operation is subject to a condition which fails to occur[4] or because it was made without any intention to create legal relations.[5] An agreement may also lack contractual force for want of consideration. The requirement of consideration is discussed in Ch.3.

2–002 **The objective test.** In deciding whether the parties have reached agreement, the courts normally apply the objective test,[6] which is further discussed at para.2–003 below. Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter,[7] then neither can, generally,[8] rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract.[9]

2. THE OFFER

2–003 **Offer defined.** An offer is an expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is

[4] Below, paras 2–156—2–166.

[5] Below, paras 2–167—2–199.

[6] Howarth (1984) 100 L.Q.R. 265; Vorster (1987) 103 L.Q.R. 247; Howarth (1987) 103 L.Q.R. 527; De Moor (1990) 106 L.Q.R. 632; *Smith v Hughes* (1871) L.R. 6 Q.B. 597, 607.

[7] See *Falck v Williams* [1900] A.C. 176; *Pagnan SpA v Fenal Products Ltd* [1987] 2 Lloyd's Rep. 601 at 610; *Guernsey v Jacob UK Ltd* [2011] EWHC 918 (TCC), [2001] 1 All E.R. (Comm) 175 at [41]; *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm), [2011] 2 All E.R. (Comm) 190 at [45]; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 1 All E.R. 1296 at [140]. The objective test can apply, not only for the purpose of establishing the existence of a contract, but also to determine the contents of an admitted contract: see *Thake v Maurice* [1986] Q.B. 644; *Eyre v Measday* [1986] 1 All E.R. 488 and *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209, [2010] 1 Lloyd's Rep. 357 at [15], [25], and [30]; and to determine whether a contract had been affirmed by agreement between the parties after the occurrence of an event which had discharged both or one of them: *Glencore Energy UK Ltd v Transworld Oil Ltd* [2010] EWHC 141 (Comm) at [55], [56].

[8] The rule stated in the text does not apply in favour of a party who knows that the other does not assent to the terms proposed in a notice displayed by the former party: e.g. where an offer is expressed in a language which the offeree, to the offeror's knowledge, does not understand, in *Geier v Kujawa, Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep. 364; or where the course of dealing shows that the offeree must have known that the offer was mistaken, in *Hartog v Shields* [1939] 3 All E.R. 566. See also below, para.2–004 at n.18. cf. in cases of mistake, below, para.3–022. But a party who completes and signs a contractual document "cannot avoid its consequences by saying that they did not read it or did not understand it": *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB), [2011] 2 All E.R. (Comm) 664 at [40] (where the reason for the signer's inability to understand the document was alleged to be that "she was an Italian speaker and the form was in English" (at [38])).

[9] See, e.g. *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1977] 2 Lloyd's Rep. 614; *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA Civ 1334, [2010] 2 All E.R. (Comm) 788 at [10]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [5].

accepted by the person to whom it is addressed.[10] Under the objective test of agreement,[11] an apparent intention to be bound may suffice, i.e. the alleged offeror (A) may be bound if his words or conduct[12] are such as to induce a reasonable offeree to believe that he intends to be bound, even though in fact he has no such intention. This was, for example, held to be the case where a university had made an offer of a place to an intending student as a result of a clerical error[13]; and where a solicitor, who had been instructed by his client to settle a claim for $155,000, by mistake offered to settle it for the higher sum of £150,000.[14] Similarly, if A offers to sell a book to B for £10 and B accepts the offer, A cannot escape liability merely by showing that his actual intention was to offer the book to B for £20, or that he intended the offer to relate to a book other than that specified in the offer.[15]

2–004 **State of mind of alleged offeree.** Whether A is actually bound by an acceptance of his apparent offer depends on the state of mind of the alleged offeree (B); to this extent, the test of agreement is not purely objective.[16] If B actually and reasonably believes that A has the requisite intention, the objective test is satisfied so that B can hold A to his apparent offer even though A did not, subjectively, have the requisite intention.[17] However, if B knows that, in spite of the objective appearance, A does not have the requisite intention, A is not bound; the objective test does not apply in favour of B as he knows the truth about A's

[10] *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep. 349 at [75]; e.g. *Storer v Manchester City Council* [1974] 1 W.L.R. 1403; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 195, 201; *Glencore Energy UK Ltd v Cirrus Oil Services Ltd* [2014] EWHC 87 (Comm), [2014] 1 All E.R. (Comm) 513, where a communication was held to be an offer as it was "intended to be capable of acceptance with a binding contract being thereby concluded" ([at 59]; cf. at [67]); contrast *André & Cie v Cook Industries Inc* [1987] 2 Lloyd's Rep. 463; *Schuldenfrei v Hilton (Inspector of Taxes)* [1998] S.T.C. 404 (statement that something *had* been done, not an offer). For other illustrations of statements held not to amount to offers, see *Destiny 1 Ltd v Lloyd's TSB Bank Plc* [2010] EWHC 1233 (proposal forming part of a negotiating "package"); *Global 5000 Ltd v Wadhawan* [2011] EWHC 853 (Comm), [2011] 2 All E.R. (Comm) at [55] (applying the objective test: at [46]); [2012] EWCA Civ 13, [2012] 2 All E.R. (Comm) 18 at [65], appeal dismissed on the different ground that there was "no serious issue to be tried as to the existence of [the alleged] contract . . . ".

[11] Above, para.2–002; *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 571; *Bowerman v ABTA Ltd* [1995] N.L.J. 1815; *Covington Marine Corporation v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [43].

[12] For offers made by conduct, see below, para.2–005; *The Aramis* [1989] 1 Lloyd's Rep. 213 (where the objective test was not satisfied); *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep. 25, 27.

[13] *Moran v University College Salford (No.2), The Times*, November 23, 1993.

[14] *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700.

[15] cf. *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com.L.R. 158; cited with approval in *Whittaker v Campbell* [1984] Q.B. 318, 327, in *Food Corp of India v Antclizo Shipping Corp (The Antclizo)* [1987] 2 Lloyd's Rep. 130, 146, affirmed [1988] 1 W.L.R. 603 and in *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 702.

[16] *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 A.C. 854, 924.

[17] *André & Cie SA v Marine Transocean Ltd (The Splendid Sun)* [1981] 1 Q.B. 694, as explained in *The Hannah Blumenthal*, above; *Challoner v Bower* (1984) 269 E.G. 725; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* 2 Lloyd's Rep. 486, 493 ("subjective understanding").

actual intention.[18] There are other permutations. If B does not know, but ought to have known that A does not have the requisite intention, English law gives no clear answer.[19] However, there are suggestions that B will not be able to hold A to his apparent offer.[20] It is also possible, although highly unlikely, that A and B, unknown to each other, both have the same requisite intention but a reasonable third party would not have thought they did, or would have thought that they had the requisite intention in respect of a different term. There is no authority on such a case, but it is submitted that where A and B reach agreement on term X but the unexpressed intention of both is that this means Y, the parties should be held to a valid contract for Y although a third party's objective interpretation is that the agreement is for X.[21] Lastly, B may have simply formed no view on the question of A's intention, so that B neither believes that A has the requisite intention nor knows that A does not have this intention. This situation has given rise to a conflict of judicial opinion. One view is that A is not bound: in other words, the objective test is satisfied only if A's conduct is such as to induce a reasonable person to believe that A had the requisite intention *and* if B actually held that belief.[22] The opposing view is that A is bound: in other words, the objective test is satisfied if A's words or conduct would induce a reasonable person to believe that A had the requisite intention, so long as B does not actually know that A does *not* have any such intention.[23] However, it is hard to see why B should be

[18] *Ignazio Messina & Co v Polskie Linie Oceaniczne* [1995] 2 Lloyd's Rep. 566, 571; *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 703; *Covington Marine Corporation v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2006] 1 Lloyd's Rep. 748 at [45] ("Subject only to actual knowledge on the part of the buyer [the offeree] that no offer was intended"); *HSBC Bank Plc v 5th Avenue Partners Ltd* [2007] EWHC 2819 (Comm) at [117] (objective principle "not engaged" where absence of any intention to vary an existing contract was known to both parties affirmed on other issues [2009] EWCA Civ 296); and see the authorities cited in n.23, below. The passage of the text ending with n.18 is evidently that in the 30th edition of this book to which approving reference is made in *Attrill v Dresdner Kleinwort Ltd* [2012] EWHC 1189 (Ch) at [130], [154], affirmed: [2013] EWCA Civ 394, [86]. See further on the mistake of term known to the other party at paras 3–018, 3–022, 3–035, and rectification for unilateral mistake as to terms at paras 3–069—3–076.

[19] In *Merrill Lynch International v Amorim Partners Ltd* [2014] EWHC 74 (QB) at [54] Hamblen J. said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract, see below, para.3–023.

[20] See *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com. L.R. 158; *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700 at 703, where Mance J. said that the objective principle would be displaced if a party knew or ought to have known of the mistake.

[21] See below, para.4–068.

[22] *The Hannah Blumenthal*, above, as interpreted in *Allied Marine Transport v Vale de Rio Doce Navegaçeo SA (The Leonidas D.)* [1985] 1 W.L.R. 925; Beatson (1986) 102 L.Q.R. 1; Atiyah (1986) 102 L.Q.R. 363; *Gebr. van Weelde Scheepvaart Kantoor BV v Homeric Marine Services (The Agrabele)* [1987] 2 Lloyd's Rep. 223, especially at 235; cf. *Cie Française d'Importation, etc., SA v Deutsche Continental Handelsgesellschaft* [1985] 2 Lloyd's Rep. 592, 597; *Amherst v James Walker Goldsmith and Silversmith Ltd* [1983] Ch. 305. The view that, in the third of the situations described in the text above, there is no contract is referred to with approval by Andrew Smith J. in *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475 at [228], affirmed [2009] EWCA Civ 1134, [2010] 2 All E.R. (Comm) 788 where Longmore L.J. at [22] paid "tribute to the careful and thorough judgment of Andrew Smith J".

[23] *Excomm Ltd v Guan Guan Shipping (Pte) Ltd (The Golden Bear)* [1987] 1 Lloyd's Rep. 330, 341 (doubted on another point in para.2–069, n.351 below, and see para.2–006, n.32); this view was approved in *The Antclizo* [1987] 2 Lloyd's Rep. 130, 143 but doubted at 147 (affirmed [1988] 1 W.L.R. 603 without reference to the point); and semble in *Floating Dock Ltd v Hong Kong and*

protected in this situation. Where B has no positive belief in A's (apparent) intention to be bound, he cannot be prejudiced by acting in reliance on it. It is therefore submitted that the objective test should not apply to the last situation. For this purpose, it should make no difference whether B's state of mind amounts to ignorance of, or merely to indifference to, the truth.

Conduct as offer. An offer may be addressed either to a specified person or to a specified group of persons or to the world at large; and it may be made expressly (by words) or by conduct. At common law, a person who had contracted to sell goods and tendered different goods (or a different quantity) might be considered to make an offer by conduct to sell the goods which he had tendered.[24] It seems that an offer to sell can still be made in this way, though by legislation against "inertia selling" the dispatch of goods "without any prior request" may amount to a gift to the recipient, rather than to an offer to sell.[25] 2–005

Inactivity as an offer. A number of cases raise the further question whether the "conduct" from which an offer may be inferred can take the form of inactivity. The issue in these cases was whether an agreement to submit a dispute to arbitration could be said to have been "abandoned" by long delay, where, over a long period of time, neither party had taken any steps in the arbitration proceedings. In cases of "inordinate and inexcusable delay" of this kind, arbitrators now have a statutory power to dismiss the claim for want of prosecution[26] and it is also open to the parties expressly to provide for "lapse" of the claim if 2–006

Shanghai Bank Ltd [1986] 1 Lloyd's Rep. 65, 77; *The Multibank Holsatia* [1988] 2 Lloyd's Rep. 486, 492 ("at least did not conflict with [B's] subjective understanding"); *Thai-Europe Tapioca Service Ltd v Seine Navigation Inc (The Maritime Winner)* [1989] 2 Lloyd's Rep. 506, 515 (using similar language). A dictum in *Furness Withy (Australia) Pty Ltd v Metal Distribution (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep. 236, 242 goes even further in suggesting that there may be a contract even though "*neither* [party] intended to make a contract".

[24] *Hart v Mills* (1846) 15 L.J. Ex. 200; cf. *Steven v Bromley & Son* [1919] 2 K.B. 722; *Greenmast Shipping Co SA v Jean Lion et Cie. SA (The Saronikos)* [1986] 2 Lloyd's Rep. 277; *Confetti Records v Warner Music UK Ltd* [2003] EWHC 1274 (Ch), [2003] E.M.L.R. 35.

[25] Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (implementing Directive 97/7/EC) regs 22 (amending Unsolicited Goods and Services Act 1971) and 24 (as amended by Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277), as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) regs 2–4), 30(1) and Sch.2, para.96) see also reg.3(4)(d) and Sch.1 para.29 of the 2008 Regulations, above. For a further amendment of the 2008 Regulations (SI 2008/1277), see Consumer Protection (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) reg.39. On these Regulations see generally below, Vol.II, paras 38–153—38–191. For further amendments of the 1971 Act, see Regulatory Reform (Unsolicited Goods and Services Act 1971) (Directory Entries and Demand for Payment) Order 2005 (SI 2005/55) and Unsolicited Goods and Services Act 1971 (Electronic Commerce) (Amendment) Regulations 2005 (SI 2005/148). Normally, these provisions against "inertia selling" would not apply where goods were dispatched in response to the buyer's order, even if they were not in accordance with the order; but they might apply where the qualitative or quantitative difference between what was ordered and what was sent was extreme.

[26] Arbitration Act 1996 s.41(3), replacing Arbitration Act 1950 s.13A. Under s.13A, it had been held that the court could take into account delay occurring before the section came into force: *Yamashita-Shinnihon S.S. Co Ltd v L'Office Cherifien des Phosphate (The Boucraa)* [1994] 1 A.C. 486, and that the court would (mutatis mutandis) apply the same principles to the power to dismiss arbitration proceedings as those which govern the dismissal of an action for want of prosecution: *James Lazenby & Co v McNicholas Construction Co Ltd* [1995] 1 W.L.R. 615.

former question, in the affirmative, Jack J. said that the situation could be analysed in two ways. The "most straightforward" analysis was that "the delivery of the transparencies accompanied by a delivery note is to be treated as an offer which was accepted by the acceptance of the transparencies and their onward transmission.".[43] On this view, the faxed requests are no more than invitations to treat, presumably because of their lack of certainty as to the terms of the contract. The second, and "equally viable" analysis was that "the faxed requests for transparencies to be submitted were offers to submit them on the usual terms of the delivery notes, which offers were accepted by the submission of the transparencies accompanied by the notes".[44]

On this view, the required degree of certainty was supplied by "an established course of dealing on the terms of the delivery notes".[45]

2–008 A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily because it is not made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms. A statement is clearly not an offer if it expressly provides that the person who makes it is *not* to be bound merely by the other party's notification of assent but only when he himself has signed the document in which the statement is contained.[46]

2–009 **Wording not conclusive.** Apart from cases of the kind just described, the wording of a statement does not conclusively determine the distinction between an offer and an invitation to treat. Thus a statement may be an invitation to treat although it contains the word "offer"[47]; while a statement may *be* an offer although it is expressed as an "acceptance,"[48] or although it requests the person to whom it is addressed to make an "offer".[49] The point that use of the word "offer" in a document does not conclusively determine its legal nature is illustrated by *Datec Electronic Holdings Ltd v United Parcels Ltd*[50] where carriers of goods had issued standard terms, clause 3 of which stated that the carriers did not "offer carriage of goods" except subject to specified restrictions, one of which was that the value of any package was not to exceed $50,000. After the shippers had indicated their acceptance of these terms, they "booked" a number of packages; these were then collected from their premises by an employee of the carriers who was unaware that the value of each package exceeded $50,000. The House of Lords rejected the argument that there was no contract because the carriers' "offer" to carry could not be accepted by tendering packages which were not in conformity with that offer.[51] Both the Court of

[43] At [63].
[44] At [64].
[45] At [64].
[46] *Financings Ltd v Stimson* [1962] 1 W.L.R. 1184.
[47] *Spencer v Harding* (1870) L.R. 5 C.P. 561; *Clifton v Palumbo*, above, para.2–007, n.36; *iSoft Group Plc v Misys Holdings Ltd* [2003] EWCA Civ 229, [2003] All E.R. (D) 438 (Feb).
[48] *Bigg v Boyd Gibbins Ltd* [1971] 1 W.L.R. 913, (1987) 87 L.Q.R. 307.
[49] *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] A.C. 207.
[50] [2007] UKHL 23, [2007] 1 W.L.R. 1325.
[51] See below, para.2–031.

Appeal[52] and the House of Lords[53] approved the view at first instance that, the phrase "offer" from clause 3 had not been used in its technical legal sense.[54] The fact that the packages were not in conformity with clause 3 did not prevent the conclusion of a contract.[55] In the words of Lord Mance, "the more natural inference" was that "the whole of clause 3 provides a contractual regime governing the carriage of non-conforming goods".[56] One analysis[57] is that the restrictions in clause 3 could, in spite of the use of the word "offer", be regarded as part of an invitation to treat, while the shippers' tender of non-conforming goods could be regarded as an offer to enter into a contract for the carriage of those goods which was then accepted by the carriers' conduct of collecting the goods. This interpretation is also supported by other provisions of clause 3: in particular, those entitling the carrier to "suspend" the carriage of non-confirming goods and making the shippers liable for charges in respect of such goods. There would, on the other hand, have been no such acceptance by the carriers' conduct if, knowing of the non-conformity of the goods, they had refused to collect them; there would have been "no contract".[58]

2–010 **Distinction between offer and invitation to treat.** As the discussion in para.2–009 above shows, the distinction between offer and invitation to treat is often hard to draw, as it depends primarily on the elusive criterion of the intention of the person making the statement in question. But, in certain stereotyped situations, the distinction is determined, at least prima facie, by rules of law. Such rules can be displaced by evidence of contrary intention; but in the absence of such evidence they will determine the distinction between offer and invitation to treat, and they will do so without reference to the intention of the maker of the statement. This is true, for example, in the cases of auction sales and shop window displays. These and other illustrations of the distinction are discussed in paras 2–011—2–024 below.

2–011 **Display of goods for sale: general rule.** As a general rule, a display of goods at a fixed price in a shop window[59] or on a shelf in a self-service store[60] is an invitation to treat and not an offer. The display is an invitation to the customer to make an offer, which the retailer may then accept or reject. There is judicial support for the view that an indication of the price at which petrol is to be sold

[52] [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep. 279 at [15].
[53] [2007] UKHL 23, [2007] 1 W.L.R. 1325 at [24].
[54] [2005] EWHC 239, [2005] 1 Lloyd's Rep. 470 at [118].
[55] [2007] UKHL 23 at [23].
[56] [2007] UKHL 23 at [25]; cf. [2005] EWCA Civ 1481, [2006] 1 Lloyd's Rep. 279 at [16].
[57] [2007] UKHL 23 at [23].
[58] [2007] UKHL 23 at [9].
[59] *Timothy v Simpson* (1834) 6 C. & P. 499, 500; *Fisher v Bell* [1961] 1 Q.B. 394 (actual decision reversed by Restriction of Offensive Weapons Act 1961 s.1; contrast Criminal Justice Act 1988 s.14A(1), as inserted by Offensive Weapons Act 1996 s.6: this refers only to selling). Dicta in *Wiles v Maddison* [1943] 1 All E.R. 315, 317 may perhaps suggest that a shop window display is an offer. See also Winfield (1939) 55 L.Q.R. 499, 516–518.
[60] *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 Q.B. 410; cf. *Lacis v Cashmarts Ltd* [1969] 2 Q.B. 400; *Davies v Leighton* [1978] Crim. L.R. 575. For the contrary view, see Ellison Kahn (1955) 72 S.A.L.J. 246, 250–253; *Lasky v Economic Grocery Stores*, 319 Mass. 224; 65 N.E. 2d 305 (1946).

at a filling station is likewise only an invitation to treat,[61] the offer to buy being made by the customer and accepted by the seller's conduct in putting the petrol into the tank.[62] But this analysis hardly fits the now more common situation in which the station operates a self-service system[63]; for once the customer has put petrol into his tank, the seller has no effective choice of refusing to deal with him.

2–012 **Display of goods for sale: exceptional cases.** The general rule stated in para.2–011 above relating to shop and similar displays is well established; but it can be excluded by special circumstances: e.g. if the retailer has stated unequivocally that he will sell to the first customer who tenders the specified price. The distinction between an offer and an invitation to treat depends, in the last resort, on the intention of the maker of the statement[64]; and where his intention to be bound immediately on acceptance is sufficiently clear a shop window or shelf display may be an offer. For example, a notice in a shop window stating that "We will beat any TV price by £20 on the spot" has been described as "a continuing offer".[65] The customer may, indeed, still lose his bargain since the offer can be withdrawn at any time before it is accepted[66]; but if it is so withdrawn the person displaying the notice may incur criminal liability under legislation passed for the protection of consumers.[67] In the case of a self-service shop, acceptance of any offer that might be made by the terms of the display would normally take place, not when the customer took the goods off the shelf, but only when he did some less equivocal act, such as presenting them for payment.[68]

2–013 **Other displays.** The principles stated in paras 2–011 and 2–012 above can also apply to other displays. Thus, where a menu is displayed outside a restaurant, or handed to a customer, it seems that the proprietor only makes an invitation to treat,[69] the offer coming from the customer. On the other hand, a

[61] *Esso Petroleum Ltd v Commissioners of Customs & Excise* [1976] 1 W.L.R. 1, 5, 6, 11; *Richardson v Worrall* [1985] S.T.C. 693, 717.

[62] *Re Charge Card Services* [1989] Ch. 417, 512; for acceptance by conduct, see below, para.2–029.

[63] cf. below, para.2–013 at n.70.

[64] Above, para.2–008.

[65] *R. v Warwickshire CC, Ex p. Johnson* [1993] A.C. 583, 588.

[66] Below, para.2–093.

[67] Under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) reg.3(4)(d) and Sch.1 para.6, a trader (as defined in reg.2, as amended by reg.2 the Consumer Protection (Amendment) Regulations 2014 (SI 2014/870)) commits an offence if he "makes an invitation to purchase products at a specified price" and then refuses to show the advertised item to consumers or refuses to take orders for it, though only if he does so "with the intention of promoting a different product (bait and switch)". A misleading price indication could also conceivably amount to deceit. And see below, para.2–017.

[68] See *Lasky v Economic Grocery Stores*, above, n.60. An alternative possibility is that the acceptance may take place before such presentation of the goods but be subject until then to the customer's power to cancel: see *Gillespie v Great Atlantic & Pacific Stores*, 187 S.E. 3d 441 (1972); *Sheeskin v Giant Food Inc*, 318 A 2d 874 (1974). cf. *R. v Morris* [1984] A.C. 320 where taking goods off the shelf of a self-service store *and changing the price labels* was held to be an "appropriation" within Theft Act 1968 s.3(1); but it does not follow that at this stage there would for the purpose of the law of contract be an acceptance even if the shelf-display amounted to an offer: see *R. v Morris* [1984] A.C. 320, 334.

[69] cf. *Guildford v Lockyer* [1975] Crim. L.R. 235.

notice at the entrance to an automatic car park may be an offer which can be accepted by driving in[70]; and a display of deck-chairs for *hire* has been held to be an offer.[71] There is no perfectly general answer to the question whether such displays are offers or invitations to treat; the answer depends in each case on the intention with which the display was made.[72] In *University of Edinburgh v Onifade*[73] a notice displayed by a landowner on its land stated that any persons parking their cars there without permit would be liable to a "fine" of £30 per day. A motorist who had so parked his car was held liable for the specified amount as his conduct amounted to an acceptance[74]; so that it must have been assumed that the notice was an offer. However, with respect, it is open to question whether the landowner had any objective intention to enter into a contract with persons parking without permit. Rather, the landowner's intention seems to have been to deter unauthorised parking. The point could be significant if an action had been brought against the landowner, e.g. in respect of loss of or damage to the car.

2–014 **Advertisements: bilateral contracts.** Advertisements intended to lead to the making of bilateral contracts tend to be regarded as invitations to treat. Thus a newspaper advertisement that goods are for sale is not generally an offer[75]; an advertisement that a scholarship examination will be held is not an offer to a candidate[76]; and the circulation of a price list by a wine merchant has been held only to be an invitation to treat.[77] It has been said that, if such statements were offers, a merchant could be liable to everyone who purported to accept his offer even though his stocks were insufficient to meet the requirements of all the "acceptors".[78] But this result would not necessarily follow; for it can be construed as an offer that is "subject to availability", and so expires as soon as the merchant's stock is exhausted. There is, again, no absolute rule determining the character of advertisements of bilateral contracts: they are normally invitations to treat, but they may be offers if the advertiser's intention to be bound immediately on acceptance is sufficiently clear.[79]

2–015 **Advertisements: unilateral contracts.** Two reasons support the position that advertisements intended to lead to the making of bilateral contracts are commonly regarded as invitations to treat. First, such advertisements often lead to further bargaining, e.g. where a house is advertised for sale. Secondly, the advertiser may legitimately wish, before becoming bound, to assure himself that the other party is able (financially or otherwise) to perform his obligations under any contract which may result. Neither of these reasons applies in the case of a

[70] *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163, 169.

[71] *Chapelton v Barry UDC* [1940] 1 K.B. 532.

[72] cf. the cases discussed below, para.2–018.

[73] 2005 S.L.T. (Sh Ct) 63.

[74] See below, paras 2–026, 2–029.

[75] *Partridge v Crittenden* [1968] 1 W.L.R. 1204; contrast *Lefkowitz v Great Minneapolis Surplus Stores*, 86 N.W. 2d. 689 (1957).

[76] *Rooke v Dawson* [1895] 1 Ch. 480.

[77] *Grainger & Son v Gough* [1896] A.C. 325.

[78] *Grainger & Son v Gough* [1896] A.C. 325 at 334.

[79] cf. the cases discussed below, para.2–018.

CHAPTER 9

PERSONAL INCAPACITY

1. IN GENERAL

Contractual incapacity. The incapacity of one or more of the contracting parties may defeat an otherwise valid contract. Prima facie, however, the law presumes that everyone has a capacity to contract; so that, where exemption from liability to fulfil an obligation is claimed by reason of want of capacity, this fact must be strictly established on the part of the person who claims the exemption. In English law, three classes of individuals are subject to some degree of personal **9–001**

contractual incapacity.[1] These are minors,[2] persons lacking the requisite mental capacity[3] and drunken persons.[4] Abnormal weakness of mind short of such mental incapacity as prevents a person understanding the nature of the transaction, or immaturity of reason in one who has attained full age, or the mere absence of skill upon the subject of the particular contract, affords in itself no ground for relief at law or in equity,[5] although in certain cases, undue influence[6] or unconscionable dealing by the other party[7] or (perhaps) inequality of bargaining power may permit the transaction to be set aside as inequitable.[8] Moreover, illiteracy and unfamiliarity with the English language are not to be equated with disabilities like mental incapacity or drunkenness. According to Millett L.J. in *Barclays Bank Plc v Schwartz*,[9] although all four conditions are disabilities which may prevent the sufferer from possessing a full understanding of a transaction into which he enters:

> "... mental incapacity and drunkenness [may] not only deprive the sufferer of understanding the transaction, but also deprive him of the awareness that he [does] not understand it",

which is not the case as regards an illiterate or a person unfamiliar with English. Again, however, such a person may in an appropriate case claim that the transaction be set aside as a harsh and unconscionable bargain.[10]

9–002 **Consumer protection and vulnerable consumers.** Modern consumer protection legislation sometimes requires a court to take into account the limited understanding of consumers of the contracts which they enter with traders in determining whether a consumer is to be protected.

9–003 **Unfair commercial practices: "mental infirmity" or impairment of judgment of consumer.** So, under the Consumer Protection from Unfair Trading Regulations 2008, unfair commercial practices by a trader towards a consumer are prohibited if they fall under a general test of unfairness, if they constitute a "misleading action", "misleading omission" or are "aggressive", or if they are contained in a legislative list.[11] Under the general test, a court must consider, inter alia, whether a business's commercial practice "materially distorts or is likely to materially distort the economic behaviour of the average consumer".[12] While in general the average consumer is understood to be "reasonably well informed, reasonably observant and circumspect",[13] it is also provided that:

> "In determining the effect of a commercial practice on the average consumer—
>
> (a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or underlying product[14] because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and
>
> (b) where the practice is likely to materially distort the economic behaviour only of that group,
>
> a reference to the average consumer shall be read as referring to the average member of that group."[15]

This definition is also relevant to the commission of a misleading statement or omission.[16] Moreover, in relation to "aggressive commercial practices", it is provided that a court must take into account in determining whether the trader uses "harassment, coercion or undue influence" whether the trader exploited:

> "any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader [was] aware, to influence the consumer's decision with regard to the product."[17]

Under the Consumer Protection from Unfair Trading Regulations 2008 as originally made, the commission of an unfair commercial by a trader had no effect on the validity of any contract concluded by the trader with the consumer,[18] but in 2014 the 2008 Regulations were amended so as to create new rights of redress for consumers in respect of misleading statements and aggressive commercial practices,[19] a right "to unwind" the contract, or to a "discount", and a right to

[1] At common law, a married woman could not in general enter into a contract on her own account either with her husband or with a third party, but successive statutes from 1857 to 1949 progressively removed this incapacity (although an agreement between spouses may be held not to be a contract on the ground of a lack of intention to create legal relations: above, para. 2–178—2–179). However, some uncertainty remains as to the liability of a wife in respect of a contract concluded with her husband before marriage, this turning on whether or not the Law Reform (Married Women and Tortfeasors) Act 1935 s.1(c) reversed the effect of the decision in *Butler v Butler* (1885) 14 Q.B.D. 831 (affirmed on a different point (1885) 16 Q.B.D. 374). It is submitted that the broader reading of the 1935 Act so as to remove from the law this last vestige of the peculiar treatment of married women's contracting is the more likely given "society's recognition of the equality of the sexes": *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, 188, per Lord Browne-Wilkinson (though this observation was made in another context).

[2] See below, paras 9–005 et seq.

[3] See below, paras 9–075 et seq.

[4] See below, paras 9–105—9–106.

[5] *Osmond v Fitzroy* (1731) 3 P.Wms. 129; *Lewis v Pead* (1789) 1 Ves. Jun. 19 and see Barton (1987) 103 L.Q.R. 118.

[6] See above, paras 8–057 et seq.

[7] See above, paras 8–130 et seq.

[8] See above, para.8–143.

[9] *The Times*, August 2, 1995; *Hambros Bank Ltd v British Historic Buildings Trust* [1995] N.P.C. 179.

[10] Above, para.8–130.

[11] The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) ("2008 Regulations (SI 2008/1277)") regs 3, 5–7, and Sch.1 as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). On these regulations generally, see Vol.II, paras 38–145 et seq.

[12] 2008 Regulations (SI 2008/1277) reg.3(3)(b).

[13] 2008 Regulations (SI 2008/1277) reg.2(2).

[14] "Product" is defined by the 2008 Regulations: see reg.2(1) and Vol.II, para.38–156.

[15] 2008 Regulations (SI 2008/1277) reg.2(5).

[16] 2008 Regulations (SI 2008/1277) regs 5 and 6.

[17] 2008 Regulations (SI 2008/1277) reg.7(2)(c).

[18] 2008 Regulations (SI 2008/1277) reg.29 (as originally enacted) provided that "an agreement shall not be void or unenforceable by reason only of a breach of these regulations".

[19] The Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) reg.3 inserting new Pt 4A into the 2008 Regulations. These changes were brought into force as from October 1, 2014.

the term is confined to necessary goods and services supplied to the minor.[37] In another, it extends to contracts for the minor's benefit and in particular to contracts of apprenticeship, education and service.[38] It has long been customary for a distinction to be drawn between these two classes of contract and it remains convenient for the purposes of exposition, but it is doubtful whether any practical importance still attaches to it. To these common law examples must be added the special treatment of settlement or compromise agreements made by a child and approved by the court under CPR r.21.10.[39]

9–009 **Deeds.** In general a minor is bound by a deed to the same extent that he would be bound if the promise contained in the deed were parol. He is, therefore, liable on a deed which contains a promise to pay for necessaries.[40]

(b) *Contracts Binding on a Minor*

(i) *Liability for Necessaries*

9–010 **Liability for necessaries.** Executed contracts for "necessary" goods and services were binding on a minor at common law,[41] though this does not mean that the minor will be liable for the price of the goods or services as stipulated.[42] The common law was partially codified in relation to the sale and delivery of necessary goods by the Sale of Goods Act 1893.[43] Less clear is the position of executory contracts for necessaries.[44] The meaning of "necessaries" is an extended one for this purpose, by no means being confined to "necessities" in the ordinary sense.

9–011 **Meaning of necessaries.** Such things as relate immediately to the person of the minor, as his necessary food, drink, clothing, lodging and medicine, are clearly necessaries for which he is liable. But the term is not confined to such matters only as are positively essential to the minor's personal subsistence or support; it is also employed to denote articles purchased for real use, so long as they are not merely ornamental, or are used as matters of comfort or convenience only, and it is a relative term to be construed with reference to the minor's age and station in life.[45] The burden of showing that the goods supplied are necessaries is always on the supplier:

[37] *Wharton v Mackenzie* (1844) 5 Q.B. 606; *Peters v Fleming* (1840) 6 M. & W. 42, 46; *Cowern v Nield* [1912] 2 K.B. 419, 422.

[38] *Walter v Everard* [1891] 2 Q.B. 369; *Roberts v Gray* [1913] 1 K.B. 520, 525, 528, 529; *Shears v Mendeloff* (1914) 30 T.L.R. 342.

[39] Below, para.9–035.

[40] *Walter v Everard* [1891] 2 Q.B. 369. As to the effect of a disposition of property by deed, see below, paras 9–072—9–074.

[41] *Peter v Fleming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1868) L.R. 4 Ex. 32. See below, para.9–014 as to the position of executory contracts for necessaries.

[42] Below, para.9–013.

[43] s.2 (now Sale of Goods Act 1979 s.3). cf. Mental Capacity Act 2005 s.7, below, paras 9–095—9–096.

[44] See below, para.9–014.

[45] *Peters v Flemming* (1840) 6 M. & W. 42; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32; *Nash v Inman* [1908] 2 K.B. 1.

"Having shewn that the goods were suitable to the condition in life of the infant, he [the tradesman] must then go on to show that they were suitable to his actual requirements at the time of the sale and delivery."[46]

Thus the fact that the minor was already sufficiently supplied with the goods in question will defeat any claim against him[47] even though this fact was unknown to the supplier.[48]

9–012 **Contracts for necessaries must be beneficial.** It has been held that even a contract for necessaries will not be binding on the minor if it contains harsh and oppressive terms so that the contract, taken as a whole, cannot be said to be for the minor's benefit.[49] So, for instance, in *Flower v London & North Western Ry Co*[50] it was held that a contract of carriage (though clearly a necessary in the circumstances) was void as against the minor because it contained a clause exempting the defendants from liability for injury to the minor even if caused by negligence. However, it is submitted that any judgment of the overall beneficial (or conversely prejudicial) effect of a minor's contract for necessaries should be viewed after the application of any relevant legislation governing the fairness of terms. So, for example, since 1977 a contract term purporting to exclude a business liability for personal injuries and death caused by negligence is ineffective in law[51]; and many types of terms in consumer contracts may be held "not binding" on a minor/consumer as unfair.[52]

9–013 **Liability for goods "sold and delivered".** Section 3 of the Sale of Goods Act 1979 (replacing s.2 of the 1893 Act) provides that where necessaries are sold and delivered to a minor he must pay a reasonable price for them. "Necessaries" are defined by s.3(3) as goods suitable to the condition in life of the minor and to his actual requirements at the time of the sale and delivery. There are two difficult points arising out of the impact of this section on the common law which have not yet been resolved. First, it is uncertain whether a minor can be held liable on an executory contract for the purchase of necessaries; and, secondly, where such a contract is executed by the delivery of the goods to the minor, it is uncertain whether the goods must be necessary for the minor at the time of sale as well as at the time of delivery.

9–014 **Executory contracts for necessary goods.** Section 3 of the Sale of Goods Act 1979 deals only with the case of necessary goods *sold and delivered*; it does

[46] *Nash v Inman* [1908] 2 K.B. 1, 5, per Cozens-Hardy M.R., *Maddox v Miller* (1813) 1 M. & s.738; *Harrison v Fane* (1840) 1 M. & G. 550; *Brooker v Scott* (1843) 11 M. & W. 67; *Ryder v Wombwell* (1869) L.R. 4 Ex. 32.

[47] *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509; *Nash v Inman* [1908] 2 K.B. 1.

[48] *Barnes & Co v Toye* (1884) 13 Q.B.D. 410; *Johnstone v Marks* (1887) 19 Q.B.D. 509. See also *Bainbridge v Pickering* (1780) 2 W.Bl. 1325; *Brayshaw v Eaton* (1839) 7 Scott 183; *Foster v Redgrave* (1867) L.R. 4 Ex. 35n.

[49] *Fawcett v Smethurst* (1914) 84 L.J.K.B. 473.

[50] [1894] 2 Q.B. 65. See also *Buckpitt v Oates* [1968] 1 All E.R. 1145, 1147–1148.

[51] Unfair Contract Terms Act 1977 s.2(1) or (on its coming into force) the Consumer Rights Act 2015 s.65.

[52] Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) or (on its coming into force) the Consumer Rights Act 2015 Pt 2: see Vol.II, paras 38–201 et seq.

some evidence on which they might properly be so found.[75] Today, however, it would seem that, while it is still a pure question of fact whether the minor is already well supplied with the goods or services in question, it is a question of mixed fact and law or a matter of evaluating the facts whether the goods or services can be treated as necessaries in themselves.[76]

9–018 **Contracts for both necessaries and non-necessaries.** If a minor buys a quantity of goods, some of which may be necessaries, but a substantial number of which cannot be necessaries, it has been said that the minor will not be liable at all if the contract is one entire contract.[77] On the other hand the courts have sometimes allowed a claimant to recover for necessaries while disallowing a claim for non-necessaries without adverting to the question whether the contract was an entire contract.[78] Since the minor is not bound to pay the contract price but only a reasonable price, there seems no reason why this course should not always be followed.[79]

9–019 **Examples.** The following have been held to be necessaries (although it must be remembered that the usages of society change and articles which once were necessaries may no longer be held to be so and vice versa): engagement and wedding rings,[80] regimental uniform (for an enlisted soldier),[81] presents for a fiancée,[82] a racing bicycle for a youth earning (in 1898) 21s. a week,[83] the hire of horses[84] and for work done for them,[85] and the hire of a car to fetch luggage from a station six miles away.[86] On the other hand, the following have been held not to be necessaries: 11 fancy waistcoats for a Cambridge undergraduate already sufficiently supplied with clothing,[87] expensive dinners with fruit and confectionery for another undergraduate,[88] jewelled solitaire sleeve-links for the son of a deceased baronet,[89] a large quantity of tobacco for an army officer,[90] lessons in flying for a law student,[91] a vanity-bag worth (in 1936) £20, 10s bought by the son of an ex-cabinet minister for his fiancée,[92] a hunter for an impecunious

[75] *Ryder v Wombwell* (1868) L.R. 3 Ex. 90.
[76] cf. *Benmax v Austin Motor Co Ltd* [1955] A.C. 370.
[77] *Stocks v Wilson* [1913] 2 K.B. 235, 241–242. As to entire contracts, see below, para.24–043.
[78] See, e.g. *Ryder v Wombwell* (1868) L.R. 3 Ex. 90.
[79] Certainly this would be the right course if the minor's liability is based on unjust enrichment; see above, para.9–014.
[80] *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.
[81] *Coates v Wilson* (1804) 5 Esp. 152.
[82] *Jenner v Walker* (1868) 19 L.T. 398; cf. *Hewlings v Graham* (1901) 70 L.J. Ch. 568; *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.
[83] *Clyde Cycle Co v Hargreaves* (1898) 78 L.T. 296.
[84] *Hart v Prater* (1837) 1 Jur. 623; cf. *Harrison v Fane* (1840) 1 M. & G. 550.
[85] *Clowes v Brook* (1739) 2 Str. 1101.
[86] *Fawcett v Smethurst* (1914) 84 L.J.K.B. 473.
[87] *Nash v Inman* [1908] 2 K.B. 1.
[88] *Wharton v Mackenzie* (1844) 5 Q.B. 606.
[89] *Ryder v Wombwell* (1869) L.R. 4 Ex. 32.
[90] *Bryant v Richardson* (1866) L.R. 3 Ex. 93.
[91] *Hamilton v Bennett* (1930) 94 J.P.N. 136.
[92] *Elkington & Co Ltd v Amery* [1936] 2 All E.R. 86.

cavalry officer,[93] a collection of snuff-boxes and curios[94] and a second-hand sports car.[95]

9–020 **Trading contracts.** A minor's trading contracts are not contracts for necessaries.[96] While there is no precise definition of a trading contract for this purpose, it has been held that a minor will not be liable in contract upon an agreement for services performed for him to enable him to carry on his trade,[97] or for goods supplied to him for the purposes of his trade,[98] or where he fails to deliver goods to a purchaser who has paid for them.[99] However, if the contract can be considered to be one by which the minor gains proficiency in a certain trade (as in a contract of service or apprenticeship) it will be binding on him if, viewed as a whole, it is for his benefit.[100]

9–021 Where a minor's contract is a "trading contract" the minor cannot be adjudicated bankrupt on this basis for he is not a debtor at law,[101] though he may be liable for (and be made bankrupt on account of) a tax debt.[102] It has even been held that a minor is not liable in unjust enrichment for the recovery of the price of goods sold by him but not delivered.[103] Moreover, the court now possesses a discretion to order the minor to transfer money, or property representing it, to the other contracting party under s.3(1) of the Minors' Contracts Act 1987.[104]

9–022 **Necessaries for wife or children.** There have been some extensions of the doctrine of minors' necessaries. Necessaries for a minor's wife are necessaries for him,[105] though he is not liable on contracts made by his wife unless he has authorised them.[106] Either spouse is bound by a contract to pay for the funeral of the other where he or she dies leaving no sufficient estate.[107]

[93] *Re Mead* [1916] 2 I.R. 285.
[94] *Stocks v Wilson* [1913] 2 K.B. 235.
[95] *Coull v Kolbuc* (1969) 68 W.W.R. 76 (Alberta District Ct).
[96] *Lowe v Griffith* (1835) 1 Scott 458.
[97] *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109.
[98] *Mercantile Union Guarantee Corp Ltd v Ball* [1937] 2 K.B. 498. But where a minor used goods (supplied to him in his trade) for household purposes he was held liable: *Turberville v Whitehouse* (1823) 1 C. & P. 94.
[99] *Cowern v Nield* [1912] 2 K.B. 419.
[100] *Roberts v Gray* [1913] 1 K.B. 520; *Doyle v White City Stadium Ltd* [1935] 1 K.B. 110. cf. *Shears v Mendeloff* (1914) 30 T.L.R. 342; below, paras 9–024—9–034.
[101] *Re Jones Ex p. Jones* (1881) 18 Ch. D. 109, 120; *Re Davenport* [1963] 1 W.L.R. 817.
[102] *Re A Debtor (No.564 of 1949)* [1950] Ch. 282.
[103] *Cowern v Nield* [1912] 2 K.B. 419. This decision is supported by Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), paras 34–14—34–16 on the basis that as a matter of policy minors should only have to repay the value of benefits which they still have at the time of the claim.
[104] See below, paras 9–061—9–064.
[105] *Rainsford v Fenwick* (1671) Carter 215; *Turner v Trisby* (1719) 1 Stra. 168.
[106] The wife's "agency of necessity" was abolished by s.41 of the Matrimonial Proceedings and Property Act 1970: see Vol.II, para.31–050.
[107] *Chapple v Cooper* (1844) 13 M. & W. 252. It was doubted whether a minor would be bound by a contract to pay for the funeral of a parent or other relative: 260. The common law rule that a husband is always bound to pay for his wife's funeral no longer obtains: *Rees v Hughes* [1946] K.B. 517.

goods who is held liable in negligence to a third party for damage caused by use of the goods, cannot claim contribution from the person who sold those goods to him if that person was not also liable to the third party; if the seller was guilty of a breach of the terms of the contract of sale, the purchaser may be able to recover a complete indemnity from the seller, depending on whether his own conduct has broken the causal link between the seller's breach and the third party's injury, but there can be no claim under the 1978 Act.[102]

[102] See Hervey (1981) 44 M.L.R. 575, 576. In *Birse Construction Ltd v Haiste Ltd* [1996] 1 W.L.R. 675 a reservoir was defectively constructed: although D1 was liable to P (who was itself liable to X) and D2 was liable to X, D1 and D2 were not liable for the same damage to the same person and hence contribution could not be recovered by D1 and D2.

CHAPTER 18

THIRD PARTIES[1]

1. INTRODUCTION

Preliminary. Our concern in this Chapter is with the extent to which persons can either take the benefit of, or be bound by, contracts to which they are not parties. Under the common law doctrine of privity of contract, the general rule is that contracts cannot be enforced either by or against third parties. The second limb of this rule (under which a contract cannot impose liabilities on anyone except a party to it) is generally regarded as just and sensible.[2] But its first limb (under which a contract cannot confer rights on anyone except a party to it) has been the subject of much criticism, culminating in a Report, issued by the Law Commission in 1996, on *Privity of Contract: Contracts for the Benefit of Third* **18–001**

[1] Finlay, *Contracts for the Benefit of Third Persons* (1939); Dold, *Stipulations for a Third Party* (1948); Furmston, *Third Party Rights* (2005); Corbin (1930) 47 L.Q.R. 12; Dowrick (1956) 19 M.L.R. 374; Furmston (1960) 23 M.L.R. 373; Wilson, 11 Sydney L.Rev. 230 (1987). Flannigan (1989) 105 L.Q.R. 564; Kincaid [1989] C.L.J. 454; Andrews (1988) L.S. 14.

[2] See below, para.18–139. The rule that a contract cannot in other respects bind a third party can be inconvenient in cases involving exemption clauses (and is therefore modified in a number of ways discussed in section 5 of Ch.15). It is further qualified in a number of ways to be discussed in section 5 of the present Chapter.

Parties.[3] The recommendations of this Report have (where legislation for this purpose was necessary[4]) been implemented by the Contracts (Rights of Third Parties) Act 1999. The Act does not precisely follow the wording of the Draft Bill attached to the Law Commission's Report, but the changes in the wording do not, in general,[5] reflect any major departures from the policy of the recommendations in that Report: their object has rather been to secure the clearer and more effective implementation of that policy. For this reason, it is submitted that reference can appropriately be made to the Report in discussing the provisions of the 1999 Act; and such references will be made in this Chapter.

18–002 **Present structure of the subject.** It is important at the outset to make a point about the nature of the changes made by the 1999 Act, since this determines the present structure of the subject. A crucial passage in the Law Commission's Report states that "it is important to emphasise that, while our proposed reform will give some third parties the right to enforce contracts, there will remain many contracts where a third party stands to benefit and yet will not have a right of enforceability. Our proposed statute carves out a general and wide-ranging exception to the third party rule, but it leaves that rule intact for cases not covered by the statute."[6] The rights conferred on third parties by the 1999 Act therefore have the character of a new statutory exception[7] to the common law doctrine of privity; and the 1999 Act will be treated as such an exception in the present Chapter, though because of its importance a separate section will be devoted to it.[8] The new exception is, however, limited in two ways. First, a number of situations which have in the past been perceived as giving rise to problems resulting from the doctrine of privity are simply outside the scope of the new statutory exception and so are not affected by the provisions of the 1999 Act at all: this is, for example, true of many of the cases in which third parties who have suffered loss in consequence of the breach of a contract between others have

[3] Law Com. No.242 (hereafter "Report"). For an earlier proposal, see Law Revision Committee, 6th Interim Report (Cmnd. 5449) Section D.

[4] For a situation in which this was *not* necessary, see Report, para.6.8 n.8 below, para.18–102.

[5] The exception is s.8 of the Act, subjecting the third party's rights to arbitration agreements, contrary to the views expressed in paras 14.14 to 14.19 of the Report: see para.18–100 below, and Vol.II, para.32–039.

[6] Report para.5.16; the importance of the point appears from the fact that it is repeated in almost identical terms in para.13.2 of the Report.

[7] See Lord Bingham's reference in *Heaton v Axa Equity & Law Life Assurance plc* [2002] UKHL 15; [2002] 2 A.C. 392 at [9] to "the limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 was enforceable by . . . a third party." *cf. Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 535 *per* Lord Clyde, saying that the 1999 Act had "made some inroads on the principle of privity" and Lord Browne-Wilkinson, *ibid.* at p.575, saying that the Act had "fundamentally affected" the law on this topic. It is respectfully submitted that these are more accurate statements than Lord Goff's reference *ibid* at p.544 to the "abolition" by the Act of the doctrine of privity, and his similar statement in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 at 40 ("recently abolished by statute"). See also *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866 at [32], treating the third party's right of enforcement under the 1999 Act as an exception to the common law doctrine of privity.

[8] Below, paras 18–090 *et seq*.

sought a remedy in tort against the party in breach.[9] Secondly, the "wide-ranging exception" created by the 1999 Act is, in turn, under that Act, subject to exceptions[10] to which the third party's new statutory rights do not extend; and the effect of this is that in some[11] of these cases the common law doctrine of privity continues to apply. The 1999 Act also does not affect any rights which the third party has apart from its provisions[12]: thus it does not deprive the third party of rights which he has because the case falls either outside the scope of the common law doctrine or within one of the exceptions to it recognised either at common law, or in equity or under other legislation.[13] The scope of the common law doctrine and these other exceptions therefore continue to call for discussion, particularly because the content of rights available apart from the 1999 Act in some ways differs from that of the rights available under it.[14] The 1999 Act also (in accordance with the Law Commission's recommendations[15]) does not affect the common law rule that a contract cannot impose liabilities on a third party or (in general) otherwise bind him, so that this aspect of the common law doctrine, too, continues to call for discussion. Nor does the Act affect any rights of the promisee to enforce any term of the contract[16]: such questions as whether the promisee can recover damages in respect of the third party's loss will therefore continue to be governed by the rules which have been (and no doubt will further be) developed as a matter of common law. There is finally the point that the 1999 Act also does not apply to contracts made before the end of the period of six months beginning on the day on which it was it passed and came into force,[17] except where a contract[18] made within that period expressly provides that the Act is to apply to it.[19] The rules of law which were established before the 1999 Act therefore continue to apply to contracts made before the date specified in the Act or in any such contract. They also continue to apply in a significant number of other situations, described above,[20] to which the Act does not apply. These rules therefore still require discussion, even though a considerable number of the cases

[9] For further discussion of this point, see below, paras 18–024 *et seq*.

[10] See s.6 of the Act, discussed in paras 18–116—18–118, below.

[11] See *e.g.* ss.6(2) and 6(3); under some of the other exceptions created by the 1999 Act, the third party will be able to get rights by another legal route: *e.g.* under those stated in ss.6(1) and (5): see para.18–117, below.

[12] s.7(1), below para.18–119; Report, para.12.12.

[13] Below, paras 18–080—18–089; 18–126—18–138. For an illustration of a situation in which the third party had rights both under the 1999 Act and under one of the judge-made exceptions to the doctrine of privity, see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602; [2004] 1 All E.R. (Comm) 481.

[14] *e.g.*, ss.2 and 3 of the 1999 Act will not apply where the third party has rights apart from the Act; see further para.18–121, below.

[15] Report, paras 10.32, 7.6.

[16] 1999 Act, s.4.

[17] On November 11, 1999, when the Act received the Royal Assent: see s.10(2). Hence, subject to the exception mentioned at n.19 below, the Act does not apply to a contract made before May 11, 1999: see *Mulchrone v Swiss Life (UK) plc* [2005] EWHC 1808, [2006] Lloyd's Rep. I.R. 339 where the contract was made before the latter date, so that the Act did not apply.

[18] See s.10(3).

[19] *ibid.*

[20] At nn.9, 11.

on which they are based would, if their facts occurred now, be decided differently (where they had denied the third party the right to enforce a term of the contract) or be decided on different grounds (where they had given the third party such a right). The result of all these points is that the 1999 Act may have improved, but that it has scarcely simplified, the law on this topic.

2. THE COMMON LAW DOCTRINE

18–003 **Statement.** The common law doctrine of privity of contract means that a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it. Two questions arise from this statement: who are the parties to the agreement? and has the claimant provided consideration for the promise which he is seeking to enforce?

(a) *Parties to the Agreement*

18–004 **Who are the parties?** Normally, the answer to this question is obvious enough: the parties to the agreement are the persons from whose communications with each other the agreement between them has been reached. There may, indeed, be factual difficulties in identifying these persons[21]; but such difficulties do not generally[22] raise any questions of legal principle. Problems as to the legal analysis of established or admitted facts can, however, arise in situations in which there is clearly an agreement, while it is doubtful exactly who the parties to it are; and difficulty in deciding who the parties to a particular contract are may also arise when there are several contracts which affect the same subject-matter and involve more than two parties. The rights of all the parties to such contracts arise independently of the Contracts (Rights of Third Parties) Act 1999 and are not limited by its provisions.[23] Situations in which such contracts may arise are discussed in the following paragraphs.

[21] *e.g. Stag Line Ltd v Tyne Ship Repair Group (The Zinnia)* [1984] 2 Lloyd's Rep. 211; *Empresa Lineas Maritimas Argentinas v The Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1984] 2 Lloyd's Rep. 517; *Uddin v Ahmed* [2001] EWCA Civ 240; [2001] 3 F.C.R. 300; *Grecoair Inc v Tilling* [2004] EWHC 2851, [2005] Lloyd's Rep. I.R. 151; *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 A.C. 28; *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179; *Lakatanmia Shipping Co Ltd v Nobu Su/Hsin Chi Su* [2014] EWHC 3611 (Comm), [2015] 1 Lloyd's Rep. 216 at [68], [73]–[76]; *cf. Independiente Ltd v Music Trading On-Line (HK) Ltd* [2007] EWCA Civ 111, [2008] 1 W.L.R. 608, where the question was one of construction or implication; *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* [2008] EWHC 511 (Comm), [2008] 2 Lloyd's Rep. 1.

[22] A highly specialised group of cases (beyond the scope of this book) concerns bills of lading issued in respect of goods shipped on a chartered ship: see *Carver on Bills of Lading*, 3rd ed. (2011), paras 4–032 to 4–062; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2004] 1 A.C. 715.

[23] Contracts (Rights of Third Parties) Act 1999, s.7(1).

18–005 **Collateral contracts.**[24] A contract between two persons may be accompanied by a collateral contract between one of them and a third person relating to the same subject-matter. In *Shanklin Pier v Detel Products Ltd*[25] the claimants had employed contractors to paint a pier and instructed them for this purpose to buy paint made by the defendants. This instruction was given in reliance on a statement made by the defendants to the claimants that the paint would last for seven years. In fact it lasted for only three months. Although the main contract for the sale of paint was between the contractors and the defendants, it was held that there was also a collateral contract between the claimants and the defendants that the paint would last for seven years. The same reasoning may apply where a person buys goods from a dealer and is given a "guarantee" in the name of the manufacturer. Here the main contract of sale is between the customer and the dealer, but it seems that the "guarantee" could also be regarded as a collateral contract between the manufacturer and the customer.[26] Special legislation applies to certain guarantees given to a "consumer" in relation to a contract between such a person and a "trader". Under s.30 of the Consumer Rights Act 2015,[26a] where such a guarantee is given in relation to a contract for the supply of goods by a "trader" to a "consumer",[27] then the guarantee "takes effect as a contractual obligation owed by the guarantor"[28] even though the latter is not a party to the supply contract.[29] There is no need, in such a case, for the consumer to satisfy the common law requirements (such as consideration or contractual intention)[30] for the creation of a collateral contract. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013[31] also make use of the concept of a "commercial guarantee" given to a consumer "by the trader *or producer*",[32] the words here italicised being evidently capable of including a person who is not a party to the contract between the "trader" and the "consumer."[33] In relation to such a guarantee, these Regulations contain no words resembling those quoted above[34] from s.30 of the 2015 Act; and this fact makes it hard to account for what appears to be intended as the legally binding force of

[24] Wedderburn [1959] C.L.J. 58; above, para.13–004.

[25] [1951] 2 K.B. 854; followed in *Wells (Merstham) Ltd v Buckland Sand & Silica Co Ltd* [1965] 2 Q.B. 170, even though in that case no specific main contract was contemplated when the collateral undertaking was given. As to sales by auction, see *Chelmsford Auctions Ltd v Poole* [1973] Q.B. 542, 550; *Morin v Bonhams & Brooks Ltd* [2003] EWHC 467 (Comm); [2003] 2 All E.R. (Comm) 36 at 28, 51; affirmed on other grounds [2003] EWCA Civ 1802, [2004] 1 All E.R. (Comm) 880; below, Vol.II, para.31–011; for similar reasoning, leading to the making of a contract "in the context of an associated and simultaneous set of transactions", see *Moody v Condor Insurance Ltd* [2006] EWHC 100 (Ch), [2006] 1 W.L.R. 1847 at [39].

[26] For legislative control of exemption clauses in such guarantees, see above, Ch.15.

[26a] The Act is fully discussed in Vol.II Ch.38; for its s.30, see para.38–491.

[27] "Trader" and "consumer" are defined in s.2(3)(a) and 2(3)(b) of the 2015 Act.

[28] 2015 Act s.30(3). Words to the same effect are used in the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15(1); these Regulations are revoked by s.60 and Sch.1, para.53 of the 2015 Act.

[29] The 2015 Act applies to contracts made on or after October 1, 2015; see below, Vol.II, para.38–197.

[30] See paras 18–010 and 18–011 below.

[31] SI 2013/3134.

[32] *ibid.*, reg.5.

[33] "Consumer" and "trader" are defined in reg.4 of the 2013 Regulations (above, n.31).

[34] At n.28 above.

the guarantee on the "producer" even where that person is not also the "trader." This difficulty has been discussed in para.4–028 above. The common law requirements for a collateral contract would of course continue to apply to guarantees given by producers or other third parties to a person who was not a "consumer."[35]

18–006 Collateral contract reasoning has also been used where a contract for the execution of building work between A and B may be performed, wholly or in part, through the instrumentality of a sub-contractor C, nominated by A but engaged by B. Such an arrangement usually gives rise to a contract between A and B and to one between B and C, but not to one between A and C[36]; but it is possible for a collateral contract to arise between these last two parties,[37] making C contractually liable to A. Similarly, where goods are bailed by A to B and A authorises B to sub-bail them to C, and B does so, then a collateral contract may arise between A and C, incorporating "via the agency of the bailee" (B) the terms of the sub-bailment from B to C.[38] Yet a further illustration of the possibility that a tripartite relationship may give rise to a collateral contract between parties who have not entered into any express contract with each other is provided by the situation in which an employment agency (A) enters into a contract with a worker (B) whom it supplies to an end user (C). In such cases, there may, in addition to the express contracts between A and B and between A and C,[39] be an implied (collateral) contract between B and C.[40] But the latter possibility is restricted by the usual requirements for such an implication. In particular, an implied contract between B and C will arise only if the implication is "necessary . . . to give business reality to the relationship between the parties",[41] *i.e.*, between B and

[35] As seems to have been the position in the *Shanklin Pier* case, above n.25.

[36] *e.g. Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *National Trust v Haden & Young* (1994) 72 B.L.R. 1. Similarly, in *British American Tobacco Switzerland SA v Exel Europe Ltd* [2012] EWHC 694 (Comm), [2013] 1 W.L.R. 317 A had entered into a contract for the carriage of A's goods with B and B engaged a subcontracting carrier C to carry out the carriage operation, but there was "no direct agreement" (at [10]) between A and C. It was held that there was no contract at common law between A and C by virtue of which C could be bound by an exclusive jurisdiction clause in the contract between A and B. Nor could A enforce such a clause by virtue of the "statutory contract" (at [23]) contained in the consignment note issued in pursuance of the CMR Convention which has the force of law in the UK under the Carriage of Goods by Road Act 1965 (see at [46]–[51]; discussion of this point is beyond the scope of the present Chapter).

[37] *Holland Hannen & Cubitts (Northern) v Welsh Health Technical Services Ltd* (1987) 7 Con.L.R. 14; *cf. Welsh Health Technical Service Organisation v Haden Young* (1987) 37 Build.L.R. 130; *Greater Nottingham Co-operative Soc. Ltd v Cementation Ltd* [1989] Ch. 497; *Linklaters Business Services v Sir Robert McAlpine* [2010] EWHC 2931 (TCC), 133 Con L.R. 211 where there seems to have been a collateral contract between A and C, but none between A and D, a sub-contractor engaged by C. Contrast *National Trust v Haden & Young*, above n.36, where there was no such collateral contract; for C's possible liability to A in tort, see below paras 18–024—18–041.

[38] *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113; [2003] Q.B. 1270, at [63]–[65].

[39] For the nature of this relationship, see *Kalwak v Consistent Group Ltd* [2007] I.R.L.R. 560.

[40] For recognition of this possibility, see *Dacas v Brook Street Bureau* [2004] EWCA Civ 217, [2004] I.C.R. 1437; *Cable & Wireless plc v Muscat* [2006] EWCA Civ 220, [2006] I.C.R. 975.

[41] *James v Greenwich LBC* [2008] EWCA Civ 35 at [23], citing *The Aramis* [1989] 1 Lloyd's Rep. 213 at 224, and applying the general principle stated in para.2–169 above.

C.[42] Facts relevant to this issue would include the terms of the two express contracts referred to above and the conduct of B and C in the course of the relationship between them while B is rendering the services to C.

18–007 **Hire-purchase.** The collateral contract device can also be used where a dealer makes a representation to a customer in order to induce him to enter into a hire-purchase contract. The main contract of hire-purchase is usually between the customer and the finance company. Accordingly, a representation by the dealer as to the quality of the goods did not formerly impose any liability on the finance company[43]; but the dealer could be liable on the representation as a collateral contract.[44] If the transaction is a regulated agreement within the Consumer Credit Act 1974[45] a dealer who conducts antecedent negotiations is in certain circumstances deemed to do so as agent of the creditor as well as in his actual capacity.[46] The representation can therefore make the finance company liable under the main contract, while the dealer may still be liable on the representation as a collateral contract.[47]

18–008 **Payment by cheque, debit or credit card.** A further situation in which a transaction involves several contracts is that in which a supply of goods or services is paid for by the use of a cheque card, debit card or credit card. Such a transaction involves three contracts: one between the supplier and the customer, a second between the customer and the issuer of the card, and a third between the issuer and the supplier of the goods.[48] The supplier therefore has a common law right of action against the issuer on this third contract.

18–009 **Loyalty cards.** Another situation in which a set of commercial relationships operates through a "network of contracts" is described in *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd*[49] a case concerned with "the

[42] Cases in which this requirement was not satisfied include the *James* case, above n.41; *Cairns v Visteon UK Ltd* [2007] I.R.L.R. 175 and *Croke v Hydro Aluminium Worcester Ltd* [2007] I.C.R. 1303; *Alstom Transport v Tilson* [2010] EWCA Civ 1308, [2011] I.R.L.R. 169 (where B had expressly refused, when invited to do so, to enter into an express contract with C); *cf. Evans v Parasol Ltd* [2010] EWCA Civ 866, [2011] I.C.R. 37, where the Court of Appeal held that B had an arguable case on the point but evidently regarded it as unlikely that B would be able at the trial to establish that there was a contract between B and C. For further discussion of this line of cases, see Vol.II, para.40–027. For legislative intervention in such situations, see Agency Workers Regulations 2010, SI 2010/93, below para.40–027.

[43] *Campbell Discount Co Ltd v Gall* [1961] 1 Q.B. 431; reversed on other points in *Branwhite v Worcester Works Finance Ltd* [1969] 1 A.C. 552 and *United Dominions Trust Ltd v Western* [1976] Q.B. 513.

[44] *Brown v Sheen & Richmond Car Sales Ltd* [1950] 1 All E.R. 1102; *Andrews v Hopkinson* [1957] 1 Q.B. 229; Diamond (1957) 21 M.L.R. 177; *cf. Astley, Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584. As to damages, see *Yeoman Credit Ltd v Odgers* [1962] 1 W.L.R. 215.

[45] See Consumer Credit Act 2006, s.2; Vol.II, paras 39–005, 39–019.

[46] s.56(2); *cf.* also s.75.

[47] This follows from s.56(2), above, n.46.

[48] *Re Charge Card Services* [1987] Ch. 150; affirmed [1989] Ch. 497; *cf. Customs and Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196; *First Sport Ltd v Barclays Bank plc* [1993] 1 W.L.R. 1229 (where the card had been stolen and been presented by the thief to the retailer). A different analysis probably applies where the card is issued by the suppliers, as is the practice of some department stores: *Richardson v Worrall* [1985] S.T.C. 693, 720.

[49] [2013] UKSC 15, [2013] 2 All E.R. 719.

well known Nectar scheme".[50] As Lord Reed there said, this scheme "involves four parties"[51]: (1) the "promoter" of the scheme, *i.e.* the entity organising it; (2) "collectors", *i.e.* members of the scheme, who collect "points"; (3) "sponsors", *i.e.* retailers who pay for their customers to have "points" credited to their accounts with the promoter when their cards are swiped by the sponsors; and (4) "redeemers", *i.e.* retailers (other than the "sponsors") from whom "collectors" receive goods or services at no, or at a reduced, cost when their cards are swiped by the redeemers.[52] Lord Reed goes on to explain that the scheme operates through three contracts between the promoter and the other parties described above[53]: a contract between the promoter and the collectors,[54] a contract between the promoter and the sponsors,[55] and a contract between the sponsor and the redeemers.[56] Each of these is an independent contract. It would not be right to describe any one of them as "collateral" to any one of the others except in the loose sense that they all operate together in pursuit of a single commercial objective. The issue in the *Aimia*[57] case was not whether any of the contracts described by Lord Reed had come into existence; it was whether the promoter was "entitled to deduct as input tax the VAT element of the payments which it makes to the redeemers".[58] A discussion of this question is beyond the scope of this book; it suffices here to say that the Supreme Court, by a majority, upheld the decision of the Court of Appeal which had answered the question in the affirmative.[59]

18–010 **Consideration in collateral contracts.** To be enforceable as a collateral contract, a promise must be supported by consideration,[60] and in the cases considered in paragraphs 18–005 to 18–009 above there is no difficulty in explaining how this requirement was satisfied. In the *Shanklin Pier* case, the consideration was the instruction given by the claimants to their contractors[61]; in the building sub-contractor case, it is similarly the client's nomination of the sub-contractor; in the guarantee case it is the purchase by the customer of the goods from the dealer[62]; in the hire-purchase case it is the entering by the customer into a hire-purchase agreement with the finance company; in the cheque card, debit

[50] [2013] UKSC 15 at [1].
[51] [2013] UKSC 15 at [3].
[52] [2013] UKSC 15 at [2].
[53] As Lord Reed explains at [11], the analysis that follows in the text above would not apply to "sales promotion or customer loyalty schemes which are operated by retailers as part of their own business." In such cases, there would be no "promoter" in the sense described above.
[54] [2013] UKSC 15 at [3].
[55] [2013] UKSC 15 at [4].
[56] [2013] UKSC 15 at [5].
[57] Above, n.49.
[58] [2013] UKSC 15 at [12], [72].
[59] [2013] UKSC 15 at [26].
[60] *cf. Brikom Investments Ltd v Carr* [1979] Q.B 467, above, para.4–081, where no third party problem arose.
[61] In the *Shanklin Pier* case (above, para.18–005 at n.25) McNair J. said at 856: "I see no reason why there may not be an enforceable warranty between A [the defendant] and B [the plaintiff] supported by the consideration that B should cause C [the contractors employed by the plaintiffs] to enter into a contract with A [*viz.* to buy the paint from A]."
[62] *cf.*, in another context, *Penn v Bristol & West Building Society* [1997] 1 W.L.R. 1356, 1363 ("entering into some transaction with a third party").

card or credit card case, it is the supply of the goods by the supplier to the customer, and the discount allowed by the supplier to the issuer of the credit card[63]; in the loyalty card cases, it is the reciprocal promises or performances of the various parties involved in the operation of the scheme described in paragraph 18–009 above.[64] A case in which the problem of consideration gives rise to more difficulty is *Charnock v Liverpool Corp*.[65] A car had been damaged and was later repaired under a contract between the owner's insurance company and a garage. It was held that there was also a collateral contract between the owner and the garage (to do the repairs within a reasonable time), even though the owner did not pay or promise to pay the garage anything.[66] The consideration for the garage's promise was found in the owner's "leaving his car with the garage for repair."[67] This might not be a detriment to the owner, at least in the factual sense.[68] But it was a benefit to the garage in giving it the opportunity of making a contract for the repair of the car with the insurance company; and this benefit constituted the consideration for the garage's promise to the owner.

18–011 **Contractual intention in collateral contracts.** A promise will not amount to a collateral contract if it was made without contractual intention.[69] The need to satisfy this requirement is illustrated (in the present context) by *Alicia Hosiery Ltd v Brown Shipley Ltd*,[70] where the owner of goods in a warehouse pledged them to a bank and later sold them. The bank gave the buyer a delivery order addressed to the warehouseman but the latter refused to deliver the goods to the buyer who claimed damages from the bank. It was held that there was a contract

[63] *Customs and Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196. For discussion of the question whether payment for a supply of goods by use of a bank card, so that the payment was made by a third party, constituted "consideration" within EC Directives relating to VAT see *Dixons Retail plc v Revenue and Customs Commissioners* (C-494/12) [2014] Ch. 326, Court of Justice of the European Union, at [31]–[38]. This subject is beyond the scope of this Chapter, but it is interesting to note that the CJEU in the *Dixons* case analysed such a situation as consisting of "two transactions" (at [34]), *i.e.* of (1) a sale of the goods to the purchaser for an agreed price, and (2) a contract for the provision of services by the third party to the supplier of the goods (the services being those of guaranteeing payment and of promoting the supplier's business in various ways (at [34])). This reasoning bears some resemblance to the common law approach to the problem of consideration in the situations discussed in the text above; and this is also true of the Court's conclusion that the requirement of "consideration" stated in Council Directive 77/388/EEC ("the Sixth VAT Directive") art.11A(1)(a) and in Council Directive 2006/112/EC art.73, could be satisfied where payment was made by a "third party" (*i.e.* by the issuer of the card) at [38]; and that the requirement of "consideration" for a supply of goods or services could therefore be satisfied even though the "consideration" was not "obtained directly from the person to whom the goods or services are supplied" (at [35]).
[64] As was pointed out in para.18–009 after n.56, none of the three contracts described in that paragraph is, strictly speaking, "collateral" to any of the others.
[65] [1968] 1 W.L.R. 1498.
[66] *cf. Godfrey Davies Ltd v Culling and Hecht* [1962] 2 Lloyd's Rep. 349; *Cooter & Green Ltd v Tyrell* [1962] 2 Lloyd's Rep. 377; *Brown & Davies v Galbraith* [1972] 1 W.L.R. 997.
[67] [1968] 1 W.L.R. at 1505; *cf. West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, [2006] B.M.L.R. 179.
[68] Above, para.4–006; the transfer of possession might subject the repairer to the obligations of a bailee, but these would not include an obligation to carry out the repairs. For reasoning similar to that in the *Charnock* case (above, n.65), see *International Petroleum Refining & Supply Ltd v Caleb Brett & Son Ltd* [1980] 1 Lloyd's Rep. 569, 594.
[69] *Heilbut, Symons & Co v Buckleton* [1913] A.C. 30, 47; above, para.2–169.
[70] [1970] 1 Q.B. 95.

CHAPTER 33

BAILMENT

1. IN GENERAL[1]

Definition of bailment. In many respects bailment "stands at the point at which contract, property and tort converge".[2] It is a subject which it is difficult both to classify and to define. Indeed, it is easier to give examples of bailment than to define its scope. A simple example of a bailment is a contract of hire of goods. Possession of the goods is handed over to someone who is not their owner and that person ("the bailee") is subject to certain obligations in relation to the goods which obligations are owed to their owner ("the bailor"). At a high level of abstraction, it can be said that bailment "denotes a separation of the actual **33–001**

[1] On bailment in general, see *Palmer on Bailment*, 3rd edn (2009); N. Palmer, "Bailment", in A Burrows (ed.), *English Private Law*, 3rd edn (Oxford, 2013), Ch.16; Bell, *Modern Law of Personal Property in England and Ireland* (1989); Paton, *Bailment in the Common Law* (1952); *Jones on Bailments*, 4th edn (1833); *Story on Bailments*, 9th edn (1878); Wyatt Paine, *Bailments* (1901); Laidlaw (1930–1931) 16 Corn. L.Q. 286; Bell in Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn (1998), p.461. For a more sceptical view of bailment, see McMeel [2003] L.M.C.L.Q. 169 where he concludes (at 199) that bailment is, at best, a "useful shorthand for all those situations where there is a transfer of possession of tangible personal property short of outright sale".

[2] *Palmer on Bailment* (hereafter, Palmer) at para.1–001.

to a sub-bailment or the terms of a sub-bailment but is nevertheless held to be bound by it).[26]

33–004 **Bailment and tort.** The demise of the consent theory of bailment may herald a move towards the law of tort and the eventual absorption of bailment into the mainstream of the law of tort. It is suggested that this is an unlikely development. Although liability in tort and in bailment may overlap[27] the two sources of liability are in fact independent and the "common law liabilities of a bailee . . . appear both independent of, and significantly different from, those that would apply under the general law of tort".[28] The clearest example of this is the fact that the burden of proof in a negligence case rests upon the claimant, whereas in a bailment case the burden of proof is upon the bailee to show that he has discharged his duties.[29] Although liability in tort and in bailment are conceptually distinct, the failure of parliamentary draftsmen to recognise a distinct head of liability based on breach of bailment has meant that, in some contexts, the courts have construed a reference to "tort" as including a reference to "breach of bailment".[30] On the other hand, claims by a bailor against his bailee which are based on breach of bailment (e.g. breach of his common law duty of care)[31] may not fall within the overall category of "wrongful interference with goods" defined in s.1 of the Torts (Interference with Goods) Act 1977.[32] Each case turns on the construction of the particular statute and, while in some cases the courts have strained for instrumental reasons to encompass a bailment action within the fold of tort, the cases cannot be used to construct a more general argument in support of the assimilation of bailment to tort. They are authority only in relation to the particular statute under consideration.

33–005 **Bailment and property.**[33] As has been noted, a transfer of possession to the bailee is an essential pre-requisite of a bailment and possession, of course, constitutes a proprietary interest. Thus it can be said that a bailment creates or gives rise to a property interest but it cannot be said that bailment lies in the law of property and not in the law of obligations. While a bailment gives rise to proprietary rights (viz possessory rights which may be vindicated against a third party or, indeed, against the bailor himself), it also creates personal rights and obligations and these rights and obligations cannot be located within the law of

[26] *The Pioneer Container* [1994] 2 A.C. 324.

[27] See below, paras 33–010—33–014.

[28] Palmer at para.1–047. For example, in the case of a gratuitous bailment, it does not follow from the fact that the bailment is not contractual that the liability of the bailee must lie in tort. The liability of the bailee is best seen as being sui generis: *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] Q.B. 1 at [48].

[29] See, e.g. *British Road Services Ltd v Arthur V Crutchley & Co Ltd* [1968] 1 All E.R. 811, 822. Further examples of the differences between an action in bailment and an action in tort are provided by Palmer at paras 1–048—1–071.

[30] *American Express Co v British Airways Board* [1983] 1 W.L.R. 701 (s.29(1) of the Post Office Act 1969 which provided that "no proceedings in tort shall lie against the Post Office . . . " in respect of loss or damage to mail): cf. *Chesworth v Farrar* [1967] 1 Q.B. 407 (see below, para.33–007 n.38).

[31] See below, paras 33–032, 33–049. See also below, para.33–026 (text at n.127).

[32] See Palmer (1978) 41 M.L.R. 629. cf. *Harold Stephen & Co Ltd v Post Office* [1977] 1 W.L.R. 1172, 1177–1178, 1179–1180.

[33] See Palmer at paras 1–106—1–130.

property. Although the language of the law of trusts is employed in many of the early definitions of bailment, there are in fact many distinctions between a bailment and a trust,[34] e.g. trusts may cover realty as well as personalty; the beneficiary under a trust has an equitable interest only, whereas a bailee has a legal interest (viz various possessory rights); a trustee has the legal title or ownership, and so has power to convey a good title to a bona fide purchaser for value, whereas the bailee has only possessory rights.

33–006 **No one unifying theory.** The reality of the matter is that there is no one theory which seems to be capable of providing a comprehensive definition of bailment. It consists of an amalgam of different ideas.[35] Thus, "the judicial analysis of bailment seems to have reached the stage at which any person who voluntarily assumed possession of goods belonging to another would be held to owe at least the principal duties of the bailee at common law".[36] Within this broad definition of bailment, certain key ideas can be identified. The first is that the bailee must be in possession of the goods. The second is that there must have been a "voluntary assumption" of possession; in other words, the consent of the bailee is necessary. The third is that the bailee must be aware of the existence of the bailor's title. Finally, it would appear that it is no longer necessary that the bailor consent to the bailee taking possession of the goods; a bailment can exist even when the bailor is unaware of the fact that the bailee has possession of his goods.

33–007 **Bailment and statute.** Notwithstanding the claim which bailment has to recognition as an independent source of obligations, statute has consistently refused to recognise the independence of bailment. One consequence of this has been that the courts have been compelled to squeeze bailment claims into legislation designed to regulate other categories of liability, principally contract and tort. A classic example of this phenomenon is provided by the law relating to limitation of actions. There is no limitation period prescribed for bailment claims and so the courts have applied the limitation periods for contract or tort. Whether the claim is brought in contract or in tort, the bailor cannot sue to recover the thing bailed more than six years after his cause of action accrued.[38]

[34] e.g. Paton at pp.5–6; Palmer at paras 3–089 and 32–001—32–002. Although there are many differences between bailment and trust, the relationship between a bailor and bailee may nonetheless be fiduciary in nature; *Matthew v TM Sutton Ltd* [1994] 1 W.L.R. 1455 (see below, para.33–144 n.891).

[35] It is largely on this basis that bailment is attacked as a "redundant" concept by McMeel [2003] L.M.C.L.Q. 169. A more charitable view is that the law has simply become more complex as new variations on the basic model of bailment are developed. In *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35, [2009] 1 W.L.R. 1375 Lord Hope of Craighead (at [10]–[11]) noted the different ways in which bailments can be classified, and that many examples of bailments do not fit precisely into any particular category, but it was not necessary for him to resolve these classificatory issues in order to decide the case and he did not do so. The label which the parties have attached to their relationship is not decisive, so the fact that the parties have expressly stated that there is no bailment cannot in itself resolve the question of the existence or otherwise of a bailment.

[36] Palmer at para.1–041.

[37] *Marcq v Christie, Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] Q.B. 286 at [49]–[50].

[38] Limitation Act 1980 ss.2, 5. The period may be extended in certain circumstances: ss.1(2), 28–33. See Vol.I, paras 28–072 et seq. The old rule that an "action in tort" lay against the estate of

The regulation of the limitation period applicable to contractual claims is dealt with in Vol.I.[39] Where the claim is brought by the bailor in conversion, the cause of action accrues at the date of conversion, irrespective of the bailor's knowledge of the conversion.[40] If there have been successive conversions (or wrongful detentions) of the same chattel, the period of limitation runs from the original conversion.[41] If the bailee has fraudulently concealed the bailor's right of action, the period of limitation runs from the time the fraud was discovered, or could by reasonable diligence have been discovered.[42] If the bailor fails to commence an action to recover the chattel before the expiration of the period of limitation, both his right of action and his title to the chattel are extinguished.[43]

33–008 **Classification of bailments.** Roman law has had considerable influence on the English law of bailment[44] and in the leading authority of *Coggs v Bernard*[45] Holt C.J. classified bailments into six classes by analogy with Roman law. Other writers[46] have reduced the number of classes in their classifications, and in the present chapter a simple classification into two classes will be adopted: (a) gratuitous bailments; and (b) bailments for valuable consideration.[47] In the first category, some bailments are for the benefit of the bailor (e.g. deposit and mandate), while some are for the benefit of the bailee (e.g. gratuitous loan for use); similarly in the second category the valuable consideration may be received either by the bailee (e.g. custody) or by the bailor (e.g. hire for use). The Court of Appeal has held that there is no difference between these two classes of bailments as far as the standard of care required of the bailee is concerned: whether the bailment is gratuitous or for reward, the bailee must take reasonable care of the chattel according to the circumstances of the particular case.[48] (The

a deceased tortfeasor only if proceedings were brought not later than six months after his personal representatives took out representation was later repealed by s.1 of the Proceedings Against Estates Act 1970; under the former rule, it had been held that a claim against the estate of a deceased bailee in respect of his obligations as bailee at common law was (despite the existence of a contract giving rise to the bailment) in substance "a cause of action in tort": *Chesworth v Farrar* [1967] 1 Q.B. 407.

[39] See Ch.28, above.

[40] *RB Policies at Lloyds v Butler* [1950] 1 K.B. 76. Before the abolition of detinue (see below, para.33–010) the action was held to accrue upon the refusal to return the chattel: *Miller v Dell* [1891] 1 Q.B. 468. See now below, paras 33–011, 33–014.

[41] Limitation Act 1980 s.3(1) (reversing, on this point, *Spackman v Foster* (1883) 11 Q.B.D. 99, and *Miller v Dell*, above). The effect of s.3 is uncertain in regard to *Wilkinson v Verity* (1871) L.R. 6 C.P. 206; cf. *Beaman v ARTS Ltd* [1948] 2 All E.R. 89, 93; reversed on another point: [1949] 1 K.B. 550.

[42] Limitation Act 1980 s.32; *Beaman v ARTS Ltd*, above.

[43] Limitation Act 1980 s.3(2).

[44] Paton at Ch.2 (History of Bailment).

[45] (1703) 2 Ld. Raym. 909.

[46] Palmer at Ch.3; Story at para.3; Jones, 1st edn, at pp.35, 36. The five-fold classification adopted in Jones and the six-fold classification adopted by Holt C.J. in *Coggs v Barnard* (1703) 2 Ld. Raym. 909 was referred to by Lord Hope of Craighead in *TRM Copy Centres (UK) Ltd v Lanwall Services Ltd* [2009] UKHL 35, [2009] 1 W.L.R. 1375 at [10]–[11]. However, it was not necessary for him to choose between the different classificatory schemes and he did not do so.

[47] There may be bailment "for reward" without a special payment being made in respect of the bailment: see below, para.33–057.

[48] *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, 698; *Sutcliffe v Chief Constable of West Yorkshire* [1996] R.T.R. 86, 90. (A similar duty of care "that which may reasonably be expected of him in all the circumstances", applies in the analogous situation of a gratuitous agent:

fact that the bailment is gratuitous is, however, a relevant circumstance.[49]) The existence of the duty, and the standard of care required, are to be judged objectively.[50] The classification into the two classes is retained in this chapter because other aspects of the relationship between bailor and bailee vary from one type of bailment to the other, e.g. exemption clauses may operate contractually if the bailment is for reward; and the Supply of Goods and Services Act 1982[51] applies to many contractual bailments, but not to gratuitous bailments. There appears to be no advantage in making a more complicated classification than that based on the twofold division proposed above. Bailment in contracts of carriage will be considered in Chs 35 and 36, below, and hire-purchase agreements in Ch.39, below. Before turning to a consideration of this twofold division, it is necessary to explore in more detail the significance of possession and related matters.

2. POSSESSION AND RELATED MATTERS

33–009 **Possession, not ownership.** A conveyance which transfers both possession and ownership to the transferee cannot be a bailment. The essence of bailment is the transfer of possession, not ownership. The fact that possession is transferred to the bailee is of significance both in terms of the relationship between the bailor and the bailee and in terms of its impact on the relationship between the bailor and third parties and between the bailee and third parties. The impact of the transfer of possession and not ownership on the various parties is considered in the following paragraphs.

33–010 **The obligation to return the goods.** In the first place, the fact that the bailee is given possession of the goods and not ownership means that he cannot keep the goods. They must be returned to the bailor at the end of the period of the bailment. The bailee is therefore normally[52] under an obligation to return the bailed chattel to the bailor at the end of the period of the bailment,[53] unless he can

Chaudhry v Prabhakar [1989] 1 W.L.R. 29). cf. *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 Q.B. 617; *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 737. cf. also below, para.33–032 nn.158 and 166.

[49] Paton at p.110.

[50] *Chaudhry v Prabhakar*, above (an analogous case). If the defendant represents himself as possessing a particular skill or experience, on which the claimant reasonably relies, he will be held to it.

[51] See below, para.33–044.

[52] If it is the obligation of the bailor to collect the chattel from the bailee, the latter may be entitled to the statutory remedy of sale when the bailor neglects to collect it: see below, paras 33–095—33–100. On the effect of delay by the bailor in collecting the goods, see Palmer [1987] L.M.C.L.Q. 43.

[53] *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303, 311, 313. (See also below, para.33–064.) On the termination of a bailment see below, para.33–014. cf. the cases on the termination of the hiring under a hire-purchase agreement, see below, paras 39–330—39–338; see also Vol.I, para.16–196. On the measure of damages in conversion (which now includes former cases of detinue: see below, this paragraph), see *Rosenthal v Alderton & Sons Ltd* [1946] K.B. 374; *Sachs v Miklos* [1948] 2 K.B. 23; *Munro v Willmott* [1949] 1 K.B. 295; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246; *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 W.L.R. 644; *Hillesden Securities Ltd v Ryjak Ltd* [1983] 1 W.L.R. 959. See *McGregor on Damages*, 19th edn (2014), Ch.36; *Clerk & Lindsell on Torts*, 21st edn (2014),

show good cause for not returning it.[54] Before the tort of detinue was abolished in 1977,[55] the bailee was liable in detinue at the suit of the bailor where the bailee had unequivocally[56] and wrongfully refused or failed to comply with the bailor's demand for the return of the chattel.[57] Detention by the bailee, after a demand by the bailor and a refusal to return on the part of the bailee, could also be evidence of a denial of the bailor's title, which would entitle the bailor to sue in conversion.[58] Since the 1977 Act, it has been held that a refusal to permit the bailor to enter the bailee's premises in order to collect the chattel is conversion.[59]

33–011 **Section 2(2) of the 1977 Act.** Section 2(2) of the Torts (Interference with Goods) Act 1977 now provides that: "An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished)". Before this subsection, there was considerable overlap between the scope of detinue and that of conversion but that overlap was not complete; in particular, it was not clear that conversion could encompass all cases of wrongful detention of goods by the bailee. Section 2(2) now extends the scope of conversion to cover many of these cases. In order to establish liability for wrongful detention of goods, there must have been deliberate withholding of the goods or interference with them[60] and such conduct is commonly, but not invariably, found in a demand for the goods followed by their retention.[61] Although the demand and the refusal need not be express, they must be unequivocal[62]: for example, in an appropriate case, an unequivocal refusal may be inferred from a delay in responding to a demand

paras 17–93 et seq.; and see for damages in similar hire-purchase cases, below, paras 39–341, 39–426.

[54] *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 312. The possession of a bailee may change to possession as donee under an immediate gift or as donee under a *donatio mortis causa: Woodard v Woodard* [1995] 3 All E.R. 980.

[55] By s.2(1) of the Torts (Interference with Goods) Act 1977. (For its replacement, see below.)

[56] cf. a temporary refusal in order to clear up a doubt: *Clayton v Le Roy* [1911] 2 K.B. 1031; *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd*, above, at 252, 253.

[57] *Miller v Dell* [1891] 1 Q.B. 468. In the absence of any specific contractual provision, the bailee is not bound to deliver the chattel to the bailor's address when the latter demands its return; the bailee's only obligation is not to prevent the bailor from taking it: *Capital Finance Co Ltd v Bray* [1964] 1 W.L.R. 323.

[58] *Pillot v Wilkinson* (1863) 2 H. & C. 72; (1864) 3 H. & C. 345; *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 W.L.R. 1375. (cf. s.11(3) of the 1977 Act.) The bailor can sue in conversion without making a demand if the bailee commits a definite act of conversion: *Grainger v Hill* (1838) 4 Bing. N.C. 212.

[59] *Howard E Perry & Co Ltd v British Railways Board*, above (fear of industrial action by the bailee's employees). See Palmer (1980) 9 An.–Am.L.R. 279.

[60] *Clayton v Le Roy* [1911] 2 K.B. 1031; *R. (on the application of Atapattu) v Secretary of State for the Home Department* [2011] EWHC 1388 (Admin), [2011] All E.R. (D) 20 (Jun) at [89].

[61] *Barclays Mercantile Business Finance Ltd v Sibec Developments Ltd* [1992] 1 W.L.R. 1253, 1257–1258. In the case where the goods have been lost by the bailee, there is no need for a refusal by the bailee. It suffices that there has been a demand for the return of the goods which has not been satisfied: *Mitchell v Ealing London BC* [1979] Q.B. 1.

[62] *R. (on the application of Atapattu) v Secretary of State for the Home Department* [2011] EWHC 1388 (Admin), [2011] All E.R. (D) 20 (Jun) at [89].

beyond a reasonable time.[63] But it has been argued[64] persuasively that in many situations in which a bailor could previously have claimed in detinue, he could also have claimed in contract, or for breach of his common law rights as bailor, and that these claims fall outside the scope of s.2.

Accidental loss of goods. If the bailee has wrongfully parted with the chattel[65] or lost it by negligence, it is no defence for him to show that he is unable to return it[66]; but the accidental loss or destruction of the chattel, without default on the part of the bailee, will excuse his failure to return it.[67] The loss of, or injury to, the chattel while it is in the bailee's possession places the onus of proof on the bailee to show that it occurred without his fault.[68] 33–012

Power of the court to order specific delivery. Although the bailor's claim against the bailee who wrongfully detains the chattel cannot now be in detinue,[69] he may still be able to recover the chattel itself from the bailee. Section 3 of the Torts (Interference with Goods) Act 1977 provides that, in proceedings for wrongful interference against a person who is in possession or in control[70] of the goods, the court may make an order for delivery of the goods which does not give the defendant the alternative of retaining them on payment of their value as assessed by the court.[71] But the court has a discretion whether or not to make such an order,[72] and may impose conditions.[73] The court: 33–013

"... in particular, where damages by reference to the value of the goods would not be the whole of the value of the goods, may require an allowance to be made by the

[63] However, the courts may be slow to draw such an inference, given that delay in many cases is likely to be equivocal: *Schwarzschild v Harrods Ltd* [2008] EWHC 521 (QB), [2008] All E.R. (D) 299 (Mar).

[64] Palmer at para.1–089 (also in (1978) 41 M.L.R. 629, where other arguments on the scope of s.2 are deployed).

[65] e.g. *Alexander v Railway Executive* [1951] 2 K.B. 882; and see below, para.33–052.

[66] *Jones v Dowle* (1841) 9 M. & W. 19, 20; *Reeve v Palmer* (1858) 5 C.B.(N.S.) 84; *Genn v Winkel* (1912) 107 L.T. 434, 437. On exemption clauses, see Vol.I, Ch.15, especially para.15–037.

[67] *Taylor v Caldwell* (1863) 3 B. & S. 826, 833; *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303, 311–312, 313. Accidental loss or destruction is, however, no defence if it occurred while the bailee was wrongfully detaining the chattel: *Shaw & Co v Symmons & Sons* [1917] 1 K.B. 799; *Mitchell v Ealing London B C* [1979] Q.B. 1 (see below, para.33–032, n.156). On frustration, see *British Berna Motor Lorries Ltd v Inter-Transport Co Ltd* (1915) 31 T.L.R. 200; Vol.I, Ch.23, especially paras 23–041—23–046 (analogous cases on charterparties).

[68] See below, para.33–050 and cases cited in nn.267 and 268 thereto; also *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*, above, at 311–312, 313.

[69] See above, para.33–010.

[70] A bailee who had sub-bailed the goods may still be in "control" of them.

[71] This section is based on the common law rules governing detinue: see *General and Finance Facilities v Cooks Cars (Romford)* [1963] 1 W.L.R. 644. (Section 4 of the 1977 Act provides for interlocutory relief where goods are wrongfully detained.) See CPR Pt 25 r.1(1)(c). See also above, para.33–010.

[72] 1977 Act ss.3(3)(b) and 3(6). For an illustration, see *Howard E Perry & Co Ltd v British Railways Board* [1980] 1 W.L.R. 1375. By CPR Pt 40 r.14, a claimant who is only a partial owner of the goods, and who has no immediate right to the possession of them, is confined to a remedy in damages for the injury to his reversionary interest unless the claimant has the written authority of all other part-owners of the goods to make the claim on his behalf as well as for himself.

[73] s.3(6). By ss.3(7) and 6(4), the court may also make an allowance under s.6(1) or (2) in respect of an improvement to the goods made by the defendant.

claimant to reflect the difference. For example, a bailor's action against the bailee may be one in which the measure of damages is not the full value of the goods, and then the court may order delivery of the goods, but require the bailor to pay the bailee a sum reflecting the difference".[74]

33–014 **Conversion of the chattel by the bailee.** In addition to his obligation to return the goods, the bailee is under a duty to his bailor not to convert the chattel, i.e. not to do intentionally in relation to the chattel an act inconsistent with the bailor's right of property in it and which excludes him from use and possession of the chattel[75]; thus a sale,[76] pledge,[77] or offering for sale,[78] of the chattel terminates the bailment forthwith, and the immediate right to the possession of the chattel revests in the bailor.[79] The assessment of the bailor's damages is discussed below.[80]

33–015 **Jus tertii.** Given that the bailor does not transfer ownership in the chattel to the bailee, he retains a proprietary interest in the chattel. He is said to retain the "general" property in the chattel, while the bailee obtains a "special" property in it. In litigation between the bailor and the bailee, the latter was, at common law, estopped from questioning the bailor's title to the chattel bailed to him, and the bailee could not set up the title of a third person in reply to the bailor's demand for redelivery of the chattel.[81] But s.8(1) of the Torts (Interference with Goods) Act 1977 abolished this rule (known as the *jus tertii*): "The defendant in an action for wrongful interference shall be entitled to show, in accordance with rules of court,[82] that a third party has a better right than the plaintiff as respects all or any part of the interest claimed by the plaintiff, or in right of which he sues,

[74] s.3(6).

[75] *Caxton Publishing Co Ltd v Sutherland Publishing Co Ltd* [1939] A.C. 178, 202; *Morris v CW Martin & Sons Ltd* [1966] 1 Q.B. 716, 732; *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 W.L.R. 940; *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 A.C. 833 at [39]–[42] (on which see Cane (2002) 118 L.Q.R. 544). The requirement that there must be a sufficient encroachment on the rights of the owner as to exclude him from use and possession of the goods assumed importance in *Marcq v Christie, Manson & Woods Ltd* [2003] EWCA Civ 731, [2004] Q.B. 286, especially at [13]–[24]. See also s.2(2) of the Torts (Interference with Goods) Act 1977 (above, para.33–010); and s.11(3) (below, para.33–135, n.821).

[76] See the cases cited below, para.33–023 n.109.

[77] *Nyberg v Handelaar* [1892] 2 Q.B. 202.

[78] *North General Wagon & Finance Co Ltd v Graham* [1950] 2 K.B. 7.

[79] See below, paras 33–023, 39–333.

[80] See below, para.33–018.

[81] *Gosling v Birnie* (1831) 7 Bing. 337; *Biddle v Bond* (1865) 6 B. & S. 225. The House of Lords has (obiter) referred to this common law rule, without adverting to the 1977 Act (see below): *China Pacific SA v Food Corp of India* [1982] A.C. 939, 959. The bailee could set up the *jus tertii* against his bailor only where he had been actually evicted by title paramount (*Biddle v Bond*, above, at 234), or where he defended on behalf of, and with the express authority of the third person (*Rogers, Sons & Co v Lambert & Co* [1891] 1 Q.B. 318, 325). Arguments which would have extended the scope of the bailee's estoppel were rejected by the Privy Council in *Re Goldcorp Exchange* [1995] 1 A.C. 74.

[82] The power to create rules of court is contained in s.8(2) of the Torts (Interference with Goods) Act 1977. The rules were formerly contained in RSC Ord.15 r.10A, which has not been retained in the current version of the CPR. The position therefore remains uncertain. The defendant's entitlement is stated clearly in s.8(1), but the rules which give effect to it are not readily apparent.

and any rule of law (sometimes called *jus tertii*) to the contrary is abolished".[83]

33–016 The main effect of s.8(1) will be where the bailor is suing the bailee: an illustration would be where a warehouseman could show that, since the goods were delivered to him by the bailor, a change in their ownership had taken place so that a third party now had acquired either a partial interest in them or had become their full owner.[84] If the bailee can prove that a third party has, at the time of the suit, a partial interest in the chattel, leaving the bailor with only a partial interest, the bailor's damages recoverable from the bailee for his failure to redeliver the chattel will be, not for its full value, but only in respect of the bailor's remaining interest in it.[85] It should be noted, however, that s.8 applies only to claims for wrongful interference with goods; if the bailor sues, not in tort, but in contract or for breach of the bailee's common law obligations arising from the bailment, it appears[86] that the bailee could not avail himself of the protection of the section.[87]

33–017 **Avoidance of double liability.** As a result of s.7 of the Torts (Interference with Goods) Act 1977, the bailee need no longer fear "double liability",[88] both to his bailor, and to a third party who can prove a better title (either full or partial) to the goods than the bailor. By s.7(2) of the Act, where two or more claimants are parties to proceedings for wrongful interference,[89] the court is to grant relief so as to avoid double liability of the wrongdoer. By s.7(3), on satisfaction of his claim, a claimant is liable to account over to another claimant to such extent as will avoid double liability; while by s.7(4), any claimant who is unjustly enriched to any extent (viz beyond the value of his own interest in the chattel) is liable to reimburse the wrongdoer to the extent of that unjust enrichment. Thus, if the bailee pays damages, first to his bailor, and then to the true owner, the bailor is unjustly enriched unless he accounts to the true owner under s.7(3); and the true owner then would be unjustly enriched and would be liable to reimburse the bailee under s.7(4).[90]

[83] Even before the 1977 Act, the bailee could interplead between the bailor and a third party claimant to the chattel: RSC Ord.17; CCR Ord.33 rr.6–12.

[84] The warehouseman would also be able to delay proceedings against him by requiring the third party to be made a party to the proceedings.

[85] This result is produced by s.7 of the 1977 Act (see below, para.33–017), in combination with s.8.

[86] One interpretation of the section might be that it covers a situation where the bailor *could* have sued for wrongful interference, e.g. where there was overlapping liability in tort or in contract. But liability in contract could arise in circumstances in which no tort had been committed: Palmer at para.4–062.

[87] Palmer at paras 4–057—4–063.

[88] Defined in s.7(1).

[89] On the question of joining in the action any third party who claims an interest in the chattel, see s.8 (see above, para.33–015). Section 9 provides machinery for allowing concurrent proceedings for wrongful interference with the same goods to be heard together, even where they originated in different courts.

[90] This example is adapted from that given in s.7(4) itself.

38–002 **Legislative protection for consumer contractors.** The beginnings of modern protection for consumers in relation to the contracts which they conclude can be seen in the 1970s. So, first, in 1973 the Supply of Goods (Implied Terms) Act controlled the exclusion by a seller of his liability arising from breach of the statutory implied terms in respect of title, description and quality and fitness for purpose set out in the Sale of Goods Act 1893.[9] Under the 1973 Act, while any exemption clauses in respect of the implied warranty of title were rendered void,[10] as regards the other liabilities a distinction was drawn between "consumer sales" (where an exemption clause was rendered void) and other cases (where the term was "not enforceable to the extent that it is shown that it would not be fair and reasonable to show reliance on the term").[11] The 1973 Act defined "consumer sale" for the purposes of this rule, in terms of a sale of goods concluded by a

> "seller in the course of business where the goods—
>
> (a) are of a type ordinarily bought for private use or consumption; and
> (b) are sold to a person who does not buy or hold himself out as buying them in the course of a business."[12]

However, when this tentative control of exemption clauses was extended by the Unfair Contract Terms Act 1977, the protection for consumers was rearranged and the reference to "consumer sales" was not replaced by reference to "consumer contracts", but instead by the notion of a person "dealing as consumer".[13] As the courts made clear, this definition could apply so as to protect not merely consumers in the sense defined by the 1973 Act, but also to businesses (even if incorporated) where the contract is neither an integral part of their business nor, if incidental to their business, of a type which they regularly enter.[14] Further important legislation for the protection of consumers was enacted by the Consumer Credit Act 1974, where the protection extended (and still extends) to a range of individuals including sole traders, small partnerships and unincorporated associations.[15] Moreover, in 1994 the well-known provisions in the Sale of Goods Act 1979 implying terms as to the quality and fitness for purpose of the goods sold were amended so as to make them more appropriate for consumers, in particular, the reference to "merchantable quality" being replaced by one to "satisfactory quality".[16]

[9] Sale of Goods Act 1893 ss.12–15.
[10] 1973 Act s.4 creating new Sale of Goods Act 1979 s.55(3).
[11] 1973 Act s.4 creating new Sale of Goods Act 1979 s.55(4).
[12] 1973 Act s.4 creating new Sale of Goods Act 1979 s.55(7).
[13] Unfair Contract Terms Act 1977 s.12 (definition). Reference to a person "dealing as consumer" was then made relevant to the controls in s.3(1) (contractual liability generally), s.4 (indemnity clauses), s.6(2) (statutory implied terms in sale of goods) and s.7(2) (statutory implied terms in miscellaneous contracts under which goods pass).
[14] *R. B. Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 W.L.R. 321 and see Vol.I, para.15–074.
[15] See below, para.39–005.
[16] Sale and Supply of Goods Act 1994 s.1. This change was recommended by Law Commission, *Sale and Supply of Goods*, Law Com. No.160 § 3.27.

38–003 **The growing importance of European law.** However, from the late 1980s EEC (later EC and now EU) law has become increasingly important as a source of legislative protection for consumer contractors, typically by way of directive and therefore requiring implementation by the UK into national law, whether by statute or, as has been more usual, by secondary legislation under the European Communities Act 1972.[17] Some of these legislative instruments have required national rules governing consumer contracts which are concluded in particular ways (as in the case of "doorstep selling"[18] and "distance contracts"[19]); some have required rules governing aspects of particular types of contracts (as in the case of contracts for the sale of goods,[20] timeshare contracts,[21] package travel contracts,[22] consumer credit[23] and passenger transport[24]); and perhaps the most prominent example, the Unfair Terms in Consumer Contracts Directive 1993, which subjected most contract terms which had not been "individually negotiated" in *all* consumer contracts to a test of unfairness.[25] At this earlier stage in its development, EU contract law generally required only "minimum harmonisation", that is to say, the European legislation required only minimum rights or protections for the consumer, thereby allowing Member States to enact national laws which are more protective of consumers than the EU law required.[26] However, at the beginning of the present century, the European Commission started a wide-ranging review of EC/EU legislation in the area of contract law, with particular reference to consumer law,[27] and there have been a number of consequences for EU (and therefore UK) consumer contract law. First, the

[17] European Communities Act 1972 s.2(2).
[18] Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31 implemented in UK law by the Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117), which were replaced by the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816). The current law is contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) ("2013 Regulations") on which see below, paras 37–057 et seq.
[19] Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19 implemented in UK law by the Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) (the current law is contained in the 2013 Regulations, on which see below paras 38–057 et seq.); Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16 art.3(2) implemented principally by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095) on which see below, para.38–131.
[20] Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/7 ("Consumer Sales Directive", "1999 Directive").
[21] Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] O.J. L280/83 and see for the current legislation below, paras 38–136—38–142.
[22] Directive 90/314/EEC on package travel, package holidays and package tours [1990] O.J. L158/59; [1994] O.J. L280/83. See below, paras 38–132—38–135.
[23] Directive 87/102/EEC on consumer credit [1987] O.J. L42/48 repealed and replaced by Directive 2008/48/EC on credit agreements for consumers [2008] O.J. L133/66.
[24] e.g. Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] O.J. L46/1.
[25] Directive 93/13/EEC [1993] O.J. L95/29 ("1993 Directive").
[26] See, notably, Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts, art.8 and see below, para.38–020.
[27] See Communication from the Commission to the Council and the European Parliament on European Contract Law Com(2001) 398 final; Communication from the Commission to the European

Commission has sought (and to an extent achieved) the reform and consolidation of existing directives so as to provide greater consistency between them, this being noticeable particularly in the Consumer Rights Directive 2011,[28] which, inter alia, consolidated the information duties required by the directives concerning "doorstep selling" (later "off-premises contracting")[29] and "distance contracts",[30] though it did not consolidate the requirements contained in directives on guarantees in contracts for the sale of goods[31] nor on unfair contract terms[32] as had earlier been proposed.[33] Other earlier consumer contract directives have also been subject to reform and consolidation, for example, on timeshare contracts.[34] Secondly, the Commission has sought to move directives in the area of consumer protection from requiring "minimum harmonisation" to requiring "full harmonisation", that is to say, the European legislation sets rights or protections for the consumer for which Member States must provide but which they must not exceed in the interests of greater protection for the consumer.[35] Thirdly, and related to this, by the Unfair Commercial Practices Directive 2005 the European legislator enacted an important general and "fully harmonised" framework for the regulation of unfair commercial practices business-to-consumer.[36] While the 2005 Directive is expressly stated as being "without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract"[37] and the UK's first implementation reflected this scope,[38] in 2014

Parliament and the Council, *A more coherent European Contract Law, An Action Plan* Com(2003) 68 final; *European Contract Law and the revision of the* acquis: *the way forward* Com(2004) 651 final; EU Commission, *Green Paper from the Commission on policy option for progress towards a European Contract Law for consumers and businesses* COM(2010) 348 final.

[28] Directive 2011/83/EU on consumer rights [2011] O.J. L304/64 ("Consumer Rights Directive" or "2011 Directive").

[29] Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises [1985] O.J. L372/31.

[30] Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] O.J. L144/19. The Consumer Rights Directive did not, however, include elements from the Directive 2002/65/EC concerning the distance marketing of consumer financial services [2002] O.J. L271/16.

[31] Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/7 (the "Consumer Sales Directive").

[32] Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts [1993] O.J. L95/29 ("Unfair Terms in Consumer Contracts Directive" or "1993 Directive").

[33] Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008 Com(2008) 614/3 final, Chs IV and V.

[34] Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] O.J. L33/30 repealing and replacing Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] O.J. L280/83; Directive 2008/48/EC on credit agreements for consumers [2008] O.J. L133/66.

[35] e.g. Directive 2011/83/EU on consumer rights art.4; Directive 2008/48/EC on credit agreements for consumers recital 9, though as the following recitals explain, the directive leaves a good deal of competence in Member States as regards matters outside its carefully delineated scope.

[36] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices [2005] O.J. L149/22 ("Unfair Commercial Practices Directive" or "2005 Directive") especially art.4. The Directive excludes certain areas from "full harmonisation", notably, art.3(9) (financial services).

[37] Directive 2005/29/EC art.3(2), on which see Whittaker in Weatherill and Bernitz (eds), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29, New Rules and New Techniques* (2007), Ch.8.

[38] The Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) ("2008 Regulations") reg.29 (as enacted) provided explicitly that "an agreement shall not be void or unenforce-

the UK legislator nonetheless chose to give some "contract law" effects to certain aspects of the 2005 Directive's requirements, thereby creating new rights to redress for consumers against their trader contracting partners.[39] Fourthly, the EU legislator brought earlier European Conventions on jurisdiction and the recognition and enforcement of judgments (the "Brussels Convention")[40] and on the law applicable to contractual obligations (the "Rome Convention")[41] directly within the fold of EU law by enacting regulations to replace them.[42] These regulations set uniform rules of private international law governing applicable law for "contractual obligations" and jurisdiction, recognition and the enforcement of judgments in "matters relating to a contract"[43] as well as special rules for, for example, consumers in these contexts.[44] The present significance of these private international law rules governing consumer contracts is that the European Court of Justice has interpreted the concepts which they use (notably, "consumer"), and this case-law may be helpful in the interpretation of the same or similar concepts in the EU substantive law legislation governing consumer contracts.[45]

Earlier approaches to UK implementation of European directives. For a long time UK implementation of the various European directives governing consumer contracts was often effected in a piecemeal way. Indeed, in many instances, directives were implemented by standalone statutory instrument, thereby creating new and distinct bodies of legislative controls; this can be seen in the context of package travel, package tours and package holidays,[46] doorstep selling[47] and distance contracts.[48] In the case of the Unfair Terms in Consumer 38–004

able by reason only of a breach of these regulations" but said no more as to the wider lack of effect of the Regulations on the "law of contract", apparently on the basis that they set out the consequences of the new controls and did not need to set out other non-consequences.

[39] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). See further, below paras 38–160 et seq.

[40] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

[41] Rome Convention on the Law Applicable to Contractual Obligations 1980.

[42] Regulation (EC) 593/2008 on the law applicable to contractual obligations ("Rome I") [2008] O.J. L177/6; Regulation (EC) 864/2007 applicable to non-contractual obligations ("Rome II Regulation") [2007] O.J. L199/40 (some of whose provisions bear an important relationship with contract, notably art.12 "*culpa in contrahendo*"); Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1 ("Brussels I Regulation") first replaced the Brussels Convention and then was itself replaced as from January 10, 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Brussels I*bis* Regulation").

[43] Brussels I*bis* Regulation art.7(1); Rome I Regulation generally.

[44] Brussels I*bis* Regulation arts 17–19; Rome I Regulation art.6.

[45] See below para.38–015.

[46] Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288).

[47] Consumer Protection (Cancellation of Contracts Concluded Away from Business Premises) Regulations 1987 (SI 1987/2117) later replaced by the Cancellation of Contracts made in a Consumer's Home or Place of Work, etc. Regulations 2008 (SI 2008/1816). As will be explained, the latter have been revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134): below, paras 38–057 et seq.

[48] Consumer Protection (Distance Selling) Regulations 2000 (SI 2000/2334) which have been revoked and replaced by the Consumer Contracts (Information, Cancellation and Additional Charges)

Contracts Directive 1993, the resulting standalone statutory instrument created a set of legislative rules which overlapped considerably with, but formally were entirely separate from, the existing domestic legislation in the area, the Unfair Contract Terms Act 1977. In the context of unfair contract terms, the resulting complexity attracted a good deal of criticism, and, in turn, a recommendation from the Law Commissions that the legislation should be recast into a single enactment.[49] In the case of other directives, the UK legislature sought to integrate their requirements within existing legislative frameworks. In the case of time-share contracts, this was easily achieved as these had already been the subject of regulation by UK statute.[50] However, in other cases, the process was more difficult, a particularly striking example being found in the legislative implementation of the Consumer Sales Directive of 1999, which was effected in English law principally by the insertion of a new Pt 5A into the Sale of Goods Act 1979.[51] This amendment created a series of dedicated rights for consumer buyers in respect of the "contractual non-conformity" of the goods in addition to (and in an awkward relationship with) the classic rights of rejection of the goods, restitution of the price and damages for breach of the implied statutory conditions governing satisfactory quality and fitness for purpose also foreseen by the Sale of Goods Act.[52] Here, therefore, implementation of the European directive lead to very considerable substantive complexity and, to an extent, overlap, even though it was effected by change to existing wider legislation.

38–005 **Recent reforms to UK consumer contract legislation: (i) the Consumer Rights Act 2015.** Recent legislation has sought to remedy some of the problems caused by this piecemeal and overly complex approach to legislative implementation of EU consumer law, prompted to an extent by the requirement to implement the Consumer Rights Directive of 2011 (which sought to bring more consistency into the underlying EU framework as regards pre-contractual information duties imposed on sellers and suppliers to consumers), but even more by a view in government that UK legislative implementation should be consistent, easier to find and easier to understand.[53] The principal result of this view is the Consumer Rights Act 2015, whose provisions re-implement earlier EU directives requiring consumer rights in respect of contractual non-conformity and the control of unfair contract terms, but do so in a way which seeks to integrate their requirements into a wider framework, in part drawn from other domestic UK

Regulations 2013 (SI 2013/3134) (below, paras 37–057 et seq.); Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095).

[49] Law Commission, Scottish Law Commission, *Unfair Terms in Contracts* (Law Com. No.292, Scot Law Com. No.199, 2005).

[50] Timeshare Act 1992, which preceded the Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. The 1994 Directive was implemented by amendment of the Timeshare Act 1992 by regulation: Timeshare Regulations 1997 (SI 1997/1081). Subsequently, the UK's treatment of timeshare and related contracts has been made by the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010/2960) on which see below, paras 38–136—38–142.

[51] On this implementation, see below, paras 38–408 et seq.

[52] s.14.

[53] BIS, *Enhancing consumer confidence by clarifying consumer law* (July 2012); BIS, *Enhancing consumer confidence through effective enforcement, consultation on consolidating and modernising consumer law enforcement powers* (March 2012).

legislation (notably, the Unfair Contract Terms Act 1977,[54] the Sale of Goods Act 1979,[55] and the Supply of Goods and Services Act 1982[56]) and in part developed specially for the purpose (as in the case of the new rules governing contracts for the supply of "digital content"[57]). In this way, the 2015 Act reflects a broad strategy of separating the most prominent special rules governing contracts between traders and consumer from the legislative schemes applicable to contracts between other categories of contractor. So, notably, the Unfair Contract Terms Act 1977 (as amended by the 2015 Act) no longer contains any rules restricted to the situation where one party "deals as consumer".[58]

(ii) Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.[59] However, the UK legislature did not seek to place all relevant consumer contract law in the Consumer Rights Act 2015. So, rather confusingly, the UK implemented the Consumer Rights *Directive* 2011 principally by enactment of standalone regulations, the 2013 (Information, Cancellation and Additional Charges) Regulations 2013 ("2013 Regulations"), rather than in the Consumer Rights *Act*.[60] The 2013 Regulations are principally concerned with rules governing a trader's information duties and the consumer's rights of cancellation in off-premises contracts and distance contracts other than relating to financial services, though they also create other particular consumer protection rules, notably, in relation to inertia selling and additional charges.[61] 38–006

(iii) Creating rights to redress in respect of certain unfair commercial practices. As earlier noted, in 2014 the UK legislator chose to give some "contract law" effects to certain aspects of the Unfair Commercial Practices Directive 2005's prohibitions by inserting new provisions into the Consumer Protection from Unfair Trading Regulations 2008 ("the 2008 Regulations") which had earlier implemented the directive, thereby creating new rights to 38–007

[54] e.g. Consumer Rights Act 2015 s.65 reflecting Unfair Contract Terms Act 1977 s.2 (1), below, para.38–377.

[55] Consumer Rights Act 2015 ss.9–11, 13 reflecting Sale of Goods Act 1979 ss.13–15: below, paras 38–462—38–464, 38–466.

[56] Consumer Rights Act 2015 ss.9–11, 13 reflecting Supply of Goods and Services Act 1982 ss.3–5 (on which see below, paras 38–462—38–464, 38–466); Consumer Rights Act 2015 ss.49, 51–53 reflecting Supply of Goods and Services Act 1982 ss.13–16: below paras 38–351, 38–537—38–538.

[57] Consumer Rights Act 2015 ss.33–47: below, paras 38–501 et seq.

[58] Consumer Rights Act 2015 s.75, Sch.4 paras 5–11 on which see Vol.I, Ch.15 where it is explained that certain persons who "deal as consumer" do not count as "consumer" and are therefore no longer protected under either the 1977 or the 2015 Act: see especially paras 15–073—15–079.

[59] SI 2013/3134 ("2013 Regulations").

[60] An exception is found in the Consumer Rights Act 2015 ss.28 (delivery of goods) and 29 (passing of risk), which implement the Consumer Rights Directive 2011 arts 18 and 20 (which were formerly implemented by the 2013 Regulations regs 42 and 43): below paras 38–489—38–490. A further exception is that the 2015 Act gives contractual force to information supplied by a trader as required by the 2011 Directive art.6(5): 2015 Act s.11(4)–(5), 12 (goods contracts); s.36(3)–(4), 37 (digital content contracts); and s.50(3) and (4) (services contracts), on which see below, paras 38–464—38–465, 38–508—38–509 and 38–535 respectively.

[61] SI 2013/3134 Pt 4 see below, paras 38–057 et seq.

redress for consumers against their trader contracting partners.[62] As a result, a consumer to whom a misleading statement has been made by a trader or who has been the object of an aggressive commercial practice may enjoy a short-lived "right to unwind in respect of a business to consumer contract", a "right to a discount" and/or a right to damages.[63] These new consumer rights are related to the wider provisions governing unfair commercial practices from which they spring in the Consumer Protection from Unfair Trading Regulations 2008, but they are separate from the broader framework of consumer rights against traders established by the 2015 Act. Moreover, the rights to redress under the amended 2008 Regulations bear a complex relationship with traditional rights for contracting parties established by the common law[64] and by the Misrepresentation Act 1967.[65] These complexities, which will be explained below, are hardly welcome, even if the new provisions create rights for consumers which they would not otherwise enjoy.[66]

38–008 **(iv) Special rules governing consumer contracts of insurance.** In parallel to these developments specifically relating to consumer protection and principally concerned with legislation implementing EU directives, the English and Scottish Law Commissions undertook a series of studies into the law governing misrepresentation and non-disclosure in contracts of insurance.[67] The first tranche of legislation resulting from their recommendations was the Consumer Insurance (Disclosure and Representations) Act 2012, which made new provision governing a consumer assured's duty of utmost good faith and the insurer's remedies for breach. The second tranche of legislation is the Insurance Act 2015, which, inter alia, abolishes the rule permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party,[68] sets out new rules governing non-consumer insurance contracts and supplements the 2012 Act's provisions governing consumer insurance contracts. These new provisions are discussed in Ch.42 (Insurance) of the present work.[68a]

38–009 **The relationship between "contract law" and prohibitions or preventive measures.** This chapter will follow the general approach of this work in focussing on "contract law" in the sense of the law which sets out the circumstances in which consumer contracts are concluded, the grounds of their invalidity and/or of the invalidity of their terms, the relative rights and obligations which they

[62] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) inserting, notably, new Pt 4A Consumers' Rights to Redress in Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277). Rights are also created for consumers in respect of payments which they have made: for the details see below paras 38–160 et seq.

[63] Consumer Protection from Unfair Trading Regulations 2008 Pt 4A.

[64] e.g. the relationship between the right to rescind a contract for misrepresentation and the "right to unwind" the contract for a misleading statement under the 2008 Regulations (as amended).

[65] e.g. the relationship between the rights to/possibility of award of damages for misrepresentation under the Misrepresentation Act 1967 s.2(1) and 2(2) and the right to damages in respect of a misleading statement under the 2008 Regulations (as amended).

[66] Below, paras 38–160 et seq.

[67] See below, para.42–045 at n.333.

[68] Insurance Act 2015 s.13.

[68a] See below, paras 42–030—42–032, 42–046—42–050.

create for their parties, and the remedies which arise on their breach ("contract law" in the narrow and usual sense), rather than on the wider laws which regulate the behaviour of contracting parties, whether through structures such as the regulation of financial services, administrative powers of control and review or the criminal law.[69] However, in the case of consumer law, this contrast is blurred in a number of important ways, since modern consumer protection legislation has often combined rules governing contract law in the narrow sense (for example, providing a consumer with a right of cancellation of the contract, rendering unfair terms not binding on consumers, or creating special rights in respect of breach of contract) with preventive measures of the behaviour of traders with which these contract law rules are concerned.[70] Many of these preventive measures have been required by European directives which also set out the "contract law" consumer protection measures, and this combination has been relied on by the European Court of Justice as a reason for national courts having a duty to raise the issue of the consumer's protection of their own motion.[71] At the same time, the Unfair Commercial Practices Directive 2005, which requires a fully harmonised framework of the control of unfair commercial practices business-to-consumer distinguishes expressly between its own concern with the prohibition of unfair commercial practices and "contract law and, in particular, . . . the rules on the validity, formation or effect of a contract", this being the case whether those rules are EU or national,[72] though, as earlier indicated, UK law has recently chosen to enact legislation which provides rights to redress for consumers in respect of certain unfair commercial practices by traders.[73]

38–010 **The structure and scope of this chapter.** This chapter will consider the law governing consumer contracts under the following headings: the relationship of EU and UK consumer contract law; definitions of consumer contract; information requirements and consumers' rights of cancellation; unfair commercial practices and the consumer's rights to redress; the control of unfair contract terms; contracts for the supply of goods, digital content or services. This chapter will not discuss the law governing consumer credit agreements, which is discussed in Ch.39, nor, as already noted, rules governing consumer insurance contracts, which are discussed in Ch.42. Chapters 35 Carriage by Air and 36 Carriage by Land discuss the law governing these contracts including for the protection of passengers.[74] Moreover, the present chapter will not discuss the legislative and regulatory frameworks governing the provision of financial services put in place by the Financial Services and Markets Act 2000 and the Financial Services Act 2012.

[69] See Vol.I, para.1–001.

[70] See below, paras 38–127—38–129 (in relation to "off-premises contracts" and "distance contracts"); paras 38–323—38–333, 38–387—38–394 (unfair contract terms) and para.38–495 (remedies for non-conformity in the context of sale of goods etc.).

[71] See below, para.38–018.

[72] Directive 2005/29 art.3(2), recital 9. cf. Consumer Rights Directive 2011 art.3(5) below, paras 38–059—38–061.

[73] Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A (as inserted by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) and see below, paras 38–160 et seq.

[74] See above, paras 35–071—35–073.

CHAPTER 40

EMPLOYMENT[1]

[1] Freedland, *The Personal Employment Contract* (2003); Gaymer, *The Employment Relationship* (2001); Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2008) (on

1. INTRODUCTION

40–001 **Contract law and statute law in relation to employment.** The legal regulation of the individual employment relationship is a highly complex body of law which, while it still has at its core the common law of the contract of employment, today consists largely of provisions contained in statutes, statutory regulations and European Union measures. In this chapter, the first aim is to be as complete as space permits in the treatment of the common law of the contract of employment, both as a system of rights and remedies in itself, and as a conceptual system upon which much of the statutory regulation is constructed and depends. The other aim is to indicate in reasonable detail the main areas in which the common law of the contract of employment is overlaid by statute law. It is, however, to be stressed that a complete account of that body of statute law, together with all its interpretative case law, would now occupy much more space than is available for that purpose in this work, and would, moreover, depart further from the law of contract than is consonant with the purpose of this work. For more comprehensive treatments of the statute law of the individual employment relationship, reference should be made to treatises entirely devoted to employment law.[2] Much, though by no means all, of the statute law regulating the individual employment relationship was consolidated first into the Employment Protection (Consolidation) Act 1978, and later into the Employment Rights Act 1996, into which many subsequent amendments have since been integrated, especially though not solely by the Employment Acts 2002 and 2008. Where the relevant statute law is not contained in the latter consolidation, that is specifically indicated in the course of this chapter.

40–002 **The contract of employment or of service and contracts for services.** Contracts[3] of employment were known to the law for many years as "master and servant" contracts, but this terminology now has archaic connotations, and is not found in modern legislation. There is no comprehensive definition of such a contract[4] and the decided cases merely indicate a number of indicia or factors which are relevant to a finding that a particular contract is one of employment, or a "contract of service".[5] The presence or absence of any one such factor is not conclusive, since the decision depends on the combined effect of all the relevant

Scottish law, but largely applicable to English law); and, for a comparative perspective, Freedland and Kountouris, *The Legal Construction of Personal Work Relations* (2011).

[2] See, for instance, Hepple & Fredman, *Labour Law and Industrial Relations in Great Britain*, 2nd edn (1992); Deakin & Morris, *Labour Law*, 6th edn (2012); *Harvey on Industrial Relations and Employment Law* (1972 and updated).

[3] On the question of whether the employment relationship should be viewed in terms of contract or as a "status" see Rideout [1966] C.L.P. 111; Kahn-Freund (1967) 30 M.L.R. 635; compare Hepple (1986) 15 I.L.J. 83.

[4] *Montreal Locomotive Works Ltd v Montreal and AG* [1947] 1 D.L.R. 161, 169 PC; *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All E.R. 220, 224; *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158, 165.

[5] *Simmons v Heath Laundry* [1910] 1 K.B. 543, 550; *Short v J & W Henderson Ltd* (1946) 62 T.L.R. 427, 429; *Kilboy v South Eastern Fire Area Joint Committee*, 1952 S.C. 280, 285–286; *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173, 184; *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497.

factors, when those pointing towards "employment" are weighed up with those pointing against. A contract of employment or of service is generally contrasted with a contract in which an independent contractor is engaged to perform a particular task, often known as a "contract for services".[6] In order to identify the contract of employment, it is useful first to describe its normal forms and then to indicate the current approach to defining it, which is developed in greater detail in the second section of this chapter.

40–003 **The normal forms of the contract of employment.** It could, at least until recent transformations in the practice of the labour market, be said that in the normal case of employment[7] the employee is selected by his or her employer, works "full-time" as part of the employer's organisation, with regular working hours, at a fixed place of work, with equipment provided by the employer, and under some degree of supervision (arranged by the employer) over his or her method of working; the employee enjoys a fixed wage or salary paid at regular intervals, fixed holidays on full pay, and has some security of employment in that he or she cannot be dismissed without notice (except for misconduct), and until the expiration of his notice of dismissal he or she is entitled to receive his or her full wages or salary, whether or not his or her employer can actually provide him or her with work to do.[8] The instances which come before courts are those where some, but not all, of these normal features of employment are present, and it must be decided whether the departures from the normal patterns of employment are sufficiently important to justify the conclusion that the relationship is not employment for the purpose of the legal rule in question.[9]

40–004 However, a large and increasing proportion of the workforce is now employed in "marginal", "atypical" or "flexible" forms of employment, such as part-time, temporary or agency employment, as well as work under so-called "zero-hours contracts".[10] In such cases, it may be even more than usually difficult to decide whether or not a contract of employment exists.[11]

40–005 **The modern approach to definition of the contract of employment.** The traditional statements of what constitutes a contract of service placed most emphasis on the power of the employer to control the work of the employee,[12] when contrasting that contract with a contract with an independent contractor. The traditional distinction was that whereas the employer could merely direct *what* work was to be done by the independent contractor, he or she might also

[6] See below, para.40–005.

[7] *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 Q.B. 437, 446.

[8] All these features are considered in more detail, see below, paras 40–010—40–024.

[9] *Short v J. & W. Henderson Ltd* (1946) 62 T.L.R. 427, 429.

[10] See para.40–031, below.

[11] See Lewis (ed.), *Labour Law in Britain* (1986), Ch.6 (Leighton) passim; Freedland, *The Personal Employment Contract* (2003), pp.18–22; and see below, paras 40–026—40–027.

[12] e.g. *Sadler v Henlock* (1855) 4 E. & B. 570. For the importance of the control test in modern law, see below, paras 40–012—40–015.

direct *how* the work was to be done by an employee.[13] The current approach to this distinction, and hence to the definition of the contract of employment, has four main elements:

(1) the denial of the supremacy of the control test, whilst still acknowledging its importance[14];

(2) the use of some form of "organisation" test[15];

(3) a growing preference for asking whether the worker is "in business on his or her own account"—though it has been denied that this is the fundamental test[16];

(4) the assertion that exhaustive definition is futile and that the method of classification is by the accumulation of relevant factors in each case[17];

(5) an increasing tendency to treat the distinction as one to be applied at first instance rather than by an appellate court.[18]

It should also be noted that the relationship of employment is to be contrasted not only with that between employer and independent contractor but also with those of agency,[19] bailment[20] and, at least traditionally, partnership.[21] It may also still be important for certain purposes to distinguish between the contract of employment and the contract of apprenticeship[22]; the way in which that distinction is to be drawn was considered by the Court of Appeal in *Flett v Matheson*.[23] The Consumer Rights Act 2015 explicitly distinguishes between "consumer contracts" and those of employment or apprenticeship.[24] This chapter will consider first the legal consequences which attach to employment (but not to other relationships) and then consider the tests used to decide whether a contract is one of employment, or one with an independent contractor.

[13] *R. v Walker* (1858) 27 L.J.M.C. 207, 208. This distinction is considered in greater detail, see below, paras 40–012—40–014.

[14] *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497; *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All E.R. 220; *Warner Holidays Ltd v Secretary of State for Social Services* [1983] I.C.R. 440. See below, para.40–026.

[15] *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 T.L.R. 101, 111; cf. *Market Investigations Ltd v Minister of Social Security* [1969] 2 Q.B. 173, 184. See below, para.40–016.

[16] *Nethermere (St Neots) Ltd v Gardner* [1984] I.C.R. 612, 619. But, for further evidence of the tendency, at least in the case of skilled workers, to prefer a business test—here in the form of "whose business is it?"—see *Lane v Shire Roofing Company (Oxford) Ltd* [1995] I.R.L.R. 593.

[17] *Argent v Minister of Social Security* [1968] 1 W.L.R. 1749; *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158, 165.

[18] *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 Q.B. 139; *Maurice Graham Ltd v Brunswick* (1974) 16 K.I.R. 158. See below, para.40–011.

[19] See above, Ch.31.

[20] See above, Ch.33.

[21] For discussion, see para.40–029, below.

[22] Compare para.40–187, and para.40–203 n.1437.

[23] [2006] EWCA Civ 53, [2006] I.R.L.R. 277.

[24] Consumer Rights Act 2015 s.61(2); See above, paras 38–027 et seq., above.

Legal consequences of a contract of employment. The importance of the distinction between an employee and an independent contractor, agent, partner (or person in another such relationship), is that certain legal rules apply to the parties in a relationship of employment which do not apply (or do not normally apply) to other relationships. Some of the distinctive legal consequences of the employment relationship are: 40–006

(1) An extensive duty (both at common law and by statute) is placed on the employer to take measures to protect the health, safety and welfare of his or her employees, and to provide safe equipment and premises, and a safe system of working.[25]

(2) An employer is vicariously liable for the torts committed by his or her employee "in the course of his or her employment",[26] whereas the person who engages an independent contractor is not normally liable for torts committed by him or her during the work he contracted to do.[27]

(3) Many obligations (e.g. obedience to lawful and reasonable orders of the employer) are imposed on employers and employees as implied terms in the contract of employment, which may not be owed by or to an independent contractor.[28]

Statutory consequences. A substantial number of statutory provisions impose duties on an employer in relation to its employees, or confer benefits on employees. For example: 40–007

(1) The employer will be responsible for contributions in respect of an "employed earner" under the Social Security Contributions and Benefits Act 1992[29] and the employee will be entitled to claim the benefits payable to a person "employed in employed earner's employment".[30]

(2) The contracts of employment legislation[31] and the redundancy payments legislation[32] apply to "employees".[33]

[25] A new framework for the statutory duties was established by the Health and Safety at Work, etc. Act 1974. The Act is applied generally to "persons at work" (s.1(1)(a)), which includes the self-employed (s.52(1)); but within that framework certain duties are specifically imposed upon employers to their employees (s.2(1)). See below, paras 40–107—40–109.

[26] See Atiyah, *Vicarious Liability in the Law of Torts* (1967).

[27] Atiyah at pp.327 et seq. But some relationships other than that of employment may also invoke vicarious liability in tort, e.g. *Ormrod v Crosville Motor Services Ltd* [1953] 1 W.L.R. 1120; cf. *Att-Gen for New South Wales v Perpetual Trustee Co Ltd* [1955] A.C. 457.

[28] See below, para.40–051.

[29] Pt 1.

[30] Social Security Contributions and Benefits Act 1992 ss.94(1), 108(1).

[31] Contained in Employment Rights Act 1996 Pts I, IX; see below, paras 40–040 et seq., 40–163.

[32] Contained in Employment Rights Act 1996 Pt XI; see below, paras 40–248 et seq.

[33] Defined by Employment Rights Act 1996 s.230(1) ("employee"), s.230(2) ("contract of employment").

(3) The unfair dismissal legislation[34] applies to "employees"[35] defined[36] as workers under contracts of employment, other than in police service.[37]

(4) The Employment Rights and Trade Union and Labour Relations (Consolidation) Acts also embody a series of rights of "employees" (such as rights in relation to maternity,[38] trade union membership and activities,[39] and insolvency of the employer)[40]; and the procedures for handling redundancies apply to "employees" as defined in s.295 of the Trade Union and Labour Relations (Consolidation) Act 1992.

(5) The Transfer of Undertakings (Protection of Employment) Regulations 2006[41] deal with the rights and obligations relating to employers and employees on certain transfers or mergers of undertakings, businesses or parts of businesses. "Employee" is defined for this purpose as any individual who works for another person whether under a contract of service or apprenticeship or otherwise but so as not to include anyone who provides services under a contract for services.[42]

These and other statutory provisions assume that there is a general legal concept of "a contract of employment" or "a contract of service" by using these terms without any statutory definition.[43] Thus, the trade dispute immunity contained in s.13(1) of the Trade Union and Labour Relations Act 1974[44] referred to the contract of employment. Similarly, the Companies Act 1948 was treated as referring to a contract of employment when it spoke of payments made "on account of wages or salary".[45] (The relevant provision has now been consolidated into the Insolvency Act 1986.[46])

40–008 **Classification for particular purposes.** Although, as the foregoing paragraphs show, a uniform concept of the contract of employment or service seems to be assumed in legislation and judge-made law, it is nevertheless true that the

[34] See below, paras 40–214 et seq.
[35] By Employment Rights Act 1996 s.230(1).
[36] Employment Rights Act 1996 s.200. The exclusion of those in the police service has been held to extend to prison officers: *Home Office v Robinson* [1982] I.C.R. 31; and it has been held that police cadets are not "employees" within the meaning of that term in the unfair dismissal legislation: *Wiltshire Police Authority v Wynn* [1980] I.C.R. 649.
[37] Employment Rights Act 1996 s.200.
[38] See below, para.40–198.
[39] Trade Union and Labour Relations (Consolidation) Act 1992 Pt III. See below, paras 40–115—40–116.
[40] See below, para.40–198.
[41] SI 2006/246. See below, para.40–179.
[42] SI 2006/246 reg.2(1).
[43] Income and Corporation Taxes Act 1988 s.19(1) (Sch.E); and see below, para.40–009, "Contract of service or personally to execute any work or labour".
[44] The corresponding provision, no longer confined to contracts of employment, is now contained in Trade Union and Labour Relations (Consolidation) Act 1992 s.219(1).
[45] s.319(4), dealing with preferential payments on a winding-up. See *Re General Radio Co Ltd* [1929] W.N. 172; *Re CW & AL Hughes Ltd* [1966] 1 W.L.R. 1369; *Redbridge LBC v Dhinsa* [2014] EWCA Civ 178, [2014] I.C.R. 834; and see below, paras 40–181—40–182.
[46] s.386 and Sch.6 paras 9 et seq.

court will generally classify a relationship in the light of the particular purpose for which the classification is required, and since there is no single test to determine who is an employee it may be possible for the court to classify a particular relationship as employment for the purpose of one of the foregoing rules, but not for another.[47] Insofar as there is a current trend, it would seem to be towards unity rather than diversity of definition, but for the possible emergence of a greater willingness to engage in a different approach to classification in the safety at work field, see the decision of the Court of Appeal in *Lane v Shire Roofing Company (Oxford) Ltd*.[48]

40–009 **The contract of service or personally to execute any work or labour: "workers" and "persons employed".** In the area of employment legislation, there is one major type of variant upon the contract "of employment" or "service" which is very extensively used and requires distinct consideration. This variant adds to the basic concept of the contract of employment by including any other contract personally to execute any work or labour. This addition brings in some contracts between employers and independent contractors, i.e. some contracts which are not contracts of employment. The conditions for this extension outside the contract of employment are that the contract shall be for personal performance by the worker[49] and probably that it shall be for work alone rather than for work and materials. The extended formula probably includes some labour-only sub-contractors who would be held not to have contracts of employment.[50] Where this kind of formula is used, it is sometimes coupled with the terminology of "workman" or "worker" to distinguish it from the simple concept of "employee", but, as the ensuing examples show, there is a lack of consistency in this respect:

(1) The provisions, formerly contained in the Industrial Courts Act 1919, for courts of inquiry into industrial disputes, apply in relation to trade

[47] e.g. *Wardell v Kent CC* [1938] 2 K.B. 768; *Hewitt v Bonvin* [1940] 1 K.B. 188, 191–192 (cf. at 194–195); *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 Q.B. 437; but it has been suggested that where a worker who has elected to be treated as self-employed for tax purposes later claims statutory rights as an employee, the Inland Revenue should take action to recover the fiscal advantage the worker gained from being assessed under Sch.D rather than Sch.E: *Young & Woods Ltd v West* [1980] I.R.L.R. 201, 208, para.34 (per Ackner L.J.).
[48] [1995] I.R.L.R. 493. Comparison should now be made with the decision in *R. (on the application of Health and Safety Executive) v Pola* [2009] EWCA Crim 655, where the Court of Appeal limited the application of the requirement of continuing mutuality of obligation, confirming that in this particular interpretative context there was no requirement of a continuing or overarching obligation between the periods when the workers in question were at work.
[49] See *Ingram v Barnes* (1857) 7 E. & B. 115; *Broadbent v Crisp* [1974] I.C.R. 248. In *Mirror Group Newspapers Ltd v Gunning* [1986] I.C.R. 145 the Court of Appeal held that the expression referred to a contract the dominant purpose of which was the execution of personal work or labour. See *Wright v Redrow Homes (North West) Ltd* [2004] EWCA Civ 469, [2004] I.C.R. 1126 where the contracts of independent individual bricklaying contractors were construed as intended to require them to work "personally" so as to constitute them as "workers"; see also, nn.55, 57; compare para.40–022 nn.138–142.
[50] *Stuart v Evans* (1883) 49 L.T. 138; and see below, para.40–026.

CHAPTER 45

SURETYSHIP

1. IN GENERAL

General nature of the contract. A contract of suretyship is in essence a contract by which one person (the surety) agrees to answer for some liability of another (the principal debtor) to a third person (the creditor). The contract may be constituted by a personal engagement on the part of the surety, or by a charge on property without any personal liability, or by both.[1] Prima facie a surety does not merely undertake to perform if the principal debtor fails to do so; he undertakes to see that the principal debtor will perform.[2] Important results flow from this prima facie rule of construction. In particular it means that a surety is normally liable to the same extent as the principal debtor for damages for breach of the latter's obligations even though he has not in terms guaranteed the payment of damages.[3] **45–001**

[1] *Smith v Wood* [1929] 1 Ch. 14; *Re Conley* [1938] 2 All E.R. 127.

[2] *Moschi v Lep Air Services Ltd* [1973] A.C. 331. cf. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 C.L.R. 245 HC Aus.

[3] *Moschi* [1973] A.C. 331. For other consequences of this rule of construction, see paras 45–040, 45–086.

45–002 **Parties to the contract.** In *Duncan Fox & Co v North & South Wales Bank*[4] it was pointed out by Lord Selborne that there are three possible variations in the parties to a contract of suretyship. The first and simplest case is that in which all three parties concerned are parties to the contract in the sense that both the principal debtor and the creditor agree that the surety's liability is a secondary liability only, and that the principal debtor is primarily liable for the obligations guaranteed. But it also is possible that the contract of suretyship may be recognised only as between the principal debtor and the surety, or as between the creditor and the surety, in which event the rights and duties arising out of the contract of suretyship only affect those parties.

45–003 **Contract of suretyship as against principal debtor alone.**[5] It is by no means unusual for a party to a contract to be a principal debtor as against the creditor, but a surety as against another debtor. Such an arrangement is commonly entered into where the creditor wishes to avoid the technical rules relating to contracts of suretyship under which the surety may become discharged from liability in various circumstances.[6] In this event, the transaction takes effect according to its terms,[7] that is to say, there will be a contract of suretyship between the principal debtor and the surety, but there will be no contract of suretyship between the surety and the creditor. The creditor is accordingly entitled to treat the surety as a principal debtor in every respect.[8]

45–004 **Creditor knows or later discovers that not principal but surety.** However, the mere fact that two parties have, on the face of some written document or instrument, apparently contracted as joint (or joint and several) debtors does not preclude the possibility that one of the debtors is in fact a surety: it is still open to one of the debtors to prove by parol evidence that the creditor knew that the intention of the debtors was that one should be a surety and not a principal debtor.[9] Thus, it has been held that an agreement expressly declaring a party to be liable "as a primary obligor and not merely as a surety" does not prevent that party being a surety for the purpose of determining the effect of the voluntariness of the main agreement.[10] Furthermore, even if the creditor does not know that one of the debtors intends to contract only as surety at the time of making the contract, but subsequently has notice of this fact, he will thereafter have to treat that debtor as a surety, with the consequence that any variation by the creditor

[4] (1880) 6 App. Cas. 1, 11–12. See also *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 E.G. 643.

[5] This paragraph was quoted by Rix L.J. (with whom Sir Anthony Clarke M.R. and Arden L.J. agreed) with apparent approval in *Berghoff Trading Ltd v Swinbrook Developments Ltd* [2009] EWCA Civ 413, [2009] 2 Lloyd's Rep. 233 at [25].

[6] See below, paras 45–085 et seq.

[7] *Duncan Fox & Co v North and South Wales Bank*, above, at 11–12; *Nicholas v Ridley* [1904] 1 Ch. 192.

[8] See footnote above. See also *Esso Petroleum Co Ltd v Alstonbridge Properties Ltd* [1975] 1 W.L.R. 1474.

[9] *Mutual Loan Fund Association v Sudlow* (1858) 5 C.B.(N.S.) 449.

[10] *Heald v O'Connor* [1971] 1 W.L.R. 497; cf. *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep. 255.

and principal debtor will discharge the surety.[11] And if two parties contract as joint principals in the first instance, but they subsequently agree between themselves that one of them is to assume primary liability, the creditor will, on acquiring notice of this fact, be obliged to treat the other as a surety only.[12]

45–005 **Contract of suretyship as against creditor alone.** It is also perfectly possible for a surety to guarantee the liability of a third person in such circumstances that a contract of suretyship is created as against the creditor, but not as against the principal debtor. Normally a guarantee is entered into at the request, express or implied, of the principal debtor, and this suffices to create a contract of suretyship as against him, but the contract may not be entered into at his request at all. For example, a "recourse agreement"[13] entered into by a dealer at the request of a finance company, whereby the dealer guarantees the due performance of a hire-purchase agreement, may be a contract of suretyship as against the creditor (the finance company) but there will not be a contract of suretyship as against the debtor (the hirer). Similarly, it often happens that a surety guarantees a loan made to a company at the request of the company's parent or holding company, and the company-debtor may not itself be in a contractual relationship with the surety.[14] In practice, however, this will usually make little difference to the rights and duties of the parties. The principal right of a surety as against the debtor is his right to be indemnified by him if called on to meet the liability,[15] and even if there is no contract of suretyship as against the debtor, there will still be a right to an indemnity, though in this case it will arise only by way of subrogation or by way of a right to restitution.[16] Such a right may be less extensive than a contractual right to an indemnity in some cases. For example, a surety has a right that the principal debtor should meet his obligations and this right may be enforceable to some extent even before the surety has been called upon to pay[17]; but a guarantor who has no contract of suretyship as against the debtor probably has no right to require the debtor to meet his obligations, and subrogation and restitution probably give no remedy until actual payment.[18] There is also a danger that subrogation rights may be lost by a technical "payment" of the debt, even though the money is provided by the surety.[19]

45–006 **Indemnities.** The term "indemnity" is used in the law in several different senses. In its widest sense it means recompense for any loss or liability which one

[11] *Oakeley v Pasheller* (1836) 4 Cl. & Fin. 207; *Overend Gurney & Co v Oriental Financial Corp* (1874) L.R. 7 H.L. 348; *Goldfarb v Bartlett* [1920] 1 K.B. 639 and see below, para.45–104.

[12] *Rouse v Bradford Banking Co Ltd* [1894] A.C. 586.

[13] As to these, see above, para.39–180. Recourse agreements will usually be drafted as indemnities and not guarantees (see below, paras 45–006 et seq., 45–044 as to this distinction) but there is nothing to prevent such an agreement being drafted as a guarantee, though it will not be a security within the meaning of s.189(1) of the Consumer Credit Act 1974, for it is not entered into at the request (express or implied) of the debtor or hirer.

[14] See, e.g. *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 2 Lloyd's Rep. 488.

[15] See below, para.45–125.

[16] See below, para.45–126.

[17] See below, para.45–133.

[18] See also below, paras 45–131, 45–132. And see above, para.42–114, as to subrogation.

[19] *Brown Shipley & Co Ltd v Amalgamated Investment (Europe) BV* [1979] 2 Lloyd's Rep. 488.

person has incurred, whether the duty to indemnify comes from an agreement or not.[20] For example, where a breach of contract gives rise to a claim for damages, that claim may include a claim to be indemnified against some loss or liability.[21] So also, on rescission of a contract for misrepresentation, the representee may be entitled to an indemnity against liabilities incurred under the contract even where there is no claim to damages.[22] In cases of this nature the claim to an indemnity arises by operation of law, not out of a contract of indemnity.[23] A person who breaks a contract or makes a misrepresentation is not agreeing to indemnify the other party against the loss he may suffer. Indemnities of this nature fall outside the scope of this chapter. But an obligation to indemnify another may also arise out of a contract of indemnity, and the term "contract of indemnity" is also used in more than one sense. In its widest sense a contract of indemnity includes all contracts of guarantee and many contracts of insurance; in its narrow sense, a contract of indemnity is used in contrast to a contract of guarantee, and it is in this narrow sense that the term is generally used in this chapter.

45–007 **Guarantees and indemnities: the significance of the distinction.** The distinction between a contract of indemnity and a contract of guarantee was originally evolved by the courts in the process of construing s.4 of the Statute of Frauds 1677 which required writing for certain classes of contracts including contracts of guarantee, and it is therefore dealt with in detail in the consideration of that section.[24] But the distinction has also come to have a more general importance throughout the law of suretyship and it is therefore necessary to explain it briefly here. Thus, apart from the fact that contracts of guarantee but not of indemnity must be evidenced by a note or memorandum in writing under the Statute of Frauds, the distinction is of importance in at least three other situations. First, the question whether a surety is liable where the main contract is void because of the principal debtor's incapacity, has been said to depend on the distinction between guarantees and indemnities,[25] and the same may also be true of other invalidating causes. Secondly, the liability of a guarantor is normally co-extensive with the liability of the principal debtor, so that if the debtor is discharged the surety will also be discharged, whereas if the contract is one of indemnity, the surety is not necessarily discharged.[26] Thirdly, certain other rules of law apply to guarantees (where only a secondary liability is undertaken) but not to indemnities (where a primary liability is undertaken), for example, the rule that any material variation of the contract between the debtor and the creditor will

[20] *Pitts v Jones* [2007] EWCA Civ 1301, [2008] 2 W.L.R. 1289 at [21]. Cf. Vol.I, paras 15–018 and 15–088—15–090 (indemnity clauses).

[21] See, e.g. *Lister v Romford Ice & Cold Storage Co Ltd* [1957] A.C. 555 (employer's right to indemnity in respect of vicarious liability arising from employee's negligence); cf. *Morris v Ford Motor Co Ltd* [1973] Q.B. 792.

[22] See Vol.I, paras 7–129—7–130.

[23] There are some cases in which it is hard to say whether the liability arises by operation of law or from an implied contract of indemnity; see, e.g. *Secretary of State v Bank of India* [1938] 2 All E.R. 797, 800.

[24] See below, paras 45–042 et seq.

[25] See below, para.45–040.

[26] See below, paras 45–086 et seq.

in principle discharge a guarantor but not a person undertaking a primary liability.[27]

45–008 **Guarantees and indemnities: the distinction itself.** The distinction between the two contracts is, in brief, that in a contract of guarantee the surety assumes a secondary liability to answer for the debtor who remains primarily liable; whereas in a contract of indemnity the surety assumes a primary liability, either alone or jointly with the principal debtor.[28] Whether a contract falls into one class or the other, and whether the normal incidents of a contract of that class are modified, are ordinary questions of construction.[29] In this respect, while the presence or absence of the language of "guarantee" in the document is not conclusive, outside the context of documents issued by banks,[30] the absence of language appropriate to provide for the creditor "the additional security of a demand bond" creates a strong presumption in favour of a merely secondary liability.[31] Moreover:

> "with the parties free to agree whatever terms they choose, there is in this field of law a spectrum of contractual possibilities ranging from the classic contract of guarantee, properly so called, at the one end, where liability of the guarantor is exclusively secondary and will be discharged if, for example, there is any material variation to the underlying contract between principal and creditor, to the performance or demand bond (or demand guarantee)[32] at the other end, where liability in the giver of the bond may be triggered by mere demand and without proof of default by the principal (and indeed where it may be apparent that the principal is not in default)."[33]

However, as has been explained, the nature of the relationship between the creditor and the surety may differ from the nature of the relationship between the debtor and the surety. It is therefore possible that even where the relationship between the surety and the creditor is that of a contract of indemnity, the debtor may still be primarily liable as between himself and the surety.[34] Thus although a contract of indemnity cannot itself *be* a contract of suretyship, the party liable under such a contract may be a surety as against the debtor and it is common and convenient to speak of him as such, even though he has assumed a primary liability towards the creditor. On the other hand, it is of course perfectly possible

[27] *Holme v Brunskill* (1877) 3 Q.B.D. 495 (on which see below, paras 45–104 et seq.); *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497.

[28] This sentence was quoted by the Court of Appeal with apparent approval in *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [20]. See also *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [23]–[25].

[29] *Moschi v Lep Air Services Ltd* [1973] A.C. 331; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595.

[30] See below, para.45–009 (performance guarantees).

[31] *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [30].

[32] On which see below, para.45–009.

[33] *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [34], per Sir William Blackburne.

[34] But the "common form" provision stating that the guarantor is liable as a principal debtor does not convert every guarantee into an indemnity: *General Produce Co v United Bank Ltd* [1979] 2 Lloyd's Rep. 255.

to have a contract of indemnity in which there is no suretyship at all, because, for example, the party liable under the indemnity has not contracted at the request of another debtor. Thus a dealer who agrees by a "recourse agreement" to indemnify a finance company against any loss under a hire-purchase transaction is not a surety either against the creditor or against the debtor. And even where, as between two debtors, one is primarily liable and the other only secondarily liable, there is not necessarily a contract of suretyship. For instance, where a tenant assigns his interest under a lease and the assignee covenants to indemnify the assignor against liability for breach of covenants in the lease, the assignee is, as between himself and the assignor, primarily liable, but there is no contract of suretyship between them.[35] And similarly, where property is sold subject to a mortgage, the mortgagor is not surety for the purchaser.[36]

45–009 **Performance guarantees.**[37] A number of cases have involved discussion of the nature of "performance guarantees" which are, in essence, exceptionally stringent contracts of indemnity.[38] They are contractual undertakings, normally granted by banks, to pay or repay, a specified sum in the event of any default in performance by the principal debtor of some other contract with a third party, the creditor. Sometimes the bank's liability arises on mere demand by the creditor, notwithstanding that it may appear on the evidence that the principal debtor is not in any way in default, or even that the creditor himself is in default under the principal contract.[39] Such guarantees are sometimes called "first demand guarantees"[40] or "demand bonds".[41] It has been held that performance guarantees of

[35] *Baynton v Morgan* (1888) 22 Q.B.D. 74 and see *Allied London Investments Ltd v Hambro Life Assurance Ltd* (1983) 269 E.G. 41; and *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 E.G. 643 and 743. On the effect of the Landlord and Tenant (Covenants) Act 1995 on tenant's covenants on assignment see below, paras 45–015—45–017.

[36] *Re Errington* [1894] 1 Q.B. 11.

[37] See further above, paras 37–126 et seq.

[38] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146; *Howe Richardson Scale Co Ltd v Polimex-Cekop* [1978] 1 Lloyd's Rep. 161; *Bolivinter Oil SA v Chase Manhattan Bank NA* [1984] 1 W.L.R. 392; *Attaleia Marine Co Ltd v Bimeh Iran (Iran Insurance Co) (The Zeus)* [1993] 2 Lloyd's Rep. 497. cf. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1996] 1 A.C. 199; *Frans Maas (UK) Ltd v Habib Bank AG Zurich* [2001] Lloyd's Rep. Bank 14; *Solo Industries UK Ltd v Canara Bank* [2001] EWCA Civ 1059, [2001] 1 W.L.R. 1800; *Banque Saudi Fransi v Lear Siegler Services Inc* [2005] EWHC 2395, [2006] 1 Lloyd's Rep. 273; *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986.

[39] See cases cited in previous note; cf. *General Surety & Guarantee Co Ltd v Francis Parker Ltd* (1977) 6 Build. L.R. 16. This does not mean, though, that a bank must always pay when asked: "a Bank is not obliged to accept without investigation a demand which is ambiguous, or potentially misleading": *Frans Maas (UK) Ltd v Habib Bank AG Zurich*, above, at [27].

[40] See further on the nature and variety of such guarantees, *Benjamin's Sale of Goods*, 9th edn (2014), Ch.24 especially at paras 24–003—24–006, contrasting "orthodox guarantees" and "autonomous guarantees". *Benjamin's Sale of Goods*, paras 24–007—24–008 explains the various international uniform rules which may be incorporated into an "autonomous guarantee", notably the I.C.C. Uniform Rules on Demand Guarantees (URDG 458) whose revised version URDG 758 applies, subject to contrary intention, to any guarantee incorporating the URDG issued on or after July 1, 2010. For an example of the application of the URDG 458 see *Meritz Fire & Marine Insurance Co Ltd v Jan de Nul NV* [2011] EWCA Civ 827, [2011] 2 Lloyd's Rep. 379.

[41] *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [30].

this nature are analogous to a bank's letter of credit, and that the bank's liability is of a primary nature which is unaffected by allegations that the creditor is in breach of the main contract between him and the principal debtor.[42] The question whether a particular instrument (such as a "refund guarantee") takes the form of an independent performance bond (or stand-by letter of credit) or a true "see to it" guarantee is one of construction of the instrument in its factual and contractual context having regard to its commercial purpose.[43] While there may be a number of indications in an instrument which argue in favour of it being a "true guarantee" or, conversely, an "on-demand bond",

> "[w]here an instrument (i) relates to an underlying transaction between the parties in different jurisdictions, (ii) is issued by a bank, (iii) contains an undertaking to pay 'on demand' (with or without the words 'first' and/or 'written') and (iv) does not contain clauses excluding or limiting the defences available to a guarantor, it will almost always be construed as a demand guarantee."[44]

On the other hand, there is a "strong presumption" that a "guarantee" concluded other than by a bank is not a demand or independent performance bond,[45] although this presumption may be rebutted.[46] In the event of fraud the court may be able to intervene to protect the surety; but the court has refused to imply a term to the effect that the beneficiary of such a guarantee will give notice of a claim only if there is reasonable cause.[47] Clear evidence is needed that the beneficiary's demand is fraudulent to the knowledge of the bank if the bank is to be restrained from paying under such a guarantee or bond, but this does not mean that all possible explanations other than fraud must be totally ruled out. It means that fraud must be the "only realistic inference".[48]

[42] See cases cited in n.38 above. As to bankers' letters of credit, see above, paras 34–445 et seq.

[43] *Gold Coast Ltd v Caja de Ahorros del Mediterraneo* [2002] 1 Lloyd's Rep. 617, 620; *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [28].

[44] *Paget's Law of Banking*, 11th edn (1996), quoted with approval by the Court of Appeal in *Caja de Ahorros v Gold Coast Ltd* [2002] 1 Lloyd's Rep. 617 at [16]; *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986 at [26]–[27]; *Caja de Ahorros v Gold Coast Ltd* [2001] EWCA Civ 1806, [2002] 1 Lloyd's Rep. 617 at [16]. The passage quoted appears in almost identical words in *Paget's Law of Banking*, 14th edn (2014), para.34.8.

[45] *Marubeni Hong Kong and South China Ltd v The Mongolian Government* [2005] EWCA Civ 395, [2005] 1 W.L.R. 2497 at [30]; *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542, [2008] 2 Lloyd's Rep. 187 at [8].

[46] *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542, [2008] EWCA Civ 542 at [33], per Waller L.J. (with whom Lawrence Collins and Rimer L.JJ. agreed). cf. *Carey Value Added SL v Grupo Urvasco SA* [2010] EWHC 1905 (Comm), [2011] 2 All E.R. (Comm) 140 at [38]–[43]; *Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd* [2010] EWHC 2443 (Ch), [2010] All E.R. (D) 86 (Oct) at [53]; *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230, [2011] 2 Lloyd's Rep. 45 at [46]–[47].

[47] *State Trading Corp of India Ltd v ED & F Man (Sugar) Ltd* [1981] Com. L.R. 235.

[48] *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep. 554; *TTI Team Telecom International Ltd v Hutchison 3G UK Ltd* [2003] EWHC 762, [2003] 1 All E.R. (Comm) 914 at [29] et seq.; *Korea Industry Co v Andoll* [1990] 2 Lloyd's Rep. 183 CA Sing. cf. *Themehelp Ltd v West* [1995] 3 W.L.R. 751 which concerned a claim by the principal debtor for an injunction to restrain the beneficiary of the bond from serving notice under the guarantee.

45–010 **Performance guarantees: counter-guarantee or indemnity.** The bank or other financial institution which grants a performance guarantee will, of course, demand a counter-guarantee or indemnity from the customer at whose request the guarantee is granted.[49] As the customer will be liable to reimburse the bank on their payment under the guarantee, and as he will be unable to prevent the bank from paying (except in cases of fraud) when demand is made on the bank, his position is clearly perilous: "these performance guarantees are virtually promissory notes payable on demand".[50] Such a counter-indemnity by a customer in favour of a guaranteeing bank takes effect according to its terms. For example, where the customer agrees to indemnify the bank in respect of claims made "under or *in connection with* the issue of the guarantee" and the guarantee obligations are expressed not to be "in any way discharged or diminished" by the guarantee's total or partial invalidity, then the bank may claim on the indemnity in respect of payments made by it under or in connection with the guarantee even if the latter was at no time legally valid.[51] Of course, the party at whose request a performance guarantee is issued, may have his remedy on the contract in the event of his being wrongfully called upon to pay, as the result of his bank's being similarly called upon. But where the other contracting party is abroad, and the contract is governed by the law of a foreign country, this remedy may in practice be of small value.

45–011 **Performance guarantees: injunction to restrain creditor.** It may, however, be somewhat easier to obtain an injunction to restrain the creditor himself from receiving payment from the bank, particularly where an interim remedy is being sought; but even in this sort of procedure, it has been held that an interim remedy should not normally be given unless the validity of the bond or guarantee is itself being challenged, or unless the circumstances are such that they would justify the grant of a freezing injunction.[52]

45–012 **Performance guarantees: implied term for repayment.** In *Cargill International SA v Bangladesh Sugar and Food Industries Corp*[53] the Court of Appeal held that a party to a contract who has paid money under a performance bond to the other party may recover it, provided that the latter has suffered no damage in consequence of the first party's breach. According to Potter L.J., in view of the very considerable commercial advantages which a performance bond gives to its beneficiary, "the obligation to account later to the seller, in respect of what turns out to be an overpayment, is a necessary corrective if a balance of commercial fairness is to be maintained between the parties".[54] Furthermore, the court

[49] cf. *Wahda Bank v Arab Bank Plc* [1996] 1 Lloyd's Rep. 470 in which the Court of Appeal held that such a counter-guarantee was intimately connected with such a performance bond with the result that, in the absence of any express choice, it felt entitled to find that the parties intended the counter-guarantee to be governed by the same law as governed the guarantees.

[50] *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] Q.B. 159 at 170, per Lord Denning M.R.

[51] *Gulf Bank KSC v Mitsubishi Heavy Industries (No.2)* [1994] 2 Lloyd's Rep. 145.

[52] *Bolivinter Oil SA v Chase Manhattan Bank SA* [1984] 1 W.L.R. 392; *Potton Homes Ltd v Coleman (Contractors) Overseas Ltd* (1984) 28 Build. L.R. 19.

[53] [1998] 1 W.L.R. 461 applied by *Tradigrain SA v State Trading Corp of India* [2005] EWHC 2206 (Comm), [2006] 1 Lloyd's Rep. 216.

[54] [1998] 1 W.L.R. 461 at 469.

construed a clause of the contract between the parties which referred to the bond being "forfeited" as referring to the bond (i.e. the exercise of party's right to call on the bond as against the bank), not to the moneys paid under the bond, a result which, according to the learned Lord Justice, "accords more with reason, fairness and commercial good sense" as to exclude the obligation to account "would be to provide the defendant with a substantial windfall in any case where it had suffered no loss or relatively nominal loss, and would run counter to the general proposition that compensation for breach of contract depends on proof of loss".[55] On the other hand, in *Uzinterimpex JSC v Standard Bank Plc*[56] a demand guarantee was given by a seller's bank to a buyer's bank (which financed the transaction) in respect of advance payments of the purchase price of goods not delivered. In these circumstances, the Court of Appeal refused to imply a term that, if any demand made under it should exceed the loss sustained by the buyer of goods or the buyer's bank, or should otherwise be excessive, the buyer's bank would repay the excess to the seller's bank/guarantor on the basis that if such a term were not implied, the buyer's bank would obtain a windfall.[57] According to Moore-Bick L.J.,

> "The guarantee stands as an independent contract between [the seller's bank] and the [buyer's bank] and is capable of operating effectively without the need for such a term. If a demand under the guarantee resulted in the wrongful refund of part of the price due to the seller, the seller would have a remedy against [the buyer] under the contract of sale. . . . That provides the answer to the 'windfall' argument, despite the fact that in this case the remedy may be of little practical value because [the buyer] is insolvent."[58]

Moreover, in the learned Lord Justice's view, there are:

> " . . . other, and perhaps even stronger, reasons why [the argument for an implied term] must be rejected. It is essential to the maintenance of international commerce, much of which is supported by undertakings of this kind given by banks and other financial institutions, that the documents by which those undertakings are given should operate in accordance with the terms which appear on their face . . . [Banks] cannot be expected to be aware of, or to implement, terms that do not appear on the face of the documents. The implied term for which [the seller's bank] contends would have the potential effect of imposing on [the buyer's bank] a liability which could not be identified from the face of the document and which would be very uncertain in its effect."[59]

And in *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA*[60] the Court of Appeal rejected an analogous claim by a bank based on constructive trust. There the bank had paid under an on-demand performance guarantee in respect of a buyer's obligations to a seller, but it was later established by arbitration that the sums paid had not fallen due by the buyer. According to

[55] [1998] 1 W.L.R. 461 at 469.

[56] [2008] EWCA Civ 819, [2008] Bus. L.R. 1762.

[57] [2008] EWCA Civ 819 at [19].

[58] [2008] EWCA Civ 819 at [20], per Moore-Bick L.J.

[59] [2008] EWCA Civ 819 at [23], per Moore-Bick L.J.

[60] [2013] EWCA Civ 1679, [2014] 1 Lloyd's Rep. 273. cf. *Wuhan Guoyu Logistics Group Co Ltd v Emporiki Bank of Greece SA* [2012] EWCA Civ 1629, [2012] 2 C.L.C. 986 (where the Court of Appeal decided that the instrument was an on-demand performance guarantee); above, para.45–009.