**1-059** **Classification for private international law** The rules governing applicable law distinguish between different types of contract classified according to their subject matter. In particular, in the absence of choice of applicable law by the parties, the (retained EU law) Rome I Regulation art.4 provides rules governing the law applicable to a series of types of contract including contracts for the sale of goods, contracts for the provision of services, contracts "relating to a right in rem in immovable property or to a tenancy of immovable property," franchise contracts and distribution contracts.[355] Other articles in the Regulation designate the law applicable to contracts of carriage, insurance contracts and individual employment contracts.[356] The classifications for these purposes are likely to require autonomous meanings in the sense of ones special to the European private international law context.[357]

**1-060** **Commercial practice** Other types of contract arise from commercial practice rather than from the regulation of either statute or common law, though the practical homogeneity on which they are based easily attracts particular treatment by the courts. Very clear examples of this can be found in an area like the building industry, in which the industry offers standard forms for the conclusion of the many contracts which modern construction requires.[358] Moreover, new types of contracts in this sense are constantly arising, for example, for the supply and maintenance of information technology.[359]

### *(ii) Relationship Between Classifications of Contracts According to their Subject Matter*

**1-061** **Introduction** As was earlier seen, a particular contract may be classified by the law as a matter of the nature or role of its contracting parties, its means of conclusion and according to its subject matter as in the case of a contract being a "consumer contract" for the supply of goods which is concluded by electronic means.[360] However, the question whether two or more legal classifications all of which relate to its subject matter can apply to an individual contract is more difficult and depends, in particular, on whether the classifications are incompatible or whether instead they are permitted to overlap in the case of a particular individual contract.

**1-062** **Legal classifications and sui generis contracts** Sometimes the key legal question is simply whether an individual contract before a court falls within a particular classification or falls outside it as being a contract without any specific classification for legal purposes, a sui generis innominate contract. A striking example of this may be found in the decision of the Supreme Court in the *Res Cogitans* where it was held that a contract for the supply of fuel bunkers which contained a retention of title clause and permitted the purchasing vessel owners to consumer the bunkers

355 See below, paras 33-101—33-110.
356 Rome I Regulation arts 5, 7 and 8 respectively on which see below, paras 33-128—33-149, 33-173—33-200, 33-201—33-218 respectively.
357 See below, para.33-024.
358 These are known as "RIBA/JCT standard forms": see Vol.II, paras 39-022 et seq.
359 See Morgan and Burden, *Morgan and Burden on IT Contracts*, 10th edn (2021).
360 Above, paras 1-048 and 1-053.





during the credit period, was not a contract for the sale of goods within the meaning of the Sale of Goods Act 1979, being instead a "sui generis supply contract".[361]

**1-063** **Incompatible categories** Sometimes two legal classifications of an individual contract before a court may be competing in the sense that that individual contract may be classified as either as one type or the other, but not as both as they are seen as incompatible. A classic example of this type is the distinction between contracts of guarantee (where the surety assumes only a secondary liability in respect of the debt of another person who is primarily liable) and contracts of indemnity (where the surety assumes a primary liability), a distinction first worked out in the context of the formal requirements of the Statute of Frauds but relevant for a number of other purposes.[362] Other examples of this kind may be found in relation to the law governing contracts for the sale of goods in the Sale of Goods Act 1979, where contracts for this type of contract are to be distinguished from contracts of exchange or barter, contracts for work or materials, and hire-purchase contracts.[363]

**1-064** **Distinct but overlapping categories** On the other hand, sometimes the law may permit the same individual contract to be classified by reference to more than one type of subject matter as long as the *content* of the contract so allows. A very clear example of this is the treatment of contracts under which goods are to be transferred and services are to be provided.[364] In the case of non-consumer contracts, the Supply of Goods and Services Act 1982 Pt 1 governs "relevant contracts for the transfer of goods" and "relevant contracts of hire of goods", while Pt 2 governs "relevant contracts for the supply of a service". For this purpose, s.1(1) defines a "relevant contract for the transfer of goods" both positively and negatively, providing that a:

> "... contract under which one person transfers or agrees to transfer to another the property in goods, other than an excepted contract, and other than a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies."

The excepted contracts are then listed, these including a contract of sale of goods, a hire-purchase agreement, and a contract intended to operate by way of mortgage, pledge, charge or other security[365]: these classifications are therefore deemed incompatible with the contract being "for the transfer of goods". Section 1(3) of the 1982 Act continues:

> "For the purposes of this Act ... a contract is a relevant contract for the transfer of goods whether or not services are also provided or to be provided under the contract..."

Similar provision is made for contracts for the hire of goods.[366] Pt 2 governing contracts for services makes complementary provision by stating that:

361 *PST Energy 7 Shipping LLC v OW Bunker Malta (The Res Cogitans)* [2016] UKSC 23; [2016] 2 W.L.R. 1193; see Vol.II, para.46-020 (note) and *Benjamin's Sale of Goods*, 11th edn (2021) para.1-030.
362 Vol.II, paras 47-043 et seq. and esp. para.47-045.
363 See Vol.II, paras 46-025—46-027.
364 cf. the question whether a contract of sale or for services which contains elements of insurance is to be regarded as a contract of insurance, this being said to depend on whether, "taking the contract as a whole, it can be said to have as its principal object the provision of insurance": *MacGillivray on Insurance*, 14th edn (2020) para.1-008.
365 Supply of Goods and Services Act 1982 s.1(2) (as amended).
366 1982 Act s.6(3).



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operator's licence) so as to qualify the driver as a "worker" for the purposes of protective legislation (including governing the national minimum wage and paid annual leave) or whether they were instead independent contractors performing services only for their own customers (the passengers).[391] In the Supreme Court's view where, as here, legislation protected a particular class of contractor, the proper starting point for answering this question should *not* be the terms of any contract between them as the question was one of interpretation of the legislation rather than interpretation of the contract,[392] and the legislation should be interpreted purposively[393] so as to prevent a party such as Uber having the "power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers".[394] The fact, therefore, that the contractual structure in which the relationship between Uber and the drivers was placed by Uber sought to characterise it as an "agency" (Uber acting on behalf of the driver in finding and charging customers) and/or the provision of an electronic service by Uber (including providing the "app" by which the ride was booked) did not prevent the relationship in fact involving the performance of work by the driver for Uber.[395] In the context of protective legislation, therefore, in the view of the Supreme Court, the court's approach should go beyond the narrow approach to "sham" transactions adopted by Diplock LJ in *Snook v London and West Riding Investments Ltd*.[396]

### (e) Classification of Contracts According to their Effect

**1-072** **Introduction** Contracts are sometimes classified according to their effect and so distinctions can be drawn between unilateral and bilateral contracts and valid, void, voidable and unenforceable contracts. The last three terms denote varying degrees of imperfection and are in constant use in the law of contract.

**1-073** **Unilateral and bilateral contracts** Contracts may be either unilateral or bilateral.[397] By a unilateral contract is meant a contract under which only one party undertakes an obligation.[398] Bilateral (or synallagmatic) contracts, on the other hand, are those under which both parties undertake obligations. It is to be noted, though, that the unilateral nature of the contract does not (in the ordinary case) mean that there is only one party, nor that there is no need for an acceptance or the provision

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[391] [2021] UKSC 5 at [42] and see [34]–[38], referring to the definition of "worker" in the Employment Rights Act 1996 s.230(3).

[392] [2021] UKSC 5 at [68]–[69], referring to *Autoclenz Ltd v Belcher* [2011] UKSC 41, (2011) I.C.R. 1157 where Lord Clarke had held that in the context of legislation designed to protect employees and other workers, the "ordinary principles of contract law" such as the parol evidence rule, the signature rule governing notice and the principles that govern rectification of contractual documents on the grounds of mistake should not apply: see also [2021] UKSC 5 at [76].

[393] [2021] UKSC 5 at [70]–[71].

[394] [2021] UKSC 5 at [77].

[395] [2021] UKSC 5 at [93]–[101], [119].

[396] *Autoclenz Ltd v Belcher* [2011] UKSC 41 at [28]; *Uber BV v Aslam* [2021] UKSC 5 at [62]. On Diplock LJ's approach, see above, para.1-069.

[397] *Restatement of Contracts* (1932), para.12. The *Restatement of Contracts*, 2nd edn (1981), para.45 abandons this distinction and substitutes for unilateral contracts "option contracts".

[398] See *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd* [1975] A.C. 154, 167–168, 171, 177. Quaere whether the engagement of an estate agent is a unilateral contract: *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 124; Murdoch (1975) 91 L.Q.R. 357; McConnell (1983) 265 E.G. 547.





of consideration by the other party.[399] An example of a unilateral contract may be found in the case of an offer for a reward for the return of lost property: here, a contract is formed (at the latest) on the return of the property, this constituting the offeree's acceptance of the offer and the furnishing of consideration for the creation of the contract.[400] Bilateral contracts comprise the exchange of a promise for a promise, e.g. if you promise to pay me £1,000, I promise to sell you my car.

**1-074** **Void contracts** A void contract is strictly a contradiction in terms, because if a contract is truly void it is not a contract at all; but the term is a useful one and well understood by lawyers. Properly speaking, a void contract should produce no legal effects whatsoever. Neither party should be able to sue the other on the contract. If goods have been delivered, they or their value should be recoverable by an action in tort, because the property will not pass. If money has been paid, it should be recoverable by an action in restitution, because the money was not due. In one situation, i.e. where a contract is void for mistake, these consequences would appear to follow from the fact that the contract is void.[401] But it is by no means true that all contracts termed "void" by the law necessarily produce this effect.

**1-075** **"Void" contract may have effects** For example, where A and B paid money to C under an agreement under which C was empowered to pay some of the money to B, the court did not at A's request restrain C from so doing, even though the agreement was held illegal and void as an unreasonable restraint of trade.[402] Other difficult questions arise in relation to the relative positions of the parties to a contract for the sale or other disposition of an interest in land which is a nullity as a result of not having been made in writing as is required by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.[403]

**1-076** **Voidable contracts** A voidable contract is one where one or more of its parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract to extinguish the power of avoidance.[404] In English law, contracts may be voidable, e.g. for misrepresentation,[405] duress,[406] undue influence,[407] minority,[408] lack of mental capacity,[409] drunken-

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[399] See *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256. In certain situations, a contract under which only one party undertakes an obligation may be truly one-sided, in that the other party may be dispensed from the need to provide consideration. Thus, an agreement contained in a deed under which A covenants to pay B a sum of money may be considered a unilateral contract as only A undertakes an obligation (see below, para.1-104).

[400] For an unusual example of a unilateral contract see *Rollerteam Ltd v Riley* [2016] EWCA Civ 1291, [2017] Ch. 109 esp. at [45], where the description in the text of unilateral contracts was cited with approval and see on this case below, para.7-020. On the issue of when such a contract is formed see below, paras 4-102 et seq.

[401] See below, paras 5-036 et seq. and 8-008 but cf. paras 5-029 et seq.

[402] *Boddington v Lawton* [1994] I.C.R. 478. For the modern law of illegality recast by the important decision of the SC in *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, see below, paras 18-025 et seq.

[403] See below, paras 7-047 et seq.

[404] See *Restatement of Contracts*, 2nd edn, para.7.

[405] See below, Ch.9. See also the consumer's "right to unwind" a contract made with a trader if the trader engages in a "misleading action" under the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) Pt 4A as amended by Consumer Protection (Amendment) Regulations 2014 (SI 2014/870): see Vol.II, paras 40-181 et seq. esp. at 40-190, 40-205—40-206.

[406] See below, paras 10-001—10-071. See also the consumer's "right to unwind" a contract made with



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an instrument binding on him is enough. He must make it his deed[478] and recognise it as presently binding on him.[479]

> "The critical thing is that the person who has signed the deed must have separately indicated that he intends to be bound by the deed. Mere signature is not enough. Nor is it enough that what looks like a deed has been given to the person who appears to be the beneficiary of it—the issue is not whether the document has been physically handed over to the beneficiary, but whether the person whose deed it is supposed to be intended to be bound by it."[480]

Delivery is effective even though the grantor retains the deed in his own possession. There need be no actual transfer of possession to the other party:

> "... the efficacy of a deed depends on its being sealed[481] and delivered by the maker of it, not on his ceasing to retain possession of it."[482]

Where a solicitor or licensed conveyancer in the course of a transaction involving the disposition or creation of an interest in land, purports to deliver an instrument as a deed on behalf of a party to the instrument, it shall be conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument.[483]

1-089 **Delivery and corporate bodies** In *Bolton Metropolitan BC v Torkington*[484] the Court of Appeal held that while s.74(1) of the Law of Property Act 1925 deemed a deed "duly executed" where a corporation's seal is affixed in the presence of and attested by its designated officers, it created no presumption as to its delivery.[485] Moreover, while strictly obiter, Peter Gibson LJ expressed the view that at common law:

> "... to describe the sealing by a corporation as giving rise to a rebuttable presumption may go too far, implying, as that does, that the burden is on the corporation affixing the seal."[486]

As a result, where, as on the facts before the court, negotiations were undertaken

[478] *Tupper v Foulkes* (1861) 9 C.B.(N.S.) 797; *Xenos v Wickham* (1867) L.R. 2 H.L. 296, 312; *Re Seymour* [1913] 1 Ch. 475.
[479] *Xenos v Wickham* (1867) L.R. 2 H.L. 296.
[480] *Bibby Financial Services Ltd v Magson* [2011] EWHC 2495 (QB) at [335], per Judge Richard Seymour QC.
[481] But see above, para.1-081.
[482] *Xenos v Wickham* (1867) L.R. 2 H.L. 296, per Lord Cranworth at 323; cf. per Pigott B. at 309; *Doe d. Garnons v Knight* (1826) 5 B. & C. 671; *Macedo v Stroud* [1922] 2 A.C. 330; *Beesly v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, affirmed [1961] Ch. 105; *Vincent v Premo Enterprises Ltd* [1969] 2 Q.B. 609.
[483] Law of Property (Miscellaneous Provisions) Act 1989 s.1(5). In *Bank of Scotland Plc v King* [2007] EWHC 2747 (Ch), [2007] All E.R. (D) 376 (Nov) at [66] it was held that s.1(5) does not apply where a solicitor or licensed conveyancer transfers a deed in escrow as they would not have "purport[ed] to deliver an instrument as a deed on behalf of a party to the instrument". For deeds in escrow see below, para.1-101. The definition of the persons to whom this provision applies changed on the bringing into force on 1 January 2010 of the Legal Services Act 2007 s.208(1), Sch.21 para.81(a) to "a relevant lawyer, or an agent or employee of a relevant lawyer"; s.1(6) of the 1989 Act (as amended) providing that "'relevant lawyer' means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes a reserved instrument activity (within the meaning of that Act)".
[484] [2003] EWCA Civ 1634, [2004] Ch. 66. The decision concerned the effect of s.74(1) as in force before its amendment by the 2005 Order, on which see below, para.1-095.
[485] [2003] EWCA Civ 1634 at [22], [45].
[486] [2003] EWCA Civ 1634 at [46].





towards a lease expressly subject to contract, a court should not infer an intention to be bound from the mere sealing of a deed of execution of a lease.[487] On the other hand, in the case of a company incorporated under the Companies Act 1985, where a document makes it clear on its face that:

> "... [I]t is intended by the person or persons making it to be a deed ... it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed."[488]

### (ii) *Instruments Executed on or after 15 September 2005*

1-090 **"Instruments executed"** The 2005 Order[489] refers to "instruments executed" and this raises the question as to how the changes it introduced apply in relation to the making of deeds.[490] It could be thought that a deed (the "instrument") is "executed" only after its delivery, and not merely after the making of the document, as only on delivery is the deed a valid instrument. However, the 2005 Order (following the Law Commission's recommendation[491]) distinguishes clearly between the formal requirements required for the execution of an instrument (or document) and the further requirement of delivery for the execution of an instrument *as a deed*[492] and this argues that the changes introduced by the Order apply only to *documents executed* on or after 15 September 2005, and not also to documents executed as deeds on or before 14 September 2005, but delivered as deeds only after this date. This interpretation also has the practical advantage of not applying the changes contained in the Order retrospectively.

1-091 **The new general requirements for deeds after the 2005 Order** Under s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 (as amended by the 2005 Order[493]), an instrument shall not be a deed unless:

> "(a) it makes clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed to be signed as a deed or otherwise); and
> (b) it is validly executed as a deed—
> (i) by that person or a person authorised to execute it in the name or on behalf of that person; or
> (ii) by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties."

These requirements apply to instruments executed by an individual, by a company incorporated under the Companies Act 1985, by a corporation aggregate or by a corporate sole.[494] However, even after the reforms of 2005, the significance and impact of these provisions differ somewhat according to these different categories

[487] [2003] EWCA Civ 1634 at [53].
[488] Companies Act 1985 s.36A(5) as inserted by the Companies Act 1989 s.130(2). On the new law, see below, para.1-095.
[489] Regulatory Reform (Execution of Deeds and Documents) Order 2005 (SI 2005/1906).
[490] cf. the discussion in Law Com. No.253, paras 3.6–3.12 as to the confusion over whether the term "executed" in the Companies Act 1985 s.36A (as amended in 1989), the Law of Property Act 1925 s.74 and the Law of Property (Miscellaneous Provisions) Act 1989 s.1 included "delivery".
[491] Law Com. No.253, para.3.12.
[492] See notably, the 2005 Order arts 4, 6 and below, paras 1-094—1-095.
[493] 2005 Order art.7(3).
[494] In the case of instruments executed by charities incorporated under statute, the formal requirements contained in the Charities Act 1993 s.60 remain applicable to instruments executed between



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*International Bank Ltd v Standard Bank London Ltd*,[418] but distinguished the contractual terms with which these cases dealt and the relevant terms before the court:

> "… [a]n important feature of the … authorities is that in each case the discretion does not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so."[419]

In the contract before the Court of Appeal, an NHS Trust had agreed to employ the respondent to supply catering and cleaning services for seven years for one of its hospitals. Under the contract, the Trust was entitled to award "service failure points" in respect of failures in the provision of the services, the contract specifying both how these points should be calculated and their consequences for the contractor in terms of deductions from its remuneration and possible termination of the contract. This being the case, the Court of Appeal held that the contract left no room for discretion in the calculation of the "service failure points" nor in their deduction from the remuneration and, as a result, there could be no implied term not to act in relation to this calculation or deduction in an arbitrary, irrational or capricious manner when assessing these matters.[420] As Lewison LJ observed, while "it was up to the Trust to decide whether or not to levy payment deductions; and whether or not to award [service failure points]", in doing so "[e]ither the Trust was right or wrong in its application of the contract terms to the facts of the case".[421] In these circumstances, the Trust had no discretion to exercise in these matters.[422]

2-070 **Braganza v BP Shipping Ltd** In *Braganza v BP Shipping Ltd* an employer had a power under the contract of employment to determine the facts surrounding the death of its employee while serving on its vessel at sea; the employer had decided that he had committed suicide, with the result that no death-in-service payments were payable to his widow under the contract.[423] The Supreme Court was agreed on the principles applicable. According to Lady Hale:

> "Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties' bargain for them, still less to substitute themselves for

[418] [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep. 558, above, para.2-068. See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The "Product Star")* [1993] 1 Lloyd's Rep. 397 esp. at 404; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [66]; *JML Direct Ltd v Freesat UK Ltd* [2010] EWCA Civ 34 at [14].

[419] [2013] EWCA Civ 200 at [83].

[420] [2013] EWCA Civ 200 at [84]–[92].

[421] [2013] EWCA Civ 200 at [138].

[422] [2013] EWCA Civ 200 at [138]–[139]; applied in *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm) at [261]–[275], [2017] 1 All E.R. (Comm) 1009 (contractual right to terminate a contract not a discretion and may be exercised irrespective of the party's reasons for doing so) (affirmed on other grounds [2018] EWCA Civ 25); *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm) at [52]–[60]; Foxton (2017) L.M.C.L.Q. 360.

[423] [2015] UKSC 17, [2015] 1 W.L.R. 1661.



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> the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."[424]

In this respect, the Supreme Court approved Rix LJ's view of the authorities in *Socimer International Bank Ltd*[425] and accepted the parallel earlier drawn with the control of decision-making by public bodies under a statutory or prerogative power,[426] while noting the "understandable reluctance" of the courts to adopt the "fully developed rigour of the principles of judicial review of administrative action in a contractual context" and their difficulty in articulating the difference.[427] In the particular context the Supreme Court held that the contractual power in the employer to decide the facts surrounding the employee's death was subject to an implied term that:

> "… the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose."[428]

This meant that "both limbs of the *Wednesbury* formulation in the rationality test" applied, i.e. imposing requirements both as to the decision-making process (considerations properly to be taken into account and ones not to be taken into account)[429] and as to the outcome (the result not being "so outrageous that no reasonable decision-maker could have reached it").[430] In the case before them, the majority of the Supreme Court held that the employer should not simply have accepted the conclusion of its investigators' report (whose purpose was to determine if its systems could be improved) in deciding whether its employee had committed suicide, and had relied on insubstantial evidence and had failed to take all relevant matters into account.[431] As a result, the decision of the employer could not stand and the employee's widow was entitled to the death-in-service payment.

**Contractual discretions and "absolute contractual rights"** In some cases it 2-071

[424] [2015] UKSC 17 at [18] with whom Lord Kerr agreed generally. Lords Wilson, Hodge and Neuberger agreed with Lady Hale in this respect: [2015] UKSC 17 at [52]–[53], [102]–[103].

[425] *Socimer International Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116 at [60]–[66], above, para.2-068, and see [2015] UKSC 17 at [22] and [102].

[426] [2015] UKSC 17 at [19].

[427] [2015] UKSC 17 at [20] per Lady Hale and see also at [28], [53] (Lord Hodge) and [103] (Lord Neuberger). It was considered unnecessary to conclude finally on the precise extent to which an implied contractual term may differ from the principles applicable to judicial review of administrative action: [2015] UKSC 17 at [31] (Lady Hale).

[428] [2015] UKSC 17 at [30]. Lady Hale and Lord Kerr considered that the fact that contracts of employment contain an implied obligation of trust and confidence is relevant for this purpose: [2015] UKSC 17 at [32]; Lord Hodge agreed (at [61]), though he did not rely on this as it had not been argued and cf. at [54]–[55]. cf. Lord Neuberger considered that such an implied term did not add anything once the implied term based on *Wednesbury* rationality had been accepted: [2015] UKSC 17 at [104].

[429] [2015] UKSC 17 at [30] and cf. at [24]; similarly at [53] (Lord Hodge) [103] (Lord Neuberger).

[430] [2015] UKSC 17 at [24]. cf. *Patural v DB Services (UK) Ltd* [2015] EWHC 3659 (QB), [2016] I.R.L.R. 286 at [61].

[431] [2015] UKSC 17 at [38]–[42] (Lady Hale and Lord Kerr); [49]–[50], [58]–[59], [62] (Lord Hodge). In this respect, Lords Neuberger and Wilson dissented, considering that the employer was justified

choose whether to put his claim in terms of contract or of tort, it would appear instead that the Court of Justice of the EU would regard the claim as "relating to a contract" for this purpose and so outside the scope of the jurisdictional rule for tort.[442] Moreover, the classification of a claim as contractual or tortious for these purposes is in principle a matter for EU law as these concepts should have an "autonomous" interpretation.[443] This view of the position was taken by the Court of Appeal in *Source Ltd v TUV Rheinland Holding AG*.[444] In that case, the plaintiffs claimed that the English courts had jurisdiction to hear their claim in tortious negligence against the defendants, a claim which arose out of and was concurrent with a claim against them for breach of their contractual obligation to exercise reasonable care and skill in presenting a report following the inspection of goods which they (the plaintiffs) had wished to import from China and Taiwan. The Court of Appeal noticed that the European Court of Justice in *Kalfelis v Schröder*,[445] had held that the phrase "matters relating to tort" in art.5(3) of the Brussels Convention (a predecessor to the Brussels Ibis Regulation art.7(2)) refers to:

> "… all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)."[446]

For Staughton LJ, with whom Waite and Aldous LJJ agreed, this means that a claim which may be brought under a contract or independently of a contract on the same facts, save that a contract does not need to be established, is excluded from art.5(3) by the European Court's words "which are not related to a 'contract' within the meaning of Art.5(1)".[447] In the result, therefore, both the contractual and tortious claims of the plaintiffs "related to a contract" and they could not by relying on art.5(3) bring the tortious claim before the English courts.[448] In a series of later cases, the Court of Justice of the EU confirmed its approach to the relationship of

on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels I Regulation") arts 5(1) and 5(3), which itself replaced the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. For the law under the Brussels I Regulation see *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (updated to 2017), Ch.11. On the effect of the UK's leaving the EU on the Brussels I Regulation, see above, para.1-024.

[442] *Kalfelis v Schröder* (189/87) [1988] E.C.R. 5565, 5577 (AG Darmon), 5585 and see *Dicey, Morris and Collins on the Conflict of Laws*, 14th edn (2006), paras 11-284, 11-299.

[443] *Netherlands State v Rüffer* (814/79) EU:C:1980:291, [1980] E.C.R. 3807, 3832–3833, 3836; *Kalfelis v Schröder* (189/87) EU:C:1988:459, [1998] E.C.R. 5565; *Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS)* (C-26/91) EU:C:1992:268 [1993] I.L.Pr. 5; *eDate Advertising and Martinez* (C-161/10) EU:C:2011:685, 25 October 2011 at para.38; *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) EU:C:2013:490, 18 July 2013 at para.27 and see *Dicey and Morris and Collins*, 15th edn (updated to 2017), paras 11-268—11-272, 11-285.

[444] [1998] Q.B. 54.

[445] *Kalfelis v Schröder* (189/87) EU:C:1988:459, [1988] E.C.R. 5565. The equivalent provision of art.5(1) in the Brussels Convention is art.7(1) of the Brussels Ibis Regulation.

[446] [1988] E.C.R. 5565 at [5585] and see *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) EU:C:2013:490, 18 July 2013 at para.32.

[447] [1998] Q.B. 54, 63.

[448] The decision of the Court of Appeal in *Source Ltd v TUV Rheinland Holding AG* [1998] Q.B. 54 is held to represent the law by *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (updated to 2017), para.11-285, but its authority was doubted by Tuckey J in *Raiffeisen Zentralbank Osterreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep. 408, 411 on the basis that its wide approach to art.5(1) is inconsistent with the restrictive approach taken by the HL in *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 A.C. 153. See also *Domicrest Ltd v Swiss Bank Corp* [1999] Q.B. 548, 561; *William Grant & Sons International Ltd v Marie Brizard Espana Sa* [1998] S.C. 536.





the contract and tort provisions in the Brussels Regulation taken in *Kalfelis v Schröder* in relation to the Brussels Convention[449] and has therefore made clear that the question whether a particular claim falls within "matters relating to contract" or "matters relating to tort, delict or quasi-delict" must be judged by reference to autonomous EU law understandings of these concepts; and that for this purpose the latter concept:

> "… covers all actions which seek to establish the liability of the defendant and do not concern 'matters relating to a contract' within the meaning of Article 5(1)(a)"

of the Brussels Regulation.[450] As a result, where a national court finds that a claim is a "matter relating to a contract", a national court does not enjoy jurisdiction on the basis that the claim could be viewed as relating to tort as a matter of national law.[451] However, on IP completion day the (retained EU law) Brussels Ibis Regulation was revoked[452] and the future position as to the rules governing international jurisdiction remains uncertain. The UK has applied to rejoin the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007[453] (whose rules on jurisdiction distinguish between matters relating to a contract and matters relating to tort, delict and quasi-delict in a similar way to the Brussels Ibis Regulation),[454] but its doing so requires the consent of all the existing parties and the EU has not yet given its consent.

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3-064 **Conflict of laws: applicable law** Under the Rome Convention on the Law Applicable to Contractual Obligations[455] it was held that there is nothing to prevent a party to a contract from framing his claim in tort so as to attract the choice of law rules applicable to that basis of liability, rather than in contract whose applicable law would be determined by that Convention.[456] However, after the enactment of the Regulation (EC) 864/2007 on the law applicable to non-contractual obligations ("Rome II Regulation")[457] and the replacement for most purposes of the Rome Convention by Regulation (EC) 593/2008 on the law applicable to contractual

[449] 189/87, EU:C:1988:459, [1988] E.C.R. 5565 at para.17.

[450] *Brogsitter v Fabrication de Montres Normandes EURL* (C-548/12) EU:C:2014:148, 13 March 2014 at para.20; *ERGO Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14) EU:C:2016:40, 21 January 2016 paras 43–45; *Kolassa v Barclays Bank Plc* (C-375/13) EU:C:2015:37, 28 January 2015 at para.44; *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) EU:C:2016:559, 14 July 2016 at para.20. See further at *Aspen Underwriting Ltd v Kairos Shipping Ltd* [2017] EWHC 1904 (Comm) at [74]–[77] (misrepresentation by contracting party inducing contract is a "matter relating to a contract" but misrepresentation by a third party to the contract is a "matter relating to tort").

[451] *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) EU:C:2016:559, 14 July 2016 at para.28.

[452] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 2019/479) reg.84 (the reference in reg.1(1) to their coming into force on exit day must be read as referring to IP completion day: European Union (Withdrawal Agreement) Act 2020 s.39(1), s.41(4) and Sch.5 para.1) and see above, para.1-024.

[453] This convention applies between the EFTA states and the EU. The UK's application was made on 8 April 2020.

[454] art.5(1) and (3).

[455] Introduced into English law by the Contracts (Applicable Law) Act 1990 and see generally, below, paras 33-018 et seq.

[456] *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 W.L.R. 1157 especially at [33].

[457] Regulation 864/2007 [2007] O.J. L199/40 and see *Dicey, Morris and Collins on the Conflict of Laws* 15th edn (2014), Ch.35.

able as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is … to protect citizens from having their rights infringed by the State. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 [art.1, 1st Protocol] rights of the landlord, and in a way which was unpredictable."[877]

The Supreme Court contrasted this situation where there are "legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants"[878] with situations where the relationship between two private parties is "tortious or quasi-tortious" rather than contractual and where the legislature has "expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise", for example, where a person is seeking to rely on her art.8 rights to restrain a newspaper from publishing an article in breach of her privacy and where the newspaper relies on art.10 of the Convention.[879]

### (iv) *Contractual Confidentiality and s.12 of the 1998 Act*

**3-136** **Section 12 and "horizontal effect"** Section 12 of the 1998 Act makes special provision for the protection of freedom of expression after the general coming into effect of the Act, on the basis that otherwise this right (which is itself found in art.10 of the Convention) may be unduly curtailed as the result of developments giving effect to the right to a private life contained in art.8 of the Convention. Section 12 therefore constrains in certain ways the granting by a court of relief which, if granted, might affect the exercise of the Convention right to freedom of expression. In this respect, s.12(4) provides that:

> "The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
> (a) the extent to which
> (i) the material has, or is about to, become available to the public; or
> (ii) it is, or would be, in the public interest for the material to be published;
> (b) any relevant privacy code."

According to Sedley LJ, this provision:

ibility under s.4 of the 1998 Act: [2016] UKSC 28 at [69]–[70]; and that, even were a proportionality assessment required, the claimant tenant's circumstances were not such as to justify refusing an order for possession and thereby postponing indefinitely the right of the landlord's mortgagee/lender (acting through appointed receivers): [2016] UKSC 28 at [71], [74]–[75].

[877] [2016] UKSC 28 at [41] per Lord Neuberger of Abbotsbury and Baroness Hale of Richmond (with whom Lord Kerr of Tonaghmore, Lord Reed and Lord Carnwath agreed). See further at [42]–[47]. The SC held that there was no support in the case law of the European Court of Human Rights for the proposition that a court must consider the proportionality of the order in the context of claims for possession by private sector landlords: see at [48]–[59] (where the relevant case-law was reviewed).

[878] [2016] UKSC 28 at [40] per Lord Neuberger of Abbotsbury and Baroness Hale of Richmond.

[879] [2016] UKSC 28 at [46] per Lord Neuberger of Abbotsbury and Baroness Hale of Richmond. See further below, para.3-136.





> "… puts beyond question the direct applicability of at least one Article of the Convention as between one private party to litigation and another—in the jargon, its horizontal effect."[880]

**3-137** In *Ashworth v The Royal National Theatre*,[881] the claimants had been employed as musicians for a particular production by the defendant theatre, which had purported to terminate their contracts of employment on alleged grounds of redundancy as it had decided to produce the play without live music. They applied to the High Court for an interim injunction, or alternatively specific performance, to continue to engage them in the production until trial of their claim. In assessing the balance of convenience in relation to the award of specific relief, Cranston J held that art.10 of the European Convention on Human Rights:

> "… has a significant role in the application of the *American Cynamid test*,[[882]] not only in considering the claimants' prospect at trial but also in deciding where the balance of convenience lies."[883]

In the learned judge's view, there was a serious issue to be tried on the question whether the defendant was contractually entitled to terminate the claimants' contracts and that the claimants' prospects in claiming that it did so in breach of contract were strong.[884] However, he noted that s.12(1) and (4) of the Human Rights Act 1998:

> "… provides that, in considering whether to grant any relief which may affect the right of freedom of expression in Article 10 of the European Convention on Human Rights, the court must have particular regard to the importance of that right. Section 12(4) refers to artistic and related material and the Strasbourg jurisprudence is clear that Article 10 protects artistic expression … The decisions of producers and artistic teams in staging plays are protected by Article 10. Here the effect of the order sought would be to interfere with the National Theatre's right of artistic freedom."[885]

This would be a clear interference with the defendant's right under art.10 and would not be necessary or proportionate to the *claimants'* rights under art.10(2), which were not interfered with by the dismissal (as they can play their instruments elsewhere) and their contractual rights could be adequately protected by an award of damages.[886] Overall, therefore, Cranston J refused the interim relief sought.[887]

**3-138** **The impact of s.12 on duties of confidentiality** Before the coming into force of the Human Rights Act, English law recognised the existence of duties of confidentiality arising from express or implied contractual agreement or from the nature of a non-contractual relationship between the parties and saw the basis of these duties in very broad concepts of good faith, loyalty and fair dealing.[888] The

[880] *Douglas v Hello! Ltd (No.1)* [2001] Q.B. 967 at [133].

[881] [2014] EWHC 1176 (QB), [2014] 4 All E.R. 238.

[882] *American Cynamid Co v Ethicon Ltd* [1975] A.C. 396.

[883] [2014] EWHC 1176 (QB) at [3].

[884] [2014] EWHC 1176 (QB) at [15].

[885] [2014] EWHC 1176 (QB) at [27].

[886] [2014] EWHC 1176 (QB) at [27] and [30]–[31].

[887] [2014] EWHC 1176 (QB) at [31]–[33].

[888] *Fraser v Evans* [1969] 1 Q.B. 349, 361; *AG v Guardian Newspaper (No.2)* [1990] 1 A.C. 109, 269; *Douglas v Hello! Ltd (No.6)* [2003] EWHC 786, (2003) 153 N.L.J. 595 at [181].



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execution of a formal policy is contemplated[639] and even though the contract, if it is one of marine insurance, is "inadmissible in evidence" unless it is embodied in a policy signed by the insurer and containing particulars specified by statute.[640]

### (v) *Stipulation for the Execution of a Formal Document*

**4-154** The effect of a stipulation that an agreement is to be embodied in a formal written document[641] depends on its purpose.[642] Four possibilities can be identified, as discussed in the following paragraphs.

**4-155** **Agreement may not be binding** One possibility is that the agreement is regarded by the parties as incomplete, or as not intended to be legally binding,[643] until the terms of the formal document are agreed and the document is duly executed in accordance with the terms of the preliminary agreement (e.g. by signature).[644] This is generally the position where "solicitors are involved on both sides, formal writ-

639 *Ionides v Pacific Insurance Co* (1871) L.R. 6 Q.B. 674, 684; *Cory v Patton* (1872) L.R. 7 Q.B. 304; *General Reinsurance Corp v Forsakringsaktiebolaget Fennia Patria* [1983] Q.B. 856; *Hadenfayre Ltd v British National Insurance Soc. Ltd* [1984] 2 Lloyd's Rep. 393; *G.A.F.L.A.C. v Tanter (The Zephyr)* [1984] 1 Lloyd's Rep. 58, 69–70; reversed in part on other grounds [1985] 2 Lloyd's Rep. 529; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127, 140–141; *HIH Casualty & General Insurance v New Hampshire Insurance* [2001] EWCA Civ 735; [2001] 2 All E.R. (Comm) 39 at [86], [87]. Under an "open cover" arrangement, it is not the initialling of the slip but the declaration of the insured which creates the obligation of the insurer: *Citadel Insurance Co v Atlantic Union Insurance Co* [1985] 2 Lloyd's Rep. 543.

640 See Marine Insurance Act 1906 ss.22, 23 and 24.

641 The mere fact that a document about the terms of which the parties had negotiated contained spaces for their signatures does not amount to a stipulation for its execution by signature: *Maple Leaf Volatility Master Fund v Rouvroy* [2009] EWCA 1334, [2010] 2 All E.R. (Comm) 788; the claimants' wish to have the matter put in writing did not imply that the oral agreement reached was not already binding: *Johal v Johal* [2021] EWHC 1315 (Ch) at [44].

642 *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch. 284, 288–289.

643 *B.S.C. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All E.R. 504; *Manatee Towing Co v Oceanbulk Maritime SA (The Bay Ridge)* [1999] 2 All E.R. (Comm) 306 at 329 ("no intention to create legal relations"); *Eurodata Systems Plc v Michael Gershon (Finance) Plc, The Times*, 25 March 2003; *Emcor Drake & Scull Ltd v Sir Robert McAlpine Ltd* [2004] EWCA Civ 1733, 98 Con. L.R. 1; *Haden Young Ltd v O'Rourke Midlands Ltd* [2008] EWHC 1016 (TCC) at [115]; *JD Cleverly Ltd v Family Finance Ltd* [2010] EWCA Civ 1477, [2011] R.T.R. 22; *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG* [2018] EWHC 1056 (Comm) at [32]–[33]; cf. the wording of the "Total Price Box" in *Smith Glaziers (Dunfermline) v Customs & Excise Commissioners* [2003] UKHL 7, [2003] 1 W.L.R. 656; *Jamp Pharma Corp v Unichem Laboratories Ltd* [2021] EWHC 1712 (Comm) at [61].

644 *Okura & Co Ltd v Navara Shipping Corp SA* [1982] 2 Lloyd's Rep. 537 at 542; *Hofflinghouse & Co Ltd v C-Trade SA (The Intra Transporter)* [1985] 2 Lloyd's Rep. 158, 163; affirmed [1986] 2 Lloyd's Rep. 132; Debattista [1985] L.M.C.L.Q. 241; *Atlantic Marine Transport Corp v Coscol Petroleum Corp (The Pina)* [1992] 2 Lloyd's Rep. 103, 107; *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep. 20 at [64] (affirmed on other grounds [2002] EWCA Civ 548, [2002] 2 All E.R. (Comm) 321); *Service Power Asia Pacific Pty Ltd v Service Power Business Solutions Ltd* [2009] EWHC 179 (Ch), [2010] 1 All E.R. (Comm) 238 at [20] (stipulation for outcome of negotiations to be reduced to writing containing detailed terms); *Benourad v Compass Group Plc* [2010] EWHC 1882 at [110] (draft providing that it would become effective from signature); *CRS GT Ltd v McLaren Automotive Ltd* [2018] EWHC 3209 (Comm) at [135] (the agreement, which expressly provided for the preparation and signing of a formal contract, was not binding). For a borderline case, see *Grant v Bragg* [2009] EWCA Civ 1228, [2010] 1 All E.R. (Comm) 1166, where Lord Neuberger concluded that, "contrary to … [his] initial impression", there was to be no contract before formal signature of the draft (at [32]); *Investec Bank (UK) Ltd v Zulman* [2010] EWCA Civ 536 at [16], citing with approval an earlier edition of *Chitty on Contracts*; *IMS SA v Capital Oil and Gas*



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ten agreements are to be produced and arrangements are made for their execution".[645] Moreover:

> "… [t]he more complicated the subject matter, the more likely the parties are to want to enshrine their contract in a written document, thereby enabling them to review all the terms before being committed to any of them."[646]

The normal inference will then be that "the parties are not bound unless and until both of them sign the agreement".[647]

**4-156** **Agreement may be binding** A second possibility is that such a document is intended only as a solemn record of an already complete and binding agreement.[648] This was the conclusion where the terms of the agreement strongly indicated the

*Industries Ltd* [2018] EWHC 894 (Comm) at [58]–[61]; *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB) at [42].

645 *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303; [2007] 1 All E.R. (Comm) 124 at [45], per Sir Andrew Morritt C.; the above statement was accepted at [81] by Carnwath LJ, who dissented in the result. And see *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm) at [148], where "it was implicit in the discussions … that to the extent that matters were the subject of agreement between those present, they would be embodied in the formal agreement which was being negotiated, so that the parties could then review all the terms before being committed to any of them".

646 *Paul David Allen (Trustee in Bankruptcy of Michelle Danique Young) v Michelle Danique Young* [2017] B.P.I.R. 1116 at [77]. And see *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303; *Benourad v Compass Group Plc* [2010] EWHC 1882 (QB) at [106(a)]; *Elleray v Bourne* [2018] UKUT 3 (LC) at [69]–[71]; *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm) at [148].

647 *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303 at [45]; *Kyte v Revenue and Customs Commissioners* [2018] EWHC 1146 (Ch); [2018] B.T.C. 20 at [64]; *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencapsulation AG)* [2018] EWHC 2765 (Comm) at [176] and [179]; *Broomhead v National Westminster Bank Plc* [2018] EWHC 1574 (Ch) at [282]; cf. *Crossco No.4 Unlimited v Jolan Ltd, Note* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [106], where similar reasoning was said at [108] to be "fatal to the claim to a constructive trust", even though there was *no* stipulation for the execution of a formal document.

648 *Rossiter v Miller* (1878) 3 App. Cas. 1124 (below, para.4-160); *Filby v Hounsell* [1896] 2 Ch. 737; *Branca v Cobarro* [1947] K.B. 854 (below, para.4-160); *E.R. Ives Investments Ltd v High* [1967] 2 Q.B. 379; *Elias v George Sahely & Co (Barbados) Ltd* [1982] 3 All E.R. 801; *Damon Cie Naviera SA v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 W.L.R. 435; *Clipper Maritime Ltd v Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep. 547; *Malcolm v Chancellor, Masters and Scholars of the University of Oxford, The Times*, 19 December 1990; *Ateni Maritime Corp v Great Marine Ltd (The Great Marine) (No.2)* [1990] 2 Lloyd's Rep. 250; affirmed (without reference to this point) [1991] 1 Lloyd's Rep. 421; *Jayaar Impex Ltd v Toaken Group Ltd* [1996] 2 Lloyd's Rep. 437; *The Kurnia Dewi* [1997] 1 Lloyd's Rep. 553 at 559; *Harvey Shopfitters Ltd v ADI Ltd* [2004] EWCA Civ 1752, [2004] 2 All E.R. 982; *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] B.L.R. 508; *Fitzpatrick Contractors Ltd v Tyco Fire and Integrated Solutions (UK) Ltd* [2008] EWHC 1301 (TCC), 119 Con. L.R. 155 at [55], [56]; *Whitney v Monster Worldwide Ltd* [2010] EWCA Civ 1312, [2011] Pens. L.R. 1; *Immingham Storage Co Ltd v Clear Plc* [2011] EWCA Civ 89 at [18]; *Tryggingarfelagio Foroyar P/F v CPT Empresas Maritimas SA (The Athena)* [2011] EWHC 589 (Admlty) at [45]; *Air Studios (Lyndhurst) Ltd v Lombard North Central Plc* [2012] EWHC 3162 (QB), [2013] 1 Lloyd's Rep. 63 at [70]; and *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep. 542 at [30], where the actual decision turned on the question whether the formal requirement of signature imposed by Statute of Frauds 1677 s.4 had been satisfied; cf. *Crowden v Aldridge* [1993] 1 W.L.R. 433, applying the same principle to a document which was not a contract but a direction by beneficiaries to executors; *Crabbe v Townsend* [2016] EWHC 2450 (Ch) at [12]; *Ely v Robson* [2016] EWCA Civ 774 at [41]; *Paul David Allen (Trustee in Bankruptcy of Michelle Danique Young) v Michelle Danique Young* [2017] B.P.I.R. 1116 at [30]; *Mena Energy DMCC v Hascol Petroleum Ltd* [2017] EWHC 262

act pending the preparation of formal contracts. One possibility is that such letters may, by their express terms or on their true construction, negative contractual intention.[1017] There is, similarly, judicial support for the view that "a letter of comfort, properly so called", is "one that does not give rise to contractual liability".[1018] This position is illustrated by a case[1019] in which a company issued a "letter of comfort" to a lender in respect of a loan to one of the company's subsidiaries. The letter stated that "it is our policy that [the subsidiary] is at all times in a position to meet its liabilities". This was held to be no more than a statement of the present policy of the company: it was not an undertaking that the policy would not be changed since the parties had not intended it to take effect as a contractually binding promise.

**4-224** On the other hand, "[t]he label used by the parties is not necessarily determinative",[1020] so that "sometimes a legal obligation may arise as a matter of construction, notwithstanding the rubric of a letter of comfort".[1021] Hence where the language of such a document, or of a letter of intent, does not negative contractual intention, it is open to the courts to hold the parties bound by the document.[1022] They will, in particular, be inclined to do so where the parties have acted on the document for a long period of time or have expended considerable sums of money in reliance on it.[1023] The fact that the parties envisage that the letter is to be superseded by a later, more formal, contractual document does not, of itself, prevent the letter from taking effect as a contract.[1024]

**4-225** The final possibility is that a letter of intent may be so worded that one part of it

[1017] Below, para.4-220; cf. *Snelling v John G. Snelling Ltd* [1973] Q.B. 87; *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1751 (TCC) at [82] a letter of intent explicitly stating that "all costs, payment terms and conditions will be mutually agreed" in due course is not an acceptance of the alleged offer.

[1018] *Associated British Ports v Ferryways* [2008] EWCA Civ 189, [2009] 1 Lloyd's Rep. 595 at [24], per Maurice Kay LJ; *Barbudev v Eurocom Cable Management Bulgaria EOOD* [2011] EWHC 1560 (Comm), [2011] 2 All E.R. (Comm) 951, where it was said at [93] that the relevant document was "not expressed to be a 'letter of comfort', though that is not conclusive", and was held "as a matter of construction … not intended to be legally binding" (at [96]), and see para.4-220 below.

[1019] *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 All E.R. 785; Reynolds 104 L.Q.R. 353 (1988); Davenport [1988] L.M.C.L.Q. 290; Prentice (1989) 105 L.Q.R. 346; Ayres and Moore [1989] L.M.C.L.Q. 281; Tyree (1989) 2 J.C.L. 279, cf. *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (where such a letter was held to be an offer but to have lapsed before acceptance); *Monk Construction v Norwich Union Life Insurance Society* (1992) 62 B.L.R. 107.

[1020] *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [24].

[1021] *Associated British Ports v Ferryways* [2008] EWCA Civ 189 at [27]. See also *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10, [2014] B.L.R. 150, where a building contractor issued a letter of intent (LOI) to a flooring sub-contractor and the parties accepted that the LOI constituted a binding contract (at [23]) but disagreed as to which terms of the contemplated later formal contract were intended to be incorporated into the LOI agreement.

[1022] In *Associated British Ports v Ferryways* [2008] EWCA Civ 189, a "letter of comfort" was held to be a legally binding guarantee, though this had been discharged by a later agreement.

[1023] cf. *Turriff Construction Ltd v Regalia Knitting Mills* (1971) 22 E.G. 169 (letter of intent held to be a collateral contract for preliminary work); *Wilson Smithett & Cape (Sugar) Ltd v Bangladesh Sugar Industries Ltd* [1986] 1 Lloyd's Rep. 378 (LOI held to be an acceptance); *Chemco Leasing SpA v Rediffusion* [1987] 1 F.T.L.R. 201 (LOI held to be an offer but to have lapsed before acceptance); *Spartafield Ltd v Penten Group Ltd* [2016] EWHC 2295 (TCC); 168 Con. L.R. 221 (LOI displaced by contract when the key principles for the contract were agreed; the contemplated execution of a formal contract was not a precondition to the existence of the contract); *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2018] EWCA Civ 2222, [2019] 1 All E.R. (Comm) 421 (LOI held to be an offer, which was accepted by letters of response and subsequent conduct).

[1024] Above, paras 4-155—4-158. For a combination of the factors described in the text above at para.4-





has contractual force, while the rest of it does not. In *Shaker v VistaJet Group Holding SA*,[1025] one of the terms of a letter of intent (LOI) began with the words:

> "Non-binding: other than the provisions relating to the application, payment and refund of the Deposit and the confidentiality provisions hereunder, it is specifically understood as agreed that this letter of intent does not constitute a binding agreement upon the Guarantor, Seller and Buyer to enter into the Transaction Documents."

On this basis, it was held that the claimant buyer was contractually entitled to enforce the provisions of the LOI relating to the return of his deposit,[1026] even though other parts of the LOI, in particular, the buyer's undertaking to negotiate in good faith, had no contractual force, because of the express terms of the LOI quoted above. In another case,[1027] a "letter of intent" was held to be binding since "where works have been carried out, it will usually be implausible to argue that there was no contract". However, none of the three sets of competing contractual terms and conditions proposed between the parties purporting to limit liability were incorporated into the contract as they had been continually amended and were never finally agreed.

**4-226** **Agreements giving discretion to one party whether to perform** An agreement may consist of mutual promises one of which gives a very wide discretion to one party. In such a case the discretionary promise may be too vague to constitute consideration for the other party's promise which may therefore be unenforceable.[1028] But if the other party has actually performed (so that there can be no question that *they* have provided consideration), the further question may arise whether the discretionary promise can be enforced; and this raises an issue of contractual intention. In *Taylor v Brewer*[1029] the claimant agreed to do work for a committee who resolved that he should receive "such remuneration … as should be deemed right". His claim for a reasonable remuneration for work done failed: the promise to pay was "merely an engagement of honour".[1030] This case is now more often distinguished than followed,[1031] but its reasoning would still be applied if the wording made it clear that the promise was not intended to be legally binding.[1032] A fortiori, there is no contract where performance by *each* party was

158, see *Diamond Build Ltd v Clapham Park Homes Ltd* [2008] EWHC 1439 (TCC), 119 Con. L.R. 33 where a LOI was held to have contractual force even though its provisions indicated that a formal contract was to be executed but the parties acted on the letter without executing any such contract; see also *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC).

[1025] [2012] EWHC 1329 (Comm), [2012] 2 Lloyd's Rep. 93.

[1026] [2012] EWHC 1329 (Comm) at [8].

[1027] *Arcadis Consulting (UK) Ltd (formerly Hyder Consulting (UK) Ltd) v AMEC (BCS) Ltd (formerly CV Buchan Ltd)* [2016] EWHC 2509 (TCC) at [51].

[1028] Below, para.6-028; *Stabilad Ltd v Stephens & Carter (No.2)* [1999] 2 All E.R. (Comm) 651 at 659–660.

[1029] (1813) 1 M. & S. 290; cf. *Shallcross v Wright* (1850) 12 Beav. 558; *Roberts v Smith* (1859) 28 L.J. Ex. 164; *Robinson v Commissioners of Customs and Excise*, *The Times*, 28 April 2000.

[1030] (1813) 1 M. & S. 290, 291.

[1031] Vol.II, para.42-081 in employment contracts which have no express or fixed provision for remuneration the law will imply a term to pay a reasonable sum; cf. *Re Brand's Estate* [1936] 3 All E.R. 374.

[1032] cf. *Re Richmond Gate Property Co Ltd* [1965] 1 W.L.R. 335.



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reflect adequately do so and there is evidence that the parties intended to create a collateral contract.[1245]

### (c) Negotiations Broken Off without Preliminary Agreements

4-272 **Fraud, negligent misrepresentation and non-disclosure** *Walford v Miles*[1246] shows that English law recognises a duty of good faith in contract negotiation at least to the extent that parties are made liable for damages for deceit[1247] and negligent misrepresentation.[1248] In that case, the defendant's promise to terminate negotiations with any third party amounted to a misrepresentation for which an award of £700 for wasted expenditure was given and this was not challenged on appeal. Further, even if no contract is ultimately concluded, a party may be liable for misleading the other party by giving careless advice as to the probable outcome of the negotiations. For example, in *Box v Midland Bank Ltd*[1249] the plaintiff sought a large loan from his bankers; the bank manager told the plaintiff that the approval of head office would be required but led the plaintiff to believe that this was a mere formality. When head office refused the plaintiff's loan application, Lloyd J awarded £5,000 as loss suffered, in the form of an extended overdraft, in reliance on the negligent statement. The question is whether the law recognises a more onerous duty of good faith in the form of a duty to have regard to the legitimate interests of the other party by making disclosure of facts that are material to the transaction. The answer is no, unless: the contract is uberrimae fidei,[1250] the parties are in a fiduciary relationship[1251] or a relationship of trust and confidence,[1252] the failure to disclose some fact distorts a positive representation,[1253] or statute requires specific disclosure.[1254] The general picture is summarised by Rix LJ in *ING Bank NV v Ros Roca SA*[1255]:

> "Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune."

4-273 **Manufacturer's statements that induce purchase of goods** A person who purchases goods in reliance on statements in a manufacturer's promotional literature is not, *for that reason alone*, entitled to claim for any loss occasioned by the

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[1245] *Coleman v Mundell* [2020] EWHC 2852. And see above, para.4-212.
[1246] [1992] 2 A.C. 128, and see above, para.4-270.
[1247] See below, paras 9-055—9-082.
[1248] See below paras 9-082, 9-094—9-099. And see para.9-101 on the special relationship required to give rise to a duty of care between parties negotiating a contract.
[1249] [1979] 2 Lloyd's Rep. 391, on appeal (as to costs only) [1981] 1 Lloyd's Rep. 434. And see below, para.9-104.
[1250] See below, paras 9-167—9-192.
[1251] See below, paras 9-086—9-097.
[1252] See below, paras 10-105—10-119.
[1253] See below, paras 9-024—9-025.
[1254] See, e.g. para.9-181.
[1255] [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92].





manufacturer's misrepresentation.[1256] But if the manufacturer knows both the purchaser's identity and his purposes, the purchaser may have an action in deceit or negligent misrepresentation,[1257] or the information given by the manufacturer may constitute a contractual warranty.[1258] Where goods are sold or supplied to a consumer with a "consumer guarantee", the consumer guarantee "takes effect … as a contractual obligation owed by the guarantor under the conditions set out in the guarantee statement and associated advertising".[1259]

4-274 **Restitution for failure of consideration** Where money has been paid in anticipation of a contract that does not eventuate, the payor may be able to recover the sums paid for failure of consideration.[1260] In *Sharma v Simposh Ltd* Toulson LJ said[1261]:

> "The agreement between the parties lacked formal validity and so had no contractual effect. It was no more than a mutual declaration of intent. An important part of the law of restitution is concerned with money paid or benefits conferred in respect of legally ineffective transactions. Goff & Jones' textbook on the Law of Restitution 7th. Ed. 2007, [states at paras 19-001 and 19-002]:
>
> 'Transactions may be or become ineffective for a variety of reasons. But the reason the courts will award restitution is in each case fundamentally the same, namely, that the plaintiff's expectations have not been fulfilled.'
>
> …
>
> 'If money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an unjust enrichment … In most of the situations, however, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed.'"

4-275 **Quantum meruit** Where work has been done in anticipation of a contract that does not eventuate, the remedy of quantum meruit (the reasonable value of the services provided) may be awarded, as a form of restitution for unjust enrichment, provided that the services were requested or acquiesced in by the recipient and provided that the claimant did not take the risk of being reimbursed only if a contract was concluded. The court may also impose an obligation on the recipient of a benefit if they have behaved unconscionably in declining to pay for it.[1262] In *Cobbe v Yeomans Row Management Ltd*[1263] Mummery LJ said that "Under English law there is no general duty to negotiate in good faith"; but he added that there were:

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[1256] *Lambert v Lewis* [1982] A.C. 225; this issue was not discussed on appeal to the House of Lords. And see below, para.9-103.
[1257] See above, para.4-272, below, para.9-103, and further, paras 9-094—9-095.
[1258] *Shanklin Pier v Detel Products Ltd* [1951] 2 K.B. 854; *Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd* [1965] 2 Q.B. 170.
[1259] Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045) reg.15(1). This is replaced by s.30 of the Consumer Rights Act 2015. This section applies where there is "(a) a contract to supply goods" and "(b) a guarantee in relation to the goods" (s.30(1); "guarantee" is defined in s.30(2)). Section 30(3) goes on to provide that such a guarantee "takes effect … as a contractual obligation owed by the guarantor". And see above, paras 4-021, 4-219.
[1260] See below, Ch.32, section 2(f) on Failure of basis.
[1261] [2011] EWCA Civ 1383, [2012] 3 W.L.R. 503 at [21]–[22]. And see *Rotam Agrochemical Co Ltd v GAT Microencapsulation GmbH (formerly GAT Microencpasulation AG)* [2018] EWHC 2765 (Comm) at [185]–[197].
[1262] See below, para.32-085.
[1263] [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964.



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referred[440] to an earlier summary of the law by Mustill J, where the latter said:

"3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter."[441]

In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*[442] Leggatt LJ explained Mustill J's statement as being merely a reference to the requirement of an outward expression of accord, but with respect it is not wholly clear that Mustill J thought that shared subjective intentions must also be proved. If during their negotiations A has manifested a particular intention to B, who shares that intention, and A has never subsequently gone back on what he indicated, should A really be able to resist rectification on the ground that his subjective intention was not in fact what he outwardly expressed?[443]

**5-091** It is submitted, therefore, that for this purpose no absolute distinction should be drawn between concluded prior contracts and partially negotiated agreements. First, while it may be the case that while negotiations on any aspect continue, the parties will regard the whole transaction as still open, this will not always be so. The parties may regard some issues as completely settled (not realising that their intentions on the point differ) and therefore not examine the relevant parts of the final document with care, so that they fail spot the difference between it and the final document. Although neither party is acting dishonestly, there seems no reason why this situation must necessarily be treated differently from that of the concluded prior agreement. It is a matter of degree, of the extent to which the parties regarded the matter as "settled" and of whether the party against whom rectification is claimed had indicated that it was proposing a change or at least a clarification.[444] Secondly, even when no concluded contract has been reached, it seems appropriate to allow each party to rely on what the other has "outwardly manifested", rather than insist on proof of each party's subjective intention.

**5-092** **"Objective" meaning known not to be party's intention** It is submitted, however, that even when the parties had concluded a prior agreement, and (if the arguments in the preceding paragraphs are accepted) in cases in which there was no concluded agreement but the parties regarded their negotiations on the relevant issue as complete, and the final document does not reflect accurately the seemingly "objective" meaning of the prior agreement, it would not always be right to rectify the document to match that objective meaning. Lord Hoffmann's dictum in *Chartbrook Ltd v Persimmon Homes Ltd*[445] quoted earlier,[446] like the statement he quotes from Denning LJ, appears to look only at the evidence of prior agreement in a purely objective way,[447] from the view point of "the reasonable fly on the wall".[448] The test normally used in English contract law to determine the content or meaning of a contract is not wholly objective in this sense.[449] First, as submitted earlier, if the parties were in fact in subjective agreement as the meaning of their words, it is at least arguable that their subjective intentions should govern.[450] Secondly, if there is no subjective agreement, the question is how A understood B's words and whether A's interpretation was reasonable, and vice versa.[451] Normally it will be reasonable to understand the words of the prior agreement on their "purely objective" sense.[452] However, if A knew B's intention to be different from the "purely objective" meaning of the words of the prior agreement, A cannot hold B to that meaning.[453] If the subsequent written agreement provides what B had intended, A should not be entitled to rectification, even if the result is that A is bound by a contract that he did not intend to make. If the written agreement were in the same terms as the prior agreement, but to A's knowledge B still intended it mean something different, B would be entitled to have it rectified on the basis of a unilateral mistake.[454] It is submitted that even if it cannot be shown that A had actual knowledge that B was still mistaken at the stage of the final draft, B should still be entitled to have the final draft rectified to match the intention that A knew that B had at the earlier stage, unless again B should reasonably have understood the draft as not merely setting down what was previously agreed, but as a new proposal (or perhaps a deliberate assertion that A did not accept the "objective" meaning of the oral agreement).[455] The aim of rectification should be "to ensure the written agreement reflects the true bargain between the parties as determined by ordinary principles of contract formation".[456]

**5-093** **A ought to have known of B's intention** It is arguable that in cases in which B's intention differed from the "purely objective", relief should be given even if A did not have actual knowledge of B's intention but A should have known that it was different to the objective meaning of the words used in the prior agreement. A's belief that B intended what he appeared to say is not a reasonable belief. In the case of an oral contract, although the authorities are not conclusive, the result at common law may be either that there is one on the terms which B intended and A should

[440] [1994] C.L.C. 561, 569.

[441] *Etablissements Levy v Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyd's Rep. 67, 72–73.

[442] [2019] EWCA Civ 1361, [2020] Ch. 365 at [159].

[443] If A was aware that B had a different understanding of what was agreed, then rectification may be available on the basis of a unilateral mistake.

[444] See above, para.5-067.

[445] [2009] UKHL 38, [2009] 1 A.C. 1101 at [60].

[446] Above, para.5-080.

[447] Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 5th edn (2019), para.13-40.

[448] Spencer [1973] C.L.J. 104, 108.

[449] See above, paras 4-004—4-006.

[450] See above, paras 5-014 and 5-065.

[451] See above, para.5-014.

[452] In *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 Arden LJ pointed out that Lord Hoffmann's test is not fully objective as the meaning of any words is taken to be that which the meaning would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which the parties were at the time of their agreement (at [46]).

[453] No more than A can accept an apparent offer from B which A knows does not represent B's true intention: see *Hartog v Colin and Shields* [1939] 3 All E.R. 566, above, para.5-022. See also paras 4-004—4-006; *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm) at [228], though doubted in the CA: [2009] EWCA Civ 1334 at [17]; *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm) at [54]–[57]; *Blue v Ashley* [2017] EWHC 1928 (Comm) at [64].

[454] *Daventry DC v Daventry and District Housing Ltd* [2011] EWCA Civ 1153 at [177], per Toulson LJ at [178]. For rectification on the basis of unilateral mistake see above, paras 5-070 et seq.

[455] See above, para.5-068.

[456] McLauchlan (2008) 124 L.Q.R. 608, 640.

if it does take this form the promise can extend the period of limitation even though the only consideration for it was the antecedent debt, and thus past. Further acknowledgments made within such an extended period or periods have the same effect.[188] But once the debt has become statute-barred the right to sue for it cannot be revived by any subsequent acknowledgment[189]: to this extent, the old "moral obligation" theory, as applied to statute-barred debts,[190] has been reversed.

## 6. Consideration Must Move from the Promisee

6-040 **Promisee must provide consideration** The rule that "consideration must move from the promisee"[191] means that a person can enforce a promise only if they themself provided consideration for it. Thus if A promises B to pay a sum of money to B if C will paint A's house and C does so, B cannot enforce the promise (unless, of course, they procured, or expressly or impliedly undertook to procure, C to do the work). It is, however, not necessary for the promisee to provide the whole consideration for the promise: thus they can enforce a promise part of the consideration for which was provided by their agent or partner or by some other co-promisee.[192]

6-041 **Consideration need not move to the promisor** While consideration must move from the promisee, it need not move to the promisor.[193] It follows that the requirement of consideration may be satisfied where the promisee does something at the

was held to amount to an "acknowledgement within section 29(5)" even though it contained no admission of the amount (or undisputed amount) of the debt; cf. *Re Overmark Smith Warden Ltd* [1982] 1 W.L.R. 1195 ("statement of affairs" by insolvent company). An express *denial* of liability is not an acknowledgement within s.29(5): *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174; and the same is true of a letter from the debtor merely questioning the amount claimed: *Phillips & Co v Bath Housing Co-operation Ltd* [2012] EWCA Civ 1591, [2013] 1 W.L.R. 1479 at [53], [58]. For the analogous question of what amounts to an acknowledgement by an occupier of land of the owner's title for the purposes of Limitation Act 1980 s.29(5)(a), see *Ofalue v Bossert* [2009] UKHL 16, [2009] 1 A.C. 290.

188 Limitation Act 1980 s.29(7).

189 Limitation Act 1980 s.29(7).

190 Above, para.6-036.

191 *Barber v Fox* (1669) 2 Saund. 134, n.(e); *Thomas v Thomas* (1842) 2 Q.B. 851, 859; *Tweddle v Atkinson* (1861) 1 B. & S. 393, 399; *Pollway v Abdullah* [1974] 1 W.L.R. 493, 497; cf. *Dickinson v Abel* [1969] 1 W.L.R. 295, and (for VAT purposes) *Customs and Excise Commissioners v Telemed* [1992] S.T.C. 89. In *Revenue and Customs Commissioners v Aimia Coalition Loyalty UK Ltd* [2013] UKSC 15, [2013] 2 All E.R. 719 the judgments of the Supreme Court contain many references to "third party consideration" (see at [12] and passim). This phrase simply reflects the words of art.11 of the relevant EC Council Directive (95/7 of 10 April 1995) which defines the taxable amount for VAT purposes as "the *consideration* which has been obtained by the supplier from the purchaser or a *third party* for such supplies" (italics supplied). The phrase carries no implication to the effect that the "third party consideration" gives any promise to the force of a binding contract. For criticism of a possibly contrary dictum, see below, para.6-046. See too *Dixons Carphone Plc v Revenue and Customs Commissioners* [2018] UKFTT 557 (TC).

192 *Jones v Robinson* (1847) 1 Ex. 454; *Fleming v Bank of New Zealand* [1900] A.C. 577. For the position where the *whole* consideration is provided by a co-promisee, see below, paras 6-043—6-046.

193 *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097; cf. *International Petroleum Refining & Supply Ltd v Caleb Brett & Sons Ltd* [1980] 1 Lloyd's Rep. 569, 594 (below, para.20-011); *Barclays Bank Plc v Weeks, Legg & Dean* [1998] 3 All E.R. 213, 220–221. These authorities for the principle stated at this point in the text above, and that principle itself, appear to have been overlooked in a passage from the judgment in *Ritz Hotel Casinos Ltd v Al Geabury* [2015] EWHC 2294 (QB), [2015] L.L.R. 860 at [137]. This passage is discussed in Vol.II, para.43–026 below.





promisor's request, but confers no corresponding benefit on the promisor. Thus the promisee may provide consideration by giving up a job[194] or the tenancy of a flat,[195] even though no direct benefit results to the promisor from these acts. In *Bolton v Madden*[196] the claimant and defendant were subscribers to a charity and entitled to vote on the disposition of its funds. The claimant promised to vote at one meeting for a person whom the defendant wished to benefit, and the defendant promised in return to vote at the next meeting for a person whom the claimant wished to benefit. The court held that consideration moved from the claimant when he had at the defendant's request conferred a benefit on a third party.

6-042 It also follows that the promisee may provide consideration by conferring a benefit on a third party at the promisor's request: e.g. by entering into a contract with the third party.[197] This possibility is illustrated by the case in which goods are bought and paid for by the use of a credit or debit or cheque guarantee card. The issuer of the card makes a promise to the supplier of the goods that the cheque will be honoured or that the supplier will be paid; and the supplier provides consideration for this promise by supplying the goods to the customer.[198] There may also be consideration in the form of the discount allowed by the supplier of the goods or services to the issuer of the card[199]: this is both a detriment to the supplier and a benefit to the issuer of the card.

6-043 **More than one promisee**[200] Where a promise is made to more than one person, it is clear that it can be enforced by any of the promisees, even by one who provided only *part* of the consideration.[201] But the further question may arise whether the promise can be enforced by one of the promisees even though they provided no part of the consideration, the *whole* being provided by the other or others. There is no clear answer in the present law to this question; but it is submitted that the position depends on the distinctions drawn in paras 6-044—6-046 below.

6-044 **Joint promisees** Where a promise is made to A and B *jointly*, it can be enforced by both of them, even though the whole consideration was provided by A.[202] If this were not so, the promise could not be enforced at all; for, if A tried to sue alone, they would be defeated by the rule that all the joint creditors must be parties to the

194 *Jones v Padavatton* [1969] 1 W.L.R. 628.

195 *Tanner v Tanner* [1975] 1 W.L.R. 1346; contrast *Horrocks v Forray* [1976] 1 W.L.R. 230 where there was no such (nor any other) consideration and no contract, partly for this reason and partly for lack of contractual intention: above, para.4-238; and see *Coombes v Smith* [1986] 1 W.L.R. 808.

196 (1873) L.R. 9 Q.B. 55.

197 See *International Petroleum Refining Supply Ltd v Caleb Brett & Son Ltd* [1980] 1 Lloyd's Rep. 569, 594, where the promisor benefited indirectly since promisor and third party were associated companies. cf. *Pearl Carriers Inc v Japan Lines Ltd (The Chemical Venture)* [1993] 1 Lloyd's Rep. 508, 522 (payments made by charterers of ship to the crew regarded as consideration for promise by shipowners to charterers).

198 *R. v Lambie* [1982] A.C. 449; *Re Charge Card Services* [1987] Ch. 150, affirmed [1989] Ch. 497.

199 *Customs & Excise Commissioners v Diners Club Ltd* [1989] 1 W.L.R. 1196, 1207.

200 Cullity (1969) 85 L.Q.R. 530; Winterton (1970) 47 Can.Bar Rev. 483.

201 Above, para.6-040.

202 This proposition seems to have been accepted in *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385; though the majority of the court held that no joint promise had in fact been made: below, para.20-076.



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**6-166** **Three qualifications of "clear and unequivocal" requirement** Lord Neuberger in *Thorner v Major* accepts the proposition "that there must be some sort of an assurance which is 'clear and unequivocal' before it can be relied on to found an estoppel"[876]; but he subjects that proposition to three qualifications. First, he expresses his agreement with Lord Walker's emphasis on the principle that "the effect of words must be assessed in their context", adding that "a sentence, which would be ambiguous and unclear in one context, [can] be a clear and unambiguous assurance in another context" and that this point was underlined by the fact that "perhaps the classic case of proprietary estoppel is based on silence or inaction, rather than statement or action"[877]—factors that (for reasons given in para.6-100 above) would not normally give rise to promissory estoppel or estoppel by representation.[878] Secondly, "it would be quite wrong to be unrealistically rigorous when applying the 'clear and unambiguous' test".[879] This test is then, in effect, reformulated: "at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely".[880] Thirdly, there may be cases in which the assurance "could reasonably be understood as having more than one possible meaning"[881] or, in other words, was ambiguous: in such cases Lord Neuberger, perhaps somewhat cautiously,[882] suggests that "the ambiguity should not deprive the person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him".[883] This interesting suggestion is not in terms or in substance repeated in any of the other speeches; but it can, with respect, be said to reflect the flexibility of the principled discretion which enables the courts to fashion the remedy in cases of proprietary estoppel.[884] The suggestion also derives some support from the similar rule (discussed in para.29-092 below) governing the assessment of damages for breach of alternative obligations.

**6-167** **Conclusion on "character or quality"[885]** The requirement of a "clear and unequivocal" assurance, representation or promise forms the starting point of the discussions in *Thorner v Major*[886] by Lords Walker and Neuberger of the question whether, in that case, Peter's conduct and statements were such as to give rise to a proprietary estoppel in favour of David. But, in giving an affirmative answer to that question, these speeches so much qualify the requirement (in ways described in

[876] [2009] UKHL 18 at [84].
[877] At [84] referring to the "acquiescence" cases (above, para.6-156).
[878] See further para.6-191 below.
[879] [2009] UKHL 18 at [85].
[880] At [84].
[881] At [86].
[882] See the words "it seems to me that, at least normally ..." (at [86]).
[883] At [86]. In the unreported case of *Walton v Walton* (14 April 1994) Hoffmann LJ had, in a passage quoted in *Thorner v Major* [2009] UKHL 18 at [56] said that "the promise must be unambiguous"; but the fact that he does not refer in the latter case to this requirement may indicate that he no longer strictly insisted on it.
[884] See below, paras 6-183—6-187.
[885] *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [30].
[886] [2009] UKHL 18, [2009] 1 W.L.R. 776. Lord Hoffmann at [9] expressed his agreement with the speeches of Lords Walker and Neuberger on the "identifiable property" issue (discussed in para.6-175 below); Lord Scott at [11] expressed his "broad agreement" with the same speeches; and Lord Rodger at [18] expressed his agreement with those speeches.





paras 6-165 and 6-166 above) that it may respectfully be doubted whether the requirement will in future cases continue to be the best starting point for the discussion of the character or quality of the assurance necessary to give rise to a proprietary estoppel. The qualifications of the "clear and unequivocal" requirement all lead to the conclusion that the crucial questions in cases of proprietary estoppel by "encouragement"[887] are whether the person invoking the estoppel can establish that (in Lord Neuberger's words) "he reasonably understood the statement or action to be an assurance on which he could rely"[888] and whether they did then reasonably rely on it to their detriment. Similar statements can be found in the speeches of Lords Hoffmann, Scott, Rodger and Walker[889]; and it is of particular interest that Lord Hoffmann in his speech in *Thorner v Major* treats this as the decisive question without expressly[890] insisting on any further requirement that the assurance must be "clear and unequivocal". It is respectfully submitted that, in any consideration of the "character and quality" of the representation, discussion of the "clear and unequivocal" point as a separate requirement amounts to an unnecessary intermediate stage in deciding whether an assurance or promise is such as to be capable of giving rise to a proprietary estoppel. If the nature of the assurance or promise is such as to give the promisee reasonable grounds for thinking that they could rely on it, and if they did reasonably rely on it, then there is no point in insisting on any *further* requirement that the assurance must be "clear and unequivocal". Both these requirements pose essentially the same question; and to treat the second as if it imposed a requirement additional to the first is not only unnecessary but also potentially misleading. It should be added that when Lord Scott accepts "the requirement that a representation, if it is to found a claim based on proprietary estoppel must be clear and unequivocal"[891] he does so in the context of other questions than those discussed in the present paragraph: that is, of the questions whether the representation adequately identifies the property alleged to be affected by the estoppel and whether the operation of any such estoppel may be affected by a supervening change of the representor's circumstances. The effect of *Thorner v Major* on these questions is discussed in paras 6-175 and 6-188 below.

**6-168** **Promise must be one to create rights in or over property of the promisor** To give rise to a proprietary estoppel, the promise or representation must contain a statement to the effect that the promisee either has an interest in the property in question or that such an interest will be created in their favour.[892] The rights which the promisee believes to have been created must, as a general rule, be rights in or over the property of the promisor.[893] Thus a representation by a planning authority

[887] See above, para.6-156.
[888] [2009] UKHL 18 at [85].
[889] At [5], [17], [26], [60].
[890] Lord Hoffmann's statement at [6] (quoted in para.6-165 above) contains no reference to any need for an "unequivocal" assurance. Nor does his discussion at [8], read as a whole, support any such requirement: see the last sentence of para.6-165 above.
[891] At [18].
[892] This requirement was not satisfied in *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 W.L.R. 1884; see also above, para.6-109 above.
[893] One exception to this general rule occurs where the promisor makes two promises, of which the first relates to their own land while the second relates to that of the promisee; if the two promises are so closely linked as to form in substance a single transaction, the doctrine of proprietary estoppel might apply to that transaction as a whole: *Salvation Army Trustee Co v West Yorks Metropolitan CC* (1981) 41 P. & C.R. 179. See also *Lester v Woodgate* [2010] EWCA Civ 199, [2010] 2 P. & C.R. 21 at [3]:



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requirement that all the terms agreed by the parties must be contained in one document in a very different context.[242] In that case, the First-tier Tribunal (Tax Chamber) considered four arrangements made by the deceased (D) with a view to removing the value of his home from his estate: (i) a trust deed by which D transferred the property to trustees (D and his solicitor), with D retaining a life interest in possession in the property; (ii) a sale by D of his life interest to the trustees for a price (its current value) on standard terms (which included an entire agreement clause); (iii) a loan agreement under which D loaned the trustees the same sum as the price; and (iv) a deed of assignment by D of the benefit of the loan agreement to his children. In these circumstances, the tribunal held that the sale of the house and the loan in fact formed part of a composite agreement: the true effect of the documents was that D agreed to sell the house to the trustees with completion to occur (and the price paid) on notice following his death.[243] This being the case, it held the sale agreement void under the s.2 of the 1989 Act in that it did not incorporate all the terms of the contract of sale of the freehold, the tribunal rejecting the arguments that the loan formed a collateral agreement or that, on its terms, the sale agreement incorporated the loan agreement by reference.[244] The entire agreement clause did not affect this decision.[245] Moreover, the fact that the two agreements did not reflect the true agreement of the parties meant that, even if read together, they could not satisfy the requirement of s.2 as to the incorporation of all the terms of the sale.[246]

7-038 **"All the terms which the parties have expressly agreed in one document" and rectification** Section 2(4) of the 1989 Act provides that:

> "Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order."

The Act therefore expressly acknowledges the possibility of a court rectifying a document so as to allow a contract to conform to its formal requirements. In *Firstpost Homes Ltd v Johnson* the Court of Appeal noted that while on its terms the letter contained no commitment by the company to purchase the property, the company could have applied to the court to rectify the letter so as to reflect the oral agreement.[247] In *Robert Leonard (Developments) Ltd v Wright*[248] the Court of Appeal exercised its power to order rectification of the terms of documents exchanged

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[242] [2020] UKFTT 53 (TC), [2020] S.F.T.D. 437.
[243] [2020] UKFTT 53 (TC) at [71].
[244] [2020] UKFTT 53 (TC) at [77]–[84]. As a result, the tribunal held the deed of assignment void on the ground of common fundamental mistake as there were no sale proceeds on which the deed could "bite": at [85]. The result was that the house formed part of D's estate for tax purposes.
[245] [2020] UKFTT 53 (TC) at [79]. The entire agreement clause incorporated by reference from the Standard Conditions of Sale (3rd Edition) stated that "This Agreement constitutes the entire contract between the Seller and the Buyer and may only be varied or modified (whether by way of collateral contract or otherwise) in writing under the hands of the Seller and the Buyer or their respective Solicitors" (quoted, [2020] UKFTT 53 (TC) at [20]) but the aspect of the entire agreement clause argued before the tribunal was that it permitted no oral variation, whereas the tribunal held that the loan agreement did not constitute a collateral agreement to the sale agreement and therefore did not directly address the significance of the "entire contract" aspect of the clause.
[246] [2020] UKFTT 53 (TC) at [83].
[247] *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567, 1576, 1577 and cf. above, para.7-036.
[248] [1994] N.P.C. 49. See also *Peters v Fairclough Homes Ltd* Unreported 20 December 2002, Ch D at





by the parties' solicitors by telephone so as to include reference to the sale of the chattels which had been included in the parties' previous oral contract, and the court also ordered that this rectified contract should be deemed to come into being from the date of the exchange of documents. The Court of Appeal recognised that allowing rectification detracted from the legislative purpose of s.2 which was to prevent disputes either as to whether the parties had entered into a binding agreement or as to what terms they had agreed, but the availability of rectification showed that:

> "… it was clearly the intention of the Act that the all terms requirement should not be so inflexible as to cause hardship or unfairness where there has been a mistake resulting in a venial non-compliance with the Act."[249]

In *Oun v Ahmad*[250] Morgan J agreed that a court could sometimes apply the conventional rules governing rectification of written instruments,[251] even though the effect of rectification in the context of the 1989 Act is to rescue an otherwise invalid agreement.[252] Morgan J further held, however, that the court could not order rectification of a document so as to include all the terms of the would-be contract where there was an express agreement to omit a term or terms from the written record of the agreement since in these circumstances there was no mistake in the recording of the agreement.[253] And in *Francis v F. Berndes Ltd*[254] Henderson J followed this approach, holding that, unless available on "conventional grounds", rectification should not be ordered so as to save an agreement from invalidity owing to the formal requirements in s.2 whatever the explanation for the omission of an express term may be:

> "Ignorance of the 1989 Act, or a misapprehension about its operation, cannot … suffice, because the policy which underpins section 2 is the need for certainty in contracts for the sale of land and the avoidance of disputes about what the parties agreed which can be resolved only be recourse to extrinsic evidence."[255]

7-039 **"Exchange of contracts"** In *Commission for the New Towns v Cooper (Great Britain) Ltd*,[256] the Court of Appeal explained the significance of the alternative formal requirement in s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 that all the terms of the contract which the parties have expressly agreed be incorporated "where contracts are exchanged, in each [document]". According to

[26]–[27] (contractual document rectified so as to include longstop date included in correspondence between solicitors). cf. *Enfield LBC v Arajah* [1995] E.G.C.S. 164 (where apparently the possibility of rectification was not raised).
[249] [1994] N.P.C. 49 at [10], per Henry LJ.
[250] [2008] EWHC 545 (Ch), [2008] All E.R. (D) 270 (Mar).
[251] [2008] EWHC 545 (Ch) at [55] and see [2008] EWHC 545 (Ch) at [36] referring to the 1989 Act s.2(4) which states that after rectification "the contract shall come into being, or be deemed to have come into being". For the law of rectification generally see above, paras 5-057 et seq.
[252] [2008] EWHC 545 (Ch) at [36] referring to 1989 Act s.2(4) which states that after rectification "the contract shall come into being, or be deemed to have come into being".
[253] [2008] EWHC 545 (Ch) at [42]–[48]. Morgan J accepted the difference between the case before him and contracts where "there are two separate contracts and not one composite contract": [2008] EWHC 545 (Ch) at [33] and see cf. para.7-032.
[254] [2011] EWHC 3377 (Ch), [2012] 1 All E.R. (Comm) 735.
[255] [2011] EWHC 3377 (Ch) at [43].
[256] [1995] Ch. 259.

(Miscellaneous Provisions) Act 1989 s.2.[77] The authority of the auctioneer to sign was held to arise directly the contract is concluded, and, at any rate on the part of the vendor, was said to be irrevocable.[78] The authority did not extend to the auctioneer's clerk unless the purchaser assented to the clerk's signing for him.[79]

21-015 **Real estate agents**[80] In England and Wales, an agent employed by the vendor to find a purchaser is an agent in a limited sense only.[81] He has authority to describe the property and perhaps make statements as to its value so as to bind his principal,[82] but he has no implied authority to receive a pre-contract deposit on such terms as to make the prospective vendor liable[83] and no power, without express authority, to conclude a contract for a lease[84] or a sale.[85] He therefore provides an example of what has been called above "incomplete" or "canvassing agency".[86] It has been held that if he is instructed actually to sell, he is impliedly authorised to sign on behalf of his principal an open contract of sale, but not a contract containing special conditions.[87] It is his duty to communicate to his principal the best offer received by him at any time before a binding contract for the sale of the property has been actually signed by the principal,[88] unless, of course, he has been informed by his principal that such an offer is not acceptable[89]; and in general he owes fiduciary duties to his principal.[90]

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[77] But the section does not apply to sales by "public auction": so that in such cases a written contract is not normally required.

[78] *Phillips v Butler* [1945] Ch. 358 (highest bidder allowed to send deposit next day and in the meantime vendor withdraws auctioneer's authority—withdrawal ineffective). In principle authority is revocable: below, para.21-182. The reason given here is that a different rule "would be opening a wide door to fraud": *Van Praagh v Everidge* [1902] 2 Ch. 266, 270; but it is difficult to square with theory. See Reynolds in Cranston (ed.), *Making Commercial Law* (1997), pp.265–266; Lord Sumption in *Angove's Pty Ltd v Bailey* [2016] UKSC 47, [2016] 1 W.L.R. 3179 at [10].

[79] *Bell v Balls* [1897] 1 Ch. 663. See in general Murdoch, *Law of Estate Agency*, 5th edn (2009).

[80] See above, para.21-003; below, paras 21-126, 21-154 et seq. The qualifications and activities of estate agents are affected by the Estate Agents Act 1979. See also Consumers, Estate Agents and Redress Act 2007 Pt 3, as amended; Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277, as amended by SI 2014/870); Conway, "Regulation of Estate Agents", House of Commons Briefing Paper No.CPB 6900, 18 April 2019.

[81] It should be noted that practice may differ in other jurisdictions.

[82] *Mullens v Miller* (1882) 22 Ch. D. 194; *Sorrell v Finch* [1977] A.C. 728, 753. But he has no authority to warrant that it may lawfully be used for a particular purpose: *Hill v Harris* [1965] 2 Q.B. 601; and the possibility of warranty may be expressly excluded: *Overbrooke Estates v Glencombe Properties Ltd* [1974] 1 W.L.R. 1335; *Collins v Howell-Jones* [1981] E.G.D. 207.

[83] *Sorrell v Finch*, above, explaining *Ryan v Pilkington* [1959] 1 W.L.R. 403 and overruling *Goding v Frazer* [1967] 1 W.L.R. 286; *Burt v Claude Cousins & Co Ltd* [1971] 2 Q.B. 426 and (in part) *Barrington v Lee* [1972] 1 Q.B. 326. Nor payment: *Petersen v Moloney* (1951) 84 C.L.R. 91. As to deposits, see further below, para.21-118.

[84] *Thuman v Best* (1907) L.T. 239; cf. *Walsh v Griffiths-Jones* (1980) 259 E.G. 331.

[85] *Hamer v Sharp* (1874) L.R. 19 Eq. 108; *Chadburn v Moore* (1892) 61 L.J. Ch. 674; cf. *Keen v Mear* [1920] 2 Ch. 574; *Rosenbaum v Belson* [1900] 2 Ch. 267; *Wragg v Lovett* [1948] 2 All E.R. 968; *Law v Robert Roberts & Co* [1964] I.R. 292 (authorities reviewed). cf. *Spiro v Lintern* [1973] 1 W.L.R. 1002; and *Jawara v Gambian Airways* [1992] C.L.Y. 95, where there was authority on the facts.

[86] Above, para.21-003.

[87] *Keen v Mear*, above.

[88] *Keppel v Wheeler* [1927] 1 K.B. 577.

[89] See *Burchell v Gowrie & Blockhouse Collieries* [1910] A.C. 614, 625.

[90] e.g. *Regier v Campbell-Stuart* [1939] Ch. 766; *Premium Real Estate Ltd v Stevens* [2009] 2 N.Z.L.R. 384; see below, paras 21-129 et seq.





21-016 **Solicitors**[91] Solicitors provide professional services for a fee, but may also have agency functions. For example, in litigation, there are decisions that a solicitor, acting under a general retainer, has implied authority to accept service of process and appear for the client, but has no authority to commence an action.[92] As between client and opponent, the former is in general bound by the acts of his solicitor done in the ordinary course of practice. Solicitors and counsel were said to have a general implied authority to effect a reasonable compromise (unless forbidden) in all matters connected with the suit in question and not merely collateral to it. They would therefore have *apparent* authority[93] to do so even if forbidden by the client, against a third party without notice of the limitation[94]; though if the consent was given under a misapprehension it may be withdrawn before a consent order is drawn up.[95] But it is not at all clear that such authority would be easily inferred today. By s.69 of the Law of Property Act 1925, the production of a deed containing a receipt for consideration money is authority for payment of that money in cash to the solicitor. Beyond this, solicitors may acquire confidential information, and owe fiduciary duties not necessarily attributable to their agency functions, but rather to confidential relationships with their clients. They may also hold money on trust for clients.

21-017 **Partners** The law of partnership raises many questions of agency law. The authority of partners is primarily[96] set out in s.5 of the Partnership Act 1890, which provides that:

> "Every partner is an agent of the firm[97] and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."[98]

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[91] See *Cordery on Legal Services*, 9th edn (looseleaf). But note in general *United Bank of Kuwait Ltd v Hammoud* [1988] 1 W.L.R. 1051, 1063, per Staughton LJ: "I prefer to have regard to the expert evidence of today in deciding what is the ordinary authority of a solicitor". See further a useful summary in *Pavlovic v Universal Music Australia Pty Ltd* [2015] NSWCA 313, (2015) 90 N.S.W.L.R. 605; below, para.21-145.

[92] *Wright v Castle* (1817) 3 Mer. 12.

[93] See below, paras 21-063 et seq.

[94] *Strauss v Francis* (1866) L.R. 1 Q.B. 379; *Re Newen* [1903] 1 Ch. 812; *Little v Spreadbury* [1910] 2 K.B. 658; *Welsh v Roe* (1918) 87 L.J. K.B. 520; *Thompson v Howley* [1977] 1 N.Z.L.R. 16; *Waugh v HB Clifford & Sons Ltd* [1982] Ch. 374 (authorities reviewed); *Penman v Parker* [1986] 1 W.L.R. 882 (notice under Road Traffic Act); *Marsden v Marsden* [1972] Fam. 280 (barrister). As to the authority of a representative from a Citizens' Advice Bureau see *Freeman v Sovereign Chicken Ltd* [1991] I.R.L.R. 408. See below, para.21-063 (apparent authority). A recent case raises such authority in connection with an attorney instructed by an insurance company to act for the assured, and who settled the claim of the assured: *Ramsook v Crossley* [2018] UKPC 9, [2018] 1 R.T.R. 29.

[95] *Shepherd v Robinson* [1919] 1 K.B. 474. See *Foskett on Compromise*, 9th edn (2020).

[96] See also ss.6, 7, 8, 9, 14, 17, 36, 38; and in general *Lindley and Banks on Partnership*, 20th edn (2017).

[97] As to the meaning of "firm", see s.4.

[98] But a "limited partner" has no power to bind his firm: Limited Partnership Act 1907 s.6 (though a member of a limited liability partnership has: Limited Liability Partnerships Act 2000 s.6); and joint adventurers are not necessarily partners with power to bind each other: *Heaps v Dobson* (1863) 15 C.B. N.S. 460; cf. *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 C.L.R. 1. The last 11 words of s.5 are notoriously ambiguous: see Montrose (1939) 17 Can. Bar Rev. 700–701; Thomas (1971) 6 Victoria U. of Wellington L.R. 1.

constructive notice in commercial transactions and there is quite extensively argued recent authority[393] that the third party can rely on an appearance of authority unless its belief that there was authority was "dishonest or irrational", which would include turning a blind eye. But though there is also authority that "nothing short of bad faith will do"[394] such an approach may go too far in protecting third parties, and does not accord with all the existing case law cited here.[395] The position as previously understood is restored by a recent Privy Council case which considers the dicta cited and recognises that a claimant cannot rely on apparent authority "if it failed to make the inquiries that a reasonable person would have made in all the circumstances in order to verify that [the agent] had authority".[396]

**21-064** **"True" estoppel** Although it seems that apparent authority should be attributed to a weak form of estoppel, there are some situations where a more orthodox form of estoppel, where there is more recognisable reliance, is employed in an agency context. This can be so where the agent cannot be said to have had actual or apparent authority, and nor has there been ratification,[397] but nevertheless the "principal" caused the belief that the transaction in question was within the supposed agent's authority, or had been authorised, or, knowing that such a belief was held, took no steps to correct it.[398] In some cases of this type the appearance of authority can

1051; *Hirst v Etherington* [1999] Lloyd's Rep. P.N. 938 (solicitors); *Egyptian Intl Foreign Trade Co v Soplex Wholesale Supplies Ltd (The Raffaella)* [1985] 2 Lloyd's Rep. 36 (documentary credits manager); *Gurtner v Beaton* [1993] 2 Lloyd's Rep. 369 (aviation manager). Where evidence as to what is usual in the particular occupation is relied on, this may be prejudicial to a third party who did not know of the practice, as in the harsh case of *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Rep. 9, HL (levels of manager within company); cf. however *Cleveland Mfg Co Ltd v Muslim Commercial Bank Ltd* [1981] 2 Lloyd's Rep. 646.

[393] In the judgment of Lord Neuberger in the Hong Kong Court of Final Appeal in *Thanakhorn Kasikorn Thai Chamchat v Akai Holdings Ltd* (2010) 13 H.K.C.F.A.R. 479 at [51] (accepting a submission of counsel, Mr Sumption QC).

[394] *Lexi Holdings v Pannone & Partners* [2009] EWHC 2590 (Ch) at [61] et seq., per Briggs J. Dicta in the Hong Kong case were followed by the Court of Appeal in *Quinn v CC Automotive Group Ltd* [2010] EWCA Civ 1412, [2011] 2 All E.R. (Comm) 584, where it is said that the reasonableness of the third party's belief was "neither here nor there"; see also *Newcastle International Airport Ltd v Eversheds LLP* [2012] EWHC 2648 (Ch), [2013] P.N.L.R. 5; *Acute Property Developments Ltd v Apostolou* [2013] EWHC 200 (Ch), [2013] Bus. L.R. D22; *LNOC Ltd v Watford Association Football Club Ltd* [2013] EWHC 3615 (Comm).

[395] See Bowstead and Reynolds on Agency, 22nd edn (2021), art.73, esp.at 8-049, 8-050 on the authority cited in the *Thanakhorn* case): Watts [2015] L.M.C.L.Q. 36. In particular it does not accord well with recent discussion in the context, admittedly different, of the inquiries to be made by bona fide purchaser in an equitable but commercial (banking) context: see *Papadimitriou v Crédit Agricole Corp* [2015] UKPC 13, [2015] 1 W.L.R. 4265; see also *Gray v Smith* [2013] EWHC 4136 (Comm), [2014] 2 All E.R. (Comm) 359.

[396] *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2019] UKPC 30, [2020] 2 All E.R. 294 at [93]; followed in *Business Mortgage Finance 6 Plc v Roundstone Technologies Ltd* [2019] EWHC 2917 (Ch).

[397] On the relation between apparent authority and estoppel see *Bowstead and Reynolds on Agency*, 22nd edn (2021), para.2-080.

[398] e.g. *Spiro v Lintern* [1973] 1 W.L.R.1002; *Worboys v Carter* [1987] 2 E.G.L.R. 1. For another example see *Geniki Investments International Ltd v Ellis Stockbrokers Ltd* [2008] EWHC 549 (QB), [2008] 1 B.C.L.C. 662. See also *City Bank of Sydney v McLaughlin* (1909) 9 C.L.R. 615, 625. The idea that this estoppel is different from that generally applicable in connection with apparent author-





perhaps sometimes be attributed also to the principal's negligence in operating a system under which an unauthorised person can appear to be authorised.[399]

**21-065** **Agents of companies**[400] Special considerations arise in the case of agents of companies, because companies can only act through agents, yet are limited in their permissible activities by their memoranda of association and have public documents indicating the distribution of powers within their constitution, which can be inspected. These features modify the application of the law of agency to agents of companies; but they have themselves been modified by statute. The law should be sought in specialised works[401]: what follows is only intended to draw attention to the impact of these special features on agency law.

**21-066** **Ultra vires** First, if a contract made by the agent of a company was ultra vires the company's memorandum of association, the company could not be bound. This doctrine was held not to apply to the exercise of powers of a type which the company undoubtedly possesses but where those powers have been used for purposes outside the memorandum or articles of association, or for improper motives.[402] But it is largely abolished in relation to external relations by s.39 of the Companies Act 2006,[403] which provides that "The validity of an act done by a company shall not be called in question on the ground of lack of capacity by reason of anything in the company's constitution". The doctrine continues to have some effect as regards a company's internal regulation, and in dealings with a director, or a person associated with a director.[404]

**21-067** **Notice of public documents** Secondly, the operation of the doctrine of apparent authority was affected by another doctrine, that a person dealing with a company was deemed to have constructive notice of its public documents, and hence of restrictions on the authority of the particular agent. This was to some extent balanced by the "indoor management" rule under which, where the person acting for the company *could* have been authorised, and either was specifically held out as authorised, or acted within the usual authority of company agents of that type,[405] the third party might be entitled to assume that procedures for authorisation had been complied with.[406] This constructive notice doctrine is also abolished by the

ity is rejected by the Singapore Court of Appeal in *The Bunga Melati 5* [2015] 2 S.L.R. 114. See also C.-H. Tan (2020) 136 L.Q.R. 315.

[399] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 C.L.R. 451 (documentary credits manager armed with rubber stamp). See also *Martin v Britannia Life Ltd* [2000] Lloyd's Rep. P.N. 412, 5.3.4 (supply of business cards); cf. *Kooragang Investments Pty v Richardson & Wrench Ltd* [1982] A.C. 462 (use of letterhead); *Smith v Prosser* [1907] 2 K.B. 735 (promissory note signed in blank).

[400] The leading recent common law cases are still *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480 and *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549. They should however be read subject to what follows.

[401] See also paras 12-020 et seq.; *Gower's Principles of Modern Company Law*, 11th edn (2021), paras 8-004 et seq.

[402] *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch. 246 (principle is one of capacity).

[403] Deriving from s.108 of the Companies Act 1989, giving effect to the EC First Directive on Company Law, and replacing earlier legislation which had been found inadequate for this purpose.

[404] Companies Act 2006 ss.40, 41.

[405] Above, para.21-050.

[406] The so-called rule in *Royal British Bank v Turquand* (1856) 6 El. & Bl. 327.



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the trust had not been at risk, and that the persons concerned might have made a loss and had been acting bona fide throughout. It is no defence to the principal's claim that the profit was made by means of a fraud on a third party, nor that the agent may have rendered himself liable to a third party.[851] Although in general the fiduciary duties end when the relationship of agency ends,[852] the agent's duty not to misuse his position or the property or information of his principal may extend beyond the period of the agency.[853]

**21-135** **Self-dealing**[854] There is also much authority that an agent employed to buy may not be the seller himself, even though he sells at the market price,[855] nor may an agent appointed to sell buy the property himself.[856] However fair the transaction, it may be set aside by the principal,[857] unless the agent had made full disclosure of all the material facts and the nature and extent of his interest and obtained his principal's consent or unless the principal subsequently waives the breach of duty.[858] It is not sufficient that the agent has put his principal on inquiry; moreover the burden of proving full disclosure lies on the agent.[859] The agent's good faith is not material.[860] So, where a large trading company which carried on separately an estate agency and a building business was employed, through its estate agency, to sell property and subsequently, through its building department, inspected the drains on behalf of the purchaser, it was held that it had committed a breach of duty.[861] An orthodox view of the cases is to the effect that the basic remedy here is rescission, and that other remedies are not often available except incidentally. Thus it is said that an agent selling to his principal is only liable for a secret profit (as opposed to being open to rescission) if he acquired the property in question while owing fiduciary duties, and so would be liable for it under general principles[862]; and there are comparatively few cases holding agents who buy from their principals liable to account for profits made, usually where rescission is impossible or inappropriate.[863] It can, however, be argued that the application of a more general right to equitable compensation is often as appropriate to breaches of these duties as it is to those of other fiduciary duties.[864]

[851] *Jubilee Cotton Mills v Lewis* [1924] A.C. 958.

[852] See *Bowstead and Reynolds on Agency*, 22nd edn (2021), para.6-038.

[853] *Carter v Palmer* (1842) 8 Cl. & F. 657; *Regier v Campbell-Stuart* [1939] Ch. 766; *Longstaff v Birtles* [2001] EWCA Civ 1219, [2002] 1 W.L.R. 470. See also *CMS Dolphin Ltd v Simonet* [2001] 2 B.C.L.C. 704. Compare the unusual case of *Nordisk Insulinlaboratorium v Gorgate Products Ltd* [1953] Ch. 430, where no information was acquired and the agents used their position only by virtue of special provisions relating to alien enemies. It will usually be in relation to confidential information that the agent's duty will continue after termination of the agency contract: see, e.g. *Lamb v Evans* [1893] 1 Ch. 218; *Robb v Green* [1895] 2 Q.B. 315; *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222.

[854] See *Bowstead and Reynolds on Agency*, 22nd edn (2021), art.45; Conaglen, *Fiduciary Loyalty* (2010), pp.126–128; Goff and Jones, *Law of Unjust Enrichment*, 9th edn (2016), paras 8-175 et seq. This is referred to separately in *Bristol & West B.S. v Mothew* [1998] Ch. 1, 19.

[855] e.g. *Massey v Davies* (1794) 2 Ves. Jr. 317; *Bentley v Craven* (1853) 18 Beav. 75; *Armstrong v Jackson* [1917] 2 K.B. 822; *Headway Construction Co Ltd v Downham* (1974) 233 E.G. 675.

[856] e.g. *McPherson v Watt* (1877) 3 App. Cas. 254; *Dunne v English* (1874) L.R. 18 Eq. 524.

[857] *Aberdeen Ry v Blaikie Bros* (1854) 1 Macq. 461; *Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch. 488. cf. *Connolly v Brown* (2006) 207 S.L.T. 778. See below, para.21-139.

[858] The rule for express trustees is stricter.

[859] *Dunne v English* (1874) L.R. 18 Eq. 524; *JD Wetherspoon Plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch).

[860] *Phipps v Boardman* [1967] 2 A.C. 46.

[861] *Harrods Ltd v Lemon* [1931] 2 K.B. 157. See also *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1988) 22 D.L.R. (4th) 410. cf. *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd* [2011] EWHC 1515 (TCC), [2012] 1 All E.R. (Comm) 1045 (principal aware of collateral services provided).

[862] The case usually cited is *Re Cape Breton Co* (1885) 29 Ch. D. 795; affirmed sub nom. *Cavendish-Bentinck v Fenn* (1887) 12 App. Cas. 652. See also *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 N.S.W.L.R. 815, 835–837.





**21-136** **Conflict of duty and duty**[865] Sometimes the agent finds himself in a position where his duty to one principal actually conflicts with his duty to another. He may then be in breach of duty to one by acting with the intention of furthering the interest of the other at the expense of the first; or by failure to disclose to one information relevant to him—information which he would be in breach of duty to the other in disclosing without consent. Here he is unlikely to make a profit at the expense of either, but may well cause loss for which he may be liable at common law in tort or in breach of contract[866]; but sometimes an action may lie in equity.[867] He may also in appropriate cases be restrained by injunction. He must serve each as faithfully and loyally as if he were his only principal,[868] and if he cannot do this he may need to resign one or both of his commitments.

However, where the agent is of a type known to act for many parties (e.g. an estate agent) it may be held that the situation is impliedly assented to by his principals and that there is no breach of duty.[869] There has as yet been little judicial consideration of the conflicts that might arise from the prospect of an agent obtaining future business from the counterparty of his principal.[870]

**21-137** **Exclusion of liability**[871] Especially in the financial world, clauses may be inserted in contracts with persons who would in normal speech be called agents, e.g. stockbrokers, whereby the "agent" indicates that he may act in ways which would normally be inconsistent with normal fiduciary duties, e.g. that he may without disclosure sell to his principal shares which he owns. Such clauses may be valid as making disclosure to the principal and hence satisfying the fiduciary obligation, or

[863] e.g. *McKenzie v MacDonald* [1927] V.L.R. 134; and see *JJ Harrison (Properties) Ltd v Harrison* [2001] 1 B.C.L.C. 158.

[864] See Conaglen (2003) 119 L.Q.R. 246; below, para.21-143.

[865] See *Bowstead and Reynolds on Agency*, 22nd edn (2021), paras 6-048 et seq.; Conaglen (2009) 125 L.Q.R. 111.

[866] See *Hilton v Barker-Booth and Eastwood* [2005] UKHL 8, [2005] 1 W.L.R. 567 (solicitor: irreconcilable duties to two clients: damages in contract); *Marks & Spencer Plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741, [2005] P.N.L.R. 4; affirming [2004] EWHC 1337, [2005] 1 W.L.R. 2331 (different transactions); *HIH Casualty and General Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710, [2007] 2 Lloyd's Rep. 278 (insurance broker not liable in negligence).

[867] e.g. an action for an account of profits, equitable compensation, or rescission. See below and *North & West Trust Co v Berkeley* [1971] 1 W.L.R. 470, 484–485.

[868] *Bristol & West BS v Mothew* [1998] Ch. 1, 19, per Millett LJ.

[869] *Kelly v Cooper* [1993] A.C. 205 (estate agent) as explained in *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222, 235; and see *Bristol & West BS v Mothew* [1998] Ch. 1. But it is submitted that some of the dicta in *Kelly v Cooper* are too wide. See above, para.21-129. As to solicitors, see below, para.21-145. The leading cases mostly concern single practitioners and small firms. For further developments of the problems arising in larger organisations see Finn in McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992), Ch.1, pp.15–36. It is certainly doubtful whether such reasoning could apply where the Commercial Agents Regulations (above, para.21-020) are operative: see regs 3(1), 5(1).

[870] See *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch) at [213]–[221]; *Premium Real Estate Ltd v Stevens* [2009] 2 N.Z.L.R. 384.

[871] See *Bowstead and Reynolds on Agency*, 22nd edn (2021), para.6-056.



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ments by operation of law, e.g. on the death or bankruptcy of a contracting party.[4] Before 1875, the only methods of achieving the equivalent of an assignment of contractual rights at law were by novation,[5] and by procuring the debtor's acknowledgment that he held for the assignee[6]: but both of these required the consent of the debtor. Powers of attorney could also be used to effect assignments, but these had considerable disadvantages, being normally revocable.[7]

22-002 **Assignment in equity** The rule of equity, on the other hand, was to permit the assignment of contractual rights whether such rights were legal or equitable. If the rights were equitable (e.g. a legacy or a share in a trust fund), the assignee could sue in his own name, but it was necessary to make the assignor a party to the suit if he retained any interest in the subject-matter, for instance if the assignment was not absolute but conditional or by way of charge. If the right was a legal right, equity could compel the assignor to allow the assignee to use his name in a common law action.[8] The assignor had to be a party to such an action in order to bind him at law.

22-003 **Assignment under particular statutes** The assignment of certain kinds of choses in action is now regulated by particular statutes. Examples are: bills of lading[9]; policies of life insurance[10]; policies of marine insurance[11]; shares in a company[12]; negotiable instruments[13]; patents[14]; and copyright.[15] Furthermore, to protect the creditors of insolvent assignors, provision has been made for the registration of certain assignments.[16]

22-004 **Statutory and equitable assignments** General statutory provision for the assignment of choses in action was first made by s.25(6) of the Judicature Act 1873, which is now repealed and substantially re-enacted by s.136 of the Law of Property Act 1925. But an assignment which fails to comply with the statutory requirements is not necessarily invalid, for it may take effect as a perfectly good equitable assignment: "[t]he statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree".[17] Indeed, it appears that for the purpose of the substantive law, there is often little (if any) advantage in a statutory assignment over an equitable assignment. To a considerable extent the rules governing them are identical, e.g. the rules relating to the question whether a particular right is assignable,[18] to priorities between successive assignees (at any rate in most cases)[19] and

[4] See below, Ch.23.
[5] Below, para.22-089.
[6] Below, para.22-099.
[7] See Marshall, *The Assignment of Choses in Action* (1950), at pp.67–69.
[8] *Hammond v Messenger* (1838) 9 Sim. 327.
[9] Carriage of Goods by Sea Act 1992.
[10] Policies of Assurance Act 1867 s.1.
[11] Marine Insurance Act 1906 s.50(2).
[12] Companies Act 2006 s.544, replacing Companies Act 1985 s.182(1); Stock Transfer Act 1963.
[13] Bills of Exchange Act 1882.
[14] Patents Act 1977 ss.30, 32.
[15] Copyright Designs and Patents Act 1988 ss.90, 94.
[16] Insolvency Act 1986 s.344; Companies Act 2006 ss.859A–859Q, replacing ss.860–861, 863, 866–867, 874; below, paras 22-062—22-068.
[17] *Brandt's Sons & Co v Dunlop Rubber Co* [1905] A.C. 454, 462.
[18] Below, para.22-043.





to the principle that assignments are "subject to equities".[20] Sometimes, as, e.g. with regard to consideration, the rules may be formulated differently, but appear to be substantially identical in result.[21] And even where the rules governing statutory and equitable assignments are different, e.g. with regard to the necessity for writing[22] and to assignments by way of charge,[23] the distinction is usually of little importance so far as the substantive law is concerned, because the rules of equity are often wider, but never narrower, than the rules governing statutory assignments.

22-005 **Difference between statutory and equitable assignments** However, there is one very important procedural consequence which attaches to the distinction between statutory and equitable assignments. A statutory assignee can sue the debtor without joining the assignor as a party to the action,[24] whereas an equitable assignee often cannot do this.[25] Furthermore, it must be observed that whereas a statutory assignment passes a legal right to the assignee, an equitable assignment passes only an equitable right. In practice, as already observed, this usually makes little difference as a matter of substantive law to the efficacy of the assignment; but there are some situations where the distinction can prove of practical importance. For example, it has been held that an assignee of an option to renew a contract for services who had not given notice of his assignment to the other contracting party could not exercise the option: the reasoning is based on the fact that the assignment was equitable only.[26]

22-006 **Transfer of rights?** The conventional view is that an equitable assignment, like a statutory assignment, involves a transfer of rights from the assignor to the assignee. However, this orthodox position has recently been challenged.[27] It has been argued that equitable assignment, as distinct from statutory assignment, does not involve any *transfer* of rights. Rather the assignee in equity is given new rights by the assignor in respect of the rights of the assignor which are still retained by the assignor: that is, the assignee's rights encumber the assignor's rights but the assignor's rights are not transferred. In effect, the assignor holds its rights on trust for the assignee. Although this theory runs counter to the prevailing view that all assignments involve a transfer and that an assignment in equity and a trust are different concepts, it does have the merit of providing a convincing substantive reason, rather than a somewhat vague procedural explanation, for why the assignor must

[19] Below, para.22-070.
[20] Below, para.22-072.
[21] Below, paras 22-020 and 22-028 et seq.
[22] Below, para.22-016.
[23] Below, para.22-013.
[24] Below, para.22-007.
[25] Below, paras 22-039—22-042.
[26] *Warner Bros Records Inc v Rollgreen Investments Ltd* [1976] Q.B. 430 (see Kloss (1975) 39 Conv.(N.S.) 261). But the authority of the case is somewhat distorted by the formulation of the question to which the Court of Appeal gave an answer, and some of the dicta may go further than was necessary for the decision of the case, which should perhaps be regarded as authority only upon the equitable assignment of options; quaere whether the result would have been the same had the assignment been oral, and so still equitable; but the assignee *had* given notice (even in the same letter). Note also that some aspects of the reasoning in this case were disapproved by a majority of the Court of Appeal (Peter Gibson LJ, with whom Waite LJ agreed) in *Three Rivers DC v Bank of England* [1996] Q.B. 292.
[27] e.g. Edelman and Elliott, "Two Conceptions of Equitable Assignment" (2015) 131 L.Q.R. 228.



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### (d) Payment by Negotiable Instrument or Documentary Credit

**24-072** **Payment by negotiable instrument**[370] Apart from express agreement,[371] a creditor is not bound to accept payment in any way except cash, i.e. legal tender.[372] If, however, the creditor accepts a negotiable instrument,[373] such as a bill of exchange, promissory note or cheque, it is a question of fact[374] depending on the intention of the parties, whether it is taken in absolute satisfaction of the debt, or only in conditional satisfaction. In either event, the acceptance of the instrument gives the debtor a good defence to an action for the debt, at least until the instrument matures.[375]

**24-073** **Conditional payment** Normally where a creditor accepts a negotiable instrument for its debt it is presumed[376] to be taken by it as a qualified or conditional payment, and, accordingly, although the original debt is still due during the currency of the instrument, the creditor's remedy is suspended until it is due.[377] If it is then paid, this amounts to payment of the debt[378]; if it is dishonoured when it is presented for payment in the ordinary way,[379] the right to sue upon the original debt revives as if no negotiable instrument had been taken.[380] Hence, if interest was due on the

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[370] The previous restrictions on payment of wages by cheque have been repealed: see Vol.II, para.42-101.

[371] On payment by bankers' commercial credit, see Vol.II, paras 36-452 et seq., 46-240. On payment by credit or charge card, see below, para.24-081.

[372] e.g. where the debtor, in answer to a demand for payment, sent to the creditor a post office order which was in fact defective, but could easily have been rendered effective by the creditor, it was held that this was no evidence of payment as the debtor had no right to put his creditor to the trouble of either correcting the mistake or of returning the defective post office order: *Gordon v Strange* (1847) 1 Exch. 477.

[373] cf. *Plimley v Westley* (1835) 2 Bing. N.C. 249 (note endorsed by debtor to creditor, but it was not negotiable).

[374] *Goldshede v Cottrell* (1836) 2 M. & W. 20; *Re Boys* (1870) L.R. 10 Eq. 467; *Re Romer and Haslam* [1893] 2 Q.B. 286; *Palmer v Bramley* [1895] 2 Q.B. 405. cf. *Re Charge Card Services Ltd* [1989] Ch. 497.

[375] The same result follows: (i) where the bill or note for the debt is given to the creditor by a third party: *Allen v Royal Bank of Canada* (1925) 95 L.J.P.C. 17 (see also *Belshaw v Bush* (1851) 11 C.B. 191, and cf. on the need for consideration in such circumstances: *Oliver v Davis* [1949] 2 K.B. 727); (ii) where the bill or note is, at the creditor's request, payable to a third person: *Price v Price* (1847) 16 M. & W. 232, 241; *National Savings Bank Association Ltd v Tranah* (1867) L.R. 2 C.P. 556.

[376] This presumption is not displaced merely because the cheque was handed over with a bank card: *Re Charge Card Services Ltd* [1987] Ch. 150, 166. The Court of Appeal reserved its view on this point: [1989] Ch. 497, 517.

[377] *Sayer v Wagstaff* (1844) 5 Beav. 415; *Belshaw v Bush* (1851) 11 C.B. 191; *Currie v Misa* (1875) L.R. 10 Ex. 153; affirmed (1876) 1 App. Cas. 554; *Ex p. Matthew* (1884) 12 Q.B.D. 506; *Re Romer & Haslam* [1893] 2 Q.B. 286, 296; *Felix Hadley & Co Ltd v Hadley* [1893] 2 Ch. 680; *Allen v Royal Bank of Canada* (1925) 95 L.J.P.C. 17; *Re Charge Card Services Ltd* [1987] Ch. 150, 511; *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd* [2005] EWHC 736 (Ch), [2005] 2 B.C.L.C. 571 at [91]. See also *Griffiths v Owen* (1844) 13 M. & W. 58, 64.

[378] *Thorne v Smith* (1851) 10 C.B. 659; *Felix Hadley & Co Ltd v Hadley* [1893] 2 Ch. 680; *Re Home* [1951] Ch. 85, 89. Payment in part is pro tanto discharge: *Bottomley v Nuttall* (1858) 5 C.B.(N.S.) 122.

[379] *Re Raatz* [1897] 2 Q.B. 80 (debtor's commission of an available act of bankruptcy amounts to dishonour of negotiable instrument given to creditor).

[380] *Gunn v Bolckow, Vaughan & Co* (1875) L.R. 10 Ch. App. 491; *Cohen v Hale* (1878) 3 Q.B.D. 371; *Re Romer & Haslam* [1893] 2 Q.B. 286, 296; *D.P.P. v Turner* [1974] A.C. 357, 367–368, 369. Where the bill has been negotiated and is outstanding in the hands of a third party, the creditor's remedy is still suspended: *Davis v Reilly* [1898] 1 Q.B. 1; *Re A Debtor* [1908] 1 K.B. 344 (except where the





debt, it continues to accrue after the date of acceptance of a cheque which is subsequently dishonoured.[381] It has been held that a claimant who accepts a cheque for part of the debt cannot sign judgment in default of appearance for the full amount claimed unless the cheque is dishonoured.[382] Similarly, acceptance of an irrevocable documentary credit does not constitute absolute payment to the seller so as to release the buyer; if the credit is not honoured, the seller may sue the buyer.[383]

**24-074** **Bill or note from debtor's agent** A creditor does not lose its remedy against its debtor merely by taking for the debt a bill or note of the debtor's agent, even without the debtor's consent.[384] The debtor will be discharged if the creditor has the opportunity of receiving payment in cash from the debtor's agent, but, for its own convenience, elects to take the agent's (or a third party's) bill or note.[385]

**24-075** **Collateral security** A negotiable instrument may be given to the creditor as collateral security for the debt, so that the existing remedies for the debt are unaffected.[386] This was frequently held to be the intention of the parties when the debt was due under a deed, or another remedy (e.g. distress) was also available.[387] Thus, where a cheque was given for interest due on a debenture, there was not a conditional payment so as to release the security; where the cheque was not met and the company went into liquidation, the debenture-holder could still claim to be a secured creditor in respect of the interest.[388] Even where the debt is secured, the acceptance of a negotiable instrument may, in the circumstances, be evidence of an agreement to suspend the remedy under the security.[389]

**24-076** **Absolute payment** If the creditor accepts a negotiable instrument in absolute satisfaction of the original debt, agreeing expressly or impliedly to take upon itself the risk of the instrument not being paid, the effect is to extinguish its right of ac-

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third party is a trustee for the claimant: *National Savings Bank Association Ltd v Tranah* (1867) L.R. 2 C.P. 556; or agent for the claimant: *Hadwen v Mendisabal* (1825) 10 Moo. C.P. 477). If, though the dishonoured bill has been negotiated, it has again been transferred to the creditor, the latter may sue on the original demand: *Tarleton v Allhusen* (1834) 2 Ad. & El. 32.

[381] *D.P.P. v Turner* [1974] A.C. 357, 368.

[382] *Bolt & Nut Co (Tipton) Ltd v Rowlands, Nicholls & Co Ltd* [1964] 2 Q.B. 10.

[383] *W.J. Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 Q.B. 189, 209–212, 221; *Maran Road Saw Mill v Austin Taylor & Co Ltd* [1975] 1 Lloyd's Rep. 156; *E.D. & F. Man Ltd v Nigerian Sweets and Confectionery Co Ltd* [1977] 2 Lloyd's Rep. 50; *Re Charge Card Services Ltd* [1989] Ch. 497, 511 (below, para.24-081). See Vol.II, paras 36-502—36-504.

[384] *Robinson v Read* (1829) 9 B. & C. 449.

[385] *Marsh v Pedder* (1815) 4 Camp. 257; *Smith v Ferrand* (1827) 7 B. & C. 19; *Strong v Hart* (1827) 6 B. & C. 160; *Robinson v Read* (1829) 9 B. & C. 449, 455; *Anderson v Hillies* (1852) 12 C.B. 499; *Litchfield Union v Greene* (1857) 1 Hurl. & N. 884, 892. Other rules on agency may also apply to this situation: see paras 21-076—21-079. cf. *Everett v Collins* (1810) 2 Camp. 515 (cheque of debtor's "servants" rather than of his "agents").

[386] *Drake v Mitchell* (1803) 3 East 251; *Pring v Clarkson* (1822) 1 B. & C. 14; *Peacock v Pursell* (1863) 14 C.B.(N.S.) 728; *Re London, Birmingham and South Staffordshire Bank* (1865) 34 L.J. Ch. 418; *Modern Light Cars Ltd v Seals* [1934] 1 K.B. 32 (following *Re Rankin and Shiliday* [1927] N.I. 162).

[387] *Davis v Gyde* (1835) 2 A. & E. 623; *Worthington v Wigley* (1837) 3 Bing. N.C. 454; *Belshaw v Bush* (1851) 11 C.B. 191, 206; *Henderson v Arthur* [1907] 1 K.B. 10, 13–14; *Re J. Defries & Sons Ltd* [1909] 2 Ch. 423, 428 ("the mere giving of a cheque is not conditional payment of a secured debt so as to release the security"). cf. *Bolt & Nut Co (Tipton) Ltd v Rowlands Nicholls & Co Ltd* [1964] 2 Q.B. 10.

[388] *Re J. Defries & Sons Ltd* [1909] 2 Ch. 423.

[389] *Baker v Walker* (1845) 14 M. & W. 465; *Palmer v Bramley* [1895] 2 Q.B. 405.



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or radical change from the obligation originally undertaken?[50] Thus, Lord Radcliffe said:

> "… frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do … There must be … such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."[51]

Lord Reid put the test for frustration in a similar way:

> "The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."[52]

Later in his speech,[53] he approved the words of Asquith LJ that the question is whether the events alleged to frustrate the contract were:

> "… fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply."[54]

It is submitted that the test put forward by Lord Reid is substantially the same as that of Lord Radcliffe.

26-013 **Confirmation of the test** In subsequent cases the House of Lords has expressly upheld the *Davis Contractors* formulation of the test for frustration.[55] In *National Carriers Ltd v Panalpina (Northern) Ltd*[56] Lord Simon restated the test as follows:

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50 This formulation does not cover the special case of supervening illegality (see below para.26-024). With this formulation, compare that in *Williston on Contracts*, 3rd edn (1978), Vol.18, para.1931, at 8: "The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract".

51 [1956] A.C. 696, 729. This statement was explicitly approved by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 688, 700, 702, 707, 717 and in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 744, 751–752. Earlier approval was given in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93. It has also been cited with approval by the Court of Appeal in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1039 and in *Globe Master Management Ltd v Boulus-Gad Ltd* [2002] EWCA Civ 313.

52 [1956] A.C. 696, 721. (Lord Somervell agreed with Lord Reid on this issue, 733.)

53 [1956] A.C. 696, 723.

54 *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 K.B. 632, 667. See also the words of Lord Sumner in *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 460: "I am of opinion that the requisitioning of the [ship] destroyed the identity of the chartered service and made the charter as a matter of business a *totally different thing*"; also the statement of Lord Simon in *British Movietonews Ltd v London & District Cinemas Ltd* [1952] A.C. 166, 185: "[I]f … a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound *in a fundamentally different situation* which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but *because on its true construction it does not apply in that situation*"; and that of Lord Dunedin in *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119, 128: "An interruption may be so long as *to destroy the identity of the work or service*, when resumed, with the work or service interrupted" (italics supplied).

55 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675; *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724 (three of their Lordships in the former case referred to it





> "Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."[57]

Yet, at the same time it was said that the doctrine should be flexible and capable of new applications as new circumstances arise.[58]

**Construction of the contract** Both Lords Reid and Radcliffe in *Davis Contractors* emphasised that the first step was to construe: 26-014

> "… the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made."[59]

From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original "obligation" and what would be the new "obligation" if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a "radical" or "fundamental" change from the original obligation.[60] It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the "obligation" or the actual effect of the promises of the parties construed in the light of the new circumstances. Was "performance … fundamentally different in a commercial sense"?[61]

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as "the construction test": 688, 702, 717); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, 909, 918–919.

56 [1981] A.C. 675.

57 [1981] A.C. 675, 700. (On the use of the word "unjust", see the use of "injustice", 701, and below, para.26-017.)

58 [1981] A.C. 675, 692, 694, 701, 712.

59 [1956] A.C. 696, 720–721, per Lord Reid; cf. 729, per Lord Radcliffe. In *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), 183 Con. L.R. 167 at [29] Marcus Smith J emphasised that the interpretation of the contract is the "beginning" rather than the "end of the doctrine of frustration".

60 "I turn then to consider the position after the Canal was closed, and to compare the rights and obligations of the parties thereafter, if the contract still bound them, with what their rights and obligations would have been if the Canal had remained open". Per Lord Reid, in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 118. "Whether a supervening event is a frustrating event or not, is, in a wide variety of cases, a question of degree …", per Lord Hailsham, in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 688.

61 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 119. See to the same effect *Pioneer*



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frustration operates within narrow confines,[450] this should not prevent the courts from recognising that a contracting party who, without fault on his part has been disabled from performing part of his contractual obligations, may be able to rely on the supervening event as an excuse for that non-performance.

## 6. THE LEGAL CONSEQUENCES OF FRUSTRATION[451]

**26-100** **Common law** Although the Law Reform (Frustrated Contracts) Act 1943 now provides for most of the legal consequences of frustration, it is still necessary to examine the common law on the subject, since some contracts fall outside the scope of the Act, and the interpretation of the Act itself demands a knowledge of the common law.

**26-101** **Contract discharged automatically** At common law frustration does not rescind the contract ab initio: it brings the contract to an end forthwith, without more and automatically,[452] in the sense that it releases both[453] parties from any further performance of the contract.[454] A court does not have the power at common law to allow the contract to continue and to adjust its terms to the new circumstances.

**26-102** **Recovery of money paid** Having set aside the contract, the initial response of the courts at common law was to let the loss lie where it fell. The origins of this rule can be found in the decision of the Court of Appeal in *Chandler v Webster*[455] where it was held that, while the effect of frustration was to release both parties from their obligations to perform in the future, frustration did not affect the obligations which had accrued prior to the date of frustration. Thus, on the facts of the case, not only was the plaintiff unable to recover the pre-payment which he had made before the frustrating event, but it was held that he remained liable to pay the balance of the

[450] Above, para.26-007.

[451] See Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.15; McKendrick (ed.), *Force Majeure and Frustration of Contract*, 2nd edn (1995), Ch.11; Burrows (ed.), *Essays on the Law of Restitution* (1991), Ch.6; Stewart and Carter [1992] C.L.J. 66; Burrows, *The Law of Restitution*, 3rd edn (2011), pp.361–371.

[452] *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 505; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 712; *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232, 241 (the House of Lords upheld the appeal, but without adverting to this point: [1983] 2 A.C. 352); *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8. See further McKendrick in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Contract* (2017), Ch.8.

[453] The theory that one party is discharged by frustration and the other party for failure of consideration resulting from that frustration (see Williams, *Law Reform (Frustrated Contracts) Act 1943*, pp.21–28; McElroy & Williams, *Impossibility of Performance*, pp.88–89, 99–100) is not accepted by the Act ("the *parties* thereto have *for that reason* been discharged": s.1(1) (italics supplied)) nor in various judicial statements (e.g. "[W]hen 'frustration' occurs … it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically", per Viscount Simon in *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 163; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700).

[454] Some clauses in the contract may, however, be intended by the parties to survive frustration of the contract (e.g. an arbitration clause: see below, para.26-127): *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352, 372 (see also the judgments below: [1981] 1 W.L.R. 232, 240–241, [1979] 1 W.L.R. 783, 829). And see s.2(3) of the 1943 Act (below, para.26-122).

[455] [1904] 1 K.B. 493; see also *Blakeley v Muller & Co* [1903] 2 K.B. 760n; *Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 K.B. 756 and *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 A.C. 494, 523.





sum which he had contracted to pay before that time. Although the Court of Appeal held that money paid was recoverable upon a total failure of consideration, it was held that such a total failure could only arise when the contract was set aside ab initio. The harshness of the rule laid down in *Chandler* was often acknowledged but it stood until 1943 when it was overruled by the House of Lords in the case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[456] in which English sellers agreed to sell certain machinery to Polish buyers, and to deliver it CIF Gdynia. The contract was made in July 1939, and in that month £1,000 was paid on account of the price. However before the sellers were able to complete the manufacture of the machines the contract was frustrated when Gdynia was occupied by the German army. The buyers sued to recover the £1,000 they had paid on the signing of the agreement. The House of Lords held that they were entitled to recover the money because there had been a total failure of consideration. They overruled *Chandler v Webster* and rejected the proposition that a total failure of consideration could arise only when a contract was set aside ab initio; it arose whenever money[457] was paid on a basis which wholly failed.

**26-103** **Defects in the common law** Although the result in *Fibrosa* represented an improvement upon the rule established in *Chandler*, the common law remained in a less than satisfactory state.[458] Three principal defects were apparent. The first was that the payer could only recover money paid upon a total failure of consideration; a partial failure of consideration did not give rise to a right of recovery.[459] The second was that the House of Lords was of the opinion that the payee could not set off against the money to be repaid any expenditure which had been incurred in the performance of the contract.[460] The third defect arose in relation to a claim by a provider of services. Where the frustrating event destroyed the work which had been done and payment was due only on the completion of the work, then the service provider was not entitled to bring a restitutionary claim to recover payment in respect of the work which he had done prior to the frustration of the contract.[461]

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**26-104** **Law Reform (Frustrated Contracts) Act 1943**[462] These remaining defects in the common law compelled Parliament to intervene in the form of the enactment of the

[456] [1943] A.C. 32. Although it should be noted that the House of Lords expressly stated that their decision did not affect the law in relation to advance freight. Thus advance freight continues to be governed by a rule "analogous to what we all know as the rule in *Chandler v Webster*" (per Robert Goff J in *The Lorna I* [1981] 2 Lloyd's Rep. 559, 560; affirmed [1983] 1 Lloyd's Rep. 373; and see also *The Karin Vatis* [1988] 2 Lloyd's Rep. 330). On advance freight see more generally Howard in McKendrick (ed.), *Force Majeure and Frustration of Contract*, 2nd edn (1995), pp.123–129.

[457] It should apply in the case of goods or services because total failure of consideration is logically applicable both to money claims and to non-money claims; see Birks, *An Introduction to the Law of Restitution* (1989), pp.230–231.

[458] For a fuller analysis of the decision of the House of Lords in *Fibrosa* [1943] A.C. 32, its implications for the common law rules and an assessment of the relevant common law principles, see Burrows (ed.), *Essays on the Law of Restitution* (1991), Ch.6.

[459] *Whincup v Hughes* (1871) L.R. 6 C.P. 78.

[460] Although it can be argued that the common law position was not as bleak as their Lordships in *Fibrosa* [1943] A.C. 32 made it appear; see Burrows (ed.) at pp.154–165.

[461] *Appleby v Myers* (1867) L.R. 2 C.P. 651. The same result is, however, likely to be reached under s.1(3) of the Law Reform (Frustrated Contracts) Act 1943 (below, para.26-114). The problem in a case such as *Appleby* lies in showing that the recipient of partial performance has been enriched. If the contract states that he is only required to pay on complete performance, why should the law say that he must pay on receipt of partial performance?

[462] Based on the "*Seventh Interim Report (Rule in Chandler v Webster)*" of the Law Revision Commit-

contracts for the sale of goods into conditions and warranties. The Court of Appeal rejected that argument and held that an express term "shipment to be made in good condition" was an intermediate term the breach of which had to be so serious as to go to the root of the contract in order to entitle the buyer to reject the goods. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[195] two charterparties were entered into in similar terms for the charter of a ship "to be built by the Osaka Shipbuilding Co Ltd and known as Hull No. 354". Owing to her size, the ship was built at a new yard by Oshima Shipbuilding Co Ltd (a company in which Osaka had a 50 per cent interest) and bore the yard or hull number Oshima 004, although she was still referred to in external documents as "called Osaka 354". The charterers sought to reject the vessel on the ground that, by analogy with contracts of sale of goods, the description of the ship was a condition of the contract, any departure from which justified rejection. The House of Lords held that they were not entitled to do so. On the other hand, terms, for example, in contracts of sale of goods that the goods contracted to be sold are afloat or already shipped,[196] or on board a ship "now at Rangoon"[197] or on a ship that will sail direct to the port of destination,[198] or that they are "under deck",[199] or as to the date of shipment,[200] have been held to be part of the description of the goods, and hence conditions. Also, a stipulation as to the place of delivery in an FOB contract[201] and a stipulation "linerterms Rotterdam" in a CIF contract[202] have been held to be conditions. In each case, when deciding the appropriate classification of the term, it is necessary to pay careful attention to the facts and circumstances of the individual case.

### (d) *Renunciation*[203]

**27-048** **Introduction** A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform, or expressly declares that he is or will be unable to perform, his obligations under the contract in some essential respect.[204]

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1889 (Comm), [2011] 2 Lloyd's Rep. 432 (provision as to impurities). Contrast *Tradax Export SA v European Grain & Shipping Co* [1983] 2 Lloyd's Rep. 100 (fibre content included in description).

195 [1976] 1 W.L.R. 989. See also *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep. 156.

196 *Benabu & Co v Produce Brokers Co Ltd* (1921) 37 T.L.R. 609, 851; *Macpherson Train & Co Ltd v Howard Ross & Co Ltd* [1955] 1 W.L.R. 640, 642.

197 *Oppenheimer v Fraser* (1876) 34 L.T. 524.

198 *Bergerco USA v Vegoil Ltd* [1984] 1 Lloyd's Rep. 440.

199 *Montagu L. Meyer Ltd v Travaru A/B; H Cornelius of Gambleby* (1930) 46 T.L.R. 553; *Messers Ltd v Morrison's Export Co Ltd* [1939] 1 All E.R. 92.

200 *Bowes v Shand* (1877) 2 App. Cas. 455.

201 *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep. 142.

202 *Soon Hua Seng Co Ltd v Glencore Grain Co Ltd* [1996] 1 Lloyd's Rep. 398.

203 Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd edn (2017), Ch.6.

204 See also *Martin v Stout* [1925] A.C. 359; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelgesellschaft mbH* [1980] 2 Lloyd's Rep. 556; affirmed [1983] 2 A.C. 34 (place of renunciation); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [66]–[78]; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] EWHC 253 (Comm), [2017] 1 Lloyd's Rep 387 at [217]. The question whether there has been a renunciation depends on what a reasonable person would understand from the conduct of the party alleged to have renounced the contract and all of the circumstances prevailing at the time of the termination, including the history of the transaction or relationship. Silence, being equivocal, will generally not amount to a renunciation (*Alegrow SA v Yayla Agro Gida San Ve Nak SA* [2020] EWHC





The renunciation may occur before or at the time fixed for performance.[205] An absolute refusal by one party to perform his side of the contract will entitle the other party to terminate further performance of the contract,[206] as will also a clear and unambiguous assertion by one party that he will be unable to perform when the time for performance should arrive.[207] Short of such an express refusal or declaration, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions.[208] The renunciation is then evidenced by conduct. Also the party in default:

> "… may intend in fact to fulfil (the contract) but may be determined to do so only in a manner substantially inconsistent with his obligations,"[209]

or may refuse to perform the contract unless the other party complies with certain conditions not required by its terms.[210] In such a case, there is little difficulty in holding that the contract has been renounced.[211] Nevertheless, not every intimation of an intention not to perform or of an inability to perform some part of a contract will amount to a renunciation. Even a deliberate breach, actual or threatened, will not necessarily entitle the innocent party to terminate further performance of the contract, since it may sometimes be that such a breach can appropriately be sanctioned in damages.[212] If the contract is entire and indivisible,[213] that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon complete performance by the other, then a refusal to perform or declaration of inability to perform any part of the agreement will normally entitle

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1845 (Comm), [2021] 1 Lloyd's Rep. 565 at [69]–[73]) but it may do so where the silence is held to "speak", that is to say, it does, in the circumstances, communicate an intention to renounce the contract (*Stocznia Gdanska SA v Latvian Shipping Co* [2002] EWCA Civ 889, [2002] 2 Lloyd's Rep. 436 at [96]).

205 Where the renunciation takes place before the time fixed for performance, it is known as an anticipatory breach: below, para.27-070.

206 *Freeth v Burr* (1874) L.R. 6 C.P. 208, 214; *Thompson v Corroon* (1992) 42 W.I.R. 157.

207 *Anchor Line Ltd v Keith Rowell Ltd* [1980] 2 Lloyd's Rep. 351; *The Munster* [1982] 1 Lloyd's Rep. 370; *Texaco Ltd v Eurogulf Shipping Co Ltd* [1987] 2 Lloyd's Rep. 541.

208 *Universal Cargo Carriers Corp v Citati* [1957] 2 Q.B. 401, 436; affirmed in part [1957] 1 W.L.R. 979 and reversed in part [1958] 2 Q.B. 254. See also *Morgan v Bain* (1874) L.R. 10 C.P. 15; *Bloomer v Bernstein* (1874) L.R. 9 C.P. 588; *Forslind v Becheley-Crundall*, 1922 S.C. (H.L.) 173; *Maple Flock Co v Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148, 157; *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 W.L.R. 698; *Chilean Nitrate Sale & Corp v Marine Transportation Co Ltd* [1982] 1 Lloyd's Rep. 570, 580; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159, 168; *Nottingham Building Society v Eurodynamics Plc* [1995] F.S.R. 605, 611–612; *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm), [2010] 1 Lloyd's Rep. 543 at [249]. cf. below, para.27-050.

209 *Ross T. Smyth & Co v Bailey, Son & Co* [1940] 3 All E.R. 60, 72; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757; *Kuwait Rocks Co v AMN Bulkcarriers Inc (The "Astra")* [2013] EWHC 865 (Comm), [2013] 2 Lloyd's Rep. 69; *Spar Shipping SA v Grand China Logistics Holding (Group) Co Ltd* [2015] EWHC 718 (Comm), [2015] 1 All E.R. (Comm) 879 at [208].

210 *BV Oliehandel Jongkind v Coastal International Ltd* [1983] 2 Lloyd's Rep. 463.

211 *Withers v Reynolds* (1831) 2 B. & Ad. 882; *Booth v Bowron* (1892) 8 T.L.R. 641.

212 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 365. See above, para.27-038.

213 See above, para.24-026.

**29-131 The Victoria Laundry case** The three main propositions in the *Victoria Laundry* case were[722]:

> "(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach …
>
> (3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach …
>
> (4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course … But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that breach in those special circumstances would be liable to cause more loss."

**29-132 The Heron II** In *The Heron II*[723] their Lordships did not agree upon a common formulation, but three of their Lordships[724] gave general approval to these and other[725] propositions in the *Victoria Laundry* case.[726] Somewhat different formulations were adopted by Lords Reid and Upjohn: the former said that Alderson B. in *Hadley v Baxendale*, above:

> "… clearly meant that a result which will happen in the great majority[727] of cases should fairly and reasonably be regarded as having been in the contemplation of the parties, but that a result which, though foreseeable as a substantial possibility, would only happen in a small minority of cases should not be regarded as having been in their contemplation."[728]

Lord Reid continued:

> "The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realised that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."[729]

Lord Upjohn stated:

[722] [1949] 2 K.B. 528, 539–540 (propositions (1), (5) and (6) are omitted for reasons of space).

[723] [1969] 1 A.C. 350. For the facts see below, para.29-186.

[724] [1969] 1 A.C. 350, 399 (Lord Morris), 410–411 (Lord Hodson), 414–417 (Lord Pearce). (But Lord Reid, at 388–391, rejected parts of the *Victoria Laundry* [1949] 2 K.B. 528 propositions.)

[725] See below, para.29-135.

[726] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528.

[727] Lord Hodson [1969] 1 A.C. 350, 411, also adopted the expression used in *Hadley v Baxendale* (1854) 9 Ex. 341: "in the great multitude of cases": (1854) 9 Ex. 341, 355, 356. On the degree of probability see below, para.29-135.

[728] [1969] 1 A.C. 350, 384 (see also at 385). Both Lords Reid and Upjohn criticised the words "foreseeable" or "reasonably foreseeable" in the *Victoria Laundry* [1949] 2 K.B. 528 formulations: [1969] 1 A.C. 350, 389, 422–423; Lord Upjohn at 422–423, expressly preferred "contemplate" or "in contemplation" for cases in contract, and these are the words used by Lord Reid at 384–385.

[729] [1969] 1 A.C. 350, 385.





> "… the broad rule as follows: 'What was in the assumed contemplation of both parties acting as reasonable men in the light of the general or special facts (as the case may be) known to both parties in regard to damages as the result of a breach of contract.'"[730]

Likewise, in *Attorney General of the Virgin Islands v Global Water Associates Ltd*[731] Lord Hodge, delivering the advice of the Privy Council, said that

> "… what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed. … [T]he test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach."

There is no need for the breach itself to be within the contemplation of the parties:

> "It is clear that one starts from the assumption that the contract-breaker contemplates, at the date of the making of the contract, the occurrence of the particular breach which he, although at the time he may have no notion of it, is thereafter going to commit."[732]

**29-133 The type or kind of loss**[733] The reference to "the loss" in the formulations of the test for remoteness of damage is to be interpreted as the type or kind of loss in question.[734] The:

> "… party who has suffered damage does not have to show that the contract-breaker ought to have contemplated, as being not unlikely, the precise detail of the damage or the precise manner of its happening. It is enough if he should have contemplated that damage *of that kind* is not unlikely."[735]

(There is a similar formulation in the test for remoteness of damage in tort:

> "… the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen."[736]

However, we shall see that in cases of breach of contract the test is applied differ-

[730] [1969] 1 A.C. 350, 424.

[731] [2020] UKPC 18, [2021] A.C. 23 at [33]–[34].

[732] *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All E.R. 1496, 1523 (Court of Appeal: the House of Lords [1972] A.C. 441 reversed the decision on other grounds, without discussing *The Heron II* [1969] 1 A.C. 350); *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 802, 807.

[733] This paragraph was quoted with approval by Stuart-Smith LJ in *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621.

[734] In *The Heron II* [1969] 1 A.C. 350 Lord Reid spoke of "type of damage" (at 385–386), "loss of a kind which" (at 382, 383) and "type of loss" (at 385); while Lord Pearce spoke of "type of consequence" (at 417). See also *H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd* [1978] Q.B. 791, 801, 805, 806, 813.

[735] *Christopher Hill Ltd v Ashington Piggeries Ltd* [1969] 3 All E.R. 1496, 1524; *Brown v K.M.R. Services Ltd* [1995] 4 All E.R. 598, 621; *Kpohraror v Woolwich Building Society* [1996] 4 All E.R. 119, 126; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 A.C. 61 at [21]; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch. 529 at [74]. See below, para.29-140 for the corresponding formulation in the second rule in *Hadley v Baxendale* (1854) 9 Ex. 341.

[736] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] A.C. 388, 426.



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