswick Construction Ltd v Nowlan* (1974) 21 BLR 27, *Equitable Debenture Assets Corpn Ltd v William Moss* (1984) 2 Con LR 1.

9 [1957] AC 555, [1957] 1 All ER 125.

10 *Robb v Green* [1895] 2 QB 315; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, [1946] 1 All ER 350.

11 *Harmer v Cornelius* (1858) 5 CBNS 236.

12 See *Matthews v Kuwait Bechtel Corpn* [1959] 2 QB 57, [1959] 2 All ER 345, and *Gregory v Ford* [1951] 1 All ER 121. In the latter case it was held that the master had committed an unlawful act in requiring the servant to drive an uninsured vehicle contrary to s 35(1) of the Road Traffic Act 1930. In *Lister v Romford Ice and Cold Storage Co Ltd*, the appellant argued that the respondents had again broken this section; but the House of Lords held that there had been no such breach.

respondents had not broken any of these terms, and the further obligations suggested by the appellant were not warranted.

In all these cases the court is really deciding what should be the content of a paradigm contract of hire, of employment, etc. The process of decision is quite independent of the intention of the parties except that they are normally free, by using express words, to exclude the term which would otherwise be implied. So the court is in effect imposing on the parties a term which is reasonable in the circumstances.[13] This process received a most instructive application in *Liverpool City Council v Irwin*.[14]

> The defendants were the tenants of a maisonette on the ninth floor of a fifteen floor tower block owned by the plaintiffs. There was no formal tenancy agreement. There was a list of tenants' obligations prepared by the landlord and signed by the tenant but there were no express undertakings of any kind by the landlord. Owing to vandalism the amenities of the block were seriously impaired so that the lifts were regularly out of action, the stairs were unlit and the rubbish shutes did not work. The defendants withheld payment of rent, alleging that the council were in breach of implied terms of the contract of tenancy. The council argued that there were no implied terms[15] but the House of Lords rejected this argument. It was necessary to consider what obligations 'the nature of the contract itself implicitly requires'[16] and since it was not possible to live in such a building without access to the stairs and the provision of a lift service it was necessary to imply some term as to these matters. On the other hand it was not proper to imply an absolute obligation on the landlords to maintain these services. It was sufficient to imply an obligation on the landlord to take reasonable care to maintain the common parts in a state of reasonable repair. It was not shown that the landlords were in breach of that implied term.[17]

Another important example is *Scally v Southern Health and Social Services Board*.[18]

> The plaintiffs were medical practitioners employed in Northern Ireland by the defendants. The terms of employment included a contributory pension scheme and an employee had, in principle, to complete 40 years of service to qualify for full pension. In 1974 a change in regulations gave employees the right to buy extra years on very favourable terms but this right had to be exercised within 12 months from 10 February 1975 by

13 Per Lord Denning MR, in *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 All ER 99 at 103.

14 [1977] AC 239, [1976] 2 All ER 39. Peden 117 LQR 459. Ayres and Gertner (1989) 94 Yale LJ 97.

15 This argument was accepted by the majority of the Court of Appeal [1976] QB 319, [1975] 3 All ER 658 where the case was fought rather on the *Moorcock* doctrine, discussed p 157, below. Compare the interesting judgment of Lord Denning MR expressly disapproved of in the House of Lords.

16 Per Lord Wilberforce [1977] AC 239 at 254, [1976] 2 All ER 39 at 44. See also Lord Cross [1977] AC 239 at 257, [1976] 2 All ER 39 at 46. Cf *Mears v Safecar Security Ltd* [1983] QB 54, [1982] 2 All ER 865.

17 See further *Shell (UK) Ltd v Lostock Garage Ltd* [1977] 1 All ER 481; *Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corpn* [1981] AC 909, [1981] 1 All ER 289; *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216, [1986] 3 All ER 887.

18 [1991] 4 All ER 563.

persons already employed and within 12 months from first taking up of employment by those employed thereafter. There was a discretion to extend this 12-month time limit and to vary the terms of purchase where the time was so extended. The plaintiffs did not exercise their rights because they did not know of them. They claimed that their employer was under a duty to inform them of this change in the terms of their employment and that a term should be implied into the contract of employment.

Lord Bridge, in delivering the only reasoned speech in the House, said:[19]

> The problem is a novel one which could not arise in the classical contractual situation in which all the contractual terms, having been agreed between the parties, must, ex hypothesi, have been known to both parties. But in the modern world it is increasingly common for individuals to enter into contracts, particularly contracts of employment, on complex terms which have been settled in the course of negotiations between representative bodies or organisations and many details of which the individual employee cannot be expected to know unless they are drawn to his attention.

Lord Bridge had no hesitation in holding that it was necessary to imply such a term where 'the following circumstances obtain'.[20]

> (1) The terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) A particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) The employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.[1]

Another interesting development of implied terms in contracts of employment occurred in *Malik v Bank of Credit and Commerce International*.[2] The bank appeared on the surface to be an ordinary high street bank. Unknown to customers and to most of its staff, including the claimants, it was a complete fraud dedicated to cheating customers and third parties. The bank eventually became insolvent and the claimants were made redundant. They argued that the bank was in breach of an implied term of the contract of employment that neither party should 'engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue'. The bank accepted that the authorities supported the implication of a term of this kind but argued that it should not apply:

(a) where the dishonest behaviour of the bank was aimed at customers and not employees; or
(b) where the employee only became aware of the dishonest conduct after he had ceased to be employed; or
(c) unless the conduct was such as to destroy or seriously damage the relationship between employee and employer.

19 Ibid at 569.
20 Ibid at 571. See also *Spring v Guardian Assurance plc* [1994] 3 All ER 129; *Wilson v Best Travel Ltd* [1993] 1 All ER 353; *Wong Mee Wan v Kwan Kin Travel Services Ltd* [1995] 4 All ER 745.
1 Ibid at 571-572.
2 [1997] 3 All ER 1. The case also raised important questions about what damages could be recovered for breach of such an implied term. See below p 675.

The House of Lords rejected all three of these suggested limitations.[3]

In addition to terms thus imported into particular types of contract, the courts may, in any class of contract, imply a term in order to repair an intrinsic failure of expression. The document which the parties have prepared may leave no doubt as the general ambit of their obligations; but they may have omitted, through inadvertence or clumsy draftsmanship, to cover an incidental contingency, and this omission, unless remedied, may negative their design. In such a case the judge may himself supply a further term, which will implement their presumed intention and, in a hallowed phrase, give 'business efficacy' to the contract. In doing this he purports at least to do merely what the parties would have done themselves had they thought of the matter. The existence of this judicial power was asserted and justified in the case of *The Moorcock*.[4]

> The defendants were wharfingers who had agreed, in consideration of charges for landing and stowing the cargo, to allow the plaintiff, a shipowner, to discharge his vessel at their jetty. The jetty extended into the Thames, and, as both parties realised, the vessel must ground at low water. While she was unloading, the tide ebbed and she settled on a ridge of hard ground beneath the mud. The plaintiff sued for the resultant damage.

The defendants had not guaranteed the safety of the anchorage, nor was the bed of the river adjoining the jetty vested in them but in the Thames Conservators. But the Court of Appeal implied an undertaking by the defendants that the river bottom was, so far as reasonable care could provide, in such a condition as not to endanger the vessel. Bowen LJ explained the nature of the implication.[5]

> I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen ... The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.

Since this case was decided in 1889, its authority has often been invoked; and the principle upon which it rests has been amplified. Scrutton LJ said in 1918:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract, ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone 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.'[6]

3 For further proceedings see [1999] 4 All ER 83, [2000] 3 All ER 51. For the same implied term in a different context see *University of Nottingham v Eyett* [1999] 2 All ER 437.

4 (1889) 14 PD 64.

5 Ibid at 68, 70.

6 *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592 at 605.

MacKinnon LJ said in 1939:

> Prima facie that which in an contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'[7]

Lord Pearson said in 1973:

> An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.[8]

Thus explained, *the Moorcock* is still full of life. In *Gardner v Coutts & Co*[9]

> X, in 1948, sold freehold property to Y. By a written contract with Y made on the day following the sale, X agreed that Y and her successors should have the option of buying the adjoining property, which X retained, if X at any time during his life wished to sell it. In 1958 the plaintiff was the successor in title to Y. In 1963 X conveyed the adjoining property to his sister by way of gift without giving the plaintiff the option of purchase. In 1965 X died, and the plaintiff now sued his executors for breach of contract.

The written contract between X and Y contained no term providing expressly for the event of X giving, as opposed to selling, the property to a third party. Cross J implied in the contract a term that X's promise should cover a gift as well as a sale.

> If I apply the test laid down by Scrutton LJ and MacKinnon LJ, I am confident that at the time, whatever views [X] may have formed later, if somebody had said to him, 'You have not expressly catered for the possibility of your wanting to give away the property', he would have said, as undoubtedly [Y] would have said, 'Oh, of course that is implied. What goes for a contemplated sale must go for a contemplated gift.'[10]

This power of judicial implication is a convenient means of repairing an obvious oversight. But it may easily be overworked, and it has more than once received the doubtful compliment of citation by counsel as a last desperate expedient in a tenuous case. In a passage immediately preceding the words of Lord Justice MacKinnon, quoted above, the learned judge gave a warning against the abuse of the power, and especially against the temptation to invoke indiscriminately the relevant sentences of Bowen LJ in *The Moorcock*.

7 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124.

8 *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at 268, [1973] 1 WLR 601 at 609.

9 [1967] 3 All ER 1064, [1968] 1 WLR 173. See also *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581; *Essoldo v Ladbroke Group* [1976] CLY 337.

10 Ibid at 1069 and 179, respectively. For an application of *The Moorcock* see *British School of Motoring Ltd v Simms* [1971] 1 All ER 317, where Talbot J, was ready to imply a term that any car provided by the school for driving lessons would be covered by insurance. See also per Megarry J in *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415 at 424.

> They are sentences from an *extempore* judgment as sound and sensible as all the utterances of that great judge; but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathize with the occasional impatience of his successors when *The Moorcock* is so often flushed for them in that guise.[11]

That this warning was needed is shown by two cases decided since it was given. In *Spring v National Amalgamated Stevedores and Dockers Society*:[12]

> The defendants and the Transport and General Workers Union agreed at the Trade Union Congress at Bridlington in 1939 certain rules for the transfer of members from one union to another. This was called the 'Bridlington Agreement'. In 1955 the defendants, in breach of this agreement, admitted the plaintiff to their Society. He knew nothing of the agreement nor was it expressly included in the defendants' rules. The breach of the agreement was submitted to the Disputes Committee of the Trade Union Congress which ordered the defendants to expel the plaintiff from their Society. When the defendants sought to do so, the plaintiff sued them for breach of contract, claimed a declaration that the expulsion was *ultra vires* and asked for an injunction to prevent it.

The defendants suggested that a term should be implied in their contract with the plaintiff that they should comply with the 'Bridlington Agreement' and take any appropriate steps to fulfil it. But the Vice-Chancellor of the County Palatine Court of Lancaster rejected the suggestion and granted to declaration and injunction for which the plaintiff had asked. He referred to the test suggested by MacKinnon LJ and said:

> If that test were to be applied to the facts of this case and the bystander had asked the plaintiff, at the time when the plaintiff paid his 5s and signed the acceptance form, 'Won't you put into it some reference to the Bridlington Agreement?' I think (indeed I have no doubt) that the plaintiff would have answered, 'What's that?'[13]

In *Sethia (1944) Ltd v Partabmull Rameshwar*:[14]

> The plaintiffs carried on business in London and the defendants were Calcutta merchants. In 1947 the plaintiffs bought from the defendants certain quantities of jute which the defendants were to ship to Genoa. As both parties knew, no jute could be exported from India save by licence of the Government of India, and in 1947 the Government adopted a 'quota system' whereby a shipper must choose as his 'basic year' any one year from 1937 to 1946 and was allotted a quota in regard to the countries to which he had made shipments in that year. The defendants chose 1946 as their basic year, but, as in that year they had shipped nothing to Italy, they were

11 *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124.

12 [1956] 2 All ER 221, [1956] 1 WLR 585. See also *Gallagher v Post Office* [1970] 3 All ER 712.

13 [1956] 2 All ER 221 at 231.

14 [1950] 1 All ER 51. See also *Western Bank Ltd v Schindler* [1977] Ch 1, [1976] 2 All ER 393; *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1978] AC 1, [1977] 2 All ER 849; *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 All ER 488. *Ashmore v Corpn of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620.

not entitled to any licence for Genoa. Subsequently, however, they were allowed to ship rather less than a third of the contract quantity of jute. The plaintiffs sued for breach of contract. The defendants admitted that the contract did not expressly provide that shipments should be 'subject to quota', but argued that such a term must be implied to give it 'business efficacy'.

The Court of Appeal refused to imply the term. In the first place, it was proved that in the jute trade contracts were sometimes made expressly 'subject to quota' and sometimes with no such phrase. The defendants, therefore, by omitting the phrase, must be supposed to have accepted an absolute obligation to deliver the jute. In the second place, to imply the term would be to commit the buyers to consequences dependent upon facts exclusively within the seller' knowledge. The buyers certainly knew of the quota system; but the sellers chose the basic year and they alone knew to what countries they had previously exported in that year.

The 'business efficacy' and 'officious bystander' tests are usually treated as if they are alternative ways of stating a single test. However, it is clear that there might be an implied term which was necessary to give business efficacy to the contract but which, because of their conflicting interests, the parties would not have agreed, if questioned by the officious bystander, as to its obviousness. In *Codelfa Construction Pty Ltd v State Railway Authority of New South Wales*[15] Mason CJ treated the tests as cumulative but it is not clear whether this is the law in England.[16]

A dramatic example of the potential scope of such 'implied in fact' terms was provided by the decision of the House of Lords in *Equitable Life Assurance Society v Hyman*.[17] In this case the appellant had issued large numbers of with profits pension policies. Under these contracts the policyholders invested money with the appellant which would produce a capital sum on the policyholder's retirement. The amount of the capital sum would depend partly on the amount invested and partly on the success of the investment policies followed by the appellant. The directors of the society were given a wide discretion by article 65 of the Rules which provided that they should 'apportion the amount of [the] declared surplus by way of bonus among the holders of the participating policies on such principles, and by such methods, as they may from time to time determine'.

In practice the directors would be unlikely to pay out all of the profit in a given year as a bonus because they would want to keep money in hand for less successful years. Bonuses would be declared during the running of the policy (and once declared could not be revoked) and a 'terminal' bonus (usually larger) would be paid at the end of the policy.

Because of the Inland Revenue rules which make pensions attractive to taxpayers, the policyholder could not take the whole of the capital sum in cash and had to convert a substantial part into an annuity. Pension providers do not necessarily offer the best rates for conversion to annuities and policyholders are normally free to get the best annuity which is available on the market.

Some of the policies offered by the appellant had an unusual feature in that they contained a provision to convert the capital sum into an annuity at

15 [1982] 149 CLR 337.
16 Steyn J in *Mosvolds Rederi A/S v Food Corpn of India* [1986] 2 Lloyd's Rep 68.
17 [2000] 3 All ER 961.

a guaranteed annual rate (GAR). The dispute concerned these policies. When the policies were sold the GAR was well below the market rate but during the 1980s and 1990s annuity rates fell steadily so that the GAR was significantly above the market rate. The reaction of the directors was to propose to pay a lower terminal bonus to policyholders who held GAR contracts. The House of Lords held that a term should be implied to prevent this.

Lord Steyn said

> The directors of the society resolved upon a differential policy which was designed to deprive the relevant guarantees of any substantial value. In my judgment an implication precluding the use of the directors' discretion in this way is strictly necessary. The implication is essential to give effect to the reasonable expectations of the parties.

In general, the parties are entitled to provide for the exclusion of terms which would otherwise be implied. In some important cases, Parliament has provided that the implied terms cannot be excluded and such implied terms, therefore, become mandatory.[18] In such cases, Parliament is in effect laying down a rule of law but it is doing so by using the technique of implying a term into the contract. The effect of this is to give the party thus protected the basic contractual remedies. Where exclusion of the normal implied terms is permitted there will be questions of interpretation. No problem arises if the contract says expressly that no terms are to be implied, or words to that effect. Difficult questions can arise, however, where it is argued that the express terms impliedly exclude normal implied terms. There must be cases where the express term covers the ground so closely that there is no room for an implied term but there will also be cases in which it is possible that the express and normal implied terms co-exist. *Johnstone v Bloomsbury Health Authority*[19] is a very instructive case in this context. The plaintiff was employed by the defendant health authority as a junior hospital doctor under a contract which required him to work 40 hours per week and to 'be available' for overtime of a further 48 hours per week on average. The plaintiff alleged that he had been required to work so many hours a week, with so little sleep, that he was physically sick, that his health was damaged and that the safety of patients was put at risk. He argued that the authority was therefore in breach of its duties as his employer to take reasonable care for his safety and well-being. He sought declarations that he could not lawfully be required to work so many hours as would foreseeably injure his health.[20] The authority argued on a preliminary point that the terms of the plaintiff's employment excluded any duty in relation to safe system of work so far as concerned the hours of work.[1] Leggatt LJ accepted the argument of the authority. The majority disagreed and thought the case should go to trial but the reasons given were not identical. Both Stuart-Smith LJ and Browne-Wilkinson thought that (subject perhaps to the provisions of the Unfair Contract Terms Act 1977) it was open to the authority by clear words to exclude the normal implied duty to provide a reasonably safe system of work but they did not think

18 See p 200, below.

19 [1991] 2 All ER 293.

20 He also argued that the contract was contrary to s 2(1) of the Unfair Contract Terms Act 1977 and void on the ground of public policy.

1 If successful, this argument would have avoided the need for any factual investigation of the effect of the long hours worked either on the plaintiff personally or on junior doctors in general.

that the provision as to hours of work had produced this effect. Both thought that the provisions as to the hours of work had to be read together with the normal implied term. Taken literally, the provision as to hours of work would have permitted the authority to require the plaintiff to work 168 hours in one week if, over a period (not specified in the contract terms), his average had been brought down to 88 hours a week. Few, if any, people can work with adequate respect for their health or the safety of others for such a long period. It was reasonable, therefore, to treat the implied term as to a reasonably safe system of work as cutting back, to some extent, the more extreme forms of overtime working which the authority might apparently, looking only at the express terms, have required. Stuart-Smith LJ would have required the authority when doing this to have regard to the personal stamina and physical strength of the individual doctor. Browne-Wilkinson VC would not have gone so far and would not have permitted the authority to impose hours of work which would impair the health of a reasonably robust young doctor. So, if the evidence at trial showed that a reasonably robust young doctor could work 100 hours a week, provided he had at least five hours' sleep each night, the express and implied term could live together.[2]

3 The relative importance of contractual terms

Common sense suggests and the law has long recognised that the obligations created by a contract are not all of equal importance. It is primarily for the parties to set their own value on the terms that they impose upon each other. But it is rare for them to express with any precision what, if anything, they have in their minds; and the resultant task of inferring and interpreting their intention is, as always, a matter of great difficulty. In the present context it has been further complicated by the phraseology adopted by the judges both to limit the operation of a contract and to value its component parts. Two words in particular, *conditions* and *warranties*, have been employed with such persistence and with so little discrimination that some preliminary attempt must be made to fix their meaning.

To lawyers familiar with the Roman jurisprudence and trained in modern Continental systems the use of the word *condition* in this context must appear a solecism. By them a condition is sharply distinguished from the actual terms of a contract, and is taken to mean, not part of the obligation itself, but an external fact upon which the existence of the obligation depends.[3] The operation of a contract may thus be postponed until some event takes place, or the occurrence of this event may cancel a contract which has already started to function. A purchaser may agree to buy a car only if it satisfies a certain test, or he may conclude the sale, reserving the right in certain circumstances to re-open the whole transaction.

2 Of course, if the evidence showed that no reasonably robust doctor could work more than 88 hours a week, there would be a conflict between the express and implied terms.

3 See Buckland and McNair *Roman Law and Common Law* (2nd edn) pp 247-256. For French law, see the Code Civil, art 1168. Scots law has substantially adopted the Continental position, though some complaints have been made of confusion arising from a flirtation with the English terminology: see Gow *The Mercantile and Industrial Law of Scotland* pp 201-214.

The orthodox application of the word is by no means unknown to English lawyers.[4] Agreements are often made which are expressed to be 'subject to' some future event, performance or the like. Such agreements may produce a variety of different effects.

First, there may be no contract at all. This may be either, as in agreements 'subject to contract', because the parties have agreed not to be bound until some future event (eg the execution of a formal contract) which cannot take place without the concurrence of both parties or because the condition is uncertain. So in *Lee-Parker v Izzet (No 2)*[5] it was held that an agreement 'subject to the purchaser obtaining a satisfactory mortgage' was void for uncertainty.[6]

Secondly, the whole existence of the contract may be suspended until the happening of a stated event, or as it is said in the common law, be subject to a *condition precedent*. In *Pym v Campbell*:[7]

> The defendants agreed in writing to buy from the plaintiff a share in an invention. When the plaintiff sued for a breach of this agreement, the defendants were allowed to give oral evidence that it was not to operate until a third party had approved the invention and that this approval had never been expressed.

'The evidence showed', said Erle J, 'that in fact there was never any agreement at all.' A more recent example is offered by the case of *Aberfoyle Plantations Ltd v Cheng*,[8] which came before the Judicial Committee of the Privy Council from Malaya.

> In 1955 the parties agreed to sell and to buy a plantation part of which consisted of 182 acres comprised in seven leases that had expired in 1950. In the intervening years the vendor had tried but failed to obtain a renewal of the leases. Clause 4 of the agreement therefore provided that 'the purchase is conditional on the vendor obtaining a renewal' of the leases. If he proved 'unable to fulfil this condition this agreement shall become null and void'.

The vendor failed to obtain the renewal, and the Judicial Committee held that the purchaser could recover the deposit that he had paid. Lord Jenkins said:

> At the very outset of the agreement the vendor's obligation to sell, and the purchaser's obligation to buy, were by clause 1 expressed to be subject to the condition contained in clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.[9]

4 See Montrose 15 Can Bar Rev 309; Stoljar 15 MLR 425, 16 MLR 174.

5 [1972] 2 All ER 800, [1972] 1 WLR 775.

6 Similar conditions had been held sufficiently certain in a number of New Zealand cases and Australian cases, eg *Barber v Crickett* [1958] NZLR 1057; *Martin v Macarthur* [1963] NZLR 403; *Scott v Rania* [1966] NZLR 527. *Meehan v Jones* (1982) 56 ALJR 813; Coote 40 Conv 37; Swanton 58 ALJ 633, 690; Furmston 3 Oxford JLS 438. See also *Janmohamed v Hassam* [1976] CLY 2851. Much of the learning on uncertain conditions is to be found in cases on conditional gifts. No doubt similar principles may apply to contracts but probably the threshold of uncertainty should be higher in a commercial setting.

7 (1956) 6 E & B 370.

8 [1960] AC 115, [1959] 3 All ER 910.

9 Ibid at 128 and 916, respectively.

Thirdly, a condition may operate, not to negative the very existence of a contract, but to suspend, until it is satisfied, some right or duty or consequence which would otherwise spring from the contract. Thus in *Marten v Whale*:[10]

> The plaintiff agreed with X to buy a plot of land from him subject to the approval by the plaintiff's solicitor 'of title and restrictions'. At the same time the plaintiff agreed to sell his motorcar to X—this second agreement to be in consideration of the first agreement and to be completed simultaneously with it. The plaintiff allowed X to take possession of the car, and X sold it at once to the defendant who took it without notice of the plaintiff's rights. The plaintiff's solicitor then refused to approve the restrictions binding the land. The plaintiff sued the defendant to recover the car and for damages.

The Court of Appeal held that he must fail. The solicitor's approval was a condition precedent, not to the creation of the contract for sale of the car, but only to the passing of property under it. It was—though not a sale—an agreement to sell, and the defendant obtained a title under section 25(2) of the Sale of Goods Act.

It will not always be easy to decide whether the failure of a condition precedent prevents the formation of a contract or only suspends the obligations created by it. Particular difficulties seem to be raised by the case of *Bentworth Finance Ltd v Lubert*:[11]

> The plaintiffs, under a hire-purchase agreement, let a second hand car to the defendant, who was to pay 24 monthly instalments. The car was delivered to the defendant but without a log-book. The defendant neither licensed nor used it and refused to pay the instalments. The plaintiffs retook possession of the car and sued for the instalments.

The Court of Appeal held that the plaintiffs could not sue the defendant. The delivery of the log-book was a condition precedent upon which the liability to pay the instalments depended. The decision itself may readily be supported. But it is hard to accept the court's view that, until the log-book was supplied, there was no contract at all.[12]

Where there is a contract but the obligations of one or both parties are subject to conditions a number of subsidiary problems arise. So there may be a question of whether one of the parties has undertaken to bring the condition about. In *Bentworth Finance Ltd v Lubert* it could have been plausibly argued that the plaintiff had promised to deliver the log-book. There is a clear distinction between a promise, for breach of which an action lies and a condition, upon which an obligation is dependent. But the same event may be both promised and conditional, when it may be called a promissory condition.[13] A common

10 [1917] 2 KB 480.

11 [1968] 1 QB 680, [1967] 2 All ER 810. See Carnegie 31 MLR 78.

12 Similarly it would appear wrong to hold as Goulding J did in *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331 that payment of a deposit by a purchaser was a condition precedent to the coming into existence of a contract of sale. Payment of the deposit is rather part of the buyer's obligations and a condition precedent to the seller's obligation to convey; *Millichamp v Jones* [1983] 1 All ER 267 [1982] 1 WLR 1422; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475 [1985] 1 WLR 435, CA.

13 See *Bashir v Comr of Lands* [1960] AC 44, [1960] 1 All ER 117, Montrose 23 MLR 350. See also per Sachs LJ in *Property and Bloodstock Ltd v Emerton* [1968] Ch 94 at 120-121, [1967] 3 All ER 321 at 330-331.

form of contract is one where land is sold 'subject to planning permission'. In such a contract one could hardly imply a promise to obtain planning permission, since this would be outwith the control of the parties but the courts have frequently implied a promise by the purchaser to use his best endeavours to obtain planning permission.[14] Another question is whether the condition may be waived. It would appear that where the condition is solely for the benefit of one party, he can waive the condition and make the contract unconditional.[15]

There is yet a fourth possibility, that one party may be able unilaterally to bring a contract into existence. The most common example is an option to buy land. The holder of the option is under no obligation to exercise it but if he does, a bilateral contract of sale between him and the owner will come into existence. In a unilateral contract, the obligation of the promisor may be conditional. So in *Carlill v Carbolic Smoke Ball Co*,[16] there was a binding contract once the plaintiff had bought the smoke ball and used it as prescribed, but the defendant's obligation to pay was conditional on the plaintiff catching influenza. It appears that where one party has the power unilaterally to bring a contract into existence on certain conditions, strict compliance with those conditions will be required.[17]

If a contract has come into existence but is to terminate upon the occurrence of some event, it is said to be subject to a *condition subsequent*. An example often cited is the case of *Head v Tattersall*.[18]

> The plaintiff bought from the defendant a horse, guaranteed 'to have been hunted with the Bicester hounds', with the understanding that he could return it up to the following Wednesday, if it did not answer the description. While in the plaintiff's possession, but without fault on his part, the horse was injured, and was then found never in fact to have been hunted with the Bicester hounds. The plaintiff returned it within the time limit and sued for the price he had paid.

It was held that a contract of sale had come into existence, but that the option to return the horse operated as a condition subsequent of which the plaintiff could take advantage. He was entitled to cancel the contract, return the horse despite the injuries it had suffered, and recover the price.

But, while familiar with its orthodox meaning, English lawyers have more often used *condition* with less propriety to denote, not an external event by which the obligation is suspended or cancelled, but a term in the contract which may be enforced against one or other of the parties. The distinction

14 See *Re Longlands Farm, Long Common, Botley, Hants, Alford v Superior Developments* [1968] 3 All ER 552; *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215. See also *Smallman v Smallman* [1972] Fam 25, [1971] 3 All ER 717 ('subject to the approval of the court' imposes an obligation to apply to the court for approval). Wilkinson 38 Conv 77.

15 See *Wood Preservation v Prior* [1969] 1 All ER 364, [1969] 1 WLR 1077. The judgment of Goff J [1968] 2 All ER 849 also repays careful study. Cf *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148, discussed Smith [1974] CLJ 211. See also *IRC v Ufitec Group Ltd* [1977] 3 All ER 924.

16 [1892] 2 QB 484, discussed, p 34, above.

17 See eg *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285. See also the difficult but important case of *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74; criticised Ativah 31 MLR 332.

18 (1871) LR 7 Exch 7. Cf Stoljar 69 LQR 485 at 506-511; Sealy [1972B] CLJ 225. Another example is *Thompson v Asda-MFI Group plc* [1988] Ch 241 [1988] 2 All ER 722.

insisted upon by the civilians is thus obliterated. Confusion is worse confounded by the fact that *warranty* is also used to indicate a term in the contract and by the failure over many years to define either word with precision. Buller J thus said in 1789:[19]

> It was rightly held by Holt CJ and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended.

It was by the Sale of Goods Act 1893 that some measure of order was imposed upon the language of the law. By section 11(1)(b) a condition is defined as a stipulation in a contract of sale, 'the breach of which may give rise to a right to treat the contract as repudiated', and a warranty as a stipulation 'the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated'. By section 62 it is added that a warranty is 'collateral to the main purpose of the contract', but no further light is shed upon the nature of a condition.

The Sale of Goods Act was treated by many lawyers as containing not only a definition of the words 'condition' and 'warranty' but also an implicit assertion that all contractual terms were either conditions or warranties. This dichotomy enjoyed widespread acceptance between 1893 and 1962 as a means of resolving the practical question of identifying the breaches which entitled the injured party to terminate the contract.[20]

This approach was shown to be over simplistic by the decision of the Court of Appeal in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*:[1]

> The plaintiffs owned a ship which they chartered to the defendants for a period of 24 months from her delivery at Liverpool in February 1957. When delivered, her engine-room staff were too few and too incompetent to cope with her antiquated machinery. It was admitted that the plaintiffs had thus broken a term in the contract to provide a ship 'in every way fitted for ordinary cargo service' and that the ship was unseaworthy. On her voyage to Osaka she was delayed for 5 weeks owing to engine trouble, and at Osaka 15 more weeks were lost because, through the incompetence of the staff, the engines had become even more dilapidated. Not until September was the ship made seaworthy. In June the defendants had repudiated the charter. The plaintiffs sued for breach of contract and claimed damages for wrongful repudiation.

It was held both by Salmon J and by the Court of Appeal that the breach of contract of which the plaintiffs had admittedly been guilty did not entitle the defendants to treat the contract as discharged but only to claim damages, and the plaintiffs won their action. In orthodox language the plaintiffs had broken a warranty and not a condition. The Court of Appeal, however, was reluctant to perpetuate a dichotomy which required each term of a contract to be pressed, at whatever cost, into one of two categories. Diplock LJ acknowledged that it was apposite to simple contractual undertakings. But there were he

19 *Pasley v Freeman* (1789) 3 Term Rep 51.

20 That this question, however approached, has always presented difficult questions of drawing the line can be seen by contrasting *Poussard v Spiers and Pond* (1876) 1 QBD 410 and *Bettini v Gye* (1876) 1 QBD 183. See Beck 38 MLR 413.

1 [1962] 2 QB 26, [1962] 1 All ER 474.

thought, other clauses too complicated to respond to such treatment.[2] Thus, in the case before the court, the obligation of seaworthiness was embodied in a clause, adopted in many charterparties, which—partly through judicial interpretation—had become one of formidable complexity. It comprised, as Upjohn LJ pointed out, a variety of undertakings, some serious and some trivial.

> 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.[3]

To so heterogeneous a clause the dichotomy of condition and warranty was, in the opinion of the court, inapplicable. It might perhaps have been helpful to regard the undertaking of 'seaworthiness', not as a single term, but as a bundle of obligations of varying importance. But even on this construction the task of the court, as envisaged in the *Hong Kong Fir* case, was not to evaluate the term as it stood in the contract, but to wait and see what happened as a result of the breach. Thus if the breach of a term, itself of apparently minor significance, caused severe loss or damage, the injured party might be able to treat the contract as discharged.

The decision in the *Hong Kong Fir* case led some to believe that classification of terms was no longer necessary but this would clearly have been to depart too far from history. That a distinction must be made between major and minor terms, rather than between the more or less serious effect of a breach, was certainly assumed by some judges in the second half of the nineteenth century. They also said that, to draw this distinction, they must place themselves at the date of the contract and not await the chances of the future. In 1863 in *Behn v Burness*, the court had to evaluate a statement in a charterparty that a ship was 'now in the port of Amsterdam'. The statement was inaccurate: the ship only arrived at Amsterdam four days after the date of the charter. Williams J said:

> The court must be influenced in the construction [of the contract], not only by the language of the instrument, but also by the circumstances under which and the purposes for which, the charter-party was entered into ... A statement is more or less important in proportion as the object of the contract more or less depends upon it. For most charters ... the time of a ship's arrival to load is an essential fact, for the interest of the charterer. In the ordinary course of charters it would be so: the evidence of the defendant shows it to be actually so in this case. Then, if the statement of the place of the ship is a substantive part of the contract, it seems to us that we ought to hold it to be a condition.[4]

In *Bettini v Gye*, Blackburn J declared that the classification of a term as major or minor 'depends on the true construction of the contract taken as a whole'. He cited Parke B in *Graves v Legg*:

2 Ibid at 70, and 487, respectively. So, too, Upjohn LJ, ibid at 64 and 484, respectively. Upjohn LJ repeated his views in *Astley Industrial Trust Ltd v Grimley* [1963] 2 All ER 33 at 46-47, [1963] 1 WLR 584 at 598-599. See Reynolds 79 LQR 534; Furmston 25 MLR 584.

3 Ibid at 62-63 and 483, respectively.

4 *Behn v Burness* (1863) 3 B & S 751 at 757, 759.

> The court must ascertain the intention of the parties, to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed.[5]

In these cases the court insisted that the test is to be found, not in the greater or less degree of loss or damage caused by the breach of contract, but in examination of the contract itself at the time and in the circumstances in which it was made.

In 1970 the Court of Appeal had to reconsider the whole question in *the Mihalis Angelos*.[6]

> On 25 May 1965, the owners of a vessel let it to charterers for a voyage from Haiphong in North Vietnam to Hamburg. In clause 1 of the charter the owners said that the vessel was 'expected ready to load under this charter about 1 July 1965'. On the date of the charter she was in the Pacific on her way to Hong Kong, where she had to discharge the cargo which she was then carrying and have a special survey lasting two days. It would take her a further two days to reach Haiphong. She did not in fact complete discharge at Hong Kong until 23 July. It was found as a fact that the owners, when the contract was made, had no reasonable ground for expecting that she would be ready to load under the charter 'about 1 July'.

The members of the Court of Appeal were not unnaturally pressed with the arguments adopted in the *Hong Kong Fir* case. But they were of opinion that the distinction between 'condition' and 'warranties', though not of universal application, was still valuable, apart from statute, in many classes of contract and notably in charterparties.[7] On the facts before them, the court held that the 'expected readiness' clause was a condition.[8] In reaching this conclusion, the court had to choose between the aims of certainty and elasticity, each of which has its part to play in the administration and development of the law. The relative importance of these aims depends upon the type of transaction involved. In a charterparty, where shipowner and charterer meet on equal terms, they, or their lawyers, seek a firm foundation of principle and authority on which they may build and yet make such variations as the law allows and the particular requirements demand. Edmund Davies LJ said:

> Notwithstanding the observations in the *Hong Kong Fir Shipping Co* case, if the fact is that a provision in a charter-party such as that contained in clause 1 in the present case has generally been regarded as a condition, giving the charterer the option to cancel on proof that the representation was made either untruthfully or without reasonable grounds, it would be regrettable at this stage to disturb an established interpretation. The standard text-books unequivocally state that such a clause as we are here concerned with is to be regarded as a condition.[9]

Megaw LJ said:[10]

> 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

5 *Bettini v Gye* (1876) 1 QBD 183; *Graves v Legg* (1854) 9 Exch 709. See also *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 at 281, p 554, below.
6 [1971] 1 QB 164, [1970] 3 All ER 125. Greig 89 LQR 93.
7 See *Behn v Burness*, p 167, above.
8 All three members of the court agreed on this ruling. Lord Denning dissented on other questions before the court but not in the result.
9 Ibid at 199 and 133-134, respectively.
10 Ibid at 205 and 138, respectively.

> and definite rule for a particular class of legal relationships ... 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 of 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.'

The alternative was to leave the parties to speculate on the ultimate reaction of the courts if litigation ensued.

In the *Hong Kong Fir* case it was clear that if the obligation as to seaworthiness had to be forced into one of the two slots marked condition or warranty, it must go into the latter. The practical thrust of the argument therefore was that there might be some breaches of undertakings which were not conditions, which might entitle the injured party to terminate.[11] The argument is at least as likely to be presented in reverse, so that the contract breaker argues that the practical results of breach do not justify allowing the innocent party to bring the contract to an end. So in *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord*:[12]

> The sellers had sold a cargo of citrus pulp pellets to the buyers cif Rotterdam. One of the terms of the contract was 'shipment to be made in good condition'. Some part of the cargo was not so shipped and on arrival at Rotterdam the whole cargo was rejected by the buyers. The defects did not appear to have been very serious as the goods were sold by order of the Rotterdam Court and eventually found their way back into the hands of the buyers[13] who used them for their originally intended purpose as cattle feed. However the buyers argued that there was no room for the application of the *Hong Kong Fir* approach in sale cases on the grounds that the scheme of the Sale of Goods Act envisaged that all terms in a contract of sale should be either conditions or warranties. If this argument had succeeded it would have been necessary for the Court of Appeal to decide whether this term was a condition or warranty but the Court was clear that this was the wrong approach. Although the Sale of Goods Act had classified some terms as conditions or warranties, it did not follow that all terms had to be so classified. Accordingly it was possible to apply general principles and consider the effect of the breach. Since this was not serious the buyers had not been entitled to reject.

This reasoning was endorsed by the House of Lords in *Reardon Smith Line v Hansen-Tangen*.[14]

> In this case the respondents had agreed to charter a tanker as yet unbuilt from a Japanese steamship company and later sub-chartered it to the appellants. The contract described the specification of the ship in detail and identified it as Osaka No 354.[15] In fact Osaka had so many orders that the work was sub-contracted to the Oshima yard where it was built as

11 There is no doubt that there are some breaches of the seaworthiness obligation which have this result. See *Stanton v Richardson* (1872) LR 7 CP 421; affd LR 9 CP 390.

12 [1976] QB 44, [1975] 3 All ER 739.

13 At a greatly reduced price.

14 [1976] 3 All ER 570, [1976] 1 WLR 989.

15 Meaning apparently that it was to be built by the Osaka Shipping Co and that its yard number was 354.

> Oshima 004. The completed vessel was in all respects up to specification but, the tanker market having meanwhile collapsed, the appellants sought to reject the vessel as not complying with its contract description. The argument clearly had little merit but it had some support in the cases on contractual description in sale of goods.[16] The House of Lords were clear that these cases were ripe for review, but should not in any case be allowed to infect the rest of the law of contract and that since the breach here was of a technical nature, the appellants were not entitled to reject.

It is now perhaps possible to summarise these developments as follows:

(1) It is certainly open to the parties to indicate expressly the consequences to be attached to any particular breach. It will not necessarily be sufficient for this purpose to describe the term as 'a condition', for as we have seen, the word condition has many meanings and the court may decide that in a given contract it does not mean that the term is one any breach of which entitles the injured party to treat the contract as at an end.[17]

(2) What the parties may do expressly, may be done for them by implication or imputation. So the Sale of Goods Act 1979 provides that certain of the seller's implied obligations are conditions and clearly custom might produce the same result. Similarly, if a term is commonly found in contracts of a particular class and such a term has in the past been held to be a condition, this provides strong support for a finding that the parties intended it to be a condition.[18]

(3) In the above situations it is possible, with some confidence, to say at the time of the contract that a term is a condition. In most other situations the question only assumes any significance when the contract is broken. Then as Lord Devlin has observed[19] 'both term and breach can be considered together ... It is ... by considering the nature of the term in the light of the breach alleged that the judge will have to make up his mind.' Nevertheless there may well be contractual situations where the court may be clear that a term is a condition even though it is possible to envisage breaches of it which would not be serious. A good example is *Bunge Corpn v Tradax Export SA*.[20]

> In this case the sellers sold 5,000 tons of US soya bean meal fob one US gulf port at sellers' option for shipment in June 1975. The buyers were required to 'give at least 15 consecutive days' notice of probable readiness of vessel' but did not give notice until 17 June. Obviously there did not remain fifteen days before the end of June but it did not necessarily follow that the sellers could not have completed their obligation to ship in June since in many cases this obligation could be completed in thirteen days rather than fifteen.

16 See eg *Re Moore & Co and Landauer & Co* [1921] 2 KB 519.

17 *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, [1973] 2 All ER 39. The judgments of the Court of Appeal in this case [1972] 2 All ER 1173, [1972] 1 WLR 840 also contain much interesting learning on the use of the word 'condition'. Nevertheless the use of the word condition' in a contract drafted by a lawyer ought usually to be construed in this sense. The parties, at least in commercial contracts, are entitled to say that some matter usually unimportant is important to them and 'condition' is the obvious technical term to use for this purpose. See Lord Wilberforce's dissenting speech in *Schuler v Wickman* and his observations in *Reardon Smith v Hansen Tangen* [1976] 3 All ER 570 at 574, [1976] 1 WLR 989 at 996.

18 *The Mihalis Angelos*, p 168, above.

19 [1966] CLJ 192 at 199-200.

20 [1981] 2 All ER 513, [1981] 1 WLR 711.

The House of Lords held that as the sellers' obligation to ship during June was certainly a condition, the buyers' obligation to give timely notice of readiness should equally be treated as a condition, without enquiry in particular cases as to whether delay had caused any serious consequences. Lord Wilberforce observed:[1]

> 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.[2]

(4) In making his decision the judge will sometimes find it helpful to concentrate primarily on the broken term, in others primarily on the extent of the breach.[3] In some contracts, such as sale, it has historically been normal to use the first approach, while, in others, such as building contracts, it has been common to use the second[4] but even in a contract of sale it is open to a court to hold that an obligation which has not been stamped either by statute or previous decisions as a 'condition', is an intermediate obligation, the effect of whose breach depends on whether it goes to the root of the contract.

4 Excluding and limiting terms

The common law has long been familiar with the attempt of one party to a contract to insert terms excluding or limiting liabilities which would otherwise be his. The situation frequently arises where a document purporting to express the terms of the contract is delivered to one of the parties and is not read by him. A passenger receives a ticket, stating the terms, or referring to terms set out elsewhere, on which a railway are prepared to carry him or take charge of his luggage. A buyer or hirer signs a document, containing clauses designed for the seller's or owner's protection. Are these terms or clauses part of the contract so as to bind the passenger, the buyer or the hirer, despite his ignorance of their character or even of their existence.[5]

The problems caused by exclusion clauses overlap with those caused by two other emergent themes of modern contract law, the increased use of standard forms contracts[6] and the development of special rules for the protection of

1 Ibid at 542 and 716, respectively.

2 The question of timely performance has historically been approached through the question of whether 'time is of the essence'. But this appears to be an alternative formulation of the same issues. See *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62 and discussion at pp 613-615, below. See also *Gill and Duffus SA v Société pour l'Exportation des Sucres SA* [1985] 1 Lloyd's Rep 621. The difficulties of deciding whether the structure of the contract makes a time provision a condition are well illustrated by *CIE Commerciale Sucrés et Denrés v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641, [1990] 1 WLR 1337.

3 The words 'extent of the breach' themselves conceal an ambiguity since they may refer either to the extent to which the contract is broken or to the effects of that breach. It is not impossible for a small breach to have devastating consequences.

4 See, pp 594-601, below.

5 The theoretical problems raised by the operation of exception clauses are considered by Coote *Exception Clauses* (1964), an invaluable work. See also Macdonald *Exemption Clauses and Unfair Terms* (1999).

6 See pp 21-23, above.

consumers.[7] Exclusion clauses are usually, though not necessarily, contained in standard form contracts but they are by no means the only problem which such contracts present for the courts.

The common law has found it very difficult to develop doctrines that can be applied equally appropriately to both commercial and consumer transactions. This failure (in what may well be an impossible task) is responsible for much of the complexity in the account which follows.[8]

Before we turn to consider the particular rules which English law has developed, we should notice that there are divergent views as to what exclusion clauses do.[9] One view is that such clauses go to define the promisor's obligation. According to this view one should read the contract as a whole and decide what it is that the promisor has agreed to do. There is no doubt that this is what the courts sometimes do. So in *G H Renton & Co Ltd v Palmyra Trading Corpn of Panama*:[10]

> The respondent issued bills of lading, subject to the Hague Rules, covering the shipment of timber from ports in British Columbia to London. The bills of lading contained a clause permitting the master, in the event of industrial disputes at the port of delivery, to discharge at the port of loading or any other convenient port. In the event a strike broke out among dock workers in the Port of London and the master discharged the cargo at Hamburg. The appellant argued that the discharge at Hamburg was a breach of contract and that the strike clause did not provide an effective defence since it sought to provide a relief of liability contrary to the Hague Rules.[11] The House of Lords held that the respondents had not broken the contract since the strike clause did not provide a defence in the event of misperformance but went to define what it was that the carrier had agreed to do.[12]

However, in other cases, exclusion clauses have been regarded as mere defences. According to this view one should first construe the contract without regard to the exemption clauses in order to discover the promisor's obligation and only then consider whether the clauses provide a defence to breach of those obligations.[13]

It is clear that this difference is not merely theoretical but likely to provide significantly different results in many cases. Both approaches are to be found in the cases though the second is probably the more common. It is possible that both approaches are correct and that the real question is to choose which to apply to a particular clause. Certainly some clauses, eg clauses limiting the amount of damages that can be recovered, look like defences[14] while others are more naturally regarded as defining the obligation.

7 See p 24, above.
8 See *Coote*.
9 See per Lord Reid in *Suisse Atlantique d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 406, [1966] 2 All ER 61 at 76.
10 [1957] AC 149, [1956] 3 All ER 957.
11 Art III, r 8.
12 See also *East Ham Corpn v Bernard Sunley & Sons* [1966] AC 406, [1965] 3 All ER 619. Cf the construction given to a different strike clause by Russell LJ in *Torquay Hotel Co v Cousins* [1969] 2 Ch 106 at 143, [1969] 1 All ER 522 at 534.
13 See eg Denning LJ in *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 at 869, [1956] 1 WLR 936 at 940.
14 Though this is denied by Barwick CJ in *State Government Insurance Office of Queensland v Brisbane Stevedoring Pty Ltd* (1969) 43 ALJR 456 at 461.

The problems raised by the attempt of one party to a contract to exclude or to limit the liability which would otherwise be his has produced prolific and persistent litigation as a result of which it is possible to hazard certain conclusions.

(1) At the outset of its inquiry the court must be satisfied that the particular document relied on as containing notice of the excluding or limiting term is in truth an integral part of the contract.[15] It must have been intended as a contractual document and not as a mere acknowledgment of payment. To hold a party bound by the terms of a document which reasonable persons would assume to be no more than a receipt is an affront to common sense. An illustration of the point is afforded by the case of *Chapelton v Barry UDC*.[16]

> The plaintiff wished to hire two deck-chairs from a pile kept by the defendant council on their beach. The chairs were stacked near a notice which read ... 'Hire of Chairs 2d per session of 3 hours', and which requested the public to obtain tickets from the chair attendant and retain them for inspection. The plaintiff took the chairs and obtained two tickets from the attendant, which he put in his pocket without reading. When he sat on one of the chairs, it collapsed and he was injured. He sued the council, who relied on a provision printed on the tickets excluding liability for any damage arising from the hire of a chair.

The Court of Appeal held the defendants liable. No reasonable man would assume that the ticket was anything but a receipt for the money. The notice on the beach constituted the offer, which the plaintiff accepted when he took the chair, and the notice contained no statement limiting the liability of the council. The defendants had failed to satisfy the preliminary requirement of identifying the ticket as a contractual document, and it was superfluous, therefore, to ask if it contained a due announcement of any conditions.

The case of *McCutcheon v David MacBrayne Ltd*[17] affords a second illustration.

> The defendants owned steamers operating between the Scottish mainland and the islands. The plaintiff asked a Mr McSporran to arrange for the plaintiff's car to be shipped to the mainland. Mr McSporran called at the defendants' office and made an oral contract on the plaintiff's behalf for the carriage of the car. On the voyage, through the defendants' negligence, both ship and car were sunk. The plaintiff sued the defendants for the value of the car.

The defendants pleaded terms, excluding liability for negligence, contained in 27 paragraphs of small print displayed both outside and inside their office. The terms were also printed on a 'risk note' which customers were usually asked to sign. On this occasion the defendants omitted to ask Mr McSporran to sign the risk note. All they did was to give him, when he had paid in advance the cost of carriage, a receipt stating that 'all goods were carried subject to the conditions set out in the notices'. The House of Lords gave judgment for the plaintiff. Neither he nor Mr McSporran had read the words on the notices or

15 Approved by Lord Denning MR in *White v Blackmore* [1972] 2 QB 651 at 666, [1972] 3 All ER 158 at 167. Clarke [1976] CLJ 51; *The Eagle* [1977] 2 Lloyd's Rep 70; Clarke [1978] CLJ 21.

16 [1940] 1 KB 532, [1940] 1 All ER 356. See also *Henson v London North Eastern Rly Co and Coote and Warren Ltd* [1946] 1 All ER 653.

17 [1964] 1 All ER 430, [1964] 1 WLR 125. See also *Burnett v Westminster Bank Ltd*, p 174, below.

on the receipt; and there was in truth no contractual document at all. The risk note was not presented to Mr McSporran, and the receipt was given only after the oral contract had been concluded.

(2) If the document is to be regarded as an integral part of the contract, it must next be seen if it has, or has not, been signed by the party against whom the excluding or limiting term is pleaded. If it is unsigned, the question will be whether reasonable notice of the term has been given. That this was the crucial test was pronounced by Mellish LJ in 1877 in the case of *Parker v South Eastern Rly Co*, where the defendants claimed that a passenger was bound by terms stated on a cloakroom ticket of which he was ignorant.[18] Had the defendants done what was sufficient to give notice of the term to the person or class of person to which the plaintiff belonged? The question is one of fact, and the court must examine the circumstances of each case.[19]

The time when the notice is alleged to have been given is of great importance. No excluding or limiting term will avail the party seeking its protection unless it has been brought adequately to the attention of the other party before the contract is made. A belated notice is valueless. Thus in *Olley v Marlborough Court Ltd*:[20]

> A husband and wife arrived at a hotel as guests and paid for a week's board and residence in advance. They went up to the bedroom allotted to them, and on one of its walls was a notice that 'the proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody'. The wife then closed the self-locking door of the bedroom, went downstairs and hung the key on the board in the reception office. In her absence the key was wrongfully taken by a third party, who opened the bedroom door and stole her furs.

The defendants sought to incorporate the notice in the contract. The Court of Appeal thought that even if incorporated in the contract, the term was not sufficiently clear to cover the defendant's negligence but Singleton and Denning LJJ considered that in any case the contract was completed before the guests went to their room.[1]

A striking if unusual illustration of the time factor is offered by *Burnett v Westminster Bank Ltd.*[2]

> The plaintiff had for some years accounts at two of the defendants' branches—branch A and branch B. A new cheque book was issued to him by branch A, on

18 (1877) 2 CPD 416, especially at 422-423. The test was approved by the House of Lords in *Richardson v Rowntree* [1894] AC 217. See also *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, [1971] 1 All ER 686; p 176, below.

19 There are a vast number of nineteenth and early twentieth century cases on railway and steamship tickets. These 'ticket cases' are more fully discussed in the 4th edition of this work at pp 104-107. English judges have tended to take a restricted view of what need be done to give reasonable notice. See eg *Thompson v London Midland and Scottish Rly Co* [1930] 1 KB 41. American judges starting from the same test have been more demanding, eg rejecting tickets in very small print which is difficult to read, eg *Lisi v Alitalia Lines Aerea Italiane SpA* [1968] 1 Lloyd's Rep 505, affirming [1967] 1 Lloyd's Rep 140; *Silvestri v Italia Societa per Azioni di Navigazione* [1968] 1 Lloyd's Rep 263.

20 [1949] 1 KB 532, [1949] 1 All ER 127. In *Chapelton v Barry UDC* (p 173, above), the ticket, even had it been a contractual document, was given to the plaintiff after he had accepted the offer to hire a chair.

1 If the plaintiffs had stayed at the hotel before it might be argued that there was a course of dealing between the parties. See p 175, below.

2 [1966] 1 QB 742, [1965] 3 All ER 81.

the front cover of which was a notice that 'the cheques in this book will be applied to the account for which they have been prepared'. These cheques were in fact designed for use in a computer system, operated by branch A, and 'magnetised ink' was used which the computer could 'read'. The plaintiff knew that there were words on the cover of the cheque book, but had not read them. He drew a cheque for £2,300, but crossed out branch A and substituted branch B. The computer could not 'read' the plaintiff's ink. He later wished to stop the cheque and told branch B. Meanwhile the computer had debited his account at branch A. He sued the defendants for breach of contract, and they pleaded the limiting words on the cover of the cheque book.

Mocatta J gave judgment for the plaintiff. The cheque book was not a document which could reasonably be assumed to contain terms of the contract; and the defendants had not in fact given adequate notice of the restriction to the plaintiff. They were, in effect, seeking, without his assent, to alter the terms of the contract.

A further point must be made. The court may infer notice from previous dealings between the parties. This possibility was demonstrated in the case of *Spurling v Bradshaw*.[3]

The defendant had dealt for many years with the plaintiffs, who were warehousemen. He delivered to them for storage eight barrels of orange juice. A few days later he received from them a document acknowledging the receipt of the barrels and referring on its face to clauses printed on the back. One such clause exempted the plaintiffs 'from any loss or damage occasioned by the negligence, wrongful act or default' of themselves or their servants. When ultimately the defendant came to collect the barrels, they were found to be empty.

The defendant refused to pay the storage charges, and the plaintiffs sued him. He counter-claimed for negligence and, in answer to this counter-claim, the plaintiffs pleaded the exempting clause. The defendant sought to argue that, as the document containing it was sent to him only after the conclusion of the contract, it was too late to affect his rights. But he admitted that in previous dealings he had often received a similar document, though he had never bothered to read it, and he was now held to be bound by it.

The phrase 'course of dealing', on which the inference of notice may rest, is not easily defined. But it is clear that it must be a consistent course. In *McCutcheon v David MacBrayne Ltd*[4] the plaintiff's agent had dealt with the

3 [1956] 2 All ER 121, [1956] 1 WLR 461. See Hoggett 33 MLR 518.

4 See p 173, above, for the facts of this case. In this case Lord Devlin suggested that a term could be introduced by a course of dealings only if there was actual knowledge of its content (as opposed to its existence). This statement was unnecessary for the decision and clearly goes too far in view of *Henry Kendall & Sons v William Lillico & Sons* [1969] 2 AC 31, [1968] 2 All ER 444. It appears relatively easy to show that terms are included in a contract by a course of dealings in a commercial context. See *British Crane Hire Corpn Ltd v Ipswich Plant Hire Ltd* [1975] QB 303, [1974] 1 All ER 1059, where an oral contract was treated as subject to the conditions of a trade association which both parties commonly employed. This case appears not to depend on a course of dealings between the parties but on the court's perception of the shared assumptions of the parties. It is more difficult in consumer transactions: see *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215; *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71, [1972] 1 All ER 399, though these cases can also be explained on the ground that there was not sufficient consistency or continuity of dealing. See also *PLM Trading Co (International) Ltd v Georgiou* [1987] CLY 430; Swanton 1 JCL 223, Macdonald 8 LS 48.

defendants on a number of occasions. Sometimes he had signed a 'risk note' and sometimes he had not. Lord Pearce said:[5]

> The respondents rely on the course of dealing. But they are seeking to establish an oral contract by a course of dealing which always insisted on a written contract. It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances a similar contractual result will follow. When the conduct is *not* consistent, there is no reason why it should still produce an invariable contractual result. The respondents having previously offered a written contract, on this occasion offered an oral one. The appellant's agent duly paid the freight for which he was asked and accepted the oral contract thus offered. This raises no implication that the condition of the oral contract must be the same as the conditions of the written contract would have been had the respondent proffered one.

A discussion of familiar problems in a novel setting is to be found in *Thornton v Shoe Lane Parking Ltd.*[6]

> The plaintiff wished to park his car in the defendants' automatic car park. He had not been there before. Outside the park was a notice, stating the charges and adding the words 'All cars parked at owners' risk'. As the plaintiff drove into the park a light turned from red to green, and a ticket was pushed out from a machine. Nobody was in attendance. The plaintiff took the ticket and saw the time on it. He also saw that it contained other words, but put it into his pocket without reading them. The words in fact stated that the ticket was issued subject to conditions displayed on the premises. To find these conditions the plaintiff would have had to walk round the park until he reached a panel on which they were displayed. The plaintiff never thought to look for them. One condition purported to exempt the defendants from liability not only for damage to the cars parked but also for injury to customers, however caused. When the plaintiff returned to collect his car, there was an accident in which he was injured. The defendants pleaded the exempting term.

The Court of Appeal gave judgment for the plaintiff. The first question raised was the moment at which the contract was made.[7] It was not easy to apply the long line of 'ticket cases', reaching back for a hundred years, to the mechanism of an automatic machine. Lord Denning said:[8]

> 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 these 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

5 [1964] 1 All ER 430 at 439-440, [1964] 1 WLR 125 at 138.
6 [1971] 2 QB 163, [1971] 1 All ER 686.
7 Megaw LJ, while he concurred in the decision, reserved his opinion as to the precise moment when the contract was made.
8 Ibid at 169 and 689, respectively.

the notice, because the ticket comes too late. The contract has already been made.

Even if the automatic machine was regarded as a booking clerk in disguise and the older ticket cases applied, the plaintiff would still succeed. In the leading case of *Parker v South Eastern Rly Co.*[9] three questions were posed. (a) Did the plaintiff know that there was printing on the ticket? In the instant case he did. (b) Did he know that the ticket contained or referred to conditions? In the instant case he did not know. (c) Had the defendants done what was sufficient to draw the plaintiff's attention to the relevant conditions? In the instant case the condition was designed to exempt the defendants from liability for personal injury caused to the customer. So wide an exception was, in the context, unusual and required an unusually explicit warning. Such warning the defendants had not given, and they could not escape liability for the plaintiff's injury. In this case the requirement of explicit warning about unusual terms was applied in the context of an exemption of liability. However, it appears that this doctrine is not limited to exempting clauses but is of general application. This was the view of the Court of Appeal in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd.*[10]

> In this case the defendants were an advertising agency who needed to obtain some photographs of the 1950s for a presentation which they were preparing. For this purpose they rang the plaintiffs who ran a library of photographs and asked if they had any suitable photographs of the period. The plaintiffs sent a bag containing 47 transparencies with a delivery note clearly stating that the transparencies were to be returned by 19 March (14 days after the enquiry) and setting out a number of printed conditions. The Court of Appeal had no doubt that in principle the contract was on the terms contained in the delivery note. One of the conditions provided that for every day after 14 days that the transparencies were kept there would be a holding fee per transparency of £5 plus VAT per day. In fact, the defendants did not return the transparencies until 2 April and were faced with a bill for £3,783.50.

The Court of Appeal held that the defendants were not obliged to pay this sum because the plaintiffs had failed to give adequate notice of such a surprising term. It was not sufficient to incorporate the term into the standard printed conditions. More vigorous steps should be taken such as printing the term in bold type or sending a covering note drawing specific attention to it.

In applying the principle that surprising terms require extra notice, it will obviously be essential to know what terms are surprising. In some cases, commonsense will provide an answer but this will not always be the case. It may be necessary to enquire and therefore for the relevant party to lead evidence as to what the normal practice is in a particular trade, profession or locality. In fact, the relevant trade association, the British Association of Picture Libraries and Agencies (BAPLA) does produce a guide as to what terms are normal which is based on consultation with representative bodies of typical customers such as the Publishers Association, the Society of Authors and so on. This guide does in fact state that a free period of loan, followed by a provision for payment for holding over, is to be expected. This is of course a

9 (1877) 2 CPD 416: see p 174, above.
10 [1989] QB 433, [1988] 1 All ER 348.

common feature of similar arrangements such as borrowing books from a library. If the term in this case was surprising therefore, it was not so much because there was provision for payments after the 14th day but because of the rate of payment. Much would turn here on the effect of the evidence as to what the normal rate was.[11]

A problem which has not so far received much attention from the courts is the so-called 'battle of the forms'.[12] This occurs where one party sends a form stating that the contract is on his terms and the other party responds by returning a form stating that the contract is on his terms! At least five solutions seem possible, viz that there is a contract on the first party's terms, a contract on the second party's terms, a contract on the terms that common law would normally imply in such circumstances, a contract on some amalgam of the parties' terms or no contract at all. In theory there is much to be said for the last solution since there is neither agreement nor apparent agreement on the terms of the contract. In practice however it may be that the courts will try to give effect to the intention of the parties to make some contract. It has been suggested that each succeeding form should be treated as a counter-offer so that the last form should be regarded as accepted by the receiver's silence. This is a possible view but not perhaps easy to reconcile with the conventional view of *Felthouse v Bindley*.[13]

The leading decision in *Butler Machine Tool Co v Ex-Cell-O Corpn*[14] is interesting but, unfortunately, indecisive.

> The sellers offered to sell a machine tool to the buyers for £75,535, delivery in ten months and the buyers replied placing an order. The offer and order were on the sellers' and buyers' standard printed stationery respectively. Each document contained various terms and there were of course differences between the terms. In particular the sellers' terms included a price variation clause, which if incorporated into the contract, would have entitled them to charge the price ruling at the day of delivery, whereas the buyers' terms contained no provision for price variation. The buyers' conditions had a tear off slip, which the sellers were invited to and did return, containing the words 'we accept your order on the terms and conditions thereon'. The slip was accompanied by a letter from the sellers, stating that the buyers' order had been entered into in accordance with the original offer. When the machine tool was delivered, the sellers claimed to be entitled to another £2,892 under their terms.

11 If the failure to return the photographs was a breach of contract then it would be arguable that some levels of charge would be invalid as being penalties. See below, pp 688-693. In *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265, Hobhouse LJ delivered an important dissenting judgment expressing some reserve as to the width of the *Interfoto* principle. He took the position that the clause before the Court of Appeal (which put the cost of returning defective goods on to the buyer) was not unusual and that the real objection of the majority to it was that it was unreasonable. He would have wished to restrict the use of tests based on unreasonableness. Cf Brooke LJ in *Lacey's Footwear Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369 at 385. See Macdonald [1999] CLJ 413, Bradgate 60 MLR 582.

12 See Furmston, Norisada and Poole *Contract Formstion and Letters of Intent, Chapter 4*. Hoggett 33 MLR 518, Adams [1983] JBL 297, Jacobs 34 ICLQ 297, MacKendrick 8 OJLS 197.

13 Pp 52-53, above. See also *British Road Services Ltd v Arthur Crutchley & Co Ltd* [1968] 1 All ER 811; *Transmotors Ltd v Robertson, Buckley & Co Ltd* [1970] 1 Lloyd's Rep 224; *OTM Ltd v Hydranautics* [1981] 2 Lloyd's Rep 211; *Nissan UK Ltd v Nissan Motor Manufacturing Ltd* (1994)unreported, CA.

14 [1979] 1 All ER 965, [1979] 1 WLR 401; Rawlings 42 MLR 715.

The Court of Appeal held that on the facts the sellers had contracted on the buyers' terms, since the return of the acknowledgment slip amounted to an acceptance of the buyers' counter-offer. The accompanying letter did not qualify this acceptance but simply confirmed the price and description of the machine.[15] This decision makes the result turn entirely on the sellers' tactical error in returning the acknowledgement slip. In future well-trained warriors in the battle of the forms will take care not to return documents originating from the other side.

The Court of Appeal also considered what the position would have been if the seller had not returned the slip. Lawton and Bridge LJJ thought the solution lay in applying the traditional rules of offer and counter-offer. This would mean that in many cases there was no contract, at least until the goods were delivered and accepted by the buyer.[16] Lord Denning MR on the other hand thought that one should first of all look to see if the parties thought they had contracted and if they had one should look at the documents as a whole to discover the content of their agreement.[17] The majority view is certainly more consistent with orthodox theory. On the other hand it may be thought unsatisfactory to employ a rule which would leave so many agreements in the air. The problem is one that is common to most developed legal systems and there have been a number of attempts at statutory reform, though none seems to have found a wholly satisfactory solution.[18]

(3) If the document is signed it will normally be impossible or at least difficult to deny its contractual character, and evidence of notice, actual or constructive, is irrelevant. In the absence of fraud or misrepresentation, a person is bound by a writing to which he has put his signature, whether he has read its contents or has chosen to leave them unread.[19] The distinction between the signed and the unsigned document was taken by Lord Justice Mellish in *Parker v South East Rly Co*, and was emphasised and illustrated in *L'Estrange v Graucob*.[20] The plaintiff bought an automatic machine from the defendants on terms contained in a document, described as a 'Sales Agreement', and including a number of clauses in 'legible, but regrettably small print', which she signed but did not read. The Divisional Court held that she was bound by these terms and that no question of notice arose. In the words of Scrutton LJ:[1]

> 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

15 This decision has been criticised on the facts, since it seems very unlikely in practice that the sellers intended to accept the buyer's standard conditions rather than to maintain adherence to their own. If the decision is correct, it is presumably on the basis of a rather stringent application of the objective test of agreement.

16 See *Sauter Automation v H C Goodman (Mechanical Services)* (1986) 34 BLR 81; *Chichester Joinery Ltd v John Mowlem Co Ltd* (1987) 42 BLR 100.

17 Lord Denning's views here are reminiscent of his views in *Gibson v Manchester City Council* [1978] 2 All ER 583, [1978] 1 WLR 520 which were emphatically disapproved of by the House of Lords [1979] 1 All ER 972, [1979] 1 WLR 294. See p 40, above. Of course the *Gibson* case did not involve a battle of the forms.

18 Uniform Commercial Code, s 2–207; *Farnsworth on Contract 3.21*; Uniform Laws on International Sales Act 1967, Sch 2, art 7; Unidroit-Principles of International Commercial Contracts, art 2.22.

19 For the possibility of pleading mistake, see pp 284–289, below. But even here there are no decided cases where the plea of mistake has availed in the absence of fraud.

20 [1934] 2 KB 394. For the dictum of Mellish LJ, see (1877) 2 CPD 416 at 421. See Spencer [1973] CLJ 104.

1 [1934] 2 KB 394 at 403.

> 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.

The qualification imposed upon the absolute character of signed documents by the last sentence quoted from this judgment will be readily understood. It was applied in the case of *Curtis v Chemical Cleaning and Dyeing Co.*[2]

> The plaintiff took to the defendants' shop for cleaning a white satin wedding dress trimmed with beads and sequins. The shop assistant gave her a document headed 'Receipt' and requested her to sign it. With unusual prudence, the plaintiff asked its purport, and the assistant replied that it exempted the defendants from certain risks and, in the present instance, from the risk of damage to the beads and sequins on the dress. The plaintiff then signed the document, which in fact contained a clause 'that the company is not liable for any damage, however caused'. When the dress was returned, it was stained and, in an action by the plaintiff for damages, the defendants relied on this clause.

The Court of Appeal held that the defence must fail. The assistant, however innocently, had misrepresented the effect of the document, and the defendants were thus prevented from insisting upon the drastic terms of the exemption. The plaintiff was entitled to assume, as the assistant had assured her, that she was running the risk only of damage to the beads and sequins.

(4) The courts have developed a number of rules which they employ as a means of controlling improper use of exemption and limiting clauses. So the courts have held that clear words must be used if they are designed to excuse one party from a serious breach of the contract.[3] Similarly, clear words must be used if one party is to be excused from the results of his negligence. A particular problem, which has given rise to a good deal of litigation, arises where a party is potentially liable both on the basis of negligence and on the basis of strict liability. A good example is the common carrier of goods, who holds himself out as prepared to carry goods to any person whatever. In addition to his liability for negligence such a person, by virtue of his calling, is strictly responsible for the safety of the goods entrusted to him, save for damage caused by an act of God, the Queen's enemies, an inherent defect in the goods themselves, or the fault of the consignor. In such a situation general words excluding liability have often been taken to exclude the strict liability but not to exclude negligence based liability. Similarly, in *White v John Warrick & Co Ltd*,[4] the plaintiff hired a cycle from the defendants under a contract which provided that 'nothing in this agreement shall render the owners liable for any personal injury'. The saddle tilted forward while the plaintiff was riding the bicycle and he was injured. The court held that the words used were sufficient to exclude the defendants' strict liability in contract for hiring a defective cycle but not their tort liability, if any, for negligence.[5]

2 [1951] 1 KB 805, [1951] 1 All ER 631. See *Jaques v Lloyd D George & Partners Ltd* [1968] 2 All ER 187. It may also, in any future case, be necessary to consider the effect of the Misrepresentation Act 1967, s 3: pp 326-328, below.

3 Discussed more fully p 189 below. Howarth 36 NILQ 101.

4 [1953] 2 All ER 1021, [1953] 1 WLR 1285.

5 See also Lord Greene MR in *Alderslade v Hendon Laundry Ltd* [1945] KB 189, [1945] 1 All ER 244.

Another principle which can overlap with the previous two is the so-called *contra proferentum* rule which says that if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity should be resolved against the party who inserted it and seeks to rely on it.[6] Courts have sometimes gone very far in using this approach. So in *Hollier v Rambler Motors (AMC) Ltd*:[7]

> The plaintiff agreed with the manager of the defendants' garage that his car should be towed to the garage for repair. While at the garage the car was substantially damaged by fire as a result of the defendants' negligence. The defendants argued that the transaction was subject to their usual terms which included 'The company is not responsible for damage caused by fire to customer's cars on the premises'.

The Court of Appeal held that even if this provision was incorporated into the contract, it would not operate to provide a defence. The defendants argued that in the circumstances the only way in which they could be liable for damage by fire was if they were negligent and that the words were therefore appropriate to exclude liability for negligence. The court held that the clause could be read by a reasonable customer as a warning that the defendants would not be responsible for a fire caused without negligence. It was not therefore sufficiently unambiguous to exclude liability for negligence.[8]

It is arguable that this case has crossed the line between legitimate strict construction and illegitimate hostile construction. It is certain that in later cases the House of Lords has warned against the excesses of hostile construction. In *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*[9] Lord Wilberforce said of clauses of limitation that 'one must not strive to create ambiguities by strained construction ... The relevant words must be given, if possible, their natural plain meaning.'[10] In *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*[11] Lord Diplock agreed with Lord Denning in the Court of Appeal that recent legislation[12] had 'removed from judges the temptation to resort to the device of ascribing to the words appearing in exemption clauses a tortured meaning so as to avoid giving effect to an exclusion or limitation of liability when a judge thought that in the circumstances to do so would be unfair'.[13]

6 It is not completely clear whether the proferens is the person responsible for the drafting of the clause or the person who seeks to rely on it. In the reported cases the defendant has been both.

7 [1972] 2 QB 71 [1972] 1 All ER 399. See also *Akerib v Booth Ltd* [1961] 1 All ER 380, [1961] 1 WLR 367; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725; *Hawkes Bay and East Coast Aero Club Ltd v Macleod* [1972] NZLR 289; Coote [1972A] CLJ 53; cf *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508; *Adams v Richardson & Starling Ltd* [1969] 2 All ER 1221, [1969] 1 WLR 1645; *Lamport and Holt Lines Ltd v Coubro & Scrutton (M and I) Ltd and Coubro and Scrutton (Ruggers and Shipwrights) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42. The same principles apply to clauses in which one party undertakes to indemnify another against the consequences of the latter's negligence: *Smith v South Wales Switchgear Ltd* [1978] 1 WLR 165. Adams and Brownsword [1982] JBL 200; [1988] JBL 146.

8 The case is criticised by Barendt 35 MLR 644. Cf Coote [1973] CLJ 14.

9 [1983] 1 All ER 101, [1983] 1 WLR 964.

10 [1983] 1 All ER 101 at 104.

11 [1983] 2 AC 803, [1983] 2 All ER 737.

12 See p 197, below.

13 Ibid at 810 and 739, respectively. In *Macey v Qazi* [1987] CLY 425 it was stated that the *contra proferentum* principle should only be used as a last resort.

(5) Even if the excluding or limiting term is an integral part of the contract and even if its language is apt to meet the situation that has in fact occurred, questions may arise as to whether the term can operate to protect a person who is not a party to the contract.[14] This often happens, for example, under contracts of carriage where the carrier has excluded or limited his own liability and an injured passenger or consignor of goods seeks to sue the servant or agent whose negligence has caused him damage. Thus in *Adler v Dickson*:[15]

> The plaintiff was a passenger in the Peninsular and Oriental Steam Navigation Co's vessel *Himalaya*, and was travelling on a first class ticket. The 'ticket' was a lengthy printed document containing terms exempting the company from liability. There was a general clause that 'passengers are carried at passengers' entire risk' and a particular clause that 'the company will not be responsible for any injury whatsoever to the person of any passenger arising from or occasioned by the negligence of the company's servants'. While the plaintiff was mounting a gangway, it moved and fell and she was thrown onto the wharf from a height of 16 feet and sustained serious injuries. She brought an action for negligence, not against the company, but against the master and boatswain of the ship.

The Court of Appeal held that, while the clauses protected the company from liability, they could avail no one else. The *ratio decidendi* of the court was that the ticket did not, on its true construction, purport to exempt the master or boatswain. The Court of Appeal also considered, obiter, what the position would have been if the ticket had said that the master and boatswain were not to be liable. On this question there were divergent views. Jenkins LJ said,

> even if these provisions had contained words purporting to exclude the liability of the company's servants, *non constat* that the company's servants could successfully rely on that exclusion ... for the company's servants are not parties to the contract.[16]

Morris LJ agreed but Denning LJ took the opposite view.
In *Scruttons Ltd v Midland Silicones Ltd*:[17]

> A drum containing chemicals was shipped in New York by X on a ship owned by the United States Lines and consigned to the order of the plaintiffs. The bill of lading contained a clause limiting the liability of the shipowners, as carriers, to 500 dollars (£179). The defendants were stevedores who had contracted with the United States Lines to act for them in London on the terms that the defendants were to have the benefit of the limiting clause in the bill of lading. The plaintiffs were ignorant of the contract between the defendants and the United States Lines. Owing to the defendants' negligence the drum of chemicals was damaged to the extent of £593. The plaintiffs sued the defendants in negligence and the defendants pleaded the limiting clause in the bill of lading.

Diplock J found for the plaintiffs, and his judgment was upheld both by the Court of Appeal and by the House of Lords.[18] Their Lordships (Lord Denning

14 See Coote *Exception Clauses* ch 9; Treitel 18 MLR 172; Furmston 23 MLR 373 at 385-397; Atiyah 46 ALJ 212; Rose 4 Anglo-American L Rev 7.
15 [1955] 1 QB 158, [1954] 3 All ER 397.
16 Ibid at 186 and 403, respectively.
17 [1962] AC 446, [1962] 2 All ER 1.
18 Ibid.

dissenting) took the view that privity of contract was a fatal objection to the defendant's claim. The defendants were not parties to the bill of lading and could derive no rights under it. This rule appears simple but it is not without difficulties.

(a) The House of Lords relied on the fact that the United States Supreme Court had recently reached the same decision in *Krawill Machinery Corpn v R C Herd & Co Inc*[19] but that decision owed nothing to the doctrine of privity on contract which does not exist in its English form in the United States. It was rested simply, as *Scuttons v Midland Silicones* could have been, on the basis that nothing in the bill of lading expressly or impliedly excluded the liability of the stevedore. Later American cases have shown that a suitably worded clause can extend immunity to non-parties.[20]

(b) The House of Lords also relied on the decision of the High Court of Australia in *Wilson v Darling Island Stevedoring Co Ltd.*[1] Stevedores here pleaded an exemption clause in a contract evidenced by a bill of lading and made between the owner of goods and a carrier. The plea failed. It is true that Fullagar J said,

> The obvious answer ... is that the defendant is not a party to the contract, evidenced by the bill of lading, that it can neither sue nor be sued on that contract, and that nothing in a contract between two other parties can relieve it from the consequences of a tortious act committed by it against the plaintiff.[2]

Dixon CJ agreed with Fullagar J, but the remainder of the court took different views and it is clear that the result would have been different if the bill of lading had stated clearly that the stevedores were not to be liable.

(c) The decision of the House is not easy to reconcile with its earlier decision in *Elder Dempster & Co v Patterson Zochonis & Co.*[3] In that case, Scrutton LJ and a unanimous House of Lords including Lord Sumner had assumed that a non-party could in some circumstances shelter behind an exemption clause contained in a contract between two other parties. In *Scruttons v Midland Silicones* the House of Lords put the *Elder Dempster* case on one side on the ground that its precise ratio was obscure.[4] It may perhaps be thought that in commercial matters what Lord Sumner and Scrutton LJ thought self-evidently correct is not often self-evidently wrong.[5]

(d) The house appeared to assume that only a contract between plaintiff and defendant would do to exclude the defendant's liability. But it is very doubtful whether this is the law. Thus we have seen that a debt owed by A to B may be rendered unenforceable by B's acceptance of part-payment by C.[6] Further the liability of the stevedores was tortious and not contractual and tortious liability may be excluded by consent, which need not be contractual.[7]

19 [1959] 1 Lloyd's Rep 305, 359 US 297.

20 Eg *Carle and Montanari Inc v American Export Isbrandtsen Lines Inc* [1968] 1 Lloyd's Rep 260; affd 386 F 2d 839; cert denied 390 US 1013 (1968).

1 [1956] 1 Lloyd's Rep 346, 95 CLR 43.

2 [1956] 1 Lloyd's Rep 346 at 357.

3 [1924] AC 522. For fuller discussion of this difficult case see p 182, n 14, above.

4 On the relevance of this case to the doctrine of precedent, see Dworkin 25 MLR 163 at 171-174.

5 It appears that the *Elder Dempster* case should be explained on the basis of a bailment on terms. See *The Pioneer Container* [1994] 2 All ER 250, discussed p 187, below.

6 See p 116, above.

7 See Kitto J in *Wilson v Darling Island Steveaoring Co Ltd* (1955) 95 CLR 43 at 81 and the advice of the Privy Council in *The Pioneer Container* [1994] 2 All ER 250, discussed p 187, below.

An interesting, if inconclusive case is that of *Morris v C W Martin & Sons Ltd*.[8]

> The plaintiff sent her mink stole to a furrier to be cleaned. The furrier told her that he himself did no cleaning but that he could arrange for this to be done by the defendants. The plaintiff approved this proposal. The furrier accordingly, acting as principal and not as agent, made a contract with the defendants, a well-known firm, to clean the plaintiff's fur. While in the possession of the defendants, the fur was stolen by their servant. The plaintiff sued the defendants, who pleaded exemption clauses contained in their contract with the furrier.

The Court of Appeal held the defendants liable. The three members of the court agreed (a) that, when the defendants received the fur in order to clean it, they became bailees for reward; (b) that, as such bailees, they owed a common law duty to the plaintiff; (c) that the clauses on which they relied were not adequate to meet the facts of the case.[9] It was unnecessary, therefore, to answer the question whether, if the clauses had been unambiguous and comprehensive, they would have protected the defendants as against the plaintiff, who was not a party to the contract. Lord Denning thought that the plaintiff might have been bound by these clauses because she had impliedly agreed that the furrier should contract for the cleaning of the fur on terms usual in the trade. Diplock and Salmon LJJ preferred to keep the question open.

(e) It seems possible that the House of Lords may have taken a somewhat simplistic view of the merits, viz that exemption clauses are bad and their operation accordingly to be confined as narrowly as possible. This is understandable if applied to the carriage of passengers as in *Adler v Dickson* but it makes less sense in relation to carriage of goods.[10] Here the exemption clauses—the Hague rules—have been approved by Parliament and are in many circumstances mandatory. The parties will (or at least should) have insured on the basis that liability is as laid down by the rules. It certainly makes no sense to allow their loss to be transferred on to the carrier's servants, who are the least likely to be insured or financially equipped to bear it. (Stevedores are perhaps in a different position since they are normally persons of substance and/or likely to carry insurance though even here it is not clear why loss should be transferred from the cargo owner's insurer to the stevedore's.) These arguments have been substantially accepted by the revised Hague Rules. The Carriage of Goods by Sea Act 1971 gives the benefit of limiting terms in the carrier's contract to his servants or agents, but not to independent contractors. Similar provisions are to be found in a number of international transport conventions.[11]

In view of these difficulties, it is perhaps not surprising that ways have been sought to avoid the effect of *Scruttons v Midland Silicones*. One possible course is for the contracting party to intervene in the action and apply to stay it. This possibility was inconclusively tested in *Gore v Van der Lann (Liverpool Corporation intervening)*.[12]

8 [1966] 1 QB 716, [1965] 2 All ER 725.
9 See pp 180-181, above.
10 See per Lord Denning MR in *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400 at 412, [1973] 1 All ER 193 at 197-198.
11 See Giles 24 ICLQ 379 at 390.
12 [1967] 2 QB 31, [1967] 1 All ER 360; Odgers 86 LQR 69. See also *Genys v Mathews* [1965] 3 All ER 24, [1966] 1 WLR 758.

> The plaintiff was an old age pensioner who applied for and received a free pass on the Liverpool Corporation's buses. The pass purported to be a licence to travel on the corporation's buses on condition that neither the corporation nor its servants would be liable for injury, etc. however caused. The plaintiff was injured and brought an action against the driver alleging negligence.

In the event the Court of Appeal held that the pass constituted not a licence but a contract,[13] and that the exclusion of liability was therefore void under section 151 of the Road Traffic Act 1960. The court considered the application for a stay, obiter, and suggested that a stay might be obtained either if there were an express promise not to sue the servant or if the employer were under a legal (and not simply a moral) obligation to reimburse the servant for any damages he might be held liable to pay. The former possibility was applied, in a different setting, by Ormrod J in *Snelling v John G Snelling Ltd.*[14]

A second possibility is to seek to create a direct contract between potential plaintiff and potential defendant. An elaborate attempt to do this was upheld by the majority of the Judicial Committee of the Privy Council in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd, The Eurymedon:*[15]

> The consignor loaded goods on a ship for carriage to the plaintiff consignee in New Zealand. The carriage was subject to a bill of lading issued by the carrier's agent, which contained the following clause: '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 the bill of lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any 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'.[16] After the plaintiff had become the holder of the bill of lading, the cargo was damaged as a result of the negligence of the defendant, the stevedores, employed by the carriers to unload the cargo in New Zealand. The plaintiff sued for damages and the defendant relied on the clause above.

13 This decision has been forcefully criticised by Odgers, above, on the ground that it is difficult to reconcile with *Wilkie v London Passenger Transport Board* [1947] 1 All ER 258. See p 39, above.

14 [1973] QB 87, [1972] 1 All ER 79. See p 508, below.

15 [1975] AC 154, [1974] 1 All ER 1015. Coote 37 MLR 453; Reynolds 90 LQR 301.

16 This clause is popularly known as the 'Himalaya clause', being named after the ship in *Adler v Dickson*, p 182, above. That the clause was not revised after *Scruttons Ltd v Midland Silicones Ltd* is perhaps evidence of the conservatism of both the legal and shipping professions.

The majority of the Judicial Committee of the Privy Council (Viscount Dilhorne and Lord Simon of Glaisdale dissenting) held for the defendant. They held that the clause, although it looked like an attempt to make the stevedores (and others) parties to the contract of carriage could be treated as an offer by the consignor of a unilateral contract, viz that if those involved in performance of the main contract would play their part (eg in the case of the stevedore, unload the goods) the consignor would hold them free from liability. The stevedore was held to have accepted the offer by unloading the goods and the plaintiff consignee by presenting the bill of lading to have contracted on bill of lading terms.[17]

Both the correctness and the ambit of this decision have been the subject of debate. Critics have plausibly argued that the clause was not aptly worded to produce this result and that it might have been more beneficial to reject the clause and compel the draftsman to try again. They have also pointed to technical difficulties presented by the majority analysis, eg would the result have been different if the stevedore had injured the goods before they had unloaded them or before the consignees took up the bill of lading.[18] Defenders of the decision have replied with force that it shows a robust awareness of the commercial realities of the situation.

Since 1974 *The Eurymedon* has been considered in a number of Commonwealth decisions,[19] on the whole with some lack of enthusiasm. The most important decision is *Salmond and Spraggon (Australia) Pty Ltd v Port Jackson Stevedoring Pty Ltd, The New York Star.*[20] In this case the relevant contractual provisions were identical to those of *The Eurymedon.* The appellant stevedores had safely unloaded the goods into their warehouse, whence they were stolen owing to their negligence. The High Court of Australia gave judgment for the consignees (Barwick CJ dissenting) but on a variety of grounds. Mason and Jacobs JJ accepted *The Eurymedon* but distinguished it on the ground that the stevedores' immunity only applied while they were doing work that the carrier was employed to do and that once the goods had been discharged into the warehouse,[1] the stevedores were acting on their own behalf and not as agents for the carriers. Stephen and Murphy JJ both in effect rejected *The Eurymedon.*[2] The Privy Council in a brief judgment allowed the stevedores' appeal. They assumed without much elaboration the correctness of *The Eurymedon* and rejected the suggested distinction on the ground that where the consignee does not collect direct from the ship, the carrier still acts as carrier when he discharges into a warehouse and that the stevedores were therefore acting for the carriers when they did likewise.

17 Cf *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co* [1924] 1 KB 575.

18 It is assumed that the burden of an exemption clause cannot be imposed on a non-party without his consent. This seems correct in principle, though there are three decisions at first instance which can be read to the contrary: *Fosbroke-Hobbes v Airwork Ltd and British American Air Services Ltd* [1937] 1 All ER 108; *Pyrene Co v Scindia Navigation Co* [1954] 2 QB 402, [1954] 2 All ER 158; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450.

19 See Clarke 29 ICLQ 132; Palmer *Bailment* (2nd edn, 1991), pp 1610-1625.

20 [1979] 1 Lloyd's Rep 298, 52 ALJR 337 (High Court of Australia); Reynolds 95 LQR 183; Palmer and Davies 41 MLR 745; [1980] 3 All ER 257 [1981] 1 WLR 138 (Privy Council); Reynolds 96 LQR 506.

1 It appears that this point was not argued before the High Court having been rejected as unarguable by Glass JA in the Court of Appeal.

2 It appears also that there was no argument as to the correctness of *The Eurymedon* before the High Court.

An important step towards clarity is provided by the decision of the Privy Council in *The Pioneer Container, KH Enterprise (cargo owners) v Pioneer Container (owners)*.[3] In this case, goods were being carried under bills of lading, clause 26 of which provided:

> This Bill of Lading contract shall be governed by Chinese Law. Any claim or other dispute arising thereunder shall be determined at Taipei in Taiwan unless the carrier otherwise agrees in writing.

In some cases the bills of lading had been issued to the goods' owners[4] but many of the goods' owners had not entered into bill of lading contracts with the defendants but had received bills of lading from other ship owners which contained provisions such as:

> 6. The Carrier shall be entitled to sub-contract on any terms the whole or any part of the handling, storage or carriage of the Goods and any and all duties whatsoever undertaken by the Carrier in relation to the Goods ...

These plaintiffs wished to argue that the exclusive jurisdiction clause was not as a matter of contract binding on them because they had never entered into a contract with the defendants. Of course, the contract which they had entered into might have contained a Himalaya clause which extended protection to agents and sub-contractors but the present dispute was not concerned with such a clause. The defendants' argument was that although they had no contract with the plaintiffs, they were bailees of the plaintiff's goods on the basis of the terms of their own bill of lading. The advice of the Privy Council was delivered by Lord Goff who approved the statement by *Pollock and Wright on Possession*[5] as follows:[6]

> If the bailee of a thing sub-bails it by authority, there may be a difference according as it is intended that the bailee's bailment is to determine and the third person is to hold as the immediate bailee of the owner, in which case the third person really becomes a first bailee directly from the owner and the case passes back into a simple case of bailment, or that the first bailee is to retain (so to speak) a reversionary interest and there is no direct privity of contract between the third person and the owner, in which case it would seem that both the owner and the first bailee have concurrently the rights of a bailor against the third person according to the nature of the sub-bailment.

So, where, as in the present case, the sub-bailment was with the consent of the owner, its effect was to create a direct bailment between owner and sub-bailee.

On what terms does the new bailee hold? Lord Goff held that the owner is bound by the sub-bailee's conditions if he has consented to them. Consent can, for this purpose, be express or implied, or indeed, in some circumstances, the original bailee may have apparent authority to consent on behalf of the owner. So the relationship between owner and sub-bailee may be governed by what the owner has agreed to, even though that agreement is not embodied in a contract between owner and sub-bailee.[7]

3 [1994] 2 All ER 250. See also *The Mahkutai* [1996] 2 Lloyd's Rep 1.

4 In respect of those owners, the disputes before the Privy Council on appeal from the Hong Kong Court of Appeal were concerned with familiar conflict of law questions as to whether the court should in its discretion allow an action to start in Hong Kong despite the exclusive jurisdiction clause.

5 P 169.

6 [1994] 2 All ER 250 at 257.

7 It follows that the decision of Donaldson J in *Johnson Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 Lloyd's Rep 215, that the terms of the sub-bailee's conditions may prevail even where the owner has not agreed to them is to that extent wrong.

A further masterly consideration of the problems in this field is to be found in the advice of the Judicial Committee of the Privy Council delivered by Lord Goff in *The Mahkutai*[8] where he made it clear that there were overwhelming policy reasons for having a uniform allocation of risk between shipowner, time charterer, stevedores and cargo owners which might, in an appropriate case, justify and require the creation of a common law exception to privity of contract.[9]

An interesting decision on the same problem in a different context is *Southern Water Authority v Carey*.[10] In this case main contractors entered into a contract with the plaintiffs for the construction of a sewage scheme. The defendants were sub-contractors. The main contract was on the I Mech E/IEE Model Form A which contained a clause 30(vi) which provided

> The contractor's liability under this clause shall be in lieu of any condition or warranty applied by law as to the quality or fitness for any particular purpose of any portion of the works taken over under clause 28 (taking over) and save as in this clause expressed neither the contractor nor his sub-contractors, servants or agents shall be liable, whether in contract, tort or otherwise in respect of defects in or damage to such portions, or for any injury, damage or loss of whatsoever kind attributable to such defects or damage. For the purposes of this sub-clause the contractor contracts on his own behalf and on behalf of and as trustee for his sub-contractors, servants and agents.

The plaintiffs sued the defendants in tort. His Honour Judge David Smout, QC, Official Referee, held that although prima facie carelessness by a sub-contractor which was likely to and did cause damage to the building owner would give rise to liability, any duty of care should be limited by relevant surrounding circumstances and that the contractual setting was decisive in defining the area of risk which the plaintiffs and defendant had respectively accepted. It would appear material for this purpose that the contract between the plaintiffs and the main contractors was on a well known standard form, the terms of which would be very familiar to plaintiffs, main contractors and defendants alike.

The logic of this reasoning was carried a stage further in *Norwich City Council v Harvey*.[11] In this case the plaintiff engaged a firm of contractors to build an extension to a swimming pool complex under JCT 1963 (1977 revision). Clause 20 of this contract places the risk of loss or damage by fire during the course of the works on the employer and requires him to maintain adequate insurance against loss or damage by fire. This clause has been held to put the risk of damage by fire on the employer even when the damage is caused by the negligence of the contractor.[12] In the present case both the existing works and the extension were damaged by fire owing to the negligence of an employee of the sub-contractor who had been engaged by the contractor to do certain roofing work. The plaintiffs sued the sub-contractors and their employee. In this case there was of course no contract between the plaintiffs and the sub-

8 [1996] 3 All ER 502

9 *The Mahkutai* was not such a case because the primary issue was the applicability of an exclusive jurisdiction clause which raised different questions.

10 [1985] 2 All ER 1077, 1 Con LR 40. See also *Twins Transport v Patrick and Brocklehurst* (1983) 25 BLR 65.

11 [1989] 1 All ER 1180, [1989] 1 WLR 828.

12 *Scottish Special Housing Association v Wimpey Construction UK Ltd* [1986] 2 All ER 957, [1986] 1 WLR 995.

contractors. Normally, one would expect the sub-contractors to be under a duty of care in respect of any personal injury or property damage which might be caused by their careless performance of their duties under the contractual arrangements. The Court of Appeal held that in the present case the defendants were not under such a duty of care. This carries the reasoning of the *Carey* case a step further because there was no express provision in the present case as to the liability of the sub-contractors. The Court of Appeal reached the conclusion that the sub-contractors should be free from liability on the basis that the employers had assumed the risk of damage by fire as against the sub-contractors as well as against the contractors. In considering this conclusion it is important to bear in mind that the parties were operating under an extremely well known and well established form so that everyone concerned knew or at least ought to have known the allocation of risk; that a very large proportion of the actual work under a modern construction contract is done by sub-contractors and that the same allocation of risk provision is contained in the sub-contract as in the main contract, the sub-contract itself being of the same provenance as the main contract. This decision makes excellent commercial sense since it encourages the taking out of a single insurance policy to cover all the interests which may be affected by damage to the works while they are in progress which must be the most economic arrangement for everyone except the insurance companies.

Cases of this kind now fall to be considered in the light of developments in the law of tort. The question is now whether it is fair, just and reasonable to impose a duty of care on a sub-contractor in relation to the property of the employer. In doing this, it will be appropriate to look at the contractual setting but, as the House of Lords emphasised in *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd*,[13] in doing so, it will be necessary to look at the whole of that setting.[14]

In so far as the difficulties in this field arise from privity of contract they will have been largely removed by the passing of the Contract (Rights of Third Parties) Act 1999. This is discussed more fully in chapter 14 but it should be noted here that section 1(6) makes it clear that the Act applies to the situation in which a third party seeks to take advantage of the exclusions or limitations of liability contained in a contract between other parties.

(6) If a person contracts to deliver or do one thing and he delivers or does another, he has failed to perform his contractual duty. The proposition is self-evident. As long ago as 1838, Lord Abinger sought to contrast the breach of a term in a contract for the sale goods with the complete non-performance of the contract.

> If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty: there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it.[15]

So, too, in *Nichol v Godts*:[16]

13 (1998) 61 Con LR 1

14 In that case, careful reading of the contract meant that nominated sub-contractors did not owe a duty of care but that domestic sub-contractors did.

15 *Chanter v Hopkins* (1838) 4 M & W 399 at 404

16 (1854) 10 Exch 191. See also *Wieler v Schilizzi* (1856) 17 CB 619.

> A seller contracted to sell to a buyer 'foreign refined rape oil, warranted only equal to sample'. The oil delivered corresponded with the sample, but was found not to be 'foreign refined rape oil' at all.

The seller was held not to be protected by the term he had inserted; and Pollock CB remarked that 'if a man contracts to buy a thing, he ought not to have something else delivered to him'.

Looking back in 1966 upon these and similar cases, Lord Wilberforce said:[17]

> Since the contracting parties could hardly have been supposed to contemplate such a mis-performance, or to have provided against it without destroying the whole contractual substratum, there is no difficulty here in holding exception clauses to be inapplicable.

In the present century the reasoning thus adopted in contracts for the sale of goods has been applied to contracts of hire purchase. In *Karsales (Harrow) Ltd v Wallis*:[18]

> The defendant inspected a car owned by X, found it in good order and wished to take it on hire purchase. X therefore sold it to the plaintiffs, and they re-sold it to a hire-purchase company. The defendant made a contract with this company. The contract contained a term that 'no condition or warranty that the vehicle is road-worthy or as to its condition or fitness for any purpose is given by the owner or implied therein'. One night a 'car' was left outside the defendant's premises. It looked like the car in question. But it was a mere shell; the cylinder head was broken; all the valves were burnt; two pistons were broken, and it was incapable of self-propulsion.

The defendant refused to accept it or to pay the hire-purchase instalments; and, when sued for these, pleaded the state of the so-called car. In reply to this plea, the plaintiffs relied on the excluding term. The Court of Appeal held that the thing delivered was not the thing contracted for. The excluding term therefore did not avail the plaintiffs, and judgment was given for the defendant.[19]

A parallel but distinct development has long been a feature of the law governing the carriage of goods by sea. It is implied in every voyage charter-party and in all bills of lading that the ship will not depart from the route laid down in the contract, or, if none is there prescribed, from the normal trade route. If, without lawful excuse, she does so depart, she is guilty of a deviation. In *Joseph Thorley Ltd v Orchis Steamship Co*:[20]

> A cargo was shipped on a vessel described as 'now lying in the port of Limassol and bound for London'. Instead of proceeding direct to London,

17 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 433, [1966] 2 All ER 61 at 92-93.

18 [1956] 2 All ER 866, [1956] 1 WLR 936.

19 In this case the car was spectacularly defective since (a) it was in very different condition when delivered than it had been when inspected and (b) in some Platonic sense it was not a 'car' at all, since it was incapable of self-propulsion. But the principle was quickly extended to a situation where neither of these factors were present but simply a congeries of defects: *Yeoman Credit v Apps* [1962] 2 QB 508, [1961] 2 All ER 281. See also *Astley Industrial Trust v Grimley* [1963] 2 All ER 33, [1963] 1 WLR 584 and *Charterhouse Credit Co v Tolly* [1963] 2 QB 683, [1963] 2 All ER 432.

20 [1907] 1 KB 660. 'Lawful excuse' covers eg saving life or the ship itself. Livermore 2 JCL 241.

the ship went first to a port in Asia Minor, then to a port in Palestine and then to Malta. When she reached London, the cargo was damaged through the negligence of the stevedores. The shipowners pleaded a term in the bill of lading exempting them from such liability.

It was held that the deviation, though it was not the direct cause of the damage, precluded the shipowners from relying on this term. Fletcher Moulton LJ said:[1]

> The cases show that, for a long series of years, the Courts have held that a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulations in his favour contained in the bill of lading.

The result of the 'deviation' cases has been summarised by Lord Wilberforce.[2]

> A shipowner, who deviates from an agreed voyage, steps out of the contract, so that clauses in the contract (such as exception or limitation clauses) which are designed to apply to the contracted voyage are held to have no application to the deviating voyage.

From the carriage of goods by sea the courts turned to the carriage of goods by land, and thence to bailment in general. In *Lilley v Doubleday*,[3] the defendant agreed to store in his repository, goods owned by the plaintiff. In fact he stored some of them in another warehouse. These latter goods were destroyed by fire, though without the defendant's negligence. The plaintiff was held to be entitled to recover their value. By depositing them elsewhere than in his repository the defendant, had 'stepped out of his contract', and he thus lost the benefit of any exemption clauses. Such cases, based on the analogy of carriage of goods by sea and attended by similar consequences, are often described as instances of 'quasi-deviation'.

A later example of such quasi-deviation is given by *Alexander v Railway Executive*:[4]

> The plaintiff was a stage performer. Together with an assistant, X, he had been on tour and he now deposited in the parcels office at Launceston railway station three trunks containing properties for what he called an 'escape illusion'. He paid 5d for each trunk, obtained for each a ticket and promised to send instructions for their despatch. Some weeks later, and before such instructions were sent, X persuaded the parcels clerk by telling a series of lies to allow him to open the trunks and remove several articles. X was subsequently convicted of larceny. The plaintiff now sued the defendants for breach of contract and the defendants pleaded the following term: 'Not liable for loss, misdelivery or damage to any articles which exceed the value of £5 unless at the time of deposit the true value and nature thereof have been declared by the depositor [and an extra charge paid].' There had been no such declaration or payment.

1 [1907] 1 KB at 669.
2 *Suisse Atlantique etc v NV Rotterdamsche etc* [1967] 1 AC 361 at 433–434. [1966] 2 All ER 61 at 93.
3 (1881) 7 QBD 510. See also *Gibaud v Great Eastern Rly Co* [1921] 2 KB 426 at 435.
4 [1951] 2 KB 882. [1951] 2 All ER 442.

Devlin J gave judgment for the plaintiff. Sufficient notice, it is true, had been given of the term, but it did not cover the facts of the case: the word 'misdelivery' was not apt to describe a deliberate delivery to the wrong person. Nor, if it did meet the facts, could it avail the defendants. They had been guilty of a 'fundamental breach of contract' in allowing X to open the trunks and remove their contents.

The phrase 'fundamental breach of contract', used in this case by Devlin J had been adopted fifteen years earlier by Lord Wright, when he analysed the nature and effect of a contract for the carriage of goods by sea.

> An unjustified deviation is a fundamental breach of a contract of affreightment ... The adventure has been changed. A contract, entered into on the basis of the original adventure, is inapplicable to the new adventure.[5]

Whether a party has been guilty of such a fundamental breach is not an easy question to answer: each case must be examined in its context.[6] In borderline cases, much may turn upon the onus of proof. If the defendant pleads an excluding or limiting term and the plaintiff in reply alleges a fundamental breach, is it for the plaintiff to prove such a breach or for the defendant to disprove it?

The question was discussed in *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd.*[7]

> The defendants contracted with the plaintiffs to carry 15 parcels of woollen goods to Manchester. Only 12 parcels arrived. The plaintiffs sued the defendants for damages equal to the value of the 3 lost parcels, and the defendants pleaded a term of the contract limiting the amount which might be claimed for any such loss 'however sustained'. The plaintiffs alleged negligence but did not in their pleadings allege a fundamental breach. The defendants offered no evidence to explain why or where the parcels had been lost.

The Court of Appeal gave judgment for the defendants. On the assumption that the defendants had in fact been guilty of negligence, the term protected them unless they had committed a fundamental breach of contract. The vital question was to determine the onus of proof. The court held that the burden lay upon the plaintiffs and that they had not discharged it. Lord Evershed admitted that this conclusion was severe: the plaintiffs had no means of knowing how their goods had been lost, and the defendants could not or would not offer any explanation. But, hard as it may seem, it is not illogical. He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. If he succeeds in this task, it is for the defendant to plead and to prove some special plea such as an excluding or limiting term. The burden must then pass back to the plaintiff who must show some reason why the term is to be disregarded.

5 *Hain Steamship Co v Tate and Lyle Ltd* [1936] 2 All ER 597 at 607-608.

6 Compare *Hollins v J Davy Ltd* [1963] 1 QB 844, [1963] 1 All ER 370, and *Mendelssohn v Normand Ltd* [1970] 1 QB 177, [1969] 2 All ER 1215. The criteria for deciding what is 'fundamental' may very well vary between different types of contract. So courts have tended to regard the distinction between deliberate and careless breaches as relevant in bailment cases, but this seems to play no part in sale or hire purchase. See *A F Colvert & Co Ltd v Anglo Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352, and *John Carter v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495, [1965] 1 All ER 113.

7 [1962] 1 QB 617, [1962] 1 All ER 111. See Wedderburn [1962] CLJ 17; Aikin 26 MLR 98.

On the other hand a different result was reached in *Levison v Patent Steam Carpet Cleaning Co Ltd.*[8] In this case the plaintiffs entrusted a carpet worth £900 to the defendants for cleaning under a contract which purported to limit the defendant's liability to £40. The carpet disappeared in circumstances which could not be explained by the defendants. It was possible therefore that it had been lost by fundamental breach and the Court of Appeal held that the defendants could only limit their liability if they could show that the loss arose from some cause which did not constitute fundamental breach. It is not too easy to see the distinction between this case and *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd.*[9] One suggested explanation is that fundamental breach was not specifically pleaded in the *Hunt* case and another possibility would be a different rule for contracts of carriage and other bailments. Perhaps the least unsatisfactory explanation is that *Levison* was a consumer.[10]

The courts have thus developed over a period of years two sets of rules. The failure to distinguish them has helped to blur the choice between two propositions: (1) that by a rule of law no excluding or limiting term may operate to protect a party who is in fundamental breach of his contract; and (2) that the question is not one of substantive law but depends upon the interpretation of the individual contract before the court. This distinction between a rule of law and a rule of construction permeates English law as a whole and in its long life has generated many curious subtleties and provoked many petty quarrels.[11] A rule of law is to be applied whether or not it defeats the intention of the parties. A rule of construction exists to give effect to the intention. Within the sphere of contract the doctrine of public policy operates as a rule of law: a contract which offends it is void despite the wishes of the parties. The effect of mutual mistake, on the other hand, is assessed by applying a rule of construction: it must be asked what, if anything, a reasonable person would think was 'the sense of the promise'.[12]

If there were a rule of law that no exemption clause however clear could exclude liability for fundamental breach, the nature of the exemption clause would be of vital significance. Where the clause went to define the extent of the promisor's obligation, the possibility of fundamental breach would be *pro tanto* excluded since nothing can be a fundamental breach which is not first a breach.[13] There was much academic discussion of the nature of the doctrine[14] and puzzlement as to its content. Were there two distinct doctrines—breach of a fundamental term and fundamental breach or were they simply alternative formulations of the same doctrine? What was the relationship between fundamental terms and conditions? Could the doctrine be side-stepped by

8 [1978] QB 69, [1977] 3 All ER 498. Males [1978] CLJ 24; Stone 41 MLR 748; Palmer *Bailment* (2nd edn, 1991) pp 1552-1557.

9 [1962] 1 QB 617, [1962] 1 All ER 111.

10 The case would now fall within Unfair Contract Terms Act 1977, s 3.

11 The rule in *Shelley's Case*, abrogated in 1925 after three centuries of controversy, is the classical example of this dichotomy. Its memory is happily embalmed in a judgment of sustained irony delivered by Lord MacNaughten in *Van Grutten v Foxwell* [1897] AC 658 at 670-676.

12 P 271, below.

13 *The Angelia* [1973] 2 All ER 144, [1973] 1 WLR 210.

14 See eg Montrose 15 Can Bar Rev 760; Unger 4 Business L Rev 30; Melville 19 MLR 26; Guest 77 LQR 98; Reynolds 79 LQR 534; Montrose [1964] CLJ 60, 254; Devlin [1966] CLJ 192.

'shrinking the core of the contract', ie by the promisor accepting a small obligation from the beginning instead of accepting a larger obligation and trying to cut it down by exemption clauses?[15]

Before 1964 the tendency of the courts was to prefer the first of these alternatives and to rely upon a rule of law.[16] But in that year, Pearson LJ chose the second alternative.

> As to the question of fundamental breach, I think there is a rule of construction that normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the parties.[17]

Two years later the House of Lords was given the opportunity to indicate its preference in the case of *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*.[18]

> The plaintiffs owned a ship which in December 1956 they chartered to the defendants for the carriage of coal from the United States to Europe. The charter was to remain in force for two years' consecutive voyages. The defendants agreed to load and discharge cargoes at specified rates; and, if there was any delay, they were to pay a thousand dollars a day as demurrage. In September 1957, the plaintiffs claimed that they were entitled to treat the contract as repudiated by the defendants' delays in loading and discharging cargoes. The defendants rejected this contention. In October 1957, the parties agreed (without prejudice to their dispute) to continue with the contract. The defendants subsequently made eight round voyages. The plaintiffs then claimed all the money which they had lost through the delays. The defendants argued that the claim must be limited to the agreed demurrage for the actual days in question. The plaintiffs replied that the delays were such as to entitle them to treat the contract as repudiated: the demurrage clause therefore did not apply, and they could recover their full loss.

Mr Justice Mocatta, the Court of Appeal and the House of Lords all held that the plaintiffs must fail. They had elected to affirm the contract, and the demurrage clause applied. But in the House of Lords, and for the first time, the plaintiffs argued that the defendants had been guilty of a fundamental breach of contract which prevented them from relying on a 'limiting term'. The House of Lords rejected this argument. There was, on the facts, no fundamental breach, nor was the provision for demurrage a 'limiting term':

15 See Wedderburn [1957] CLJ 12, [1960] CLJ 11. No doubt a shrunken core would be less attractive to a potential promisee than an apparently whole apple. See also Barton 87 LQR 20 on possible use of a deed as a method of exemption.

16 See *Alexander v Railway Executive* [1951] 2 KB 882, [1951] 2 All ER 442, p 179; *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, [1956] 1 WLR 936, pp 178-179, above; *Yeoman Credit Ltd v Apps* [1962] 2 QB 508, [1961] 2 All ER 281.

17 *UGS Finance Ltd National Mortgage Bank of Greece SA* [1964] 1 Lloyd's Rep 446 at 453. See also the valuable judgments of the High Court of Australia in *Sydney City Council v West* (1965) 114 CLR 481 and *Thomas National Transport (Melbourne) Pty Ltd v May and Baker (Australia) Pty Ltd* [1966] 2 Lloyd's Rep 347.

18 [1967] 1 AC 361, [1966] 2 All ER 61. Treitel 29 MLR 546; Drake 30 MLR 531; Jenkins [1969] CLJ 257.

it was a statement of agreed damages in the event of delay. In the result it was unnecessary for the House of Lords to discuss the meaning and effect of fundamental breach. But the arguments offered to them by the plaintiffs raised issues of general contractual importance which they felt they must examine. Their opinions, though not technically binding on the courts, represent views which cannot be disregarded.

The five members of the House of Lords who heard the *Suisse Atlantique* case approved, with some doubts but no dissent, the approach to the problem of fundamental breach which Pearson LJ had preferred in 1964. The rules to be applied should be regarded as rules of construction and not as rules of law.[19]

It was unfortunate that the first modern consideration of the topic by the House of Lords should have involved atypical facts and arguably not presented a fundamental breach situation at all. A further difficulty was that their Lordships attached considerable significance to the fact that the plaintiffs had affirmed the contract. This led some to think that exemption clauses might be disregarded in deciding whether there had been a sufficient breach to entitle the injured party to terminate the contract and that if he did so the excluding or limiting clauses could be treated as ineffective.

This lack of total clarity in the speeches in the House of Lords was followed by a series of decisions in the Court of Appeal, which behaved as if the House of Lords had never spoken at all[20] and continued to treat fundamental breach as a rule of law. This indiscipline was firmly corrected in *Photo Production Ltd v Securicor Transport Ltd.*[1]

> The plaintiffs, the owners of a factory, entered into a contract with the defendants, a security organisation, under which the defendants were to arrange for periodic visits to the factory during the night. On one such visit, an employee of the defendants started a small fire which got out of hand and destroyed the entire factory and contents, worth about £615,000. The plaintiffs brought an action and the defendants relied on exemption clauses, including one which provided that 'under no circumstances' were they 'to be responsible for any injuries act or default by any employee ... unless such act or default could have been foreseen and avoided by the exercise of due diligence' by the defendants. (It was not alleged that the defendants had been negligent in engaging this employee.)

In the Court of Appeal it was held that this exemption could not avail the defendants because they had been guilty of a fundamental breach but the House of Lords unanimously reversed this decision. Lord Wilberforce said:[2]

19 It is noteworthy however that their Lordships did not think any of the earlier cases in which the rule was treated as one of law were incorrect in the result. Both Lord Reid and Lord Wilberforce appeared to reserve the possibility that there might be super-fundamental breaches liability for which could not be excluded.

20 *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225; *Farnworth Finance Facilities Ltd v Attryde* [1970] 2 All ER 774, [1970] 1 WLR 1053; *Wathes (Western) Ltd v Austins (Menswear) Ltd* [1976] 1 Lloyd's Rep 14. These cases, especially the first, were subject to powerful criticism. See Weir [1970] CLJ 189; Baker 33 MLR 441; Legh-Jones and Pickering 86 LQR 513, 87 LQR 515; Dawson 91 LQR 380; Fridman 7 Alberta L Rev 281; Reynolds 92 LQR 172. For a valiant attempt to reconcile House of Lords and Court of Appeal, see *Kenyon Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 2 All ER 708, [1971] 1 WLR 519.

1 [1980] AC 827, [1980] 1 All ER 556; Nicol and Rawlings 43 MLR 567.

2 And the other Lords agreed. The speeches appear deliberately brief as if to ensure that they cannot be misunderstood.

> 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 construction of the contract.

Furthermore he thought the clause completely clear and adequate to cover the defendant's position. The plaintiff's action therefore failed. It is instructive to note that the House of Lords thought this result not only technically correct but also fair and reasonable.[3] This may seem surprising since the plaintiffs had suffered such an enormous loss but the key to understanding lies in the insurance position. In a commercial contract of this kind, many of the contractual provisions operate to allocate risks and in practice therefore to decide who should insure against the risk. Any prudent factory owner will insure his factory against damage or destruction by fire and he is much the best person to fix the value of the premises. It is doubtful if *Photo Production's* fire insurance premiums would have been significantly reduced if Securicor had accepted a higher degree of responsibility[4] but very likely that if Securicor had not excluded liability, they would have had to charge a considerably higher fee. It follows that the arrangements adopted were probably the most economically efficient and there was certainly no adequate reasons why the court should interfere with the parties' negotiated allocation of the risk.

STATUTORY PROVISIONS

Over the years Parliament has come to intervene more and more extensively in this area. This intervention has so far been piecemeal, that is, it has operated by the prohibition or regulation of exemption clauses in particular types of contract rather than by the enactment of rules applicable to all contracts. The intervention has been largely but by no means exclusively in the field of consumer protection. Part II of the Fair Trading Act 1973 gave the Secretary of State a discretion to make orders, on the recommendation of the Consumer Protection Advisory Committee, regulating unfair consumer trade practices.[5] Such an order might forbid the use of particular types of exemption clause in particular situations and it would then be a criminal offence to insert such a term in such a contract. This is a radical new departure from the usual legislative technique of declaring the clause void.[6]

We cannot give an exhaustive list of such provisions here but a number of examples may be given.[7]

(1) The Road Traffic Act 1960, section 151, provides that:

3 Thereby providing clues as to the application of the reasonableness test under the Unfair Contract Terms Act 1977.

4 Because the risk of a fire being started by a Securicor employee was such a small part of the total risk covered.

5 For a full account, see Cunningham *the Fair Trading Act 1973: Consumer Protection and Competition Law* ch 5, pp 80-41.

6 Where a clause is simply declared void, a tradesman may continue to insert it in his contracts and it will give him effective protection against those who do not know the law or do not take legal advice—a very large proportion of the population! Such an order is made by the Consumer Transactions (Restrictions on Statements) Order 1976 SI 1976/1813 as amended by SI 1978/27.

7 See also Grunfeld 24 MLR 62 at 64-65; Patents Act 1949, s 57.

> A contract for the conveyance of a passenger in a public service vehicle shall, so far as it purports to negative or to restrict the liability of a person in respect of a claim which may be made against him in respect of the death of, or bodily injury to, the passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability, be void.[8]

(2) A similar, but not identical, provision is contained in the Transport Act 1962. By section 43(7) it is enacted that:

> The Boards[9] shall not carry passengers by rail on terms or conditions which (a) purport, whether directly or indirectly, to exclude or limit their liability in respect of the death of, or bodily injury to, any passenger other than a passenger travelling on a free pass, or (b) purport, whether directly or indirectly, to prescribe the time within which or the manner in which any such liability may be enforced.

Any such terms or conditions 'shall be void and of no effect'.

(3) The most important legislative provisions are the Unfair Contract Terms Act 1977[10] and the Unfair Terms in Consumer Contracts Regulations 1994. Between them the Act and the Regulations would now govern the result of the majority of cases which we have discussed in this section and arguably we should have started our discussion with them. However the Act presupposes the existing law, does not oust it altogether and cannot easily be understood without reference to it. The Act and the Regulations overlap and fit together awkwardly. It will be simplest, therefore, to consider them separately.

1 THE SCOPE OF THE ACT

The title of the Act is grossly misleading. It does not deal in principle with all unfair contract terms but only with unfair exemption clauses. It does not, in general, deal with unfair imposition of liability.[11] Even in the context of exemption clauses, it does not introduce a test of fairness. Some clauses are declared ineffective per se; others are subjected to a test of reasonableness.

The Act is divided into three parts. Part I applies to England, Wales and Northern Ireland; Part II to Scotland and Part III to the whole of the United Kingdom.[12] We shall confine our discussion to Part I and III.

The Act applies widely but it does not apply to all contracts. The provisions as to which contracts fall within the purview of the Act are complex:

(1) Sections 2 to 7 (the main enacting provisions of Part I) apply only to business liability.[13] Business liability is defined as 'liability for breach of

8 This section was discussed by the Court of Appeal in *Gore v Van der Lann (Liverpool Corpn intervening)* [1967] 2 QB 31, [1967] 1 All ER 360. See p 184, above. See also Motor Vehicles (Passenger Insurance) Act 1971.

9 Four Boards were created by the Transport Act 1962, including the British Railways Board. The Transport Act 1968 drastically changed the organisation which has been changed again by the process of privatisation.

10 Coote 41 MLR 312; Adams 41 MLR 703; Mann 27 ICLQ 661; Sealy [1978] CLJ 15. Palmer and Yates [1981] CLJ 108; Adams and Brownsword 104 LQR 94; Palmer 7 BLR 57; Macdonald [1994] JBL 441.

11 To some small extent, this may not be true of s 3 (see p 201, below) or s 4 (see p 209, below) Nicol [1979] CLJ 273.

12 It is believed that the objectives of Part I and Part II are to a considerable extent the same but the language used is very different and the results may well not be the same.

13 S 1(3). S 6(4) is the one exception but this is relatively unimportant since exemption clauses are relatively unusual in non-business sales and fewer terms are implied into a sale where the seller is not a merchant.

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); and (b) from the occupation of premises used for business purposes by the occupier'. There is no definition of 'business' but section 14 provides that 'business' includes 'a profession and the activities of any Government department or local or public authority'. This still leaves a number of unclear areas, for example, state schools are clearly within the Act; public schools may not be but it is thought that a purposive interpretation would include them.

(2) Schedule 1 contains a list of contracts to which the whole or part of sections 2, 3, 4 and 7 do not apply. These include:
   (a) contracts of insurance (including contracts of annuity);
   (b) contracts relating to the creation, transfer or termination of interests in land;[14]
   (c) contracts relating to the creation, transfer or termination of rights or interests in intellectual property such as patents, trade marks, copyrights etc.;
   (d) contracts relating to the formation or dissolution of a company or the constitution or rights or obligations of its members;
   (e) contracts relating to the creation or transfer of securities or of any right or interest therein;
   (f) contracts of marine salvage or towage; or charterparty of ships or hovercraft or of carriage of goods by sea, by ship or hovercraft (except in relation to section 2(1) or in favour of a person dealing as consumer).

   It will be seen that a number of extremely common and important contracts are thereby excluded.

(3) International supply contracts are outside the scope of the Act. International supply contracts are defined by section 26. There are three requirements:
   (a) the contract is one for the sale of goods or under which either the ownership or possession of goods will pass; and
   (b) the places of business (or if none, habitual residences) of the parties are in the territories of different states (the Channel Islands and the Isle of Man being treated for this purpose as different states from the United Kingdom); and
   (c) Either–
      (i) at the time the contract is concluded the goods are in the course of carriage or will be carried from the territory of one state to the territory of another; or
      (ii) the acts constituting the offer and acceptance have been done in the territories of different states; or
      (iii) the contract provides for the goods to be delivered to the territory of a state other than that within which the acts of offer and acceptance were done.

(4) Where English law is the proper law of the contract 'only by choice of the parties' sections 2 to 7 shall not operate as part of the proper law. Both (3) and (4) are concerned with the problem of international contracts, that is contracts having a close connection with more than one country.

14 Wilkinson [1984] Conv 12. See *Electricity Supply Nominees Ltd v IAF Group plc* [1993] 3 All ER 372.

Historically English courts and arbitrators have enjoyed a wide jurisdiction in respect of disputes over such contracts. It would appear that these provisions are designed not to frighten awav foreign businessmen bv subjecting their contracts to the control imposed by the Act.

2 THE ARRANGEMENT OF THE ACT

The main enacting provisions of Part I are sections 2, 3, 6 and 7. These sections interrelate in a curious way. Section 6 applies only to contracts of sale and hire purchase.[15] Section 7 applies to contracts other than contracts of sale or hire purchase under which possession or ownership of goods passes, for example, contracts of hire, exchange or for work and materials.[16] These two sections are therefore mutually exclusive, applying as they do only to specific types of contract. Sections 2 and 3, on the other hand, are of general application and are potentially applicable to any contract within the scope of the Act, including those covered by section 6 or 7. It is possible, therefore, for different provisions in, for example, a contract of sale to be subject to sections 2, 3 and 6.

Section 2 deals with liability for negligence. Negligence is defined under section 1 to mean the breach either of a contractual obligation, 'to take reasonable care or to exercise reasonable skill in the performance of the contract' or of 'any common law duty to take reasonable care or exercise reasonable skill' or 'of the common duty of care imposed by the Occupiers' Liability Act 1957'. It will be seen, therefore, that this section is dealing with liability for negligence both in contract and tort.

Section 3 deals with two quite distinct though overlapping types of contract. One is where the contract is between two parties, one of whom deals as consumer;[17] the other is where it is between two parties, one of whom deals on the 'other's written standard terms of business'. Obviously many consumer contracts are on the supplier's written standard terms of business but equally many business contracts are too. Unfortunately, the Act is completely silent as to the meaning of the expression.[18] It clearly covers the case of a business which has its own custom-built terms but what of a business which uses standard trade association terms. It seems natural to say that, say, a road haulier who always carries goods on the terms of the Road Haulage Association standard conditions falls within the policy of the section. But what of two commodity traders who have regular dealings on the basis of their trade association terms. Is either dealing on the other's written standard terms of business? Another unclear example would be a builder who habitually enters into building contracts under the JCT Contract Form. Arguably these are his standard terms of business since he regularly employs them; on the other hand he has no direct voice in the drafting of the conditions.[19] It is also

15 It is largely a re-enactment of the relevant parts of the Supply of Goods (Implied Terms) Act 1973.

16 This last category is a very important one in practice, embracing most contracts where goods are being manufactured especially to the customer's requirements instead of being supplied from stock.

17 Who is a consumer is discussed, p 202, below.

18 The corresponding provision in Part II, s 17 uses the formula 'standard form contract' which is easier to apply.

19 In practice these difficulties may not matter too much, since the section applies the test of reasonableness and in many cases terms caught by a wide construction of 'written standard terms of business' would survive a test of reasonableness.

questionable at what stage standard terms of business, which are amended in negotiation, cease to be standard terms.[20]

3 CONTRACT TERMS MADE TOTALLY INEFFECTIVE BY THE ACT

The Act applies in two ways, either to make a term totally ineffective or to subject it to a test of reasonableness. The following terms are made ineffective:

(a) *Personal injury or death* Under section 2(1) it is no longer possible to exclude or restrict liability in negligence for personal injury or death 'by reference to any contract terms or to a notice given to persons generally or to particular persons'. The reference to notices embraces wide areas of tort liability, where there was no contractual relationship between the parties, for example, where visitors are allowed on to premises without payment.[1]

(b) In contracts of sale or hire purchase, the implied undertakings as to title of the seller or owner cannot be excluded or restricted.[2]

(c) In consumer[3] contracts of sale or hire purchase, the seller or owner's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose cannot be excluded or restricted.[4]

(d) The same rule applies to contracts within section 7 when the goods are supplied to a consumer.[5]

4 TERMS SUBJECTED TO A TEST OF REASONABLENESS[6]

(a) *Loss or damage arising from negligence other than personal injury or death.*[7] This provision, like section 2(1), is primarily aimed at attempts to exclude or limit tort based liability for negligently inflicted injury though it no doubt also includes attempts to exclude contractual duties of care. It is necessary to say a little more about tort based liability here. It is of course fundamental that in English tort law liability in negligence depends on the existence of a duty of care. As we have already seen in the discussion of exemption clauses and third parties[8] the contractual set up may be relevant to the existence of the duty of care. So an exclusion clause may be argued to negative the existence of a duty of care rather than to provide a defence for a negligent breach of a duty of care. An argument along these lines was rejected by the House of Lords in the twin appeal in *Smith v Eric S Bush* and *Harris v Wyre Forest District Council*.[9] In both cases the plaintiffs had bought houses with the help of mortgages, which had been granted after a professional valuation of the house carried out on behalf of the mortgagee. In both cases the valuer was careless and failed to notice major

20 See *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481.

1 Note that both s 2(1) and s 2(2) are subject to a cryptic provision that 'a person's agreement to or awareness of [the contract term or notice] is not of itself to be taken as indicating his voluntary acceptance of any risk': s 2(3).

2 S 6(1).

3 See p 202, below.

4 S 6(2).

5 S 7(2). the implied terms in these contracts are now defined by the Supply of Goods and Services Act 1982.

6 As to the content of the reasonableness test, see p 204, below.

7 S 2(2). And see n 1, above.

8 See p 188, above.

9 [1990] 1 AC 831, [1989] 2 All ER 514.

defects in the house which in effect made both houses valueless. When the plaintiffs discovered the defects they sought to sue the valuers in tort. Shortly, their argument was that the valuer knew that if he gave a favourable report the lenders were likely to make an offer of a mortgage and that the plaintiffs would know that this must be based on a favourable report on the premises (at least that they were good for the money which was being lent, though not necessarily for the price which was being paid) and that they could therefore safely buy the property without having to worry about the existence of major defects. The House of Lords approved an earlier decision in *Yianni v Edwin Evans and Sons*[10] that in principle liability could lie on such facts.

After the earlier decision most mortgage lenders had altered their practice. In particular many lenders of money including the two mortgagees in the present cases had adopted the practice of saying that the valuation constituted no kind of guarantee as to the value or condition of the property. In the Court of Appeal in *Harris* an argument was accepted that the effect of the disclaimer was not to provide a defence for breach of a duty of care but to prevent a duty of care arising in the first place. This argument was based on a number of statements in the leading decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[11] in which it had been said that liability for careless statements depends on the maker of the statement assuming liability for it. This argument was robustly rejected by the House of Lords. It appears to follow that since 1977 at least it is no use someone giving advice in a situation where liability would normally attach because the transaction was a serious one and hoping to escape liability by the deployment of a standard form disclaimer. It is important to emphasise that in this particular kind of transaction although there was no formal contractual relationship between the borrower and the valuer it was the borrower who paid for the valuation since it is the normal practice of lenders to charge a valuation fee which is not returnable if the valuation proves too low. Also many lenders are legally required to have valuations which are professionally carried out so the situation is not one in which it can be argued with any plausibility that everybody knew that the answer was being given off the cuff. It does not follow from this that there cannot be other situations of a non-standard kind where it can be successfully argued that there is no assumption of liability.

(b) *Contracts falling within section 3* This section contains a complex set of provisions, which are far from easy to understand or interpret. It provides that the person who deals with the consumer or on his own written standard terms of business

> 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

unless the term satisfies the reasonableness test.

10 [1982] QB 438, [1981] 3 All ER 592.
11 [1964] AC 465, [1963] 2 All ER 575.

The principal difficulty is the relationship between (a) and (b) above. It is clear that many cases of rendering a substantially different performance and most cases of rendering no performance will be breaches but those that are will fall within (a) and the draftsman must therefore have intended (b) to apply to such acts which were not breaches of contract at all. Presumably, this was an attempt to block a hole which draftsmen of standard form contracts might otherwise exploit by converting breaches into non-breaches. Unfortunately the Act does not appear to be based on, still less to state, any coherent theory as to the relationship between exemption clauses and clauses defining liability. This means that, as worded, (b) appears to catch not only ingeniously drafted exemption clauses but also provisions that have never previously been thought of as at all like exemption clauses. Suppose for instance a supplier of machine tools provided in his standard printed conditions that payment terms are 25 per cent with order and 75 per cent on delivery and that he should be under no obligation to start manufacture until the initial payment is made. Such a provision may now have to pass the test for reasonableness under section 3(2)(b)(ii). Of course it would very likely pass with flying colours but it is not a good argument for putting hurdles on a motorway that most cars will drive through them.

Another puzzle, more easily explicable, is the double test of reasonableness under section 3(2)(b)(i). It might be thought that delivery of a contractual performance substantially different from that which was reasonably expected could not be reasonable but this is probably not so, as where the substitute performance was better than what was contractually required, for instance, if an airline reserves the right to move tourist class passengers to first class seats at no extra cost.

(c) In non-consumer contracts of sale or hire purchase, the seller or owner's implied undertakings as to conformity of goods with description or sample or as to their quality or fitness for a particular purpose.[12]

(d) Similarly with the supplier's implied undertakings as to these matters in non-consumer contracts under section 7.[13]

(e) The liability of the supplier in all contracts under section 7 'in respect of (a) the right to transfer ownership of the goods, or give possession; (b) the assurance of quiet possession to a person taking goods in pursuance of the contract'.[14]

5 THE CONCEPT OF CONSUMER

The Act follows and extends the approach of the Supply of Goods (Implied Terms) Act 1973 in providing special rules for consumers and indeed it should be regarded as the greatest success of the consumer protection movements to date, so far as the law of contract is concerned. The definition of 'deals as consumer' is contained in section 12(1). This introduces a threefold test for the purposes of section 6 and 7, viz: the consumer

> (a) ... neither makes the contract in the course of a business nor holds himself out as doing so; and

12 S 6(3).
13 S 7(3).
14 S 7(4). Note that this was the one difference in approach between s 6 and s 7. Cf s 6(1). However, this difference was substantially removed by the new s 3(A) introduced by the Supply of Goods and Services Act 1982.

(b) the other party does make the contract in the course of a business; and
(c) ... the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

Outside sections 6 or 7, requirement (c) does not apply—no doubt because it is much more difficult to distinguish consumer services than consumer goods. It should be noted that transactions between consumers are not consumer transactions for the purpose of the Act because of the combined requirements (a) and (b). There will be a number of cases where deciding whether the transaction is a consumer transaction may require some investigation. An obvious example would be where a businessman buys a car to be used partly for business and partly for private use. It is thought that whether he deals as consumer should turn on whether he buys it through his business account or his private account. A different view was taken however by the Court of Appeal in *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd (Saunders Abbott (1980) Ltd, third party)*.[15] In this case the plaintiffs acquired a second-hand Colt Shogun from the defendants on conditional sale terms. The plaintiffs were a company owned and controlled by Mr and Mrs Bell, which ran a business as shipping brokers and freight forwarding agents. The car was to be used by Mr and Mrs Bell partly for the business and partly for private use. At first sight it would seem clear that the transaction was a business sale since the company was the customer and the company only existed for the purpose of conducting the business. However, the Court of Appeal were persuaded that the company was in fact a consumer since it was not in the business of buying cars (the company apparently had only one car at a time and had only bought one or two previously). This decision has strong claims to be regarded as wrong, whatever style of statutory interpretation one adopts. On a literal interpretation, the transaction must be a business one because that was the purpose of the company. One might depart from a literal interpretation and adopt a purposive interpretation but this would require consideration of the purpose of the act. The reason for making a distinction between consumers and non-consumers must be that consumers are presumed as a class to be less able to protect themselves. It has to be remembered in this context that business buyers are not deprived of all protection because an unreasonable exemption will still be ineffective as against them. The Court of Appeal was greatly influenced by decisions on the meaning of 'course of a business' in relation to the Trade Descriptions Act 1968. It was argued that it would be inelegant to have different meanings of this expression in different statutes. But there are many other statutes which use the concept of business and it is hard to believe that such a common word does not derive shades of meaning from its context and from the purpose of the statute in which it is found. Furthermore, the question which arises under the Trade Descriptions Act is usually whether a seller is acting in the course of a business, whereas under the Unfair Contract Terms Act the question will more commonly be whether a buyer is acting in the course of a business. The notion of regularity to which the Court of Appeal attached importance is much easier to apply to a seller than to a buyer. Many organisations which are undoubtedly businesses may buy particular kinds of article very infrequently. It is difficult to believe that this is the right test to apply since the regularity with which the plaintiffs had been buying cars had little or nothing to do with their need for protection.

15 [1988] 1 All ER 847, [1988] 1 WLR 321; Jones and Harland 2 JCL 266.

It is very hard to reconcile the decision of the Court of Appeal in the *R&B* case with its later decision in *Stevenson v Rogers*[16] where a fisherman sold his fishing boat to the claimants who sought to bring an action under the implied terms of the Sale of Goods Act 1979. The defendant argued that he was in business as a fisherman and not as a seller of fishing boats. The Court held that the sale was in the course of business. The Court were much pressed with the *R&B* case. Formally they distinguished it as turning on the meaning of 'business' in a different statute but careful reading of the judgments does not support the view that both cases can be correctly decided.

It may appear odd that anyone should deprive himself of his protected consumer status by holding himself out as buying in the course of business, where he is not doing so, but a common example would be a consumer who obtains a trade card to enable him to buy at discount terms from the wholesaler.[17]

6 THE REASONABLENESS TEST[18]

The reasonableness test stands at the centre of the strategy of the Act. By its adoption Parliament appears to accept the modern orthodoxy that it is sensible and practicable to refer difficult questions to a standard of reasonableness and to share the lawyer's assumption that he is an expert in what is reasonable. It is questionable whether these assumptions are well founded. A more far-reaching criticism would be that the courts are often quite unable to tell what is reasonable without a detailed knowledge of the business background, which it would be oppressive to compel the parties to establish on a case by case basis.[19]

The Act offers some limited guidance on the application of the test. This is contained partly in section 11 and partly in Schedule 2.

a Time for application of tests

In relation to contract terms the question is whether 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*'.[20] This provision resolves a dispute between the English and Scottish Law Commissions as to whether to adopt this date or to consider rather reasonableness at the date the defendant seeks to rely on the term. Since decisions are actually made at this later date, it may not prove easy to exclude facts which become known between the date of the contract and the date of the dispute. This is perhaps particularly important in relation to the way the contract is broken, which obviously cannot be known at the time the contract is made. Suppose a clause imposes a requirement that the plaintiff report a breach within a short period, a common requirement particularly in relation to contracts of carriage. This might be a reasonable

16 [1999] QB 1028.

17 Under s 12(2) a buyer at a sale by auction or competitive tender is not to be regarded as dealing as consumer. Under s 12(3) the burden of proof rests on those who allege that a party does not deal as consumer.

18 Brown & Chandler, 109 LQR 41.

19 Consider, for instance, the elaborate statements of relevant commercial background to be found in the judgments of the Restrictive Practices Court and the reports of the Monopolies Commission. See ch 10, below.

20 S 11(1).

requirement in relation to some breaches and not in relation to others. If the reasonableness requirement is to be considered in the light of events at the time of contract, the court will have to decide the question of reasonableness in relation to all possible breaches, without considering the actual breach.

In relation to a notice not having contractual effect the test is to be applied 'having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen'.[2] It will be noted that nothing is said here about the parties' knowledge of the circumstances.

b Burden of proof

It is for the person alleging that a term or notice is reasonable to show that it is.[3]

c Factors to be taken into account

Section 11 (2) provides that in considering the requirement of reasonableness in relation to sections 6 and 7, the court is to have regard to the matters specified in Schedule 2. There is no such requirement in regard to the application of reasonableness in relation to other sections. The reason for this curious position is that guidelines were provided under the Supply of Goods (Implied Terms) Act 1973—the precursor of section 6 and have been extended to section 7 but that between 1973 and 1977 the views of the Law Commission as to the wisdom of providing guidelines changed.[4] In practice it has not proved possible to prevent reasonableness notions developed in relation to one section from infecting the consideration of reasonableness in relation to other sections.[5]

Five 'guidelines' are set out in Schedule 2. The court is adjured to consider them 'in particular'[6] so that it is clear that even when they apply they are not the only factors to be considered:

(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.

1 See *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257. Effective draftsmanship may therefore require breaking the exempting clause down into a number of less comprehensive provisions.
2 S 11(3).
3 S 11(5).
4 See the First and Second Reports of the Law Commission on Exemption Clauses (1969 and 1975).
5 This was accepted as inevitable by Potter J in *The Fiamar Pride* [1990] 1 Lloyd's Rep 484.
6 See also s 11(2).

In relation to guidelines (a) and (d) it appears clear in which direction the guideline leads: it will be easier to show that the term is reasonable if the parties' bargaining position is equal or if the customer received an inducement to agree or knew or ought to have known of the term or could readily have complied with the condition. In relation to (e) however, it is not clear whether the fact that the goods are made to special order makes it more or less reasonable to exclude or limit liability. Perhaps the answer is that either is possible, depending on the rest of the circumstances.

Guideline (b) is an important and interesting one. When the courts had to decide the application of a 'just and reasonable' requirement under section 7 of the Railway and Canal Traffic Act 1854 they held it reasonable for a carrier to offer two tariffs, a lower one at the owner's risk and a higher one at the carrier's risk. It would seem possible that contracting parties subject to a reasonableness test might well adopt this practice, though whether it is reasonable in any particular case, must also turn on the reasonableness of the differential between the two rates.[7]

Guideline (c) at first sight appears puzzling, since for the term to be part of the contract at all, the rules as to incorporation will have to be satisfied. Presumably, however, this guideline contemplates that a higher degree of awareness of the term may make it more reasonable to uphold it.

In relation to the application of these guidelines it is helpful to consider first the case of *R W Green Ltd v Cade Bros Farm*.[8] This was a case involving the application of the reasonableness test under the Supply of Goods (Implied Terms) Act 1973. Although that test was not formulated in exactly the same language as under the present Act, the differences are not significant for present purposes.

> The plaintiffs were seed potato merchants who had had regular dealings for several years with the defendants who were brothers running a farm in partnership. The contracts were for the sale of seed potatoes and were on the standard conditions of the National Association of Seed Potato Merchants. These conditions provided inter alia that 'notification of rejection, claim or complaint must be made to the seller ... within three days ... after the arrival of the seed at its destination' and that any claim to compensation should not amount to more than the contract price of the potatoes. In respect of one contract for the sale of 20 tons of King Edward potatoes, it later appeared that they were affected by potato virus Y, which could not be detected by inspection of the seed potatoes at the time of delivery. As a result the defendants claimed that they had suffered loss of profits. The plaintiffs sued for the price of the potatoes and the defendants counter-claimed for the loss of profits.

In considering the reasonableness of the exempting provisions Griffiths J observed that although it would probably have been difficult for the buyers to obtain seed potatoes otherwise than on these conditions, the conditions had been in operation for many years and had been the subject of discussion between the Association and the National Farmers' Union. Guidelines (a)

7 The failure by a film processor to offer a two-tier service was treated as strong evidence of unreasonableness by Judge Clarke in *Woodman v Photo Trade Processing* (1981) 131 NLJ 938.

8 [1978] 1 Lloyd's Rep 602.

and (c) therefore pointed in favour of reasonableness. The sellers sought to justify the requirement to complain within three days on the grounds that potatoes are a very perishable commodity and may deteriorate badly after delivery, particularly if badly stored. He thought this a very reasonable argument in relation to defects discoverable by reason of inspection but not in relation to a defect like virus Y, which was not discoverable by inspection. Griffiths J therefore held that the purported exclusion of liability for lack of timely complaint was unreasonable but that the limitation of liability to the price of the potatoes was reasonable.

The House of Lords has delivered two leading decisions on unreasonableness. The first is that in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd.*[9] Curiously this was also a case involving seeds. The appellants, a firm of seed merchants, contracted to sell to the respondents, 30 lbs of Dutch winter cabbage seed for £201.60. The respondents planted 63 acres with the seeds. The resultant crop was worthless, partly because the seed delivered was autumn seed and partly because even as autumn seed it was of inferior quality. The respondents sued for damages for loss of the crop and the appellants argued that they were protected by a clause in their standard conditions of sale limiting liability to replacing defective seeds or refunding payment.

The House of Lords, differing in this respect from the majority of the Court of Appeal, held that the clause was sufficiently clear and unambiguous to be effective at common law but that it did not pass the reasonableness test.

Perhaps the most important feature of the leading speech by Lord Bridge was his insistence that although the question of reasonableness was not strictly a matter of judicial discretion an appellate court should treat the decision of the trial judge with great respect and only interfere with it if it proceeded on some erroneous principle or was plainly and obviously wrong. This statement was clearly designed to discourage a flow of appeals on reasonableness.

In concluding that the instant clause was unreasonable, the House attached considerable weight to evidence, paradoxically led by the sellers, that they commonly made *ex gratia* payments in the case of complaints which they regarded as 'justified'. This was treated as showing that the sellers did not themselves regard their terms as reasonable though it might perhaps be regarded as showing no more than that the sellers did not always think it good business to stand rigidly on their rights. This point is perhaps of purely passing importance since it is hardly likely that sellers will lead such evidence again.

Other factors which were thought to point towards unreasonableness were that the seller's breach was the result of gross negligence and that the evidence was that sellers could insure against delivering the wrong seed without a significant increase in price. This last factor must often be an important one.[10] The second case was the twin appeals in *Smith v Eric S Bush* and *Harris v Wyre Forest District Council*.[11] In this case, having held that the valuer's disclaimer was subject to the test of reasonableness, the House of Lords went on to hold that it did not pass the test. In a very helpful passage

9 [1983] 2 AC 803, [1983] 2 All ER 737. This action concerned the wording of the modified s 55 of the Sale of Goods Act 1979 but for most purposes this makes no difference to the guidance given by the House of Lords.

10 See p 208, below.

11 [1990] 1 AC 831, [1989] 2 All ER 514.

in his speech, Lord Griffiths drew attention to a number of matters which should always be considered. These were:

(1) 'Were the parties of equal bargaining power?'
(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?' On the facts of the particular case the House of Lords thought it unrealistic to expect a first time buyer whose financial resources were stretched to the limit in order to find the deposit and probably to furnish the house, to find extra money for an independent full structural survey. It is clear that this argument applies with diminishing force as the house increases in value and the resources of its purchaser are proportionately increased.
(3) 'How difficult is the task being undertaken for which liability is being excluded?' It was clear that in the present case it did not impose an excessive burden on valuers since they were only being required to reach that degree of reasonable care and skill which the law in general demands of valuers and which the valuer has in any case to achieve in order to discharge his duty to the mortgage lender.
(4) 'What are the practical consequences of the decision on the question of reasonableness?' In the present case, the risk was one which the valuer could easily cover by professional indemnity insurance at a relatively modest cost, whereas the house purchasers were exposed to an enormous potential loss against which they were unlikely in practice to insure or even to be able to afford to insure.

The process of deciding whether a clause is reasonable will often involve balancing a collection of factors, some of which point towards reasonableness and some against. It has been suggested that the fact that the terms are in very small print or are very difficult to understand is an argument against their reasonableness.[12] On the other hand it is easier to justify reasonableness in relation to limitation of liability or to the exclusion of particular types of loss than to total exclusion of liability.[13] Presumably the fact that the clauses are well-known and that the parties are represented by solicitors are factors pointing towards reasonableness but they were outweighed by contrary indications in *Walker v Boyle*.[14]

d The relevance of insurance

The guidelines do not suggest that the court should take into account the availability of insurance or the question of who can most efficiently insure the risk. However it seems clear from the reasoning above[15] that questions of the most

12 Per Staughton J *obiter in Stag Line Ltd v Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep 211 at 222.

13 Ibid.

14 [1982] 1 All ER 634 [1982] 1 WLR 495 (actually a case on s 3 of Misrepresentation Act 1967). See also *Rees-Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 Con LR 109.

15 See also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, [1980] 1 All ER 556 and Lord Denning MR in *Lamb v London Borough of Camden* [1981] QB 625 at 638, [1981] 2 All ER 408 at 415. In *The Flamar Pride* [1990] 1 Lloyd's Rep 434, Potter J thought the actual insurance position was irrelevant. In *St Albans City and District Council v International Computers Ltd* [1996] 4 All ER 481 the defendant's standard conditions limited liability to £100,000. The Court of Appeal held the recoverable damages to be about £685,000 and that their limitation was unreasonable. This seems

economic insurance arrangement are intimately connected with the reasonableness test. Where a clause is designed to limit liability rather than to exclude it altogether, section 11(4) requires the court to have regard 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.

It would seem clear that under (a) there must be a reasonable relationship between the resources and the limitation which it is sought to justify. More difficulty surrounds the construction of (b). It might be read to apply only to those cases where insurance was not obtainable at all, but it is suggested that this is too narrow and that the words should also cover the much more common case where the premium for insurance in excess of the stipulated limits would in all the circumstances be unacceptably high.

7 OTHER PROVISIONS

a Anti-evasion clauses

The Act contains a number of clauses, whose purpose appears to be to render ineffective devices, to which ingenious draftsmen might otherwise resort, to escape or minimise the effect of the Act.

i Unreasonable indemnity clauses

Section 4 provides:

> (1) A person dealing as consumer cannot by reference to any contract term be made to indemnify another person (whether a party to the contract or not) in respect of liability that may be incurred by the other for negligence or breach of contract, except in so far as the contract term satisfies the requirement of reasonableness.
> (2) This section applies whether the liability in question–
> (a) is directly that of the person to be indemnified or is incurred by him vicariously;
> (b) is to the person dealing as consumer or to someone else.

A contract of indemnity is one in which a person A (the indemnifier) agrees to make good any legal liability which another person B (the indemnifiee) is held to be under. The liability may be one which B is under to a third party C or which B is under to A. In the latter case the result will be that A has a claim against B but that B is then entitled to call on A to indemnify him and thereby in effect to nullify A's claim. This obviously produces a result very like that of an exemption clause. Even where three parties are involved, this may in fact still be the case since it is not uncommon to find that A has agreed to indemnify B in respect of B's liability to C under a contract in which B agrees to indemnify C against C's liability to A.[16]

to turn at least in part on the fact that the defendants had insurance cover far in excess of the amount of liability and in part on a not wholly articulated notion that the defendants were better able to carry the substantial risks of defective software.

16 See eg *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193. The same clause may function as an exemption clause or an indemnity clause depending on the circumstances in which it is sought to apply it. See *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, [1987] 1 WLR 659n. *Thompson v Lohan (Plant Hire) Ltd (t/a W Hurdiss Ltd, third party)* [1987] 2 All ER 631, [1987] 1 WLR 649.

Indemnity clauses are common in both consumer and commercial contracts and section 4 is obviously designed to curb their misuse. It does appear however to have gaps. First it does not apply at all outside consumer transactions. This means that in those cases where in a commercial contract between A and B a term purporting to exclude or restrict B's liability to A would be subject to a test of reasonableness, B may nevertheless stipulate that A is to indemnify him against such liability. Secondly in a consumer context it only applies a test of reasonableness, whereas in many cases the liability in question will be one which cannot be excluded at all. However, it seems probable that a court will not easily be persuaded that it is reasonable for B to seek to shift back to A, by an indemnity clause, a risk which has been firmly placed on him.

ii Secondary contracts

Section 10 provides:

> 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.

This provision is not a masterpiece of lucidity but its general thrust appears clear. It is aimed at situations where there are two related contracts and it seeks to prevent a party doing indirectly in the second what he could not have done directly in the first. A common example would be a consumer contract to buy a television set with an associated contract for its maintenance. The sale contract would clearly fall within section 6 so that the seller's implied obligations could not be excluded or restricted. An attempt to exclude or restrict obliquely in the maintenance contract would also fall within the present section. It would seem that the same result would not follow if the contract were a non-consumer sale since then the Act does not *prevent* the seller from excluding or restricting his liability but only subjects his attempts to do so to a test of reasonableness.

iii Choice of law

Section 27(2) provides:

> This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)–
>
> (a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or
>
> (b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

Where a contract has connections with more than one country, the court will have to decide which law to apply. The rules for this purpose are part of the conflict of laws[17] and a detailed discussion would be out of place here.

17 For further discussion see Dicey and Morris on the *Conflict of Laws* (12th edn, 1993) pp 1187-1284, and Cheshire and North *Private International Law* (12th edn, 1992) pp 447-471.

However, it is clear that as a rule where the parties have made an express choice of governing law, considerable, and in many cases decisive, weight will be given to this choice. On the other hand it is very doubtful whether the parties can in respect of an otherwise entirely English contract, make a choice of a foreign governing law. The present provision clearly envisages some departure from the ordinary rules though of a rather curiously drafted kind. It will be noted that the section does not make the choice invalid but that the Act applies notwithstanding, so that the choice of a foreign law may otherwise be effective. As far as section 27(2)(a) is concerned, the Act will apply only if the term choosing a foreign law is *imposed* (a very strong word) and only if it is wholly or mainly for the purpose of evasion. This latter requirement would appear to involve an inquiry into motive, which will usually not be apparent from the face of the contract. There are, after all, many reasons, good or bad, why another system of law might be chosen especially once we pass outside the purely English domestic contract, which was probably dealt with by the common law. Under section 27(2)(b) the crucial question is the meaning of 'essential steps'. Does this mean *all* the essential steps, ie offer, acceptance and communication of acceptance? It is thought that it probably does, since if it were only the final essential step which was required to take place in the United Kingdom, Parliament might more conveniently have adopted the familiar test of where the contract was made.[18] Even so, the provision may have a very wide reach. Suppose an English consumer makes a contract in England with an agent of the Japanese National Railways for personal effects to be carried by rail from Tokyo to Osaka on a standard contract form which provides that the contract is governed by Japanese law. This appears to fall within the literal words of the section but this would produce a very odd result since on such facts, it is very probable that Japanese law would be held to be the governing law even where there was no express choice of law.

b Provisions for the avoidance of doubt

The Act contains a number of provisions which appear to have been inserted because of doubts as to the precise state of the common law and consequently as to its possible interrelation with the Act.

(i) Section 1(4) provides:

> In relation to any breach of duty or obligation, it is immaterial for any purpose of this Part of this Act whether the breach was inadvertent or intentional, or whether liability for it arises directly or vicariously.

In some cases of fundamental breach it has been suggested that a deliberate breach may be more easily held fundamental[19] but it is clear that the distinction between inadvertent and deliberate breaches is not relevant for the purposes of Part I of the Act.

(ii) Section 9 provides:

> (1) Where for reliance upon it a contract term has to satisfy the requirement of reasonableness, it may be found to do so and be given effect accordingly notwithstanding that the contract has been terminated either by breach or by a party electing to treat it as repudiated.

18 See eg *Entores Ltd v Miles Far East Corpn* [1955] 2 QB 327, [1955] 2 All ER 493, p 55, above.

19 See p 192, above.

(2) Where on a breach the contract is nevertheless affirmed by a party entitled to treat it as repudiated, this does not of itself exclude the requirement of reasonableness in relation to any contract term.

Section 9(1) assumes that a substantive doctrine of fundamental breach may exist and appears to be aimed in particular at a case such as *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*[20] where the exemption clause in question might well, if subjected to a test of reasonableness, have been held reasonable but the reasoning of the Court of Appeal would have denied it effect. Now that that doctrine has been given its quietus by the decision of the House of Lords in *Photo Production Ltd v Securicor Transport Ltd.*[1] this subsection will have little if any scope. In the same way, subsection (2) deals with the possibility, to which some credibility was given by some of the speeches in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*[2] that the effect of the exemption clause might differ according to whether the injured party claimed to treat the contract as at an end or to affirm it.[3] Again, this possibility now seems less important but, in any case, section 9(2) does not prevent an injured party who has affirmed from contending that an exempting term is unreasonable.

(iii) The side note to section 13 states that it is concerned with 'Varieties of exemption clause'. It provides:

(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.

(2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part of this Act as excluding or restricting any liability.

This is a curious provision. One might expect a statute dealing with exemption clauses to place a definition of exemption clauses at its centre but the Act fails to state any clear conceptual basis. The present section does not offer a definition but rather a statement that whatever the central thrust of the Act, certain marginal matters are also included. It would embrace clauses which require claims to be brought within a short time; which restrict particular remedies such as the right of rejection or which purport to reverse the burden of proof. It includes clauses excluding the usual provisions as to set-off[4] but does not include a compromise of an existing claim.[5]

20 [1970] 1 QB 447, [1970] 1 All ER 225.
1 [1980] 1 All ER 556. See p 195, above.
2 [1967] 1 AC 361, [1966] 2 All ER 61.
3 See 9th edition of this work at p 165.
4 *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257.
5 *Tudor Grange Holdings Ltd v Citibank NA* [1991] 4 All ER 1.

c Other provisions

i Misrepresentation

Section 8 provides an amended version of section 3 of the Misrepresentation Act 1967 and is discussed in detail elsewhere.[6] An important point which should be emphasised, however, is that since the section operates within the context of the 1967 Act, it is free from the restrictions of the present Act as to the contracts to which it applies and is therefore of general application. So, for instance, although the Unfair Contract Terms Act does not apply to contracts for sale of land, the Misrepresentation Act 1967 does. If a vendor of land makes a pre-contractual statement, which might be classified as either a misrepresentation or a contractual term, and the contract of sale contains a clause limiting liability to £10, the clause will be subject to a test of reasonableness in so far as it limits liability for a misrepresentation but only to common law controls so far as it limits liability for breach of a contractual term. So, paradoxically, the vendor might be in a better position by making it clear that the statement was a contractual undertaking.

ii Manufacturer's guarantees

Section 5 provides:

> (1) In the case of goods of a type ordinarily supplied for private use or consumption, where loss or damage–
> (a) arises from the goods proving defective while in consumer use; and
> (b) results from the negligence of a person concerned in the manufacture or distribution of the goods,
> liability for the loss or damage cannot be excluded or restricted by reference to any contract term or notice contained in or operating by reference to a guarantee of the goods.
> (2) For these purposes–
> (a) goods are to be regarded as 'in consumer use' when a person is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business; and
> (b) anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.
> (3) This section does not apply as between the parties to a contract under or in pursuance of which possession or ownership of the goods passed.

This is an important provision but its effect requires some explanation. Manufacturers do not as a rule sell direct to consumers and where they do section 6 will apply.[7] The present section deals with the common case where the goods pass from manufacturer to customer through a chain of wholesalers and retailers but the manufacturer nevertheless 'guarantees' the goods. This is particularly common in relation to consumer durables. The legal effect of such guarantees is murky. In some cases a consumer might argue that he had bought, relying on the manufacturer's guarantee,[8] but usually this would not be a plausible argument. In some cases the manufacturer attaches to the 'guarantee' a returnable card and it might perhaps be argued that the return

6 See p 326, below.
7 S 5(3) makes it clear that ss 6 and 7 cannot overlap with s 5.
8 Adopting reasoning such as that in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

of the card was consideration for the manufacturer's promise. In practice, there would be no great advantage in most cases to the consumer in the 'guarantee' being legally binding since most manufacturers will most of the time honour the guarantee whether it is legally binding or not and, usually, the amounts at stake would not justify the consumer in resorting to litigation. Indeed, paradoxically, the consumer may be better off if the 'guarantee' is not binding, since in practice many manufacturers have so worded their 'guarantees' as to offer a small service, for example, replacement of defective parts within a year of purchase, in return for the consumer abandoning his common law right of action in tort. This would often be a bad bargain from the consumer' viewpoint. If my negligently manufactured colour television explodes and burns down my house, it will be a small consolation that I am entitled to a new tube! It seems likely that this feature of 'guarantees' was often not understood by consumers, particularly as the 'guarantees' often give pride of place to their positive aspects. Be that as it may, section 5 ensures that where the 'guarantee' does constitute a contract between manufacturer and consumer, these exempting provisions will be ineffective. It should be emphasised, however, that it says nothing as to the preliminary question of whether the 'guarantee' does constitute a contract. It should be noted that 'consumer' as used here has rather a different sense than in the rest of the Act. If we take the case of the businessman who buys a car partly for private and partly for business use, we have seen[9] that under the test laid down in section 12 the question should be whether he *buys* through his business or his private account; for the purposes of the present section, however, it is sufficient that he *uses* the car partly for private purposes, even if he is using the car for business purposes at the time of the accident.

iii Saving for other relevant legislation

Section 29 provides:

> (1) Nothing in this Act removes or restricts the effect of, or prevents reliance upon, any contractual provision which–
>
> (a) is authorised or required by the express terms or necessary implication of an enactment; or
>
> (b) being made with a view to compliance with an international agreement to which the United Kingdom is a party, does not operate more restrictively than is contemplated by the agreement.
>
> (2) A contract term is to be taken–
>
> (a) for the purposes of Part I of this Act, as satisfying the requirement of reasonableness; and
>
> (b) for those of Part II, to have been fair and reasonable to incorporate, if it is incorporated or approved by, or incorporated pursuant to a decision or ruling of, a competent authority acting in the exercise of any statutory jurisdiction or function and is not a term in a contract to which the competent authority is itself a party.
>
> (3) In this section–
>
> 'competent authority' means any court, arbitrator or arbiter, government department or public authority;
>
> 'enactment' means any legislation (including subordinate legislation) of the United Kingdom or Northern Ireland and any instrument having effect by virtue of such legislation; and
>
> 'statutory' means conferred by an enactment.

9 P 202, above.

This is an important provision since it is increasingly common for statutes, often as the result of international convention, to lay down mandatory contractual terms and thereby to provide a statutory solution to the allocation of risks in relation to certain contracts, for example, that a carrier may not exclude his liability for certain events but may limit it to a prescribed amount.

8 EVALUATION OF THE ACT

The Unfair Contract Terms Act does not stand alone; indeed it forms part of a worldwide pattern. In the past thirty years many countries have sought to tackle the problems of standard form contracts, inequality of bargaining power and exemption clauses by legislation.[10] Some of these Acts appear more comprehensive in scope[11] but the Unfair Contract Terms Act is clearly a major work, the most important statute in the English contract law since the Statute of Frauds. It is perhaps inauspicious that it should come exactly three hundred years after its great predecessor and one may wonder whether it will make as much difficulty for litigants and as much money for lawyers.

Certainly the Act is not immune from criticism. It makes a negative contribution to simplicity in two ways; first, it does not render any of the previous law redundant, so that it is still necessary to master the whole of the common law before considering the statute[12] and secondly, as those who have read so far may agree, the Act is not internally simple. Its scope cannot be concisely stated, its main sections overlap confusingly, key concepts such as 'reasonableness' and 'consumer' are not consistently used and it has a yawning conceptual void at its centre. It is certainly not a masterpiece of the draftsman's art.

Perhaps these inelegancies are outweighed by the substantive improvements which are made in the law. Certainly in so far as the law of contract can help the consumer, he appears significantly better off.[13] Ironically, the most important change may have come in the law of tort, with the outlawing of notices purporting to exclude liability for negligently inflicted death or personal injury.

It should perhaps be mentioned in conclusion that Parliament may not only invalidate or regulate exemption clauses but may also impose them. The classic example is the Hague Rules, which by the Carriage of Goods by Sea Act 1924,[14] are mandatory in Bills of lading covering cargo carrying voyages from UK ports.[15] These rules provide for the limitation of the carrier's liability. Such rules are commonly to be found in international conventions on carriage.[16]

10 The first example seems to be the Israeli Standard Contracts Law 1964. Other countries which have followed suit include Sweden (1971); Denmark (1974); Federal Germany (1976); France (1978) and Finland (1978). See Berg 28 ICLQ 560. See also in the United States the Uniform Commercial Code, s 2-302. Deutch *Unfair Contracts*. Hellner 1 Oxford JLS 13. See also the United States Magnusson-Moss Warranty Act.

11 Particularly that in Federal Germany.

12 Though many of the leading authorities upon which the common law is based would, on their facts, now fall under the statutory tests.

13 Though it has been argued that this improvement has only been achieved by imposing extra costs on the supplier, which will in the long run be passed on to the consumer.

14 As amended by the Carriage of Goods by Sea Act 1971.

15 The rules are incorporated by agreement or imposed by the legislation of other countries in many other cases.

16 See eg the Warsaw Convention on carriage by air incorporated into English law by the Carriage by Air Act 1932.

5 The Unfair Terms in Consumer Contracts Regulations 1999[17]

The Directive on Unfair Terms in Consumer Contracts was adopted by the Council of Ministers on 5 April 1993. Member States were required to implement its provisions by 31 December 1994. The Directive was not mandatory as to its precise terms; it laid down a minimum standard which Member States must reach for protection of consumers against unfair terms in consumer contracts. Most Member States of the European Union already had legislation in place which deals with this area. In the case of the United Kingdom, the relevant legislation is the Unfair Contract Terms Act 1977. The Act is both wider and narrower than the Directive. It would have been possible for the Government to identify those areas at which the Directive is aimed, which the Act has not reached and to legislate to expand consumer protection to these areas. The Government decided not to do this and instead to introduce secondary legislation under section 2(2) of the European Communities Act 1972.

The Unfair Terms in Consumer Contracts Regulations were laid before Parliament on 14 December 1994 and came into force on 1 July 1995. They were replaced with effect from 1 October 1999 by the Unfair Terms in Consumer Contracts Regulations 1999. It would appear that the purpose of the 1999 Regulations was to conform more closely than the 1994 Regulations had done to the Directive.[18]

A TO WHAT CONTRACTS DO THE REGULATIONS APPLY?

The Regulations apply only to consumer contracts and only to standard forms of contract.

The Regulations define a consumer as 'a natural person who in making a contract to which these Regulations apply, is acting for purposes which are outside his business'. The courts have held that a company can be a consumer for the purposes of the Act[19] but this possibility is expressly excluded by the Regulations.

The Regulations do not apply to contracts which have been individually negotiated. They are limited to contracts which have been 'drafted in advance'. Of course, it is extremely common in consumer contracts, if there is a written document, for the document to have been drafted in advance by the businesses' advisers. Nevertheless, even in such contracts there may be some negotiation, particularly about the price. The Regulations say that 'the fact that a specific term or certain aspects of it have been individually negotiated' does not exclude the application of the Regulations if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

The limitation to consumer contracts would exclude most international sales and charter party transactions. Perhaps the most important and obvious

17 Collins 14 Oxford LJS 229; Macdonald [1994] JBL 441; Dean 56 MLR 581; Bright and Bright 111 LQR 655.

18 For instance by extending the scope to contracts involving land.

19 See p 202, above.

area which is covered by the Regulations but not by the Act is contracts for insurance. The Regulations do not apply to terms in a contract of insurance which define the insured risk or the liability of the insurer if they are in plain intelligible language but they will apply to other provisions. For instance, many insurance contracts have elaborate and demanding requirements for reporting losses and making claims. It seems certain that consumers will argue that some of these clauses are unfair.

The 1994 Regulations applied only to contracts for the supply of goods and services. The provision producing this limitation does not appear in the 1999 Regulations. It is probable therefore that the regulation apply to transactions involving land. This appears more in accord with the wording of the Directive (especially the French version).

B THE EFFECT OF THE REGULATIONS

Under the Regulations, terms classified as unfair are struck out and in principle the rest of the contract would be left in being unless the effect of striking out the offending term is to leave a contract which makes no sense. There are two important differences between the Act and the Regulations here. The first is that, despite its name, the Act is not concerned with unfair terms. Whether a term is unfair is never a test of its validity under the Act. Some terms are simply struck out. Other terms are valid if reasonable. Invalidity does not depend on fairness or unfairness.

The other is that, in principle, the Regulations can be used to attack any term which can be argued to be unfair.

C UNFAIRNESS UNDER THE REGULATIONS

Clause 8(1) of the Regulations provides that 'an unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer' and 8(2) 'the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term'. Unfairness is defined by Clause 5(1) of the Regulations which provides '"Unfair term" means any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'. So the possible scope of arguments about unfairness is very wide. However, there is one very important limitation which is contained in Clause 6(2) which provides 'In so far as it is in plain intelligible language the assessment of fairness of a term shall not relate (a) to the definition of the main subject matter of the contract or (b) to the adequacy of the price or remuneration as against the goods or services sold or supplied'. This means that it will not be open to a consumer to argue that a contract is unfair because he or she has been charged too much. This provision represents a vital decision as to a central part of the application of the unfairness concept. It is perfectly easy to understand why it was thought not expedient to leave judges with the task of deciding whether the price was fair. This would be the sort of question which could often not be answered without hearing complex economic evidence of a kind which many lawyers and judges are not trained to evaluate. On the other hand,

questions of price must often be an important ingredient in questions of fairness and unfairness. Supposing I sell you a car which has been badly damaged in an accident, requires extensive repair work and is totally unroadworthy as it stands. If I sell you the car at a price which reflects all these defects, it is hard to say that the contract is unfair. If I sell you the car at a price which would be appropriate for the same car in perfect second hand condition but seek to conceal the defects and to exclude liability by the words in the small print, it is much more plausible to regard the contract as unfair.

The second schedule to the 1994 Regulations required particular regard to be had to 'the strength of the bargaining positions of the parties; whether the consumer has an inducement to agree to the terms; whether the goods or services were sold or supplied to the special order of the consumer; and the extent to which the seller or supplier has dealt fairly and equitably with the consumer'. It will be seen that the first three of these conditions are also relevant to reasonableness under the Act. This schedule does not appear in the 1999 Regulations. However very much the same language appears in recital 16 of the Directive and a judge could properly look at this in interpreting the Regulations.

Section 7 of the Regulations provides 'A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language'. Where 'there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail'. The second sentence is simply a statement in statutory form of a rule which the English courts have always applied and which indeed is to be found in virtually all legal systems. Although there were suggestions in *Stag Line v Tyne Shiprepair*[20] that putting a clause in very small print or very difficult language might make it unreasonable, there are no cases in which this suggestion has been implemented. The wording of the first sentence of Section 7 is therefore of great practical importance. Many businesses operate at the moment by making a glowing statement in their marketing and trying to weasel out of them in the small print by obscure and complex jargon. Section 7 will make this ineffective and certainly therefore requires consumer contracts to be carefully re-read and in many cases extensively re-written.

Finally, it should be noted that Section 5(5) provides that Schedule 2 contains 'an indicative and non-exhaustive list of the terms which may be regarded as unfair'. It should be noted that the list is not a black list in that the Regulations does not say in terms that inclusion on the list means that the clause is unfair. It is rather a grey list in the sense that inclusion on the list raises a strong inference that in most circumstances a clause of this kind should be treated as unfair.

D POWERS OF THE DIRECTOR-GENERAL OF FAIR TRADING

Under the 1994 Regulations, the Director-General was given powers to try to prevent the continued use of unfair terms, including in particular the power to seek an injunction to prevent a trader using unfair terms. In practice many

20 [1984] 2 Lloyd's Rep 211 at 222; see p 208, above.

traders agree to abandon the use of offending terms without any application to court.[1] The Office of Fair Trading (OFT) issues regular bulletin to report progress on these questions.[2] The 1999 Regulations extended these powers to statutory regulators and trading standards departments. They also extended to the Consumers Association the power to seek injunctions.

1 For an application see *Director General of Fair Trading v First National Bank plc* [2000] 1 All ER 240; [2000] 2 All ER 759 Mitchell 116 LQR 557, Beresford [2000] CLJ 242.

2 See MacDonald, *Exemption Clauses and Unfair Terms*, ch 4.