



**THE CONTRACTUAL CORE:  
WHICH TOPICS REALLY COUNT?**

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**INTRODUCTION**

The question to be considered is this: which contractual doctrines are of special practical significance? Although English contract law is in some respects highly distinctive,<sup>1</sup> it would be surprising if the answer to this question varied significantly from one modern trading jurisdiction to another. But the question is neglected.

The textbooks conspire to treat legal doctrines as they would children: with fastidious ostensible impartiality, lest they hint that some are of almost zero- practical importance, and other doctrines of huge day-to-day significance. There are occasional judicial references to the relative practical significance of different branches of contract law. For example, Lord Mustill observed at the Lipstein conference (Clare College, Friday 21 May, 2010) that in his entire career as a barrister, judge, and arbitrator, he had never encountered a contractual mistake plea (he had just heard a thirty-minute learned discourse on the topic). Conversely, Sir Christopher Staughton in a 1999 lecture to Cambridge students strongly emphasised the centrality of interpretation of written contracts.<sup>2</sup>

In this article it is suggested that the five main doctrines, or clusters of topics, in contract law are (and these are examined in detail in the online version at sections I to V of the article):

- (i) *formation issues*: minimum elements for the achievement of an effective consensus must be prescribed;

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<sup>1</sup> On the main differences between English contract law and soft-law contract rules reflecting significant civilian influence: N Andrews, *Contract Law* (2<sup>nd</sup> edn, Cambridge University Press, 2015), 23-06 ff. On the good faith issue, see *op cit*, ch 21; and N Andrews, *Contract Rules* (Intersentia Publishing, Cambridge, 2016), Article 5.

<sup>2</sup> C Staughton, 'How Do the Courts Interpret Commercial Contracts?' [1999] CLJ 303.

- (ii) *identifying terms*: the express contents of the parties' bargain have to be ascertained ('express terms') or, where there are real gaps, terms must be inserted in the form of default rules ('implied terms');
- (iii) *interpreting terms*: written bargains have to be interpreted if the parties cannot agree;
- (iv) *issues concerning breach*: judicial determinations have to be made on the following point of difference: (a) whether a party is in default; (b) if so, the significance of that default, in particular whether termination for breach is available, or whether the innocent party is instead confined to remedies for payment (debt), compensation (damages), or perhaps coercive relief (see (v) on these remedies); and
- (v) *judicial remedies and enforcement of judgments*: if default<sup>3</sup> persists, and self-help<sup>4</sup> measures are inadequate, the legal system provides an array of judicial remedies and a system of enforcement.

## I

### FORMATION ISSUES:

#### IS THERE A BINDING AGREEMENT?

Of the many doctrines associated with formation of contract, 'offer and acceptance' and 'certainty' appear to be the most important.

#### Offer and Acceptance

The ground rules for forming a contract are long-established and indeed they rest mostly on nineteenth century case law. However, the courts have more recently had to consider the following issues: (a) how strictly must offer and acceptance be applied; and (b) is that analysis applicable to the battle of the forms?

As for (a), the House of Lords in *Gibson v Manchester CC* (1979) reaffirmed that offer and acceptance analysis should be applied to determine whether a contract has been reached following negotiations by successive correspondence, notably regarding the proposed sale of land.<sup>5</sup> This decision also contains this clear message: courts must not twist words to

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<sup>3</sup> Alternatively, judicial remedies might be required where the contract proves to be abortive or it is set aside on the ground of misrepresentation, or some other vitiating factor.

<sup>4</sup> eg, the threat of forfeiture of a deposit or invocation of a liquidated damages clause; on the latter, *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] AC 1172; R Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018).

<sup>5</sup> [1979] 1 WLR 294, HL; objective scrutiny is required, eg, *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC); [2014] 1 All ER (Comm) 761, at [53] to [56] (Ramsey J); *Glencore Energy Ltd v Cirrus Oli Services*

achieve a consensus when no such final agreement has in fact arisen. In the *Gibson* case (1979), the city council decided to resile from a proposal to sell a council house to the appellant, because (following a local election) the incoming Labour administration had decided to stop selling off its 'housing stock'. It was not enough that the price for the proposed sale had been fixed and the council had earlier assumed that the sale would proceed. The House of Lords held that the parties had yet to achieve a final agreement on the proposed purchase.<sup>6</sup> In essence, the prospective purchaser could only show an offer made by him, which the council had not accepted. Gibson could not show (i) an offer made by the council which he had accepted, or (ii) an offer made by him which the council had accepted.

As for (b), the battle of the forms, the Court of Appeal in *Tekdata Intercommunications v Amphenol Ltd* (2009)<sup>7</sup> confirmed that in English law the test is the so-called 'last shot' analysis. And so, victory goes to the party proposing its own terms as the final part of the sequence of terms, provided the other side either (i) orally or in writing acknowledges those terms or (ii) acquiesces in those terms. In this decision, Dyson LJ said:<sup>8</sup> 'That [offer and acceptance approach] has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.'

There has also been a line of cases which have enabled the courts to establish minimum standards of fair dealing with respect to particular types of bargaining processes: auctions, sealed bids; tenders. The Court of Appeal in *Barry v Davies* (2000)<sup>9</sup> awarded damages *against an auctioneer* when he refused to accept a bidder's acceptance of an item put up for auction without a reserve price. The House of Lords in *Harvela v Royal Trust Company of Canada* (1986) held that persons making sealed bids would break the (implicit) rules of fair dealing if they proposed a 'referential bid' as distinct from a single fixed bid (a referential bid would occur if, for example, a party offered to pay '£10 more than the other party's or parties' highest fixed bid').<sup>10</sup> As for tenders, the Court of Appeal in *Blackpool and Fylde Aero Club v Blackpool Borough Council* (1990)<sup>11</sup> held that each tenderer is entitled to these procedural rights: (a) each valid tender will be at least considered; (b) invalid tenders will be ignored; (c) the tender deadline will not be broken (by the award of a tender before the expiry of that period or, perhaps, to a candidate who has not met the deadline).

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*Ltd* [2014] EWHC (Comm) 87, at [57] to [68] (Cooke J); *Proton Energy Group SA v Orlen Liuteva* [2013] EWHC 2872 (Comm); [2014] 1 All ER (Comm) 972, at [39] (Judge Mackie QC).

<sup>6</sup> *Storer v Manchester City Council* [1974] 1 WLR 1403, CA, a related case, which went the other way.

<sup>7</sup> [2009] EWCA Civ 1209; [2010] 2 All ER (Comm) 302; followed by Coulson J in *Trebor Bassett Holdings Limited v ADT Fire and Security plc* [2011] EWHC 1936 (TCC), at [157]; and see Coulson J's summary, *ibid*, at [155] and [156], of the the *Tekdata* case.

<sup>8</sup> [2009] EWCA Civ 1209; [2010] 2 All ER (Comm) 302, at [25].

<sup>9</sup> [2000] 1 WLR 1962, CA.

<sup>10</sup> [1986] AC 207, 231-3, HL

<sup>11</sup> [1990] 1 WLR 1195, CA.

## Certainty

A line is to be drawn between incompleteness and hopeless vagueness (when a purported agreement will be void) and, on the other hand, the minimum elements of a binding contract (when the agreement will be upheld). An important statement of general principle is *Hillas & Co v Arcos Ltd* (1932).<sup>12</sup> Here the House of Lords expressed a willingness to uphold even scanty contractual language, provided there are objective indicators enabling the court to piece together the essential terms of the relevant putative transaction.

The substantial case law on this topic demonstrates its great commercial importance. The main cases will now be summarised.

*Insufficient Certainty.* The Court of Appeal in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* (2012)<sup>13</sup> established that a mediation agreement will be valid in English law only if (i) the mediation clause is final and thus does not require any further negotiation over its own terms; (ii) the clause nominates a mediation provider or indicates how one is to be appointed; and (iii) the mediation process is either already finalised under the rules of the agreed mediation provider or the parties have themselves supplied minimum details. No problem of certainty will arise if the mediation clause refers to a well-established institutional 'model' set of mediation rules.<sup>14</sup>

In *Scammell v Ouston* (1941)<sup>15</sup> the House of Lords held that a very sketchy hire-purchase arrangement, concerning a lorry, was void *ab initio* for uncertainty. There was no clear outline of an enforceable transaction.

In the *Barbudev* case (2012)<sup>16</sup> Aikens LJ acknowledged that the House of Lords in *Walford v Miles* (1992)<sup>17</sup> confirmed (i) that an agreement to agree is not binding and (ii) that it makes no difference that the negotiation agreement is couched as one to negotiate in good faith or reasonably.

But Teare J in *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (2014)<sup>18</sup>

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<sup>12</sup> [1932] All ER 494, HL; 147 LT 503; 38 Com Cas 23.

<sup>13</sup> [2012] EWCA Civ 638; [2013] 1 WLR 102; for criticism, N Andrews, 'Mediation Agreements: Time for a More Creative Approach by the English Courts' (2013) 18 *Revue de droit uniforme* 6-16 (also known as *Uniform Law Review*).

<sup>14</sup> *Cable & Wireless v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041, at [21] (Colman J).

<sup>15</sup> [1941] AC 251, HL.

<sup>16</sup> *Barbudev v Eurocom Cable Management Bulgaria Eood* [2012] EWCA Civ 548; [2012] 2 All ER (Comm) 963, at [46]; see also *Shaker v Vistajet* [2012] EWHC 1329 (Comm); [2012] 2 All ER (Comm) 1010 (Teare J) (purported condition precedent to repayment; requirement that depositor negotiates in good faith; requirement void for uncertainty; therefore, sum repayable without this fetter; [8] to [18]).

<sup>17</sup> *Walford v Miles* [1992] 2 AC 128, 139-140, HL; N Andrews, *Contract Law* (2nd edn, Cambridge University Press, 2015), 2.10.

<sup>18</sup> [2014] EWHC 2104 (Comm); [2015] 1 WLR 1145, at [64].

recognised an exception to *Walford v Miles* (1992) in the context of dispute-resolution clauses. In the *Emirates* case the relevant negotiation clause was restricted to a fixed period of four weeks (for the parallel requirement that lock-out agreements should be fixed-term, see two paragraphs above). Teare J held that the clause in the *Emirates* case required the parties to conduct 'friendly' negotiations as the mandatory prelude to commencing arbitration proceedings. He decided that the negotiation clause operated as a condition precedent to valid arbitral proceedings and that it imported the implied obligation to conduct 'fair, honest and genuine discussions aimed at resolving a dispute'.<sup>19</sup> But the *Emirates* decision has been criticised by a leading commentator, David Joseph QC.<sup>20</sup>

*Incompleteness.* In *May & Butcher v R* (1927)<sup>21</sup> an agreement to sell a defined subject matter but at a price on which the parties had merely agreed to agree was held not to create a binding contract of sale. There had been no performance. But this decision was distinguished in *Foley v Classique Coaches* (1934)<sup>22</sup> on the basis that the parties in the 1934 case a three year course of supply had already worked out well.

*Sufficient Certainty.* The Court of Appeal in *Pitt v PHH Asset Management Ltd* (1994)<sup>23</sup> acknowledged that *Walford v Miles* (1992)<sup>24</sup> is authority that a 'lock-out agreement' is a binding commitment to engage in rival 'talks' with third parties, provided the duration of this restriction is fixed, as distinct from being open-ended (such as a period which is 'reasonable' or 'necessary').

In *Durham Tees Valley Airport Ltd v bmibaby Ltd* (2010),<sup>25</sup> the defendant's agreement to run a low-cost flight service at the claimant's airport for a period of ten years by 'establishing a 2 based aircraft operation' was sufficiently certain. Similarly, in *Jet2.com Ltd v Blackpool Airport Ltd* (2012)<sup>26</sup> an airport had agreed in writing to use best endeavours to promote a low-cost airline (Jet2's) business in running a service at its airport. This meant that the airport could not confine Jet2's aircraft movements to the provincial airport's normal opening hours.

In *Attrill v Dresdner Kleinwort Ltd* (2013)<sup>27</sup> the Court of Appeal concluded that there was enough background information, including previous dealings, to enable an unwritten promise to be upheld. The case concerned an investment bank's assurance (made orally

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<sup>19</sup> *ibid.*

<sup>20</sup> D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd edition, Sweet & Maxwell, London, 2015), 18.07 (also noting p 648 n 31A criticism in *Arbitration Law Monthly* (Dec 2014) and by R Merkin and L Flannery in *Arbitration International* Vol 31 p 63).

<sup>21</sup> [1934] 2 KB 17 n, HL (decided in 1927, but not reported until 1934).

<sup>22</sup> [1934] 2 KB 1.

<sup>23</sup> [1994] 1 WLR 327, CA.

<sup>24</sup> [1992] 2 AC 128, 139–140, HL.

<sup>25</sup> [2010] EWCA Civ 485; [2011] 1 All ER (Comm) 731.

<sup>26</sup> [2012] EWCA Civ 417; [2012] 2 All ER (Comm) 1053.

<sup>27</sup> [2013] EWCA Civ 394; [2013] 3 All ER 807.

other an intra-net system) that in January 2009 financial market traders would be entitled, on an individual discretionary basis, to seek bonuses from a bonus chest of 400 million euros. The criteria for allocation had been worked out in previous years.

Similarly, in *Didymi Corporation v Atlantic Lines and Navigation Co Inc* (1988)<sup>28</sup> the word 'equitable' was held to pass muster. It took its colour from the context. The case concerned a charterparty for five years. The basic rate of hire was agreed. But this sum could be raised or reduced to reflect the ship's speed and efficiency. Such variation was to be 'mutually agreed' according to what was 'equitable'. The owners claimed such an increase. The hirer said that the variation clause was void. The Court of Appeal, somewhat generously, regarded the word 'equitable' as a clear enough criterion to permit objective assessment of the disputed hire payment.

In *Malcolm v Chancellor, Masters and Scholars of the University of Oxford* (1994)<sup>29</sup> the court gave effect to a publisher's telephone vague commitment to publish an academic study, even though the parties had yet to agree in writing on the detailed provisions of the publishing agreement. This decision seems to be an uncommercial overstretching of the courts' willingness to uphold thinly evidence promised (Mustill LJ convincingly dissented). Commercial common sense would suggest that final decisions about publications by august University presses are made only by the senior board of the university press (this board is known in Oxford as 'The Delegates', and in Cambridge as 'The Syndics').

The Court of Appeal in *MRI Trading AG v Erdenet Mining Corp LLC* (2013)<sup>30</sup> upheld a complex settlement of interlocking commercial arrangements, and rejected the counter-argument that the deal lacked precision because three minor matters were not yet settled. The main part of the agreement carried the hallmark of finality, and indeed the court considered that it would be 'almost perverse' to treat the missing elements of agreement as wrecking the whole set of arrangements.<sup>31</sup> The court also noted that there was the safety-net of an arbitration clause.

## II

### IDENTIFYING TERMS

#### Implied Terms

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<sup>28</sup> [1988] 2 Lloyd's Rep 108, CA (noted by Reynolds (1988) 104 LQR 353); considering *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, HL; *Brown v Gould* [1972] Ch 53, Megarry J (both contracts certain); and *Courtney v Tolaini* [1975] 1 WLR 297, CA and *Mallozzi v Carapelli SpA* [1976] 1 Lloyd's Rep 407, CA (both contracts uncertain).

<sup>29</sup> [1994] EMLR 17, CA.

<sup>30</sup> [2013] EWCA Civ 156; [2013] 1 CLC 423, at [19] and [21] (Tomlinson LJ) (considering *Mamidoil-Jetoil Greek Petroleum Co Ltd v Okta Crude Oil Refinery (No 1)* [2001] EWCA Civ 406; [2001] 2 Lloyd's Rep 76, at [69]; latter passage analysed by Chadwick LJ in *BJ Aviation Ltd v Pool Aviation Ltd* [2002] EWCA Civ 163; [2002] 2 P & CR 25, at [18] ff).

<sup>31</sup> [2013] EWCA Civ 156, at [21].

Contracts are either (fully) in writing, or oral, or part oral. Promissory terms are supplied either by express agreement or they are implied by statute or judicially. The three categories of implied term are:<sup>32</sup> (a) implied in law (by statute or judicially); (b) implied in fact (that is, as a discrete exercise, particular to the present contract); or (c) implied by trade usage/custom.

Terms implied in fact are not showered on petitioners like confetti. They must be hard-won. The criteria are necessity and obviousness. As the Supreme Court confirmed in *Marks & Spencer v BNP Paribas* (2015),<sup>33</sup> detailed commercial agreements are unlikely to yield implied terms of fact, applying either or both of the criteria of 'necessary to produce business efficacy' and 'obviousness'. By contrast, in *Yam Seng Pte Ltd v International Trade Corp Ltd* (2013) Leggatt J noted that implied terms will be more readily discovered if the written contract is 'skeletal'.<sup>34</sup>

The so-called 'business efficacy' test derives from Bowen LJ's judgment in '*The Moorcock*' (1889), where he said:<sup>35</sup> 'In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen....' Following *Marks and Spencer* case, where Lord Neuberger adopted Lord Sumption's suggestion made during argument,<sup>36</sup> the Court of Appeal in a trilogy of cases (*Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* (2016),<sup>37</sup> *Ukraine v Law Debenture Trust Corp plc* (2018),<sup>38</sup> and *Bou-Simon v BGC Brokers LP*, 2018),<sup>39</sup> has re-branded the business efficacy test. The criterion has been recast so as to pose the question whether the agreement will lack 'commercial or practical coherence' in the absence of the putative implied term.

As for the 'obviousness' criterion, MacKinnon LJ formulated the 'officious bystander' test in *Shirlaw v Southern Foundries (1926) Ltd* (1939) as follows:<sup>40</sup> '[the proposed implied term of fact

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<sup>32</sup> N Andrews, *Contract Law* (2<sup>nd</sup> edn, Cambridge University Press, 2015), chapter 13; R Austen-Baker, *Implied Terms in English Contract Law* (2<sup>nd</sup> edn, Edward Elgar Publishing, 2017).

<sup>33</sup> [2015] UKSC 72; [2016] AC 742.

<sup>34</sup> [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321, at [161].

<sup>35</sup> (1889) 14 PD 64, 68, CA; A Phang, [1998] JBL 1; for the observation that this decision is as much about terms implied in law as those implied in fact, R Austen-Baker, 'Implied Terms in English Contract Law', in L DiMatteo, Q Zhou, S Saintier, K Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, 2014), chapter 10, at 234.

<sup>36</sup> [2015] UKSC 72; [2016] AC 742, at [21] (Lord Neuberger, adopting Lord Sumption's suggestion made during argument).

<sup>37</sup> [2016] EWCA Civ 990; [2017] 1 WLR 1893, at [45] and [46].

<sup>38</sup> [2018] EWCA Civ 2026, at [210].

<sup>39</sup> [2018] EWCA Civ 1525, at [18] and [21].

<sup>40</sup> MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227, CA (affirmed [1940] AC 701, HL); this test echoes Scrutton LJ's statement in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, 605, CA (Scrutton had been MacKinnon's pupil-master at the Bar), as noted by A Phang [1998] JBL 1 and D Foxton, *The Life of Thomas E Scrutton* (Cambridge University Press, 2013), 250 (see also HG Collins, 'Implied Terms: the

must be] something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course! "'

Judicially crafted terms which are implied in law are discovered with greater flexibility. They represent judicial legislation. The courts tend to impose only minimum levels of obligation, consistent with general expectations of what is required in the relevant context. Terms implied in law apply to a regular or frequent type of transaction. Lord Steyn in *Equitable Life Assurance Co Ltd v Hyman* (2002) explained that terms (judicially or statutorily) implied in law are 'operate as general default rules'.<sup>41</sup> In *Crossley v Faithful & Gould Holdings Ltd* (2004) the Court of Appeal admitted that, in this context at any rate, the concept of 'necessity' is 'somewhat protean'<sup>42</sup> because such implied terms 'raise questions of reasonableness, fairness and the balancing of competing policy considerations'.<sup>43</sup>

In *Liverpool City Council v Irwin* (1977),<sup>44</sup> the issue was whether an implied term in law should bind a landlord. The precise issue was whether there was an intrinsic obligation incumbent on a local authority landlord that this party would be obliged to maintain the so-called 'common parts' of local authority 'high-rise' flats. The present case concerned 15 storey flats. Such accommodation is an important, but often unsatisfactory, type of housing in modern Britain. The House of Lords held that a term should be implied as a matter of law that the landlord should exercise reasonable care to keep the common parts in reasonable repair (although, on the facts, it was held that the court could not conclude whether the obligation had been breached because the tenant had pleaded a stricter obligation). The speeches contain various formulations of the general test for finding an implied term in law. But the gist is that the court here found an obligation essential to the relations between a landlord and tenants inhabiting a block of flats. Lord Salmon encapsulated the central decision: 'the whole transaction would become futile, inefficacious and absurd' unless 'in a 15 storey block of flats or maisonettes... the landlords were under [a] legal duty to take reasonable care to keep the lifts in working order and the staircases lit'.<sup>45</sup>

The House of Lords in *Malik (and Mahmud) v Bank of Credit and Commerce International SA* (1998) (adopting a line of authority in modern times) recognised a general implied term that

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Foundation in Good Faith and Fair Dealing' (2014) 67 CLP 297, 312), and as noted by Lord Neuberger in *Marks and Spencer v BNP Paribas* [2015] UKSC 72; [2016] AC 742, at [16].

<sup>41</sup> [2002] 1 AC 408, 458-9 HL; *Lister v Romford Ice & Cold Storage Co* [1957] AC 555, 598, HL; for overt gap-filling and explicit reference to fairness, in the context of credit card payments, *Re Charge Card Services Ltd* [1989] Ch 497, 513, CA.

<sup>42</sup> [2004] ICR 1615, CA, at [34] (Dyson LJ).

<sup>43</sup> *ibid*, at [36]; analysis approved in *Geys v Société Générale, London Branch* [2012] UKSC 63; [2013] 1 AC 523, at [55] to [60] (Baroness Hale); E Peden, 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 LQR 459-476.

<sup>44</sup> [1977] AC 239, HL.

<sup>45</sup> *ibid*, 263; cited by Lord Scarman in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 105, PC and by Peter Coulson QC (sitting as a judge of the High Court) in *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QBD); [2008] 1 Lloyd's Rep 305, at [47].



the employer should not behave in a way which will destroy or threaten the relationship of confidence and trust between him and his employees.<sup>46</sup>

The same implied term was held to have been breached in *Attrill v Dresdner Kleinwort Ltd* (2013)<sup>47</sup> when the bank sought to 'move the goal-posts', having already promised to provide a generous bonus fund. In August 2008 the defendant investment bank's management had promised high-earning employees a bonus pool of 400 million Euros for the January 2009 'season'. But in late December 2008 and early 2009, under pressure from the new management (a German bank which had acquired the business), the employer sought to resile from this by purporting to introduce a 'material adverse change' clause.<sup>48</sup> That *volte-face* was held to violate the present implied term.

In *Ivey v Genting (UK) Ltd (trading as Crockfords Club)* (2017)<sup>49</sup> the claimant claimed his 'winnings' at a London casino. He had played a card game and won over £7 million. The casino refused to pay. It was accepted that there is an implied term (it would appear one of law) that a gambler will not cheat. The term was formulated in the Court of Appeal as follows:<sup>50</sup> 'It is an obvious part of the bargain between the parties to any gaming contract, that neither side should cheat, and a gaming contract in which either side could do would, self-evidently, lack any efficacy.'

An implied term is non-text: it is not sub-text. In *Marks & Spencer v BNP Paribas* (2015) the Supreme Court repudiated the heretical suggestion (as expressed by Lord Hoffmann's suggestions in *Attorney-General for Belize v Belize Telecom Ltd* (2009),<sup>51</sup> a Privy Council case) that a term implied in law can be squeezed from the text as a matter of documentary interpretation. Lord Neuberger's main criticism in the 2015 case of the suggestion made in the 2009 case is that the task of reading in text, by the process of implying a term, is distinct from that of making sense of text which is already on the page<sup>52</sup>

[27]. ...When one is implying a term or a phrase, one is not construing words, as the words to be implied are *ex hypothesi* not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful... [28]... it is only after the

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<sup>46</sup> [1998] 1 AC 20, 45–6, HL (Lord Steyn); this implied term was not extended to a commercial relationship, nor where the trust would have been owed to a third party, *HTV Ltd (formerly Can Associates TV Ltd) v ITV2 Ltd* [2015] EWHC 2840 (Comm), at [269] ff (Flaux J).

<sup>47</sup> [2013] EWCA Civ 394; [2013] 3 All ER 807.

<sup>48</sup> *ibid*, at [28]; see [101] for formulation of the trust and confidence implied term; and at [143] it was concluded that the implied term had been breached.

<sup>49</sup> [2017] UKSC 67; [2018] AC 391; noted [2018] CLJ 18 (G Virgo); [2018] Crim L Rev 395-9 (K Laird).

<sup>50</sup> [2016] EWCA Civ 1093; [2017] 1 WLR 679, at [126].

<sup>51</sup> [2009] UKPC 10; [2009] 2 All ER 1127, notably at [21], see also [16] to [27]; see also *Trump International Golf Club Scotland v Scottish Ministers* [2015] UKSC 74; [2015] 1 WLR 85 for further remarks by Lord Hodge at [35] and Lord Mance at [41] to [44] on the *Marks & Spencer* case.

<sup>52</sup> [2015] UKSC 72; [2016] AC 742 at [26] to [31], notably [27] and [28] (Lord Neuberger; with the agreement of Lords Sumption and Hodge; similarly, at [77], Lord Clarke).

*process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied....'*

### No 'Master' Implied Term of Good Faith

Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* (2013)<sup>53</sup> concerned an exclusive distributorship contract, which is a species of a so-called 'relational contract'.<sup>54</sup> In such a special context, an implied term of fact will be found to prevent a party acting other than honestly and in a manner which reflects co-operative good faith. In a 2018 case the same judge (now Leggatt LJ) case held that a joint venture relationship imported a duty of good faith either as an implied term in fact or as an implied term in law.<sup>55</sup>

These decisions are acceptable, provided the notion of good faith is confined to special relationships of close co-operation. But to extend the concept more broadly would go against the traditional<sup>56</sup> view, namely that English law will refuse to imply a general duty of good faith into contracts.

Keen to emphasise the danger of a runaway new concept, Beatson LJ commented in *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest)* (2013) that Leggatt J's wider suggestion must be resisted.<sup>57</sup> Similarly, in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* (2016) Moore-Bick LJ roundly confirmed that there is no general principle of good faith 'in matters of contract'.<sup>58</sup>

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<sup>53</sup> [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 1321 (notably at [141], [144], [147], and [154]); noted by S Bogle, 'Disclosing good faith in English contract law' (2014) 18 Edin LR 141-5; D Campbell, 'Good faith and the ubiquity of the "relational" contract' (2014) 77 MLR 475-492; HG Collins, 'Implied Terms: the Foundation in Good Faith and Fair Dealing' (2014) 67 CLP 297, 324 ff; S Whittaker, 'Good Faith, Implied Terms and Commercial Contracts' (2013) 129 LQR 463; E Granger [2013] LMCLQ 418; more generally, H Hoskins, 'Contractual obligations to negotiate in good faith: faithfulness to the agreed common purpose' (2014) 130 LQR 131-159.

<sup>54</sup> See the essays in D Campbell, L Mulcahy and S Wheeler (eds), *Changing Concepts of Contract* (Palgrave, Basingstoke, 2013) (for example, H Beale, chapter 6); D Campbell, 'Good faith and the ubiquity of the "relational" contract' (2014) 77 MLR 475; L DiMatteo, Q Zhou, S Saintier, K Rowley (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press, 2014), chapter 9 (by Z Ollerenshaw); MA Eisenberg, 'Relational Contracts' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), 291 (especially at 298-9, 303-4), and 'Why There is no law of Relational Contracts' (2000) 94 N W U L Rev 805.

<sup>55</sup> *Al Nehayan v Kent* [2018] EWHC (Comm) 333, at [174].

<sup>56</sup> The author has examined the issue of good faith in N Andrews, *Contract Law* (Cambridge University Press, 2015), chapter 21; at Article 5, Andrews, *Contract Rules* (Intersentia Publishing, Cambridge, 2016), and in Andrews, 'Good Faith Beneath the Surface: the Ethical Sensitivity of English Contract Law', in *The Age of Uniform Law: Essays in Honour of Michael Joachim Bonell* (Rome, 2016) (UNIDROIT, Rome and Oxford University Press), vol 2 of the collection, at 953-974 (ISBN: 978 88 86 44 93 66). See also: M Bridge, 'An English Lawyer looks at American Contract Law', in FH Buckley (ed), *The American Illness: Essays on the Rule of Law* (Yale University Press, New Haven, 2013), 291-311.

<sup>57</sup> [2013] EWCA Civ 200; [2013] BLR 265, at [150].

<sup>58</sup> [2016] EWCA Civ 789; [2016] 2 Lloyd's Rep. 494, at [45], per Moore-Bick LJ.

*'... recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case. ....In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organizing principle" drawn from cases of disparate kinds.'*

### Incorporation of Express Terms

An exclusion clause or any unusual and onerous clause (not regularly encountered in business or sector) will be incorporated into a transaction only if the party subject to the clause (a) signs a document containing the relevant clause or (b) reasonable steps have been taken to make him aware of it.

A signature is effective to incorporate an exclusion clause. The Common Law rule is straightforward: if the innocent party has signed a document, he is taken objectively to have assented to the exclusion clause, even if in fact he had not read it, or at least did not understand its effect. This was affirmed in *L'Estrange v F Graucob Ltd* (1934), where the claimant, having signed the supplier's standard terms, discovered within days that she had bought a defective cigarette slot machine for her Llandudno café.<sup>59</sup> But her signature had been effective to incorporate terms which fatefully conferred extensive immunity on the supplier.

Bingham LJ in *Interfoto v Stiletto* (1989)<sup>60</sup> case noted Mellish LJ's analysis of the 'ticket' cases, notably *Parker v SE Ry Co* (1877),<sup>61</sup> which was summarised as follows by Megaw LJ in *Thornton v Shoe Lane Parking* (1971):<sup>62</sup>

*'...Parker v South Eastern Railway Co (1877) ...established that the appropriate questions ... in a ticket case were: (1) Did the passenger know that there was printing on the railway ticket? (2) Did he know that the ticket contained or referred to conditions? and (3) Did the railway company do what was reasonable in the way of notifying prospective passengers of the existence of conditions and where their terms might be considered?''*

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<sup>59</sup> [1934] 2 KB 394, Divisional Court; JR Spencer, 'Signature, Consent and the Rule in *L'Estrange v Graucob*' [1973] CLJ 104; D McLaughlan, 'The Entire Agreement Clause...' (2012) 128 LQR 521, 532-533. Moore-Bick LJ in *Peekay Intermark Ltd v Australia and NZ Banking Group Ltd* [2006] 2 Lloyd's Rep 511; [2006] 1 CLC 582, at [43] proclaimed this rule as 'an important principle' which 'underpins the whole of commercial life'.

<sup>60</sup> [1989] QB 433, CA; noted by H McLean, [1988] CLJ 172; PA Chandler and JA Holland, (1988) 104 LQR 359; Sir Bernard Rix, 'Lord Bingham's Contributions to Commercial Law', in M Andenas and D Fairgrieve (eds), *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford University Press, 2009), 668-71; the 'ticket' cases and the *Interfoto* decision were considered in: *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265, CA (clause restricting non-consumer purchaser's rights 'extremely onerous and unusual', per Hirst and Waite LJ); at 276-8 Hobhouse LJ adopted a more nuanced approach on the issue of incorporation); and in *dicta* in *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC); [2007] BLR 135, at [57] to [69] (Christopher Clarke J).

<sup>61</sup> (1877) 2 CPD 416, 423, CA (Mellish LJ).

<sup>62</sup> [1971] 2 QB 163, 171-2, CA.

Bingham LJ in *Interfoto v Stiletto* (1989) noted that this 'reasonable steps' test applies not just to exclusion clauses but to all 'unusual and stringent',<sup>63</sup> 'outlandish',<sup>64</sup> or 'unreasonable and extortionate'<sup>65</sup> clauses (perhaps only if 'particularly', or 'extremely' 'onerous or unusual')<sup>66</sup> lurking in the undergrowth of the other party's standard terms. In the *Interfoto* case an advertising agency, Stiletto, hired 47 transparencies of scenes from the 1950s from Interfoto, a photographic library. Stiletto was later invoiced for holding on to these beyond the contractual deadline for return. Stiletto disputed liability to pay this amount. Interfoto's small-print terms imposed a large daily fee for each transparency if they were retained for longer than fourteen days, namely, £5 (plus VAT) for each item for each extra day (it was thus a liquidated damages clause which smacked of a penalty).<sup>67</sup> Interfoto's charges were about ten times higher than those charged by competitors. The eventual bill for late return was a massive amount, nearly £4,000. The initial delivery note had been headed 'Conditions'. However, nothing more had been done to impress upon the customer the importance of these proposed terms. Nor had Stiletto signed to acknowledge notice of these terms. In short, Interfoto had not done enough to alert its customer to the especially onerous nature of the clause. And so the £4,000 contract claim failed.

### III

#### INTERPRETATION ISSUES:

#### WHAT DO THE TERMS MEAN?

##### Interpretation

This is the topic on which, it appears, no leading judge or commentator can remain silent. The last few decades have seen both extensive judicial and lecture-hall analysis.<sup>68</sup> This

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<sup>63</sup> [1989] QB 433, 439, CA.

<sup>64</sup> *ibid*, 444.

<sup>65</sup> *ibid*, 445.

<sup>66</sup> Dillon LJ in the *Interfoto* case referred to 'a particularly onerous clause', [1989] QB 433, 438, CA. The adverbs 'particularly' and 'extremely' (qualifying the adjectives 'onerous and unusual') recur in *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265, 269-5, 277, CA; see also *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 All ER (Comm) 39, at [211] (Rix LJ); Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp.* [2008] EWHC 1186, at [578] ff (affirmed [2010] EWCA Civ 1221; [2010] 2 CLC 705).

<sup>67</sup> Surprisingly, as noted by Bingham LJ at [1989] QB 433, 445-6, CA, the customer had not pleaded that the term was void under the penalty jurisdiction. On the penalty jurisdiction: *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] AC 1172; R Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018).

<sup>68</sup> eg, Lord Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553; Lord Neuberger, 'The impact of pre- and post-contractual conduct on contractual interpretation' (2014) (<<https://www.supremecourt.uk/docs/speech-140811.pdf>>); Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2017) [2016-2017] 9 *The UK Supreme Court Yearbook* 74 (<<https://www.supremecourt.uk/docs/speech-170508.pdf>>); Lord Hoffmann, 'Rectification and other Mistakes' (COMBAR lecture, 2015) (<<http://www.combar.com/public/cms/260/604/384/2242/Lord%20Hoffmann%20Lecture%203.11.15.pdf?realName=n7IZK4.pdf>>); Lord Grabiner, 'The Iterative Process of Contractual Interpretation' (2012) 128 LQR 41; Neil

hyper-analysis reflects the fact that businesses (with or without legal advice) tend to express their agreements in a highly structured, detailed, and often prolix form, not always carefully thought out, and riven with internal linguistic inconsistencies or 'tensions'.

*Principles of Interpretation of Written Contracts. Wood v Capita Insurance Services Ltd (2017)*<sup>69</sup> summarises the case law.<sup>70</sup> Earlier, Lord Neuberger summarised the topic as follows in *Arnold v. Britton (2015)*:<sup>71</sup>

*'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"...And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [document], (iii) the overall purpose of the clause and the [document], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'*

The tribunal's legal duty is to interpret a written contract faithfully, objectively, and practically, that is, (a) refraining from illegitimately rewriting the agreement, (b) without reference to any declaration of subjective intent made by a party or to the parties' negotiations, but (c) with due regard to commercial and practical common sense where the text is fairly open to more than one interpretation.<sup>72</sup> A tribunal must give effect to the parties' agreed text. And so the tribunal must refrain from illegitimately modifying, rewriting, or leaving out of account the language of the contract if the meaning is clear and

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Andrews, 'Interpretation of Contracts and "Commercial Common Sense": Do Not Overlay this Useful Criterion' [2017] CLJ 36-62.

<sup>69</sup> [2017] UKSC 24; [2017] AC 1173, at [8] to [15] (Lord Hodge).

<sup>70</sup> [2015] UKSC 36, [2015] AC 1619; in *Taurus Petroleum Ltd v State Oil Marketing Co* [2017] UKSC 64; [2018] AC 690, at [86], Lord Mance said: 'As to construction, the general principles of construction are, I hope, well-established to the point where they need little discussion.' Lord Mance then cited paragraphs [10] to [12] of Lord Hodge's judgment in *Wood v Capita* (above).

<sup>71</sup> [2015] UKSC 36, [2015] AC 1619, at [15]: see also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; and *Taurus Petroleum Ltd v State Oil Marketing Co, Ministry of Oil, Iraq* [2017] UKSC 64; [2018] AC 690.

<sup>72</sup> *Prenn v Simmonds* [1971] 1 WLR 1381, HL; and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; and *Taurus Petroleum Ltd v State Oil Marketing Co, Ministry of Oil, Iraq* [2017] UKSC 64; [2018] AC 690.

consistent with commercial common sense.<sup>73</sup> The tribunal can construe a text so as to correct a slip or other drafting problem, provided (a) it is clear that the text is defective and (b) it is also obvious how the text should be repaired in order to reflect the parties' objective true meaning.<sup>74</sup>

The whole contract must be considered when interpreting any word, phrase, clause, or part within it (or within a set of connected contractually binding documents).<sup>75</sup> When seeking to interpret written contracts, a party cannot adduce, without his opponent's permission, the parties' prior negotiations.<sup>76</sup> But this evidential bar does not apply if:<sup>77</sup> (a) an application is made for the equitable remedy of rectification (see text below); or (b) a mutual understanding can be substantiated on the basis of estoppel by convention, that is, a consensual understanding manifested in their interactive dealings; or (c) the parties (or a group or sect of which they are members) habitually use the relevant word or phrase in an unusual manner. Furthermore, a written contract should not be construed by reference to the parties' conduct which has occurred subsequent to the contract's formation,<sup>78</sup> unless the evidence shows (a) that the parties had specifically agreed to vary or discharge the agreement;<sup>79</sup> or (b) there has been a waiver;<sup>80</sup> or (c) the doctrine of estoppel by convention has arisen on these facts. But the parties can produce evidence of the transaction's background in

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<sup>73</sup> *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

<sup>74</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101.

<sup>75</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; and *Taurus Petroleum Ltd v State Oil Marketing Co, Ministry of Oil, Iraq* [2017] UKSC 64; [2018] AC 690 and *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, HL.

<sup>76</sup> *Prenn v Simmonds* [1971] 1 WLR 1381, HL; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

<sup>77</sup> *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, CA; *Joscelyne v Nissen* [1970] 2 QB 86, CA, Russell LJ (Sachs and Phillimore LJJ agreeing); *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 WLR 1333, at [227]; noted Paul S Davies, 'Rectifying the Course of Rectification', (2012) 75 MLR 412-426; *George Wimpey UK Ltd v VI Components Ltd* [2005] EWCA Civ 77; [2005] BLR 135; 103 Con LR 67; [2005] 2 P & CR DG5.

<sup>78</sup> *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603, HL (Lord Reid) (K Lewison, *Interpretation of Contracts* (6th edn, Sweet & Maxwell, London, 2015), 3-19; Lord Neuberger, 'The impact of pre- and post-contractual conduct on contractual interpretation' (Banking Services and Finance Law Association Conference, Queenstown, 2014, <<https://www.supremecourt.uk/docs/speech-140811.pdf>>)). In *Ottoman Bank of Nicosia v Chakarian* [1938] AC 260, 272-3, PC, Lord Wright said: 'if a contract is clear and unambiguous its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly in special cases support, along with other appropriate evidence, a claim for rectification.'

<sup>79</sup> For a longer list, *Chitty on Contracts* (33rd edn, Sweet & Maxwell, London, 2018), 13-114.

<sup>80</sup> *WJ Alan v El Nasr* [1972] 2 QB 189, 206-7, CA (Lord Denning MR).

order to illuminate the text, provided this background material was available to the parties at the time of formation.<sup>81</sup>

The tribunal must adopt an interpretation which applies the contractual text to the relevant changed circumstances in a manner consistent with the objective purposes and values expressed in that document, or implicit within it.<sup>82</sup> However, the tribunal will not apply the original language to new events if it is obvious that, at the time of the original agreement, the parties could not possibly have contemplated such a drastic alteration of circumstances.<sup>83</sup>

### Rectification

*Common intention rectification.*<sup>84</sup> Rectification is available if the tribunal is satisfied that the text of the parties' final agreement fails to reflect the objectively agreed and most recent version of the pre-formation text, that is, the version which the parties had intended to adopt as their final agreement. The preconditions for common intention rectification are: (a) the parties had a common intention at the time of formation; (b) the existence and content of that common intention will be established objectively; (c) the relevant common intention subsisted without alteration at the moment of formation; and (d) by mistake, the written contract did not accurately and fully reflect that common intention. Reduced to essentials the doctrine thus turns on (a) an accidental mismatch between the concluded text and (b) the parties' final version, intended to be adopted, objectively manifested.

*Unilateral mistake rectification.*<sup>85</sup> This alternative ground of rectification applies where a party has reprehensibly failed to point out to the other party that the written terms of their imminent transaction will not accord with the latter party's mistaken understanding concerning the contents of that written agreement.

Rectification will not be awarded if this would harm a third party who has, in good faith and for consideration, acquired rights in the relevant subject matter.<sup>86</sup> The rectified document speaks from the moment of formation, that is, it operates in its rectified form from the document's commencement.<sup>87</sup>

## IV

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<sup>81</sup> *Prenn v Simmonds* [1971] 1 WLR 1381, HL; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 898, HL; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619.

<sup>82</sup> *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56; 2012 SLT 205; 2012 SCLR 114 and *Debenhams Retail plc v Sun Alliance and London Assurance Co Ltd* [2005] EWCA Civ 868; [2005] BTC 5464; [2005] NPC 9.

<sup>83</sup> *Lloyds TSB Foundation for Scotland v Lloyds Group plc* [2013] UKSC 3; [2013] 1 WLR 366.

<sup>84</sup> *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, CA; *Joscelyne v Nissen* [1970] 2 QB 86, CA; *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 WLR 1333, at [227] (noted Paul S Davies, 'Rectifying the Course of Rectification', (2012) 75 MLR 412-426).

<sup>85</sup> *George Wimpey UK Ltd v VI Components Ltd* [2005] EWCA Civ 77; [2005] BLR 135.

<sup>86</sup> N Andrews, *Contract Rules* (Intersentia Publishing, Cambridge, 2016), 229 ('proposition (iii)', citing authority).

<sup>87</sup> *ibid*, 229 ('proposition (iv)', citing authority).

## ISSUES CONCERNING BREACH

This topic concerns the various forms of breach and their impact.<sup>88</sup> The author has elsewhere suggested that in commercial contexts, that is, where the parties are both commercial entities, the law should strive to ensure that the doctrines provide clear and predictable answers to these questions:<sup>89</sup> (i) Has there been a breach which entitles the innocent party to terminate the contract for breach? (ii) Has the process of termination for breach been satisfied on the present facts? (For reasons of space, the large and technical topic of exclusion clauses is not treated here).<sup>90</sup>

### Is Termination for Breach Available on the Facts?

As for (i), the innocent party is entitled to terminate a contract for breach in any of the following situations: (1) the other party has shown a clear unwillingness to satisfy his contract ('renunciation');<sup>91</sup> (2) the guilty party's default has rendered performance

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<sup>88</sup> The present author's contribution to Andrews, Clarke, Tettenborn and Virgo *Contractual Duties* (2nd edn, Sweet & Maxwell, London, 2017) (chapters 5 to 15 on breach).

<sup>89</sup> The central contention within N Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 LQR 117-137 (see: SSRN <<http://ssrn.com/abstract=3198563>>).

<sup>90</sup> N Andrews, *Contract Law* (2nd edn, Cambridge University Press, 2015), chapter 15; N Andrews, *Contract Rules* (Intersentia Publishing, Cambridge, 2016), Articles 116 to 121. Leading cases include: (1) incorporation: *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, Div Ct (JR Spencer, 'Signature, Consent and the Rule in *L'Estrange v Graucob*' [1973] CLJ 104; D McLaughlan, 'The Entire Agreement Clause...' (2012) 128 LQR 521, 532-533); *Goodlife Foods v Hall Fire Protection Ltd* [2018] EWCA Civ 1371; [2018] BLR 491 (considering *Interfoto v Stiletto* [1989] QB 433, CA); (2) inability at Common Law to restrict liability for fraud: *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 1 All ER (Comm) 349, [2003] 1 CLC 358, at [16], [78], [81], [98]; (3) construction at Common Law: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, HL (no fundamental breach doctrine; giving effect to plain language of exclusion; on which, see *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57; [2017] AC 73); *Canada Steamship Lines Ltd v R* [1952] AC 192, 207-8, PC (*contra proferentem* technique; on which, notably, Briggs LJ in *The Hut Group Ltd v Nobahar-Cookson* [2016] EWCA Civ 128; [2016] 1 CLC 573, at [18] and [19]); (4) section 3, Misrepresentation Act 1967 and liability for misrepresentation: *Springwell Navigation Corporation v JP Morgan Chase* [2010] EWCA Civ 1221; [2010] 2 CLC 705; *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396; [2019] 1 WLR 637; (5) standard written terms of business and section 3, Unfair Contract Terms Act 1977: *African Export-Import Bank v Shebah Exploration and Production Co Ltd* [2017] EWCA Civ 845; [2018] 1 WLR 487; (6) application of statutory reasonableness test: see (for recent comment) *Goodlife* (above) at [108] and [109].

<sup>91</sup> *Freeth v Burr* (1874) LR 9 CP 208, (Court of Common Pleas); *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All ER 377; *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd ('The Spa Draco')* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447 (affirming [2015] EWHC 718 (Comm); [2015] 1 All ER (Comm) 879, Popplewell J); *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ('The Nanfri')* [1979] AC 757, HL; *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2011] 2 All ER (Comm) 223; *Vaswani v Italian Motors (Sales & Services) Ltd* [1996] 1 WLR 270, PC; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, HL. As for cases on anticipatory breach, *Hochster v De La Tour* (1853) 2 E & B 678; 118 ER 922; *Universal Cargo Carriers Corporation v Citati* [1957] 2 QB 401, 436-8 (not disturbed on appeal on this point: [1957] 1 WLR 979 CA and [1958] 2 QB 254, CA); *White & Carter v McGregor* [1962] AC 413, HL; and *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082 (noted JW Carter and G Tolhurst (2016) 132 LQR 1-6; M Yip and Y Goh 'The compensatory principle: a golden victory for a new certainty' (2016) JBL 335-345).



impossible ('self-induced frustration'); (3) the contract has been breached in a serious manner going to the root of the innocent party's contractual expectations ('repudiation');<sup>92</sup> (4) there has been a breach of an important term (a 'condition'); or (5) there has been a breach of a termination clause which has the effect that the innocent party can treat the contract as discharged for breach; or (6) the facts disclose a serious breach of an intermediate term.

As for (1), the Court of Appeal in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* (2013) adopted these textbook formulations.<sup>93</sup> An explicit renunciation is defined as follows:<sup>94</sup> '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. The renunciation may occur before or at the time fixed for performance.'

An implicit renunciation is defined thus:<sup>95</sup> '[This arises where] 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. The renunciation is then evidenced by conduct.'

As for (2), Devlin J noted in *Universal Cargo Carriers Corporation v Citati* (1957)<sup>96</sup> that termination on the ground of self-induced frustration involves the 'serious risk' that the court might find that (contrary to the innocent party's pessimistic assessment) in fact the other party's inability to perform had not been shown to be inexorable, or sufficiently probable, because that party might yet have retrieved the situation. Devlin J adopted Lord Sumner's 1923 formulation<sup>97</sup> of this doctrine, which requires the innocent party to prove that the other had become 'wholly and finally disabled' from performing as he had undertaken to do. And so, to avoid this danger, the prudent course is to contend instead that the other party has *expressly renounced* the contract (see (1) on renunciation).

As for (3), Lewison LJ noted in *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* (2013) that the courts have not yet committed themselves to a choice between the following tests: (i) 'whether the breach deprives the innocent party of "substantially the whole benefit which it was the intention of the parties...that he should obtain"'; or (ii) 'whether the breach

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<sup>92</sup> *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All ER 377; *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc ('The Nanfri')* [1979] AC 757, HL; *Rice v Great Yarmouth BC* *The Times*, 26 July 2000; (2001) 3 LGLR 4, CA.

<sup>93</sup> [2013] EWCA Civ 577; [2013] 4 All ER 377, at [70], citing [as the present edition now is] *Chitty on Contracts* (32<sup>nd</sup> edn, Sweet & Maxwell, London 2015), at 24-018.

<sup>94</sup> [2013] EWCA Civ 577; [2013] 4 All ER 377, at [70].

<sup>95</sup> *ibid.*

<sup>96</sup> [1957] 2 QB 401, 436-8 (on this point not disturbed on appeal: [1957] 1 WLR 979 CA and [1958] 2 QB 254, CA); M Mustill, *Anticipatory Breach: Butterworths Lectures 1989-90* (1990), 69 ff; M Mustill (2008) 124 LQR 569, 580 n 23, notes the galaxy of commercial talent employed in arguing this case.

<sup>97</sup> *British & Beningtons Ltd v North West Cachar Tea Co Ltd* [1923] AC 48, 72, HL.

“deprive[s] the injured party of a substantial part of the benefit to which he is entitled under the contract”<sup>98</sup>.

As for (4), Waller LJ in *The Seaflower* (*BS & N Ltd (BVI) v Micado Shipping Ltd (Malta)*) (2001) confirmed<sup>99</sup> that a term will be a condition in any of the following circumstances: (i) statute explicitly classifies the term in this way;<sup>100</sup> (ii) there is a binding judicial decision classifying a particular term as a ‘condition’; (iii) a term is described in the contract as a ‘condition’ and, furthermore, upon construction it is held that it has that technical meaning (see *Schuler (L) AG v Wickman Machine Tool Sales Ltd* (1974));<sup>101</sup> (iv) the parties have explicitly agreed that breach of that term, no matter what the factual consequences, will entitle the innocent party to terminate the contract for breach; or (v) as a matter of general construction of the contract, the clause must be understood as intended to operate as a condition (for example, this was the conclusion in *The Seaflower* (2001) itself). As for (iv), in *BNP Paribas v Wockhardt EU Operations (Swiss) AG* (2009)<sup>102</sup> it was apparent that the parties had intended that a termination clause in a sophisticated financial instrument would operate as a (promissory) condition, and there was no sound reason not to give it this clear and decisive effect. Christopher Clarke J noted that the contract was ‘a carefully drawn standard form intended for widespread commercial use’. He held that the parties had intended that breach would necessarily entitle the innocent party to terminate the contract (for a problematic case which had gone the other way, see *Rice v Great Yarmouth BC* (2000)).<sup>103</sup> As for (v), as *The Seaflower* (2001) demonstrates, even if there is no express designation of a term as a ‘condition’ (by statute, precedent decision, or under the terms of the contract), the court can characterise it as such by a process of interpretation, having regard to the relevant obligation’s great commercial importance.

Etherton C made clear in *Urban 1 (Blonk Street) Ltd v Ayres* (2013)<sup>104</sup> that where a term is not *ab initio* a condition, the innocent party’s decision to serve notice purporting to render time of the essence does not upgrade the term into a condition. Instead failure to adhere to the deadline contained in the notice will need to be assessed to determine whether there has been a repudiatory breach going to the root of the contract, or whether there has been a renunciation.

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<sup>98</sup> [2013] EWCA Civ 577; [2013] 4 All ER 377, at [48].

<sup>99</sup> [2001] 1 All ER (Comm) 240; [2001] 1 Lloyd’s Rep 341, at [42].

<sup>100</sup> eg, ss 12(5A), 13 (1A), 14(6), 15(3), Sale of Goods Act 1979 (as amended); in non-consumer cases, ss. 13 to 15 must be read subject to s 15A of the Sale of Goods Act 1979, on which *Benjamin’s Sale of Goods* (9<sup>th</sup> edn, Sweet & Maxwell, London, 2014), 12-024 ff; inserted by s 4, Sale and Supply of Goods Act 1994; MG Bridge, ‘The Sale and Supply of Goods Act 1994’ [1995] JBL 398; ‘Sale and Supply of Goods’ (L Com No 160, 1987).

<sup>101</sup> [1974] AC 235, HL.

<sup>102</sup> [2009] EWHC 3116 (Comm).

<sup>103</sup> *The Times*, 26 July 2000; (2001) 3 LGLR 4, CA, at [17] (Hale LJ).

<sup>104</sup> [2013] EWCA Civ 816 [2014] 1 WLR 756 at [44] (see also *Ampurius Nu Homes Holdings Ltd v Telford Homes (Creekside) Ltd* [2013] EWCA Civ 577; [2013] 4 All ER 377).

As for (5), termination clauses, see discussion at (4)(iv) in text above. As for (6), An 'intermediate' or 'innominate' term is a promissory term which is neither a condition nor a warranty. If breached, the intermediate term will support a claim for breach. Whether termination for breach is justified will depend on whether the breach has deprived the innocent party of substantially the whole contractual benefit. In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962)<sup>105</sup> the concept of an innominate or intermediate term was rediscovered by the Court of Appeal. In this case Diplock LJ rejected the contention that the law comprises only a simple dichotomy of promissory term, namely 'conditions' and 'warranties', the latter producing only liability in damages, and the former entitling the innocent party additionally to terminate the contract.<sup>106</sup> Instead Diplock LJ accepted that some obligations can be breached only in a way which will necessarily have very serious consequences. Conversely, other contractual obligations might never have serious consequences, and so should be regarded as 'warranties'.<sup>107</sup> But, as Diplock LJ noted, this leaves a large category of obligations 'of a more complex nature' where it will depend on the actual events following breach whether the innocent party can justify termination. In the same case, the Court of Appeal held that express terms in charter parties as to 'seaworthiness' should not be treated as conditions. On the present facts, the court further held, agreeing with Salmon J at first instance, that termination was not justified because the relevant breaches had not been serious enough.

### The Process of Termination for Breach

As the Supreme Court noted in *Geys v Société Générale, London Branch* (2012),<sup>108</sup> the innocent party, faced by a breach which entitles him to terminate the contract, has a choice whether to do so, or to affirm the contract and merely sue for damages. As for the decision to terminate, Lord Hope in the same case said that 'the requirement is for a real acceptance—a conscious intention to bring the contract to an end, or the doing of something that is inconsistent with its continuation.'<sup>109</sup>

However, one exception to the 'elective' process of termination for breach has been identified by the Court of Appeal in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* (2016).<sup>110</sup> It was

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<sup>105</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] QB 26, CA; N Andrews, 'Breach of Contract: A Plea for Clarity and Discipline' (2018) 134 LQR 117-137 (on SSRN <<http://ssrn.com/abstract=3198563>>); JE Stannard and D Capper, *Termination for Breach of Contract* (Oxford University Press, 2014), chapter 6; D Nolan, in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, Oxford, 2008), 269 ff; and for Lord Diplock's own account of this decision, 'The Law of Contract in the Eighties' (1981) 15 U Brit Columbia LR 371; Lord Devlin, 'The Treatment of Breach of Contract' [1966] CLJ 192; JW Carter, GJ Tolhurst, E Peden, 'Developing the Intermediate Term Concept' (2006) 22 JCL 268-286.

<sup>106</sup> [1962] QB 26, 69-70.

<sup>107</sup> *ibid*, 70.

<sup>108</sup> [2012] UKSC 63; [2013] 1 AC 523.

<sup>109</sup> *ibid*, at [17].

<sup>110</sup> [2016] EWCA Civ 789; [2017] 1 All ER (Comm) 483 at [61]; and see Moore-Bick LJ at [25] to [28]; noted J Morgan [2017] CLJ 11-14.

here decided that the innocent party need not elect to terminate if performance has become impossible, in the sense that the relevant commercial venture is no longer achievable. Instead, such culpably induced frustration operates automatically to terminate the contract. The result is that the innocent party, even if he purports to do so, cannot keep the contract running to his advantage. On the facts of that case, a hirer of containers had been unable to return them because they had continued to languish in a foreign port, their contents remaining uncollected by the buyer. The hirer was in breach, although that party had become a victim of a commercial farce beyond its effective control. The owner's claim to continuing daily non-return charges ended at a date selected by the court as the point at which the commercial venture to hire and return these containers had collapsed and become commercially absurd.

Where the innocent party chooses to keep the contract alive, and not to terminate for breach, the innocent party remains locked into the contract's regime of obligations. This proposition was recognised by the House of Lords in *The Simona* (1989)<sup>111</sup> where Lord Ackner explained:<sup>112</sup> 'There is no third choice, as a sort of *via media*, to affirm the contract and yet to be absolved from tendering further performance unless and until party A gives reasonable notice that he is once again able and willing to perform.'

The courts are sensitive to the fact that, before deciding to terminate, the innocent party might first prudently wish to check whether the guilty party might recommit to the contract. For this reason, Moore-Bick J said in *Yukong Line of Korea v Rendsburg Investments Corporation of Liberia (The Rialto)* (1996):<sup>113</sup> 'the Court should not adopt an unduly technical approach to deciding whether the injured party has affirmed the contract and should not be willing to hold that the contract has been affirmed without very clear evidence that the injured party has indeed chosen to go on with the contract notwithstanding the other party's repudiation.'

But the innocent party has a (normally very) short period in which to make this decision whether to terminate. In *White Rosebay Shipping SA v Hong Kong Chain Glory Shipping Ltd* (2013)<sup>114</sup> Teare J said that the period during which the injured party can pause for thought must be a 'reasonable' one. The length of this period is entirely dependent on the context, some (perhaps most) situations demanding swift decision-making, others permitting a more leisurely approach. Occasionally, as on the special facts of *Force India Formula One Team Ltd v*

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<sup>111</sup> *Fermometal SARL v Mediterranean Shipping Co SA (The Simona)* [1989] AC 788, 805, HL (Lord Ackner) (criticised by GH Jones and W Goodhart, *Specific Performance* (2nd edn, Butterworths, London, 1996), 69-72, considering Australian case, *Foran v Wight* (1989) 168 CLR 385 (HCA) (on which, Q Liu, *Anticipatory Breach* (Hart Publishing, Oxford, 2011), 107-112), and *Peter Turnbull & Co v Mundus Trading Co (Australasia)* (1954) 90 CLR 235, HCA) (on which, Q Liu, *op cit*, 102); M Mustill, 'Anticipatory Breach: The Common Law at Work', *Butterworths Lectures 1989-90* (Butterworths, London, 1990), 65-8; JW Carter in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), 485, 498, 502-4; also on *The Simona*, Q Liu, *op cit*, 104-5.

<sup>112</sup> [1989] AC 788, 805, HL.

<sup>113</sup> [1996] 2 Lloyd's Rep 604, 608, col 1.

<sup>114</sup> [2013] EWHC 1355 (Comm); [2013] 2 All ER (Comm) 449, at [21] to [26] (Teare J).

*Etihad Airways PJSC* (2010), the period for decision-making might be quite long.<sup>115</sup> This 'make your mind up' period was quite generous in that case only because the relevant events had fallen within the long vacation of Formula One racing calendar, a fallow period (several months long) between racing seasons.

The innocent party's notification of the decision to terminate (or, conversely, not to do so) is normally made explicitly, but sometimes it might be inferred from conduct. As Lord Steyn said in *Vitol SA v Norelf Ltd* ('*The Santa Clara*') (1996): 'the aggrieved party need not...notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election comes to the repudiating party's attention.'<sup>116</sup>

Once the contract has been declared over, there is no back-tracking from such a decision. Conversely, once the contract has been affirmed, the decision is also final. These points will now be amplified.

Lord Wilberforce said in *Johnson v Agnew* (1980): 'Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity.'<sup>117</sup> He added that once a decision to terminate has been communicated, it is too late to try to resurrect the contract:<sup>118</sup> 'What is dead is dead.'<sup>119</sup> Therefore, the innocent party cannot try to change his mind and revive the contract by a unilateral decision. Instead the contract can only be resurrected by the parties' joint decision.<sup>120</sup> Similarly, once the innocent party decides to affirm the contract, he cannot normally change his mind, at least where he has full knowledge<sup>121</sup> of the relevant facts and of his right to terminate. However, the innocent party's attempt to obtain performance by obtaining specific performance does not close the door upon termination for breach if it turns out that the specific performance remedy cannot be implemented.

Also in *Johnson v Agnew* (1980) Lord Wilberforce cemented the distinction (of substance and terminology) between termination or discharge for breach and rescission for misrepresentation, or some other vitiating factor. He said:<sup>122</sup> '...although the [innocent party] is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission ab initio, such as may arise for example in

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<sup>115</sup> [2010] EWCA Civ 1051; [2011] ETLR 10, at [122].

<sup>116</sup> [1996] AC 800, 811, HL (Lord Steyn); *Yukong Line of Korea v Rendsburg Investments Corporation of Liberia* ('*The Rialto*') [1996] 2 Lloyd's Rep 604, 607 (Moore-Bick J), propositions (7) and (8).

<sup>117</sup> Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 398, HL.

<sup>118</sup> *Yukong Line of Korea v Rendsburg Investments Corporation of Liberia* ('*The Rialto*') [1996] 2 Lloyd's Rep 604, 607, Moore-Bick J, proposition (4).

<sup>119</sup> Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 398, HL.

<sup>120</sup> Q Liu, *Anticipatory Breach* (Hart Publishing, Oxford, 2011), 127, at n 637, citing J Ewart, *Waiver Distributed* (Harvard University Press, 1917), 83-4.

<sup>121</sup> *Peyman v Lanjani* [1985] Ch 457, CA; for an example of affirmation and waiver of the right to terminate, *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239; [2005] Info TLR 294, at [16] to [23].

<sup>122</sup> *Johnson v Agnew* [1980] AC 367, 392-3, HL.

cases of mistake, fraud or lack of consent.'

Lord Wilberforce continued: 'In those cases [of rescission ab initio], the contract is treated in law as never having come into existence... In the case of an accepted repudiatory breach, the contract has come into existence but has been put an end to or discharged.' He concluded: '...it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about "rescission ab initio".'

Lord Porter in *Heyman v Darwins Ltd* (1942) explained:<sup>123</sup> 'To say that the contract ... has come to an end... may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position.'

The practical effects of this distinction (between, for example, misrepresentation and rescission and breach and termination) are: (1) when a contract is terminated for breach, the innocent party retains the right to sue in respect of breaches of contract<sup>124</sup> or payment obligations<sup>125</sup> which antedate the termination;<sup>126</sup> and (2) the innocent party (who has justifiably terminated the contract) might himself remain liable in respect of his breaches of contract which antedated termination for the guilty party's breach.<sup>127</sup>

## V

### JUDICIAL REMEDIES AND OFFICIAL ENFORCEMENT

Enforcement looms large in the real world, but barely attracts acknowledgement within most British University courses on law, a patent example of academic myopia or perhaps misplaced disdain for the 'nitty-gritty' of 'practice'.

Court judgments, whether for money or non-monetary orders (injunctions and orders for specific performance, or orders to gain possession of goods or immovable property), might need to be enforced. The substantive contract books do not venture beyond the availability

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<sup>123</sup> [1942] AC 356, 399, HL, and Dixon J in *McDonald v Denny Lascelles Ltd* (1933) 48 CLR 457, 476-7, HCA

<sup>124</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849, HL (Lord Diplock); *Johnson v Agnew* [1980] AC 367, 396, HL (Lord Wilberforce).

<sup>125</sup> *Stocznia Gdanska SA v Latvian SS Co* [1998] 1 WLR 574, HL (liability to pay accrued instalments under contract for construction of a ship); J Beatson and G Tolhurst [1998] CLJ 253; *Hurst v Bryk* [2002] 1 AC 185, HL (former partner liable for accrued and accruing rent liability for partnership premises when liability arose before partner accepted other partners' repudiatory breach; although on that context see *Golstein v Bishop* [2014] EWCA Civ 10; [2014] Ch 455; affirming [2013] EWHC 881 (Ch); [2014] Ch 131, at [116] to [120] (Nugee QC), and adopting Neuberger J in *Mullins v Laughton* [2002] EWHC 2761 (Ch); [2003] Ch 250).

<sup>126</sup> eg, *Hardy v Griffiths* [2014] EWHC 3947 (Ch); [2015] Ch 417, at [107], [109], [117] (liability for unpaid deposit); following *Griffon Shipping LLC v Firodi Shipping Ltd* ('The Griffon') [2013] EWCA Civ 1567; [2014] 1 All ER (Comm) 593 and *Damon Cia Naviera SA v Hapag-Lloyd International SA*, 'The Blankenstein' [1985] 1 WLR 435, 449, 457, CA.

<sup>127</sup> *Eastwood v Magnox Electric plc* [2004] UKHL 35; [2005] 1 AC 503, at [27].

of the remedy. They stop short of the process of enforcement. Indeed on leading treatment of contract (*Halsbury's Laws*)<sup>128</sup> even stops short of examining remedies for breach.<sup>129</sup>

Because any form of litigation is inconvenient, uncertain, expensive, and slow, self-help forms of protection are especially valuable, notably deposits (see next paragraph), forfeiture,<sup>130</sup> set-off of a cross-claim against the main claim,<sup>131</sup> and the 'self-assessed' 'liquidated damages' clause.<sup>132</sup>

### Deposits

The Privy Council in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* (1993)<sup>133</sup> held that a deposit<sup>134</sup> in respect of a land transaction cannot exceed the customary level of 10 *per cent*, unless special circumstances were shown. Section 49(2) of the Law of Property Act 1925 (on which see *In Midill (97PL) Ltd v Park Lane Estates Ltd and Gomba International* (2008))<sup>135</sup> allows a court, 'if it thinks fit', to 'order the repayment of any deposit'. But this provision applies only to contracts for the 'sale or exchange of any interest of land'.<sup>136</sup>

### Debt Claims

The most important remedy for breach of contract is the action to payment of an agreed sum, the claim for debt. Debts can arise for reasons other than contract, for example, taxes.

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<sup>128</sup> *Halsbury's Laws of England* (5th edn, Lexis Nexis, updated periodically), vol 22, *Contract*.

<sup>129</sup> But that is atypical and a reflection of the fact that this encyclopaedia has separate chapters on different remedies (Damages, and Injunctions).

<sup>130</sup> eg, forfeiture of a lease for non-payment or other types of breach.

<sup>131</sup> *Andrews on Civil Processes* (2nd edn, Intersentia Publishing, Cambridge, 2019), chapter 7; *Derham on the Law of Set-off* (4th edn, Oxford University Press, 2010); L Gulliver (ed), *Goode and Gulliver on Legal Problems of Credit and Security* (6th edn, Sweet & Maxwell, London, 2017), chapter 7; S McCracken, *The Banker's Remedy of Set-Off* (3rd edn, Bloomsbury Publishing, London, 2010); P Wood, *English and International Set-off* (Sweet & Maxwell, London, 1989); P Wood, *Law and Practice of International Finance: Set-off and Netting, Derivatives and Clearing Systems* (Sweet & Maxwell, London, 2007); UNIDROIT's *Principles of International Commercial Contracts* (3rd edn, International Institute for the Unification of Private Law, Rome, 2010), chapter 8. Comparative discussion: P Pichonnaz and L Gullifer, *Set-off in Arbitration and Commercial Transactions* (Oxford University Press, 2014); R Zimmermann, *Comparative Foundations of a European Law of Set-off and Prescription* (Cambridge University Press, 2002; reprinted 2010), summary at 167–9.

<sup>132</sup> *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] AC 1172; R Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018).

<sup>133</sup> [1993] AC 573, PC.

<sup>134</sup> *Goff and Jones on the Law of Unjust Enrichment* (9th edn, London, 2016), chapter 14; L Gullifer, in AS Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford University Press, 2003), 191, 205 ff; R Halson, *Contract Law* (2nd edn, Pearson Publishing, London, 2012), 517-521; Law Commission, 'Penalty Clauses and Forfeiture of Monies Paid; (Law Commission Consultation Paper No 61, London, 1975); GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (Oxford University Press, 1988), 234 ff; C Conte, 'Deposit Clauses', in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2017), chapter 17.

<sup>135</sup> [2008] EWCA Civ 1227; [2009] 1 WLR 2460; considering, especially, *Omar v El-Wakil* [2001] EWCA Civ 1090; [2002] 2 P & CR 3 (at pp 36 ff, CA); *Tennaro Ltd v Majorarch* [2003] EWHC 2601; [2004] 1 P & CR 13 (Neuberger J); and *Bidaisee v Sampath* (1995) 46 WIR 461, PC.

<sup>136</sup> s 49(2)(3), Law of Property Act 1925.

Debts survive us, spoil our New Year celebrations, and have become easier to assume in an economy driven by lending.

Debts are normally for fixed sums. But a debt might be capable of subsisting even though the amount has yet to be established: a good debt will arise, provided there is a criterion or a mechanism for establishing the amount payable. When the debt arises from agreement it is sometimes called the 'action for the agreed sum'. Occasionally, an equitable order of specific performance can be made to compel payment of money, notably in contracts for the sale of real property<sup>137</sup> or where successive debt claims might be irksome.<sup>138</sup>

*Debt Contrasted with Damages.* The main points of difference are as follows. (1) Debt is not confined to breach of contract or other civil wrongs. A debt obligation can arise by way of agreement, but not all debts rest on contract. Damages are available where there has been a breach of contract or the commission of a tort. (2) *Non-payment of debt is actionable without more.* Damages (unless punitive) are compensatory and thus presuppose that the claimant (or someone on whose behalf the claimant can legitimately sue for compensation) has suffered substantial loss. Thus debt does not require proof of loss. (3) *Debts are Assignable.* By contrast a damages claim in contract or in tort is not assignable unless special factors can be shown. (4) *The Defence of Set-off is Automatic in the Case of Mutual Debts.* A debt claim is readily set-off against another debt obligation (for example, A owes B 100; B owes A 25; therefore A owes B nett 75). Non-debt claims give rise to set-off in more restricted circumstances.<sup>139</sup> (5) *The Mitigation Doctrine does Not Apply to Claims for Debt.* Since debt does not involve proof of loss, the duty to mitigate loss does not apply. Mitigation is a defence, total or partial, to a claim for damages. (6) *Debts Tend to be More Easily Proved.* Many debt claims are readily proved, without the need for trial and thus without oral testimony. Summary judgment under CPR Part 24 provides a relatively speedy route to judgment where the defendant has 'no real prospect' of raising a successful defence.

*Debt Collection Procedures.* Judgment creditors are free to choose from the portfolio of available enforcement methods.<sup>140</sup> The Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007'), (Parts 3 to 5), modified the law of enforcement (the Act was implemented on 6 April, 2014). Under these changes, High Court sheriffs were re-named 'enforcement officers'<sup>141</sup> and

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<sup>137</sup> GH Jones and W Goodhart *Specific Performance* (2nd edn, Butterworths, London, 1996), 33-4 criticise the rule, arguing that it is an indefensible aspect of the theory of 'affirmative mutuality'.

<sup>138</sup> As in *Beswick v Beswick* [1968] AC 58 HL (weekly sums payable by A to C, a third party, following transfer to A by B of a coal merchant business; specific performance, at suit of B, awarded for C's benefit to maintain latter's income stream; debt not actionable in claim for debt by B because sums payable to C under agreement; damages at suit of B assumed to be nominal, Lord Pearce alone regarding damages as substantial on these facts).

<sup>139</sup> *Andrews on Civil Processes* (2nd edn, Intersentia Publishing, Cambridge, 2019), chapter 7; *Derham on the Law of Set-off* (4th edn, Oxford University Press, 2010); for other literature, n 129 above.

<sup>140</sup> CPR 70.2(2).

<sup>141</sup> Courts Act 2003, sch 7, para 2(1); High Court Enforcement Officers Regulations 2004 (SI 2004/400).



County Court bailiffs were re-named 'enforcement agents'.<sup>142</sup> The TCEA 2007 introduced a regime for 'taking control of goods', replacing the system of 'seizure of goods'.<sup>143</sup> Money judgments can be enforced by: (i) 'writs of control' and 'warrants of control';<sup>144</sup> (ii) a third party debt order (formerly known as 'garnishee orders');<sup>145</sup> (iii) a charging order (against land, or stop orders with respect to securities or funds in court);<sup>146</sup> or (iv) by appointment of a receiver.<sup>147</sup> Some types of pecuniary enforcement are available only in the County Court: (v) attachment of earnings orders<sup>148</sup> and (vi) 'administration orders'.<sup>149</sup> The court has power to order a stay of execution in respect of a judgment or order for payment of money.<sup>150</sup>

### Damages for Breach

The next important remedy is the claim for compensatory damages.<sup>151</sup> Damages are calculated to place the innocent party monetarily in the position she would have been if the contract had not been breached. Parke B in *Robinson v Harman* (1848) (which is the *locus classicus*) said that a person who has been promised a lease is entitled to damages reflecting the value of the lease not delivered, and is not confined to expenses wasted on the abortive transaction.<sup>152</sup>

But the innocent party might sometimes claim damages for loss incurred in preparing for the contract and attempting to perform under it. For example, in *Anglia Television Ltd v Reed* (1972), the defendant actor breached his contract by failing to participate in filming. The claimant company could not show that its intended film would have been profitable.<sup>153</sup> The Court of Appeal awarded compensation for the expenses wasted when the project had to be

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<sup>142</sup> Tribunals, Courts and Enforcement Act 2007, ss 63, 64; Certificate of Enforcement Agents Regulations 2014 (SI 2014/421).

<sup>143</sup> Tribunals, Courts and Enforcement Act 2007, sections 62 to 70, Schedule 12.

<sup>144</sup> CPR Part 84.

<sup>145</sup> CPR Part 72.

<sup>146</sup> CPR Part 73.

<sup>147</sup> s 37, Senior Courts Act 1981; s 107, County Courts Act 1984; CPR Part 69.

<sup>148</sup> CPR Part 89.

<sup>149</sup> County Courts Act 1984, s 112; such an order prevents named creditors from petitioning for bankruptcy against the judgment debtor, and makes provision for payment of creditors by instalments; the order can last for three years (s 106, Tribunals, Courts and Enforcement Act 2007 is not yet in force).

<sup>150</sup> *Michael Wilson and Partners v Sinclair (No 2)* [2017] EWCA Civ 55, [2017] 1 WLR 3069, at [13] and [15], applying CPR 81.7.

<sup>151</sup> The leading discussion is *McGregor on Damages* (20<sup>th</sup> edn, Sweet & Maxwell, London, 2018).

<sup>152</sup> (1848) 1 Exch 850, 855; on the claimant's expectation or performance interest, Fuller and Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52 and 373 (in two parts); D Friedmann, 'The Performance Interest in Contract Damages' (1995) 111 *LQR* 628; D Friedmann, 'A Comment on Fuller and Perdue' (2001) 1 *Issues in Legal Scholarship* 11; P Jaffey, 'Damages and the Protection of Contractual Reliance', in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008), chapter 6; R Stevens, 'Damages and the Right to Performance ...', in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Oxford, 2009), 171 ff; C Webb, 'Justifying Damages', in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing, Oxford, 2009), 139 ff; D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution, and Vindication' (2008) 28 *OJLS* 73–98.

<sup>153</sup> [1972] 1 QB 60, CA.

scrapped. The award also covered pre-contractual expenditure made in contemplation of the filming.

*C & P Haulage v Middleton* (1983)<sup>154</sup> establishes that the defendant's liability is confined to nominal damages if the defendant can show that the claimant had no chance of 'covering his expenses' even if the contract had not been breached. The burden is upon the defendant to make out this restriction on recovery by the claimant, as was made clear in *CCC Films v Impact Quadrant Ltd* (1985).<sup>155</sup>

Damages claims are subject to numerous defences and restrictions: (i) in the absence of proven substantial loss, the innocent party is confined to a claim for nominal damages;<sup>156</sup> (ii) causation;<sup>157</sup> (iii) the need for certainty (*Allied Maples Group v Simmons & Simmons* (1995)<sup>158</sup> established the proposition that loss of chance damages are available only if the relevance chance was 'real' or 'substantial'); (iv) remoteness<sup>159</sup> (and scope of duty);<sup>160</sup> (v) mitigation; (vi) contributory negligence<sup>161</sup> (but only where the obligation is to exercise reasonable care and that obligation runs parallel to the same obligation in the tort of negligence).<sup>162</sup>

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<sup>154</sup> [1983] 1 WLR 1461, CA.

<sup>155</sup> [1985] QB 16, Hutchison J; followed in *Grange v Quinn* [2013] EWCA Civ 24; [2013] 1 P & CR 18.

<sup>156</sup> eg, *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32; [2018] AC 313 and *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 3 All ER 1082; on nominal damages, *McGregor on Damages* (20<sup>th</sup> edn, Sweet & Maxwell, London, 2018), chapter 12.

<sup>157</sup> *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, 1370-3, CA; *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; [2010] NPC 5.

<sup>158</sup> [1995] 1 WLR 1602, CA, noted by T Church, [1996] CLJ 187; considered in *Ampleforth Abbey (Trustees of) v Turner & Townsend Management Ltd* [2012] EWHC 2137 (TCC); [2012] TCLR 8; 144 Con LR 115; [2012] CILL 3252, at [131] ff, notably the formulation of law at [134]; considered in *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch); [2009] Ch 91 (noted by P Mitchell, (2009) 125 LQR 12-17); *McGregor on Damages* (20<sup>th</sup> edn, Sweet & Maxwell, London, 2018), chapter 10; S Green, 'Actionable Loss of a Chance', in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press, 2018), chapter 12.

<sup>159</sup> *Transfield Shipping Inc v Mercator ('The Achilles')*, [2008] UKHL 48; [2009] 1 AC 61; B Coote, (2010) 26 JCL 211; D Foxton, [2009] LMCLQ 461-87; VP Goldberg (2013) 66 CLP 107-130; G Gordon, (2009) 13 Edinburgh Law Review 125-30; Lord Hoffmann, (2010) 14 Edinburgh Law Review 47-61; H Hunter, (2014) 31 JCL 120-130; Adam Kramer, (2009) 125 LQR 408-15; D McLaughlan, (2009) 9 Oxford University Commonwealth Law Journal 109-39; SS Naravane, [2012] JBL 404-418; J O'Sullivan, [2009] CLJ 34-7; E Peel, (2009) 125 LQR 6-12; M Stiggelbout, [2012] LMCLQ 97-121; *Hadley v Baxendale* (1854) Ex 341; *Victoria Laundry v Newman Industries* [1949] 2 KB 528, CA; *Czarnikow Ltd v Koufos ('The Heron II')* [1969] 1 AC 350, HL; *H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791, CA; *Balfour Beatty Construction Ltd v Scottish Power* 1994 SLT 807, HL; *Brown v KMR Services Ltd* [1995] 4 All ER 598, CA; *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512; [2015] IRLR 112; [2015] ICR D13.

<sup>160</sup> *Hughes-Holland v BPE* [2017] UKSC 21; [2018] AC 599; noted J Thomson [2017] CLJ 476-80

<sup>161</sup> Law Reform (Contributory Negligence) Act 1945.

<sup>162</sup> *Forsikringsaktieselskapet Vesta v Butcher* (affirmed on other points by the House of Lords, [1989] AC 852, 860, where the Court of Appeal's decision is also reported); Court of Appeal approving *Hobhouse J* at [1986] 2 All ER 488, 508; *Barclays Bank plc v Fairclough Building* [1995] QB 214, CA, noted by C Hopkins, [1995] CLJ 20-3; AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, Oxford University Press, 2004), 136-44..

The Supreme Court decision in *Morris-Garner v One-Step Support Ltd* (2018)<sup>163</sup> appears to support this principle: breach of particular contractual rights, namely those which (a) constitute proprietary assets or (b) operate to prevent infringement of similarly highly valued interests, can be remedied by the award of 'negotiating damages'. Such damages are compensation for the sum which might reasonably have been charged if the parties had negotiated a waiver fee. But negotiating damages cannot be awarded simply because, on the relevant facts, it will prove hard to calculate the ordinary measure of economic or material loss. Nor is it enough (or indeed necessary) to show that the defendant's breach was deliberate or high-handed.

The House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* (1996)<sup>164</sup> made clear that 'cost of cure' or reinstatement damages are the default compensatory award for breach of building or repair contracts. The award is made to enable the innocent party to finance remedial work. But such damages will not be granted if, having considered the claimant's needs, such an award would impose a disproportionate or unreasonable burden on the party in breach.

*Addis v Gramophone Co Ltd* (1909)<sup>165</sup> supports these propositions: (i) that contractual damages are intended to compensate the claimant, rather than to punish the defendant;<sup>166</sup> (ii) in general, a defendant is not liable to compensate for mental distress caused by breach of contract, even though the distress is not too remote a consequence of the breach.

As for proposition (ii) in the *Addis* case, the starting point<sup>167</sup> is that, in general, a defendant is not liable for mental distress caused by breach of contract, even though the distress is not

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<sup>163</sup> [2018] UKSC 20; [2018] 2 WLR 1353; A Burrows, 'One Step Forward?' (2018) 134 LQR 515; *Chitty on Contracts* (33<sup>rd</sup> edn, Sweet & Maxwell, London, 2018), 26-050 to 26-061; *McGregor on Damages* (20<sup>th</sup> edn, Sweet & Maxwell, London, 2018) (first supplement), 14A-001.

<sup>164</sup> [1996] AC 344, HL; considered in the context of a tort claim following damage to a crane: *Southampton Container Terminals Ltd v Hansa Schiffahrts GmbH* ('The Maersk Colombo') [2001] EWCA Civ 717; [2001] 2 Lloyd's Rep 275.

<sup>165</sup> [1909] AC 488, HL; considered in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; [2012] 2 AC 22; on which C Barnard and L Merrett [2013] CLJ 313.

<sup>166</sup> Besides the *Addis* case [1909] AC 488, HL, see: *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 365, HL; Adam Kramer, *The Law of Contract Damages* (Hart Publishing, Oxford, 2014), section 23.3; R Cunnington, 'Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases?' (2006) 26 LS 369; J Morgan, *Contract Law* (Palgrave Publishing, Basingstoke, 2012), 252-7; S Rowan, (2010) 30 OxJLS 495; otherwise in Canada, *Royal Bank of Canada v Got* (2000) 17 DLR (4th) 385 (Supreme Court of Canada), noted by J. Edelman, (2001) 117 LQR 539; *Whiten v Pilot Insurance Co* [2002] SCC 18; [2002] 1 SCR 595 (Supreme Court of Canada); *Honda Canada Inc v Keays* [2008] SCC 39; (2008) 294 DLR (4th) 371 (Supreme Court of Canada), noted by M McInnes, (2009) 125 LQR 16, at 19-20; as for punitive damages in English tort law, see *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, HL, and *A v Bottrill* [2003] 1 AC 449, PC.

<sup>167</sup> *McGregor on Damages* (20<sup>th</sup> edn, Sweet & Maxwell London, 2018), 5-015 ff; Adam Kramer, *The Law of Contract Damages* (Hart Publishing, Oxford, 2014), chapter 19; Tettenborn, in N Andrews, MA Clarke, AM Tettenborn, G Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2<sup>nd</sup> edn, Sweet & Maxwell Contract Library Series, 2017), chapter 22.

too remote a consequence of the breach.<sup>168</sup> The House of Lords in *Farley v Skinner* (2002)<sup>169</sup> identified the first exceptions to this proposition (exception (2) emerged in the *Ruxley* case,<sup>170</sup> on which see the preceding paragraph):

(1) the contract has as one of its main<sup>171</sup> purposes (a) the avoidance of aggravation (such as liability of surveyors commissioned to inspect property or the liability of lawyers retained to obtain injunctive relief against violent or threatening persons); or (b) conferment of pleasure (holiday companies<sup>172</sup> or photographers at 'one-off' special occasions;<sup>173</sup> or

(2) the 'consumer surplus' measure of compensation; the phrase 'consumer surplus' denotes a non-pecuniary type of non-performance; it is vindicated by a contractual 'solatium', or loss of amenity award; such a claim is for 'loss' which, although palpable to consumers, is not reflected concretely in the 'market'; the leading discussion of the 'consumer surplus' concept is the *Ruxley* case (see text above) (1996),<sup>174</sup> where a 'consumer' recovered a modest sum of £2,500 for the disappointment he suffered because the other party had failed to construct a swimming pool of specified depth.

### Injunctions and Specific Performance

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<sup>168</sup> *Addis v Gramophone Co Ltd* [1909] AC 488, HL; *Watts v Morrow* [1991] 1 WLR 1421, 1445, CA (Bingham LJ); *Johnson v Gore, Wood & Co* [2002] 2 AC 1, 37–8, HL; *Hamilton Jones v David and Snape* [2003] EWHC 3147 (Ch); [2004] 1 All ER 657, at [52] ff, Neuberger J; see also *Ashworth v Royal National Theatre* [2014] EWHC 1176; [2014] 4 All ER 238, at [30] (Cranston J).

<sup>169</sup> [2001] UKHL 49; [2002] 2 AC 732, HL, noted D Capper, (2002) 118 LQR 193 and E McKendrick and M Graham, [2002] LMCLQ 161; cf Canada: *Fidler v Sun Life Assurance Co of Canada Ltd* [2006] SCC 30; [2006] 2 SCR 3 (Supreme Court of Canada), noted by M Clapton and M McInnes, (2007) 123 LQR 26–9; and *Honda Canada Inc v Keays* [2008] SCC 39; (2008) 294 DLR (4th) 371 (Supreme Court of Canada), noted by M McInnes (2009) 125 LQR 16.

<sup>170</sup> *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 360–361, HL; D Harris, A Ogus and J Phillips, (1979) 95 LQR 581, cited by Lord Mustill in the *Ruxley* case.

<sup>171</sup> *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732, at [24] (Lord Steyn): 'a major or important object of the contract is to give pleasure, relaxation or peace of mind.'

<sup>172</sup> *Milner v Carnival plc (trading as Cunard)* [2010] EWCA Civ 389; [2010] 3 All ER 701, at [32] ff (noting parsimonious awards for bad holiday –perhaps because many lawyers are too busy to take holidays—at [54] ff; and disappointment damages for a most unhappy 'luxury cruise' were pegged at £4,500 for the wife and £4,000 for the husband).

<sup>173</sup> *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732, at [52] to [69]; solicitors have been liable under this heading: *Heywood v Wellers* [1976] QB 446, CA, and *Hamilton Jones v David & Snape* [2003] EWHC 3147 (Ch); [2004] 1 WLR 921, Neuberger J.

<sup>174</sup> *Ruxley* case [1996] AC 344, 3601, HL; literature on the *Ruxley* case includes H Beale in PBH Birks (ed), *Wrongs & Remedies in the Twenty-First Century* (Oxford University Press, 1996), 227–9; J O'Sullivan, in FD Rose (ed), *Failure of Contract* (Hart Publishing, Oxford, 1997), chapter 1; E Peel, in *ibid*, at chapter 2; B Coote, [1997] CLJ 537, especially on facts (538–9) and proposals for reform (566, 569–70); J Cartwright, in A Burrows and E Peel (eds), *Commercial Remedies: Current Issues and Problems* (Oxford University Press, 2003), 9–13.

Injunctions<sup>175</sup> (including specific performance)<sup>176</sup> are the third type of remedy (after debt and damages). An injunction is coercive and ultimately sanctioned by the civil courts' contempt of court powers.<sup>177</sup>

Only if the Common Law monetary remedies of debt and damages do not yield adequate relief on the relevant facts will it be necessary to consider the remedy of specific performance.<sup>178</sup> Specific performance is not awarded to compel transfers of chattels<sup>179</sup> unless they are special, indeed 'unique' (for example, 'Princess Diana's wedding dress'). More generally, in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (1998)<sup>180</sup> the House of Lords held that specific performance is unavailable to compel a tenant to honour a long-running covenant to 'keep open' a business. The case contains important observations on the need to confine specific performance to a residual category, the primary remedies for breach of contract being (Common Law) monetary orders for payment of debt or damages. This is sound. Apart from agreements to transfer land (where specific performance is the primary remedy), there are three reasons for justify this restrictive approach.<sup>181</sup> First, specific performance is a heavy-handed remedy, sanctioned by contempt of court powers. It should be narrowly confined, otherwise it threatens to become a remedial sledgehammer. Secondly, the mitigation principle requires that, in general, an innocent party should be required to act straightaway in order to reduce or even eliminate his loss. The innocent party should not be at liberty to wait for the court to order the guilty party to perform.<sup>182</sup> Thirdly, the parties can

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<sup>175</sup> The leading decision on injunctions which indirectly, and hence objectionably, threaten to compel a person to perform services is *Warren v Mendy* [1989] 1 WLR 853, CA (noted by H McLean, [1990] CLJ 28); considering *Lumley v Wagner* (1852) 1 De GM & G 604, and *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, and *Page One Record Ltd v Britton* [1968] 1 WLR 157 ('The Troggs' case); P Saprai, 'The Principle against Self-Enslavement in Contract Law' (2009) 25 *Journal of Contract Law* 26; otherwise, if the defendant is a company: Mance LJ in *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579; [2006] All ER 866.

<sup>176</sup> This is a special term given to a mandatory order to compel performance of a contractual obligation; the leading decision is *Co-Operative Insurance Society Ltd. Respondents v Argyll Stores (Holdings) Ltd* [1998] AC 1, HL.

<sup>177</sup> Where appropriate, a contemnor (a party who has breached an injunction or order for specific performance) can be punished under the courts' civil jurisdiction, and the sanctions include fines, imprisonment (up to 24 months), seizure of assets, and various severe procedural restrictions or responses: *Andrews on Civil Processes* (2<sup>nd</sup> edn, Intersentia Publishing, Cambridge, 2019), chapter 17; *Arlidge, Eady and Smith on Contempt* (5<sup>th</sup> edn, Sweet & Maxwell, London, 2017); I Cram (ed), *The Law of Contempt* (Lexis Nexis, London, 2010); *Müller on Contempt of Court* (CJ Miller and D Perry, eds) (4<sup>th</sup> edn, Oxford University Press, 2017).

<sup>178</sup> eg, on the facts of *Beswick v Beswick* [1968] AC 58 HL: debt claim unavailable because A promising B that payment would be made to T, a non-party; and damages at suit of B would have yielded on facts only nominal damages because B had suffered no personal loss; the facts antedate the creation by statute of a *ius quaesitum tertio*, introduced by the Contracts (Rights of Third Parties) Act 1999; specific performance on these facts was the perfect remedy because the sums promised (weekly payments) were to be paid to T for, probably, many years (until T's death).

<sup>179</sup> GH Jones and W Goodhart, *Specific Performance* (2<sup>nd</sup> edn, Butterworths, London, 1996), 143–54.

<sup>180</sup> [1998] AC 1, HL.

<sup>181</sup> SM Waddams, 'The Choice of Remedy for Breach of Contract', in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), 471 ff, provides a compelling defence of the residual role of coercive specific relief.

<sup>182</sup> D Friedmann, 'Economic Aspects of Damages and Specific Performance Compared', in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, Oxford, 2008), chapter 2, at 86 ff.

insert liquidated damages clauses<sup>183</sup> or require payment of a deposit (see text below) to apply leverage to induce performance. As for the particular context of the leading case, Lord Hoffmann in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (1998) noted that an order to compel someone to carry on a business at a loss ‘cannot be in the public interest’ because ‘it is not only a waste of resources but yokes the parties together in a continuing hostile relationship’, whereas damages would allow the parties to ‘go their separate ways and the wounds of conflict can heal.’<sup>184</sup>

As for injunctions to compel compliance with a promise not to do something, the leading case is *Araci v Fallon* (2011).<sup>185</sup> Here the defendant jockey had agreed in writing that he would not ride for the claimant racehorse owner if the latter wished to use the defendant as a jockey in the relevant race. In contemplated breach of that negative undertaking, the defendant proposed to ride a rival owner’s horse in the Epsom Derby. Although the claimant had now found a different jockey for that race, the claimant sought an injunction to prevent the defendant riding for the rival in the Derby race. The interim injunction was granted on the morning of the race. The Court of Appeal judgments confirm that a court will be inclined to grant an injunction when there is a clear breach (actual or proposed) of a negative undertaking. Lord Hoffmann in *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* (1998) noted that an order to compel someone to carry on a business at a loss ‘cannot be in the public interest’ because ‘it is not only a waste of resources but yokes the parties together in a continuing hostile relationship’, whereas damages would allow the parties to ‘go their separate ways and the wounds of conflict can heal.’<sup>186</sup>

## CONCLUDING REMARKS

In this article we have concentrated on the five topics which really matter in the usual run of contractual disputes. It is hoped that the reader has acquired a feel for the most important contractual areas of dispute and that avenues for further investigation have been sufficiently indicated.

It will be noted that each doctrine is the product of case law and that statute hardly figures in the notes which support this text. The malleability of the Common Law method and the

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<sup>183</sup> *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2016] AC 1172; R Halson, *Liquidated Damages and Penalty Clauses* (Oxford University Press, 2018); the criterion to identify a penalty clause is whether that clause prescribes a sum (or other detrimental consequence) which is ‘extravagant and unconscionable’, that is, the sum (or other specified detrimental consequence) is disproportionate (‘out of all proportion’) either to the loss likely to be suffered or to some wider commercial or non-commercial interest which the innocent party wishes to protect.

<sup>184</sup> *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15–16, HL (Lord Hoffmann).

<sup>185</sup> [2011] EWCA Civ 668; [2011] Lloyd’s Rep 440 (Jackson and Elias LJ).

<sup>186</sup> *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 15–16, HL (Lord Hoffmann).

experienced quality of the English jurisdiction's most important courts (the High Court, Court of Appeal, and Supreme Court) enable the law to remain carefully adjusted to reflect the changing practices and values within the market-place.<sup>187</sup>

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<sup>187</sup> For comments on the absence of codification in English contract law, N Andrews, *Contract Law* (2<sup>nd</sup> edn, Cambridge University Press, 2015), chapter 22; see also N Andrews, 'Codification of Remedies for Breach of Commercial Contracts: A Blueprint', in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge UP, 2017), chapter 23; N Andrews, *Contract Rules: Decoding English Law* (Intersentia Publishing, Cambridge, 2016); A Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016).