CHAPTER 1

THE STATUS OF AGENCY

"It is a fallacy to suppose that a person cannot be a party to a contract in two capacities, both as agent and principal."[1]

"In what capacity were the plaintiffs acting? For whom were they acting as agents? Were they acting as the first in the string of brokers from the sellers upwards, or were they acting as the last in the string of brokers, from the buyers downwards? In my judgment it is clear beyond all controversy that they were, in fact, the brokers-the last brokers-in the string from the buyers and their function was, in this particular transaction, to pass on and to make, a bid on behalf of the buyers, which was capable of acceptance by the sellers or their agents, and that, in fact, is what happened."[2]

GENERAL FEATURES OF AGENCY

Power to affect another's legal position with third parties

A person may be spoken of as an "agent" and no doubt in the popular sense of the word may properly be said to be an "agent". However, when it is attempted to suggest that he is an "agent" under such circumstances as create the legal obligations attaching to agency, use of the word is only misleading.[3] It has been said there is scarcely any field of law in which language is used by the layman with less regard to its true legal implications and consequences.[4] **1–001**

Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a manner as to be able to affect in one way or another the principal's legal position in respect of strangers to the relationship. It seems virtually impossible to define agency except in terms of its consequences. A person is an agent only insofar as his acts can result in some alteration of the legal situation of the one for whom he acts or purports to act.[5]

[1] *Establissement Biret et Cie SA v Yukeiteru Kaiun KK (The Sun Happiness)* [1984] 1 Lloyd's Rep. 381 at 384, Lloyd J.

[2] *CH Rugg & Co v Street* [1962] 1 Lloyd's Rep. 364 at 369, McNair J.; see also *Mercantile Credit Co Ltd v Hamblin* [1965] 2 Q.B. 242 at 269 CA Pearson L.J.

[3] *Kennedy v De Trafford* [1897] 1 A.C. 180 at 188 HL Lord Herschell.

[4] *Fraser v Equatorial Shipping Co Ltd (The Ijaola)* [1979] 1 Lloyd's Rep. 103 at 111, Lloyd J. See also *WT Lamb and Sons v Goring Brick Co Ltd* [1932] 1 K.B. 710 CA.

[5] *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory) (No.2)* [2005] EWCA Civ 519; [2005] 1 Lloyd's Rep. 688 at para.33 citing *Bowstead & Reynolds on Agency*; "Agency is the fiduciary relationship which exists between two persons, one of who expressly or impliedly consents that the other should act on their behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts".

A person may do by an agent what he can do himself.[6] Indeed in situations where the principal is a corporate entity it can in many cases only act through agents.[7] Permission accorded to a specified person to do an act is prima facie accorded to him or his agents.[8] It is the agent's power and status in the law to affect the legal position of his principal that is critical to the existence of the relationship of agency. No man can be an agent in law if he has no such relevant power to so affect his principal's position for the purposes of the issue under consideration. It is convenient to consider the principal's relations with his agent and with third parties together, as for the most part the two situations raise similar issues.

Torts

1–002 The relevance of agency law to the liability in tort of a principal is obscure. Though the fact that a person is an agent may have some bearing in a limited number of cases, albeit not many, on the incidence of his own personal liability to a third party in tort the mere existence of an agency relationship (whether arising out of employment or partnership, or with an independent contractor), does not without more make a principal liable for his agent's wrongs.

His liability rather depends upon proof of sufficient degree of exercise of dominion and control over the agent (as the actual wrongdoer) on his part so as to make him vicariously liable for the wrong committed by the agent or proof of sufficient common design, concerted action, or combination with the agent so that in either case each of them is to be regarded as having made the act his own and each are liable accordingly as joint tortfeasors.[9]

Mandates and principals

1–003 An agent may retain a number of mandates so that he may act consecutively or even simultaneously for a number of principals in relation to any one or more aspects of the same transaction and he may perform his mandate either personally

[6] *Bevan v Webb* [1901] 2 Ch. 59 at 77 CA; *R. v Kent Justices* (1873) L.R. 8 Q.B. 305 at 307, Blackburn J.; "No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature"; and *LCC v Agricultural Food Products Ltd* [1955] 2 Q.B. 218 CA.

[7] As to liability of a company for acts done on its behalf see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] A.C. 500 PC at 506–507, Lord Hoffmann; "The company's primary rules of attribution will generally be found in its constitution, typically the articles of association….There are also primary rules of attribution which are not expressly stated in the articles but implied by company law… The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability."

[8] *Bevan v Webb* [1901] 2 Ch. 59 at 78 CA.

[9] *Vandyke v Fender* [1970] 2 Q.B. 292 CA; *Morgans v Launchbury* [1973] A.C. 127 at 483 HL; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 HL; *The Catholic Child Welfare Society v Various Claimants* [2012] UKSC 56; [2012] 3 W.L.R. 1319; and Ch.10 Tort.

or through sub-agents. An agent may be an agent for a specific purpose with a very limited mandate to bind his principal[10] or an agent under a general appointment with a wide-ranging mandate.

The agent need not have the power to contract for the principal at all. He may be an agent for no more than the purpose of binding his principal to some pre-contractual representations,[11] or imparting knowledge[12] to his principal, or receiving notice from, or giving notice on behalf of, the principal[13] or communicating some statement of fact to a third party.[14]

It is also of course quite possible for an agent to assume to his principal certain of the obligations of the third party under a *del credere* agency[15] or subsequently perform the contract in his own name so that he is the principal. An agent may also incur liabilities to third parties, e.g. through a collateral contract or as a tortfeasor, quite independently of whether his agency was disclosed to the third party.[16]

As with the law of bailment, where it is invariably easy to characterise a party as a bailee but often far more difficult to identify whose bailee he is and for what purpose and upon what terms, so with agency, the difficulty is not so much in ascertaining that a party is an agent but rather in determining whose agent he is and with what mandate. Likewise, as in bailment, duties in agency are often co-extensive with duties in contract and tort but not necessarily exhaustively or exclusively so.

[10] Note the position in this respect of the chartering broker; *Polish Steamship Co v A.J. Williams Fuels (Overseas Sales) Ltd (The Suwalki)* [1989] 1 Lloyd's Rep. 511 at 512 Steyn J; "A broker, or even an exclusive broker, is not in the shipping trade regarded as having authority to commit his principals without reference back to them"; see also *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; 219 C.L.R. 165.

[11] As with case of estate agents *Sorrell v Finch* [1977] A.C. 750 at 753 HL.

[12] As in *Apthorp v Neville & Co* (1907) 23 T.L.R. 575; *Societe Generale de Paris v Tramways Union Co* (1884) 14 Q.B.D. 424 CA. See also art.97 *Bowstead & Reynolds on Agency*; generally speaking it seems that, unless the agent is an agent to know, where an agent acquires knowledge other than when acting for the principal whether before he assumed the agency (or thereafter but whilst he was engaged on different business—whether his own or that of another principal) that knowledge is not to be imputed to the principal but the authorities are far from clear on this point; *Blackburn Low & Co v Vigors* (1887) 12 App. Cas. 531 at 537 HL; *El-Ajou v Dollar Land Holdings Plc* [1994] 2 All E.R. 685 CA; and *American Jewellery Co Ltd v Commercial Corp Jamaica Ltd* [2013] UKPC 5 at para.22. See also *Hampshire Land Co, Re* [1896] 2 Ch. 743; and *Belmont Finance v Williams Furniture* [1979] 1 Ch. 250 holding that knowledge should not be attributed to a principal where he is the "victim" of the improper conduct of the agent.

[13] See, e.g. *Victoria Fur Traders Ltd v Road Line (UK) Ltd* [1981] 1 Lloyd's Rep. 570, Mocatta J.; and *Marbrook Freight Ltd v KMI (London) Ltd* [1979] 2 Lloyd's Rep. 341 at 343 CA.

[14] As in *Energy (UK) Ltd v Hungarian International Bank Ltd* [1992] 2 Lloyd's Rep. 194 CA.

[15] As to which see further below.

[16] As considered at Ch.2 Agents and Third Parties.

CREATION OF AGENCY

Importance of consensus

1–004 The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it. The consent must, however, have been given by each of them, either expressly or by implication from their words and conduct.

Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though they are likely to be less important.[17]

Conversely neither a description of a party as an "agent"[18] nor indeed the assumption of certain fiduciary obligations of an agent is necessarily determinative of the power of the supposed agent to affect his principal's legal position[19] and the principle of apparent authority (derived from holding out by the principal to third parties of an agent as having the necessary authority to bind the principal)

[17] *Garnac Grain Co Inc v HMF Faure & Fairclough Ltd* [1967] 2 All E.R. 353 at 358; *Branwhite v Worcester Works Finance* [1969] 1 A.C. 552 HL; and *Pole v Leask* (1863) 33 L.J. Ch. 155 HL Lord Carnwarth L.C.; "The burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must show that the agency existed and that the agent had the authority which he assumed to exercise, or otherwise that the principal is estopped from disputing it . . . No one can become the agent of another person except by the will of that person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him".

[18] *WT Lamb and Sons v Goring Brick Co Ltd* [1932] 1 K.B. 710 CA; *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 Q.B. 139 at 152, Widgery C.J. (in relation to presumption in law of status of a subcontractor as opposed to an employee); "although the parties cannot by intention make a transaction into something which it is not, yet it is recognised that such intention is a factor for consideration in these cases"; and *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaella S)* [2005] UKHL 11; [2005] 2 A.C. 423 (where it was held that although it was for the Court to determine the nature and effect of a legal document and that it was not bound by the label which the parties had chosen to apply to it, in circumstances where in the case of a bona fide mercantile document issued in the ordinary course of business, the Court would be slow to reject the description which the document bore, especially where the document is issued by the party seeking to reject the description).

[19] See the position of a commission agent or commission merchant as described by Lord Blackburn in *Ireland v Livingston* (1872) L.R. 5 H.L. 395; and in *Robinson v Mollett* (1875) L.R. 7 H.L. 802 at 809 (in a dissenting speech); "Any person, if he chooses, may give an order to an agent to buy as his agent, not only with an express dispensation from any obligation to establish privity of contract between him and the person from whom the agent buys, but even expressly refusing authority to the agent to establish such privity. This is the ordinary authority given to a foreign commission merchant who (on account of the great inconvenience which would result from establishing privity of contract between the foreign producer and the home merchant) is not allowed (far less required) to establish privity of contract between them . . . This, however in no way interferes with the existence of a fiduciary relation"; considered in *Scott v Godfrey* (1901) 6 Com. Cas. 226 at 234, Bigham J.

may mean that the consent to the agency is to be derived not from anything said or done as between principal and agent but rather what was said or done between the principal and the third party.

One is hardly ever just an agent. The principal's and agent's (including any sub-agent's) consent to the agency relationship along with the extent of the agent's and any sub-agent's actual and ostensible authority arises, in almost all, if not all, cases out of some direct or indirect contractual relationship, typically of employment, partnership or independent contractor.

Relevance of manner of remuneration of the agent

1–005 That the parties did not intend to create an agency relationship may be suggested by the fact that the person carrying out the functions is paid through profit earned in trading rather than through commission, or is entitled to fix the price of the goods being sold, or retains money received from sales. Yet, such matters are not conclusive since a principal can consent to an agent making a profit or entering into personal contracts with buyers on his own account, either impliedly by reason of the way in which business is conducted in any particular trade or market, or expressly.[20]

Conversely a party may agree to charge his so called "principal" by way of mark up or commission and assume certain fiduciary duties to such party yet still have no authority whatsoever to alter his "principal's" legal position with third parties at all.

In other cases, as with insurance brokers and in some cases freight forwarders, the agent may be remunerated not by his principal but by the third party.[21]

ACTUAL AUTHORITY

Express, implied and usual authority

1–006 The actual authority of an agent to affect his principal's legal relations with third parties may be express or implied[22] but in considering what authority is usually, ordinarily or customarily held by an agent the old cases may be a rather

[20] *Mercantile International Group Plc v Chuan Soon Huat Industrial Group Ltd* [2002] EWCA Civ 288; [2002] 1 All E.R. (Comm) 788.

[21] *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710; [2007] 2 Lloyd's Rep. 278 at para.60, Auld L.J.; "The role of an insurance broker is notoriously anomalous for its inherent scope for engendering conflict of interest in the otherwise relatively tidy legal world of agency. In its simplest form, the negotiation of insurance, the broker acts as agent for the insured, but normally receives his remuneration from the insurer in the form of commission; he may, in certain circumstances, act for both. Where there is reinsurance of an insured risk, the same broker may act on behalf of the insured in placing the insurance and on behalf of the insurer in placing the reinsurance."

[22] See e.g. *Blandy Brothers & Co Lda v Nello Simoni Ltd* [1963] 2 Lloyd's Rep. 393 at 404 CA Pearson L.J.; "The ship's agent is, in the normal case, the agent of the shipowner at the particular port, and the ship's agent, therefore, at that port stands in the shoes of the shipowner; and it is reasonable to suppose that he has the authority to do whatever the shipowner has to do at that port"; and also

complications and pushed the evolution of substantive law in the wrong direction. In most if not all cases a plaintiff would be better off framing his action in tort, whereas in the judgment of the court if a contract was in existence this would be the natural vehicle for recourse.

CHAPTER 11

RESTITUTION

"Lord Mansfield C.J., in a familiar passage in Moses v Macferlan, *sought to rationalize the action for money had and received, and illustrated it by some typical instances. 'It lies,' he said, 'for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'... The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it."*[1]

"The courts of law in this country have always strongly condemned and, when they could, punished the bribing of agents, and have taken a strong view as to what constitutes a bribe. I believe the mercantile community as a whole appreciate and approve of the court's views on the subject. But some persons undoubtedly hold laxer views. Not that these persons like the word 'bribe' or would excuse the giving of a bribe if that word be used, but they differ from the courts in their view as to what constitutes a bribe."[2]

RECOVERY AND REWARD

Recovery of monies paid or other benefits conferred

11–001 Recovery in restitution may be obtained in appropriate circumstances for money paid, or for other valuable benefits conferred,[3] under a contract void or otherwise unenforceable for mistake (including a mistake of law[4]), illegality,[5] want of authority[6] or ultra vires[7] or more generally, in both contractual and other circumstances where there has been a total failure of consideration in the broad

[1] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 at 61 to 66, Lord Wright.

[2] *Hovenden and Sons v Millhoff* [1900] 83 L.T. 41, Romer L.J. See also *Shipway v Broadwood* [1899] 1 Q.B. 369, Chitty L.J.; "the real evil is not the payment of money, but the secrecy attending it"; *AG of Hong Kong v Reid* [1994] A.C. 324 at 330 PC, Lord Templeman; "A bribe is a gift accepted by a fiduciary as an inducement to him to betray his trust. A secret benefit, which may or may not constitute a bribe is a benefit which the fiduciary derives from trust property or obtains from knowledge which he acquires in the course of acting as a fiduciary. A fiduciary is not always accountable for a secret benefit but he is undoubtedly accountable for a secret benefit which consists of a bribe"; and *Nayyar v Denton Wilde Sapte* [2009] EWHC 3218 (QB); [2010] Lloyd's Rep. P.N. 139, paras 75–122, Hamblen J.

[3] See generally *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32.

[4] *Kleinwort Benson Ltd v Birmingham City Council* [1997] Q.B. 380 CA.

[5] See Ch.26 Illegality and further below as to defences; a restitutionary claim may be defeated on grounds of public policy as where, on the correct construction of a statute or regulation, recovery in restitution would be contrary to the objective of the statute.

[6] *Kleinwort Benson Ltd v Birmingham City Council* [1997] Q.B. 380 CA; and *Guinness Plc v Saunders* [1990] 2 A.C. 663 HL.

sense of that term or where goods have been supplied, work done or services rendered[8] without reward or under a wrongful demand.[9]

In the law relating to the formation of contract, the promise to do a thing may often be the consideration, but in the law as to failure of consideration and of the right to recover money on that ground it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise.

The money is treated as paid to secure performance and, if performance fails, the inducement which brought about the payment is not fulfilled. If this were not so there could never be any recovery of money for failure of consideration by the payer of the money in return for a promise of future performance.[10]

11–002 The failure in consideration (i.e. performance) has to be total.[11] The test is whether the benefit received, however small, is part of the essential bargain contracted for as distinct from an incidental or collateral benefit. In considering the extent to which the general rule may be departed from or qualified as to its scope and extent, courts have tended to focus on two separate but sometimes related questions; that is first, whether the contract was severable or divisible at the time it was entered into (so that apportionment can be carried out without difficulty) and secondly, whether certain benefits received by the claimant can be

[7] *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912 CA; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 HL; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 HL.

[8] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 HL; *Dies v British & International Mining and Finance Corp Ltd* [1939] 1 K.B. 724, Stable J.; and the review of the authorities in *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB), Stadlen J.

[9] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] A.C. 70 HL.

[10] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 at 48 HL, Viscount Simon; and *Tyrie v Fletcher* (1777) 2 Cowp 666.

[11] *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912 at 923 CA, Kerr L.J. (where a payer received a benefit which was not the benefit bargained for in the contract, advances paid in instalments under a joint venture agreement could be recovered on the basis of total failure of consideration); "The question whether there has been a total failure of consideration is not answered by considering whether there was any consideration sufficient to support a contract or purported contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract"; and *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 W.L.R. 574 at 588 HL, Lord Goff (recovery of instalments paid under a shipbuilding contract): "the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due. The present case cannot, therefore, be approached by asking the simple question whether the property in the vessel or any part of it has passed to the buyers. That test would be apposite if the contract in question was a contract for the sale of goods (or indeed a contract for the sale of land) simpliciter under which the consideration for the price would be the passing of the property in the goods (or land). However before that test can be regarded as appropriate, the anterior question has to be asked: is the contract in question simply a contract for the sale of a ship? or is it rather a contract under which the design and construction of the vessel formed part of the yard's contractual duties, as well as the duty to transfer the finished object to the buyers? If it is the latter, the design and construction of the vessel form part of the consideration for which the price is to be paid, and the fact that the contract has been brought to an end before the property in the vessel or any part of it has passed to the buyers does not prevent the yard from asserting that there has been no total failure of consideration in respect of an instalment of the price which has been paid before the contract was terminated, or that an instalment which has then accrued due could not, if paid, be recoverable on that ground".

disregarded as no more than ancillary or incidental benefits.[12] The failed performance may extend to that envisaged under a putative or contemplated contract.[13]

Where a company is not incorporated at the time it purports to make a contract, or a contract is ultra vires a company or other corporate or public body, a total failure of consideration is deemed to arise by that reason alone[14]; even in those cases where the contract is performed and services rendered.

Reward for benefits conferred

11–003 In many cases the claimant may be able to choose between bringing a claim for recovery of payments or other benefits conferred on the defendant, or alternatively, acquiescing in the defendant's retention of same but seeking reward from him in return for their conferral.

Services rendered, work done, or goods supplied under a void, avoided or unenforceable contract and even sometimes (as where there is a failure to agree terms[15]) where there never was any contract at all, may give rise in appropriate circumstances to a claim in restitution in quantum valebat (for goods) or quantum meruit (for services) rendered.[16]

[12] *Giedo van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB), Stadlen J.; *Goss v Chilcott* [1996] A.C. 788 PC.

[13] *Chillingworth v Esche* [1924] 1 Ch. 97 at 114 CA, Sargant L.J.; "I look on the whole payment [i.e. the deposit] as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at… the vendor might on his side have broken off the negotiations at any time, whether reasonably or not, without incurring any penalty. To my mind it would be an unreasonable view to adopt of the arrangement between the parties that the purchasers should be in a worse position, and only able to break off on the terms of incurring the forfeiture of the deposit"; *Griffon Shipping LLC v Firodi Shipping Ltd* [2013] EWHC 593 (Comm); [2013] 2 Lloyd's Rep. 50, Teare J. (appeal pending); and Ch.19 Charges and Payment.

[14] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] Q.B. 549 at para.62 (where the lender under a loan contract which was void by reason of being ultra vires the borrower, sought to recover the sum lent in a restitutionary claim), Aikens L.J.; "It is common ground that if the swaps contracts are void, then the only remedy available to Depfa to recover the money advanced to the Kommunes is one in restitution. The basis must be that the Kommunes became 'unjustly enriched' by being paid the money under void contracts. There was little analysis of the precise juridical basis on which the restitutionary claim is put, but I think it was common ground that in traditional terminology it is a common law claim for money had and received, in circumstances where there had been a total failure of consideration"; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 W.L.R. 912 CA; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349 HL; and *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 HL.

[15] *Regalian Properties Plc v London Docklands Development Corp* [1995] 1 W.L.R. 212 at 230, Rattee J.; "I can well understand… that, where one party to an expected contract expressly requests the other to perform services or supply goods that would have been performable or suppliable under the expected contract when concluded, in advance of the contract, that party should have to pay a quantum meruit if the contract does not materialise. The present case is not analogous. The costs for which Regalian seeks reimbursement were incurred by it not by way of accelerated performance of the anticipated contract at the request of L.D.D.C., but for the purpose of putting itself in a position to obtain and then perform the contract".

[16] *Craven Ellis v Canons Ltd* [1936] 2 K.B. 403 CA; *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352 HL; *British Steel Corp v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504, Goff J.; and *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752.

A right to a quantum meruit payment may also arise in cases of total failure of consideration for work done under a contract terminated for repudiatory breach or under a term of the contract itself; even in those cases where the wrongdoer himself has conferred a valuable benefit on the innocent party through his work for which he could not otherwise be remunerated under the contract.[17]

It is the defendant's benefit or gain that needs to be measured rather than the loss to the claimant. The amount recoverable by a claimant is, therefore, prima facie the objective value of the benefit conferred at the time of receipt, namely the price which a reasonable person in the defendant's position would have had to pay for the services. Where there is a market, this price is assessed by reference to market rates.[18]

Defences

11–004 A restitutionary claim may be subject to counter-restitution in respect of monies received by, or benefits conferred by, the payee on the payer and it would seem that the inability to make counter-restitution is a ground for declining restitution as part of a wider change of position defence on the part of the payee.[19]

Otherwise more generally, a claim for recovery may also fail if: (a) the payer intends that the payee shall have the money or other benefit conferred at all events, whether the fact be true or false, or is deemed in law so to intend[20]; or (b) the payment or other benefit conferred is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment)

[17] *Chandler Bros Ltd v Boswell* [1936] 3 All E.R. 179 CA; and *Hain Steamship Co Ltd v Tate and Lyle Ltd* [1936] 2 All E.R. 597 at 612 HL.

[18] *Benedetti v Sawiris* [2013] UKSC 50 at para.34, Lord Clarke; "in my opinion, in a case of this kind, (i) the starting point for identifying whether a benefit has been conferred on a defendant, and for valuing that benefit, is the market price of the services; (ii) the defendant is entitled to adduce evidence in order subjectively to devalue the benefit, thereby proving either that he in fact received no benefit at all, or that he valued the benefit at less than the market price; but (iii) save perhaps in exceptional circumstances, the principle of subjective revaluation should not be recognised, either for the purpose of identifying a benefit, or for valuing a benefit received". cf. the position where a valid contract subsists but the contract is incomplete in its terms as to payment, the law may fix by implication of a term an obligation on the party receiving the goods or services in contract to pay for them at a reasonable rate, in which case the court can have regard to all the circumstances to determine what would be a reasonable amount as contemplated by the parties to the contract.

[19] As to which see below.

[20] See, e.g. *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] Q.B. 303 CA and the compromise/settlement cases considered Ch.24 Redirection, Delivery and Competing Claims.

by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee or other recipient[21] has changed his position in good faith, or is deemed in law to have done so.[22]

For the change of position defence to apply, the defendant must have so changed his position so that the injustice of requiring him to repay outweighs the injustice of denying the claimant restitution (in whole or part). That can only be decided on the facts of each individual case. A defendant cannot rely on this defence if he has acted in bad faith or has failed to show good faith, which is not the same thing as having acted dishonestly.[23]

In other cases, a claim of restitution may be defeated on grounds of public policy, namely where it would be contrary to the objective of a statute[24] or where it would more generally subvert other public policy considerations.[25]

WRONGFUL INTERFERENCE CLAIMS

11–005 Section 7 of the Torts (Interference with Goods) Act 1977 obliges an "overpaid party" in all cases of wrongful interference with goods to account over to any other person with an interest in the goods.[26]

Section (2) and (3) of the Torts (Interference with Goods) Act 1977 makes provision for restitution to a defendant for the value of improvements to goods undertaken in circumstances where the improver has a mistaken but good faith belief in his title to the goods.

COMPULSORY PAYMENTS MADE FOR BENEFIT OF ANOTHER

11–006 Where the claimant has been compelled by law to pay or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, the

[21] See also *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch); [2013] Ch. 156 at para.105, Stephen Morris Q.C.; "As regards bona fide purchaser for value as a defence to claim for unjust enrichment, it is plain that there are two schools of thought.... These two schools of thought mirror the two different views of the *Lipkin Gorman* case and the nature of the propriety restitutionary claim. If, as I consider, the law as it currently stands is that set out by Lord Millett in *Foskett* and there are two distinct strands of claim and, *Lipkin Gorman* is in substance a proprietary restitutionary claim, then in my judgment, bona fide purchase is not strictly a defence to an unjust enrichment claim. On this basis, in an unjust enrichment case, the passing of title to the defendant is the very basis for the claim in the first place".

[22] See generally *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] Q.B. 677 at 695, Goff J.; and *Holt v Markham* [1923] 1 K.B. 504 CA.

[23] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] Q.B. 549 para.124, Aikens L.J. (n.14 above); "the Kommunes made those investments without any involvement by Depfa and the Kommunes made them on the understanding, at that stage in the history, that they had to repay the principal and interest to Depfa whatever happened to the investments... The Kommunes took the risk in this case".

[24] *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579; [2012] Q.B. 549 at para.92, Aikens L.J.; and Ch.26 Illegality.

[25] *Guinness Plc v Saunders* [1990] 2 A.C. 663 HL; *Dimond v Lovell* [2002] 1 A.C. 384 HL; *Mohamed v Alaga & Co* [2000] 1 W.L.R. 1815 CA.

[26] As to which see also Ch.24 Redirection, Delivery and Competing Claims.

Pre-judgment interest under Late Payment of Commercial Debts (Interest) Act 1998

19–047 The Act applies through insertion into the contract of a statutorily implied term at a high rate of interest (currently 8 per cent) to debts for the "price" arising under a contract[156] governed by the law of any part of the UK for the supply of goods or services, including a contract of, or for, a bailment, where the purchaser and the supplier are each acting in the course of a business, unless there is no significant connection between the contract and that part of the United Kingdom and but for that choice of UK law by the parties, the applicable law would be a foreign law. Section 5 of the Act confers on the court an important power to remit the rate of interest in whole or in part "in the interest of justice".[157]

Post-judgment interest

19–048 The combined effect of s.17 of the Judgments Act 1838 and CPR 40.8 is that interest is to be paid at 8 per cent per annum on the amount of the costs from the date of judgment unless the court orders otherwise.[158] The statutory position provides general certainty and clarity, and Judgments Act interest should not be deferred simply because it is at a considerably higher rate than commercial rates.

There must be something about the circumstances of the particular case that justify a departure from the usual rule, and it is for the applicant seeking deferral to show this. Typically the applicant would have to show that particular features of the case mean that the application of the general rule would be so unfair to him that justice requires departure from it. This might be because a large amount of costs is likely to be outstanding for a particularly long period and the applicant cannot be expected to avoid this by assessing what costs he will have to pay and making (or tendering) a substantial payment on account. If such unfairness is shown, the fact that the Judgments Act interest rate encourages the paying party to reach a compromise would not be a proper reason to refuse an order.[159]

[156] A right to liquidated damages under a "take or pay" clause is not claim in debt; *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 344 (Comm); [2008] 1 Lloyd's Rep. 541, Burton J.

[157] *Ruttle Plant Hire Ltd v Secretary of State for Environment Food & Rural Affairs* [2009] EWCA Civ 97; [2010] 1 All E.R. (Comm) 444 at para.61, Jacob L.J.; and *Crema v Cenkos Securities Plc* [2011] EWCA Civ 10; [2011] 1 W.L.R. 2066.

[158] As to post-judgment compound interest under an express contractual provision for same see *Director-General of Fair Trading v First National Bank Plc* [2001] UKHL 52; [2002] 1 A.C. 481 and as to post-award interest (compound or simple) in arbitrations see s.49(4) of the Arbitration Act 1996; *Walker v Rome* [2000] 1 Lloyd's Rep. 116, Aikins J.; and *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2008] EWHC 1108 (Comm); [2008] 2 Lloyd's Rep. 295, Beatson J.

[159] *Fiona Trust & Holding Corp v Privalov*[2011] EWHC 1312 (Comm), Andrew Smith J.; affirmed at [2013] EWCA Civ 749; *Colour Quest Ltd v Total Downstream*[2009] EWHC 823 (Comm), David Steel J.; *D Pride and Partners v Institute for Animal Health* [2009] EWHC 1617 (QB), Tugendhat J.; and *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWHC 29 (Ch), Roth J.

CHAPTER 20

LIMITATION OF LIABILITY

"It is common ground that 'wilful misconduct' goes far beyond any negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be."[1]

CONVENTION CARRIAGE

CIM

20–001 Under CIM the basic limitation of liability is 17 SDR per kilogram of the goods lost or damaged in the absence of a special declaration on delivery to the carrier.[2] This limit can be broken however in the case of deliberate acts or acts (but only those of the carrier personally[3]) done recklessly with knowledge that damage would result.[4]

In addition the carrier must refund without limitation carriage charges, customs duties already paid and other sums paid in relation to the carriage of goods lost, "except excise duties for goods carried under 'a procedure suspending those duties'".[5]

CMR

20–002 Under CMR the carrier's liability is limited to 8.33 SDR per kilogram of the goods lost or damaged save where either a higher value or a special interest in delivery has been declared in the consignment note.[6] By art.29 of CMR the carrier is not entitled to limit his liability in the case of wilful misconduct. This includes misconduct by servants, agents or subcontractors acting within the scope

[1] *Rustenburg Platinum Mines Ltd v South African Airways* [1977] 1 Lloyd's Rep. 564 at 569, Ackner J.; as affirmed at [1979] 1 Lloyd's Rep. 19 CA.

[2] CIM arts 30.2, 32.2, 33.5 for the limits provided ordinarily by the Convention and CIM arts 34, 35 for the limits in case of declared value or interest. See also arts 15.3, 19.6, 19.7 as well as 32.2 all limiting compensation at the level as payable in case of loss.

[3] CIM art.36.

[4] See below in relation to the Warsaw-Hague Convention as to the meaning of deliberate or reckless acts where the same phrase is used.

[5] CIM art.30.4 and see also CIM Explanatory Report to art.30 at paras 6 and 7; and Bulletin of International Carriage by Rail No.1/2004, Case Law.

[6] CMR arts 23 and 25 for limits ordinarily provided by the Convention. See CMR arts 24 and 26 for the limits in case of declaration of value or interest, each against surcharge.

of their employment. In addition, carriage charges, customs duties, and other charges are refundable without limitation.[7]

Warsaw and Montreal Conventions

20–003 The liability of the carrier in the case of destruction, loss, damage or delay to cargo for carriage governed by the Montreal Convention is limited to 19 SDR[8] per kilo of the total weight of packages concerned; for carriage under Warsaw-MP1 and Warsaw-Hague-MP4 his liability is limited to 17 SDR per kilo; and for the Warsaw and Warsaw-Hague Conventions liability is limited to 250 Gold Francs per kilo.[9] However for the purposes of UK law the Carriage by Air Act 1961,implementing the Warsaw-Hague Convention by Sch.1 thereto, has been amended[10] so as to replace the Gold Franc by the SDR with the result that the limitation for Warsaw-Hague as applied in the United Kingdom is now 17 SDR.

With effect from July 1, 2010 the International Air Transport Association (IATA) amended its Air Waybill (AWB) Conditions of Contract by Resolution 600b binding on all IATA Members so as to standardise the Montreal limits of liability of 19 SDR across all routes worldwide.[11]

In the case of loss, damage or delay of part of a cargo the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is the total weight of the package or packages actually physically delayed,

[7] CMR art.23(4); and see *Buchanan & Co v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141 HL; and *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] Q.B. 127, as discussed at n.112 of Ch.14 Assessment of Damages. As the value of the goods under the CMR (art.23.1) is determined by their market value at the place and time of acceptance for carriage or delivery to the carrier (and similarly under CIM (art.30.1)), the charges for carriage are included separately.

[8] See Montreal Convention art.22.3 together with the escalator clause in art.24.1, permitting review at five year intervals. Changes to the initial Montreal limits were effective as of December 30, 2009 based on the first review of limits of liability conducted by the International Civil Aviation Organisation ICAO, as data suggested a 13.1 per cent increase of inflation during the five year period. These changes are added to the depository information available at the Treaty Collection of ICAO and are implemented into UK law by the Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2009 (SI 2009/3018).

[9] Each of the Conventions art.22. For conversion of Gold Francs into Sterling, for cases where the unamended Warsaw Convention applies, see the Carriage by Air (Sterling Equivalents) Order 1999 (SI 1999/2881). These limitations will, however, be displaced if the consignor has made, at the time when the cargo was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires, in which case the carrier will be liable to pay a sum not exceeding the declared sum unless it proves that that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

[10] By s.4(1) of the Carriage by Air and Road Act 1979. 1979 Act s.4(1) came into force on December 1, 1997 by s.2 of the Carriage by Air and Road Act 1979 (Commencement No.2) Order 1997 (SI1997/2565) giving effect to the coming into force of the additional Montreal Protocol No.2 to the Warsaw-Hague Convention.

[11] IATA Press Release of July 14, 2010: Particular advantages are: "Increased certainty for claims handling and service determination. - Increased accuracy for claims procedures by standardizing the various regimes. – [And that t]he single global standard eliminates the uncertainty that existed where there was no applicable convention, or where existing conventions were out-of-date or required conversions from non-existing currencies, such as French gold francs".

damaged or lost, unless, in cases where the Warsaw-Hague, Warsaw-Hague-MP4 or Montreal Conventions apply, the value of other "packages" covered by the same airway bill is also affected, in which case the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.[12] The Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions also specifically stipulate that the limits of the Conventions shall not apply to court costs and other expenses of litigation awarded according to the law of the forum.[13]

20–004 The limitations on liability apply whatever the nature of the proceedings by which liability may be enforced[14]; in particular they apply to the carrier's aggregate liability in all proceedings brought against him under the law of any part of the United Kingdom together with any proceedings brought against him elsewhere.[15]

The right to limit will be lost in the case of the Warsaw Convention by wilful misconduct or, in the case of the Warsaw-Hague, Warsaw-Hague-MP4 and Montreal Conventions,[16] by an act or omission done with intent to cause damage or recklessly and with knowledge that damage will probably result. In all cases the relevant misconduct may embrace that of servants, agents or subcontractor acting within the scope of their employment.[17] However in case of the Warsaw-Hague-MP4 and Montreal Conventions the limits are only lost in case of passenger and baggage claims; they cannot be broken for cargo claims.[18] Further by art.9 of the Warsaw Convention if the carrier accepts cargo without an air waybill having been made out or the air waybill does not contain the particulars required by arts.8(a)–(i) inclusive and (q) the carrier is not entitled to avail himself of the provisions in the Convention which exclude or limit his liability and by art.9 of the Warsaw-Hague Convention if, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by art.8(c) the carrier should not be entitled to avail himself of the provisions of art.22 whereby the carrier is entitled to limit liability.[19]

There are no corresponding provisions to such effect in the Warsaw-Hague-MP4 and Montreal Conventions; indeed art.9 thereof in each case affirms the

[12] Warsaw-Hague art.22.2(b), Warsaw-Hague-MP4 art.22.2(c) and Montreal Convention art.22.4; and for an application of this provision under the Warsaw-Hague Convention see *Applied Implants Technology Ltd v Lufthansa Cargo A.G.* [2000] 2 Lloyd's Rep.46, Steel J. The unamended Warsaw Convention has no equivalent provision, and in *Datacard Corp v Air Express International Corp* [1983] 2 Lloyd's Rep. 81 Bingham J. held that liability was limited by reference to the damaged package only.

[13] Warsaw-Hague and Warsaw-Hague-MP4 Conventions art.22.4 and Montreal Convention art.22.6 (in the latter case also including interest).

[14] Warsaw, Warsaw-Hague and Warsaw-Hague-MP4 Coventions art.24 and Montreal Convention arts 29–30.

[15] Carriage by Air Act 1961 s.4(1).

[16] But only in respect of claims for destruction, loss, damage or delay to cargo.

[17] Warsaw Convention art.25 and Montreal Convention art.22.5.

[18] Montreal Convention arts 22.5 and 30.3 and Warsaw-Hague-MP4 arts 25 and 25A.3.

[19] As to scope for less than exact compliance with the form of words see *Samuel Montague & Co Ltd v Swiss Air Transport Co Ltd* [1966] 1 Lloyd's Rep. 323 CA; and *Fujitsu Computer Products v Bax Global* [2006] 1 Lloyd's Rep. 367, Christopher Clarke J.

existence of a contract of carriage and the availability of the limitation provisions even where the requirements as to issue and content of an air waybill are not met.

The Hague Visby Rules

20–005 By art.IV r.5(a) of the Hague Visby Rules[20] in the absence of a declaration as to the nature and value[21] of the goods in advance of shipment inserted in the bill of lading (in which case the carrier's liability is unlimited), or some other agreement under art.V between shipper and carrier upon a greater limit of liability than that imposed by the Rules "neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 SDR per package unit[22] or 2 SDR per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher".[23]

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units *enumerated in the bill of lading as*

[20] Under the Rotterdam Rules the limits of liability for the carrier are raised to SDR 875 per package and SDR 3 kilo per tonne. These limits can be exceeded in the same circumstances as with the Hague Visby Rules, namely by a declaration of value by the shipper included in the transport document or proof that damage was caused with intent or recklessly knowing that loss or damage would probably result (see arts 59.1 and 61 of the Rotterdam Rules and art.IV r.5(e) of the Hague Visby Rules). Damages for delay are limited to two and one-half times the freight payable on the goods delayed, unless the total of the damages payable in respect to the delayed goods would exceed the amount payable for the total loss of the same goods (art.60 of the Rotterdam Rules).

[21] As to commercial utility of such declarations and their use in practice see *Owners of Cargo on Board the River Gurara v Nigerian National Shipping Line Ltd (The River Guarara)* [1996] 2 Lloyd's Rep. 53 at 60, Colman J. citing via US authorities, Lord Diplock writing extra-judicially to the effect that the option to declare a higher value is practically never exercised; "The increase over the standard freight rates which the carrier requires for accepting the higher liability is greater than the reduction in the insurance premium which the cargo insurer is prepared to offer for the prospect of recovering a higher amount from the carrier or his P and I insurer, in the event of a loss…There are so many risks covered by the cargo insurance policy that the prospect of recovery in respect of one of them has little influence in fixing the premium, whereas the risk of liability to the cargo-owner is one of the principal risks insured under the carrier's P and I policy, and his maximum liability is a significant factor in the rates of premium".

[22] As to meaning of unit see *Falconbridge Nickel Mines Ltd v Chimo Shiping Ltd* [1973] 2 Lloyd's Rep. 469 Supreme Court Canada (tractor a unit though not a package); *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep. 595 Supreme Ct BC; and *Johnston Co Ltd v Sealion Navigation Co SA (The Tindefjel)* [1973] 2 Lloyd's Rep. 253 Fed Ct Canada.

[23] For the effect of an alteration to the limitation clause under contractually incorporated Hague Rules, see *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22; [2004] 2 Lloyd's Rep. 647.

packed[24] in such article of transport shall be deemed the number of packages or units for the purpose of limitation but otherwise such article of transport is the package or unit.[25]

Accordingly in such a case (but not otherwise) the limitation figure (at least so far as weight is not also relevant) is defined by the entries on the bill of lading as to the number of packages or units enumerated *as packed* but otherwise in such cases the container or pallet will by application of the default rule be the package for such purpose. Attempts by the bill of lading terms to redefine what is meant by package or pieces, etc. so as to produce a lower limit of liability than would otherwise be the case will be contrary to the Rules and ineffective[26] as will, it appears, be attempts to disclaim the accuracy or conclusiveness of the enumeration for purposes of the calculation of the overall limitation figure in the case of goods enumerated as so packed in a container or pallet.[27]

20–006 The phrase "in any event" means in every case of loss or damage to or in connection with the goods which are the subject of the contract of carriage but the art.IV r.5 limitation is not, at least without some express contractual extension, applicable to operations outside the ambit of the those embraced by the Rules.[28]

[24] This according to the Fed Court of Australia in *El Greco (Australia) PTY Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep. 537 at 585 means some kind of unit of packing, but not the individual pieces or items of cargo where, due to their nature or type, they need to be consolidated into packages before loading into the container. In the case the bill of lading stating one container to be shipped containing some 200,000 posters or prints was held not to provide an enumeration for the purposes of art.IV r.5(c) and thus the container itself was the only package. But note there is no reference in art.III r.3(b) to "units" in this respect, and instead stipulates that the bill must enumerate the number of packages or "*pieces*".

[25] Hague Visby Rules art.IV r.5(c); and Reynolds, "The Package or Unit Limitation under the Visby Rules" [2005] L.M.C.L.Q. 1.

[26] Hague Visby Rules art.III r.8; and *Owners of Cargo on Board the River Gurara v Nigerian National Shipping Line Ltd (The River Gurara)* [1998] 1 Lloyd's Rep. 225 CA.

[27] *El Greco (Australia) PTY Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep. 537 Fed Court of Australia (cf. dissenting judgment of Beaumont J.); and Reynolds, "Package or Unit Limitation under the Visby Rules" [2005] L.M.C.L.Q. 1. Such a disclaimer may however still be effective to rebut any presumption under art.III r.4 that the goods were loaded or as to limitation in cases other than those relating to containers, etc.; *The River Gurara* [1998] 1 Lloyd's Rep. 225 CA.

[28] *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] EWHC 944 (Comm); [2007] 2 All E.R.149 at para.97, Aikens J.; "That still leaves the alternative submission of Mr Parsons that the shipowner can still rely on Article IV(5), because of the broad wording of that article. But I cannot accept this argument. The parties have agreed that the 'Hague Rules *period*', or the Hague Visby Rules period, is limited to a certain time, in this case until discharge (and hence 'delivery') of the goods. This must mean that the parties have agreed that all the HR or HVR are confined to that period, unless there is something in the wording of clauses 4, 7 or 22 of the bill of lading to suggest that certain of the HR or HVR are to carry on after the end of the HR or HVR period. But there is not. In this case, the shipowner continued to have custody of the goods. It did so as a bailee, on terms. But none of the HVR, including the limitation provisions in Article IV(5) can apply"; approved on appeal at *Mediterranean Shipping Co SA v Trafigura Beheer BV* [2007] EWCA Civ 794; [2007] 2 Lloyd's Rep. 622 at paras 25–26, Longmore L.J. See also Ch.16 International Carriage Conventions, Ch.18 Deviation and Exemption Clauses; and Todd, "Excluding and limiting liability for misdelivery" [2010] J.B.L. 243.

Novation can occur in the absence of any formality unless the contract is of a type in respect of which statute requires this for it to be effective but the difficulty in these circumstances is proving that a novation has actually occurred.[133]

[133] *Camillin Denny Architects Ltd v Adelaide Jones & Co Ltd* [2009] EWHC 2110 (TCC); [2009] B.L.R. 60 at para.36, Akenhead J.; *CEP Holdings Ltd and CEP Claddings Ltd v Steni AS* [2009] EWHC 2447 at paras 20–41, Gloster J. where a contention that a notice of a transfer of business from a holding company to its subsidiary coupled thereafter by acceptance of orders from the subsidiary, invoices sent to the subsidiary and payment from it amounted to the necessary agreement to novate was rejected and it was held that the trading through subsidiaries showed no more than that the parties accepted vicarious performance of their trading obligations under an "umbrella" agreement; *Goodridge v Macquarie Bank Ltd* [2010] F.C.A. 67 at 100–125 where the Federal Court of Australia declined to hold that one party to a contract can prospectively authorise a novation to be made by another party unilaterally and without any further involvement or knowledge of the first party.

CHAPTER 26

UNENFORCEABLE RIGHTS—ILLEGALITY AND PUBLIC POLICY

"In our 2009 consultative report, we argued that it was open to the courts to develop the law in ways that would render it considerably clearer, more certain and less arbitrary. Instead of purporting to apply rigid rules, the courts should consider each case to see whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence. We did not think this would require a major alteration. The policy rationales were already found within the case law and the courts already apply them to do justice. All that was required was an incremental change, as courts became more prepared to articulate the policy reasons behind their decisions. The decision in Gray v Thames Trains shows that this incremental change is already taking place. As Lord Hoffmann explained, the illegality defence is based upon a group of reasons, which vary in different situations. In each case, the policy reasons must be considered against the facts of the case. Stone & Rolls is a more difficult decision, but we do not think it is inconsistent with this approach. Gray v Thames Trains was a claim in tort and Stone & Rolls involved a concurrent claim in both contract and tort. However, there appears to be no reason why a similar approach might not be adopted in relation to claims for the reversal of unjust enrichment or indeed any other claims falling outside the strict remit of Tinsley v Milligan. In view of these trends within the case law, we do not think that legislative reform is needed outside the area of trust law."[1]

CONTRACT

Effect of statutory provision

26–001 A statute may provide expressly that a contract is unenforceable without making it illegal or void but if by statute a contract is declared illegal it is void ab initio (unless otherwise provided by the statue) and cannot be enforced.[2] Usually the unenforceability affects both parties[3] but in some cases, where the law is implemented to protect a class of persons for some social purpose, the statute may be construed so as to prevent enforcement by only the "predatory" class of party.[4] Otherwise the court must enforce the prohibition[5] even though the person

[1] Law Commission Report (2010) L.C. 320 "The Illegality Defence" paras 3.37–3.40. The report included a draft bill for very limited statutory reform of the illegality defence in relation to the law of trusts where it was considered the existing law had the potential to operate arbitrarily but the Government announced in their March 2012 Report on the Implementation of Law Commission Proposals that "reform of this area of the law cannot be considered a pressing priority for the Government at present" and that it was "not minded not to implement the Commission's proposals". See also *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338; [2012] 2 Lloyd's Rep. 679 at para.39, Jacob L.J.; as to *Tinsley v Milligan* [1994] 1 A.C. 340 HL and the application of the "reliance" test to determine the effect of illegality on proprietary rights see Pt 2 of the Law Commission Report (2010) L.C. 320 and below.

[2] See generally Law Commission Report (2010) L.C. 320.

[3] *Yin v Sam* [1962] A.C. 304 PC (buyer entitled to rely upon his own illegality in respect of the purchase of rubber from the respondent in view of the prohibition imposed by s.5(i) of the Rubber Supervision Enactment 1937, which forbade the purchase of rubber without a licence so as to defeat claim for recovery of price even by an innocent seller).

[4] *Marles v Philip Trant & Sons Ltd* [1954] 1 Q.B. 29 at 36 CA.

breaking the law relies upon his own illegality and irrespective of knowledge or intent,[6] unless of course the statute provides to the contrary.

The question of statutory illegality in a contract generally arises in connection with its formation, but it may also arise in connection with its performance.[7]

The cases tend to conflate statutory illegality and its consequences with enforceability at common law under the ex turpi rule but the two concepts are by no means juristically the same or mutually exclusive in their application; in particular though a statute may not make a particular contract void, or otherwise unenforceable, the court may nevertheless still decline to enforce it on the grounds that it was integral to some illegal or otherwise objectionable purpose.[8]

26–002 When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it may have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case it is necessary to examine the precise terms of the statute imposing the penalty upon the individual.

A statute may impose a penalty upon an individual, and yet not prohibit the contract so that even the party knowingly committing the offence can sue on the contract notwithstanding any criminal liability on his part.[9]

[5] *Mahmoud v Ispahani* [1921] 2 K.B. 716 at 731, Atkin L.J. and at 729, Scrutton L.J.; quoting Parke B. in *Cope v Rowlands*; "'a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition… if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?' If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract".

[6] *Vickers v Jackson* [2011] EWCA Civ 725 at para.21, Lloyd L.J.; "In a simple case of A suing B on a contract which is apparently lawful, claiming the payment of sums due, for example for services rendered, it is open to B to prove that the agreement was illegal because the services rendered, if any, were inherently illegal, even though that requires B to assert and prove that both he and A were parties to an illegal agreement. Equally it is open to B in such a case to show that the contract was a sham intended to deceive or defraud some third party".

[7] *Anderson Ltd v Daniel* [1924] 1 K.B. 138 at 149 CA, Atkin L.J.; "If a man contracts to supply bricks, which when delivered are found not to be of the statutory dimensions, or a printer employed to print a book delivers it without his name being affixed to it as required by the statute in that behalf, the party so supplying the bricks or printing the book is not entitled to any remuneration for his services, which are ex hypothesi illegal and ought not to have been rendered in the form in which they were rendered".

[8] *Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil* [1985] Q.B. 966 at 983, Parker J.; "In my view, however, much, if not all, of the confusion arises from attempts to apply dicta from cases where the contract itself was perfectly lawful but actual performance was not, from seeking to equate cases concerning the question whether breach of some statutory duty gives a civil remedy with cases concerned with the question whether the statute bars a civil remedy, and from occasional failures to specify, when referring to a contract as being illegal, whether it was intended to say whether it was also void ab initio or merely unenforceable ab initio or whether it was illegal in itself or merely illegal because it was intended by one or both parties to be performed in an illegal manner".

[9] *St John Shipping Corp v Joseph Rank Shipping Ltd* [1957] 1 Q.B. 267, Devlin J.; "the purpose of this statute is sufficiently served by the penalties prescribed for the offender; the avoidance of the contract would cause grave inconvenience and injury to innocent members of the public without furthering the object of the statute" (but where he enters into the contract with that motive the common law lex turpi rules as discussed post will be engaged and the contract may be unenforceable

Whether the statute has that effect ultimately must depend upon considerations of public policy.[10]

Inability to enforce the terms of the contract itself (whether under statute or common law rules) is often just one issue in any suit; and often perhaps not the most important or relevant one at that. Other rights, as typically engaged by any suit, arising out of, or in consequence of, some illegal or otherwise unenforceable contract may include rights arising under some collateral contract or warranty, out of some misrepresentation or deceit inducing the contract or some negligent misstatement, or under some other restitutionary remedy; as well as rights arising out of real or personal property interests arising through execution of any such contract.

Common law—objectionable purpose

26–003 A contract which is entered into with the object of committing an illegal act, or other objectionable act under established heads of public policy, is unenforceable under the *ex turpi causa non oritur actio* principles.[11] If the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.[12]

The common law *ex turpi* principle is in fact not specifically, or only, concerned with the lawfulness of contracts but more generally with the enforcement of any rights by the courts, howsoever arising.[13] Existing principles of public policy can be applied to new situations but otherwise the scope for any extension of the law is probably very limited[14] and the cases fall into five readily definable categories of objectionable conduct in relation to contracts,[15] namely:

by him on that discrete basis); and *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 Q.B. 374 at 389 CA, Devlin L.J. "it does not follow that because it is an offence for one party to enter into a contract, the contract itself is void".

[10] *Shaw v Groom* [1970] 2 Q.B. 504 CA; *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 Q.B. 374 CA; and *Stewart v Oriental Fire and Marine Insurance Co Ltd* [1984] 2 Lloyd's Rep. 109, Legatt J.

[11] See generally *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338; [2012] 2 Lloyd's Rep. 679; for a review of the various policy considerations and the Law Commission Report (2010) L.C. 320.

[12] *St John Shipping Corp v Joseph Rank Shipping Ltd* [1957] 1 Q.B. 267 at 283, Devlin J.; as to the effect of the law as to illegality upon demands made by beneficiaries under autonomous letters of credit and bonds see Ch.19 Charges, Payment Securities and Interest.

[13] *Hardy v Motor Insurers' Bureau* [1964] 2 Q.B. 745 at 767 CA, Diplock L.J.

[14] *Montefiore v Menday Motor Components Co* [1918] 2 K.B. 241 at 246, Shearman J.; "It has been urged upon me in the course of the argument that a judge must act with great caution in declaring a contract void as against public policy. Burrough J. in *Richardson v. Mellish* , said that public policy 'is a very unruly horse, and when once you get astride it you never know where it will carry you'; and Lord Bramwell in *Mogul Steamship Co v McGregor, Gow & Co* and Lord Halsbury in *Janson v Driefontein Consolidated Mines Ld.* repeat the warning. But, applying the words of Pollock C.B. in *Egerton v Earl Brownlow*, 'I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise'".

[15] *Printing & Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462 at 465, Jessel M.R.; "If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that their contracts, when entered freely and voluntarily, shall be held enforceable by the courts of justice."

(a) criminal and tortious conduct[16]; (b) conduct injurious to good government of foreign or domestic affairs[17]; (c) conduct injurious to the proper administration of justice[18]; (d) immoral conduct[19]; and (e) conduct in restraint of trade.[20]

Though on its true construction a statute does not make a contract expressly or impliedly unenforceable the court may nevertheless still not lend its hand to enforcement of such a contract where there is relevant intent to break the law.[21]

26–004 The range of contracts rendered unenforceable by this aspect of the ex turpi rule in any case is inevitably potentially very wide.[22] Although it is well established that mere knowledge by the party seeking to enforce the contract that the other party may have had an illegal purpose is not sufficient[23] but the authorities are none too clear on what amounts to participation in a guilty purpose and it is clear

[16] *Allen v Rescous* (1677) 2 Lev. 174.

[17] See *De Wutz v Hendricks* (1824) 2 Bing. 314 (contract to forcibly overthrow government of friendly country); *Parkinson v College of Ambulance Ltd* [1925] 2 K.B. 1, Lush J. (contract for promise of a knighthood); and *Osborne v Amalgamated Society of Railway Servants (No.1)* [1910] A.C. 87 HL (trade union levy on its members with the purpose of securing parliamentary representation).

[18] As to maintenance and champerty see Ch.12 Assignment and Other Transfer of Rights of Suit and Obligations at "Illegality".

[19] *Pearce v Brooks* (1866) L.R. 1 Exch. 213 (prostitute hired a carriage "of intriguing design" for the purposes of her trade); and *Taylor v Chester* (1869) L.R. 4 Q.B. 309 considered below.

[20] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] A.C. 535 at 565 HL, Lord MacNaghten; "restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public"; *Herbert Morris Ld v Saxelby* [1916] 1 A.C. 688 at 707 HL, Lord Parker; "the restraint to be reasonable in the interests of the parties it must afford no more than adequate protection to the party in whose favour it is imposed, and in merely considering the interests of the parties you do not take into account the effect on the public, which is a separate matter"; and *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] A.C. 269 at 335, Lord Wilberforce; "If in any individual case one finds a deviation from accepted standards, some greater restriction of an individual's right to 'trade,' or some artificial use of an accepted legal technique, it is right that this should be examined in the light of public policy… The line of thought that restrictions may in some contexts be imposed, and upheld, where they have become part of the accepted pattern or structure of a trade, as encouraging or strengthening trade, rather than as limiting it, is I think behind the courts' acceptance of exclusivity contracts and contracts of sole agency".

[21] *St John Shipping Corp v Joseph Rank Shipping Ltd* [1957] 1 Q.B. 267 at 287, Devlin J.; "if the parties knowingly agree to ship goods by an overloaded vessel, such a contract would be illegal; but its illegality does not depend on whether it is impliedly prohibited by the statute".

[22] *Spector v Ageda* [1973] Ch. 30, Megarry J.

[23] *Anglo Petroleum Ltd TFB (Mortgages) Ltd* [2007] EWCA Civ 456 at para.72, Toulson L.J.; "the distinction between knowledge and purpose was directly addressed by Lord Mansfield CJ in *Hodgson v Temple* (1813)… The plaintiff sued for the price of spirits sold and delivered to a distillery run by the defendant. As the plaintiff knew, the defendant also had a retail shop in Fleet Street for the sale of spirits. It was a statutory offence for a person to carry on the dual trades of distilling and retailing spirits. The defendant argued that the plaintiff was not entitled to recover the price of the goods sold because of his knowledge of the defendant's dual occupations. This argument was rejected. Lord Mansfield declared with masterly succinctness that: 'This would be carrying the law much further than it has ever yet been carried. The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction'"; and *Parkingeye Ltd v Somerfield Stores Ltd* [2012] EWCA Civ 1338; [2012] 2 Lloyd's Rep. 679.

that there must come a point when the connection of the contract with the intention is too remote; where the line is to be drawn in any particular case may be a question of fact and degree.

Certainly it is evident that not every contract entered into with the intention of committing an illegal act is illegal and unenforceable. It seems that there is, or may be, a distinction between a contract which creates the opportunity, or setting, for the objectionable conduct as opposed to one which actually serves to carry it into effect.[24]

A contract of indemnity against the consequences of a tort, or even a crime, is not without more necessarily unenforceable. Everything depends on public policy considerations in relation to the type of indemnity conferred by the contract, the circumstances in which it was given[25] and the nature of the particular acts on the part of the indemnitee giving rise to the claim for indemnity in the suit to which enforcement is an issue.[26]

Common law—objectionable mode of performance

26–005 Quite irrespective of any illegal purpose, shared or otherwise, a contract will be unenforceable by a party where (a) it is known to him that it can only be performed in an illegal way or only in some other manner objectionable as a matter of established public policy; or (b) there is a real and positive intention on his part to perform it in the manner known to be illegal or otherwise objectionable in those cases where the contact can be performed in more than one way[27]; or (c)

[24] *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456 at para.81, Toulson L.J.; *Les Laboratoires Servier v Apotex Inc* [2012] EWCA Civ 593; [2013] Bus. L.R. 80; and *21st Century Logistic Solutions Ltd v Madysen Ltd* [2004] EWHC 231 (QB); [2004] 2 Lloyd's Rep. 92, Field J. (no sufficient proximity between the contract of sale and the claimant's intention to defraud revenue by a VAT "carousel" scheme for the contract to be vitiated by illegality; the fact that the claimant intended the contract should be part of a fraudulent design was insufficient for the defence of illegality to defeat the claim for the price of goods sold and delivered).

[25] *Hardy v Motor Insurers' Bureau* [1964] 2 Q.B. 745 at 768 CA, Diplock L.J.; "The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced. Thus, although before the Law Reform (Married Women and Tortfeasors) Act, 1935, the court refused to enforce any right of contribution between joint tortfeasors even where the joint tort was negligence, the rights of the assured under contracts of insurance against loss caused by his own negligence were enforced at the suit of the assured notwithstanding that the negligence was criminal"; see also Ch.23 Duties and Liabilities of the Merchant; *Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd* [1957] 2 Lloyd's Rep. 1 CA; and *Ben Line Steamers Ltd v Joseph Heureux (London) Ltd* (1935) 52 Lloyd's List Rep. 27 CA.

[26] *Hardy v Motor Insurers' Bureau* [1964] 2 Q.B. 745 at 769 CA, Diplock L.J.; "No doubt in the unlikely event of the assured himself discharging his liability to the third party, the rule ex turpi causa non oritur actio would prevent his enforcing his contractual right to indemnity against the insurers if the event which gave rise to his liability to the third party were an intentional crime committed by the assured".

[27] *Archbolds (Freightage) Ltd v S Spanglett Ltd*[1961] 1 Q.B. 374 CA; *Waugh v Morris* (1873) L.R. 8 Q.B. 202, Blackburn J. (where the parties were not aware that the intended mode of performance was illegal and, on discovery, were subsequently content that the contract be performed in a legal manner within its terms, the contract was enforceable); and *Enfield Technical Services Ltd v Payne* [2008] EWCA Civ 393; [2008] I.C.R. C.A. 1433 at para.39, Lloyd L.J.; "In the present cases, neither the employer nor the employee has been found to have made any misrepresentation to the Revenue.