WILMOT-SMITH ON CONSTRUCTION CONTRACTS

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CONTRACTS: FORMATION

Introduction

1.01 In this book we shall be examining the law relating to construction, engineering, and infrastructure contracts. The law has developed a series of rules which guide the courts into making decisions about whether obligations shall be enforced. Certain types of contract are not enforced as a matter of policy, such as betting contracts. These are outside the scope of this book.

1.02 The courts will enforce most contracts in circumstances where the parties had an intention to create legal relations, there has been an offer which is accepted, and the obligations are supported by consideration (or quid pro quo).[1]

1.03 However, parties to a contract must have capacity to contract. Adults usually have the capacity to contract. Corporations will usually have capacity to contract. Companies can contract through their agents. An unincorporated association has no legal personality (in contradistinction to a company or limited liability partnership) and therefore members of the association will not be liable under a contract unless they expressly ratify the contract. However, members of the committee who contract will be liable. An undischarged bankrupt may enter into a contract so long as it does not result in him committing a criminal offence.[2] In appropriate circumstances, an agent may have actual or ostensible authority to contract on behalf of his principal. Government departments can contract and can sue or be sued pursuant to their contracts.[3] An enemy alien may not enforce a contract, but an alien may.[4]

1.04 The minimum requirement for an enforceable construction contract to be entered into is an agreement between two or more parties whereby one party offers to execute work for the other for a price.

[1] Consideration is not necessary, however, when the parties have contracted under seal.
[2] For circumstances where bankrupts can engage in business, see Insolvency Act 1986, s 360.
[3] See the Crown Proceedings Act 1947.
[4] An enemy alien does not have a right of access to the English courts. See *Amin v Brown* [2005] EWHC 1670 (Ch).

Formation of Contracts

Invitations to tender/treat and the contractor's tender

1.05 Prior to the formation of a construction contract, employers often invite tenders from contractors for the execution of work. Invitations to tender are not normally offers which are capable of acceptance, but are invitations to treat.[5]

1.06 Provided the invitation to tender is expressed to be exactly that, no legal consequences flow from the submission of a tender. The tender is received and the employer then has the option either to accept or to reject it. For clarification, invitations to tender usually state expressly that the putative employer does not bind itself to accept the lowest tender.

1.07 The tender process is different to a fixed bidding sale where a party invites fixed bids and undertakes to accept the lowest offer. In such circumstances the lowest price submitted in conformity with the invitation will constitute an acceptance of an offer.[6]

1.08 The contractor's 'offer' to carry out the works contained in the employer's invitation to treat is called a 'tender'. Modern tenders are expensive for contractors to compile and require a great deal of management and professional time. Despite the fact that the process may be costly to the contractor and that some specialist contractors might even carry out design works during the process, in most cases there will be no implication that the contractor will be entitled to be paid for producing its tender.[7] Whilst the employer may not be bound to accept the lowest tender, in some cases there may be a contractual obligation upon the employer inviting tenders to examine and consider any valid tender. Bingham LJ gave an authoritative explanation of the process in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*:[8]

> A tendering procedure of this kind is, in many respects, heavily weighted in favour of the invitor. He can invite tenders from as many or as few parties as he chooses. He need not tell any of them who else, or how many others, he has invited. The invitee may often, although not here, be put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful. The invitation to tender may itself, in a complex case, although again not here, involve time and expense to prepare, but the invitor does not commit himself to proceed with the project, whatever it is; he need not accept the highest tender; he need not accept any tender; he need not give reasons to justify his acceptance or rejection of

[5] See *Spencer v Harding* (1870) LR 5 CP 561.

[6] See *South Hetton Coal Co v Haswell Coal Co* [1898] 1 Ch 465 (CA) and *Harvela Ltd v Royal Trust Co* [1986] AC 207 (HL).

[7] However, where the work carried out by the tenderer falls outside the work that would normally be carried out by a tenderer, the court may imply a promise that the employer will pay the tenderer a reasonable sum for those works: *William Lacey (Hounslow)Ltd v Davis* [1957] 1 WLR 932.

[8] [1990] 1 WLR 1195 at 1202.

> any tender received. The risk to which the tenderer is exposed does not end with the risk that his tender may not be the highest or, as the case may be, lowest. But where, as here, tenders are solicited from selected parties all of them known to the invitor, and where a local authority's invitation prescribes a clear, orderly and familiar procedure—draft contract conditions available for inspection and plainly not open to negotiation, a prescribed common form of tender, the supply of envelopes designed to preserve the absolute anonymity of tenderers and clearly to identify the tender in question, and an absolute deadline—the invitee is in my judgment protected at least to this extent: if he submits a conforming tender before the deadline he is entitled, not as a matter of mere expectation but of contractual right, to be sure that his tender will after the deadline be opened and considered in conjunction with all other conforming tenders or at least that his tender will be considered if others are. Had the club, before tendering, inquired of the council whether it could rely on any timely and conforming tender being considered along with others, I feel quite sure that the answer would have been 'of course'. The law would, I think, be defective if it did not give effect to that.

1.09 The consequences of a breach of contract of this nature may be difficult to establish. A party has an obligation to consider a tender, provided it complies with the published rules of submission.[9] If it fails to do so, it will be open to a claim for damages. It may be that no loss can be established.[10] However, if the party losing out is able to establish that its tender would have been accepted had it been considered, it could recover damages on that basis.[11] As for the scope of the obligation to consider a tender: a party has an obligation to act fairly and in good faith.[12] However,

[9] In *JB Leadbitter & Co Ltd v Devon County Council* [2009] EWHC 930 (Ch), Richards J held that the local authority was entitled to refuse to consider the incomplete, submitted tender of a construction company to participate in a framework agreement from which public bodies could procure construction contracts, as the rules for submission clearly stated that only complete tenders would qualify for consideration.

[10] See, for example, *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 33 Con LR 24. The Court of Appeal upheld the Council's entitlement to remove Fairclough from the list of tenderers to avoid the conflict of interest arising from the wife of a Fairclough director being on the tender appraisal team, holding that they had a duty *honestly to consider the tenders of those whom they had placed on the short-list, unless there were reasonable grounds for not doing so.*

[11] This is just like a contractor which loses the opportunity to tender because of a breach of the Public Works Contracts Regulations 1991. See, for example, *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (1999) 67 Con LR 1.

[12] In the Privy Council case *Pratt Contractors Ltd v Transit New Zealand* (2003) 100 Con LR 29, it was accepted that there was an obligation to act fairly and in good faith in the consideration of tenders. However, Lord Hoffman commented that the duty of fairness was considered in Commonwealth authorities to be a 'rather indefinable term' [para 45]. On the facts of the case, he stated:

> It is…necessary to identify exactly what standard of conduct was required of the TET [tender evaluation team] in making its assessment. In their Lordships' opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different. Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable

the meaning of fairness in this context is somewhat intangible. It has been held to include treating the tenderers equally, and using competent decision-makers.[13] In the public law sphere, where a council puts a contract out to tender and complies with the statutory tendering procedure, it is entitled to apply its own commercial judgement as to what is the most effective and economic tender, even if that results in some unfairness to the applicant.[14]

Letters of intent

1.10 A letter of intent is a document which is sent to a contractor whereby the employer states that it intends to enter into a contract for the works and, pending such contract being entered into, asks for work to be done. In *ERDC Group v Brunel University*[15] the judge said:

> Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have not been used.

1.11 Letters of intent normally seek an agreement that a limited amount of work will be done for either a fixed price or up to an amount which is capped, or occasionally for a reasonable sum for the work done (a quantum meruit).[16] They may be appropriate in circumstances where either the price is agreed, or the contract terms are very likely to be agreed, and there are good reasons to start work in advance of the finalization of all the contractual documents: *Cunningham v Collett* [2006] EWHC 1771 (TCC), (2007) 113 Con LR 142.

1.12 The effect of a letter of intent depends upon the objective meaning of the words used. It may have no binding effect. This may well be its objective. For example, when considering the effect of the letter of intent sent to the contractor in *British*

> or adverse. It would have been impossible to have a TET competent to perform its function unless it consisted of people with enough experience to have already formed opinions about the merits and demerits of roading contractors. The obligation of good faith and fair dealing also did not mean that the TET had to act judicially. It did not have to accord [each tenderer] a hearing or enter into debate with him about the rights and wrongs of [any particular] contract. It would no doubt have been bad faith for a member of the TET to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all. [para 47]

See also *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 33 Con LR 2, discussed above.

13 *Pratt Contractors Ltd v Transit New Zealand* (2003) 100 Con LR 29.

14 *R v Bridgend County Borough Council (Respondent), ex parte Alison Jones (t/a Shamrock Coaches)* (QBD) (Crown Office List) (Kay J) 1 October 1999.

15 [2006] BLR 255 at p. 265.

16 Examples of such letters of intent producing binding obligations to pay either a price or a quantum meruit include *Turriff Construction v Regalia* (1971) 9 BLR 20; and *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, (1983) 24 BLR 94.

Steel v Cleveland Bridge [1984] 1 All ER 504, Robert Goff J said: 'In these circumstances, if the buyer asks the seller to commence work "pending" the parties entering into a formal contract, it is difficult to infer from the buyer (sic) acting on that request that he is assuming any responsibility for his performance, except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into . . . '.[17]

1.13 On the other hand, a letter of intent can create an ancillary contract for preliminary works which is enforceable in the ordinary way. In *Turriff Construction v Regalia* (1971) 9 BLR 20, the letter of intent included the words 'subject to agreement on an acceptable contract', but it was held that this referred only to the full contract, and the letter of intent amounted to a binding contract in respect of the preliminary works and the employer was liable to pay for those works. Where the terms of a letter of intent are sufficiently clear so as to give rise to a binding agreement, and no formal contract is ever executed by the parties, the parties will continue to be governed by the letter of intent.[18] Similarly, if the parties ultimately enter into the intended contract, the parties are normally governed by that contract and the terms of the letter of intent cease to have effect. Alternatively, a letter of intent can be held to constitute acceptance of an offer leading to a binding contract. This was held to be the case in *Watson Smithett v Bangladesh Sugar* [1986] 1 Lloyd's Rep 378, despite the requirement for the submission of a security deposit/performance bond.

1.14 Another alternative is that the letter of intent can constitute a contractual offer to the effect that if the recipient undertakes the proposed action, he will be remunerated reasonably where he acts to the benefit of the sender pursuant to the letter (a quantum meruit). The legal basis for recovery of a reasonable sum is the law of unjust enrichment, rather than by a contractual promise of payment: *BSC v Cleveland Bridge* [1984] 1 All ER 504, at page 511.

However, if the letter of intent expressly refers to the parties being required to use their reasonable endeavours or to negotiate further agreements in good faith (even where such terms could be construed as a condition precedent[19]), there will be no enforceable contract.[20]

[17] At 510j–511a. NB the text correctly reflects the judgment but the judge must have meant to refer to the 'seller'.

[18] *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC); 119 Con LR 32.

[19] See *Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm); [2012] 2 Lloyd's Rep 93.

[20] *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC), 107 Con LR 1; *Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] EWCA Civ 548 but see also the cases cited in paragraphs 1.34 and 1.60.

Subject to contract

1.15 Work is often asked to be done 'subject to contract'.[21] Sometimes, work may be asked to be done subject to contract and in anticipation of a contract. In such cases it becomes a question of construction as to whether there is any concluded contract and whether or not there is an obligation on the contractor to carry out the works and an obligation on the employer to pay for the work done.

1.16 However, the term 'subject to contract' ought not to be confused with agreements which contemplate that a more formal contract will be agreed later, but where the parties wish to bind themselves in the meantime. For example, the Infrastructure Conditions of Contract, Measurement Version August 2011 provides for a formal agreement being executed, but that does not mean that a contract has not already been made. It is a question of construction as to whether the parties intend to be bound by their agreement pending the execution of a later and formal agreement, or whether they do not wish to be bound until the formal agreement is executed. In *Harvey Shopfitters Ltd v ADI Ltd*[22] and *Bryen & Langley Ltd v Martin Boston*[23] the Court of Appeal decided that the parties were bound by the deal they had made even though they contemplated the execution of a formal agreement at a later date.

In *R.T.S. Flexible Systems v Molkerei*[24] the Supreme Court stated:

> 47. . . . in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend on the circumstances.

1.17 In a 'subject to contract' case, it is important to keep in mind whether by the parties' exchanges they have, in any event, agreed to enter into a contract irrespective of their earlier understanding or agreement.[25]

1.18 An agreement marked 'subject to contract' and also letters of intent (to some extent) should be distinguished from where the parties enter into an 'agreement to agree'.[26] Such agreements will not be enforced by the courts because they are too uncertain or vague. However, if the court is satisfied that the parties thought they had made a binding contract, the courts will look to seek if there is a way to enforce the contract

[21] This is also dealt with under the topic 'Intention to create legal relations', para 1.60 et seq.
[22] [2003] EWCA Civ 1757, [2004] 2 All ER 982.
[23] [2005] EWCA Civ 973. See also *Rossiter v Miller* (1878) 3 App Cas 1124 at 1151 *per* Lord Blackburn; and *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 288–9.
[24] [2010] UKSC 14, [2010] 1 WLR 753.
[25] See *R.T.S. Flexible Systems v Molkerei* [2010] UKSC 14, [2010] 1 WLR 753 at [55–6].
[26] See, for example, *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC), 107 Con LR 1; *Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] EWCA Civ 548 and the discussion and cases cited in paragraphs 1.34 and 1.60.

(this may arise by implying certain terms into the agreement) in order to 'facilitate the transaction of commercial men and not to create obstacles'.[27] In this regard, see the discussion at paragraphs 1.34–1.38. Particularly with long-term contracts, the courts may well imply an agreement that a reasonable price be paid in the event that the validity of the original prices has expired and there is no, or no sufficient, mechanism for agreement of new prices for further works.

The process of offer and acceptance

1.19 No contract can be legally enforceable without an offer and an acceptance. Usually these elements will be documented in writing and the parties will sign or seal their agreement in a document which will record what they have agreed.

1.20 A written contract has additional consequences in that it means that the terms of the contract will not normally require a court to decide what words the parties used to express their agreement, although the court may be required to decide what the chosen wording actually means.

1.21 Contracts are not always formed by the signing of a written document. The agreement can be formed entirely orally (or verbally as it is sometimes described), or it can be formed partly orally and partly in writing. For example, an offer can be made by email and accepted by telephone. An offer can also be accepted by conduct. This is common in the field of construction. A main contractor may send an order form to a sub-contractor (the offer) and that may be accepted by the sub-contractor commencing the work. The commencement of the work will usually be taken as an acceptance if there has been no intermediate communication. Sometimes the conduct of the parties will lead the court to infer a contract was either entered into or continued by conduct. A contractor may make an offer by an estimate for the works.[28] The objective actions of the parties will be determinative in deciding whether a contract was entered into.[29]

[27] *R&J Dempster Ltd v Motherwell Bridge and Engineering* 1964 SC 308 (Scotland), *per* Lord Guthrie. For this concept in action regarding a settlement agreement, see *Jacobs UK Ltd v Skidmore Owings & Merrill LLP* [2012] EWHC 3293.

[28] For an example of a case where an estimate was deemed an offer, see *Sykes v Packham t/a Bathroom Specialist* [2001] EWCA Civ 608, where the Court of Appeal upheld the judge's decision that the contractor's estimate provided for a reasonable price for the works.

[29] For example, in *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] All ER (Comm) 737 it was held that you could infer a common intention to be bound by a contract which has legal effect in order to establish an agreement based on conduct. This case was applied by Ramsey J in *Skanska Rashleigh Weatherfoil v Somerfield Stores Ltd* [2006] EWHC 947 (TCC) where he held in para 92: 'The important factor in this case is that the parties continued to conduct themselves as before in circumstances where they had a pre-existing agreement.' The appeal was allowed against part of his judgment [2006] EWCA Civ 1732, but not that part.

Offers

1.22 Offers may be in the form of (for example): a tender, letter of intent, estimates, standing offers,[30] or simply an oral conversation between two parties. The essential characteristics for reaching a binding agreement are the offer and the acceptance, whatever modes are used.[31]

A valid offer is capable of acceptance at any time after it has been made, unless it is rejected (by counter-offer or otherwise); it is expressly withdrawn/revoked; or it lapses due to the passage of time. An offer which is replied to by a counter-offer (often called a 'cross offer'), the law states is rejected, unless it is renewed by the offeror.[32]

1.23 Once an offer is rejected it is incapable of being accepted. Once the recipient of an offer (the offeree) has replied with a counter-offer, the recipient cannot then accept the previous offer, unless the original offeror expressly allows it. But that allowance must normally be by way of a fresh offer which is capable of being accepted.

Unconditional acceptance

1.24 Whilst the concept of offer and acceptance might appear simple, in practice in many cases it is not at all. It can often be difficult to establish whether or not there has been an offer and an acceptance in circumstances where the passing of numerous offers and counter-offers mounts up before at some point a consensus is reached. The issue is particularly acute in construction contracts where a considerable volume of documentation may pass between the parties before the contract is finally agreed and the works are commenced. For example, the passing of correspondence between putative contracting parties may be a succession of letters or emails chipping away at disagreements until at some point an agreement is reached on enough of the individual items contained within one or other party's terms and conditions sufficient to permit a court to hold that there is a consensus. In this scenario a further difficulty may arise where the parties send various counter-offers with their own printed terms on the reverse of their correspondence. This process, of a series of counter-offers each referring to a parties' own terms and conditions, is sometimes described as 'the battle of the forms'. In some of those cases, 'the battle is won by the man who fires the last shot'.[33]

[30] Standing offers are tenders which are invited for the periodic carrying out of work. Most of the relevant authorities concern the supply of goods. However, the principles are applicable to contracts for work and labour: *R v Demers* [1900] AC 103 (PC). A construction contract would be a contract for work and labour.

[31] For guidance as to whether an agreement has been reached, see the helpful guidance in *Pagnan v Feed Products* [1987] 2 Lloyd's Rep 601 (CA) at pp. 610 and 619, and see *R.T.S Flexible Systems v Molkerei* [2010] UKSC 14, [2010] 1 WLR 753, which adopted the *Pagnan* principles at [46–54]. However, cf *Wartsila France SAS v Genergy Plc* (2003) 92 Con LR 113.

[32] *Hyde v Wrench* (1840) 3 Beav. 334.

[33] *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 WLR 401 at 404. Also, see *Tekdata v Amphenol* [2009] EWCA Civ 1209, [2010] Lloyd's Rep 357, where Dyson LJ referred to and seemed to approve of the 'last shot doctrine'; see also *Trebor Bassett Holdings Ltd v ADT Security plc* [2011] EWHC 1936 (TCC), [2011] BLR 661 at [173].

1.25 The structural scheme of offer, acceptance, and counter offer described above is classic law.[34] However, it was called into question by the courts in recognition of the fact that the conduct of the parties is not always susceptible to clear analysis in that classic way. In many cases, a close analysis of the parties' correspondence would (in fact) reveal that neither party reached a stage where it wholly accepted the other party's offer. However, in most cases, the courts would be likely[35] to find that at a point in time the parties had agreed on all the essential terms. In *Tekdata*[36] Dyson LJ said at paragraph 25:

> In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions, and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the 'traditional offer and acceptance analysis' i.e. that there is a contract on B's conditions. I accept that this analysis is not without its difficulties, in circumstances of the kind to which Professor Treitel refers in the passage quoted at paragraph 20 above. But in the next sentence of that passage Professor Treitel adds 'for this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance'. I also accept the force of the criticisms made in Anson's *Law of Contract*, 28th Edition. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.

1.26 The above authorities must be looked at against the background of Lloyd LJ's well-known dictum in *Pagnan SpA v Feed Products Ltd*:[37]

> As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarised as follows:
> (1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see *Hussey v Horne-Payne* (1878–1879) 4 App Cas 311).
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see *Love and Stewart v Instone*,[38]

[34] *Per* Steyn LJ in *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27.
[35] See *R.T.S Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] 1 WLR 753 (SC); *Pagnan SpA v Feed Products Ltd* [1987] 1 Lloyd's Rep 601 (CA).
[36] *Tekdata v Amphenol* [2009] EWCA Civ 1209, [2010] Lloyd's Rep 357, which was followed in *Trebor Bassett Holdings Ltd v ADT Security plc* [2011] EWHC 1936 (TCC), [2011] BLR 661 at [173].
[37] [1987] 2 Lloyd's Rep 601 at 619. Applied in *Haden Young Ltd v Laing O'Rourke Midlands Ltd* [2008] All ER (D) 49 (Jun).
[38] (1917) 33 TLR 475.

where the parties failed to agree the intended strike clause, and *Hussey v Horne-Payne*,[39] where Lord Selbourne said at p 323:

> …the observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held to be established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, *and without the settlement of which the parties had no idea of concluding any agreement*. [Lloyd LJ's emphasis].

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart v Instone* per Lord Loreburn at p 476).

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later…

1.27 It can be difficult to contend against the existence of a contract when performance has taken place. In *G Percy Trentham Ltd v Archital Luxfer Ltd*,[40] Steyn LJ said:

> The fact that the contract was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential.

[39] (1878–1879) 4 App Cas 311.

[40] [1993] 1 Lloyd's Rep 25 at 27, which was applied in *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] 3024 (TCC) at [81].

1.28 In some circumstances where there has been a long chain of correspondence, the parties may both be uncertain as to if or when an agreement was reached, and/or whether the agreement pertained as a result of the content of their continuing correspondence.

1.29 In that event, the courts will analyse the correspondence and decide that at the point where agreement is reached a curtain comes down on the correspondence, a contract is made, and all that takes place subsequently is irrelevant.[41] Subsequent acts of negotiations of the parties do not assist the court in deciding how a contract (and the correspondence constituting the offer and acceptance) is to be interpreted,[42] and nor do they affect a contract once it has been agreed. What parties think and do subsequent to the formation of a written contract is irrelevant, unless a fresh contract is entered into.[43]

1.30 If the contract has been entered into orally or partly orally and partly in writing subsequent conduct might be examined to help determine the parties' original intentions. In *Maggs v Marsh*,[44] the court held, citing Lewison on *The Interpretation of Contracts*, 3rd edn,[45] that the principles laid down in *Whitworth Street Estates v James Miller* [1969] 1 WLR 377 that subsequent conduct is inadmissible did not apply to an oral contract or a contract partly oral and partly in writing. The rationale is that the subsequent words or conduct may assist in ascertaining the terms agreed to but not written down.[46]

Essential terms

1.31 Essential and important terms must be agreed before there can be a binding contract.[47] In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*,[48] a failure to agree the amount of damages payable in the event of delay was held by Robert Goff J to relate to an essential term of the putative contract and, since the term was not agreed, he concluded that no contract was entered into. Without a contract, there could be no breach of contract claim, therefore defective work or late completion of the work would have (and in this case had) no remedy.

1.32 However, this is subject to the important clarification in *R.T.S. Flexible Systems v Molerei* [49] that '[e]ven if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct

[41] *Harmony Shipping Co SA v Saudi Europe Line Ltd 'The Good Helmsman'* [1981] 1 Lloyd's Rep 377 (CA) *per* Ackner LJ.
[42] See *British Guiana Credit Corp v Da Silva* [1965] 1 WLR 248, 255 (PC).
[43] *Whitworth Street Estates v James Miller* [1969] 1 WLR 377.
[44] [2006] EWCA Civ 1058, [2006] BLR 395.
[45] Particularly at pp. 89 and 91.
[46] See also *Chartbrook Ltd v Persimmon Homes Ltd and others* [2009] UKHL 38, at paragraph 65.
[47] See Lloyd LJ in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 at 619 (n 37).
[48] [1984] 1 All ER 504, (1983) 24 BLR 504.
[49] [2010] UKSC 14, [2010] 1 WLR 435 at [45].

may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement'.

1.33 What the essential and important terms are is a matter for decision in each case. There is no hard and fast rule because the applicable test is what was important to the parties, as opposed to what would have been important to an objective and cool bystander. Nevertheless, in construction contracts, the important terms are usually:

(a) the identification of the parties;
(b) the definition of the work to be done;
(c) the price to be paid for that work;
(d) the time in which the work is to be done (often referred to as the contract period, as it shall be in this book); and
(e) the amount of damages which are to be paid in the event of delay.

1.34 It has been suggested that the price to be paid for the work is invariably an essential element which must be agreed upon for there to be a contract.[50] But this is too simple a position. If the price is not agreed and it is not an essential term, then the absence of agreement as to price will not prevent an agreement coming into existence.[51] In that event, the parties will have made an agreement and all the court has to do is ascertain what is fair and reasonable. For example, in *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170 the Court of Appeal held that an electrical sub-contractor could have entered into a contract even though no price had been agreed on the basis that the price was to be a reasonable price. In that event recovery would be for sums due under a contract. A bare agreement to negotiate a price is not enforceable.[52] But an express agreement to negotiate a price in good faith may well be where the parties have set out the basis upon which they

[50] *Courtney & Fairbairn v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297; *Foley v Classique Coaches Ltd* [1934] 2 KB 1 at 13 *per* Maugham LJ; *May and Butcher Ltd v R* [1934] 2 KB 17 at 20 *per* Lord Buckmaster and 21 *per* Viscount Dunedin.

[51] *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170; and *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504. Here, the plaintiffs had performed work pursuant to a request by the defendants, in anticipation of an agreement as to price. The work done was not referable to any contractual terms as to payment or performance. However, in the circumstances, the defendants were obliged to pay a reasonable sum for the work by quantum meruit. See also *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* (No. 1) [2001] EWCA Civ 406, [2001] 2 All ER (Comm) 193, [2001] 2 Lloyd's Rep 76. See also *Monavon Construction Ltd v Davenport* [2006] EWHC 1094 (TCC), (2006) 108 Con LR 15 in which HHJ Thornton QC held that there was no enforceable agreement containing a cost limit because the precise scope of work to which such a limit would relate was not clearly defined or definable.

[52] *Walford v Miles* [1992] AC 128 (HL); see also *P&O Property Holdings Ltd v Norwich Union Life Insurance Society* (1994) 68 P&CR 261 (HL) and *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd* [2006] EWHC 1341 (TCC), (2006) 107 Con LR 1 at [633–9]. See also the discussion below on the intention to create legal relations and *Jackson & Ors v Thakrar & Ors* [2007] EWHC 271 (TCC).

intend to reach settlement.[53] If there is an agreement that a fair price will be paid, then the courts can enforce the agreement and quantify the amount.[54] If the agreement is a long-term one and the matter of price is left for agreement in the future, then the courts will seek to enforce the agreement, if they can. They cannot do so if the contract contains no objective criteria by reference to which the matter still to be agreed can be ascertained.[55] The contract has to contain sufficient indications of objective criteria to enable that which has still to be agreed or calculated to be arrived at by the parties—or if they cannot agree, by a court or arbitrator. If there are those objective indications, then the contract will be enforceable.[56] The presence of an arbitration clause may not provide the necessary objective indications, and it may not be possible to imply a term that the arbitrator could arrive at what the parties were unable to agree. On the other hand the courts could look upon an

[53] See *Cable & Wireless Plc v IBM United Kingdom* [2003] BLR 89 (Comm Crt); and the *obiter* discussion in the Court of Appeal in *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 at [115]–[121], particularly at [121]. Eldyard J in *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198 (Ch) cited *Petromec* in paragraph 54 of his judgment and said:

> Longmore LJ (with whom Mance LJ (as he then was) and Pill LJ agreed) considered that in the particular circumstances there were no good reasons for saying that the obligation to negotiate the discrete issue as to the extra cost of the upgrade was unenforceable: the task was defined and of comparatively narrow scope; the provision in question was part of a complex agreement drafted by City solicitors; and whilst recognising the difficulty of determining when a requirement to negotiate in good faith has been satisfied (the concept of bringing negotiations to an end in bad faith being 'somewhat elusive') nevertheless the court should not deny enforcement on that ground: 'the difficulty of a problem should not be an excuse for a court to withhold relevant assistance from the parties by declaring a blanket enforceability of the obligation'. Though of course accepting that any review of *Walford v Miles* was a matter for the House of Lords/Supreme Court he did not consider it could mandate 'blanket unenforceability' and he concluded as follows (in paragraph 121):
>
> > It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for the law deliberately to defeat the expectations of honest men, to adopt slightly the title of Lord Steyn's Sultan Azlan Shah lecture delivered in Kuala Lumpur on 24th October 1996 (113 LQR 433). At page 439 Lord Steyn hoped that the House of Lords might reconsider *Walford v Miles* with the benefit of fuller argument. That is not an option open to this court. I would say only that I do not consider that *Walford v Miles* binds us to hold that the express obligation to negotiate as contained in [the relevant provision] is completely without legal substance.

But see *Little v Courage Ltd, The Times*, 4 January 1995; *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329 (CA) cited by Jackson J in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another* [2006] EWHC 1341 (TCC).

[54] *The Didymi* [1988] 2 Lloyd's Rep 108, particularly at 115–16 and 119; and *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Refinery AD* (No. 1) [2001] 2 Lloyd's Rep 76 at 91.

[55] *Malozzi v Carapelli* [1976] 1 Lloyd's Rep 407 (CA). See also *Walford v Miles* [1992] AC 128 where an open-ended agreement by a seller to deal with only one potential purchaser lacked certainty and was therefore unenforceable.

[56] *The Didymi* [1988] 2 Lloyd's Rep 108, and *Sudbrook Trading Estate Ltd v Eggelton* [1983] 1 AC 444 (HL).

arbitration clause as providing the appropriate objective machinery to allow what appears to be an incomplete bargain to have contractual certainty by the operation of that arbitration clause.[57] This would particularly be the case if the arbitration clause provided machinery for completion of the bargain.[58] There is a distinction between an agreement to pay a reasonable price (enforceable)[59] and an agreement that the price is to be agreed—probably unenforceable.

1.35 The following situations could potentially provide sufficient certainty for a court to decide whether the parties have reached a sufficient degree of agreement to give rise to a contract. Where the price is ascertainable by reference to a formula subsequent to the execution of the work, then a contract can be entered into with no price agreed. If the exact price is not important to the parties, then a contract can be formed without a price being agreed. If the contract price is to be ascertained by a third party, be it an expert or an arbitrator, then the contract is enforceable.

1.36 When the parties do not actually agree, but agree that they will enter an agreement, that agreement is not enforceable.[60]

[57] For the two sides to this coin, see *Beer v Bowden* [1981] 1 WLR 522 (CA) at 526 *per* Goff LJ (to the effect that such a clause does not complete the bargain) and Rix LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* (No 1) [2001] EWCA Civ 406, [2001] 2 All ER (Comm) 193, [2001] 2 Lloyd's Rep 76.

[58] See, for example, *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1988] 1 Lloyd's Rep 205 (PC), in which Sir Robin Cooke said:

> At the present day, in cases where the parties have agreed on an arbitration or valuation clause in wide enough terms, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction . . .

[59] See Rix LJ in *Willis Management (Isle of Man) Ltd v Cable and Wireless plc* [2005] EWCA Civ 806 at para 33:

> It is like the distinction between agreeing, whether expressly or by implication, that the price of goods to be sold is to be a fair or reasonable price and on the other hand agreeing that the price is to be a price 'to be agreed'. In the first case the price will be set by the court (if none is previously agreed by the parties), but in the second case the parties have said that they, and not the court, will agree the price: see *May and Butcher Ltd v R* [1934] 2 KB 17, at 21, 22.

[60] See *Courtney & Fairbairn v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297; *Albion Sugar Co Ltd v Williams Tankers Ltd* [1977] 2 Lloyd's Rep 457; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1981] 2 Lloyd's Rep 425; *Voest Alpine Intertrading GmbH v Chevron International Oil Co Ltd* [1987] 2 Lloyd's Rep 547; *Walford v Miles* [1992] 2 AC 128; *Willis Management (Isle of Man) Ltd v Cable and Wireless plc* [2005] EWCA Civ 806. But see the decision of Peter Pain J in *Donwin Productions Ltd v EMI Films Ltd, The Times*, 9 March 1984, in which he held that an oral contract which contained a term that the parties would negotiate in good faith a fuller agreement with further terms which would be reduced to writing was a proper contractual agreement in law. This might be doubted however having regard to Millett LJ in *Little v Courage Ltd* (1994) 70 P&CR 469 at 476 but, as the recent cases illustrate, may be explained on the basis that the further terms were not sufficiently important to mean that no agreement had been reached.

1.37 If lesser terms are not agreed, then a contract can still be formed. It is not the case that all terms must be agreed, but that all important terms must be agreed; see *Pagnan SpA v Feed Products Ltd*[61] (nn 37 and 47).

1.38 Rix LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* (No. 1) [2001] EWCA Civ 406, [2001] 2 All ER (Comm) 193, [2001] 2 Lloyd's Rep 76 set out the following propositions:

(i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that,

(ii) Where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that 'you cannot agree to agree'.

(iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.

(iv) However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

(v) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence.

(vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. *Certum est quod certum reddi potest*.

(vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.

(viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable.

(ix) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in section 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in section 15(1) of the Supply of Goods and Services Act 1982).

(x) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.

1.39 These propositions were applied by Ramsey J in *Bell Scaffolding (Aust) Pty Ltd v Rekon Ltd* and *Alba Hire & Sales Ltd* [2006] EWHC 2656 (TCC). It is in the sphere

[61] [1987] 2 Lloyd's Rep 601 at 619.

of construction contracts, where arguments as to whether there is a contract or not (a 'contract v no contract' argument), that the problems are felt most acutely.[62] Often the questions of fact which must be applied to the above principles by the judge, will be looked at through the viewpoint of whether there can be divined from them objectively speaking a desire to be contractually bound. If one party appears to the judge to be astute to ensure that there is no agreement in the classical offer and acceptance sense in order that it can avoid damages for breach of contract or obtain a quantum meruit, the judge is likely to find that there was a contractual agreement on the basis that the reasonable expectations of honest men would, on the objective evidence, require it. Alternatively, the judge may find that there is no contract, but may value the quantum meruit at the rates which the contract provided for.

Communication of acceptance and silence

1.40 Generally, an offeree's acceptance of an offer will not be effective unless and until it is communicated to the offeror. For there to be effective communication it must be brought to the attention of the offeror. There are exceptions to this general rule: (a) where a letter is being sent to a commercial organization and the offeree's conduct displaces the general rule;[63] (b) where an offer is made to the public;[64] (c) terms of the offer expressly or impliedly do not require communication of the acceptance;[65] (d) in unilateral contracts;[66] (e) where the acceptance is not communicated to the offeror due to some fault on the offeror's part;[67] (f) communication to the offeror's agent (subject to the agent having the due authority to receive the communication of the acceptance); (g) acceptance by post (generally, acceptance by post takes effect when the letter is posted);[68] and (h) an acceptance based on some form of estoppel.[69]

Notice of terms

1.41 A party is only bound by terms of which it has notice. Where a contract contains a particularly onerous or unusual clause, a party must show that it was brought fairly and reasonably to the attention of the other party.[70] Such a clause may be in the form of an exclusion or limitation of liability clause.

[62] First-instance decisions which seek to apply these principles do not do more than just that; there has been no real development of them. An example of how these principles are applied is in *J Murphy & Sons Ltd v ABB Daimler Benz Transportation (Signal) Ltd* (HHJ Hicks QC), 2 December 1998 [1999] CILL 1461.

[63] See *Chitty on Contracts* (31st Edn) at [2-091].

[64] See *Chitty on Contracts* (31st Edn) at [2-091].

[65] *Attrill v Kleinwort Benson Ltd* [2012] EWHC 1189 (QB) at [164]. The Court of Appeal confirmed the findings in the High Court: [2013] EWCA Civ 394.

[66] For a more detailed analysis of this areas, see *Chitty on Contracts* (31st Edn) at [2-047].

[67] See, for example, *Entores Ltd v Miles Far East Corp.* [1955] 2 QB 327.

[68] See, for example, *Henthorn v Fraser* [1892] 2 Ch 27, p. 33; and *Harris' Case* (1872) LR 7 Ch App 587.

[69] This proposition is advanced in *Chitty on Contracts* (31st Edn) at [2-73].

[70] See *Interfoto Picture Library v Stiletto Visual Programmes* [1989] QB 433 (CA).

Course of dealing

1.42 In construction contracts, sometimes terms may be implied by reason of the fact that the parties have made a series of similar contracts containing certain terms.[71] However, due to the complexity of construction contracts, the implication of such terms will often be excluded by the express written terms of the contract.

Consideration

1.43 In English law, except where a promise is made in a deed or 'under seal', it is still thought to be the case that there must be 'consideration', or quid pro quo, within the contract before the law will enforce a bargain.[72]

1.44 Normally, this presents no difficulty. In a normal building contract consideration might be described in the following way: *in consideration of A building the structure, then B will pay to A the contract price*.

1.45 Absent consideration, the law will regard a 'contract' as a worthless promise which is unenforceable at law.

1.46 Thus, taking the above example, if A had already built the structure on B's land with no promise by A to pay, then there will be no consideration in a subsequent promise by A to pay the contract price. This situation has been characterized by the legal maxim *past consideration is no consideration*. In that situation, because the structure has already been built before a promise to pay has been made, there is no mutual exchange of obligations and A's subsequent promise to pay the contract price will be unenforceable for want of consideration.

1.47 Consideration must be real. It cannot be illusory. A promise to repay a debt of £100 with a cheque for £90 will not therefore discharge the debt, even if both parties agree that should be so. That is because the pre-existing contractual obligation to repay a debt of £100 is clearly of greater value than the payment of £90. So the bargain: *in consideration of A paying B £90, B agrees to forgive A's debt of £100 in full*, will not be an enforceable contract.[73] Instead, this situation may be seen as B giving A a gift of £10 (because, as a matter of arithmetic the consideration is worth less than the promise).

[71] See, for example, *Hanson v Rapid Civil Engineering* (1987) 38 BLR 106.

[72] It was not always so as a rule of substantive law. Lord Mansfield in *Pillans v Van Mierop* (1765) 3 Burr 1663 at 1668, 1669 said: 'I take it that the ancient notion about want of consideration was for the sake of evidence only; for when it is reduced to writing, as in covenants, specialties, bonds etc., there was no objection to want of consideration.' This extract from the judgment is quoted by Oliver Wendell Holmes Jnr, *The Common Law*, Lecture VII (1881). In the same lecture Holmes shows from the Yearbooks that the doctrine was one of proof and evidence only.

[73] See *Foakes v Beer* (1884) 9 App Cas 605.

However, the courts do not look too closely into the adequacy of consideration: generally, the adequacy of the consideration will not affect the validity of the contract. Therefore, small acts or omissions (and even nominal consideration)[74] may constitute adequate consideration. In the above example, where money alone is the commodity traded, it is easy to see that the consideration is not consideration at all. But if the bargain is expressed: *in consideration of A paying B £90 and a peppercorn, B agrees to forgive A's debt of £100 in full*, then it would be enforceable because the court will not inquire into the exact worth of the peppercorn. **1.48**

This is obviously artificial. Everyone knows that a peppercorn is virtually worthless. But the distinction remains part of English law. **1.49**

In construction contracts, such bargains as those identified above will attend the completion of the works where the builder is owed money by the employer and the employer wishes to reduce the amount payable. If the builder claims £100 and the employer disputes the claim but agrees to pay £90 in settlement of the claim, then there will be an enforceable bargain. The claim will have been bought off with the promise of payment. But if the builder's claim is agreed in the sum of £100 and then the employer agrees to pay £90 in settlement, then the bargain is unenforceable for want of consideration. **1.50**

Upon such distinctions many cases turn. But at the end of the works, when tempers on both sides are frayed, it will often be the case that the contractor wishes a swift payment and the employer wishes to minimize its payment, because of real or perceived inadequacies of the performance of the builder. Such distinctions become important in that event. **1.51**

An analogous situation is when the builder is not performing its obligations in a way which gives the employer confidence that the works will be properly done, and the employer agrees to pay to the builder a sum greater than the contract price in order to persuade it to complete its work properly. In such a situation, which is not uncommon, a strict view might be that the promise to pay a sum in addition to the contract price was unsupported by consideration and was therefore unenforceable. That would be, so the argument would go, because the employer was not getting anything in exchange for its promise beyond what it was already entitled to. **1.52**

However, in that situation the courts have held that the promise to pay the further sum was enforceable because it was in fact supported by consideration. The leading case of *Williams v Roffey Bros & Nichols (Contractors) Ltd*,[75] is authority for the proposition that the promise to execute a pre-existing contractual obligation can be good consideration. The judgment manifests a tension between the court's wish **1.53**

[74] eg a peppercorn.
[75] [1991] 1 QB 1.

to enforce a bargain and its wish not to reward a builder by awarding more money than the original bargain allowed.[76] Nevertheless, the court set out the applicable principles as follows:

> (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 obligation under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding. [15G–16A]
>
> Consideration there must still be but, in my judgment, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflect (sic) the true intention of the parties. [18H]

1.54 The current position is that the courts will rarely find that a commercial bargain is unenforceable because of a lack of consideration. Such situations where the courts will do so usually involve unfair commercial pressure. A want of consideration can be invoked when seeking to set aside a bargain obtained in unfair circumstances. However, the law relating to economic duress would seem to be more than sufficient to deal with any such injustice.

1.55 The practical result of this is that it would be a brave litigant now who would seek to defend a case on the basis that the bargain lacked consideration. The doctrine is ripe for reconsideration by the Supreme Court. It is more likely, however, that it will not be revisited since very few cases will turn on the question of whether or not there has been consideration.

Economic duress

1.56 This topic is a close relation of the doctrine of consideration and so is examined here. An agreement which is achieved under economic duress is voidable, that is avoidable by the party who was under the duress.[77] However, economic duress is a hard matter to prove. It involves the coercion of will such that there is no true consent. It is not merely a situation where a party has or feels he has no choice. Similarly, mere commercial pressure without coercion will not amount to economic duress.[78] A party must demonstrate that 'the payment made or the contract

[76] See *Ward v Byham* [1956] 1 WLR 496; *Williams v Williams* [1957] 1 WLR 148; *New Zealand Shipping Co Ltd v Satterthwaite & Co Ltd* [1975] AC 154; *Pao On v Lau Yiu Long* [1980] AC 614. But for a contrary view, see *Stilk v Myrick* (1809) 2 Camp 317; and *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705.

[77] *Universe Tankships v International Transport Workers Federation* [1983] 1 AC 366 (HL); *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.

[78] See *Pao On v Lau Yiu Long* [1980] AC 614, particularly at 635, *per* Lord Scarman.

entered into was not a voluntary act'[79] and that the pressure exerted was illegitimate.[80] 'Illegitimate pressure' could be conduct which is not (by itself) unlawful, however it would be an unusual case where a tribunal were to make such a finding, particularly in a commercial context.[81]

1.57 These principles were summarized by Clarke J in *Kolmar Group AG v Traxpo Enterprises Pvt Ltd*:[82]

(i) Economic pressure can amount to duress, provided it may be characterized as illegitimate and has constituted a 'but for' cause inducing the claimant to enter into the relevant contract or to make a payment. See Mance J in *Huyton SA v Peter Cremer GmbH & Co* [1999] CLC 230.

(ii) a threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented.

(iii) it is relevant to consider whether the claimant had a 'real choice' or 'realistic alternative' and could, if it had wished, equally well have resisted the pressure and, for example, pursued practical and effective legal redress. If there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat.

(iv) The presence, or absence, of protest, may be of some relevance when considering whether the threat had coercive effect. But, even the total absence of protest does not mean that the payment was voluntary.

1.58 Economic duress is often a matter which has been considered by those in the construction field, particularly when contractors or sub-contractors are starved of cash and feel they have no choice but to bend the knee in the particular situation in which they are in. But a weak bargaining position does not create economic duress. The requirement is of coercion of will, which will usually mean some kind of moral turpitude on the part of the party doing the coercing. The two areas where it can be a factor are first where the employer seeks to get the builder to take a lesser sum than he is truly entitled to just so that he gets paid; second where the contractor or sub-contractor states that it will not proceed unless an enhanced rate is paid.

1.59 Whilst the concept of economic duress has received academic criticism,[83] it is not something which can be disregarded as not being part of the law. In the

[79] See *Pao On v Lau Yiu Long* (n 78), p. 636.

[80] *Universe Tankships v International Transport Workers Federation* [1983] 1 AC 366 (HL) at pp. 384 and 400.

[81] See *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA); *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620; *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 1 Lloyd's Rep 501.

[82] [2010] EWHC 113 (Comm), [2010] 1 CLC 256.

[83] As for example by PS Atiyah in his article, 'Economic Duress and the Overborne Will' (1982) 98 LQR 197. See also D Tiplady, 'Concepts of Duress' (1983) 99 LQR 188 and PS Atiyah, 'Duress and the Overborne Will Again' (1983) 99 LQR 353.

construction sphere, there are relatively few economic duress cases.[84] The most famous one, *D&C Builders v Rees*,[85] involved a threat not to pay, and a lesser sum than that which was owed was accepted in an agreement which was set aside. That case, as many others no doubt, could have been solely decided on the basis of a lack of consideration.[86] But, generally speaking, claims for economic duress fail unless some kind of moral turpitude can be shown.[87] In cases involving withdrawal of credit or payment of a smaller sum than that claimed, for example, much may depend on the genuineness or good faith of the party applying the duress.[88]

Intention to create legal relations

1.60 The relevant principles were summarized by the Supreme Court at paragraph 45 of its judgment in *R.T.S Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co*:[89]

> The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.

1.61 See also Coulson J in *Jackson & Ors v Thakrar & Ors* [2007] EWHC 271 (TCC): '[i]t is trite law that, in order for there to be an enforceable contract or a binding compromise, the parties must have intended to create legal relations: see, by way of example, *Baird Textile Holdings v Marks and Spencer* [2002] 1 All ER (Comm) 737…'.

1.62 A lack of intention can be inferred from a lack of specificity in the work to be done.[90] The intention is presumed in nearly every commercial situation and it would be an unusual case where parties had made an agreement concerning the demolition, alteration, or creation of a structure and they did not intend that agreement to have

[84] An example would be: *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1 (TCC).
[85] [1966] 2 QB 617. See also *Pao On v Lau Yui Long* [1980] AC 614 (PC).
[86] *Foakes v Beer* (1884) 9 App Cas 605; *Newton Moore Construction Ltd v Charlton* (1997) 3 Const LJ 275 (CA); *Ferguson v Davies* [1997] 1 All ER 315 (CA).
[87] *DSND Subsea Ltd v Petroleum Geoservices ASA* [2000] BLR 530; *Dorimex SRL v Visage Imports* (CA, 18 May 1999); *Huyton SA v Peter Cremer GmbH* [1999] 1 Lloyd's Rep 620; *Amsalem (t/a MRE Building Contractors) v Raivid* [2008] EWHC 3028 (TCC).
[88] *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA).
[89] [2010] 1 WLR 735 (SC).
[90] An example of this would be *University of Plymouth v European Language Centre Ltd* [2009] EWCA Civ 784.

legal force. The 'fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty.'[91]

1.63 The common situation where parties may not intend to create legal relations is where an agreement is expressly stated to be 'subject to contract'; see the discussion under that heading above.[92]

What happens when work is done and there is no contract

1.64 Every request for work done (be it for work and materials or professional work by an architect or an engineer) will normally have implied within it a promise to pay for the work. So if an architect is asked to draw up plans and no agreement is made but the architect does so, then the request carries within it the implied promise to pay for the work, and the law will therefore require payment to be made if the work is done.

1.65 This is a very common situation. If a builder is asked to do work in an emergency and no agreement is made, for example, then the builder will be entitled to payment. With professionals, like architects, engineers, or surveyors, the legal solution is the same. However, the situation is normally less likely to be prompted by an emergency and more likely to be brought about by inattention to the formalities of an agreement or indeed their essentials (particularly price). A surveyor may be asked to carry out work with no price mentioned in situations where the employer is not focused on the essentials of an agreement because the project is still in its infancy. In that situation the professional is entitled to be paid for the work done.

1.66 Given that there is no contract price agreed, the law implies or infers that there is an obligation to pay a reasonable price for the work. This is frequently referred to (even now that Latin is unfashionable) as quantum meruit. It is part of the law of Unjust Enrichment and is dealt with in Chapter 3. However, that remedy is only available in the event that no contract has been entered into. If, however, a contract is found to have been entered into notwithstanding that no price has been agreed, then the recovery is not for a quantum meruit but is for sums due under a contract. Frequently, when parties fall out on small projects, an employer will seek to allege that it had overpaid previously submitted invoices and accounts under the contract which has the obligation to pay a reasonable price. In this situation it will usually be difficult to re-open invoices already paid.[93]

[91] *G. Percy Trentham Ltd v Archital Luxfer Ltd* (1992) 63 BLR 44, p. 52, which was approved by the Supreme Court in *R.T.S Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] 1 WLR 735 (SC).

[92] See *R.T.S Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2010] 1 WLR 735 (SC) at [55].

[93] See, for example, *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170.

Contractual Interpretation

1.67 There are no magic rules of construction applying to building contracts. Rules of contractual interpretation apply to all contracts and there are some clear rules and statements applicable to contractual interpretation which assist in understanding how the courts will interpret a contract which is before them.

1.68 In *Investors Compensation Scheme v West Bromwich Building Society*[94] Lord Hoffmann set out five principles of construction which have been regarded as stating the modern law relating to the interpretation of contracts:

(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 to 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.[95] The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs 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.

(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 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 Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749.

[94] [1998] 1 WLR 896 (HL).

[95] See *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 and for a more recent application, see *Scottish Widows Fund and Life Assurance Society v BGC International (formerly Cantor Fitzgerald International)* [2012] EWCA Civ 607, 142 Con LR 27.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

This formulation has been reaffirmed as definitive.[96] **1.69**

Pre-contract negotiations have been held to be inadmissible historically. In *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38, the House of Lords refused to allow pre-contractual negotiations to be taken into account for the purpose of interpreting the contract. In doing so it declined to follow invitations by academic writers and precedent from other jurisdictions which suggested that English law was anomalous. The House of Lords, however, allowed the defendant's appeal on the ground that the context and background drove them to conclude that something must have gone wrong with the language and the defendant's interpretation of the contract was that which a reasonable person would have understood the parties to have meant.[97] **1.70**

There are several maxims which are applicable to contractual interpretation; some must be read with others and there is the wider question of context. In this section we will consider first literalism and reasonableness, then context, and finally more particular rules of, or aids to, construction and interpretation. **1.71**

Literalism and reasonableness

The first and basic maxim is that the courts will give effect to the objective meaning of the words which the parties have chosen to use. This is because the courts are not trying to make a bargain for the parties, but instead are seeking to understand what the parties meant by reference to the words which they chose.[98] **1.72**

[96] See, for example, *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 779 *per* Lord Hoffmann. For a recent case where the court applied the principles in *ICS* and *Mannai*, see *Brudenell-Bruce v Moore* [2012] EWHC 1024 (Ch).

[97] Examples being *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770; *WW Gear Construction Ltd v McGee Group Limited* [2010] EWC 1460 (TCC), 131 Con LR 63.

[98] *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235. See, for example, in a case applying *Wickman* in an insurance context, Lord Denning MR in *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's L Rep 250 at 253: 'The parties can, by clear words, provide that complete performance of a particular stipulation can be a condition precedent. But, in the absence of clear words the court should look to see which of the rival interpretations gives the more reasonable result.'

1.73 However, that basic rule is tempered by common sense. Lord Diplock said in *Antaios Compania Naviera SA v Salen Rederierna AB*:[99] 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense'. Therefore, the words used in their objective sense must be interpreted or construed. The words of Lord Diplock are an example of construction. If the express words of the contract will lead to an unreasonable result, this is unacceptable. The courts have adopted the rule that they will not interpret the contract so as to produce a result which is unreasonable, unless it is clear that is what the parties actually want. That doctrine is succinctly contained in the speech of Lord Reid in *Wickman Machine Tool Sales Ltd v L Schuler AG*:[100]

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

1.74 However, as has been seen above, where something has gone wrong with the language used in the parties' contract, the law does not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.[101]

1.75 It is fair to say that the above rule overarches all contractual interpretation. On the one hand you have the express words used and, on the other, you may have an absurd result if there is too much literalism.[102] There is a balance to be struck. Lord Mustill in *Charter Reinsurance Co Ltd v Fagan*[103] referred to the above statement by Lord Reid and said:

> This practical rule of thumb (if I may so describe it without disrespect) must however have its limits. There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force into the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms.

1.76 Subject to the assorted aids to construction which are dealt with below, reasonableness (and its twin, absurdity) must be considered within context. There have been many instances where the literal meaning of words has been modified or even rejected because of context, if a literal approach to interpretation would lead to an

[99] [1985] AC 191 at 201.
[100] [1974] AC 235 at 251.
[101] *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 at [14].
[102] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313.
[103] *Charter Reinsurance Co Ltd v Fagan* (n 102) at 388.

unreasonable result. In *Wickman Machine Tool Sales Ltd v L Schuler AG*,[104] it was held that the words 'it shall be a condition of this agreement' did not mean that it was a fundamental term of the agreement which is what lawyers would understand by the term 'a condition'. The context here was that S Co, a German company, entered into a contract with W Co, an English company, giving W Co the sole rights to sell S Co's panel presses in England. A contractual clause provided that 'it shall be a condition of this agreement' that W Co's representatives should visit six named firms each week to solicit orders. W Co's representatives failed on a few occasions to do so. S Co claimed to be entitled to repudiate the agreement, on the basis that a single failure was a breach of condition, giving them an absolute right to treat the contract as at an end. The House of Lords held that such a breach did not entitle S Co to repudiate, since such a construction of the clause was so unreasonable that the parties could not have intended it.

1.77 Conversely in *Antaios Compania Naviera SA v Salen Rederierna AB*,[105] it was held that the words 'on any breach of this charterparty' did not mean any breach, but any repudiatory breach. The context of that case was that the owners of a vessel purported to withdraw it 13 days after discovering that the charterers had mistakenly issued incorrect bills of lading. The House of Lords held that, on a true construction of the relevant clause, it only applied to repudiatory breaches and therefore did not apply to this breach which was non-repudiatory.

1.78 In addition, the court may be assisted by looking at the commercial purpose of the contract—albeit that a court is to take caution before concluding that a particular interpretation does not accord with commercial common sense.[106] At one time, it was thought[107] that the courts could only take business common sense into account where a literal construction would lead to absurdity. However, this is no longer thought to represent the current state of the law.

1.79 In *Barclays Bank Plc v HHY Luxembourg SARL*,[108] the Court of Appeal considered the approach that it should take where a clause has two possible meanings. Longmore LJ said:

> The Judge said that it did not flout common sense to say that the clause provided for a very limited level of release, but that, with respect, is not quite the way to look at the matter. If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout common sense. In such circumstances, it is much more appropriate to adopt the more rather than the less, commercial construction.

[104] [1974] AC 235.
[105] [1985] AC 191.
[106] See *Lewison on the Interpretation of Contracts* (5th Edn) at [2.07].
[107] See, for example, *The Sounion* [1986] 2 Lloyd's Rep 593, which was then reversed on appeal where Lloyd LJ said that the problem of construing a contract was '*designed to separate the purposive sheep from the literalist goats*': [1987] 1 Lloyd's Rep 230 (CA).
[108] [2010] EWCA Civ 128.

1.80 The principles have been further considered by the Supreme Court in *Rainy Sky SA v Koomin Bank*[109] where Lord Clarke summarized the relevant principles of construction as being:

> 14…the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme* case [1998] 1 WLR 896, 912 h, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> 21 The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

1.81 As is clear from the passage above quoted from *Rainy Sky*, a finding that a particular construction of a provision would lead to an absurd result is not a precondition to construing that provision in a manner which most closely reflects common sense.

1.82 *Rainy Sky* has been applied by the Supreme Court in *Aberdeen City Council v Stewart Milne Group*.[110]

1.83 Therefore, it can be seen that, whilst the touchstone of contractual interpretation might be the words themselves, context and reasonableness may lead to results which a literal reading of the contract would not permit.

1.84 One of the best discussions of literalism and its folly comes from Lord Steyn in *Sirius International Insurance Co v FAI General Insurance Ltd*:[111]

> There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed (at 201): 'if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.' In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, at 771, I explained the rationale of this approach as follows:
>
> > In determining the meaning of the language of a commercial contract…the law…generally favours a commercially sensible construction. The reason for

[109] [2011] UKSC 50, [2011] 1 WLR 2900.
[110] [2011] UKSC 56.
[111] [2004] UKHL 54 at [19].

> this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

The tendency should therefore, generally speaking, be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley*, 1838 edn, Vol III, 60. The moral philosophy of Paley influenced thinking on contract in the 19th century. The example is as follows: the tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process because, after all, the purpose of construction is 'designed to separate the purposive sheep from the literalist goats'.[112]

Context and 'factual matrix': what is admissible and what is inadmissible evidence of context

1.85 Context has always been troubling for the courts. A court must decide what evidence it can look at outside the four corners of the contract documents in order to ascertain the meaning of its contents. On the one hand, it must be remembered that a court is not seeking to rewrite the contract which the parties have made; it is seeking to interpret that contract. But, on the other hand, as a general principle, the meaning of words cannot be ascertained if those words are divorced from their context. Lawyers, who might describe themselves as rigorous and be described as austere, frequently try to exclude as much extraneous matter as possible. It might be thought that this would lead to greater certainty. But it often does not, given the infinite variety of ways in which people can express themselves.

1.86 There have been many distillations of what is admissible extrinsic evidence. One of the most helpful is in *Arbuthnott v Fagan*[113] where Sir Thomas Bingham MR said:

> Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide to what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor

[112] *Per* Lloyd LJ in *The Sounion* [1987] 1 Lloyd's Rep 230 (CA).
[113] [1996] LRLR 135 (CA, 30 July 1993).

> unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.[114]

1.87 Admissible surrounding circumstances must at least be known, or capable of being known, to both parties at the time when the contract is made.[115] The admissible evidence is in order to obtain the objective or aim or genesis of the transaction.[116] The admissible evidence does not include the parties' subjective intentions.[117] These may change from time to time. Nor does it include the negotiations between the parties, because negotiations are fluid matters of give and take where also the parties' positions may change from time to time.[118] The courts are looking for the common intention of the parties divined by what they expressed and not what each party may have thought.[119] Lord Wilberforce in *Prenn v Simmonds*[120] put it this way:

> In my opinion, then, evidence of negotiations, or of the parties' intentions,... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

However, in *Chartbrook Ltd v Persimmon Homes Ltd and others* [2009] UKHL 38 it was pointed out that the remedy of rectification was available if the written contract did not properly reflect the parties' consensus. Evidence of negotiations is admissible in an action for rectification.

1.88 The ambit of admissible evidence has been explained by Lord Hoffmann in his five principles set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.[121] As to the 'admissible evidence' which can be taken into account, he said:

(1) The background was famously referred to 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

[114] See also *Charrington & Co Ltd v Wooder* [1914] AC 71 at 82 *per* Lord Dunedin.

[115] *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989.

[116] See *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 affirming *Prenn v Simmonds* [1971] 1 WLR 1381.

[117] This is one of Lord Hoffman's five principles set out in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896. Note that this rule has been subject to criticism and the principle is not recognized in all jurisdictions. See, for example, *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523. However, the principle was reaffirmed by the House of Lords as representing the law of England and Wales in: *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38 at [32] and [33].

[118] The changing and unhelpful nature of negotiations explained by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381.

[119] Staughton LJ put it succinctly in *Scottish Power v Britoil, The Times*, 2 December 1977: '... the court is looking for the *common* intention of the parties, and not what intention each had *in pectore*'.

[120] [1971] 1 WLR 1381 at 1385.

[121] [1998] 1 WLR 896, which are set out at paragraph 1.68 above.

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.

(2) 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.[122] The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs 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.

1.89 Lord Hoffmann's five principles were reaffirmed by the House of Lords.[123] However, following some disquiet about what the courts could take into consideration when considering the factual background, Lord Hoffmann then re-clarified what he meant by these principles in *BCCI v Ali*,[124] stating that 'I said that the admissible background included "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man", I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant.' Lord Hoffmann's principles from *ICS* were then further affirmed and explained by the House of Lords in *Chartbrook Ltd and another v Persimmon Homes Ltd and another*[125] where their Lordships allowed the defendant's appeal on the latter ground, refusing to depart from the long-standing rule that excluded evidence of pre-contractual negotiations. It was emphasized that the courts would not easily accept that people had made linguistic mistakes, particularly in formal documents. However, in some cases, the context and background drove a court to conclude that something must have gone wrong with the language. In such a case the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had. In this case, to interpret the definition of 'additional residential payment' in accordance with ordinary rules of syntax made no commercial sense. It was clear that something had gone wrong with the language and the defendant's interpretation of the contract was that which a reasonable person would have understood the parties to have meant.

1.90 However, in practice, and especially in complex construction and commercial cases, this will often lead to the parties submitting volumes of evidence on the factual background when the courts are looking at construing the contract. This

[122] See *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38.
[123] See, for example, *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 779 *per* Lord Hoffmann.
[124] [2001] 1 AC 251 (HL).
[125] [2009] UKHL 38.

has caused judges to express their disquiet and general dissatisfaction with this rule and that the principle can lead to excessive material being put before a judge. In *Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd*[126] where Coulson J said:

> One of the unhappy consequences of these passages is that parties to commercial disputes, in which the interpretation of the contract is in issue, can be tempted to put in a large amount of evidence and documentation by way of 'background'. [Lord Hoffmann] made plain that his speech in *Investors Compensation Scheme* was not designed to 'encourage a trawl through "background" which could not have made a reasonable person think that the parties must have departed from a conventional usage'…evidence of factual background should never be used as some sort of Trojan horse in order to usher in what would otherwise be inadmissible evidence as to subjective intent.[127]

1.91 Subject to those two exceptions (negotiations and subjective intentions), commercial contracts, and with them construction contracts, are construed in the light of all the background which could reasonably have been expected to be available to the parties in order to ascertain what would objectively have been understood to be their intention.[128] There is a limitation upon this, namely, that before evidence is sought to be admitted, care must be taken to consider exactly why the evidence is said to assist and to consider whether its relevance is sufficiently cogent to the determination of the joint intention of the parties to justify having regard to it.[129]

Individual rules of construction and interpretation actual and outdated

1.92 The law has accumulated many maxims of legal interpretation and these are examined below. However, each must be looked at carefully against the over-arching rules of construction set out above that: (a) the words the parties use is the primary guide to intention (practice notes which accompany standard form contracts are unlikely to be admissible evidence for the purpose of construing the parties'

[126] [2008] EWHC 2397 (TCC).

[127] See also the views of Tomlinson J in *Standard Life Assurance Ltd v Oak Dedicated Ltd* [2008] 2 All ER (Comm) 916.

[128] *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 779. See also *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] 2 Lloyds Rep 24, para 12 where Moore Bick LJ said:

> Unless the dispute concerns a detailed document of a complex nature that can properly be assumed to have been carefully drafted to ensure that its provisions dovetail neatly, detailed linguistic analysis is unlikely to yield a reliable answer. It is far preferable, in my view, to read the words in question fairly as a whole in the context of the document as a whole and in the light of the commercial and factual background known to both parties in order to ascertain what they were intending to achieve.

[129] See Lord Phillips MR in *The Tychy* [2001] 2 Lloyd's Rep 403 at [29]. See also Staughton LJ in *Scottish Power v Britoil, The Times*, 2 December 1977, in which he decried the citation of masses of pre-contract documentation.

contract);[130] but (b) those words will be looked at in context; and (c) interpreted in line with the intention of avoiding absurdity. The individual rules of construction which are applied to contracts are considered below:

The contract will be read as a whole

1.93 This is almost axiomatic[131] but not always easy to apply in practice. For example, in some contracts the same word may be used for different purposes,[132] or the contract may use different words for the same thing (which will give rise to a presumption that where different words are used, the draftsman will have meant a different thing or concept[133]). When construing a contract, 'all parts of it must be given effect where possible, and no part of it should be treated as inoperative or surplus'.[134]

1.94 It has been stated that where there is inconsistency which cannot be reconciled, the earlier clause will prevail over the later one. This is incorrect. The principle is taken from Lord Wrenbury in the Privy Council[135] where he said: 'If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.'

1.95 This statement might be thought of as too wide given that most contracts today are made with the aid of computers which means that the order of the stated obligations is often cut and pasted. The principle, however, may be a good one if all it means is that the parties will not be taken to have destroyed their obligations through the addition of later wording. But that is an aspect of the doctrine of repugnancy, which is that the courts will not give effect to a term of the contract if it is repugnant to the primary obligation as set out in the contract documents. The better view today is that parties should construe the contract as a whole and deal with inconsistencies on their individual merits without reference to the place of the inconsistent clauses in the contract documents.

Chosen terms will normally prevail over standard terms in cases of conflict

1.96 Parties to construction contracts often contract on standard forms of contract which are commonly used in the industry. They frequently change or add new or special provisions to the standard form. If there is a conflict between the provisions

[130] The JCT Practice Notes are no aid to the construction of a JCT Minor Works standard form: *TWF Printers Ltd v Interserve Project* Services [2006] EWCA Civ 875. Therefore, it can be inferred that the contractual context does not include such documents which are issued by the publishers of standard forms.

[131] *Chamber Colliery Ltd v Twyerould* [1915] 1 Ch 268.

[132] See *Tea Properties Ltd v CIN Properties* [1990] 1 EGLR 155.

[133] *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89, which was a case of statutory interpretation. However, it was applied to a case concerning the construction of the JCT form of building contract in *Jarvis (John) Ltd v Rockdale Housing Association Ltd* (1986) 3 Const LJ 24.

[134] *Lewison on the Interpretation of Contracts* (5th Edn) at [7.03].

[135] *Forbes v Git* [1922] AC 256 at 259.

of the standard form and the special provisions, it is the special provisions that will prevail. In *Robertson v French*,[136] the court said:

> . . . if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all contracting parties upon similar occasions and subjects.

1.97 Construction contracts often contain general and specific terms. For example, parties may use standard terms or a standard form contract, and have other special or bespoke terms supplementing them, particularly Bills of Quantities, Specifications, and Drawings. In those circumstances the bespoke terms will normally prevail over the standard terms.[137] The exception is where the printed terms clearly state otherwise, as for example they did in clause 12 of the 1963 Edition of the Joint Contracts Tribunal (JCT) Standard Form of Building Contract.[138] The reason is fairly prosaic, namely that the courts will give effect to the words which the parties have chosen specially for their contract. This principle has been described as a 'principle of common sense'.[139]

Express terms defeat or make unlikely implied terms

1.98 Where a contract contains express terms relating to a particular subject matter, it may preclude a party from implying a term which deals with the same subject matter as the express term. This is based on the principle that: 'where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument'.[140]

Obvious errors and mistakes will be corrected

1.99 Where a contract document contains obvious errors and mistakes of meaning and syntax, the courts will look to correct or accommodate such errors so as to construe the agreement in line with the parties' objective intention.[141] This process has been described as 'correction of mistakes by construction'.[142]

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[136] (1803) 4 East 130.

[137] *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715. See also *Glynn v Margetson & Co* [1893] AC 351; and *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492.

[138] *English Industrial Estates Corp v George Wimpey & Co Ltd* (1972) 7 BLR 22, the particular provision stating 'nothing in the Contract Bills shall override or modify that which is contained in these Conditions'. That remains the position under clause 1.3 of the JCT Standard Building Contract 2011 edition.

[139] *Woodford Land Ltd v Persimmon Homes Ltd* [2011] EWHC 984 (Ch).

[140] *Aspdin v Austin* (1844) QB 671. See also *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, at 282–3.

[141] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 914; and *Mannai Ltd v Eagle Star Assurance Co Ltd* [1997] AC 749 at 775.

[142] *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 *per* Brightman LJ.

Interpretation will avoid creating uncommercial bargains

1.100 An uncommercial bargain will not be taken to be the intention of the parties without very clear language to indicate that it should be.[143]

Recitals form part of the contract to be interpreted

1.101 Most construction contracts contain recitals and articles of agreement which are printed ahead of the detailed provisions of the contract conditions and other documents. Usually, these articles of agreement or recitals do no more than state the primary essential terms, namely, that the builder has agreed to build, who the contract professional is, and what the contract sum is. They have been said to be 'very important, for [the recitals] are "agreed" facts'.[144]

1.102 Recitals usually state the objective or aim of the transaction. It has been said in an ancient case that the recitals cannot be resorted to if the express words of the contract are clear or there is no doubt about what they mean.[145] Such a statement does not stand analysis with the modern law on the admission of extrinsic evidence outlined above.[146] It would be illogical if the recitals to a contract, which form part of the document which is being construed, were not looked at but extrinsic evidence was.

Latin Part 1: the ejusdem generis 'rule'

1.103 Ejusdem generis is Latin for 'of the same kind'. This 'rule of construction' resolves the problem of giving meaning to groups of words where one of the words is ambiguous or inherently unclear. It provides that, in a contract where a list of words is set out referring to items of a particular class and they are followed by general words, then the general words are treated as referring to matters of the same class. The 'rule' springs from a 'presumption against surplusage', namely, if the general words have an unrestricted meaning, then the enumerated items are surplusage.[147] In fact the 'rule' has no place in commercial contracts because there is no reason to suppose that commercial parties will not allow for surplusage in their contracts.[148] The arrival of the computer has made the 'rule' even

[143] *Beaufort Developments v Gilbert Ash* [1999] AC 266 at 282.
[144] *Dysart Timbers Ltd v Nielsen* [2007] NZCA 198.
[145] See Brett LJ in *Leggott v Barrett* (1880) 15 Ch D 306 at 311.
[146] *Arbuthnott v Fagan* (CA, 30 July 1993) where Steyn LJ said:

> I readily accept [Counsel's] submission that the starting point of the process of interpretation must be the language of the contract. But [Counsel] went further and said that, if the meaning of the words is clear, as he submitted it is, the purpose of the contractual provisions cannot be allowed to influence the court's interpretation. That involves approaching the process of interpretation in the fashion of a black-letter man. The argument assumes that interpretation is a purely linguistic or semantic process until an ambiguity is revealed. That is wrong.

[147] See Devlin J in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240 at 245.
[148] See Devlin J in *Chandris v Isbrandtsen-Moller Co Inc* (n 148).

less compelling. It is a perfectly permissible aid to the construction of wills and legislation (primary and secondary) because such intentions can be expected to come from the drafters of wills and statutes, but not for commercial contracts. In relation to the JCT Standard Form, the rule was not applied to the then clause 23(h), the extension of time clause giving an extension to artists and tradesmen engaged by the employer, for that reason.[149] The rule can be seen to have been applied in old cases but there is no case where it has been applied in a commercial context. Indeed, when the rule is sought to be applied in a commercial context, it is usually ignored or distinguished, see for example *Effort Shipping Co Ltd v Linden Management SA*.[150]

Latin Part 2: contra proferentem 'rule'

1.104 Contra proferentem means 'against the party putting forward the document'. If there is ambiguity or doubt, then the party which drafted any particular clause or which put forward any clause will have the ambiguity resolved against it. The rule was applied, for example, by Edmund Davies LJ in *Billyack v Leyland Construction Co Ltd*,[151] who said: 'If there be any ambiguity in the building contract drawn up by the defendants in the present case, it must, of course, be interpreted contra proferentem.'[152] This rule is to be contrasted with the rules of construction relating to exemption clauses and extensions of time and liquidated damages which are dealt with separately. Given the appellate endorsement of Edmund Davies LJ, it might be thought that the rule has some force. But the modern approach to contractual construction is against the application of the rule, which was more appropriate to be used when there was a much more restricted recourse to the surrounding circumstances and extrinsic evidence in that context.[153] The 'rule' also gives problems to the court in deciding who the 'proferens' (the party putting forward the document) is.

1.105 In the construction context in particular, where parties use standard form contracts that have been produced by bodies fully representative of the interests of prospective parties, the 'rule' has become largely defunct.[154] For building works, the JCT standard form contracts are used as principal or main contracts and subcontracts. For civil engineering projects the Infrastructure Conditions of Contract

[149] *Henry Boot Construction Ltd v Central Lancashire New Town Development Corp* (1980) 15 BLR 1.

[150] [1998] AC 605.

[151] [1968] 1 WLR 471 at 477.

[152] See also the rule being applied in *Cook v Shoesmith* [1951] 1 KB 752; and *Skillion plc v Celltech Industrial Research Ltd* [1992] EGLR 123 at 125.

[153] See, for example, *C&J Clark International Ltd v Regina Estates Ltd* [2003] EWHC 1622 (Ch) *per* Neuberger J at [40]–[43].

[154] See *Tersons Ltd v Stevenage Development Corpn* [1963] 2 Lloyd's Rep 333 at 368, CA *per* Pearson LJ.

(based on the former ICE Conditions) and the NEC3 contract suite are commonly used or adapted for use by major employers. The Government generally uses its own sets of general conditions for works contracts, which encompass all aspects of building works, in conjunction with its own standard forms for inviting and accepting tenders and for recording non-standard terms. As a result, there is no real place for the 'rule' in modern construction law. The modern approach to contractual construction is set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[155] namely, that its use will only be in special circumstances. It has been applied by the Court of Appeal in *Lexi Holdings plc v Stainforth* [2006] EWCA Civ 988 but that decision discussed the rare nature of the application of the 'rule'. There have also been other applications of the doctrine. But although it is more often prayed in aid and rejected it has found favour occasionally.[156]

Implied Terms and Impermissible Terms

1.106 Terms are implied into contracts by operation of law. The law operates in two ways, first by statute and, second, by the application of common law principles. Just as terms are implied into contracts by operation of law, so too are some terms outlawed. Outlawed terms are dealt with in this section, albeit that there is overlap with the non-enforcement of certain terms. (Those are dealt with separately, although reference is made to them.)

1.107 There is a separate category of implied terms, namely, one implied by a course of dealing. Terms will be dealt with in the following order: first, terms implied by course of dealing; second, terms implied by statute; third, terms implied by the common law; and finally, outlawed terms.

A course of dealing

1.108 Terms can be implied into a contract by a course of dealing. This may result from an objective examination of contractual intention from the actions of the parties. If over a period the parties have always dealt on certain terms and conditions, then when they make a further bargain the terms and conditions upon which they have

[155] [1998] 1 WLR 896.

[156] More recently Coulson J in *William Hare Ltd v Shepherd Construction Ltd* [2009] EWHC 1603 (TCC) was faced with the suggestion of its application but found the contract clear enough not to need to use it. Akenhead J applied it in *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC) (15 August 2008). As did Coulson J in *YJL London Ltd v Roswin Estates* [2009] EWHC 3174 (TCC). The Court of Appeal has applied it in an insurance context, in *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314; and also in a commercial context in *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429; and *Elektrim SA v Vivendi Holdings 1 Corp* [2008] EWCA Civ 1178. Aside from a holiday case and those cited here, the rule has not been applied by the Court of Appeal, the language of the contract being sufficient.

previously contracted are likely to be implied.[157] This is not invariable, however, because the objective contractual intention might be otherwise. If, for example, the parties expressly agree that the former terms and conditions will not apply to the transaction under consideration, then the course of dealing will be of no effect. A course of dealing normally establishes the implication of terms and conditions when there is a long history of contracting on those terms and conditions. The omission of express reference is taken to be an error or omission which they will 'of course' agree to rectify.[158] Most of the cases on a course of dealing are concerned with exemption clauses. A course of dealing is likely to be established with the use of delivery notes always referring to particular terms and conditions, for example with crane hire or the supply of materials to site.[159]

Terms implied by statute

1.109 There are two major pieces of legislation which cause terms to be implied into construction contracts and contracts between employers and professionals. The first is the Supply of Goods and Services Act 1982 and the second is the Housing Grants, Construction and Regeneration Act 1996. Those in the 1982 Act are more traditional implied terms relating to performance. The 1996 Act is more wide ranging and seeks to deal with long-standing issues. Those who adhere to a freedom of contract approach might find this difficult. Others think it is a helpful attempt to deal with long-standing vices in the construction industry and the courts' processes.

[157] *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125; and applied in *Hardwick Game Farm v SAPPA* [1969] AC 31 at 90 where Lord Morris said:

> . . . the learned judge, after considering the case of *McCutcheon v David Macbrayne Ltd* [1964] 1 WLR 125, HL, held that the conditions in the contract note were not incorporated into the contracts of sale. In agreement with all the members of the Court of Appeal I consider that they were. Over the course of a long period prior to the three oral contracts which are now in question SAPPA knew that when Grimsdale sold they did so on the terms that they had continuously made known to SAPPA. In these circumstances it is reasonable to hold that when SAPPA placed an order to buy they did so on the basis and with the knowledge that an acceptance of the order by Grimsdale and their agreement to sell would be on the terms and conditions set out on their contract notes to the extent to which they were applicable.

In that case see also Sellers LJ [1966] 1 WLR 287 at 308, and Diplock LJ (at 339).

[158] In *British Crane Hire v Ipswich Plant Hire* [1975] QB 303 at 311 Lord Denning MR said:

> From that evidence it is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines: and both parties knew the substance of those conditions. In particular that if the crane sank in soft ground it was the hirer's job to recover it: and that there was an indemnity clause. In these circumstances, I think the conditions on the form should be regarded as incorporated into the contract. I would not put it so much on the course of dealing, but rather on the common understanding which is to be derived from the conduct of the parties, namely, that the hiring was to be on the terms of the plaintiffs' usual conditions.

[159] *British Crane Hire v Ipswich Plant Hire* (n 159).

Housing Grants, Construction and Regeneration Act 1996 ('the HGCRA')

1.110 The relevant sections and the statutory scheme are set out in full in Appendices 1 and 2 to this book. The HGCRA as amended by the Local Democracy, Economic Development and Construction Act 2009 ('the LDEDCA'), modifies considerably several traditional rights and obligations. It does not apply to operations outside the United Kingdom. It provides for rights in a way which is not traditional, in that it permits the parties, by their contract, to make express provision for the matters dealt with by the Act, but provides that if they do not do so or do not do so adequately, then the provisions of the Act will apply irrespective of the provisions of the contract or the intentions of the parties.

1.111 The HGCRA applies to construction contracts, as defined by the Act, entered into after 1 May 1998, or in some cases after 1 October 2011. It gives certain rights which are statutory in nature. Therefore, strictly speaking, the provisions of the statute are not implied terms but are obligations which are impressed upon the parties by statute. However, where the parties make an agreement which makes sufficient provision for the statutory requirement, then the statutory requirement need not apply and the terms of the contract will. At all events, rights are given to the contractor, which cannot be abrogated by agreement. These are set out below.

The right to adjudication (section 108)

1.112 This is dealt with in detail in Chapter 23, so no more is said about it here. Suffice it to say that, with the exception of a contract with a residential occupier of a building and particular construction contracts (usually with a PFI element to them),[160] in all construction contracts and all contracts for professional services (such as architectural work, design work, engineering work, surveying work, interior and exterior decoration, and landscaping work), which are oral or in writing there is a right to adjudication.

The right to stage payments (section 109)

1.113 The old law used to be that the contractor had to complete its obligations before being paid the contract sum. The terminology used was that of the 'entire contract'.[161] This was a harsh doctrine which resulted in the doctrine of 'substantial completion', whereby the courts would permit a claim for the contract price if substantial rather than absolute completion had been reached.[162] The entire contract doctrine was, of course, totally uncommercial. All standard forms now provide

[160] As provided by ss 106(1)(a) and 106A of the HGCRA.

[161] *Cutter v Powell* (1795) 6 Term Rep 320.

[162] *H Dakin & Co Ltd v Lee* [1916] 1 KB 566; and *Hoenig v Isaacs* [1952] 2 All ER 176. See particularly Denning LJ at 180–1: 'When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions . . .'

for interim or stage payments to the contractor as the work progresses. Whilst there have been occasions where the courts have had to consider a single lump sum payment in exchange for completion, these are very rare. Apart from the obvious reason, namely, that contractors are not finance houses able to finance the construction of expensive structures, there is also the problem of confidence, namely the confidence of the builder that he will actually get paid when the works are completed given the possible financial situation of the employer. Under s 109[163] a party to a construction contract is entitled to payment by instalments (or stage payments) or other periodic payments for any work under the contract. This is subject to the proviso that the duration of the contract works is more than 45 days, or is at least estimated to be so.[164] It is open to the parties to agree the amounts of the payments and the intervals at which and the circumstances in which they become due.[165] However, if the parties' agreement is silent as to the payment intervals or the circumstances in which payments become due, the relevant provisions of the Scheme[166] will apply.[167]

The right to have an adequate mechanism for determining what payments become due and when, and a final date for payment (sections 110(1) and 110(1A))

1.114 If the contract does not make provision for this, then the Scheme[168] will apply. The section permits the parties to agree how long the period is between the date a sum becomes due and the final date for payment. The parties are free to agree the period between the date on which a sum becomes due and the final date for payment. The Act as originally enacted did not explain or define what was meant by 'adequate mechanism'. A process of defining an adequate mechanism was introduced by the 2009 amendments. Where the contract was entered into after 1 October 2011 a contract will not provide an adequate mechanism for determining what payments become due and when (under s 110(1)) where the construction contract makes payment conditional on (a) the performance of obligations under another contract or (b) a decision by any person as to whether obligations under another contract have been performed.[169]

1.115 The requirement to provide an adequate mechanism for determining what payments become due and when is also not satisfied where a construction contract

[163] For a case illustrating how s 109 HGCRA functions, see *JDM Accord v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 2 (TCC) and *C&B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46.

[164] Section 109(1)(a) and (b).

[165] Section 109(2).

[166] The Scheme is set out at Appendix 2 to this book.

[167] Section 109(3). In *C&B Scene v Isobars* (2001) CILL 1781 (reversed on appeal ([2002] EWCA Civ 46) but on different grounds), the parties failed to elect between different payment provisions contained in a standard form. The Court held that the contract failed to comply with s 109 HGCRA and so the terms of the standard form fell away and the Scheme applied in its place.

[168] See paras 2–8 of the Scheme.

[169] HGCRA, s 110(1A).

provides for the date on which payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.[170] The purpose of this requirement is to ensure that contract provisions are rendered ineffective where they provide that a payment will only fall due if a payment notice is given in respect of that payment. If the contract does not make provision for this, then the Scheme[171] will apply. The section permits the parties to agree how long the period is between the date a sum becomes due and the final date for payment.

The requirement to give payment notices (sections 110A and 110B)

1.116 From 1 October 2011, construction contracts shall, in relation to every payment provided for by the contract (a) require the payer or a specified person to give a notice complying with the requirements of s 110A(b) to the payee not later than five days after the payment due date, or (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date. The requirements of the payer's and payee notices are set out in sections 110A(2) and (3). If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme will apply.[172] Following receipt of such notices, the payer is then required to pay in accordance with s 111.

Notice of intention to withhold/requirement to pay notified sum (sections 110, 110A, 110B, and 111)[173]

1.117 Section 111 of the HGCRA has been substantially changed with effect from 1 October 2011. Section 111 (before the amendments) contained a provision under which a party could withhold payment. It provided that payment could not be withheld after the final date payment became due unless the party had given an effective notice of intention to withhold payment, in proper form and in time.

1.118 Section 110 now provides for the giving of payment notices. The payment obligations which follow from the payer's and payee's notices are then set out in the provisions of the amended s 111. Section 111, which was previously entitled 'Notice of intention to withhold' has now been renamed 'Requirement to pay notified sum'. The withholding provisions contained in s 111 have been replaced with a system

[170] Section 110(1D). This provision only applies to contracts entered into after 1 October 2011. Prior to the amendments s 110 provided that parties to a construction contract had to include terms in their contract to the effect that in relation to each payment and at least five days after such payment became payable, the payer was to give the contractor a notice.

[171] Section 110(3). See paras 2–8 of the Scheme (which deal with both interim and final payments).

[172] Section 110A(5).

[173] Note the prospective amendment of this section (to be on a date prescribed by the Secretary of State) in the LDEDCA. The contractual requirements as to notices are potentially subject to considerable amendment by the LDEDCA if the provisions are brought into force. See ss 110A and 110B as well as the new s 111.

whereby there is a requirement on the part of the payer to pay the sum set out in the payment notice. Provision is now also made for the sum set out in that notice to be challenged by the giving of a counter notice. The requirement to pay the notified sum is intended to further assist cashflow in the industry.[174]

The right to suspend work if there is non-payment (section 112)[175]

1.119 Prior to the HGCRA there was no right to suspend work in the event of non-payment.[176] This was on the basis that if you have promised to perform the contract, you cannot yourself refuse to perform it if the other party has not done so. Whilst you may accept a repudiation, unless you do so, there is nothing for the wronged party to do but to perform the contract. Section 112 provides that where there is a requirement (under s 111(1)) to pay the notified sum on or before the final date for payment but the paying party has failed to do so, the person to whom the sum is due is entitled to suspend performance of its obligations under the contract. Section 112(1) has also been amended to confirm that a party may suspend any or all of its obligations under the contract (ie it is not required to suspend all works).

1.120 At least seven days' notice must be given of the intention to suspend[177] and the right to suspend ceases when payment in full is made.[178] Section 112 now provides (applicable to post 1 October 2011 contracts) that where a party exercises its right to suspend performance for non-payment, the party in default shall be liable to pay to the party exercising the right a reasonable amount in respect of costs and expenses reasonably incurred by that party as a result of the exercise of the right to suspend.[179] The suspension period and delay caused thereby (directly or indirectly) is to be disregarded in computing any contractual time limit including the time to complete.[180] Therefore, the period of time when the works are suspended will effectively be the subject of an extension of time. Equally if there is a knock-on delay (for example, the suspension causing a contractor to lose its 'slot' in a sub-contractor's workshop), that too will be the subject of an extension of time.

Supply of Goods and Services Act 1982

1.121 The Supply of Goods and Services Act 1982 ('SGSA') will apply to most construction contracts, such contracts often being for the supply of construction-related goods (often in the form of materials) and services (often in the form of labour

[174] See the Government's Explanatory Notes to the LDEDCA.
[175] Note that this is subject to the possibility of a small prospective amendment by the LDEDCA.
[176] *Canterbury Pipelines v Christchurch Drainage* (1979) 16 BLR 76 (decision of the Court of Appeal in New Zealand with a particularly impressive judgment by Lord Cooke).
[177] HGCRA, s 112(2).
[178] HGCRA, s 112(3).
[179] HGCRA, s 112(3A).
[180] HGCRA, s 112(4). Note recent amendments to s 112(4) have extended the time period in s 112(4) to include any period in which the contractor stops work in consequence of the exercise of this right.

or professional construction services).[181] Sections 13 to 16 SGSA provide for four terms to be implied into contracts, which catch contracts for professional services and building contracts.

1.122 Where there is a contract for the supply of a service where the supplier is acting in the course of a business, a term will be implied that the supplier will carry out the service with reasonable care and skill (s 13). Where the contract concerns the provision of professional services (such as those of an architect, surveyor, or engineer), the standard of care and skill expected of the professional is that which would be expected of a member of the professional's profession of ordinary competence and experience. Where the professional is a specialist, s/he will be expected to perform the services to the standard expected of a member within that specialist area. Where works are performed by builders, unless the contract provides otherwise, the builder will be expected to carry out and perform the works in a reasonable and workmanlike manner. There may be particular circumstances which may suggest that the supplier has warranted that the performance of his services will result in a particular result or that such services will be reasonably fit for a specified purpose. However, construction suppliers will often look to avoid giving such warranties because it may unnecessarily expose them in terms of liability.

1.123 Where the contract fails to specify the time within which the contract works are to be completed, s 14 of SGSA will imply a term that the service will be carried out within a reasonable time. Similarly, where the contract fails to specify a price for the contract works, s 15 of SGSA implies a term into the contract that the supplier will pay a reasonable charge for the service. In such cases, disputes often arise as to what is a 'reasonable charge' for the services and/or goods rendered.

1.124 However, the terms implied by SGSA may be negatived or varied by the parties' express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract.[182] Express terms of a contract will not negative a term implied by this part of SGSA unless the implied terms are inconsistent with it.[183] Similarly SGSA does not prejudice: (a) any rule of law which imposes on a supplier a stricter duty than that imposed by s 13 or 14 (ie where, for example, the contract concerns professionals or express contractual provisions as to timing); or (b) (subject to (a)) any rule of law whereby any term not inconsistent with the relevant part of SGSA is to be implied in a contract for the supply of a service.[184]

[181] Most construction contracts will satisfy the other requirements of SGSA, namely that the supplier agrees to provide a service and that the supplier is acting in the course of a business: SGSA, ss 12(1) and 13.

[182] SGSA, s 16(1).

[183] SGSA, s 16(2).

[184] SGSA, s 16(3).

1.125 These implied terms, yielding as they do to the express terms of the contract, are uncontroversial and accord with anyone's reasonable and honest expectation of what is intended. Few could argue with much conviction, for example, that reasonable skill and care would not be expected of anyone who provides services. The contrary would be uncommercial.

Terms implied by common law

1.126 The courts do not make contracts for the parties: they interpret them. Parties' freedom of contract can be interfered with by statute. However, terms can also be implied into contracts by common law. The question of the common law implied terms will be approached in two stages. First, an examination of the basic criteria for implication of terms, and second, an examination of common or 'traditional' terms.

Criteria for the implication of a term into a contract: the basic criterion

1.127 In *Société Générale, London Branch v Geys*,[185] Lady Hale referred to two types of implied term as follows at paragraph 55:

> In this connection, it is important to distinguish between two different kinds of implied terms. First, there are those terms which are implied into a particular contract because, on its proper construction, the parties must have intended to include them: see *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988. Such terms are only implied where it is necessary to give business efficacy to the particular contract in question. Second, there are those terms which are implied into a class of contractual relationship, such as that between landlord and tenant or between employer and employee, where the parties may have left a good deal unsaid, but the courts have implied the term as a necessary incident of the relationship concerned, unless the parties have expressly excluded it: see *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, *Liverpool City Council v Irwin* [1977] AC 239.

With construction contracts we are dealing with the former type.

1.128 The opinion of Lord Hoffmann in *Attorney General of Belize & Ors v Belize Telecom* can only be described as seminal.[186] Whether a term is to be implied is a matter of

[185] [2013] 1 All ER 1061, [2013] ICR 117, [2013] IRLR 122, [2012] UKSC 63, [2012] WLR(D) 394, [2013] 1 AC 523.

[186] Sir Anthony Clarke MR said in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc ('the Reborn')* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639 at paras 8 and 9 of his judgment:

> The correct approach to the question when to imply a term into a contract or other instrument, including therefore a charterparty, has recently been considered by Lord Hoffmann, giving the judgment of the Judicial Committee of the Privy Council, which also comprised Lord Rodger, Baroness Hale, Lord Carswell and Lord Brown, in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 11. I predict that his analysis will soon be as much referred to as his approach to the construction of contracts in *Investors*

interpretation or construction of the contract and is to be considered as such as a single test rather than, as was thought of before, a series of tests. Overturning or reinterpreting much of the conventional wisdom in relation to the implication of terms Lord Hoffmann expressed himself in the following terms:[187]

> The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
>
> The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601, at 609 Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:
>
> > [T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended

Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 at 912–3. His analysis in the *Belize* case is extensive: see [16] to [27].

It repays detailed study but for present purposes it is I think sufficient to say that the implication of a term is an exercise in the construction of the contract as a whole: see *Trollope & Colls Ltd v North West Metropolitan Hospital Board* [1973] 1 WLR 601, at 609 *per* Lord Pearson, with whom Lord Guest and Lord Diplock agreed and *Equitable Life Assurance Society v Hyman* [2002] 1 AC 405, at 459.

[187] These passages have been applied in subsequent cases, including a number of Court of Appeal judgments, including in: *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The 'Reborn')* [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep. 639 at [8]-[14]; *Chantry Estates (Southeast) Ltd v Anderson* [2010] EWCA Civ 316, 130 Con. L.R. 11; *KG Bominflot Bunkergesellschaft für Mineralole Mbh v Petroplus Marketing AG* [2010] EWCA Civ 1145, [2011] 1 Lloyd's Rep 442 at [44]; *Beazer Homes Ltd v Durham CC* [2010] EWCA Civ 1175 at [36]; *Garratt v Mirror Group Newspapers Ltd* [2011] EWCA Civ 425, [2011] IRLR 591 at [46]; *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444, [2011] 1 WLR 2066 at [36]; *BDW Trading Ltd v J M Rowe (Investments) Ltd* [2011] EWCA Civ 548, [2011] 20 EG 113 (CS) at [34]; *The Procter & Gamble Company, Procter & Gamble International Operations SA, Procter & Gamble Product Supply (U.K.) Limited v Svenska Cellulosa Aktiebolaget SCA, SCA Hygiene Products UK Limited* [2012] EWCA Civ 1413 at [15].

> 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, though tacit, formed part of the contract which the parties made for themselves.

More recently, in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, at 459, Lord Steyn said: 'If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting.'

It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer—the implied term must 'go without saying', it must be 'necessary to give business efficacy to the contract' and so on—but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is 'necessary to give business efficacy' to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word 'business', is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word 'necessary', is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

The danger lies, however, in detaching the phrase 'necessary to give business efficacy' from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p 459) when he said that in that case an implication was necessary 'to give effect to the reasonable expectations of the parties.'

The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64, 68:

> 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 business men.

Likewise, the requirement that the implied term must 'go without saying' is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. Any attempt to make more of this requirement runs the risk of diverting attention from the objectivity which

informs the whole process of construction into speculation about what the actual parties to the contract or authors (or supposed authors) of the instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, at 227 is celebrated throughout the common law world. Like the phrase 'necessary to give business efficacy', it vividly emphasizes the need for the court to be satisfied that the proposed implication spells out what the contact would reasonably be understood to mean. But it carries the danger of barren argument over how the actual parties would have reacted to the proposed amendment. That, in the Board's opinion, is irrelevant. Likewise, it is not necessary that the need for the implied term should be obvious in the sense of being immediately apparent, even upon a superficial consideration of the terms of the contract and the relevant background. The need for an implied term not infrequently arises when the draftsman of a complicated instrument has omitted to make express provision for some event because he has not fully thought through the contingencies which might arise, even though it is obvious after a careful consideration of the express terms and the background that only one answer would be consistent with the rest of the instrument. In such circumstances, the fact that the actual parties might have said to the officious bystander 'Could you please explain that again?' does not matter.

In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, at 282–283 Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was 'not... necessary to review exhaustively the authorities on the implication of a term in a contract' but that the following conditions ('which may overlap') must be satisfied:

> (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of 'necessary to give business efficacy' and 'goes without saying'. As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.

1.129 The cases referred to by Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* included *Liverpool City Council v Irwin*;[188] *Trollope & Colls v North West Metropolitan Regional Hospital Board*;[189] and *BP Refinery (Westernport) v Shire of Hastings*.[190] In the first edition of this book it was submitted that each said the

[188] [1977] AC 239.

[189] [1973] 1 WLR 601.

[190] [1978] 52 ALJR 20, (1990) 106 LQR 179 at 182. Approved by the Court of Appeal in *Countryside Residential (North Thames) Ltd v Christina Tugwell* (2000) 34 EG 87; and *Rosehaugh Stanhope v Redpath Dorman Long* (1990) 50 BLR 75 at 87.

same thing in different ways and that the fundamental touchstone was not whether the term was reasonable, but whether it was necessary.[191] This must now be regarded as either incorrect or too rigid a formulation. Necessity may be a touchstone, but it is one which arises from a process of interpretation and understanding what the parties meant. That does not mean that the courts will no longer look at necessity as being decisive in most cases.[192] But it will do so as a matter of interpretation having regard to the limits of how far the courts will go in interposing matters which the parties themselves have not specifically addressed. As Lord Bingham MR said in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472:

> The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power.

Criteria for the implication of a term into a contract: traditional terms examined

1.130 There are several implied terms which might be described as 'traditional' in that they are frequently said to be implied into construction contracts. Such terms include implied terms as to co-operation, non-prevention, quality of work, and materials. However, care must be taken to see whether in fact a term is implied into a contract as a matter of construction in each case. That a term may be implied into one contract does not mean that it will be implied into every contract. Each contract must be looked at having regard to its express terms. The express terms of the contract may mean that a term which would traditionally be implied is not in fact implied in the particular case. The more basic or 'incomplete' the agreement, the more likely that a term will need to be implied as the court will be filling a gap to either make the contract work or to accord with the intention of the parties. When there are detailed contract conditions, then the room for implied terms recedes.

Implied terms—co-operation/non-prevention of completion

1.131 Where the contract requires the co-operation of both parties in order to perform the contract works, there will often be a term implied as to the parties' co-operation. '*Mackay v Dick* terms' are terms which involve the employer agreeing that it will do

[191] See also *The Moorcock* (1889) 14 PD 64.

[192] As the Court of Appeal did in *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc* [2009] EWCA Civ 531 but applying Lord Hoffmann's Opinion in *Belize.*

all that is necessary on its part to permit the completion of the contract works. As Lord Blackburn said in his judgment:[193]

> I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.

Lord Watson said:[194]

> The respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working pace provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, they must be taken to have fulfilled the condition. The passage cited by Lord Shand from *Bell's Principles of the Laws of Scotland*, 8th ed. (1884), paragraph 50 to the effect that, 'If the debtor bound under a certain condition has impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement,' expresses a doctrine, borrowed from the civil law, which has long been recognised in the law of Scotland, and I think it ought to be applied to the present case.

1.132 It should be noted that this case is a Scottish case in which the language of Lord Watson is not that of an implied term but seems to relate to civil law concepts in Scots law, and the language of Lord Blackburn is of construction rather than implied term. Nevertheless, the case has since been looked at as an implied term case, usually in relation to charterparty cases and not in relation to construction contracts. A better view is that the case relates to fictional non-fulfilment of a condition subsequent.[195]

1.133 One of the '*Mackay v Dick* terms' often referred to in the textbooks is possession of the site. However, that is not always an implied term. Many standard forms require possession of the site to be given expressly. Indeed, some standard forms and bespoke forms expressly state that the contractor shall not have exclusive possession of the site. It will depend on the circumstances as to what degree of possession is in fact required for the contract works to be carried out. However, in the absence of any specific mention of it in the contract, reasonable possession of the site will have to be implied, otherwise there is no sensible way that the contractor

[193] *Mackay v Dick* (1881) 6 App Cas 251 at p. 263.
[194] *Mackay v Dick* (n 194), p. 271.
[195] See *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1; and *Thompson v Asda* [1988] Ch 241. See also *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; and *Mona Oil Equipment and Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014.

can execute its obligations. But that analysis should be one of necessity and not non-hindrance. A non-hindrance term is circular and unnecessary, as pointed out by Devlin J in *Mona Oil Equipment and Supply Co Ltd v Rhodesia Railways Ltd*:[196]

> The second term alleged is that the defendants would do nothing to prevent or obstruct the performance of the condition of payment in the Messrs. Turnbull, Gibson & Co. clause. This is a common form of allegation, but I venture to think that in the light of the decision in *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 its use could now with advantage be restricted to the exceptional case. It is generally regarded as originating from the dictum of Willes J, in *Inchbald v Neilgherry Coffee, Tea & Cinchona Plantation Co, Ltd* (1864) 17 CBNS 733. It was applied in *Trollope (George) & Sons v Martyn Bros* [1934] 2 KB 436 but with the qualification that the prevention must be 'without just cause or excuse.' In *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33 the right qualification was said by Lord Wright to be that the prevention must be wrongful. Lord Wright explains what this means in the following passage—and then Devlin J cited a passage from Lord Wright's judgment that I have cited and went on—'This shows that, except possibly in the rare cases where the wrongful act alleged is independent of the contract, the allegation of prevention is only circumlocution. Where the wrongful act is a breach of the contract, it can stand alone. There is no advantage in alleging an implied term not to break another term. Indeed, it is absurd, since it is implicit in this form of allegation that the breach of the second term is objectionable only if it prevents the performance of a condition . . .' In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it is not necessarily the most important, and it is certainly not the only matter. There are many decided cases in which it has not prevailed. . . Since *Luxor (Eastbourne) Ltd v Cooper* it is clear that the court cannot by means of an implied term prohibit arbitrary behaviour or acts done 'without just cause or excuse,' for the reason that such matters are not capable of sufficiently precise definition. For the same reason the court cannot by such means exact a higher degree of co-operation than that which can be defined by reference to the necessities of the contract.

1.134 That analysis is impeccable.[197] Therefore, again, the touchstone is necessity as a matter of construction. This and other *Mackay v Dick* terms can be analysed in that light.

1.135 Sometimes the term is expressed more widely than possession, as a 'duty of necessary co-operation'. A particular act or omission is then examined to see whether it is a breach of that term or not.[198] For example, an obligation sometimes expressed

[196] [1949] 2 All ER 1014 at 1016–18.

[197] Applied by Cooke J in *Imamovic v Cinergy Global Trading Ltd* [2006] EWHC 323 (Comm), para 175.

[198] For discussion and application of these terms, see *Hamlyn v Wood* [1891] 2 QB 488; *Holland Hannen & Cubitts v Welsh Health Technical Services Organisation* (1983) 118 BLR 80, particularly at 117; and *London Borough of Merton v Stanley Hugh Leach* (1985) 32 BLR 51, particularly at 81.

is that the employer will not interfere with the certifier and must ensure that its architect or certifier applies the contract properly.[199] One might ask whether this is necessary today when there is the right to adjudication or arbitration, where the adjudicator or arbitrator can review and revise certificates.[200] Equally, it can simply be a breach of the obligation to provide a contract professional who carries out the proper functions of the contract as assigned to the employer and its agent under the contract. The contract professional must act honestly and reasonably. As a matter of interpretation, the parties cannot intend that the contract professional (architect, engineer, or surveyor) need not act honestly and reasonably. Another aspect of co-operation is the giving of instructions to the contractor so that it can execute the work on time and so as not to hinder its performance.[201] Again, express terms of standard forms usually deal with this aspect of the matter.

1.136 The extent of co-operation required under the contract will depend upon the contractual obligations imposed on the parties and also the surrounding circumstances.[202]

1.137 A term will often be implied that the parties are not to prevent performance of the contractual obligations. In *Stirling v Maitland*[203] the position was summarized as:

> . . . if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can become operative.

1.138 It is common to plead an implied term that the employer will not hinder the contractor in the execution of its work. This is too broad a plea. Hindrance takes many forms and is seldom anything other than specific. For example, lack of proper possession of the site is an act of hindrance. But it need not be a breach of an implied term, since, usually, express terms will deal with site possession. Lack of information is similarly usually dealt with by way of express terms.

Implied terms—proceeding expeditiously, economically, and in accordance with the contract

1.139 It is sometimes pleaded as an implied term that information will be given so that the contractor can proceed 'expeditiously, economically and in accordance with

[199] See *Croudace Ltd v London Borough of Lambeth* (1986) 33 BLR 20; and see also *Panamena v Leyland* [1947] AC 428; *Perini v Commonwealth of Australia* (1969) 12 BLR 82; and *Minster Trust v Traps Tractor* [1954] 1 WLR 963 at 975 *per* Devlin J.

[200] See *Lubenham v South Pembrokeshire District Council* (1986) 33 BLR 39.

[201] See *Glenlion Construction Co Ltd v Guinness Trust* (1987) 39 BLR 89; *J Fee Ltd v Express Lift Co* (1993) 34 Con LR 147; and *Neodox v Swinton and Pendlebury Borough Council* (1958) 5 BLR 38 (Diplock J).

[202] *Mackay v Dick* (1881) 6 App Cas 251 at p. 263. For a more recent case, see *Brookfield Construction Limited v Foster and Partners Limited* [2009] EWHC 307 (TCC), [2009] BLR 246.

[203] (1864) 5 B & S 840, p. 852.

the contract'.[204] Again, this is too wide a term. There is nothing which requires a contractor to proceed expeditiously and economically[205] albeit that it is axiomatic that the contractor ought to proceed in accordance with the contract.[206] There is no implied term that a contractor will proceed with diligence.[207] A term will be necessarily implied that neither party will prevent the other from performing the contract.[208] The conclusive test for *MacKay v Dick* terms, in summary, is that they must pass the test of necessity (as a matter of construction). In the words of Stocker LJ, in *Rosehaugh Stanhope v Redpath Dorman Long* dealing with a specific contract where express terms covered things:[209]

> It is very well known that the courts readily imply a *MacKay v Dick* term, but I am not for my part persuaded that it would be appropriate to do so here. A term will only be implied where it is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it . . . It seems to me that on a reasonably commercial construction of clause 21(1), and particularly sub-clause (1)(b), any lack of co-operation by the plaintiffs would entitle the defendants to reimbursement under that clause. If that is so, then there is no necessity to imply a term for breach of which damages would lie.

1.140 The older cases which do not apply the rigour of this position ought to be treated with caution.

1.141 Whilst it has been seen above that necessity must be shown before a non-hindrance term can be implied, in one case a non-hindrance term has been implied into a licence agreement where the licensor's parent company asked the supplier of the licensee not to supply essential equipment to it.[210] It must be said that the case, decided in a hurry by the Court of Appeal ten days after the issue of the writ, has all the hallmarks of the haste and enthusiasm that Lord Denning MR could bring to cases. The case has not been applied in relation to the implied term point, although it is useful on such matters as extraterritorial jurisdiction and interference with

[204] A similarly formulated term was contended for in *Martin Grant and Co Ltd v Sir Lindsay Parkinson and Co Ltd* (1984) 29 BLR 31 and rejected on the basis that the express terms of the contract did not leave any room for such a term.

[205] Where the court found that there was no such term, see *Leander Construction Ltd v Mulalley and Company Ltd* [2011] EWHC 3449 (TCC), [2012] BLR 152.

[206] See for example *Glenlion*, n 142 above.

[207] *Greater London Council v Cleveland Bridge and Engineering Co Ltd* (1986) 34 BLR 50, 8 Con LR 30 (CA); and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd and another* [2006] EWHC 1341 (TCC). Modern contracts contain express obligations on contractors to progress the works with due diligence. In *Sabic UK Petrochemicals Limited v Punj Lloyd Limited and others* [2013] EWHC 2916 (TCC) Stuart-Smith J held that this obligation, unlike the imposition of the completion date, did not impose an absolute contractual obligation. What it required would depend upon what was needed to achieve the contractual objects, but it might require acceleration measures to be taken. If the completion date was exceeded the due diligence obligation continued and at that point was directed to minimizing the ongoing breach.

[208] See the *obiter* dicta of Lord Asquith in *William Cory and Sons Ltd v London Corp* [1951] 2 KB 476 at 484.

[209] (1990) 50 BLR 75 at 87.

[210] *Acrow Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676.

contractual rights. It cannot be regarded as authoritative in relation to an implied term of non-hindrance.

Implied terms—fitness of work and materials

1.142 Fitness of work and materials terms are truly traditional and, some may argue, do not fall into the necessity category. If that view is correct (a debate which may be better suited to take place amongst academics) then it is the only exception to the necessity rule. It has been established by authority for hundreds of years that there is normally an implied term in construction contracts that materials will be of good quality and reasonably fit for their intended purpose. The terms implied at common law correspond substantially with those contained in the Sale of Goods Act 1979 and also the Supply of Goods and Services Act 1982. Once stated, however, it is necessary to know that this is not an invariable rule and may not in fact be applicable, depending upon the circumstances.

1.143 The basic term has been described by du Parcq J, sitting in the Divisional Court, in *GH Myers and Co v Brent Cross Service Co*[211] as follows:

> I think that the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.

1.144 That statement has been approved by the House of Lords[212] and applied ever since and can be described as settled law. It has been suggested by commentators that this position has been cast into doubt by the Court of Appeal in *Trebor Bassett Holdings Ltd v ADT Fire & Security Plc*.[213] However, it would be fair to say that the case did not focus on this issue and it cannot be taken that the Court of Appeal intended to overturn long-standing authority.[214] The court held that a fire-suppressant system, designed and supplied to Cadbury by ADT, was not to be equated with 'goods' and did not, therefore, attract the statutory implied terms of quality or fitness for purpose, or the express terms of the contract applicable to goods. The implications of this decision will not be lost on those who draft or amend standard forms of contract for such supplies.

1.145 The sting in the tail of the warranty relates to whether the circumstances are such as to exclude any warranty. Those circumstances have, to date, been twofold.

1.146 The first exclusion relates to skill and judgment. Implicit in the implied term is reliance upon the skill and judgment of the party supplying the goods and materials. If there is no reliance upon the skill and judgment of the builder, then the

[211] [1934] 1 KB 46 at 55.
[212] *Young & Marten v McManus Childs* [1969] 1 AC 454.
[213] [2012] EWCA Civ 1158.
[214] Not least that cited in the previous paragraph as well as *IBA v EMI and BICC* (1980) 14 BLR 1.

warranty as described is not given.[215] This has been best described by Bayley J in *Duncan v Blundell*[216] (a case about the supply and fitting of a stove) when he said: 'Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not. Of course it is otherwise if the party employing him chooses to supersede the workman's judgment by using his own.' It follows that if the selection of materials is by the employer, then the builder will not be liable if the materials turn out not to be fit for their purpose because their skill and judgement has not been relied upon in that respect. Of course that does not mean that if the supplied materials suffered from a latent defect the builder would not be liable. The latent defect would be caught by the warranty as to merchantability.[217] Those words of Bayley J are also applicable to the question of the warranty of the builder that it can execute the work, in a traditional type of contract.

1.147 The second exclusion of the warranty relates to other special circumstances in which the employer requires the builder to divest itself of effective recourse against suppliers or sub-contractors for breach of warranty.[218] The rationale behind this exclusion is that normally an employer is in contractual relations with its builder which is in turn in contractual relations with its supplier, which in turn is in contractual relations with its sub-supplier and so on. This means that if the builder supplies materials which are defective, then it has recourse against its supplier and so on down the chain. There is no direct remedy for the employer against the supplier. The chain of responsibility therefore provides the remedy, each member of the chain bearing the risk of the insolvency of the link below it. If, however, the employer deprives the builder of its remedy against the supplier, then it cannot have been the intention of the parties that the employer would have a remedy against the builder but that the builder should have no remedy against its supplier. The Court of Exchequer Chamber in *Readhead v Midland Railway Co*[219] said: 'Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.'

1.148 Therefore, applying the law as stated then, the parties cannot be said to have contracted on terms which would have exposed the builder to the risk that its supplier would not perform and that it would have no recourse. The better view is that it would be unreasonable to require a term of quality and fitness to be implied when

[215] See *Cammell Laird & Co Ltd v Manganese Bronze and Brass* [1934] AC 402; and *Rotherham MBC v Frank Haslam Milan* (1996) 78 BLR 1.

[216] (1820) 3 Stark 6.

[217] See *Young & Marten v McManus Childs* [1969] 1 AC 454; and *Rotherham MBC v Frank Haslam Milan* (1996) 78 BLR 1.

[218] *Gloucestershire County Council v Richardson* [1969] 1 AC 480 is a case where a nominated supplier's conditions substantially limited its liability to the contractor.

[219] (1869) LR 4 QB 379 at 392.

the builder has no recourse, because such a term would not be equitable and reasonable. Reliance on skill and judgment is often a matter of degree. Sometimes there is a large amount of reliance on skill and judgment, in which case fitness for purpose of the completed works is to be implied.[220] Sometimes there is little or none, as for example when the contractor is asked to build to a detailed design specified by the employer's professional.[221] Where a contractor is a specialist contractor, the courts are more likely to imply a term as to the fitness of the contractor's performance because the contractor has and holds itself out as having a specialist skill.[222] There are many cases in the books where the courts have had to look on one or other side of the line, but each case must be looked at on its own facts in order to see how far the warranties go so far as fitness for purpose is concerned. Obviously, if there is reliance upon the contractor's skill and judgement, then fitness for purpose is more likely to be implied. If, however, the design is that of the employer or its architect, then the responsibility for the defective design does not lie with the contractor because the contractor's skill and judgement has not been relied upon.

Implied terms—duty to warn

1.149 The concept (in the first edition described as a heresy) of 'duty to warn' implied terms grew up in several first instance decisions in the 1980s and early 1990s.[223] The concept was that it was an implied term of a building contract that the builder would act with the reasonable skill and care of an ordinary competent builder, and allied with that that the builder would warn the employer's professional or the employer of any defects in design of which it was aware or which it believed to exist. These implied terms have no support from appellate English authority and do not pass the applicable test (as set out in *Belize*) and it is submitted that they cannot be held to truly exist. Not only is the necessity test not complied with, but also there is clearly no reliance on the skill and judgement of the contractor in construction cases let in a traditional form where the employer's professional designs and the builder builds. There can be no warrant for the imposition of an implied term that the builder will obtrude into the sphere of design when the contractual structure excludes the builder from that role. Coulson J in *J Murphy & Sons v Johnston Precast Ltd* [2008] EWHC 3024 (TCC) did hold that such a duty existed. That case related to the supply of pipe and his reasoning was shortly stated as follows:

> In my judgment, there is no reason why, as a matter of law, and as a matter of common sense, a supplier in the position of JP would not owe a similar duty to the contractor who was buying his GRP pipe.

[220] See, for example, *Greaves & Co v Baynham Meikle* [1975] 1 WLR 1095; *Test Valley BC v Greater London Council* (1979) 13 BLR 63; *IBA v EMI and BICC* (1980) 14 BLR 1; and *Basildon v Lesser* [1985] 1 All ER 20.

[221] *Lynch v Thorne* [1956] 1 WLR 303.

[222] *Hancock v B. W. Brazier (Anerley) Ltd* [1966] 1 WLR 1317 at p. 1332 (CA).

[223] *Equitable Debenture Life Assurance Society v William Moss* (1980) 2 Const LR 1; and *The Victoria University of Manchester v Hugh Wilson and Lewis Womersley* (1985) 2 Con LR 43; and *Edward Lindenburg v Joe Canning* (1992) 62 BLR 147.

It is respectfully submitted that the decision is wrong. Suppliers' obligations to contractors can be, and are, dealt with by the Sale of Goods Act 1979. However, it has been held by the Court of Appeal in *CGA Brown v Carr and another* [2006] EWCA Civ 785 that an allegation of a failure to carry out work with reasonable skill and care comprehended an allegation that an instruction given to a contractor in drawings and plans was inadequate. However, that case's decision was not just based upon the failure to spot a defect in the drawings but also the making of a defective joint.[224]

Impermissible terms

Penalties and exemption clauses

1.150 The law prohibits penalty clauses and unfair exemption clauses. These are dealt with in Chapters 7 and 11.

'Pay when paid' clauses

1.151 Section 113 of the HGCRA prohibits 'conditional payment provisions' under applicable contracts unless the condition is of payment by a third party who is insolvent.[225] See Chapters 2 and 10. There is also another (limited) exception to the rule in relation to high-value PFI contracts, which are not subject to the payment and adjudication provisions contained in the HGCRA.

1.152 These clauses are termed 'pay when paid' clauses and normally state that the contractor is not obliged to pay the sub-contractor unless and until it has received payment by the employer in respect of the sub-contractor's work. The terms used to be in the form of a proviso following the payment clause. The larger national contractors in the 1980s and 1990s had 'pay when paid' clauses as standard terms and they were nearly always accepted by sub-contractors in a competitive situation. The clauses were a source of dispute and were frequently a last resort by a main contractor in the event that it was resisting payment to the sub-contractor. Ironically, whilst the clauses attracted some academic commentary in the construction law journals and whilst they caused a great deal of anger in the industry, they were rarely tested by a court's decision.[226] The reason for this may have been an unwillingness of the

[224] See *Walter Lilly & Company Ltd v Mackay & Anor* [2012] EWHC 1773 paras 162 and 224 for a summary dismissal of a suggestion of such a duty.

[225] HGCRA, s 113(1). Section 113(2) sets out when a company 'becomes insolvent', s 113(2) sets out when a partnership 'becomes insolvent', s 113(4) sets out when an individual becomes insolvent, and s 113(5) gives further guidance.

[226] *Durabella Ltd v J Jarvis and Sons* (2001) 83 Con LR 145. Also, see *William Hare Ltd v Shepherd Construction Ltd* [2009] EWHC 1603 (TCC) where the judge said: 'This claim under CPR Part 8 arises out of a type of contractual provision which has been a relatively rare sight in the construction industry for the last 15 years—the "pay when paid" clause. Such clauses were effectively outlawed by section 113. . . . This provision, and the contract forms drafted to comply with it, have given rise to very few reported cases but now, as the UK industry faces severe economic difficulties, this part of the Act is back under the spotlight.' See also *J.B. Leadbitter & Co Ltd v Hygrove* [2012] EWHC 1941 (TCC).

larger national contractors to have these clauses the subject of judicial decision, or it is possible that it is because contracts were linking payment to certification (which is discussed further below). American cases suggested that they were not in fact enforceable in that they would be construed as not having the effect of preventing payment of the sub-contractor. But the main reason for the lack of case law may have been the difficulty, on the part of main contractors, in showing that the non-payment by the employer was not its own fault or the fault of other sub-contractors. Therefore if the main contractor pleaded that it had not been paid by the employer as a reason for non-payment, the sub-contractor was often able to show that the employer's non-payment was brought about by the default of the main contractor. In those circumstances the 'pay when paid' provision would not bite because there was not actually non-payment, but rather an appropriation of sums due by the employer against a claim for damages against the contractor. Additionally there was always the risk that the court would hold that the 'pay when paid' clause was ineffective because the contractor failed to obtain its remedies against the employer. All these arguments were present in *Durabella Ltd v J Jarvis and Sons*.[227]

1.153 Where a party's 'pay when paid' clause is rendered ineffective, the parties are at liberty to agree alternative terms for payment or, in the absence of such agreement, the relevant terms of the Scheme will apply.[228]

1.154 'Pay when paid clauses' were considered during the consultation process on the latest amendments to the 1996 Act. It was identified that parties were circumventing the prohibition of 'pay when paid clauses' by making provision within their contracts for 'paid when certified clauses' (the payment being dependent upon certification of the payment under the main contract). Ultimately, this presented similar risks to sub-contractors and contractors as the outlawed 'pay when paid clauses'. However, this has now been remedied by s 110(1A) of the HGCRA.

Rectification

1.155 The courts will rectify a written agreement if it can be shown that the written contract does not set out what the parties in fact agreed. This has been restated by the House of Lords in *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38. The signed and formal document may be rectified to conform to the true agreement between the parties.[229] It has been stated that convincing proof must be tendered before rectification is granted.[230] But all that really means is that

[227] (2001) 83 Con LR 145.

[228] HGCRA, s 113(6); the Scheme, Part II, para 11.

[229] *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep 301 at 307; and *Joscelyne v Nissen* [1970] 2 QB 86.

[230] *Ernest Scragg and Sons v Perseverence Banking Ltd* [1973] 2 Lloyd's Rep 101, see particularly 103–4; *Thomas Bates and Son Ltd v Wyndhams Ltd* [1981] 1 WLR 505, see particularly 514; *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [1999] EGCS 83.

the courts will take as a starting point the view that the parties in fact did write the agreement as they intended, and the burden of proof is upon the party alleging rectification. Necessarily such proof must be to a high standard because the proof will have the effect of unseating the words used by the parties in their written deed. Rectification can be granted if there is common mistake[231] or unilateral mistake.[232] However, where there has been unilateral mistake the test is severe because the courts recognize that there must be a limit beyond which they will not go to assist parties, who are involved in arm's-length commercial transactions, from their misapprehensions. Effectively, this means that there must be some element of unconscionability in the conduct of the other party before the courts will intervene to rectify a commercial agreement.[233] The best example of this is when one of the parties knows about the other's misapprehension and takes advantage of it.[234]

1.156 The essential ingredient of rectification is that both parties failed to get the agreement to reflect what they intended it to mean.[235] If one of the parties thought it meant one thing and the other party thought it meant another, this does not bring about a right to have the agreement rectified, subject, of course, to unconscionability.

1.157 Therefore, a party must be able to show that if the document is rectified it would represent the parties' agreement at the time when the agreement was formed.[236] On the other hand, the courts will not rectify the contract where it is only one of the parties which has made a mistake in expressing the contract. However, if the other party is aware of this mistake and takes advantage of it, rectification will be granted by the court.[237] Rectification is permitted in such circumstances on the basis that it would otherwise be inequitable to allow the other party to resist rectification as there was no mutual mistake.

1.158 The standard of proof in rectification cases gets higher the more detailed and complex the commercial agreement is, and where there have been prolonged negotiations over the terms.[238]

1.159 Most arbitration clauses or the arbitral procedure adopted are sufficiently widely drawn so as to allow for the arbitrator to rectify the contract,[239] but each must be looked at to ensure that it is widely drawn enough to allow for this. The question

[231] *Joscelyne v Nissen* [1970] 2 QB 86.
[232] *Thomas Bates and Son Ltd v Wyndhams Ltd* [1981] 1 WLR 505.
[233] *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [1999] EGCS 83; and cf *A Roberts & Co Ltd v Leicestershire County Council* [1961] 1 Ch 555.
[234] *Riverlate Properties v Paul* [1975] Ch 133.
[235] For the modern approach to the remedy of rectification, see *Chartbrook Ltd and another v Persimmon Homes Ltd and another* [2009] UKHL 38.
[236] *The Nai Genova* [1984] 1 Lloyd's Rep 353 (CA).
[237] *Riverlate Properties Ltd v Paul* [1975] Ch 133 (CA).
[238] *James Hay Pension Trustees Ltd v Kean Hird* [2005] EWHC 1093, Lawrence Collins J.
[239] *Ashville Investments v Elmer Construction Ltd* [1989] QB 488; cf *Crane v Hegeman-Harris* [1939] 4 All ER 68. See also *El Nasharty v J Sainsbury plc* [2003] EWHC 2195 (Comm).

of whether a dispute falls within the arbitrator's jurisdiction turns upon the construction of the relevant clause,[240] and such construction is an objective exercise in contractual interpretation.[241] Arbitration clauses which give the arbitrator power to decide 'disputes arising out of the agreement' or 'in relation to the agreement' will normally give the arbitrator power to rectify the contract.[242] But arbitration clauses which merely give power to decide disputes under the agreement do not.[243] Arbitrators can, under s 30 of the Arbitration Act 1996, rule on their jurisdiction. Therefore, the arbitrator may be able to rule that he or she has jurisdiction to rectify the agreement.

1.160 The position is not the same with regard to adjudicators. They do not have power to rule upon their own jurisdiction in the same way that arbitrators do. It may be doubted whether adjudicators will have jurisdiction to order rectification.[244] But it is submitted that, as a matter of statutory construction they will do so. The intention of the 1996 Act is that all construction contracts, including those which are in writing or evidenced in writing, have the right to adjudication. Therefore, there ought, in most cases, to be the power to appoint an adjudicator pursuant to an agreement which is susceptible to rectification or indeed to an agreement which is subject to rectification. To hold otherwise would be to deprive certain construction contracts, namely, agreements which are rectified or susceptible to rectification, of the benefit of the HGCRA.

Estoppel and waiver[245]

1.161 Estoppel and waiver are closely allied doctrines which govern the situation where the parties' obligations have altered—but there is no consideration—or one party

[240] See *Fiona Trust & Holding v Privalov* [2007] UKHL 40, (2007) Con LR 69.

[241] See *Ashville Investments v Elmer Construction Ltd* [1989] QB 488 at 506; and *X Ltd v Y Ltd* [2005] EWHC 769 (QB) (TCC) at [36].

[242] *Faghirzadeh v Rudolph Wolff (SA) (Pty) Ltd* [1977] 1 Lloyd's Rep 630 (a case which had to decide whether a varied agreement came within an arbitration clause); and *A and B v C and D* [1982] 1 Lloyd's Rep 166 (a case dealing with whether a third agreement came within the arbitration clause of the previous two) both decided that the arbitration clauses so worded permitted what amounted to different agreements being arbitrable under the earlier arbitration agreement. This would be consistent with a claim for rectification because ipso facto a rectified agreement is not the original agreement. This was decided authoritatively in *Ashville Investments v Elmer Construction Ltd* [1989] QB 488; and see also *El Nasharty v J Sainsbury plc* [2003] EWHC 2195 (Comm) at [17]. Also see *Fiona Trust & Holding v Privalov* [2007] UKHL 40, (2007) 114 Con LR 69 where the House of Lords considered the meaning of 'any dispute' and other formulations used in arbitration agreements. In that case, it was held that where such phrases were used it was likely that the parties (as rational businessmen) meant: '*any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal*'.

[243] *Crane v Hegeman-Harris* [1939] 4 All ER 68; and *Fillite (Runcorn) Ltd v Aqua-Lift* (1989) 45 BLR 27.

[244] *Project Consultancy Group v Trustees of the Gray Trust* [1999] All ER (D) 842.

[245] A detailed consideration of these doctrines lies outside the scope of this work. Reference should be made to Wilken & Ghaly, *The Law of Waiver, Variation and Estoppel*, 3rd edn, OUP.

wants, usually for commercial reasons, to resile from a previously agreed state of affairs. Although the two doctrines are frequently viewed as one, they are not.[246]

1.162 Estoppel involves the concept of someone's mouth being stopped up. The term is taken from the Norman word denoting stopping up. Estoppel is a varied concept. A person can be estopped from denying that they made a particular promise, from denying that a particular set of facts existed, or from denying that they had entered into a contract.[247] Denning LJ (who was the midwife of the revival of the concept of estoppel) said in *Charles Rickards Ltd v Oppenhaim*:[248]

> If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it. I think not only that that follows from *Panoutsos v Raymond Hadley Corp of New York* [1917] 2 KB 473, a decision of this court, but that it was also anticipated in *Bruner v Moore* [1904] 1 Ch 305. It is a particular application of the principle which I endeavoured to state in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 13.

1.163 In *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd*[249] Lord Denning MR said:

> When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

Thus, classically for an estoppel to arise, a party (the representor) must make a representation (usually of fact) to the other party (the representee), on which the representee then relies to its detriment. The representation must be unambiguous and unequivocal.[250] Such an estoppel has been held to arise in relation to practical completion. It was held that the parties could not go back on an assumption that practical completion had been achieved because all parties had acted upon a common understanding that practical completion had in fact been achieved.[251]

[246] For a detailed explanation of the differences between the two, see Wilken & Ghaly at Ch 1.
[247] See *Mitsui Babcock v John Brown Engineering* (1997) 51 Con LR 129 (QBD).
[248] [1950] 1 KB 617 at 623.
[249] [1982] QB 84 at 122.
[250] *Woodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741 (HL) at pp. 755, 768, and 771; *Hodgson v Lipson* [2009] EWHC 3111.
[251] *Menolly Investments 3 Sarl v Cerep Sarl (Rev 1)* [2009] EWHC 516 (Ch).

1.164 Waiver by contrast does not require detriment. A waiver will arise where the representor has full knowledge of the facts and makes the unequivocal representation that it will not rely on a particular contractual right or provision. The doctrine was described by Lord Blackburn as follows:

> …where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down in a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected another way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.[252]

1.165 Waiver or estoppel are often pleaded in construction cases as a matter of last resort. The reason they fail is that the evidence does not support the plea, rather than that the dicta are wrong.[253] The pleas usually involve departures from strict legal rights, as for example the dispensing with a condition precedent (such as notice) or barring a party from denying that they agreed to a particular method of performance.

1.166 In relation to waiver of defects, certification or inspection will not create the necessary waiver to disentitle the employer from claiming damages for a number of reasons.[254] First, as set out above, waiver requires knowledge—if the certificate or inspection does not locate the defects then can be no waiver. Second, the certificate or inspection is usually a trigger for payment to the contractor: it is not usually a representation that there are no defects.

1.167 In forfeiture clauses there are often provisions which permit the employer to determine the contractor's employment if it has defaulted in some way. Sometimes the entitlement follows a repetition of a previous default which is subject to a notice. If, however, the contractor does default and the employer does not determine but allows the work to continue, then the employer will be taken to have waived its right to determine in respect of that default.[255] The position will be different, however, where the contractor defaults again. In those circumstances, the employer's ability to rely on subsequent defaults will be entirely unfettered by any waiver. In charterparty cases it is open to argument that there is an implied term that when

[252] *Scarf v Jardine* (1882) 7 App Cas 345 at 360–1 *per* Lord Blackburn.

[253] See Wilken and Ghaly, *The Law of WaiverVariation and Estoppel* (3rd edn, OUP), Ch 19.

[254] See *Clayton v Woodman* [1962] 1 WLR 585; see also *AMF International v Magnet Bowling* [1968] 1 WLR 1025; and *East Ham Corp v Bernard Sunley* [1966] AC 406 at 444. See also Wilken and Ghaly, Ch 19.

[255] See *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co* [2003] 1 WLR 1015, [2003] 1 Lloyd's Rep 212 at para 55, a charterparty case, but to which the principles in construction cases are equally applicable.

there is a default the innocent party must exercise its rights to determine within a reasonable time, failing which it loses its rights.[256] However, the criteria as to the business efficacy of an implied term are not the same with charterparties as they are with construction contracts. It must be doubted that there is any need for an implied term to that effect, and it is submitted that absent a waiver or estoppel the right to determine will not be abated once accrued, and if it is abated, it will not be so by an implied term.

[256] See *KKKK v Bantham Steamship Company* [1939] 2 KB 554, (1939) 63 Ll L Rep 175 at 193; and *CMA CGM SA* (n 263) at para 53.