tion itself,[183] the question arises whether this notion should be interpreted according to the understanding of the various Member State laws or instead on the basis of an "autonomous" definition to be formulated by the Court of Justice of the EU. It is submitted that there is not likely to be any single answer to be given to this question and that different answers may be given according to the context of the legislation in question, these turning on a variety of considerations, but particularly on the degree of juristic integration which the Court of Justice thinks desirable and practicable in that context. However, where the Court of Justice considers it right to take an autonomous view of "contract" for the purposes of EU legislation, it may well take as its starting-point the definition of contract set out in the Proposed Regulation on a Common European Sales Law, which defines "contract" as "an agreement intended to give rise to obligations or other legal effects".[184] It is to be noticed, in particular, that this definition makes no requirement of reciprocity or provision of value such as is found in the doctrine of consideration with the result that, in principle, purely gratuitous agreements could fall within its scope.[185] The following paragraphs consider the approach to definitions of "contract" following existing case law of the European Court.

1-026 **EU private international law** The Court of Justice itself has had occasion to hold that a European and "autonomous" view should be taken of the understanding of what constitutes a contractual as opposed to an non-contractual matter for the purposes of jurisdictional rules under the Brussels Convention (now brought within EU law as the Brussels Ibis Regulation),[186] and this has meant that an action classified in one Member State (France) as contractual has been held extra-contractual for these purposes.[187] The European Court decided that:

> "... the phrase 'matters relating to a contract' within the meaning of Article 5(1) of the Convention should not be understood to cover a situation where there is no obligation freely entered into by one party to another. Where a sub-buyer of goods which are bought from an intermediate seller brings an action against a manufacturer for damages on the sole ground that the goods are not in conformity, it is important to observe that there is no contractual link between the sub-buyer and the manufacturer because the latter has not undertaken a contractual obligation of any kind to the former."[188]

As regards the EU instruments governing applicable law, the Rome II Regulation on the law applicable to non-contractual obligations specifies that "the concept of non-contractual obligation" must be understood as an "autonomous concept"[189] and includes certain areas of law (notably, "product liability" and pre-contractual liability ("culpa in contrahendo")) which in some national laws fall within contract and in others outside it.[190] The scope of the Rome I Regulation (replacing the earlier Rome Convention) on the law applicable to *contractual* obligations is to be interpreted in a way consistent with the earlier Rome II Regulation.[191] For this purpose, the Court of Justice of the EU has held that "the concept of 'contractual obligation' [under the Rome I Regulation] designates a legal obligation freely consented to by one person towards another".[192]

1-027 **European definition of "worker"** As to the various legislative provisions governing contracts of employment and contracts under which "workers" act, clearly their concern is not with "contract", but rather with "employment contract" or "worker", but in this respect some of the EU legislation clearly invites the courts of the Member States to refer to a conception of contract drawn from their own legal system, while other provisions have attracted a European conception. So, for example, Directive 91/533 which makes certain requirements as to the information to be given by employers to their employees as to the conditions of employment expressly provides that it shall apply "to every paid employee having a contract or employment relationship defined by the law in force in a Member State".[193] On the other hand, the European Court of Justice made clear as early as

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183 cf. Amended Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2017) 637 final, art.2(g) and a Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 art.2(7), where "contract" is defined for the purposes of the proposed directives as "an agreement intended to give rise to obligations or other legal effects".

184 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales, Law Com(2011) 635 final art.2(a). On the Proposal, see above, para.1-013. As noted above, this definition is adopted by recent proposals for directives in the areas of contracts of sales of goods and for the supply of digital content.

185 cf. the inclusion within those contracts for which the Common European Sales Law would have been available of "contracts for the supply of digital content ... irrespective of whether the digital content is supplied in exchange for the payment of a price": Proposal Com(2011) 635 final, art.5(b) and the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 art.3(1) which adopts a definition of contract as "an agreement intended to give rise to obligations or other legal effects" but then restricts the scope of its requirements, inter alia, to "any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data".

186 *Kalfelis v Schröder* (189/87) EU:C:1988:459, [1988] E.C.R. 5565 especially at 5577 (A.G. Darmon), 5585; *ÖFAB, Östergötlands Fastigheter AB v Koot* (C-147/12) EU:C:2013:490, July 18, 2013 at para.33; *Brogsitter v Fabrication de Montres Normandes EURL* (C-548/12) EU:C:2014:148, March 13, 2014 at para.18; *ERGO Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14) EU:C:2016:40, January 21, 2016 at para.43; *Kolassa v Barclays Bank Plc* (C-375/13) EU:C:2015:37, January 28, 2015 at para.43; *Granarolo SpA v Ambrosi Emmi France SA* (C-196/15) EU:C:2016:559, July 14, 2016 at para.19. The Brussels Convention was replaced as from March 1, 2002 by the Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L012/1 ("Brussels I Regulation"), which was in turn replaced as from January 10, 2015 by Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Brussels Ibis Regulation"). And see below, para.1-209.

187 *Jakob Handte & Co GmbH v Société Traitements Mécano-chimiques des Surfaces (TMCS)* (C-26/91) EU:C:1992:268, [1993] I.L.Pr. 5 and see below, para.1-209.

188 [1993] I.L.Pr. 5 at 22.

189 Regulation 864/2007 of the European Parliament and of the Council law applicable to non-contractual obligations ("Rome II Regulation") [2007] O.J. L199/40 recital 11.

190 Rome II Regulation arts 5 and 12 respectively.

191 Regulation (EC) 593/2008 on the law applicable to contractual obligations ("Rome I") [2008] O.J. L177/6 recital 7. See below, Ch.30 and especially para.30-018.

192 *ERGO Insurance SE v If P&C Insurance AS* (Joined Cases C-359/14 and C-475/14) EU:C:2016:40, January 21, 2016 para.44; *Verein für Konsumenteninformation v Amazon EU Sàrl* (C-191/15) EU:C:2016:612, July 28, 2016 esp. at para.60 (action for cessation of use of unfair contract terms falls under Rome II as concerning a non-contractual obligation, though the assessment of the terms falls under Rome I as concerning a contractual obligation following the nature of these terms whether this arises in an action for cessation or in an individual action between a trader and a consumer); *Committeri v Club Mediterranee SA* [2016] EWHC 1510 (QB) at [45]–[48]; *Pan Oceanic Inc v UNIPEC UK Co Ltd* [2016] EWHC 2774 (Comm), [2017] 2 All E.R. (Comm) 196 at [153]–[163].

193 Directive 91/533 on an employer's obligation to inform employees of the conditions applicable to

1964 that "worker" for the purposes of the principle of freedom of movement of workers contained in art.48 (later art.39) of the EC Treaty (now art.45 TFEU) must be given a European understanding[194] the fleshing out of this being the matter for a series of subsequent judgments.[195]

1-028 **"Consumer contract"** Finally, while it is clear that certain aspects of the notion of "consumer contract" for the purposes of the Directive on Unfair Terms in Consumer Contracts 1993[196] are to be interpreted "autonomously", it is less clear whether the notion of "contract" itself will also be so interpreted by the Court of Justice of the EU or will instead fall to be governed by the legislation or case law of the Member States.[197] If it were interpreted autonomously, then the significance of "contract" may well differ from that given by English law, notably as regards the latter's requirement of consideration, a requirement which is not shared by the other Member States except the Republic of Ireland. Furthermore, in coming to a view as to what constitutes "a contract" for this purpose, the Court of Justice is likely to be inspired by the definition already noted in the Proposal for a Regulation on a common European sales law.[198]

1-029 **"Contract" in EU public procurement law** The Court of Justice has adopted an autonomous European view of "contract" for the purposes of the public procurement directives. In *Teckal Srl v Comune di Viano*[199] the Court recognised that the conclusion of an agreement by a public authority and a company which, although a separate entity, is in substance a department of the authority falls outside the requirements of these directives.[200] According to the Court:

> "As to whether there is a contract, the national court must determine whether there has been an agreement between two separate persons.
>
> In that regard, … it is, in principle, sufficient if the contract was concluded between, on the one hand, a local authority and, on the other, a person legally distinct from that local authority. The position can be otherwise only in the case where the local authority exercises over the person concerned a control which is similar to that which it exercises

the contract or employment relationship [1991] O.J. L288/32 art.1(1). Similarly, Framework Agreement on Part-time Work cl.2(1) "[t]his Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State", Annex to Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] O.J. L14/9.

194 *Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (C-75/63) EU:C:1964:19, [1964] E.C.R. 177.

195 See Craig and de Búrca, *EU Law*, 6th edn (2015), Ch.21.

196 See Vol.II, paras 38-218—38-219.

197 Whittaker (2000) 116 L.Q.R. 95 and see Vol.II, paras 38-015, 38-229—38-230. cf. the position under the Consumer Rights Directive 2011 art.6(5), on which see Vol.II, paras 38-063—38-065.

198 Above, para.1-025. cf. the Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 art.3(1) which adopts a definition of contract as "an agreement intended to give rise to obligations or other legal effects" but then restricts the scope of its requirements, inter alia, to "any contract where the supplier supplies digital content to the consumer or undertakes to do so and, in exchange, a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data".

199 C-107/98 EU:C:1999:562, [1999] E.C.R. I-8121.

200 At the time, Council Directive 1992/50/EEC relating to the co-ordination of procedures for the award of public service contracts; Directive 93/36/EEC of June 14, 1993 co-ordinating procedures for the award of public supply contracts.

over its own departments and, at the same time, that person carries out the essential part of its activities with the controlling local authority or authorities."[201]

As A.G. Stix-Hackl observed in the *TREA Leuna Case*, "in *Teckal* the court … narrowed the concept of "contract" by interpreting it teleologically".[202] Subsequent case law in the European Court (as reviewed by the Supreme Court in *Risk Management Partners Ltd v Brent LBC*) makes clear that the "*Teckal* exception" does not "depend on the meaning to be given to particular words or phrases in the Directive, such as those to be found in the definition of 'public contracts' ", but rather on fundamental policies pursued both by the procurement directives and by the EC Treaty itself.[203]

3. FUNDAMENTAL PRINCIPLES OF CONTRACT LAW

1-030 There are a number of norms of the English law of contract of a generality, pervasiveness and importance to have attracted the designation of principle, though such a designation does not have a technical legal significance. A number of legal norms could be advanced as included within such a category of principle, including the principle of privity of contract,[204] the principle of "objectivity" in agreement,[205] and principles of contractual interpretation.[206] However, two linked principles remain of fundamental importance, viz the principles of freedom of contract and of the binding force of contract.[207] By these two principles, English law has expressed its attachment to a general vision of contract as the free expression of the choices of the parties which will then be given effect by the law. However, while the modern law still takes these principles as the starting-point of its approach to contracts, it also recognises a host of qualifications on them, some recognised at common law and some created by legislation.[208] Moreover, some commentators have argued that these various qualifications should not be seen merely as the expression of particular reasons or considerations of policy special to their context, but should instead be seen as themselves reflecting a further, central principle, sometimes put in terms of a principle of good faith in contract or a principle of contractual fairness.[209] EU law also recognises the importance of freedom of contract and the binding force of contracts, but, unlike English common law, also appears to be moving towards the recognition of a principle of good faith or "good faith and fair dealing".[210]

201 C-107/98 EU:C:1999:562, [1999] E.C.R. I-8121 at paras 49 and 50.

202 *Stadt Halle & RPL Recyclingpark Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall und Energierverwertungsanlage* (C-26/03) EU:C:2005:5, [2005] E.C.R. I-1 at [52].

203 *Risk Management Partners Ltd v Brent LBC* [2011] UKSC 7, [2011] 2 A.C. 34 at [22], per Lord Hope of Craighead and see further [2011] UKSC 7 at [38]. The conclusion of public contracts between entities in the public sector (which forms the context of this case-law) was the subject of regulation by the Public Contracts Directive 2014: Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC [2014] O.J. L94/65 art.12 and recitals 31 and 32.

204 See below, Ch.18, para.18-003.

205 See below, para.2-002.

206 See below, paras 13-041 et seq. and especially *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 W.L.R. 896 at 912–913, per Lord Hoffmann.

207 See below, paras 1-031—1-040, 1-041—1-043.

208 See below, paras 1-032, 1-036 et seq.

209 See below, paras 1-044 et seq.

210 Below, paras 1-047—1-048.

(a) Freedom of Contract

1-031 **Freedom of contract in the nineteenth century** In the nineteenth century, freedom of contract was regarded by many philosophers, economists and judges as an end in itself, finding its philosophical justification in the "will theory" of contract and its economic justification in laissez faire liberalism.[211] Thus, the parties were to be the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it. In particular, its validity should not be challenged on the ground that its effect was unfair or socially undesirable (as long as it was not actually illegal or immoral, the latter of which was understood in a restrictive sense)[212] and it was immaterial that one party was economically in a stronger bargaining position than the other. Nowhere can this attitude be seen more clearly than in the attitude of the courts to clauses which attempted to regulate the damages payable on breach of contract. For, the courts held that parties to a contract were able to limit or exclude liability in damages not merely for breach of contract, but also in tort.[213] The courts' attitude to freedom of contract can also be seen in their treatment of an exception to it, for while they accepted that penalty clauses were ineffective even if agreed by the parties, they did so only owing to the force of established precedent to this effect and with considerable reluctance.[214]

1-032 **Freedom of contract in the modern common law** Freedom of contract as a general principle of the common law retains considerable support. For example, in 1966, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negativing any agreement to the contrary (and capable of being used to strike down an exemption clause)[215] on the ground, inter alia, that this would restrict "the general principle of English law that parties are free to contract as they may think fit".[216] In 1980, in the same context, Lord Diplock observed[217] that:

[211] See Dicey, *Law and Opinion in England*, 2nd edn (1914), pp.150–158; *Printing and Numerical Registering Co v Sampson* (1875) L.R. 19 Eq. 462 at [465], per Jessel M.R.; *Manchester, Sheffield and Lincolnshire Ry v Brown* (1883) 8 App. Cas. 703 at [716]–[720], per Lord Bramwell; *Salt v Marquess of Northampton* [1892] A.C. 1 at [18]–[19], per Lord Bramwell. It is instructive to observe that Lord Bramwell, who was one of the foremost judicial champions of freedom of contract, also believed in the necessity for a real as opposed to an apparent consent: see his judgment in *British and American Telegraph Co Ltd v Colson* (1871) L.R. 6 Ex. 108, and his dissenting judgment in *Household Fire Insurance Co v Grant* (1879) 4 Ex. D. 216, 232. See further, Atiyah, *The Rise and Fall of Freedom of Contract* (1979) and cf. Gordley, above, para.1-019 at pp.214–217.

[212] See below, paras 16-005 et seq.

[213] *Nicholson v Willan* (1804) 5 East 507. Lord Ellenborough C.J., at 513, rejected the plaintiff's argument that the attempt of the defendant, a common carrier, to exclude his liability for the loss of goods carried beyond the value of £5 was: "contrary to the policy of the common law, which has made common carriers responsible to an indefinite extent for losses not occasioned by … act of God [or] the King's enemies".

[214] *Ranger v G.W. Ry Co* (1854) 5 H.L. Cas. 72, 94–95, 118–119; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), pp.414–415.

[215] See *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361 and below, paras 15-023—15-027.

[216] [1967] 1 A.C. 361 at 399.

[217] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 848.

> "A basic principle of the common law of contract … is that parties to a contract are free to determine for themselves what primary obligations they will accept."[218]

This support remains particularly strong in commercial contexts. So Lord Bingham of Cornhill stated that "[l]egal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting".[219] Moreover, English courts have proved unwilling to strike down contracts on the ground simply that one of the parties suffered from an "inequality of bargaining power".[220] Conversely, the House of Lords held that it would not *add* to the agreement which the parties have made by implying a term merely because it would be reasonable to do so, but only where it is "necessary",[221] nor will the courts put a meaning on the words of a contract different from that which they clearly express.[222] Even where the common law recognises an exception to freedom of contract, as in the case of the law controlling penalty clauses,[223] the courts have distinguished between the nature of this control and wider controls of contracts on the ground of fairness. According to Lord Neuberger and Lord Sumption (with whom Lord Carnwath agreed) in *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis*:

> "There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves."[224]

In the view of the Supreme Court, the true test whether a contract term imposes a "penalty" on the party in default is whether:

[218] And see *Eurico SpA v Philipp Brothers* [1987] 2 Lloyd's Rep. 215, 218 (term to do the impossible valid).

[219] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2003] 3 W.L.R. 711 at [57]. See also *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] A.C. 436 at [47] (contractual recital of fact known by both parties to be untrue enforceable in principle); *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 All E.R. (Comm) 606 at [28] ("the principle of freedom of contract is still fundamental to [English] commercial law"). See also *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2018] 2 W.L.R. 1603 at [11] (holding that "party autonomy" justifies the binding nature of "no oral modification" clause in a contract).

[220] *National Westminster Bank Plc v Morgan* [1985] 1 A.C. 686, 708, disapproving the dictum of Lord Denning M.R. in *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326, 339; and see below, para.8-145. cf. paras 8-132 et seq. (unconscionable bargains).

[221] *Liverpool City Council v Irwin* [1977] A.C. 239, 254; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] A.C. 80, 104–105; *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 W.L.R. 1843 at [14]–[21] and [77]; *Ali v Petroleum Co of Trinidad and Tobago* [2017] UKPC 2, [2017] I.C.R. 531 at [7] and see below, paras 14–001 et seq. especially at 14-011—14-012

[222] See below, paras 13-041 et seq.

[223] *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [33] ("[t]he penalty rule is an interference with freedom of contract", per Lord Neuberger and Lord Sumption); at [257] per Lord Hodge. On this decision see below, paras 26-190 et seq.

[224] [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [13]; and see similarly at [73].

...ment on the contract-breaker out of all proportion to any legitimate ...nocent party in the enforcement of the primary obligation.[225]

... purpose:

> "... the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."[226]

And the bargaining position of the parties more generally may be relevant.[227]

1-033 **Freedom of contract in EU law** The "principle of freedom of contract" has been recognised by the European Court of Justice.[228] According to A.G. Kokott:

> "Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is inseparably linked to the freedom to conduct a business [protected by art.16 of the EU Charter of Fundamental Rights]. In a Community which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed."[229]

Freedom of contract has also been set by the European Commission as a fundamental point of reference for the development of European contract law[230] and was placed by it as a "general principle" in its Proposal for a Regulation on a Common European Sales Law,[231] it being explained that "[p]arty autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection".[232] The principle of "party autonomy" is also important in EU private international law.[233] On the other hand, the Late Payments in Commercial Transactions Directive 2011 recognised that freedom of contract may be "abused" and therefore renders terms in commercial contracts unenforce-

[225] [2015] UKSC 67 at [32] per Lord Neuberger and Lord Sumption (with whom Lord Carnwath and Lord Clarke agreed. See similarly at [152] per Lord Mance and [249] and [255] per Lord Hodge.

[226] [2015] UKSC 67 at [35] per Lord Neuberger and Lord Sumption (with whom Lord Carnwath and Lord Clarke agreed. See similarly at [75]. For discussion of this point, see below, para.26-229.

[227] [2015] UKSC 67 at [35].

[228] *Spain v European Commission* (C-240/97) EU:C:1999:479, [1999] E.C.R. I-6571 at [99] (common agricultural policy); *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie, des Finances et de l'Industrie* (C-277/05) EU:C:2007:440, [2007] E.C.R. I-6415 at [21], [24], [28] and [29] (VAT); Opinion of A.G. Wahl in *Kasler v OTP Jelzalogbank Zrt* (C-26/13) EU:C:2014:282, February 12, 2012 at [3] referring to art.4(2) of Directive 93/13/EEC on unfair terms in consumer contracts as "safeguarding, to some extent, the principles of freedom of choice and freedom of contract". The CJEU's judgment of April 30, 2014 did not refer to art.4(2) in this way.

[229] *European Commission v Alrosa Co Ltd* (C-441/07) EU:C:2010:377, [2010] 5 C.M.L.R. 11 at AG para.225.

[230] EC Commission, *First Annual Progress Report on European Contract Law and the Acquis Review* COM(2005) 456 final, para.2.6.3.

[231] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final, Annex I, art.1 CESL.

[232] CESL Proposal recital 30.

[233] See Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L177/6, art.3 and see below, paras 30-018 et seq.; Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("the Brussels Ibis Regulation") art.23 (on jurisdiction agreements) and recital 14, on which see *Dicey, Morris and Collins on the Conflict of Laws*, 15th edn (updated to 2017), paras 12–099 et seq.

able where they are "grossly unfair to the creditor" in relation to t... the directive requires.[234] 1-037

Alemo-Herron v Parkwood Leisure Ltd The decision of the ... in *Alemo-Herron v Parkwood Leisure Ltd* provides a striking illu... of art.16 of the EU Charter of Fundamental Rights to give effe... freedom of contract.[235] There, the UK Supreme Court asked the Court of Just... whether a Member State is prohibited by the Transfer of Undertakings Directive[236] from extending to employees, in the event of a transfer of an undertaking or business, a "dynamic" protection as a result of the recognition by domestic contract law of the effectiveness of a contract term in the employees' individual contracts of employment that their pay may be determined from time to time by a third party, there a public sector collective negotiating body (the "dynamic pay clause"). If such a dynamic protection were permitted, then in the particular case the transferee (a private sector company which had bought the undertaking from a local authority) would in effect be bound by a collective agreement to whose negotiation it could not be party.[237] The Transfer of Undertakings Directive provides that:

> "... the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing *on the date of a transfer* shall, by reason of such transfer, be transferred to the transferee"

but also that Member States have the right to apply or introduce laws "which are more favourable to employees or to promote or permit collective agreements between social partners more favourable to employees".[238] While acknowledging this right in Member States, the Court of Justice held that the aim of the directive was not solely to safeguard the interests of employees on the transfer of an undertaking, but to ensure a fair balance between their interests and the interests of the transferee employer, which "must be in a position to make the adjustments and changes necessary to carry on its operations", notably where the transfer of the undertaking was from the public sector to the private sector.[239] Giving effect to the dynamic pay clause would undermine this fair balance.[240] Moreover, the fundamental freedom to conduct a business laid down in art.16 of the EU Charter

[234] Directive 2011/7/EU on combating late payment in commercial transactions [2011] O.J. L48/1 recital 28 and art.7 and see *IOS Finance EFC SA v Servicio Murciano De Salud* (C-555/14) EU:C:2017:121, [2017] 3 C.M.L.R. 5 at paras 28–36.

[235] C-426/11, EU:C:2013:521, July 18, 2013. For the UK Supreme Court judgment of referral see [2011] UKSC 26, [2011] 4 All E.R. 800. See also *Anonymi Geniki Etairia Tsimenton Iraklis (AGET Iraklis) v Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis* (C-201/15) EU:C:2016:972, [2017] 2 C.M.L.R. 32 at paras 68–70 (framework of collective redundancies which was subject to authorisation by a public authority held to be an interference in employer's freedom to conduct a business and, in particular, freedom of contract).

[236] Directive 2001/23 relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] O.J. L82/16 implemented in UK law by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246). The case itself concerned earlier UK regulations implementing an earlier EEC directive, but the relevant provisions were essentially identical.

[237] C-426/11 at para.8.

[238] Directive 2001/23 art.3(1) and (8) respectively (emphasis added).

[239] C-426/11 at paras 25 and 26.

[240] C-426/11 at paras 28–29.

of Fundamental Rights "covers, inter alia, freedom of contract".[241] In the light of the Directive's provision that the transferee of an undertaking must give effect to the rights of employees existing at the date of its transfer:

> "... [i]t is apparent that, by reason of the freedom to conduct a business, the transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in working conditions for its employees with a view to its future economic activity."[242]

This is not the case where a transferee cannot participate in the collective bargaining body identified by the dynamic pay clause and so, in this situation, "the transferee's contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business."[243]

The Court of Justice therefore held that the Directive cannot be interpreted as "entitling Member States to take measures which, while being more favourable to employees, are liable to adversely affect the very essence of the transferee's freedom to conduct a business".[244] So, in effect, the need to preserve the transferee employer's freedom of contract trumps the freedom of contract of the contracting parties to the original contracts of employment who had agreed to set the employees' pay by a third party.[245] In doing so, the Court of Justice interpreted restrictively the reference in the Directive to "the transferor's ... obligations arising from a contract of employment ... existing on the date of a transfer", treating the relevant obligation as the obligation to pay the employee's wages rather than a wider obligation to honour the contract's terms governing the determination of pay, including its future determination.

1-035 **Freedom of Contract and the ECHR** While the European Convention on Human Rights does not refer to freedom of contract, the European Court of Human Rights has held that the extent to which a State interferes with an owner of property's freedom of contract relating to the property is relevant to the assessment of its compliance with its duties in respect of the right to property under art.1 of the First Protocol.[246]

1-036 **Qualifications on freedom of contract** However, the principle of freedom of contract is subject to many qualifications in modern English law. These qualifications may affect a person's decision as to whether and with whom to contract; the parties' choice as to the terms on which their contractual relations are to be governed and more generally as to their legal consequences. Furthermore, even where it does not bear directly on the mutual rights and duties of the contracting parties, modern legislation has also regulated the contractual environment in which the parties to some types of contract negotiate, conclude and perform their contracts.

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241 C-426/11 at para.32.
242 C-426/11 at para.33.
243 C-426/11 at para.35.
244 C-426/11 at para.36.
245 cf. *Alemo-Herron v Parkwood Leisure Ltd* [2011] UKSC 26 at [9], Lord Hope referring to the argument in favour of the binding nature of a third party pay determination clause as "entirely consistent with the common law principle of freedom of contract".
246 *Hutten-Czapska v Poland* App. No.35014/97 (2006) 42 E.H.R.R. 15 at [151]; *Edwards v Malta App. No.17647/04* at [69]–[71]; *Gauci v Malta* App. No.47045/06 (2011) 52 E.H.R.R. 25 at [58].

1-037 **(i) Refusal to enter contracts** Even at common law, an innkeeper or common carrier was not entitled to refuse to accommodate a would-be customer without sufficient excuse.[247] Companies which supply what used to be called public utilities such as water, gas and electricity, in some circumstances are under a statutory duty to supply the commodity in question,[248] though in this type of case the existence of the duty has led the courts to hold that the relationship so created is not contractual.[249]

1-038 **(ii) The law of discrimination** Moreover, modern discrimination law has forbidden a person to refuse to contract in certain situations and has provided more widely for the prevention of discrimination. This was first the case as regards discrimination on the grounds of sex[250] and racial group,[251] and was later extended to discrimination on the grounds of disability of the would-be contractor,[252] and, in the context of employment, prohibitions on discrimination on the ground of a person's sexual orientation,[253] religion or belief,[254] and age.[255] However, the Equality Act 2010 subjected this earlier law of discrimination to considerable legislative consolidation, reframing and reform. A full discussion of the scope of this important legislation would be beyond the scope of the present work, but the general scheme of the new legislation is as follows. A key new concept is "protected characteristics", which are set out by the Act: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.[256] The Act then defines and explains "prohibited conduct" in relation to these protected characteristics, which includes "direct and

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247 *Clarke v West Ham Corp* [1909] 2 K.B. 858, 879, 882. See Vol.II, para.36-008 on the ways by which a carrier could "abdicate" this status by giving notice that he would not accept custom from the public.
248 Gas Act 1986 s.10; Electricity Act 1989 s.16 (as substituted by Utilities Act 2000 s.44 and as amended); Electricity Act 1989 Sch.6 para.3 (as substituted by Utilities Act 2000 s.51 and Sch.4) (deemed contracts in respect of the supply of electricity in certain cases).
249 *Read v Croydon Corp* [1938] 4 All E.R. 631; *Norweb Plc v Dixon* [1995] 1 W.L.R. 637 (on which see Peel (ed.), *Treitel on The Law of Contract*, 13th edn (2011), para.1-042 n.37). cf. *Oceangas (Gibraltar) Ltd v Port of London Authority* [1993] 2 Lloyd's Rep. 292 (no contract in respect of compulsory pilotage services); cf. *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] H.L.R. 9 (no contract between council and tenant exercising "right to buy" under scheme created by Pt V of the Housing Act 1985); *R. (on the application of Data Broadcasting International Ltd) v Office of Communications* [2010] EWHC 1243 (Admin), [2010] All E.R. (D) 289 (May) at [88]–[94] (broadcasting licences given to broadcasting companies under Broadcasting Act 1990 are not contractual giving rise to private law rights and obligations).
250 Sex Discrimination Act 1975 s.6(1)(c).
251 Race Relations Act 1976 ss.4(1)(c), 17, 20 and 21.
252 Disability Discrimination Act 2005.
253 Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661).
254 Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).
255 Employment Equality (Age) Regulations 2006 (SI 2006/1031).
256 Equality Act 2010 ss.4–12. The main provisions concerning discrimination in the workplace and in the provision of goods, facilities and services took effect from October 1, 2010: Equality Act 2010 (Commencement No.4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010 (SI 2010/2317). A summary of the commencement dates of the provisions of the 2010 Act may be found at *http://www.homeoffice.gov.uk/equalities/equality-act/commencement*. The statutory provisions noted above were superseded on the coming into force of the relevant provisions of the Equality Act 2010, which repealed and replaced, inter alia, the Equal Pay Act 1970; the Sex Discrimination Acts 1975 and 1986; the Race Relations Act 1976; and the Disability Discrimination Act 2005: Equality Act 2010 Sch.27 Pt 1. See also below, paras 2-192, 2-193, 2-194, 27-038, 40-009, 40-039, 40-096, 40-125—40-129, 40-132—40-138 and 40-175.

indirect discrimination, harassment and victimisation".[257] The Act sets out the extent to which and how the various "protected characteristics" are protected against the different types of prohibited conduct, notably, for present purposes, in relation to the provision of public services (which includes goods and facilities)[258]; the disposal of premises[259]; work, including provisions governing employment and partnerships[260]; education[261]; and associations.[262] Provision is made for the relationship of the Act's rules on discrimination and contracts,[263] including a general provision to the effect that:

> "... [a] term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act."[264]

1-039 **(iii) Restricted freedom as to terms** Moreover, even where, as in the majority of cases, a person is free to decide whether to enter a particular contract, he or she is not free to determine on what terms to do so. First, many contracts, whether between two commercial parties or between such a party and a consumer, are made on the written standard terms of one of the parties in such circumstances that it is all but impossible for them to be varied,[265] a phenomenon which led French commentators to refer to such transactions as *contrats d'adhésion*.[266] Similarly, the terms of employees' contracts of employment may be determined by agreement between their trade union and their employer,[267] or by a statutory scheme of employment.[268] However, in both the latter situations, despite the lack of real freedom of the parties to do other than accept or reject the whole package as it is offered to them, these types of transactions are still treated as contracts.[269] Secondly, even while the courts formally stated the need for a term to be "necessary" before it will be implied into a contract,[270] the courts have over the years found many such implied terms, often in situations where it is difficult to see how this test is fulfilled,[271] thereby creating

257 Equality Act 2010 ss.13–27.
258 Equality Act 2010 Pt 3 ss.28–31.
259 Equality Act 2010 Pt 4 ss.32–38.
260 Equality Act 2010 Pt 5 ss.39–83.
261 Equality Act 2010 Pt 6 ss.84–97.
262 Equality Act 2010 Pt 7 ss.100–106.
263 Equality Act 2010 Pt 10 ss.142–148.
264 Equality Act 2010 s.142(1).
265 Sales (1953) 16 M.L.R. 318; Law Commission, *Unfair Terms in Contracts*, Law Com No.292 (2005), especially parts 4 and 5. Where both parties to the contract are in business, each may attempt to impose its own conditions on the other, and this sometimes gives rise to what is known as a "battle of forms": see below, paras 2-033—2-036.
266 While *le contrat d'adhésion* did not appear in the French Civil Code as promulgated in 1804, it was introduced there on the reform of French contract law in 2016 (and subsequently amended on ratification of *Ordonnance* No.2016/131 of February 10, 2016 by the French Parliament): see arts 1110 and 1171 C.civ.
267 See Vol.II, paras 40-047 et seq.
268 cf. *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181, 196; *Roy v Kensington & Chelsea and Westminster Family Practitioner Committee* [1992] 1 A.C. 624; *Scally v Southern Health and Social Services Board* [1992] 1 A.C. 294, 304.
269 cf. below, paras 1-234 et seq. on the question of the availability of public law remedies in this sort of case.
270 See above, para.1-032 and below, paras 14-007 et seq.
271 See below, para.14-005.

for many types of contracts the "legal incidents of those ... kinds of contractual relationship".[272] According to one author:

> "Faced with a problem in contract, the Common lawyer is as likely as not to try to solve it with an implied term. [In contrast,] the Civil lawyer will probably resort to a rule, whether it be a broad and fundamental precept such as the German requirement of good faith[273] ... or one derived from the nature of obligation or contract ... or, finally, one derived from the nature of the particular contract in question."[274]

While some judicially implied terms have been recognised by statute,[275] many remain a matter of common law, where they constitute an important part of the regulation of many contractors' relations.[276] Thirdly, the effects of many modern contracts are regulated by statute, sometimes by way of statutory insertion of an implied term,[277] but sometimes by attaching a legal consequence directly to the conclusion of a particular type of contract. This is particularly noticeable as regards some types of contracts made by consumers, notably contracts for the sale or supply of goods, hire purchase and consumer credit,[278] where the protection which the law thereby ensures is often not capable of avoidance by an expression of contrary intention.[279] Contracts of employment and between a landlord and tenant have also been subjected to considerable legislative regulation, to the extent that the voluntary aspect of the contract appears only to be whether or not to enter the contract, a decision which then triggers a set of obligations which are determined by the law.[280]

1-040 **(iv) Regulation of the contractual environment** Other statutory techniques for the regulation of contracts are less direct. For example, one aim of modern competition law is to help ensure that no company is able to impose what terms it likes on those with whom it deals because of its "dominant position" in the market.[281] This can be seen either as an intervention in the market (and therefore as interfering with

272 *Mears v Safecar Securities Ltd* [1983] Q.B. 54, 78, per Stephenson L.J. The learned Lord Justice specifically accepted, however, that "the obligation must be a *necessary* term; that is, required by their relationship". A legislative regime governing a particular category of contracts may require the implication of an appropriate term by the courts: see, e.g. contracts governed by the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649) and *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, [2015] 1 W.L.R. 2961 esp. at [23].
273 cf. below, paras 1-047 et seq.
274 Nicholas (1974) 48 Tulane L.R. 946, 950.
275 See, e.g. *Jones v Just* (1868) L.R. 3 Q.B. 197 and Sale of Goods Act 1893 s.14 (now Sale of Goods Act 1979 s.14 and Consumer Rights Act 2015 ss.9 and 10).
276 See, below, Ch.14. The contract of employment has proved particularly fertile ground for the implication of terms: see Vol.II, paras 40-059—40-068, 40-072—40-073.
277 See Equality Act 2010 s.66(1); Sale of Goods Act 1979 ss.12–15; Supply of Goods (Implied Terms) Act 1973 ss.8–11. cf. Consumer Rights Act 2015 ss.9–14, 17, 34–37, 39–41, 49–52 referring to the contracts to which they apply as "treated as including" terms of various contents.
278 See Vol.II, Chs 39 and 44 (on the law generally applicable) and paras 38-432 et seq. (on the law applicable to consumer contracts).
279 Other contracts made with consumers, for example contracts of insurance and guarantee, were long left unregulated in this way, but important changes were made in this respect by the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159); revoked and replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) and themselves replaced by the Consumer Rights Act 2015 Pt 2: see below, Vol.II, paras 38-211 et seq.
280 Hepple (1986–1987) 36 *King's Counsel* 11.
281 See art.101 TFEU (ex 81 EC), art.102 TFEU (ex 82 EC); Vol.II, Ch.43, especially paras 43-004 et seq.

the principle of freedom of contract[282]) or as a mechanism for ensuring that the market functions properly (and therefore as promoting freedom of contract). Another modern technique is for legislation to set up a system of regulation for a particular type of business. For example, under the Financial Services and Markets Act 2000, there is a general prohibition on the carrying on without authorisation or exemption of a regulated investment activity,[283] and doing so may constitute an offence and give rise to civil liability.[284] The Act gives to the Financial Conduct Authority very considerable rule-making powers for the conduct of investment business,[285] and breach of a rule so made is actionable at the suit of a private person who suffers loss as a result, though it will not constitute a criminal offence.[286] Clearly, this system of regulation affects the way in which contracts relating to investment business are concluded, even though breach of the rules does not affect the validity of any such contract.[287] A further example of the regulation of contractual behaviour is to be found in the Unfair Commercial Practices Directive 2005, implemented in UK law by the Consumer Protection from Unfair Trading Regulations 2008.[288] The Directive sets a very broad standard of commercial behaviour in relation to consumers in a "general clause" which prohibits practices which contrary to "professional diligence", "materially distort the economic behaviour" of an average consumer.[289] This general standard frames particular protections given to consumers by existing EU directives and is fleshed out by the 2005 Directive itself by the setting of two main examples of unfair commercial practices: misleading actions and omissions and aggressive commercial practices.[290] The Directive also provides a black list of particular commercial practices which "are in all circumstances [to be] considered unfair".[291] On the other hand, the concern of the Directive is to prohibit unfair commercial practices, and it explicitly provides that it is "without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract"[292] and the UK's initial implementing regulations reflected this feature and provided explicitly that "an agreement shall not be void or unenforceable by reason only of a breach of these regulations"[293] though they said no more as to the wider lack of effect of the Regulations on the "law of contract", apparently on the basis that they set out the consequences of the new controls and do not need to set out other non-consequences. However, in 2014 the

[282] See, e.g. *European Commission v Alrosa Co Ltd* (C-441/07) EU:C:2010:377, [2010] 5 C.M.L.R. 11 at para.225.
[283] Financial Services and Markets Act 2000 s.19(1). "Regulated activities" are defined by s.22.
[284] ss.23, 20(3), respectively.
[285] Financial Services and Markets Act 2000 Pt IXA.
[286] Financial Services and Markets Act 2000 ss.138D(2), 138E(1).
[287] Financial Services and Markets Act 2000 s.138E(2).
[288] Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) implementing Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, on which see Vol.II, paras 38-157 et seq.
[289] Unfair Commercial Practices Directive art.5; Consumer Protection from Unfair Trading Regulations 2008 reg.3(3).
[290] Unfair Commercial Practices Directive arts 6 and 7; Consumer Protection from Unfair Trading Regulations 2008 regs 5, 6 and 7.
[291] Unfair Commercial Practices Directive art.5(5) referring to Annex I; Consumer Protection from Unfair Trading Regulations 2008 reg.3(4)(d), Sch.1.
[292] Unfair Commercial Practices Directive art.3(2) on which see Whittaker in Weatherill and Bernitz at Ch.8.
[293] 2008 Regulations reg.29.

2008 Regulations were amended so as to create a series of "rights to redress" for consumers against traders in respect of *some* categories of unfair commercial practices.[294]

(b) The Binding Force of Contract

General significance A concomitant of the doctrine of freedom of contract is the binding force of contracts,[295] a force which the French Civil Code compares to the binding force of the law itself[296] and which has been recognised by the European Court of Justice as a "general principle of civil law".[297] English law has also long recognised this principle, which suits the needs of commerce as well as the expectations of parties to contracts more generally. However, care must be taken in interpreting what is meant by the "binding force" of contracts in English law. Some authors argue that: 1-041

> "... [g]enerally speaking the law does not actually compel the performance of a contract, it merely gives a remedy, normally damages, for the breach"[298]

an approach which echoes Oliver Wendell Holmes' famous statement that the law leaves a contractor "free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses".[299] However, four arguments can counter such an approach. First, the courts sometimes do enforce the primary obligations of a contract: apart from the equitable remedies of specific performance and injunction,[300] this is clearest in relation to the action for the agreed contract price, a remedy available at common law and as of right which enforces a party's primary contractual obligation to pay money.[301] Moreover, the special statutory consumer right to repair and replacement of goods or digital content, and the right to repeat performance of services, similarly seek to ensure that one party (the consumer) obtains a conforming performance from the other (the trader).[302] Secondly, the purpose of many awards of damages for breach of contract, and the one which is particular to it,[303] is to put the injured party in the position as though

[294] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870) on which see Vol.II, paras 38-172 et seq.
[295] This has been termed the "sanctity of contracts": see Hughes Parry, *The Sanctity of Contracts in English Law* (1959).
[296] The relevant provision of the French Civil Code was originally contained in art.1134.1 (inspired by D. 16.3.1.6; D. 50.17.23 (both attributed to Ulpian)), but since the Code's amendment in 2016 has been contained in art.1103. The principle of the binding force of contracts is, however, much qualified in modern French contract law: see the contributions by Fauvarque-Cosson, Pérès, Stoffel-Munck and Whittaker in Cartwright and Whittaker (eds), *The Code Napoléon Rewritten, French Contract Law after the 2016 Reforms* (2017), Chs 11, 9, 8 and 1 respectively.
[297] *Société thermale d'Eugénie-les-Bains v Ministère de l'Economie, des Finances et de l'Industrie* (C-277/05) EU:C:2007:440, [2007] E.C.R. I–6415 at [24].
[298] Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), p.37.
[299] *The Common Law* (1881), p.301.
[300] See below, Ch.27.
[301] See below, para.26-009.
[302] See Consumer Rights Act 2015 ss.23 (goods), 43 (digital content) and 55 (services) and 58 (powers of the court) on which see Vol.II, paras 38-447 and 38-517, 38-558 and 38-560, and 38-581 and 38-583.
[303] In particular, a contrast is drawn here with the basis of awards of damages in tort: see below, paras 1-201—1-203.

the contract had been performed.[304] While this approach to damages is not without its restrictions[305] (notably, those imposed by the rules as to remoteness[306] and mitigation of damage),[307] where an award of damages is made on this basis, it can be seen as reflecting the idea that the obligations created by the contract *should* have been performed. Thirdly, a concern with the apparent injustice of allowing a party to break his contract without sanction where the breach has occasioned no loss but has allowed him to make a profit can be seen to lie behind the recognition of the remedy of an "account of profits" on breach based on the principle of unjustified enrichment.[308] Fourthly, English law recognises the binding force of contracts in another way, it being a tort for a third party knowingly[309] to induce a party to a contract to break his obligations to his co-contractor.[310] While a third party may be liable in damages for such a tort of interference with a contractual relationship, its commission may also be prevented by injunction in an appropriate case.[311] And finally, and at a much more general level, the argument that English law does not recognise the truly obligational character of contracts often rests on the absence of a particular form of sanction for a breach of contract—viz the threat of punishment for contempt of court, a sanction which exists in the contractual context only in relation to a failure to conform to a judicial order for specific performance or injunction. However, to this it may be countered that there is no reason to tie the question of the truly binding character of a contract to the presence of a particular type of sanction for its breach and that many English lawyers are content to use the language of obligation to describe the consequences of contracts, which suggests that they see contract terms as set up and to be used as guides for the conduct of the contracting parties.[312]

1-042 However, rather than alluding to the variety of sanctions which are available if a contract is broken, the notion of the binding force of contracts is often used instead to draw attention to the general refusal of the courts to deny them effect on the ground of unfairness or inequality, for example where an inadequate price has been stipulated for the sale of property.[313] This refusal is also reflected in the development of the law of frustration. Until 1863, the general rule was that a party who contracted in absolute terms remained liable, notwithstanding a change of circumstances between the time of making the contract and the time for performance,[314] but in that year this harsh rule was mitigated by the doctrine of frustration,[315] which for many years was reconciled with principle by the device of implying a term into the contract, to which both parties could be supposed to have agreed, and which provided for its discharge in the event of a given thing or state of things ceasing to exist. However, the doctrine came to be applied in circumstances where it was obvious that both parties would never have agreed to any such term and in *Davis Contractors Ltd v Fareham Urban DC*,[316] this basis for relief on frustration was firmly rejected. While some judges had relied simply on the notion of justice to justify the doctrine,[317] this decision of the House of Lords also made clear that its proper basis is the construction of the contract.[318] By so doing, reliance is again placed on what the parties agreed or rather on what they did not agree, viz to perform the contract in such radically different circumstances from those which obtained when it was made. However, even if the view were taken that the rationale for the doctrine of frustration is simply that in the circumstances the law decides that it would be unfair to keep the parties to the terms of their agreement, this does not mean that simple unfairness is the test of frustration. Again, in *Davis Contractors Ltd*[319] Lord Radcliffe made clear that the proper test for frustration is whether performance of the contract is radically different from that which was undertaken by the contract[320] and this test has been consistently upheld,[321] the courts refusing to grant relief for frustration merely because performance of the contract is more onerous than was envisaged by the parties on contract.[322]

Limits on binding force of contracts Nevertheless, recognition of the principle of the binding force of contracts does not mean that contracts, or particular terms of contracts, will always be enforced. This is clearest in cases of illegal contracts,[323] but another exception to the principle exists at common law in the case of penalty clauses.[324] As regards the latter, the Supreme Court has recently clarified the limits of the law which renders a contract term unenforceable as a penalty, holding that a contract term which stipulates the payment of a sum of money on breach of contract will be classed as a penalty clause (and so unenforceable) only if it "imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation".[325] Furthermore, very **1-043**

304 See below, para.26-001. Such an award is sometimes said to be made to protect the injured party's expectation interest or performance interest. An award of damages may be made on other bases, in particular in order to protect what is known as the reliance interest of the injured party: below, paras 26-022—26-024.

305 A practical as opposed to a legal restriction is that a claim for damages on the basis of an injured party's performance interest may be difficult to show: see below, para.26-027.

306 See below, paras 26-117 et seq.

307 See below, paras 26-087 et seq.

308 See *A.G. v Blake* [2001] 1 A.C. 268 and below, paras 26-063—26-065.

309 See *Clerk & Lindsell on Torts*, 22nd edn (2017), paras 24-15 et seq.

310 See *Lumley v Gye* (1853) 2 E.B. 216 and below, para.1-212.

311 e.g. *Torquay Hotel Co Ltd v Cousins* [1969] 2 Ch. 106.

312 cf. Hart, *The Concept of Law* (1961), pp.79–88, who distinguishes the situation where a person is under an *obligation* and where a person is *obliged*.

313 This can be seen in those cases which hold that the consideration for a promise need not be adequate: below, paras 4-014—4-021.

314 *Paradine v Jane* (1647) Aleyn 26.

315 *Taylor v Caldwell* (1863) 3 B.S. 826; see below, Ch.23.

316 [1956] A.C. 696, 720–729.

317 e.g. *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 275; *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 K.B. 190, 202 (reversed [1952] A.C. 166).

318 [1956] A.C. 696, 720–721; and see below, para.23-011.

319 [1956] A.C. 696.

320 [1956] A.C. 696, 729; and see below, para.23-012.

321 See below, para.23-013.

322 *British Movietonews Ltd v London and District Cinemas Ltd* [1952] A.C. 166, 185; *Davis Contractors Ltd v Fareham Urban DC Ltd* [1956] A.C. 696; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93.

323 See below, Ch.16.

324 See below, paras 26-190 et seq. Another exception is to be found in the inability of the parties to a contract to fetter the discretion of the court in deciding whether to grant the remedy of specific performance: *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] B.C.L.C. 442, 451, 452.

325 *Cavendish Square Holding BV v Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373 at [32] per Lord Neuberger and Lord Sumption (with whom Lord Carnwath and Lord Clarke of Stone-cum-Ebony (at [291] agreed); and see similarly at [152] (Lord Mance) and [255] (Lord Hodge, with whom Lord Toulson at [292] agreed on this issue). On this decision see below paras 26-190 et seq.

important qualifications on the binding force of contract terms were introduced as a result of modern legislative intervention, of which the Unfair Contract Terms Act 1977[326] and the Consumer Rights Act 2015 are particularly prominent.[327] First, the Unfair Contract Terms Act 1977 (as amended by the 2015 Act) declares exemption clauses totally ineffective where they attempt to exclude business liability for death or personal injuries caused by negligence.[328] Furthermore, in a series of other cases the 1977 Act denies effectiveness to exemption clauses and certain related clauses unless they are proven to be "fair and reasonable" by the person who seeks to rely upon it.[329] Secondly, the Consumer Rights Act 2015 Pt 2 provides a general regime for the control of unfair terms in consumer contracts (replacing earlier controls in the Unfair Terms in Consumer Contracts Regulations 1999)[330] and also makes special provision as regards the exclusion of liability for breach of the statutory terms which it inserts into three categories of consumer contracts.[331] Another very striking inroad into the binding force of contracts may be found in provisions of the Consumer Credit Act 2006 which replaced earlier provisions governing extortionate credit bargains in the Consumer Credit Act 1974 with very broad provisions concerning "unfair relationships" arising from a consumer credit agreement.[332] As a result, a court is empowered to make a range of orders (including requiring the creditor to repay any sums paid by the debtor, to reduce or discharge any sum payable by the debtor and to alter the terms of the agreement)[333] in connection with a consumer credit agreement:

> "... if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor"

in one or more of a number of ways.[334] According to the Supreme Court, this provision

> "... is deliberately framed in wide terms with very little in the way of guidance about the criteria for its application ... It is not possible to state a precise or universal test for its application, which must depend on the court's judgment of all relevant facts",

although the Supreme Court offered some general points which courts should take into account for this purpose.[335]

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326 See below, paras 15-062 et seq.

327 On the Consumer Rights Act 2015 see Vol.II, paras 38-211 et seq. The 2015 Act replaced earlier controls on unfair terms in consumer contracts contained in the Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2083, on which see Vol.II, paras 38-220 et seq.

328 Unfair Contract Terms Act 1977 s.2(1). See also 1977 Act ss.6(1) and 7(3A) (exclusion of liabilities for breach of implied terms as to title etc.).

329 Unfair Contract Terms Act 1977 ss.2(2), 3, 6(1A), 7(1A) and (4) and 11; and see below, paras 15-080 et seq.

330 See below, paras 15-064 et seq.

331 Consumer Rights Act 2015 s.31 ("goods contracts"), s.47 ("digital content contracts") and s.57 ("services contracts") and see Vol.II, paras 38-365 et seq. The 2015 Act ss.65 and 66 also makes similar provision as regards the exclusion of liability for personal injuries and death caused by negligence as are found in s.2(1) of the 1977 Act.

332 Consumer Credit Act 1974 ss.140A–140D as inserted by Consumer Credit Act 2006 ss.19–22. See Vol.II, paras 39-212—39-228.

333 Consumer Credit Act 1974 s.140B(1).

334 Consumer Credit Act 1974 s.140A(1). On these provisions see Vol.II, paras 39-213—39-228.

335 *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2014] 1 W.L.R. 4222 at [10] per Lord

(c) A Principle of Good Faith or of Contractual Fairness?

No general principle of good faith Use by EU legislation of the notion of good faith or "good faith and fair dealing" has made more prominent the question whether English law requires that a party to a contract exercise his rights in good faith, whether the right in question concerns the creation of a contract, its performance or its non-performance.[336] Such a question may be expressed in different ways and may use a variety of language: put negatively, it may be asked whether a party's *bad faith* should affect his exercise of rights or whether his "unconscionable conduct" in the creation or performance of a contract should affect its validity.[337] Put more positively, the question may be posed in terms of a general requirement or series of more particular requirements that a person act in good faith, reasonably and fairly.[338] In 1766, in the context of recognising the duty of disclosure in contracts of insurance,[339] Lord Mansfield C.J. stated that: 1-044

> "The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent as to grounds open to both, to exercise their judgment upon."[340]

Nevertheless, the modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract law there is no legal principle of good faith of general application, although some authors have argued that there should be.[341] As Bingham L.J. famously observed:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise;

Sumption (with whom Baroness Hale of Richmond, Lord Clarke of Stone-cum-Ebony, Lord Carnwath and Lord Hodge agreed).

336 Below, para.1-048.

337 See below, paras 8-132 et seq.

338 art.1:201(1) of the *Principles of European Contract Law* provides that "[e]ach party must act in accordance with good faith and fair dealing". cf. the provision in the proposed Common European Sales Law (above, para.1-013), art.1(1) which provides that "Each party has a duty to act in accordance with good faith and fair dealing": see further below, para.1-048.

339 See Vol.II, paras 42-030 et seq.

340 *Carter v Boehm* (1766) 3 Burr. 1905, 1910.

341 Bridge (1984) 9 Can. Bus. L.J. 385; Collins, *The Law of Contract*, 4th edn (2003), Chs 13 and 15; Finn in Finn (ed.), *Essays on Contract Law* (1987), p.104; Lücke in Finn (ed.), *Essays on Contract Law*, p.155; Steyn (1991) Denning L.J. 131; Carter and Furmston (1994) 8 J.C.L. 1; Brownsword (1994) 7 J.C.L. 197; Staughton (1994) 7 J.C.L. 193; Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (1995), especially the essays by Beatson and Friedmann, p.3; Cohen, p.25; McKendrick, p.305; Friedmann, p.399; Brownsword in Deakin and Michie (eds), *Contracts, Co-operation and Competition* (1997), p.255; Stein (1997) 113 L.Q.R. 433; Teubner (1998) 6 M.L.R. 11; Brownsword [1997] C.L.P. 111; McKendrick, *Contract Law*, 7th edn (2016), Ch.15; Smith, *Atiyah's Introduction to the Law of Contract*, 6th edn (2006), pp.164–166; Campbell (2014) 77 M.L.R. 475; Tan (2015) J.B.L. 420; Foxton (2017) L.M.C.L.Q. 360; Campbell (2017) Edinburgh L.R. 376; Cheung (2017) 34 International Construction L.R. 242; Saintier (2017) J.B.L. 441; Bridge (2017) Uniform L.R. 98. Burrows, *A Restatement of the English Law of Contract* (2016) considers that it remains clear that there is no freestanding rule imposing a duty to perform in good faith in English law, though notes that English law sometimes comes to the same result by implying a term: commentary to s.5, p.50; commentary to ss.15(3)–(4), p.93.

its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing … English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."[342]

The fact that at least some English judges have not been attracted by the idea of a general ground for relief for unfairness is also clear from judicial treatment of the attempt of Lord Denning M.R. to construct a general principle of "inequality of bargaining power" in *Lloyds Bank Ltd v Bundy*[343] and the House of Lords' refusal in *Walford v Miles*[344] to imply a term in a "lock-out" agreement that a party to it be obliged to continue to negotiate in good faith. Indeed, in that case, Lord Ackner stated that:

"… the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations[345] … [and] … unworkable in practice."[346]

Similarly, Potter L.J. observed in denying relevance to an injured party's motive in termination of a contract, that:

"There is no general doctrine of good faith in the English law of contract. The [injured parties] are free to act as they wish, provided that they do not act in breach of a term of the contract."[347]

[342] *Interfoto Picture Library Ltd v Stilletto Visual Programmes Ltd* [1989] 1 Q.B. 433, 439. Bingham L.J. gave as illustrations of these solutions equity's striking down of unconscionable bargains (see below, paras 8-132 et seq.), statutory control of exemption clauses (see below, paras 15-062 et seq.) and hire-purchase (see Vol.II, paras 39-356 et seq.) and the ineffectiveness of penalty clauses (see below, paras 26-190 et seq.). See similarly, *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 507 at [17] (Lord Bingham of Cornhill), on which see Vol.II, para.38-272.

[343] [1975] Q.B. 326, 339; and see below, para.8-145.

[344] *Walford v Miles* [1992] 2 A.C. 128, 138. cf. *Little v Courage Ltd, The Times,* January 19, 1994; *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964 at [4]. The CA's decision on the facts applying the doctrine of proprietary estoppel was overturned by the House of Lords: see [2008] UKHL 55 and below, paras 4-161—4-162.

[345] [1992] 2 A.C. 128, 138. The agreement was held unenforceable on the grounds of uncertainty, and see below, paras 2-144—2-146.

[346] [1992] 2 A.C. 128, 138. In *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665, 772 (affirmed on other grounds [1990] 2 All E.R. 947), Slade L.J. rejected Steyn J.'s formulation of the content of the ambit of the duty of disclosure on insurers based simply on the question "did good faith and fair dealing require a disclosure?" on the ground that: "[I]n the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent". See further Vol.II, paras 42-030 et seq.

[347] *James Spencer & Co Ltd v Tame Valley Padding Co Ltd* Unreported April 8, 1998, CA (Civ Div). See similarly *Bernhard Schulte GmbH & Co KG v Nile Holdings Ltd* [2004] EWHC 977, [2004] 2 Lloyd's Rep. 352 at [113]; *Horkulak v Cantor Fitzgerald International* [2004] EWCA Civ 1287, [2005] I.C.R. 402 at [30]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] B.L.R. 265 at [105]; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2017] 1 All E.R. (Comm) 483 at [45]. cf. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] Lloyd's Rep. 526 at [121]–[154] where Leggatt J. discussed, obiter, the arguments in favour of and against the recognition of an apparently general implied duty of good faith in the performance of contracts. On the latter see below, para.1-058.

Moreover, according to Rix L.J. in *ING Bank NV v Ros Roca SA*:

"Outside the insurance context, there is no obligation in general to bring difficulties and defects to the attention of a contract partner or prospective contract partner. Caveat emptor reflects a basic facet of English commercial law (the growth of consumer law has been moving in a different direction). Nor is there any general notion, as there is in the civil law, of a duty of good faith in commercial affairs, however much individual concepts of English common law, such as that of the reasonable man, and of waiver and estoppel itself, may be said to reflect such a notion. In such circumstances, silence is golden, for where there is no obligation to speak, silence gives no hostages to fortune."[348]

And, more recently, Moore-Bick L.J. has observed that:

"… 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 organising principle' drawn from cases of disparate kinds … There is … a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."[349]

A very stark example of the preference of English judges for the strict application of the terms of a contract rather than tempering their effect on the grounds of fairness may be found in *Union Eagle Ltd v Golden Achievement Ltd.*[350] There, the Privy Council refused specific performance of a contract for the sale of land to its purchaser who had paid the price 10 minutes late, time having been made expressly of the essence for performance of this obligation. It rejected the argument that the courts enjoyed a discretion to relieve a party from the contractual consequences of late performance (stemming from its jurisdiction to relieve from forfeitures in equity). According to Lord Hoffmann: **1-045**

"The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority … but also upon considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty."[351]

It is to be noted, though, that Lord Hoffmann recognised that "the same need for certainty is not present in all transactions".[352]

[348] [2011] EWCA Civ 353, [2011] All E.R. (D) 39 (Apr) at [92]. Having stated this as a general rule, Rix L.J. held that, in the circumstances, the relationship between the parties and the unconscionable conduct of the silent party justified the latter being estopped from relying on the contract as concluded: at [93]–[107], [111]. Carnwath L.J. agreed on the basis of estoppel by convention ([66]–[71]). Stanley Burton L.J. agreed with both judgments: [2011] EWCA Civ 353 at [76].

[349] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, [2016] 2 Lloyd's Rep. 494 at [45]. The learned judge at trial was Leggatt J., who had earlier given judgment in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep. 526, discussed below, para.1-058.

[350] [1997] A.C. 514.

[351] [1997] A.C. 514 at 518.

[352] [1997] A.C. 514 at 519. cf. *O'Neill v Phillips* [1999] 1 W.L.R. 1092, 1098 where Lord Hoffmann observed in the context of contracts of partnership and a company's duty not to engage in conduct

Moreover, the House of Lords has had occasion to hold that a party is not prevented from relying on the formal invalidity of a contract on the ground merely that it would be "unconscionable" to do so, in the absence of an unambiguous representation of the contract's validity (not being the promise to be enforced itself) on which to base an estoppel.[353] In the words of Lord Clyde:

> "Without entering into questions of categorisation of different classes of estoppel, it seems to me that some recognisable structural framework must be established before recourse is had to the underlying idea of unconscionable conduct in the particular circumstances."[354]

Similarly, in *Cobbe v Yeoman's Row Management Ltd*[355] (which concerned claims, inter alia, for proprietary estoppel and/or constructive trust arising from an oral agreement to develop another person's land intended to be binding "in honour alone"), Lord Scott of Foscote observed that:

> "... unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present ... To treat a 'proprietary estoppel equity' as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion."[356]

In the view of Lord Walker of Gestingthorpe, no cases cited before the House:

> "... cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract."[357]

Moreover, the courts do not generally allow a party to a contract to rely on public law defences (such as one based on its legitimate expectation) against its contractual partner where the latter's claim is fundamentally for the enforcement of a commercial bargain, even if that partner was a public authority acting under statutory powers, though it has been accepted that they could do so where "a true public law defence vitiates a contractual claim".[358] For this purpose, in the view of Lewison L.J., it cannot "usually be an abuse of power [in a public body] to exercise contractual rights freely conferred, even if the result may appear to be a harsh one".[359]

"unfairly prejudicial" to its members that: "One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith." See also the significance of "unconscionability" in the context of the law of duress in *Borrelli v Ting* [2010] UKPC 21, [2010] Bus. L.R. 1718, below, para.8-011.

353 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 All E.R. 615 especially at [16]–[20], [51] and see below, para.5-039.

354 [2003] 2 All E.R. 615 at [34].

355 [2008] UKHL 55, [2008] 1 W.L.R. 1752, on which see below, paras 4-161—4-162.

356 [2008] UKHL 55 at [16].

357 [2008] UKHL 55 at [81].

358 *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [29] per Lewison L.J. (with whom Treacy and Gloster L.JJ. agreed) (local authority able to enforce covenant in lease as to re-conveyance of freehold transferred under option on the failure of a condition as to obtain timely planning permission).

359 [2015] EWCA Civ 1123 at [49]. Lewison L.J. also noted (at [50]) that in the case before the court,

Good faith in other common law systems As Lord Browne-Wilkinson observed: 1-046

> "... throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships",[360]

and other common law systems have taken varying positions as to the relevance of good faith in the creation or the performance of contracts.[361] Perhaps the most extensive use is taken by lawyers in the United States, the Restatement (Second) of Contracts requiring that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement".[362] In Australia too, courts and writers are generally quite open to the use of good faith, holding that an agreement to negotiate in good faith may be contractually enforceable,[363] and willing to find implied terms requiring co-operation in performance, if not always good faith, between the parties.[364] Moreover, although earlier Canadian cases show considerable hesitation in accepting a general duty of good faith in either negotiation or performance of contract,[365] the Canadian Supreme Court has recently ruled that there is "a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance" and that "as a further manifestation of this organizing principle of good faith, *i.e.* there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations."[366] However, the Canadian Supreme Court acknowledged that "the principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest."[367]

private law mechanisms which preclude a person from relying on his strict legal rights such as promissory estoppel had not been pleaded.

360 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All E.R. (Comm) 849 (PC) at [54].

361 See also works noted above, para.1-044.

362 *Restatement (Second) of Contracts* para.205. cf. Uniform Commercial Code s.1-203 and see for a general introduction Summers in Zimmermann and Whittaker (eds), *Good Faith in European Contract Law* (2000), Ch.4; White and Summers, *Uniform Commercial Code*, 6th edn (up to date to 2011), Vol.1, Ch.4.

363 *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 N.S.W.L.R. 1 at 21–27.

364 Carter, *Contract Law of Australia*, 7th edn (2018), Ch.2.

365 Waddams, *The Law of Contract*, 6th edn (2010), paras 17, 210, 498–508, 550.

366 *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 495 at [33] per Cromwell J. giving the judgment of the S.C. of Canada, which reviews earlier Canadian cases and wider common law literature. An "organizing principle" was defined by the court as one which "states in general terms a requirement of justice from which more specific legal doctrines may be derived" and is "not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations": *Bhasin v Hrynew* at [64]. However, the list of these specific legal doctrines "is not closed": *Bhasin v Hrynew* at [66]. The Supreme Court of Canada saw the duty of honest performance as a "general doctrine of contract law" rather than as an implied term, thereby operating "irrespective of the intentions of the parties": *Bhasin v Hrynew* at [74]. As a result, the duty was mandatory and was not affected by an express entire agreement clause in the contract, though there may be circumstances in which it could be influenced by the agreement of the contracting parties: *Bhasin v Hrynew* at [75]–[78].

367 2014 SCC 71 at [70].

has been more controversial.[287]

5-042 **Promissory estoppel ("forbearance in equity")** The Law Commission considered that "promissory estoppel" might apply to qualify the strictness of the formal requirements of s.2 of the 1989 Act.[288] In the present context, however, the so-called doctrine of promissory or equitable estoppel, sometimes known as "forbearance in equity", would not improve a vendor's position owing to its essentially defensive nature, for promissory estoppel cannot create a new cause of action in substitution for the contractual action denied for want of formality.[289] Moreover, as Lewison L.J. has observed, "it would be surprising if one could do by promissory estoppel what one could not do by informal contract"[290] and, moreover, in the case of promissory estoppel, "there is no question of a constructive trust of land arising" so as to fall within the exception to the formality requirements provided by the 1989 Act s.2(5).[291]

5-043 **Estoppel by convention** It is fairly clear that the courts will not allow the application of estoppel by convention so as simply to give effect to an agreement rendered a nullity by s.2 of the 1989 Act. In *Godden v Merthyr Tydfil Housing Association*[292] a building contractor claimed damages for breach of an oral agreement with a Housing Association, under which he had agreed to purchase a particular site, obtain planning permission for the building of seven houses and prepare the site for development, the Housing Association agreeing to reimburse him for the costs of this acquisition and work and that it would enter a contract with him for the construction of the houses. In response to the Housing Association's claim that this agreement failed the formal requirements of s.2 of the 1989 Act, the builder argued that since both parties had contracted in ignorance of this provision, the Housing Association was precluded by the doctrine of estoppel by convention from relying on this provision so as to deny that there was indeed an agreement reached between the parties. According to Simon Brown L.J., with whom Thorpe L.J. and Sir John Balcombe agreed, this submission:

> "... necessarily involves saying that, although Parliament has dictated that a contract involving the disposition of land made otherwise than in compliance with s.2 is void, the defendants are not allowed to say so. That, to my mind, is an impossible argument ... [I]f it were soundly made, it is difficult to see why it should not operate to escape the intended constraints of s.2 in virtually all cases."[293]

In Simon Brown L.J.'s view, the doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid.[294] So, for example, where the effect of the assurance on which the alleged estoppel is based is tantamount to a variation of the contract (itself void as failing to comply with s.2), then giving effect to the estoppel would subvert

[287] Below, paras 5-044—5-049.
[288] *Law Commission, Working Paper No.92*, para.5.8.
[289] cf. above, paras 4-086 et seq. especially para.4-099.
[290] *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33].
[291] [2015] EWCA Civ 1123 at [33].
[292] (1997) 74 P. & C.R. D1. On estoppel by convention generally, see above, paras 4-108—4-115.
[293] (1997) 74 P. & C.R. D1, D3. Simon Brown L.J. thereby approved the statement found in *Halsbury's Laws of England*, 4th edn, Vol.16, para.962.
[294] In *Yaxley v Gotts* [2000] Ch. 162, 174 Robert Walker L.J. agreed that estoppel by convention in the context of s.2 of the 1989 Act was "impossible"; Clarke L.J. considered it "likely to fail": at 182.

the policy behind s.2 of the 1989 Act.[295]

5-044 **Proprietary estoppel**[296] In its work towards the 1989 Act the Law Commission saw proprietary estoppel as a particularly attractive technique for the avoidance of injustice caused by a rigid adherence to the new formality rules because, unlike the doctrine of part performance, it does not simply enforce the underlying agreement but allows a flexible remedy which can vary according to the particular circumstances.[297] As has earlier been explained, there are three main elements of proprietary estoppel: a representation made or assurance given to the claimant, reliance by the claimant on that representation or assurance and detriment suffered by the claimant in consequence of such reliance.[298] It is to be noted, however, that the representation or assurance must have encouraged the claimant to believe that he has or will in the future enjoy some right or benefit over the owner's property[299] and so, even if adopted by a court in a case where an agreement for the sale of land did not satisfy the formal requirements of s.2, it would apply only so as to give a remedy to a would-be purchaser[300]: any claim by a would-be vendor would not be for a right to land nor indeed for a specific asset, but for a sum of money, a simple claim for a debt.[301]

The difficulties in applying the contrasting approaches to the three main requirements of proprietary estoppel found in the speeches of the House of Lords in *Cobbe v Yeoman's Row Management Ltd*[302] and *Thorner v Major* have already been discussed.[303] The following paragraphs will discuss how the courts have applied the doctrine of proprietary estoppel in the context of the formal requirements of s.2 and their differing approaches as to the appropriateness of so doing.

5-045 **Earlier cases on use of proprietary estoppel** An example of the application of proprietary estoppel in this context may be found in *Wayling v Jones*.[304] In that case, A had promised his companion of some ten years, B, that he would bequeath B the business in which he worked at very low wages, but A died without having done so. The Court of Appeal held that B was entitled to rely on a proprietary estoppel against A's executors and therefore ordered them to pay the proceeds of sale of the business to B. If, by contrast, B had alleged that he had *contracted* with A that the latter would bequeath him the business in return for working for low wages, his claim would have failed for lack of fulfilling the formal requirements in s.2 of the

[295] *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch) at [123] (though not stating that the estoppel in question would be by convention and not deciding whether the effect of the estoppel on the facts was tantamount to a variation), applying the approach of the HL in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 (decided in relation to the Statute of Frauds s.4), on which see above, para.5-039 and Vol.II, para.45-060.
[296] See above, paras 4-139 et seq.
[297] Law Com. No.164 (1987), para.5.5.
[298] *Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776 at [15], [29], [72] and see above, paras 4-149 et seq.
[299] Megarry and Wade, *The Law of Real Property*, 8th edn (2012) by Harpum, Bridge and Dixon paras 16-007, 16-011. In *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [36]–[38] it was emphasised that proprietary estoppel arises from a representation that the claimant would acquire a *certain* interest in land.
[300] Davis (1993) 13 O.J.L.S. 101, 103.
[301] (1993) 13 O.J.L.S. 101, 104 and see *Godden v Merthyr Tydfil Housing Association* (1997) 74 P. & C.R. D1.
[302] [2008] UKHL 55, [2008] 1 W.L.R. 1752.
[303] [2009] UKHL 18, [2009] 1 W.L.R. 776.
[304] [1995] 2 F.L.R. 1029.

1989 Act.[305] In *Yaxley v Gotts*,[306] Robert Walker L.J. considered that where a constructive trust is based on "common intention", then it is "closely akin to, if not indistinguishable from, proprietary estoppel".[307] So, while the Court of Appeal substituted constructive trust for proprietary estoppel (on which the trial judge had relied) as the basis for its decision, this case has been seen as authority for the proposition that:

> "... the doctrine of estoppel may operate to modify and counteract the effect of section 2(2) [of the 1989 Act]; and that section 2(5) can cover cases of the equitable intervention of proprietary estoppel *which coincide with or overlap* the concept of a constructive trust, even though section 2(5) does not expressly refer to proprietary estoppel."[308]

On the other hand, in *Kinane v Mackie-Conteh*[309] Arden L.J. and Neuberger L.J. expressed contrasting views as to whether a proprietary estoppel "unassociated with a constructive trust" would avoid the formal requirements found in s.2. According to Neuberger L.J.:

> "... one must ... avoid regarding [subsection 2(5)] as an automatically available statutory escape route from the rigours of section 2(1) of the 1989 Act, simply because fairness appears to demand it. A provision such as section 2 ... was enacted for policy reasons which, no doubt, appeared sensible to the legislature ... the Court should not allow its desire to avoid what might appear a rather harsh result in a particular case to undermine the statutory policy."[310]

He concluded, therefore, that a "mere estoppel, unassociated with a constructive trust" might not avoid the formal requirements of s.2, especially given the decision of the House of Lords in *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA*.[311] However, here Arden L.J. did not agree, and emphasised that the latter decision was concerned with s.4 of the Statute of Frauds 1677 which contains no exception to its formal requirements equivalent to s.2(5) of the 1989 Act. In her view, proprietary estoppel could form the basis of disapplying s.2(1):

> "... the cause of action in proprietary estoppel is ... not founded on the unenforceable agreement but upon the defendant's conduct which, when viewed in all relevant aspects, is unconscionable."[312]

5-046 **Cobbe v Yeoman's Row Management Ltd** However, a very different approach to the appropriateness of recourse to proprietary estoppel in the context of s.2 of the 1989 can be seen in the decision of the House of Lords in *Cobbe v Yeoman's Row Management Ltd*.[313] There a company which owned a building had orally agreed in principle with a property developer that it would sell the building

[305] cf. *James v Evans* [2001] C.P. Rep. 36 (no defence of proprietary estoppel on the facts).
[306] [2000] Ch. 162, above, para.5-040.
[307] [2000] Ch. 162 at 180; *McGuane v Welch* [2008] EWCA Civ 785, [2008] 2 P. & C.R. 24 at [37], per Mummery L.J. cf. Lord Walker's "lesser enthusiasm" for the complete assimilation of "common intention" constructive trust and proprietary estoppel in *Stack v Dowden* [2007] UKHL 17, [2007] 2 A.C. 432 at [37].
[308] *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684, [2007] All E.R. (D) 68 (Jul) at [55], per Mummery L.J. (emphasis added).
[309] [2005] EWCA Civ 45, [2005] W.T.L.R. 345.
[310] [2005] EWCA Civ 45 at [40].
[311] [2003] UKHL 17, [2003] 2 A.C. 541.
[312] [2005] EWCA Civ 45 at [29].
[313] [2008] UKHL 55, [2008] 1 W.L.R. 1752. See also at *Capron v Government of Turks and Caicos*

to him if he obtained planning permission for its redevelopment, this agreement fixing a price and specifying an "overage" payment if the gross resale of the building exceeded a certain sum. The director of the company encouraged the developer to expect that her company would fulfil this agreement even after she had decided not to do so but to renegotiate for more money, and then (acting for the company) reneged on the agreement on the same day on which planning permission was granted. In these circumstances, the House of Lords held that proprietary estoppel could not apply as the person (the property developer) wishing to rely on the doctrine could not point to anything which the other person (the land-owner) could be estopped from relying on or denying in relation to a certain interest in land, but instead could point only to an expectation that that other person would enter into a contract with them on terms some of which remained to be negotiated.[314] In so holding, Lord Scott of Foscote (with whom Lords Hoffmann, Brown of Eaton-under-Heywood and Mance agreed) cast doubt on the use of proprietary estoppel as a means of escaping the formal requirements of s.2 of the 1989 Act. Lord Scott expressed the view (though recognising this as not being necessary for the decision of the House) that:

> "... proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute."[315]

Unlike resulting, implied or constructive trusts, the statute does not recognise any exception from the formal requirements for proprietary estoppel.[316]

Thorner v Major In *Thorner v Major*[317] a somewhat differently constituted House of Lords (Lords Hoffmann, Scott of Foscote, Rodger of Earlsferry, Walker of Gestingthorpe and Neuberger of Abbotsbury) took a more positive view of the role of proprietary estoppel in relation to the requirements of the 1989 Act, although, as has been explained,[318] its context was domestic rather than commercial. In relation to the 1989 Act Lord Neuberger observed that: 5-047

> "The notion that much of the reasoning in *Cobbe*'s case ... was directed to the unusual facts of that case is supported by the discussion, at para 29, relating to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 may have presented Mr Cobbe [the developer] with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature ... and section 2 lays down formalities which are required for a valid "agreement" relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection. It

Islands [2010] UKPC 2, [33]–[40].
[314] See further above, paras 4-146 et seq.
[315] [2008] UKHL 55 at [29].
[316] [2008] UKHL 55 at [29] and see *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123, [2016] 1 P. & C.R. 10 at [33] (doubting the law as expressed in *Yaxley v Gotts* [2000] Ch. 162 noted above, para.5-045) by reference to Lord Scott of Foscote's view). Lord Walker in *Cobbe* considered that it was not "necessary or appropriate to consider the issue of section 2" of the 1989 Act: [2008] UKHL 55 at [93].
[317] [2009] UKHL 18, [2009] 1 W.L.R. 776. The decision was applied in *Suggitt v Suggitt* [2011] EWHC 903 (Ch), [2011] 2 F.L.R. 875.
[318] Above, paras 4-149—4-152.

was no doubt for that reason that the defendants, rightly in my view, eschewed any argument based on section 2."[319]

This observation therefore suggests a distinction between claims for proprietary estoppel based on an assurance reasonably relied on and made in a family or domestic context (where s.2's requirements of formality are not relevant) and those based on an agreement which would (otherwise) qualify as a contract (where s.2's requirements of formality are relevant and, arguably, should not be circumvented).

5-048 **Herbert v Doyle** In *Herbert v Doyle*[320] the Court of Appeal, on an application for permission to appeal, considered the approaches taken by the House of Lords in *Cobbe* and *Thorner v Major* to the requirement of certainty as regards constructive trust in the context of s.2 of the 1989 Act. Arden L.J. (with whom Morgan and Jackson JJ. agreed) noted that while the distinction between proprietary estoppel and constructive trust must be kept in mind,

> "it appears from *Cobbe* that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature"

as was the case on the facts before her.[321] Arden L.J. saw "a common thread running through the speeches of Lord Scott and Lord Walker" in *Cobbe*:

> "... that, if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement. In other words, at least in those situations, if their agreement (which does not comply with section 2(1)) is incomplete, they cannot utilise the doctrine of proprietary estoppel or the doctrine of constructive trust to make their agreement binding on the other party by virtue of section 2(5) of the 1989 Act."[322]

Arden L.J. saw this interpretation of *Cobbe* as consistent with Lord Neuberger's position on the need for certainty in *Thorner v Major*.[323] For Arden L.J., on the facts before her, the relevant question was "whether, subject to section 2 of the 1989 Act,

[319] [2009] UKHL 18 at [99] referring to *Cobbe* [2008] UKHL 55, [2008] 1 W.L.R. 1752 at [129].

[320] [2010] EWCA Civ 1095, [2010] N.P.C. 100. See also *Kinnear v Whittaker* [2011] EWHC 1479 (QB), [2011] All E.R. (D) 78 (Jun) (allowing the possibility of proprietary estoppel and preferring the approach of the CA in *Yaxley v Gotts* [2000] Ch. 162 (above, para.5-040) to the approach found in Lord Scott's speech in *Cobbe*, quoted above, para.5-046; *Ghazaani v Rowshan* [2015] EWHC 1922 (Ch) at [192] and [197] (allowing the possibility of proprietary estoppel/constructive trust in the "exceptional circumstances" of the case); *Muhammad v ARY Properties Ltd* [2016] EWHC 1698 (Ch) at [32]–[50] and *Pinisetty v Manikonda* [2017] EWHC 838 (QB), [2017] 5 Costs L.O. 565 at [39]–[42] (agreement not sufficiently certain to be enforced).

[321] [2010] EWCA Civ 1095 at [56].

[322] [2010] EWCA Civ 1095 at [57]. See also *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All E.R. 754 at [107] and [133]. According to the CA in *Dowding v Matchmove Ltd* [2016] EWCA Civ 1233, [2017] 1 W.L.R. 749 at [32], Arden L.J. was not intending to describe three different situations in which s.2(5) would not apply, but rather to describe the *Cobbe* case in three different ways, which taken together meant that the party "never expected to acquire an interest in the property otherwise than under a legally enforceable contract" (quoting Lord Scott in *Cobbe* [2008] UKHL 55 at [37]).

[323] [2010] EWCA Civ 1095 at [58] referring to [2009] UKHL 18 at [93].

there was a valid contract" and for this purpose Arden L.J. agreed with the finding of the trial judge below that the agreement of the parties was sufficiently certain.[324] This suggests that where the agreement is sufficiently certain (notably, where it is not made subject to contract nor is merely "an agreement to agree"), then this agreement may provide the basis for the recognition of a constructive trust or for proprietary estoppel.

5-049 **Effects of proprietary estoppel** One important aspect of the difference between proprietary estoppel and constructive trust lies in the former's greater flexibility of remedial response,[325] although sometimes, the effect of the application of the two doctrines will be the same.[326] For:

> "... if there is a constructive trust the court must usually give effect to it, often by ordering a transfer of the relevant proprietary interest, whereas if there is an estoppel the court will give a remedy that reflects the value of the equity in question."[327]

5-050 **Restitution: recovery of money paid by purchaser**[328] The availability of restitution of money paid under an agreement which failed to comply with the formal requirements of s.40 of the Law of Property Act 1925 thereby rendering the contract unenforceable depended on whether the vendor or purchaser defaulted. The general rule was that if the vendor defaulted, the purchaser might recover his deposit on the ground of total failure of consideration.[329] It was, however, possible that, even here, consideration for the payment would not have failed if the vendor had done acts of part performance of the contract and these acts benefited the purchaser.[330] If, on the other hand, the purchaser defaulted, he could not recover a deposit paid on the ground of failure of consideration as the consideration for the payment could not be said to have failed.[331]

5-051 **Nullity of contract under s.2 of the 1989 Act does not prevent passing of property in deposit** It could be thought that the fact that a contract is void for want of the requisite formal requirements of s.2 of the 1989 Act prevents the passing of property in any money paid under a contract to the other contracting party. However, in *Sharma v Simposh Ltd* the Court of Appeal noted "an important point of principle" in this respect, that is that:

[324] [2010] EWCA Civ 1095 at [71] and [73]) and see similarly Morgan L.J. [2010] EWCA Civ 1095 at [91].

[325] Goff and Jones, *The Law of Restitution*, 7th edn (2007), p.579–580.

[326] Megarry and Wade, *The Law of Real Property* 8th edn (2012) by Harpum, Bridge and Dixon, para.11-032.

[327] *Representative Body of the Church in Wales v Newton* [2005] EWHC 631 (QB), [2005] All E.R. (D) 163 (Apr) at [62], per Antony Edwards-Stuart Q.C. For general discussions of the remedial flexibility of proprietary estoppel see *Jennings v Rice* [2002] EWCA Civ 159, [2002] All E.R. (D) 324 (Feb); *Powell v Benny* [2007] EWCA Civ 1283, [2007] All E.R. (D) 71 (Dec); *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P. & C.R. 10 esp. at [39]–[42]; Gardner (1999) 115 L.Q.R. 438 and (2006) 122 L.Q.R. 492 and above, paras 4-173—4-180.

[328] See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), Ch.12 preferring to describe this law as "restitution on the ground of failure of basis". See further below, paras 29-057 et seq.

[329] *Pulbrook v Lawes* (1876) 1 Q.B.D. 284, 289, subject to the discretion of the court under the Law of Property Act 1925 s.49(2).

[330] cf. Goff and Jones, *The Law of Restitution*, 7th edn (2007), paras 1-059—1-062. If the acts of part performance were sufficient to satisfy the doctrine of part performance, then the contract might be enforced in equity: *Steadman v Steadman* [1976] A.C. 536.

[331] *Thomas v Brown* (1875-76) L.R. 1 Q.B.D. 714, 723 subject to the discretion granted to the court under the Law of Property Act 1925 s.49(2).

> "Property may pass between parties who are involved in a purchase transaction which is contractually ineffective. Property may pass by delivery with the necessary intention, and that may occur even in the context of a contract which is void for illegality."[332]

Sharma v Simposh Ltd concerned a contract void for failure to conform to the requirements of s.2 and the Court of Appeal considered that the general principle which it had identified applied equally to this situation so that the question whether property in a deposit paid under the contract depended on the intention with which the payment was made.[333]

> "Was the payment intended to be conditional on the [buyer] completing the transaction or was it intended to be unconditional? If the former, the [vendor] would have obtained only a conditional title to the money and would have been bound to return it on the transaction falling through. If the property passed unconditionally, the defendant was prima facie entitled to retain it."[334]

However, the fact that property was intended to pass and did pass does not exclude the possibility of a claim for restitution, but such a claim depends on the claimant being able to establish a recognised ground of restitution.[335] In this respect, two possible grounds could be relevant: failure of consideration and mistake of law.

5-052 **Failure of consideration and its significance** A first possible ground of restitution of money paid under an agreement which fails to fulfil the requirements of s.2 of the 1989 Act is that the consideration for the payment has failed. If the notion of consideration is understood as the basis on which the payment was made,[336] then this basis would normally be the existence of the contract of sale with the result that, under the new requirements, failure to comply with the formalities would nullify the contract so as to deprive the payment of its basis. If, on the other hand, the receipt of any promised benefit by the purchaser (such as, for example, by entering possession) were to be taken as preventing the failure of consideration even under this non-existent contract, then recovery would be denied. In *Sharma v Simposh Ltd* the Court of Appeal expressly adopted the former interpretation of failure of consideration thereby endorsing the position of Professor Birks,[337] and this view was explicitly approved by the majority of the Supreme Court in *Patel v Mirza* in the context of an illegal transaction rather than one void under s.2, where Lord Toulson observed that:

> "A defendant's enrichment is prima facie unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialise."[338]

Sharma v Simposh Ltd itself concerned the restitutionary consequences of nullity

[332] [2011] EWCA Civ 1383, [2013] Ch. 23 at [43] per Toulson L.J. (with whom Black and Laws L.JJ. agreed) and referring to *Singh v Ali* [1960] A.C. 167.
[333] [2011] EWCA Civ 1383 at [44].
[334] [2011] EWCA Civ 1383 at [44] per Toulson L.J.
[335] [2011] EWCA Civ 1383 at [55].
[336] Birks, *An Introduction to the Law of Restitution* (revised edn, 1989), p.223; and see Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), para.12-003, and below, paras 29-057 et seq.
[337] [2011] EWCA Civ 1383, [2013] Ch. 23 at [24] quoting Birks, cited in previous note. Failure of consideration was "the only suggested ground" of recovery of the deposit: [2011] EWCA Civ 1383 at [55] and cf. below, para.5-054.
[338] [2016] UKSC 42, [2017] A.C. 467 referring to Burrows, *A Restatement of the English Law of Unjust*

of a contract on the ground of its failure to satisfy the formal requirements in s.2 of the 1989 Act and the Court of Appeal noted in this respect that, prior to the Act, the Law Commission had suggested that a purchaser who pays a deposit under an oral agreement for the purchase of land will generally be entitled to recover his deposit if the sale does not go ahead, "for the state of affairs contemplated as the reason for the payment will have failed to materialise".[339] However, the Court of Appeal held that on the facts of the case before it, which concerned an agreement:

> "... to attempt to create an option giving the claimants the right to buy [a building under construction] within the period leading to its completion for an agreed price in exchange for a non-refundable deposit",[340]

there was no failure of consideration "[s]ince the claimants obtained the benefit for which the payment was made",[341] that is:

> "... the defendant took the property off the market pending completion and kept open its offer to sell it to the claimants at a fixed price."[342]

In the result, therefore, the Court of Appeal saw the benefit obtained under the contract (even though void for informality) as preventing failure of consideration. Moreover, as the claimants had obtained the benefit for which the payment was made and given that they had decided not to proceed with the purchase of the property owing to a sharp fall in the financial market,[343] there was "no merit in their claim and no injustice in the defendant retaining the money. The justice of the matter is entirely on the defendant's side".[344]

5-053 It could be thought that where a buyer has paid the full purchase price under a contract for the sale of land and entered into possession of the land for a period, it would be unjust to allow him to rely on the statutory invalidity in order to claim back the price, leaving the seller to any possible counterclaim in restitution on the ground of the buyer's unjust enrichment in enjoying the property during the period. However, in *Singh v Sanghera* the High Court accepted that:

Enrichment (2012), p.86, para.15 (Baroness Hale of Richmond, Lords Kerr of Tonaghmore, Wilson and Hodge agreed generally with Lord Toulson). On *Patel v Mirza* more generally, see below, paras 16-018 et seq. and 16-225 et seq., which includes discussion of the positions of the minority of the SC. For restitution on failure of basis, see below, para.29-057.
[339] [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [25]. See also Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), paras 13-25, 13-32 and 14-08.
[340] [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [9].
[341] [2011] EWCA Civ 1383 at [55], per Toulson L.J. giving judgment of the Court.
[342] [2011] EWCA Civ 1383 at [26] (the reasons given by the judge below).
[343] [2011] EWCA Civ 1383 at [8].
[344] [2011] EWCA Civ 1383, [2012] 1 P. & C.R. 12 at [55], per Toulson L.J. *Sharma v Simposh* was applied by the CA in *Marlbray Ltd v Laditi* (on appeal from sub nom. *Rabiu v Marlbray Ltd*) [2016] EWCA Civ 476, [2016] 1 W.L.R. 5147 at [81]–[93], [96], esp. at [92] where it was held that a deposit paid by a joint and several purchaser off-plan of a long lease of a flat in a large block should not be returned on the basis of a failure of consideration, even if the contract was void under s.2 of the 1989 Act (which it was held not to be), as the purchaser had the benefit of the specific unit chosen being taken off the market; the flat had been secured at a specific price; the developer had (apparently) completed the works with the deposit as collateral; and the purchaser had become entitled to 10 free days at a London hotel. For this purpose, it made no difference that the deposit was held by a third-party stakeholder: [2016] EWCA Civ 476 at [99].

both parties to a contract represented the position at common law; and that the rules of equity "cut across this distinction".[42] This referred to the line of cases to the effect that in some circumstances a common mistake would give either party the right to avoid a contract that was not void for mistake at common law,[43] based on a rule of equity. Now that these cases have been disapproved,[44] and if the interpretation of certain cases of unilateral mistake that was offered in Ch.3[45] is accepted, it seems that there is no inconsistency between common law and equity. Equity will on occasion supplement the remedies available at common law: for example, a mistake may entitle a party to a contract that has been reduced to writing to have the document rectified if it is not expressed in accordance with the parties' true intentions, or does not reflect the terms that the claimant intended and the other party knew him to intend.[46]

6-010 The only apparent "divergence" between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either unilateral or common mistake may lead to the court refusing specific performance as a matter of discretion even though the mistake does not render the contract void or have any other effect at common law.[47] As this is merely the denial of a particular remedy, and the contract remains binding in other respects (e.g. the claimant would still be entitled to damages if the contract were not performed[48]) this is not a contradiction of the common law rules.[49] Thus in cases of contractual mistake, common law and equity are consistent and equity plays only a minor role. Therefore in this edition of this work there is no separate treatment of "Mistake in Equity".[50]

6-011 **Is there a separate doctrine of mistake?** Any "doctrine" of mistake in English contract law seems to have emerged only in the late nineteenth or even the twentieth century,[51] and from time to time commentators have argued that the doctrine is redundant or that the cases are better explained on some other basis.[52] Thus it has been said that cases of common mistake may be explained as resting on the construction of the contract, and in particular on an implied condition precedent[53]; while cases of unilateral and mutual mistake may be no more than an application of the rules of offer and acceptance.[54] From a conceptual point of view there is force in these arguments, and it is certainly hard to discern a single "doctrine" of mistake when the two categories of case described above are subject to quite different rules.

[42] See the 28th edition of this work, para.5-001.
[43] Above, para.6-001.
[44] See below, paras 6-055 et seq.
[45] Above, paras 3-029—3-035. These paragraphs discuss the relationship between rectification and unilateral mistake as to the terms at common law. There was very little authority to suggest that unilateral mistake as to the facts was a ground for rescission in equity, and what there was has recently been rejected.
[46] See above, paras 3-057 et seq.
[47] See below, para.6-061.
[48] See, e.g. *Wood v Scarth* (1855) 2 K. & J. 33 (equity), (1858) 1 F. & F. 293 (law).
[49] cf. cases in which specific performance may be refused because of the hardship that would result because of a subsequent change of circumstances: see below, para.6-061 and para.27-048.
[50] cf. *Chitty*, 28th edn, paras 5-060 et seq.
[51] See below, paras 6-017 et seq.
[52] e.g. Slade (1954) 70 L.Q.R. 385.
[53] Smith (1994) 110 L.Q.R. 400. See below, para.6-014.
[54] e.g. Slade (1954) 70 L.Q.R. 385; Atiyah, *Essays in Contract* (1986), Ch.9.

However in this work it is assumed that there are distinct rules on mistake dealing with each category, and in particular in the case of the "common" mistakes dealt with in this chapter. This is partly because the courts have recognised distinct rules of common mistake[55] and partly because common mistake is what may be called a "functional category". In factual terms, a party may claim that both he and the other party made the contract under an unstated misapprehension of some kind as to some fact bearing on the contract.[56] We need to know what self-induced "mistakes" or (to use a word that does not have legal connotations) "misapprehensions" the law will take account of and what the parties' rights will be. Whether the rules that are applied are simply applications of more general rules, such as the doctrine of implied conditions is from a functional viewpoint irrelevant; they are the rules that govern these types of mistake.

Mistake and misrepresentation In earlier paragraphs the factual situation to which the rules on mistake apply was described as one in which one party, or both he and the other party, have entered the contract under a "self-induced" misapprehension. This is to differentiate it from a closely similar situation that the law treats in a different fashion, under the rubric of misrepresentation. If one party has entered the contract relying on a statement made by the other party about some fact that is material to the contract, and the statement was untrue, the first party will normally have a remedy for misrepresentation. At least if he acts promptly he will normally be entitled[57] to avoid the contract for misrepresentation, and this is so whether the misrepresentor, when he made the untrue statement, was acting fraudulently, negligently or wholly innocently.[58] In one sense, all cases of misrepresentation are also cases of "misapprehension", as at least one party, and often both the parties, entered the contract believing the facts to be different to what they were. Because one party has misled the other, the law gives relief even though the misapprehension is about the facts surrounding the contract[59] and is not of the seriousness that we will see is required for relief to be given on the ground of mistake. However, if the right to rescind has been lost, for example because of the lapse of time,[60] the misrepresentee may have an effective remedy only if he can show that the contract was void for mistake. **6-012**

Misrepresentation and common mistake Relief may be given on the ground of misrepresentation whether the resulting misapprehension was only on the part of the misrepresentee, as when he is the victim of a fraudulent misrepresentation by **6-013**

[55] e.g. *Bell v Lever Bros* [1932] A.C. 161; *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679.
[56] Or a "mistake" that resulted from a misrepresentation but the right to rescind for misrepresentation has been lost. See below, para.6-012.
[57] Subject in some cases to a statutory discretion in the court: see below, paras 7-105 et seq.
[58] The law on misrepresentation is described in Ch.7.
[59] One party might also make a misrepresentation as to the terms of the contract, for example as to the contents of a written contract that the other party is being asked to sign. Where the statement is that a particular term is or is not in the document, the result will normally be determined by the rules that determine the content of the contract: see Ch.13 (Express terms), in particular paras 13-109 et seq. (parol evidence rule) and Ch.15 (Exemption clauses). Where the misrepresentation is as to the meaning of a clause in the contract the courts have also fashioned a remedy: below, paras 7-021 and 15-146.
[60] See below, para.7-137.

the other, or whether both parties were under the same misapprehension, as in cases of "innocent" misrepresentation. The misrepresentation cases are treated differently simply because one party chose to make a statement of fact on which the other party relied when he entered the contract.[61] It probably happens far more frequently that one party states the facts as he believes them, and the other party enters the contract relying to some extent on that statement,[62] than that each enters the contract relying on his own, equally mistaken view of the facts. This goes some way to explain why there are relatively few cases in which a party seeks to escape from a contract on the ground of common mistake: he will often be able to rescind the contract for misrepresentation, while it seems that the other party, the misrepresentor, will be precluded from arguing that the contract is void for common mistake.[63] Nonetheless, shared "self-induced" mistake over the facts does happen, and the rules that apply in this type of case form the subject matter of the present chapter.

6-014 **Common mistake and construction of the contract** The question of the effect of common mistake in the law of contract is basically one of the allocation of risk as to the facts being as assumed.[64] In most situations one or other of the parties will be considered to have assumed the risk of the ordinary uncertainties which exist when an agreement is concluded.[65] Where contracts of sale of goods are concerned, for example, the seller will normally be held to have assumed the risk that the goods do not correspond to their description, or, if the seller sells in the course of a business, that they may be defective, under express or implied terms, except insofar as the usual conditions are validly excluded, or may in the particular circumstances be inapplicable.[66] The risk that for other reasons the goods will be less useful than the parties envisaged will be borne by the buyer. Thus it has been said that one must first determine whether the contract itself, by express or implied condition (promissory or non-promissory) or otherwise, provides who bears the risk of the relevant mistake. Only if the contract is silent on the point is there scope for invoking the rules or "doctrine" of mistake.[67] It has been pointed out that if the enquiry whether the construction of the contract is only as to:

61 One justification given for granting a remedy even when the misrepresentor was acting wholly innocently is that the statement may put the other party off from making further enquires that might have revealed the truth: see below, para.7-044.

62 See below, para.7-038.

63 See below, para.6-040.

64 *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164; McTurnan, An Introduction to Common Mistake in English Law (1963) 41 Can. Bar Rev. 1; Swan, "The Allocation of Risk in the Analysis of Mistake and Frustration" in Reiter and Swan, *Studies in Contract Law* (1980); American Law Institute's *Restatement of Contracts* (2d), para.152.

65 *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(ii)], citing this sentence of the paragraph.

66 e.g. *Gloucestershire CC v Richardson* [1969] 1 A.C. 480 (normal implied term did not apply when contractor had no right to object to supplier nominated by employer and supplier would contract only on limited liability terms).

67 *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 W.L.R. 255, 268; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [74]–[75]; *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69], referring to this paragraph. See also *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035; *Grains & Fourriers SA v Huyton* [1997] 1 Lloyd's Rep. 628. Thus, in *Kalsep Ltd v X-Flow BV, The Times*, May 3, 2001 it was held that the risk of the mistake which had been made was allocated to one party by an express clause of the agreement. In *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party.

"whether either party has given an undertaking as to the matter at issue (i.e. if that is what is meant by a provision as to 'who bears the risk of the relevant mistake'), and the answer is that neither has"

that does not preclude a second enquiry as to the effect of the mistake; but if it includes asking whether, if neither bears the risk, the contract is as a matter of construction subject to an implied condition precedent that the facts assumed existed, there seems to be no scope for asking whether the contract is void for mistake.[68] In other words, if it does include asking whether the contract is subject to such a condition, there is no room for an independent doctrine of common mistake.[69] Although the courts have held that there is a separate doctrine of mistake,[70] this is a formidable argument. It will be submitted that it can really be met only by admitting that, in cases which involve the kind of facts to which the doctrine of common mistake might apply, the process of construction and the application of the rules of mistake are really merely alternative ways of formulating the same thing and reaching the same result.[71] We will see later, however, that sometimes courts have held a contract to be ineffective because as a matter of construction it was subject to an implied condition which has not been fulfilled, in circumstances in which the requirements of common mistake do not seem to have been met.[72]

2. INTRODUCTION TO COMMON MISTAKE[73]

6-015 **Common mistake** Where the mistake is common, that is shared by both parties, there is *consensus ad idem*, but the law may nullify this consent if the parties are mistaken as to some fact or point of law[74] which lies at the basis of the contract. In summary, if: (i) the parties have entered a contract under a shared and self-induced[75] mistake as to the facts or law[76] affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is[77]; (iii) neither party was responsible for or should have

68 Smith (1994) 110 L.Q.R. 400, 407.

69 Smith (1994) 110 L.Q.R. 400, 419. The court might conclude that the contract has not allocated the risk to either party, but the conditions for common mistake are not fulfilled (e.g. because the mistake is not sufficiently fundamental), so that the loss lies where it falls. But this does not demonstrate that there is a separate doctrine of mistake, as the same might occur on a "construction" approach.

70 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [73] and [82], discussed below, para.6-034.

71 See below, paras 6-029 and 6-062—6-063.

72 See *Graves v Graves* [2007] EWCA Civ 660, [2007] All E.R. (D) 32 (Jul), discussed below, para.6-063.

73 See Cheshire (1944) 60 L.Q.R. 175, 177; Tylor (1948) 11 M.L.R. 257, 262; Slade (1954) 70 L.Q.R. 385, 396; Bamford (1955) 32 S.A.L.J. 166; Atiyah (1957) 73 L.Q.R. 340; Atiyah and Bennion (1961) 24 M.L.R. 421; McTurnan (1963) 41 Can. Bar Rev. 1; Stoljar (1965) 28 M.L.R. 265, 275; Smith (1994) 110 L.Q.R. 400.

74 On mistake of law see below, para.6-052.

75 In other words, it is not a case where one party's mistaken belief was induced by a representation by the other party; cf. para.6-013, above. If it was, the first party will normally have a remedy for misrepresentation, see Ch.7, below.

76 See below, para.6-052.

77 See below, paras 6-037—6-040.

known of the true state of affairs[78]; and (iv) the mistake is so fundamental that it makes the "contractual adventure" impossible, or makes performance essentially different to what the parties anticipated,[79] the contract will be void.

6-016 **Different conceptual bases** While it is clear on the authorities that a doctrine of common mistake exists in English law, the situation is complicated by the fact that there are three possible conceptual routes which have been employed in considering whether a fundamental mistake has the result that a party can in effect escape from the contract and recover any payment made or other benefit transferred: (1) that there has been a total failure of consideration; (2) that the contract is subject to an express or implied condition that the facts were as the parties believed them to be, or (to use a modern formulation derived from the same argument) that it would be invalid if, on the true construction of the contract, the essence of the obligations are impossible to perform; and (3) that there is a separate doctrine of mistake. We will see that these grounds were not always kept distinct and the leading cases seem to combine the three in a way that makes it hard to state the rules in a simple form. A further issue is whether there is, or was, a separate rule for mistake in equity under which the contract would be treated as voidable rather than void. The Court of Appeal[80] has now made it clear that no such doctrine can have survived the decision of the House of Lords in the leading case of common mistake, *Bell v Lever Bros*.[81]

3. DIFFERENT APPROACHES BEFORE BELL V LEVER BROS

6-017 **Total failure of consideration** There are a number of early cases in which the parties had bought and sold something which, unknown to either of them, was very different to what they thought or even did not exist at all; but the seller tried to claim the price or to retain the price paid. Thus in *Strickland v Turner*[82] the purchaser of an annuity on the life of a man who was, unknown to both parties, already dead, was able to recover the purchase price from the vendor on the basis of total failure of consideration, as the annuity had ceased to exist at the time of the contract for sale. In *Gompertz v Bartlett*[83] an unstamped bill of exchange was sold by the defendant to the plaintiff on a non-recourse basis. The parties believed that it was a foreign bill but it was shown in fact to have been drawn in England and it was therefore unenforceable for want of a stamp. The buyer sued to recover the price paid. The Court of Queen's Bench held that this was not merely a case of the bill being of poor quality, when the seller would have been liable only if he had given an express warranty or had been fraudulent. The bill did not meet the description of "a foreign bill" by which it was sold and the buyer was entitled to recover the price.

78 In such cases the relevant party will normally be treated as bearing the risk of the mistake: see below, para.6-039.
79 See below, paras 6-041—6-051.
80 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679. See below, para.6-055.
81 [1932] A.C. 161.
82 (1852) 7 Ex. 208, 155 E.R. 919.
83 (1853) 2 El. & Bl. 849, 118 E.R. 985.

6-018 **Couturier v Hastie** In *Couturier v Hastie*[84] there was a sale of a cargo of corn which was believed to be in transit from Salonica to the United Kingdom. Unknown to either party the cargo had deteriorated and had already been sold by the master of the ship. The liability of the purchaser to pay the price depended upon the construction of the contract. If the contract was a contract for the sale of that specific cargo of corn, then the consideration for the contract had totally failed and the seller was not entitled to the price. If, however, as the seller contended, it was a contract for the sale of the adventure, the seller had performed his side of the contract by offering to deliver the shipping documents and the purchaser was liable to pay the purchase price. The House of Lords, confirming the decision of the Exchequer Chamber that had reversed a contrary decision by the Court of Exchequer, held that the contract was for the sale of a cargo and therefore the purchaser was not bound to pay.

6-019 **Seller liable for non-delivery** Neither *Couturier v Hastie* nor *Gompertz v Bartlett* was decided on the ground of mistake invalidating the contract. In each case there was what would later be termed a total failure of consideration.[85] For the purposes of the decision it did not matter whether the contract was valid or void; the purchaser could not be compelled to pay for what he had never received. It seems more likely that the court thought that the contract was valid and that the seller would have been liable, had he been sued, for damages for failure to deliver the subject matter of the contract. Certainly this seems to have been the view of Parke B. in *Barr v Gibson*[86] the parties had bought and sold a ship that, unknown to either of them, had already become stranded on rocks in the Gulf of St Lawrence. Parke B. said that the sale as a "ship" implied a contract that the subject of the transfer did exist in the character of a ship. In *Couturier v Hastie* in the Court of Exchequer, he said that where there is a sale of a specific chattel, there is an implied undertaking that it exists.[87]

6-020 **Kennedy's case** In *Kennedy v Panama, New Zealand and Australian Royal Mail Co*[88] the prospectus of a company offering shares stated that fresh capital was required in order to fulfil a lucrative mail contract with the Postmaster of New Zealand. The contract proved to be beyond the Postmaster's authority to make and the plaintiff, who had purchased shares in reliance on the prospectus, claimed to repudiate the transaction on the ground that there had been a total failure of consideration. The Court of Queen's Bench refused to allow him to do so. In deciding whether or not that had been a total failure of consideration so as to entitle the buyer to get his money back, Blackburn J. referred to the Roman law on mistake

84 (1856) 5 H.L.C. 673, HL; (1853) 9 Ex. 102 (Ex.Ch.); (1852) 8 Ex. 40.
85 In *Gompertz v Bartlett* (1853) 2 El. & Bl. 849, 854, 118 E.R. 985, 987 Lord Campbell C.J. said that the money paid for the bill could be recovered as it was paid in mistake of the facts. See Lord Atkin's comment in *Bell v Lever Bros* [1932] A.C. 161, 222, on *Gompertz v Bartlett* and *Gurney v Wormesley* (1854) 4 El. & Bl. 133: "In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration".
86 (1838) 3 M. & W. 390; 150 E.R. 1196.
87 8 Ex. 40, 55; 155 E.R. 1250, 1257.
88 (1867) L.R. 2 Q.B. 580.

and its distinction between mistakes as to substance, which in Roman law would invalidate the contract,[89] and mistakes as to quality, which would not; and held that as the misunderstanding about the shares went only to quality, there was no total failure of consideration. It is easy to see how this might be interpreted as saying that a mistake as to substance might make the contract void in English law. It is not clear that this was what was meant[90]; and in any event, the fact that a mistake has led to there being a total failure of consideration cannot lead straight to the conclusion that the contract is void, since it might be that the seller is liable for non-performance. In other words, total failure is not an independent ground on which a contract may be held void: rather, it is a possible basis for an action for the recovery of money when the contract is void.[91] There will equally be a total failure of consideration when one party has simply failed to perform.[92] Even in cases in which at the time of sale the goods might have been said no longer to exist[93] (when in Roman law there could be no contract for want of an object[94]), in English law there might be an implied promise that the thing existed, so that the seller would be liable for failing to deliver.

6-021 **Development of an independent doctrine of common mistake** The cases of total failure of consideration seem to have played a central role in the development of a doctrine of mistake in English law, but one that involved their being given a rather different interpretation. The great work of Pothier was very influential.[95] His statement, derived from the Roman law, that if there was no object (because, for example, the thing sold had ceased to exist before the contract was made) there could be no contract of sale, was cited by counsel for the seller[96] in *Couturier v Hastie*[97] and may have formed the basis for s.6 of the Sale of Goods Act 1893.[98] This stated:

[89] Lawson (1936) 52 L.Q.R. 79 argued that the Roman texts were not wholly clear on the effect of such a mistake. If the thing did not exist at all, there would be no object and therefore no contract; that did not depend on a doctrine of mistake but on the lack of an object.

[90] In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [59] the Court of Appeal agreed with this comment.

[91] Although when a contract is void for common mistake either party will be able to obtain restitution (see, e.g. Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.22-013), there is some uncertainty as to the basis of the restitutionary remedy. One possibility is that restitution is permitted simply because the contract is void: Treitel at paras 22-014—22-015. When a contract is void for mistake there will usually be a total failure of consideration, as was held to be the case in *Strickland v Turner* (1852) 7 Ex. 208, but it has been argued that this does not necessarily follow from the fact that the contract is void, as it might nonetheless have been completely executed: Burrows, *Law of Restitution*, 3rd edn (2011), p.386. But even in such a case it seems that either party would be able to recover on the basis that he had performed under a mistake: see Treitel at para.22-016. Mistake appears to have been the basis of recovery in *Pritchard v Merchant's and Tradesman's Mutual Life Assurance Society* (1858) 3 C.B.(N.S.) 622, 645. See Burrows at pp.387–388.

[92] See below, paras 29-057 et seq., which follows modern terminology by referring to "failure of basis" rather than the traditional "failure of consideration".

[93] As in *Barr v Gibson* (1838) 3 M. & W. 390, 150 E.R. 1196.

[94] See Lawson (1936) 52 L.Q.R. 79, noted above.

[95] See Simpson (1975) 91 L.Q.R. 247, 266–269.

[96] Who argued that this was not a case of a sale of something that had ceased to exist but a sale of an expectation. Counsel for the defendant was not called upon.

[97] (1856) 5 H.L.C. 673.

[98] See now Sale of Goods Act 1979 s.6, which is identical.

> "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void."

The draftsman stated that the rule might be based on mutual mistake or impossibility of performance, and cited *Couturier v Hastie*.[99]

6-022 The notion that a contract might be void for mistake may also have been influenced by the development of the idea that a contract depends upon agreement. It has been said that with the emergence of the theory of *consensus ad idem*, "it became possible to treat misrepresentation, undue influence and mistake as factors vitiating consent".[100] At any event, in the early years of the last century there were a few cases in which contracts entered on the basis of a common mistake were held to be void.[101]

6-023 **Express or implied condition** Meanwhile situations of "common mistake" were also sometimes approached on the basis of that the contract might be subject to a condition that the facts were as the parties believed them to be, just as "frustration" cases were explained on the basis that there was an implied condition that the facts would remain as they were. The foundations of the doctrine of frustration were laid in 1863 in the judgment of Blackburn J. in *Taylor v Caldwell*.[102] In that case the subject-matter of the contract had been destroyed by fire after the contract had been made and before the date for its performance. The Court of Queen's Bench held that performance of the contract was excused by reason of an implied term:

> "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[103]

The same approach was applied when subsequent events made the contract a completely different venture from that which the parties had contemplated.[104] The courts would later abandon the notion that the doctrine of frustration rests on an implied term.[105] Though in 1916 Earl Loreburn was still basing frustration on an implied condition of the contract,[106] in the "coronation cases" that arose out of the sudden cancellation of the coronation of King Edward VII[107] the question was said to be whether the parties must have contemplated a particular state of affairs as forming the foundation of the contract. If, because of some event for which neither party was responsible, the contract becomes impossible because the state of things

[99] See Chalmers, *The Sale of Goods Act 1893* (1894), p.17, cited in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [52].

[100] Steyn J. in *Associated Japanese Bank International Ltd v Credit du Nord SA* [1989] 1 W.L.R. 255, 264.

[101] *Scott v Coulson* [1903] 2 Ch. 249 (contract for sale of life assurance policy when person whose life was assured was already dead. Vaughan Williams L.J. at p.252, said the contract was void at law); *Galloway v Galloway* (1914) 30 T.L.R. 531 (separation deed between parties who incorrectly thought they were married held void).

[102] (1863) 3 B. & S. 826, 122 E.R. 309.

[103] (1863) 3 B. & S. 826, 833–834.

[104] *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125.

[105] See below, Ch.23.

[106] *F.A. Tamplin Steamship Co Ltd v Anglo-Mexican Products Co Ltd* [1916] 2 A.C. 397, 403–404.

[107] See below, paras 23-033—23-034.

assumed by the parties as the foundation of the contract ceases to exist, the contract will be frustrated.[108] In *Griffith v Brymer*[109] Wright J. applied the same principle to a case of common mistake, one in which the contract had been made after the announcement of the cancellation of the procession, and held that the agreement was void because it was made on a missupposition that went to the whole root of the matter. Thus common mistake cases were sometimes dealt with by analogy to frustration, which was derived originally from the notion of an implied condition.

6-024 **Cases in equity** In the eighteenth and nineteenth centuries there were many cases in the courts of equity in which it was held that relief could be given where an agreement had been made under a mistake. It is not easy to discern the basis for relief. Some cases were based on a wide notion of fraud in equity[110] which has probably not survived the decision of the House of Lords in *Derry v Peek*.[111] Others seem to have involved undue influence.[112] Yet others give no real hint of the basis of relief but their facts were similar to those involving total failure of consideration.[113] While some cases suggest that equity might grant rescission on the basis of a common mistake that was not induced by one of the parties, "no coherent equitable doctrine of mistake can be spelt from them".[114]

6-025 It appears that rescission was granted in *Cooper v Phibbs*.[115] A had agreed to take a lease of a fishery in Ireland from B, though contrary to the belief of both parties at the time A was himself tenant in tail of the fishery. The proceedings were brought in equity[116] and the House of Lords ordered that the agreement should be set aside. However the respondents had a lien on the fishery for the money they had spent on its improvement. Lord Westbury said that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as proceeding upon a common mistake.[117]

[108] See the judgments of Lord Alverstone C.J. in *Hobson v Pattenden & Co* (1903) 19 T.L.R. 186 and *Clark v Lindsay* (1903) 19 T.L.R. 202; and of Vaughan Williams L.J. in *Krell v Henry* [1903] 2 K.B. 740, 749.

[109] (1903) 19 T.L.R. 434.

[110] e.g. *Hitchcock v Giddings* (1817) 4 Price 135, 146 E.R. 418 (fraud in equity for a party to bargain and sell as if he had title to the property when he had none).

[111] (1889) 14 App. Cas. 337: below, para.7-049.

[112] e.g. *Cocking v Pratt* (1750) 1 Ves. Sen. 400, 27 E.R. 1105. On undue influence, see below, paras 8-058 et seq.

[113] e.g. *Bingham v Bingham* (1748) 1 Ves. Sen. 126, 27 E.R. 934 (purchaser bought an estate which later was found already to have belonged to him; "a plain mistake such as the court was warranted to give relief against"). In *Cochrane v Willis* (1865) L.R. 1 Ch. 58 an agreement was made on the basis that a tenant for life was alive when in fact he had died. The Court of Appeal held that it would be contrary to all the rules of equity and common law to enforce it or hold a party bound by it.

[114] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [100], quoting Goff and Jones, *Law of Restitution*, 5th edn (1998), 288 (see more recently 9th edn (2016), para.40-07). On the "mistake" cases in equity before 1875 see Macmillan, *Mistakes in Contract Law* (2010), Ch.3.

[115] (1867) L.R. 2 H.L. 149.

[116] See Matthews (1989) 105 L.Q.R. 599.

[117] See also *Earl of Beauchamp v Winn* (1873) L.R. 6 H.L. 223, 233. Lord Westbury's suggestion that the contract is merely "liable to be set aside" has been criticised in the House of Lords: see below, para.6-056.

4. Mistake at Common Law

(a) Bell v Lever Bros

6-026 **Bell v Lever Bros** The law on common mistake was extensively reviewed by the House of Lords in *Bell v Lever Brothers Ltd*.[118] There an action was brought by Lever Brothers for the recovery of money paid to the two defendants under the following circumstances. Lever Brothers had large interests in Africa and set up a subsidiary company, called the Niger Company, to control them there. The defendants were members of the board of the Niger Company and received large salaries in respect of their service agreements with Lever Brothers. One of the conditions of their service agreements was that they were not to make any private profit for themselves by doing business on their own account while serving the company. The defendants did in fact make such profits, unknown to Lever Brothers and undisclosed by the defendants. Lever Brothers, having made other arrangements for their interests in Africa, desired to terminate the service agreements with the defendants before their expiry, and accordingly entered into compensation agreements with them whereby the defendants consented to terminate their service agreements in consideration of the payment to them of large sums of money. After the money had been paid, Lever Brothers discovered the breaches of their service agreements committed by the defendants, which would have entitled the company to dismiss them summarily without notice or compensation. They therefore claimed to recover the sums which they had paid on the ground, inter alia, that they had entered into the compensation agreements under the mistaken assumption that the service contracts could only have been determined by them with the consent of the defendants.

6-027 At the trial of the action, the jury found that there was no evidence of fraud on the part of the defendants, and that when they entered into the compensation agreements they had not directed their minds to their previous breaches of duty. The case was therefore one of common (or as their Lordships described it, mutual)[119] mistake, as both parties had made the same mistaken assumption. Wright J. held that this assumption that a state of facts existed which entitled the defendants to compensation was essential to the agreement; consequently there could be no binding contract, and Lever Brothers were therefore entitled to recover the money paid. This decision was unanimously affirmed by the Court of Appeal. Scrutton and Greer L.JJ. both held that if the contract is made on the basis of a state of facts which is fundamental to the contract, and which turns out not to exist, the contract is void. Greer L.J. based this on an implied condition,[120] Scrutton L.J. on either an implied term or mutual mistake as to the assumed foundation of the contract, which he regarded as "only another way of putting the proposition".[121] In the House of Lords an appeal by the defendants was allowed by a majority of three to two. Lord Blanesburgh,[122] one of the majority, based his opinion largely on the fact that mutual

[118] [1932] A.C. 161. The background to the case and its progress through the courts are explored in MacMillan (2003) 119 L.Q.R. 625.

[119] See above, para.6-001.

[120] [1931] 1 K.B. 577, 595.

[121] [1931] 1 K.B. 577, 585.

[122] [1932] A.C. 161, 167. Lord Blanesburgh also held that the payments were irrecoverable as: (i) the defendants' service contracts were made with the Niger Company and not with the plaintiffs; and (ii) the payments were in part voluntary, since they greatly exceeded in value the unexpired portion of the service agreements.

ground, and … deliberately induced by him in the mind of the other party".[134]

6-032 **Subsequent cases** Notwithstanding the views expressed in *McRae's* case, the doctrine was applied by the Privy Council in *Sheikh Bros Ltd v Ochsner*,[135] where the parties' mistake had led them to make a contract that was impossible to perform. The case was decided under the Indian Contract Act 1872 s.20, which enacts that where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void, but the English authorities on the law of mistake were expressly cited to the Board. The contract was for the production of a stated amount of sisal on a piece of land and was held to be void when the land turned out to be incapable of producing the quantity contracted for. In *Nicholson and Venn v Smith-Marriott*[136] Hallett J. said that the buyers could have treated a contract for the sale of table linen which the parties believed to have been the property of Charles I when it was in fact Georgian as not binding on them.

6-033 **The Associated Japanese Bank case** In *Associated Japanese Bank International Ltd v Crédit du Nord SA*[137] Steyn J. gave a detailed account of the doctrine. The plaintiffs had entered a sale and lease-back agreement with B and the defendants had guaranteed the performance of B's obligations under the lease. It was then discovered that the machines purportedly sold and leased back did not exist and the arrangement was a fraud perpetrated by B. Steyn J. held that the defendants were not liable on the guarantee, which was expressly or by necessary implication subject to a condition precedent that the leases related to machines that existed.[138] He went on to say that in his view the guarantee was also void for common mistake. Steyn J. said that *Bell v Lever Bros* had decided that a mistake might render a contract void provided it rendered the subject-matter essentially different from what the parties believed to exist.[139] The doctrine was subsequently applied in a number of other cases.[140]

6-034 **The Great Peace** In *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)*[141] the principal point was the rejection of the equitable doctrine that had been developed by earlier decisions of the same court. However, the judgment contains a valuable discussion of the doctrine of mistake at common law. The Court of Appeal also were quite clear that there is a separate doctrine of common mistake, which will apply "where that which is expressly defined as the

134 (1951) 84 C.L.R. 377, 408.
135 [1957] A.C. 136.
136 See (1947) 177 L.T. 189, 192. The case was said to have been wrongly decided on this point in *Solle v Butcher* [1950] 1 K.B. 671, 692, but that case itself has been disapproved: see below, para.6-058.
137 [1989] 1 W.L.R. 255.
138 [1989] 1 W.L.R. 255, 263. On this point see below, para.6-037.
139 [1989] 1 W.L.R. 255, 266.
140 In *Re Cleveland Trust Plc* [1991] B.C.L.C. 424 the common law of mistake was applied to a bonus issue of shares which was held to be void when a subsidiary's dividend, which was to pay for the issue, was held to be ultra vires. In *Grains & Fourriers SA v Huyton* [1997] 1 Lloyd's Rep. 628 the parties believed the results in two certificates of analysis to have been transposed. An agreement to rectify them was void when it was discovered that there had been no transposition, so the rectification would produce the very result it was supposed to avoid.
141 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679; K. Low, "Coming to Terms With the Great Peace in Common Mistake", in J. Neyers, R. Bronaugh and S. Pitel (eds), *Exploring Contract Law* (2009) 319.

subject matter of a contract does not exist".[142] But as to mistakes in relation to quality of the subject matter of the contract, the Court favoured a different approach to Lord Atkin's. It preferred to approach the question of common mistake as a parallel to the doctrine of frustration. Although originally frustration was based on an implied condition, and that approach was still favoured in some twentieth-century cases,[143] it has since been rejected as unrealistic. The modern approach is to say that frustration takes place whenever a supervening event that occurs without the fault of either party and is not provided for in the contract so changes the nature of the outstanding obligations from what the parties could reasonably have contemplated that it would be unjust to hold them to the literal terms of the contract.[144] Equally the Court of Appeal were quite clear that the doctrine of common mistake is a rule of law, not based on an implied term.[145] However:

> "the implication of a term of the same nature as that which was applied under the doctrine of frustration, as it was then understood … was a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing."[146]

A mistake, including one as to some quality of the subject-matter, will render a contract void only if the non-existence of the state of affairs assumed by the parties rendered the contract or the contractual adventure impossible.[147]

Elements of common mistake According to the Court of Appeal: **6-035**

> "the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render contractual performance impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."[148]

In what follows we will discuss these elements in more detail, and consider how the doctrine may apply in particular fact situations.

(ii) Conditions for Common Mistake to Render Contract Void

Common assumption as to the existence of a state of affairs We saw earlier that mistake requires that the parties have a positive belief in something which is **6-036**

142 [2002] EWCA Civ 1407 at [55].
143 See para.23-010, below.
144 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [70], quoting *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700. See further below, para.23-013.
145 [2002] EWCA Civ 1407 at [73] and [82].
146 [2002] EWCA Civ 1407 at [61].
147 [2002] EWCA Civ 1407 at [76]. In *Chancery Client Partners Ltd v MRC 957 Ltd* [2016] EWHC 2142 (Ch), [2016] Lloyd's Rep. F.C. 578 it was held that the contract was not void for common mistake because its performance was not impossible (at [37]). See also *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) at [25(iii)].
148 [2002] EWCA Civ 1407 at [76].

not in fact true[149]; and that where the mistake is as to the nature of the subject matter or the factual circumstances, relief on the ground of mistake is possible only where the parties made the same mistake.[150] They may not have to believe precisely the same thing but they must make "substantially" the same mistake.[151]

6-037 **Risk not allocated to either party** It is evident that in order to decide whether the subject matter has turned out to be essentially different or the contractual adventure has turned out to be impossible, and therefore the contract is void for "mistake", the court must construe the contract and, in particular, consider the contractual allocation of risk. In *The Great Peace*[152] the Court of Appeal quoted Steyn J.'s words in the *Associated Japanese Bank* case:

> "Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake."[153]

In the summary of the rules of mistake from *The Great Peace* quoted above,[154] the court refers to a warranty by one party or the other that the state of affairs exists. That may be the case either because the law allocates a particular risk to one party (e.g. where the goods do not conform to the contract)[155] or because that is the correct interpretation on the facts.[156] But the Court points out that relief on the ground of mistake may also be precluded because the risk is allocated under the contract in other ways than by a warranty, for example when the correct interpretation is that the buyer takes the risk that the property sold is less valuable than the parties suppose, or that each party takes the risk that the facts will turn out to be less favourable than he hopes.[157] We will see a particular application of an allocation of the risk of this kind when we come to consider compromise agreements which turn out to have been made on a mistaken assumption about the law.[158]

6-038 **Non-existence of the state of affairs must not be attributable to the fault of either party** The most obvious meaning of this is that the contract will not be void if one party should have known the truth, since he could have prevented the parties from making the mistake they did.[159] The rule that a party who should have known the truth cannot rely on common mistake at common law was first stated by Steyn J. in the *Associated Japanese Bank* case[160]: he derived it from *McRae's* case, in which the High Court of Australia had said that a party cannot rely on a mistake consisting:

> "of a belief which is entertained without any reasonable ground, and … deliberately induced by him in the mind of the other party."[161]

Steyn J. also referred to a similar requirement stated in *Solle v Butcher*,[162] one of the "equitable mistake cases which is no longer treated as good law".[163] It has been pointed out that Steyn J.'s principle goes further than what is stated in *McRae's* case, since the latter refers only to cases in which one party should have known the truth and (by a promise or representation) induced the other party to share the same mistaken belief.[164] In those circumstances the party who induced the other's belief will almost invariably have committed at least a negligent misstatement if not (as in *McRae's* case) a breach of warranty, and he should not be permitted to avoid liability by arguing that the resulting contract was void. But it is submitted that relief on the ground of mistake should be denied in at least two further cases.[165]

6-039 **One party in better position to discover the truth** The first is the situation encompassed by Steyn J.'s wider principle. If a party entered the contract relying on his own self-induced mistake rather than any misrepresentation by the other, he will only wish to argue that the contract is void for common mistake if otherwise he would bear the risk of the facts being as in truth they are. Thus in *Griffith v Brymer*,[166] had the contract not been void the hirer would have had to pay the agreed fee even though there would be no procession to watch. If he could have discovered the true situation and have prevented either party from being mistaken, it seems appropriate to place the risk on him by preventing him from arguing that the contract was void. The rule will give parties who have reasonable means to discover the truth an incentive to do so. It is submitted that Steyn J.'s wider principle should be followed.

6-040 **Misrepresentor cannot rely on common mistake** The second situation is where the party who is claiming that the contract is void induced the other party's mistake,

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149 Above, para.6-004.
150 Above, para.6-005.
151 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268.
152 [2002] EWCA Civ 1407, [2003] Q.B. 679 at [80].
153 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268.
154 See para.6-035.
155 See above, para.6-014.
156 In *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69]; *Dana Gas PJSC v Dana Gas SUKUK Ltd* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep. 177, at [66]–[78].
157 See [2002] EWCA Civ 1407 at [81], referring to the judgment of Hoffmann L.J. in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016 at 1035, that: "Such allocation of risk can come about by rules of general law applicable to contract, such as 'caveat emptor' in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser".
158 Below, para.6-053.

159 It is possible that there is an exception to this when s.6 of the Sale of Goods Act 1979 applies, since that section seems at first sight to state an absolute rule that the contract is void: but it will be submitted that this is not the correct interpretation of the section, which should be interpreted as stating the prima facie position. See below, para.6-045. In *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) the state of affairs was attributable to the claimant's fault because it resulted from the claimant's non-performance of another contract (see at [25(ii)]).
160 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268. Steyn L.J.'s dictum was applied in *National Private Air Transport Co v Kaki* [2017] EWHC 1496 (Comm) at [25(i)].
161 (1951) 84 C.L.R. 377, 408.
162 [1950] 1 K.B. 671, 693. Steyn J. also noted that the civilian doctrine of error in substantia is qualified by the principles governing culpa in contrahendo: [1989] 1 W.L.R 255, 269.
163 See below, para.6-058.
164 Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.15-22; Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.8-005.
165 The second is considered in para.6-040.
166 (1903) 19 T.L.R. 434. See above, para.6-023.

and the other party to enter the contract, by an innocent, non-negligent misrepresentation. Although the issue is unlikely to arise in practice, it is submitted that in principle the misrepresentor should not be able to raise common mistake as a defence to a claim for remedies for misrepresentation—for example, if the other party were to seek an indemnity for costs or liabilities incurred as part of the process of rescission.[167]

6-041 **Non-existence of the state of affairs must render contractual performance impossible** In *The Great Peace* the Court of Appeal appears to assume that where the subject matter of the contract does not exist, the contract will necessarily be one that cannot be performed.[168] In other cases, even if performance in a literal sense is possible, the mistake may be such that the contractual venture is impossible and the contract will again be void. Each of these propositions needs examination. We will consider first cases in which it turns out that property "sold" no longer exists, or already belongs to the buyer.[169] We will then turn to cases in which the subject matter differs in quality from what the parties believed and the Court of Appeal's preferred explanation in terms of the impossibility of the contractual venture.[170]

6-042 **Sale of thing that has ceased to exist** Lord Atkin said[171]:

> "So the agreement of A and B to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, though I know of so case where the seller has so committed himself."

Although we have seen that the nineteenth century cases of sales of a non-existent thing were unclear as to whether the contract was void or merely not enforceable by the seller,[172] there are cases that apply s.6 and hold the contract to be void.[173] There are two questions that remain unclear, however. One is posed by the fact that Lord Atkin's statement and s.6 refer strictly to those cases where the subject matter of the contract has once been in existence, but has subsequently perished before the contract is made. The question is whether the same principles apply where the subject matter of the contract has never been in existence at all. The second is whether the fact that the subject matter of the contract has perished always renders the contract void, particularly if the seller should have known the truth. These questions will be considered in the following paragraphs.

[167] See below, para.7-130.
[168] [2002] EWCA Civ 1407 at [55].
[169] Below, paras 6-042—6-047.
[170] Below, paras 6-048—6-051.
[171] *Bell v Lever Bros Ltd* [1932] A.C. 161, 217.
[172] Above, paras 6-017—6-019.
[173] e.g. *Turnbull v Rendell* (1908) 27 N.Z.L.R 1067; *Barrow, Lane & Ballard Ltd v Phillip Phillips & Co* [1929] 1 K.B. 574, in which A agreed to buy and B to sell 700 specific bags of nuts lying in a particular warehouse. Unknown to both parties, 109 bags had been stolen prior to the sale. The contract was held void. However, it should be noted that the surviving bags were delivered and paid for; the action was brought by the sellers for the price of the missing bags.

6-043 **Sale of goods that have never existed** Although such a case is outside both s.6 of the Sale of Goods Act 1979 and Lord Atkin's dictum, there seems no reason why in an appropriate case the same principle should not apply, with the result that (subject to what is said in the next paragraph) the contract will be void. Such facts did arise in the Australian case of *McRae v Commonwealth Disposals Commission*[174] though, as we have seen, the High Court held that the contract was not void for other reasons.[175]

6-044 **Seller responsible if should have known that goods have ceased to exist** Although Lord Atkin appears to refer to an absolute rule that if the subject matter has ceased to exist, the sale must be void, it is submitted that this is not the case except perhaps in cases to which s.6 of the Sale of Goods Act applies.[176] We have seen that earlier cases sometimes based the doctrine of common mistake on an implied condition, in parallel with the doctrine of frustration. This made it clear that the condition would not occur, and thus the contract would not be void, unless the mistake came about without the fault of either party. In other words, the court may refuse to imply such a condition where it would be inappropriate, and it would normally be inappropriate to do so when one of the parties should have known the true situation and therefore could have prevented the mistake.[177] Lord Atkin's acceptance of the "alternative way of formulating the effect of a mutual mistake" seems to accept that whether the contract will be nullified will depend on its construction. This is reflected also in the summary found in the judgment in *The Great Peace*.[178] If the seller should have known that the goods no longer exist, he will be treated as warranting that the goods do exist and this will exclude the doctrine of common mistake.

6-045 **Section 6 cases** Where, however, the case is one of the sale of goods which have perished before the contract was made, s.6 of the Sale of Goods Act 1979 may preclude such a result, since it provides that the contract will be void.[179] It is possible that the parties are unable to vary this rule by contrary agreement.[180] In the light of *McRae*'s case and the fact that under s.6 a seller who knows that the goods no longer exist may nonetheless commit himself to deliver, it seems unlikely that a modern court would accept that s.6 necessarily has the effect that a seller who ought to have known that the goods no longer exist will escape liability. It is submitted that even though s.6 is not expressly stated to apply only if the parties have not

[174] (1950) 84 C.L.R. 377.
[175] Above, para.6-031.
[176] On this point see below, para.6-045.
[177] cf. *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [84] ("... whether ... one or other party has taken responsibility ... is another way of asking whether one or other party has taken the risk ... and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one party or the other").
[178] See above, para.6-035.
[179] cf. Atiyah (1957) 83 L.Q.R. 340, 348; Sale of Goods Act 1979 s.55. An extensive discussion of the meaning of "perish", in the context of the New Zealand equivalent of s.7, can be found in *Oldfields Asphalts v Govedale Coolstores (1994) Ltd* [1998] 3 N.Z.L.R. 479.
[180] See Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.8-010.

in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy."[193]

There is thus some doubt whether a common mistake as to the quality of the subject matter will ever render a contract void for mistake.

6-050 **Impossibility of the contractual venture** In *The Great Peace* the Court said that the cases cited by Lord Atkin in support of his statement "form an insubstantial basis for his formulation".[194] One was *Kennedy v Panama, New Zealand and Australian Royal Mail Co*,[195] in which, as we saw earlier, it is not clear that Blackburn J. was intending to say that a mistake as to substance would make a contract void at English law. The other was *Smith v Hughes*,[196] which does not appear to be relevant.[197] However, the Court said that just as a contract may be frustrated if subsequent events make the contractual adventure impossible, so a contract may be void for common mistake if the mistake is as to:

> "the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible."[198]

Where it is possible to perform the letter of the contract but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible it is a matter of construction to decide whether this is the case.[199]

> "it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the 'contractual adventure' which go beyond the terms that are expressly spelt out, in others it will not."[200]

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193 [1932] A.C. 161, 224.

194 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [61].

195 (1867) L.R. 2 Q.B. 580.

196 (1871) L.R. 6 Q.B. 597. See above, para.3-025.

197 See *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [52]–[60].

198 [2002] EWCA Civ 1407 at [76].

199 [2002] EWCA Civ 1407 at [82].

200 [2002] EWCA Civ 1407 at [74]. Thus the test now seems to be whether performance of the contract or the contractual venture has turned out to be impossible. See also *Co-operative Bank Plc v Hayes Freehold Ltd* [2017] EWHC 1820 (Ch) at [143(iii)]. In *Dana Gas PJSC v Dan Gas Sukuk Ltd* [2017] EWHC 1896 (Comm) H.H.J. Waksman Q.C. said (at [65]) that common mistake is not confined to cases where the contract is impossible to perform, but he cited the headnote to *The Great Peace* [2003] Q.B. 679 (which speaks of the contract performance being essentially different from the performance the parties had contemplated) rather than what was said by the Court of Appeal itself (at [76], quoted in para.6-035); and in any event it seems to have been arguable in the *Dana Gas* case that the contractual venture was impossible, see at [68]. In *Dana Gas PJSC v Dana Gas SUKUK Ltd* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd's Rep. 177 at [65] Leggatt J. said that the two approaches may essentially amount to the same thing, citing dicta in *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters Subscribing under Policy No.019057/08/01* [2007] EWCA Civ 57, [2007] 1 C.L.C. 164 at [24]–[25] (on which see below, para.6-053); and see also *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97, at [65]. Earlier in his judgment in the *Dana Gas* case, Leggatt J. had appeared to rule out any doctrine based on the parties' subjective beliefs: see above, para.6-048.

What mistakes may frustrate contractual venture? Clearly a contract which turns out to be literally impossible to perform may be void for mistake, provided the other conditions set out above are met. But what other kinds of case may fall within the phrase, "frustration of the contractual venture"—or, for that matter, following Lord Atkin's formulation, make the subject matter "essentially different from the thing it was believed to be"?[201] The cases give examples: a contract for "a room with a view" when in fact there was no procession to look at[202]; a guarantee of a lease of machines when in fact no machines existed[203]; possibly the sale of a life insurance policy on someone the parties did not know was already dead.[204] Beyond this it is not easy to generalise. However it has been argued that an appropriate test for determining whether a mistake is fundamental is to ask the parties "what are you contracting about"? If they would both identify the subject matter in terms that are correct (e.g. in *Bell v Lever Bros* they would have answered, "[w]e are contracting about a service agreement") the mistake is not fundamental. If they would identify the subject matter in terms that in fact are not correct, the mistake is fundamental.[205] This argument is attractive but it presupposes that the correct test is one of the identity of the subject matter. That fits Lord Atkin's analysis[206] but not necessarily that in *The Great Peace*. In *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd*, Peter MacDonald Eggers Q.C., sitting as a deputy High Court judge, suggested that **6-051**

> "the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical."[207]

5. MISTAKES OF LAW

Mistakes as to law Until recently, it was established that, for a common mistake to be operative at common law,[208] and (when it was thought that there might be a separate equitable right to rescind)[209] in equity,[210] it must be a mistake as to fact and **6-052**

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201 See above, para.6-048.

202 *Griffiths v Brymer* (1903) 19 T.L.R. 434, above, para.6-023.

203 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, cited with apparent approval in *The Great Peace* [2002] EWCA Civ 1407 at [93].

204 *Scott v Coulson* [1903] 2 Ch. 249. In *The Great Peace* [2002] EWCA Civ 1407 the Court seems to have had some difficulty in explaining this decision but did not say it was wrong (at [87]–[88]).

205 Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.8-019.

206 But not his example of the picture thought to be an Old Master, where the parties would presumably have said they were buying and selling " a Rembrandt" rather than just "a picture": see Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.8-020.

207 [2018] EWHC 1348 (Comm), [2018] 4 W.L.R. 97 at [66]. The judge added that it is not sufficient if both parties would not have entered into the contract had they known of the true state of affairs; that is necessary but not sufficient (at [70]–[72]). On the facts the mistake was not sufficiently fundamental to render the agreements void, see at [87].

208 *Beesley v Hallwood Estates Ltd* [1960] 1 W.L.R. 549, 563, affirmed [1961] Ch. 105.

209 See above, para.6-009.

210 *Stone v Godfrey* (1854) 5 De G.M. & G. 76, 90; *Rogers v Ingham* (1876) 3 Ch. D. 351, 357; *Alcard v Walker* [1896] 2 Ch. 369, 375; *Re Diplock* [1948] Ch. 465 (affirmed sub nom. *Ministry of Health v Simpson* [1951] A.C. 251); *Whiteside v Whiteside* [1950] Ch. 65, 74; see below, para.29-044. However in *Solle v Butcher* [1950] 1 K.B. 671 the Court of Appeal assumed that no relief could be

6-056 **Previous authority on common mistake in equity**[238] We saw earlier that before *Bell v Lever Bros Ltd*[239] no coherent equitable doctrine of mistake had developed.[240] In that case Lord Atkin did not advert to a separate equitable doctrine; he approved Lord Westbury's words in *Cooper v Phibbs*[241] subject to the remark that "the agreement would appear to be void rather than voidable".[242] At least so far as common mistake is concerned, the modern equitable principle of rescission was developed by the Court of Appeal in the case of *Solle v Butcher*.[243] Drawing upon the various cases in which contracts have been set aside on the ground of mistake, together with those in which the defendant has been given the option to rescind or accept rectification,[244] the Court of Appeal enunciated a new doctrine of mistake in equity: that the courts have a discretionary jurisdiction to grant such relief as in the circumstances seems just, including setting aside the contract on terms. In that case, the defendant leased to the plaintiff a dwelling-house which both parties erroneously believed to have been so altered in structure that it had become a "new" dwelling-house and fell outside the restrictions imposed by the Rent Acts. The controlled rent of the house was £140 per annum, but the rent inserted in the lease was £250 per annum. The plaintiff claimed to recover the money overpaid, and, in his defence, the defendant counter-claimed for rescission of the lease on the ground of mutual mistake. The majority of the Court of Appeal[245] considered that there had been a mutual mistake of fact. They ordered that the lease should be rescinded, but on the terms that the plaintiff should choose whether to accept the rescission or claim a new lease at the full rent of £250 per annum. In his judgment Denning L.J. said[246]:

> "It is now clear that a contract will be set aside if the mistake of one party has been induced by the material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake … A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative or respective rights, provided that the misapprehension was fundamental, and that the party seeking to set it aside was not himself at fault."

Denning L.J said that the correct interpretation of *Bell v Lever Bros* was that:

> "if the parties have agreed in the same terms on the same subject matter, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground."[247]

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238 See Cartwright (1987) 103 L.Q.R. 594; Slade (1954) 70 L.Q.R. 385.
239 [1932] A.C. 161.
240 See above, paras 6-024—6-025.
241 (1867) L.R. 2 H.L. 149, quoted above, para.6-025.
242 [1932] A.C. 161, 218.
243 [1950] 1 K.B. 671.
244 See above, paras 3-073 et seq.
245 Denning and Bucknill L.JJ. (Jenkins L.J. dissenting).
246 [1950] 1 K.B. 671, 692.
247 [1950] 1 K.B. 671, 691. In *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255, 267 Steyn J. said that Lord Denning's "interpretation of *Bell v Lever Bros Ltd* does not do justice to the speeches of the majority".

Lord Denning M.R. (as he by then was) applied this doctrine again in the Court of Appeal case of *Magee v Pennine Insurance*.[248] In this case the court held by a majority[249] that an agreement by an insurance company to pay £385 on the occurrence of the risk insured against was invalidated because the policy was voidable, though this was only discovered later, but the second member of the majority, Fenton Atkinson L.J., did not make it clear whether he regarded the contract as void or voidable.[250] The supposed equitable rule was applied in a number of cases at first instance.[251] In *Associated Japanese Bank International Ltd v Crédit du Nord SA* Steyn J. said that he would have been prepared to set the contract aside even if he had not found it to be void at common law.[252] And in *West Sussex Properties Ltd v Chichester DC*[253] the Court of Appeal had considered itself bound by the decision, but apparently without argument because counsel had accepted that it was good law unless and until overturned by the House of Lords.[254]

6-057 **Scope of supposed equitable jurisdiction** Even if it was accepted that there was an equitable jurisdiction to set aside a contract on terms on the ground of a mutual mistake, there remained doubt about how the jurisdiction was to be exercised. First, it was suggested above that the common law doctrine will not apply if the risk is one which the contract expressly or by implication puts on one of the parties.[255] Given the general importance of upholding agreements and the agreed allocation of risk,[256] it would have been surprising if relief were given in equity in these circumstances. However, the only explicit limitation upon the equitable doctrine was that the party seeking relief should not be at fault, and it has to be said that relief was sometimes given when the normal allocation of risk would suggest that it should be denied. In *Grist v Bailey*[257] a vendor sold property subject to an existing tenancy which both parties thought was protected, when in fact both the protected tenant and her husband were dead. Although neither the vendor nor her solicitor were personally at fault, it seems more natural to put the risk of this kind of mistake occurring on the vendor; yet the contract was set aside.[258] Perhaps it was relevant

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248 [1969] 2 Q.B. 507.
249 Winn L.J. dissented on the ground that the case was indistinguishable from *Bell v Lever Bros Ltd* [1932] A.C. 161.
250 [1969] 2 Q.B. 507, 517; see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [139]–[140]. The equitable doctrine seems to have been applied by the Court of Appeal in *Nutt v Read* (2000) 32 H.L.R. 761, but "the proceedings had been beset by muddle and confusion" (see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [148]; *Islington London BC v UCKAC* [2006] EWCA Civ 340, [2006] 1 W.L.R. 1303 at [19]–[21]) and it seems that the point was not argued.
251 See *Peters v Batchelor* (1950) 100 L.J. News. 718; *Grist v Bailey* [1967] Ch. 532; *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128; *London Borough of Redbridge v Robinson Rentals* (1969) 211 E.G. 1125. (Contrast *Svanosio v McNamara* (1956) 96 C.L.R. 186; Slade (1954) 70 L.Q.R. 385, 407; Shatwell (1955) 33 Can. Bar Rev. 164; Atiyah and Bennion (1961) 24 M.L.R. 421, 439.) In *Clarion Ltd v National Provident Institution* [2000] 1 W.L.R 1888 Rimer J. held that the grounds for rescission were not made out.
252 [1989] 1 W.L.R. 255, 270. See above, para.6-033.
253 [2000] All E.R. (D) 887.
254 In the court below junior counsel had sought to challenge the correctness of *Solle v Butcher*: see *The Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [160].
255 See above, para.6-037.
256 See above, para.6-006.
257 [1967] Ch. 532.
258 In *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1035, Hoffmann L.J. suggested that this case and *Laurence v Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128 might have been

terms on either party, as the previous decisions of the Court of Appeal had done.[277] This does not prevent the court requiring a party to make payments to the other on general principles of restitution. This happened in *Cooper v Phibbs*,[278] where payments were ordered in respect of improvements.

6-061 **Refusal of specific performance** The decision in *The Great Peace* does not prevent a common mistake that is not sufficient to make the contract void being used as a defence to an action for specific performance. Specific performance is a discretionary remedy, and, in the exercise of its discretion, a court may refuse an order for specific performance on the ground of a mistake by the defendant.[279] Although the cases are nearly all ones in which the defendant unilaterally misunderstood the terms,[280] it is submitted that the same approach should apply in a case in which the contract has been made under a common mistake that was not sufficient to invalidate the contract at common law, if to enforce the contract specifically would cause particular hardship to the defendant.[281]

7. MISTAKE AND CONSTRUCTION

6-062 **Construction: an alternative route** It must now be taken as established that there is at common law a doctrine of common mistake, a rule of law distinct from any question of implying a condition on the facts of the case. However, as was suggested earlier,[282] construction of the contract, without reference to "mistake",

cases (as to which see *de Lasala v de Lasala* [1980] A.C. 546, 560 and *Thwaite v Thwaite* [1982] Fam. 1, 7–8), a judgment given or an order made by consent, being founded on the agreement of the parties, may be set aside if it was entered into under a mutual mistake of fact or in ignorance of a material fact if the mistake would justify the setting aside of an agreement on the same grounds (*Att-Gen v Tomline* (1877) 7 Ch. D. 388. See also *Hickman v Berens* [1895] 2 Ch. 638; *Allcard v Walker* [1896] 2 Ch. 369; *Wilding v Sanderson* [1897] 2 Ch. 534). In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch. 273 the mortgagees of certain factory premises allowed the defendants to sell, under a consent order, trade machinery on the premises in the belief, shared by both parties, that the machinery was affixed to the realty. It subsequently appeared that it had been unlawfully detached, and so properly belonged to the mortgagees. The order was set aside. (See also *Furnival v Bogle* (1827) 4 Russ. 142; *Wilding v Sanderson* [1897] 2 Ch. 534; *Dietz v Lennig Chemicals Ltd* [1969] 1 A.C. 170; *Walker v Lundborg* [2008] UKPC 17; *British Red Cross v Werry* [2017] EWHC 875 (Ch), [2017] W.T.L.R. 441.) But a consent order cannot be set aside on the ground of a mistake where the mistake would not suffice to impeach the agreement on which the order was based: *Purcell v F.C. Trigell Ltd* [1971] 1 Q.B. 358; cf. *Chanel Ltd v F.W. Woolworth & Co Ltd* [1981] 1 W.L.R. 485.

277 See above, para.6-056. In *The Great Peace* [2002] EWCA Civ 1407, at [161], Lord Phillips, M.R. said: "Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows".

278 (1867) L.R. 7 H.L. 149.

279 *Townshend v Stangroom* (1801) 6 Ves. Jr. 328.

280 See above, para.3-026.

281 "It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance": Brett L.J. in *Tamplin v James* (1879) 15 Ch. D. 215, 221. For a recent case, in which it appears that both parties were mistaken as to the facts, see *Heath v Heath* [2009] EWHC 1908 (Ch), [2009] 2 P. & C.R. DG21 at [26] ("specific performance is a discretionary remedy and mistake may … still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case … the mistake may also amount to, or be practically indistinguishable from, a misrepresentation").

282 Above, para.6-014.

remains an alternative route by which the courts may reach its conclusion.[283] This is likely to cause some confusion unless the courts accept that when they apply the process of construction to a case in which, factually speaking, the parties have entered the contract under a shared misapprehension as to the surrounding facts, they are normally merely applying "an alternative formulation" of the doctrine of common mistake. Normally the outcome will be the same whichever approach is applied.[284]

6-063 **Contract void as a matter of construction where no common mistake** In exceptional circumstances the outcomes may differ according to whether the case is analysed in terms of common mistake or as a matter of construction. On occasion the courts have held that a contract is ineffective because on the facts it was subject to an implied condition precedent which has failed, even though the conditions for common mistake were not met—in particular because the contract or contractual venture may not have been impossible to perform. One example is *Financings Ltd v Stimson*.[285] The defendant offered to take a car on hire-purchase, his offer acknowledging that he had examined the car and had satisfied himself that it was in good condition. Before his offer had been accepted the car was stolen and damaged. It was held that his offer was subject to the implied condition that the car remained in substantially the same condition as when he saw it, so that the offer could no longer be accepted.[286] In that case the court emphasised that the condition was as to the offer, rather than the contract once formed.[287] The same does not apply however to *Graves v Graves*.[288] In that case divorcees had agreed that the wife would rent a property from the husband; they had assumed that the wife would be eligible for housing benefit which would pay 90 per cent of the rent. It turned out that the wife was not eligible. Thomas L.J., delivering the only full judgment, referred to Steyn J.'s words in the *Associated Japanese Bank* case that one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake.[289] Following this approach, he held that it was necessary to imply a condition in the agreement that if housing benefit was not payable, the tenancy would come to an end, and it was not necessary to consider either mistake or frustration.[290]

283 See, e.g. *Associated Japanese Bank International Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255. Chandler, Deveney and Poole [2004] J.B.L. 34 argue that as the result of the abolition of the equitable jurisdiction, courts may resort more frequently to the construction technique, which may give them more flexibility.

284 e.g. in *Standard Chartered Bank v Banque Marocaine De Commerce Exterieur* [2006] EWHC 413 (Comm), [2006] All E.R. (D) 213 (Feb) the contract was held to be binding on the alternative grounds that the mistake did not make the agreement essentially different and that the risk was clearly allocated to one party. See also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch) at [68]–[69].

285 [1962] 1 W.L.R. 1184, CA.

286 See further Atiyah, *Essays in Contract* (1986), Ch.10.

287 Peel (ed.), *Treitel on The Law of Contract*, 14th edn (2015), para.2-066.

288 [2007] EWCA Civ 660, [2008] H.L.R. 10.

289 *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 268, quoted above, para.6-037.

290 [2007] EWCA Civ 660 at [38]–[42].

tions are habitually imposed and of the substance of those conditions, even if they are not referred to at the time of contracting.[58] Contracts may also be found to have been made subject to the terms of a "master agreement" even though that agreement is not referred to in the individual contracts.[59] A sequence of emails may be read together even if a later email does not expressly refer to the earlier emails.[60]

13-013 Meaning of notice It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts[61] regarding notice in such circumstances are three in number:

(1) if the person receiving the document did not know that there was writing or printing on it, he is not bound;
(2) if he knew that the writing or printing contained or referred to conditions, he is bound;
(3) if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that there was writing or printing on the document, but did not know it contained conditions, then the conditions will become the terms of the contract between them.

13-014 Reasonable sufficiency of notice It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must

58 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B. 303; *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 Lloyd's Rep. 356; *Laceys Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369, 378; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm), [2006] 2 Lloyd's Rep. 629 at [357]; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336 at [42]. cf. *Salei v Jetspread Air Services Ltd* [1977] 2 Lloyd's Rep. 57; *Pancommerce SA v Veecheema BV* [1982] 2 Lloyd's Rep. 304, 305; *Neptune Orient Lines Ltd v J.V.C. (UK) Ltd* [1983] 2 Lloyd's Rep. 438; *Shipbuilders Ltd v Benson* [1992] 3 N.Z.L.R. 349; *Grogan v Robin Meredith Plant Hire* (1996) 15 Tr. L.R. 371. See also *Matrix Europe Ltd v Uniserve Holdings Ltd* [2008] EWHC 11 (QB), [2008] 1 C.L.C. 205 (BIFA terms applied even to unintentional delivery of goods).

59 *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 Q.B. 711. But cf. *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm), [2013] 2 Lloyd's Rep. 213.

60 *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT* [2011] EWHC 56 (Comm), [2011] 2 All E.R. (Comm) 95, [2012] EWCA Civ 265, [2012] 1 W.L.R. 3674.

61 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 421, 423; *Richardson, Spence & Co v Rowntree* [1894] A.C. 217; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125; *Burnett v Westminster Bank* [1966] 1 Q.B. 742; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] B.L.R. 135; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [56]. See Clarke [1976] C.L.J. 51. However, the court may be slower to incorporate a term into a contract where that term is to be found in a contract between two other parties or between one of the contracting parties and a third party: *Barrier Ltd v Redhall Marine Ltd* [2016] EWHC 381 (QB); *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661; *TTMI SARL v Statoil ASA* [2011] EWHC 1150 (Comm), [2011] 2 Lloyd's Rep 220.

look at all the circumstances and the situation of the parties.[62] But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient.[63] Cases in which the notice has been held to be insufficient have been those where the conditions were printed on the back of the document, without any reference, or any adequate reference, on its face, such as, "[f]or conditions, see back",[64] where, on documents sent by fax, reference was made to conditions stated on the back, but those conditions were not in fact stated on the back or otherwise communicated,[65] or where the conditions were obliterated by a printed stamp.[66] In many situations, however, the tender of printed conditions will in itself be sufficient.[67] It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given.[68] Reference to standard terms to be found on a website may be sufficient to incorporate the terms on the website into the contract.[69]

13-015 Onerous or unusual terms Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention.[70] "Some clauses which I have seen," said Denning L.J.[71]:

62 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416; *Richardson, Spence & Co v Rowntree* [1894] A.C. 217; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837, 844, 847.

63 *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41.

64 *Henderson v Stevenson* (1875) L.R. 2 H.L.(Sc.) 470; *Sugar v L.M. & S. Ry* [1941] 1 All E.R. 172; *White v Blackmore* [1972] 2 Q.B. 651, 664. cf. *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336.

65 *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep. 388; *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC), [2015] B.L.R. 336.

66 *Richardson, Spence & Co v Rowntree* [1894] A.C. 217. On small and illegible print, see *Paterson Zochonis & Co Ltd v Elder, Dempster & Co Ltd* [1923] 1 K.B. 420, 441. cf. *P.S. Chellaram & Co Ltd v China Ocean Shipping Co* [1991] 1 Lloyd's Rep. 493, 519.

67 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416; *Hood v Anchor Line (Henderson Bros) Ltd* [1918] A.C. 837; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep. 450; *Budd v P. & O. Steam Navigation Co* [1969] 2 Lloyd's Rep. 262; cf. *Union Steamships v Barnes* (1956) 5 D.L.R. (2d) 535.

68 *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep. 427; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 613; *Crédit Suisse Financial Products v Société Generale d'Enterprises* (1996) 5 Bank. L.R. 220, *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446; *O'Brien v MGN Ltd* [2001] EWCA Civ 1279, [2002] C.L.C. 33; *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 2 Lloyd's Rep. 87.

69 *Impala Warehousing and Logistics (Shanghai) Co Ltd v Wanxiang Resources (Singapore) Pte Ltd* [2015] EWHC 25 (Comm) at [16].

70 *Parker v South Eastern Ry* (1877) 2 C.P.D. 416, 428; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep. 70; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] Q.B. 433; *Dillon v Baltic Shipping Co* [1991] 2 Lloyd's Rep. 155; *A.E.G. (UK) Ltd v Logic Resource Ltd* [1996] C.L.C. 265; *Laceys Footwear v Bowler International Freight (Wholesale) Ltd* [1997] 2 Lloyd's Rep. 369, 384–385; *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 Lloyd's Rep. 446, 451, *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767; *Kaye v NuSkin UK Ltd* [2009] EWHC 3509 (Ch), [2011] 1 Lloyd's Rep. 40. For the suggested extension of this principle to signed documents, see *Jaques v Lloyd D George & Partners Ltd* [1968] 1 W.L.R. 625, 630; *Tilden Rent-a-Car Co v Clendenning* (1978) 83 D.L.R. (3d) 400; *Ocean Chemical Transport Inc v Exnor Craggs*

"... would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient."

13-016 **Personal disability** It is immaterial that the party receiving the document is under some personal, but non-legal, disability, such as blindness, illiteracy, or an inability to read our language.[72] Provided the notice is reasonably sufficient for the class of persons to which the party belongs (e.g. passengers on a ship or railway) he will be bound by the conditions.

13-017 **Printed notices** Where printed notices are exhibited, it may be sufficient if the party to be bound has, before or at the time of making the contract, had his attention drawn to the notices,[73] or received a printed document which refers him to the notices,[74] in circumstances which make it clear to him that the contract is subject to the conditions contained in the notices.[75] The reference may be circuitous provided it is clear.[76] It has, however, been stated by Denning L.J. that:

"The party who is liable at law cannot escape liability by simply putting up a printed notice, or issuing a printed catalogue, containing exempting conditions. He must go further and show affirmatively that it is a contractual document and accepted as such by the party affected."[77]

In many situations it will nevertheless be sufficient to display a prominent public notice which can be plainly seen at the time of making the contract.[78] But the issue of a catalogue or brochure which states that the contract to be concluded will be subject to exempting conditions may not be sufficient to make the conditions terms

Ltd [2000] 1 Lloyd's Rep. 446, 454; *Montgomery Litho Ltd v Maxwell*, 2000 S.C. 56; *Amiri Flight Authority v BAE Systems Plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767 at [14]–[16]; *Cie World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB) at [52]–[58]; Macdonald [1999] C.L.J. 413, 422; above, para.13-002 n.5. Contrast *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep. 570, 612; *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep. 161 at [209]; *Do-Buy 95 Ltd v National Westminster Bank Plc* [2010] EWHC 2862 (QB) at [91]; cf. also *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148, [2008] 1 Lloyd's Rep. 40; *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC) [2007] B.L.R. 135; *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 Lloyd's Rep. 31; *Photolibrary Group Ltd v Burda Senator Verlag GmbH* [2008] EWHC 1343 (QB), [2008] 2 All E.R. (Comm) 881; *Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL* [2010] EWHC 29 (Comm), [2010] 1 Lloyd's Rep. 661; *Allen Fabrications Ltd v ASD Ltd* [2012] EWHC 2213 (TCC) at [57]–[64] (terms not onerous or unusual); *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA 1371 at [46]

71 *J. Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 466.

72 *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41; cf. *Firchuk and Firchuk v Waterfront Cartage Division, etc., Ltd* [1969] 2 Lloyd's Rep. 533, 534. Quaere if the disability is known to the other contracting party: see *Geier v Kujawa Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep. 364.

73 *Birch v Thomas* [1972] 1 W.L.R. 294.

74 *Watkins v Rymill* (1883) 10 Q.B.D. 178.

75 cf. *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep. 70.

76 *Wyndham Rather Ltd v Eagle Star and British Dominions Insurance Co Ltd* (1925) 21 Ll.L. Rep. 214; *Thompson v L.M. & S. Ry* [1930] 1 K.B. 41; *Goodyear Tyre & Rubber Co v Lancashire Batteries* [1958] 1 W.L.R. 857.

77 *Harling v Eddy* [1951] 2 K.B. 739, 748. See also *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532, 549; *Adams (Durham) Ltd v Trust Houses Ltd* [1960] 1 Lloyd's Rep. 380; *Mendelssohn v Normand Ltd* [1970] 1 Q.B. 177, 182.

78 *Olley v Marlborough Court Ltd* [1949] 1 K.B. 532, 549; *Ashdown v Samuel Williams & Sons Ltd* [1957] 1 Q.B. 409; *Thornton v Shoe Lane Parking Ltd* [1970] 1 Q.B. 177; *White v Blackmore* [1972] 2 Q.B. 651. Contrast *McCutcheon v David Macbrayne Ltd* [1964] 1 W.L.R. 125; *Smith v Taylor* [1966] 2 Lloyd's Rep. 231; *Burnett v British Waterways Board* [1973] 1 W.L.R. 700.

of the contract if further steps to incorporate the conditions are not taken at the time the contract is concluded.[79]

13-018 **Statute** Certain additional requirements of form have been imposed by statute on some classes of contract; for example, by the Carriers Act 1830 s.4, common carriers cannot limit their liability by publication of notices alone, but only by special contract.[80]

2. CLASSIFICATION OF TERMS

13-019 **Conditions and warranties** Once it has been established that a certain stipulation is indeed a term of the contract, the question arises as to its comparative importance and effect. Traditionally, in English law, the terms of a contract have been classified as being either *conditions* or *warranties*, the difference between them being that any breach of a condition entitles the innocent party, if he so chooses, to treat himself as discharged from further performance under the contract,[81] and in any event to claim damages for loss sustained by the breach. A breach of warranty, on the other hand, does not entitle him to treat himself as discharged, but to claim damages only.

13-020 **Intermediate terms** The dichotomy between conditions and warranties is not, however, exhaustive. The "more modern doctrine"[82] is that there exists a third category of "intermediate" (or "innominate") terms, the failure to perform which may or may not entitle the innocent party to treat himself as discharged, depending on the nature and consequences of the breach.[83]

13-021 **Fundamental terms** There was at one time some support for the view that, in addition to conditions, warranties and intermediate terms, the law recognises yet a fourth category of term, the "fundamental term".[84] The fundamental term has been described as part of the "core" of the contract,[85] the non-performance of which destroys the very substance of the agreement. It has been distinguished by Devlin J.[86] as being "something narrower than a condition of the contract" and as:

"... something which underlies the whole contract so that, if it is not complied with, the performance becomes totally different from that which the contract contemplates."

Examples usually cited are those where a seller delivers goods wholly different from the agreed contract goods or delivers goods which are so seriously defective as to render them in substance not the goods contracted for: e.g. the delivery of beans instead of peas,[87] of pinewood logs instead of mahogany logs,[88] or of a vehicle

79 *Hollingworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep. 70.

80 See Vol.II, para.36-025. But the common carrier is now virtually extinct.

81 See below, para.24-040.

82 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 998.

83 See below, para.13-034.

84 See below, paras 15-023, 15-027. See also Guest (1961) 77 L.Q.R. 98, 327; Montrose [1964] C.L.J. 60, 254; Reynolds (1963) 79 L.Q.R. 534; Lord Devlin [1966] C.L.J. 192; Jenkins [1969] C.L.J. 251.

85 *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189, 192.

86 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co* [1953] 1 W.L.R. 1468, 1470.

87 *Chanter v Hopkins* (1838) 4 M. & W. 399, 404.

88 *Smeaton Hanscomb & Co Ltd v Sassoon I. Setty Son & Co* [1953] 1 W.L.R. 1468, 1470.

which is incapable or barely capable of self-propulsion instead of a motor car.[89] In each case, so it is said, there is a breach of the fundamental term, that is to say, of the "core" obligation to deliver the essential goods which are the subject matter of the contract of sale.

13-022 The concept of the fundamental term has most often been employed in relation to exemption clauses. At one time it was asserted that, even though liability for a breach of condition might be excluded by an appropriately drafted exemption clause, no such clause could exonerate a party from failure to perform the fundamental term of an agreement. The House of Lords, however, has since held that there is no rule of law that an exemption clause is inapplicable in the case of a "fundamental" or "total" breach.[90] The question is now whether the clause, on its true construction, applies to the breach which has occurred. No doubt, as a matter of construction, a court will be reluctant to ascribe to an exemption clause so wide an ambit as in effect to deprive one party's stipulations of all contractual force.[91] But, for the purpose of ascertaining the intention of the parties in this respect, it seems unnecessary to predicate the existence of a fundamental term, i.e. in considering whether an exemption clause covers the delivery of beans instead of peas, to say that the contract contains a "fundamental term" to deliver peas. There may also be difficulties in identifying the "core" of the particular contract: Is it to supply "peas" or "leguminous vegetables" or "agricultural produce"?[92] The quest for the fundamental term may well deflect the court from its proper task of ascertaining the true construction of the exemption clause into a barren enquiry as to whether the essential object of the contract has not been fulfilled at all or whether it has been fulfilled, but not in a way that the contract requires.

13-023 Whether any further consequences follow from the categorisation of a particular contractual obligation as a fundamental term is even more doubtful. It is possible to contend that s.11(4) of the Sale of Goods Act 1979,[93] which in certain circumstances precludes a buyer who has accepted the goods from subsequently rejecting them and treating the contract as repudiated, does not apply to the breach of a fundamental term.[94] This seems to be only an ex-post facto rationalisation of an independent principle (if such exists) that, for the purposes of s.35 of the 1979 Act, a buyer will not be deemed to have accepted goods that are wholly different from those agreed to be sold. It is also possible to assert that the breach of a fundamental term gives rise, not merely to a claim for damages, but to recover all money paid as upon a consideration which has totally failed.[95] But it seems better to regard the question whether or not there has been a total failure of considera-

[89] *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 17; *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508; *Farnworth Finance Facilities Ltd v Attryde* [1970] 1 W.L.R. 1053.

[90] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 W.L.R. 964, 971; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; see below, para.15-023.

[91] *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 432. See also *Tor Line AB v Alltrans Group of Canada Ltd* [1984] 1 W.L.R. 48, 58–59. See below, para.15-010.

[92] See, e.g. *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 W.L.R. 964; Lord Devlin [1966] C.L.J. 192, 212.

[93] Formerly s.11(1)(c) of the Sale of Goods Act 1893.

[94] See Vol.II, para.44-068.

[95] *Rowland v Divall* [1923] 2 K.B. 500; *Karflex Ltd v Poole* [1933] 2 K.B. 251; *Warman v Southern Counties Car Finance Corp Ltd* [1949] 2 K.B. 576; *Butterworth v Kingsway Motors Ltd* [1954] 1 W.L.R. 1286; *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 936. See also *Hain S.S. Co v Tate &*

tion as dependent upon the facts of the case, "fundamental term".

In conclusion it is submitted that it is neither yet a fourth category of contractual term—the "fu conditions, warranties and intermediate terms *d'Armement Maritime SA v NV Rotterdamsche K* defined the expression "fundamental term" in langua he regarded it as an alternative way of referring to went to the root of the contract so that any breach of to be discharged. There is therefore strong ground for t not recognise any category of "fundamental terms" dis

w.[230] The precedent is generally low. plied to the used by the parties the need for c proper appr and the the provi-

(a) Conditions

Differing terminology The word "condition" is some used, even in legal documents, to mean simply "a stipulation, a provision" and not to connote a condition in the technical sense of that word.[97] Even within the sphere of the technical meaning attached to the word "condition", the terminology employed is, unfortunately, not uniform.[98] There may, for example, be conditions, the failure of which gives no right of action, but which merely suspends the rights and obligations of the parties.[99] The most commonly used sense of the word "condition" is that of an essential stipulation of the contract which one party guarantees is true or promises will be fulfilled. Any breach of such a stipulation entitles the innocent party, if he so chooses, to treat himself as discharged from further performance of the contract, and notwithstanding that he has suffered no prejudice by the breach. He can also claim damages for any loss suffered. **13-025**

Conditions and other contract terms The use of the word "condition" in this sense appears to have originated in the seventeenth century[100]: a stipulation might be regarded as so vital to the contract that its complete and exact performance by one party was a condition precedent to the obligation of the other party to perform his part.[101] In the modern law, the reason why a breach of a condition entitles the innocent party to treat himself as discharged has been said to be that conditions: **13-026**

> "... go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all."[102]

And the reason why *any* breach of a condition has this effect has been put on the

Lyle Ltd (1936) 41 Com. Cas. 350, 368, 369, and Vol.II, paras 39-388, 44-081, 44-127.

[96] [1967] 1 A.C. 361, 422; see below, para.15-024.

[97] *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235; cf. *Skips A/S Nordheim v Syrian Petroleum Ltd* [1984] Q.B. 599.

[98] See Stoljar (1953) 69 L.Q.R. 485.

[99] See below, para.13-027.

[100] See *Pordage v Cole* (1669) 1 Saund. 319; *Kingston v Preston* (1773) 2 Doug. 689, 691; *Boone v Eyre* (1777) 1 H. Bl. 273n; *Cutter v Powell* (1795) 6 Term.R. 320; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, 65; *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 57, 72. See also Chalmers, *Sale of Goods*, 2nd edn, p.164; Dawson [1981] C.L.J. 83, 87; and below, para.24-039.

[101] See also Marine Insurance Act 1906 ss.33–41; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233.

[102] *Wallis, Son & Wells v Pratt & Haynes* [1910] 2 K.B. 1003, 1012, per Fletcher Moulton J.

ground that the parties are to be regarded as having agreed that any failure of performance, irrespective of the gravity of the event that has in fact resulted from the breach, should entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.[103] The parties may, by express words[104] or by implication of law,[105] agree that a particular stipulation is to be a condition of their contract. They may agree to classify as a condition a term which would not otherwise amount to a condition under the general law[106] but, in order to do so, they should use "clear words".[107] The parties may also be held to have created a condition by necessary implication arising from the nature, purpose and circumstances of the contract,[108] and in this respect:

> "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability."[109]

13-027 Promissory and contingent conditions A condition in the sense mentioned above may conveniently be termed a "promissory" condition, being a promise or assurance for the non-performance of which a right of action accrues to the innocent party.[110] This sense must be carefully distinguished from that of a "contingent" condition, i.e. a provision that on the happening of some uncertain event an obligation shall come into force, or that an obligation shall not come into force until such an event happens.[111] In this latter case, the non-fulfilment of the

(dissenting): approved [1911] A.C. 394; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1973] A.C. 235, 264, 272; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 282.

103 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849. See also *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277.

104 *Dawsons Ltd v Bonnin* [1922] 2 A.C. 413; *Lombard North Central Plc v Butterworth* [1987] Q.B. 527. But the terminology used may not be decisive: Sale of Goods Act 1979 s.11(3).

105 e.g. Sale of Goods Act 1979 ss.11(3), 12(5A), 13(1A), 14(6), 15(3). These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015.

106 *Lombard North Central Plc v Butterworth* [1987] Q.B. 527, 535.

107 *Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048, [2014] 2 C.L.C. 61 at [37], where it was noted that the decision of the House of Lords in *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235 represented the "high-water mark" of the reluctance of the courts to classify a term as a condition. Where the contract uses the term "condition" once and provides that "It is a condition of the agreement …" that should generally suffice to constitute the term a condition: *Personal Touch Financial Services Ltd v Simplysure Ltd* [2016] EWCA Civ 461, [2016] Bus. L.R. 1049 at [28].

108 *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711. See also the cases cited in para.13-037 below (mercantile contracts).

109 *Bentsen v Taylor, Sons & Co* [1893] 2 Q.B. 274, 281. See also *Glaholm v Hays* (1841) 2 Man. & G. 257, 266; *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 K.B. 868, 898; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26, 60; *Astley Industrial Trust Ltd v Grimley* [1963] 1 W.L.R. 584, 590; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 719, 725; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 282; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1347; *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465, 1475–1476; Sale of Goods Act 1979 ss.11(3), 61(1).

110 Stoljar (1953) 69 L.Q.R. 485.

111 *London Passenger Transport Board v Moscrop* [1942] A.C. 332, 341; *Panoutsos v Raymond Hadley*

condition gives no right of action for breach[112]; it simply suspends the obligations of one or both parties.[113] In *Trans Trust S.P.R.L. v Danubian Trading Co Ltd*,[114] Denning L.J. considered a condition in a contract for the sale of goods whereby the buyer was to open a confirmed credit in favour of the seller, and said:

> "What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a credit' is rather like a stipulation 'subject to contract.' If no credit is provided, there is no contract between the parties.[115] In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of the contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."

The first of these instances provided by Denning L.J. is that of a contingent, and the second of a promissory, condition.

Conditions precedent The liability of one or both of the contracting parties may become effective only if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event. In such a case the contract is said to be subject to a condition precedent.[116] The failure of a condition precedent may have one of a number of effects.[117] It may, in the first place, suspend the rights and obligations of both parties, as, for instance, where the parties enter into an agreement on the express understanding that it is not to become binding on either of them **13-028**

Corp of New York [1917] 2 K.B. 473; *Aberfoyle Plantations Ltd v Cheng* [1960] A.C. 115; *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665 (affirmed on other grounds [1991] 2 A.C. 249); *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209. In *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 W.L.R. 435, it was held that a provision for payment of a deposit on signing a memorandum of agreement was not a condition precedent (i.e. contingent condition) to the formation of the contract, but was a fundamental term (i.e. promissory condition) of a concluded contract. cf. *Haugland Tankers AS v RMK Marine Gemi Yapin Sanayii ve Dentz Tasimaciligi Isletmesi AS* [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573 (payment of commitment fee condition precedent to exercise of option).

112 Unless one party himself deliberately procures the non-fulfilment of the condition in certain circumstances: see below, para.14-024.

113 See below, para.13-028.

114 [1952] 2 Q.B. 297, 304.

115 The analogy is not, however, an exact one, for in the case of a stipulation "subject to contract" no contract will usually come into existence at all (see above, para.2-126) whereas in the case of a contingent condition relating to the opening of a credit a contract normally comes into existence, though certain rights and obligations of the parties are suspended until the condition is fulfilled (see below, para.13-028). cf. *UR Power GmbH v Kuok Oils and Grains Pte Ltd* [2009] EWHC 1940 (Comm), [2009] 2 Lloyd's Rep. 495 at [16].

116 For the other use of the term "condition precedent" to mean a promissory condition, see above, para.13-026, below, para.24-039.

117 See the analyses, e.g. in *Property and Bloodstock Ltd v Emerton* [1967] 2 All E.R. 839, affirmed [1968] Ch. 94; *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74, 82; *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077; *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1972] 1 W.L.R. 840, 850, 854, 859, CA; affirmed [1974] A.C. 235, 250–251, 256, HL; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418, 429.

unless the condition is fulfilled.[118] Secondly, one party may assume an immediate unilateral binding obligation, subject to a condition. From this he cannot withdraw[119]; but no bilateral contract, binding on both parties, comes into existence until the condition is fulfilled.[120] Thirdly, the parties may enter into an immediate binding contract, but subject to a condition, which suspends all or some of the obligations of one or both parties pending fulfilment of the condition.[121] These conditions precedent are, however, normally contingent and not promissory, and in such a case neither party will be liable to the other if the condition is not fulfilled.

13-029 **Concurrent conditions** The word "condition" has also been employed in the case of "concurrent conditions". Where the promises made by each party are to be fulfilled at the same time, or, at any rate, where each party's obligation is to depend on the readiness and willingness of the other to perform at that time, the promises are termed concurrent conditions. For example, in a contract of sale of goods, delivery of the goods and payment of the price are in the absence of a contrary intention concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.[122] Similarly, when freight is payable on delivery of cargo, payment of the freight and delivery of the cargo are normally concurrent conditions.[123]

13-030 **Conditions subsequent** The obligation of one or both parties may be made subject to a condition that it is to be immediately binding, but if certain facts are ascertained to exist or upon the occurrence or non-occurrence of some further event, then either the contract is to cease to bind or one or both parties are to have the right to avoid the contract or bring it to an end.[124] In such a case the contract is said to be subject to a condition subsequent. An example is provided by the case of *Head v Tattersall*[125] where A bought a horse from B which B warranted to have been hunted with the Bicester hounds. If it did not answer its description, A was to have the right to return it by a certain day. The horse did not answer its description and A accordingly returned it before the day. In the meantime, however, the horse had

[118] *Pym v Campbell* (1856) 6 E. & B. 370; *Aberfoyle Plantations Ltd v Cheng* [1960] A.C. 115; *William Cory & Son Ltd v IRC* [1965] A.C. 1088; *Haslemere Estates Ltd v Baker* [1982] 1 W.L.R. 1109.

[119] *Smith v Butler* [1900] 1 Q.B. 694.

[120] *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 W.L.R. 74; *Wood Preservation Ltd v Prior* [1969] 1 W.L.R. 1077; cf. *Eastham v Leigh, London & Provincial Properties Ltd* [1971] Ch. 871.

[121] *Worsley v Wood* (1796) 6 Term Rep. 710; *Clarke v Watson* (1865) 18 C.B.(N.S.) 278; *Re Sandwell Park Colliery Co* [1929] 1 Ch. 277; *Parway Estates Ltd v IRC* (1958) 45 T.C. 135; *Smallman v Smallman* [1972] Fam. 25; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418; *Collidge v Freeport Plc* [2008] EWCA Civ 485, [2008] I.R.L.R. 697; *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC), 131 Con. L.R. 63; cf. *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209 (contract ceases to bind). See also (insurance contracts), Vol.II, para.42-079.

[122] Sale of Goods Act 1979 s.28. See Vol.II, para.44-237 and *P T Berlian Laju Tanker TBK V Nuse Shipping Ltd* [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246 (sale of a ship).

[123] *Paynter v James* (1867) L.R. 2 C.P. 348; *Duthie v Hilton* (1868) L.R. 4 C.P. 138; *Vogeman v Bisley* (1897) 13 T.L.R. 172.

[124] *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209. Examples can also be found in the "excepted risks" clauses of charterparties (*Atlantic Maritime Co Inc v Gibbon* [1954] 1 Q.B. 88), and the power given to a landlord to re-enter in cases of breach of covenant (*Bashir v Commissioner of Lands* [1960] A.C. 44). The former are contingent conditions; the latter, promissory.

[125] (1871) L.R. 7 Ex. 7.

been injured without A's fault. It was held that the injury did not cause A to lose his right to return the horse and he could recover the purchase price paid.[126]

(b) Warranties

13-031 **Warranties** The word "warranty" has been described as "one of the most ill-used expressions in the legal dictionary".[127] In many older cases, it was used in the sense of "condition"[128] and today it is very frequently used simply in the sense of a contractual undertaking or promise. In its most technical sense, however, it is to be understood as meaning a term of the contract, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated.[129] The use of the word "warranty" in this sense is reserved for the less important terms of a contract, or those which are collateral to the main purpose of the contract,[130] the breach of which by one party does not entitle the other to treat his obligations as discharged. But the emergence of the new category of "intermediate" terms seems likely to have reduced the number of occasions when a term will be classified as a warranty in this sense almost to vanishing point,[131] save in the very exceptional circumstances where a term has been specifically so classified by statute.[132]

13-032 **"Warranty" upon election** Upon the occurrence of a breach of condition, the injured party may elect to treat the breach of condition as a breach of warranty only and not as a ground for treating the contract as repudiated[133]; or he may be compelled to do so where he goes on with the contract and takes some benefit under it.[134] In such a case he is sometimes said to sue on a "warranty ex post facto", although this expression is somewhat misleading since the breach is still that of a condition of the contract.[135]

13-033 **Collateral warranties** Undertakings may be given that are collateral to another contract.[136] They may be considered to be independent of that other contract either

[126] But Cleasby J. held ((1871) L.R. 7 Ex. 7, 13, 14) that, since the property in the horse had reverted to B, B had to bear the risk of loss which had occurred without A's fault in the meantime.

[127] *Finnegan v Allen* [1943] 1 K.B. 425, 430.

[128] *Behn v Burness* (1863) 3 B. & S. 751. In marine insurance, a promissory "warranty" is used to signify a condition precedent, the breach of which discharges the insurer from liability as from the date of breach: Marine Insurance Act 1906 ss.33–41; *Thomson v Weems* (1884) 9 App. Cas. 671, 684; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1992] 1 A.C. 233.

[129] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 70; Sale of Goods Act 1979 ss.11(3), 61(1).

[130] Sale of Goods Act 1979 s.61(1).

[131] *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273 at [33]. But see *Palmco Shipping Inc v Continental Ore Corp* [1970] 2 Lloyd's Rep. 21; *Anglia Commercial Properties v North East Essex Building Co* (1983) 266 E.G. 1096.

[132] Sale of Goods Act 1979 ss.11(3), 12(5A). See also Supply of Goods (Implied Terms) Act 1973 s.8(3). These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (applicable to contracts made on or after October 1, 2015: see below, Vol.II, para.38-465).

[133] Sale of Goods Act 1979 s.11(2).

[134] Sale of Goods Act 1979 s.11(4).

[135] *Wallis, Son & Wells v Pratt & Haynes* [1911] A.C. 394.

[136] See above, para.13-004; Wedderburn [1959] C.L.J. 58.

because they cannot fairly be regarded as having been incorporated therein,[137] or because rules of evidence hinder their incorporation,[138] or because the main contract is defective in some way[139] or is subject to certain requirements of form[140] or is made between parties other than those by or to whom the undertaking is given.[141] Such undertakings are often referred to as collateral contracts, or "collateral warranties".

(c) Intermediate Terms

13-034 **Intermediate terms** The advantage that arises from the classification of a particular term as a condition is that of certainty[142]: the party affected by the breach of such a term knows at once where he stands, i.e. that he is immediately and unequivocally entitled to treat the contract as repudiated and, for example in a contract of sale of goods, to reject the goods.[143] On the other hand, since *any* breach of a condition gives rise to this right, it may be exercised irrespective of the gravity of the breach or of the consequences resulting from the breach. The innocent party may have suffered no, or only trifling, loss or damage by reason of the breach, but is nevertheless entitled to refuse further performance of the contract.[144] The courts have therefore curtailed the right of discharge which follows from the classification of a term as a condition by the creation of another category of terms, adopting a more flexible approach to the consequences of breach and tending to encourage, rather than discourage, performance of the contract.[145] In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[146] the Court of Appeal refused to ascribe to the shipowner's obligation to deliver a seaworthy vessel the character of a condition, and Diplock L.J. said[147]:

> "There are, however, many contractual undertakings of a more complex character which cannot be categorised as being 'conditions' or 'warranties' … Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such undertaking, unless provided for expressly[148] in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking, as a 'condition' or a 'warranty.'"

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137 *Esso Petroleum Ltd v Mardon* [1976] Q.B. 801.
138 See below, para.13-108.
139 e.g. for illegality: see below, para.16-216.
140 *Record v Bell* [1991] 1 W.L.R. 853.
141 See above, para.13-007.
142 *A/S Awilco of Oslo v Fulvia Spa (The Chikuma)* [1981] 1 W.L.R. 314, 322; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 715, 718, 720, 725; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1348; *Richco International Ltd v Bunge & Co Ltd* [1991] 2 Lloyd's Rep. 93, 99.
143 Sale of Goods Act 1979 ss.11(3), 12(5A), 13(1A), 14(6), 15(3). But see the modification of remedies for breach of condition contained in s.15A of the 1979 Act; Vol.II, para.44-070. These provisions do not apply to contracts which fall within the scope of Ch.2 of Pt 1 of the Consumer Rights Act 2015 (applicable to contracts made on or after October 1, 2015: see below, Vol.II, para.38-465). In the case of the latter contracts the right to reject the goods (whether of a short term or final nature) is set out in ss.20, 22 and 24 of the Act: see further paras 38-512 et seq.
144 *Heritage Oil and Gas Ltd v Tullow Uganda Ltd* [2014] EWCA Civ 1048, [2014] 2 C.L.C. 61 at [33].
145 *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 70; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 715, 179.
146 [1962] 2 Q.B. 26.
147 [1962] 2 Q.B. 26 at 70.
148 Or impliedly: see *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711 and below, para.13-040.

The description that has been applied to such terms is that of "intermediate" or "innominate" terms.[149] Breach of such a term entitles the party not in default to treat the contract as repudiated only if the other party has thereby renounced his obligations under the contract,[150] or rendered them impossible of performance,[151] in some essential respect or if the consequences of the breach are so serious as to deprive the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract.[152] The bar which must be cleared before there is an entitlement in the innocent party to treat itself as discharged is a "high" one[153] which requires the court to engage in a fact-sensitive inquiry,[154] involves "a multifactorial assessment"[155] and the use of various "open-textured expressions".[156]

13-035 **Instances of classification** In the absence of either express classification as a condition by the parties or of a statute or binding authority classifying the disputed term as a condition, modern courts seem more inclined to classify a term as intermediate rather than as a condition: "the modern approach is that a term is innominate unless a contrary intention is made clear."[157] A term is most likely to be classified as intermediate if it is capable of being broken either in a manner that is trivial and capable of remedy by an award of damages or in a way that is so fundamental as to undermine the whole contract. Thus, for example, a shipowner's obligation in a charterparty to provide a seaworthy vessel,[158] to load containers without any stability problem[159] or to commence and carry out the voyage agreed on with reasonable despatch,[160] or a clause by which the master of the ship was to act under the charterer's orders,[161] have been classified as intermediate terms, the breach of which does not entitle discharge unless the consequences are such as to deprive the charterer of substantially the whole benefit of the contract or to frustrate the object of the charterer in chartering the ship.[162]

13-036 **Classification of terms in sale of goods contracts** The Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973 expressly define certain implied

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149 *Cehave NV v Bremer Handelsgesellschaft mbH* [1976] Q.B. 44, 60; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 113; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 714, 717, 719, 724; *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd* [1987] 1 Lloyd's Rep. 283; *Phibro Energy A.G. v Nissho Iwai Corp* [1990] 1 Lloyd's Rep. 38, 58–59; *Wuhan Ocean Economic and Technical Co-operation Co Ltd v Schiffahrts-Gesellschaft "Hansa Murcia" mbH & Co KG* [2012] EWHC 3104 (Comm), [2013] 1 Lloyd's Rep. 273 at [32]–[39].
150 See below, para.24-018.
151 See below, para.24-039.
152 See below, para.24-041.
153 *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All E.R. 377 at [48].
154 *Valilas v Januzaj* [2014] EWCA Civ 436, 154 Con. L.R. 38 at [60]; *Phones 4U Ltd (in administration) v EE Ltd* [2018] EWHC 49 (Comm), [2018] 1 Lloyd's Rep. 204 at [42].
155 [2014] EWCA Civ 436, 154 Con. L.R. 38 at [53].
156 [2014] EWCA Civ 436, 154 Con. L.R. 38 at [59].
157 *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [93].
158 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26; *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA* [1980] 1 Lloyd's Rep. 638.
159 *Compagnie Generale Maritime v Diakan Spirit SA* [1982] 2 Lloyd's Rep. 574.
160 *Freeman v Taylor* (1831) 8 Bing. 124; *Clipsham v Vertue* (1843) 5 Q.B. 265; *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643.
161 *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757.
162 *MacAndrew v Chapple* (1866) L.R. 1 C.P. 643, 648.

terms in contracts of sale of goods or hire-purchase as being "conditions" or "warranties".[163] There can be no doubt that such classification is binding. But in *Cehave NV v Bremer Handelsgesellschaft mbH*[164] it was argued that s.11(1) of the Sale of Goods Act 1893 created a statutory dichotomy which divided all terms in contracts for the sale of goods into conditions and warranties. The Court of Appeal rejected that argument and held that an express term "shipment to be made in good condition" was an intermediate term the breach of which had to be so serious as to go to the root of the contract in order to entitle the buyer to reject the goods. In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen*[165] two charterparties were entered into in similar terms for the charter of a ship "to be built by the Osaka Shipbuilding Co Ltd and known as Hull No. 354". Owing to her size, the ship was built at a new yard by Oshima Shipbuilding Co Ltd (a company in which Osaka had a 50 per cent interest) and bore the yard or hull number Oshima 004, although she was still referred to in external documents as "called Osaka 354". The charterers sought to reject the vessel on the ground that, by analogy with contracts of sale of goods, the description of the ship was a condition of the contract, any departure from which justified rejection. The House of Lords held that they were not entitled to do so. On the other hand, terms, for example, in contracts of sale of goods that the goods contracted to be sold are afloat or already shipped,[166] or on board a ship "now at Rangoon"[167] or on a ship that will sail direct to the port of destination,[168] or that they are "under deck",[169] or as to the date of shipment,[170] have been held to be part of the description of the goods, and hence conditions. Also, a stipulation as to the place of delivery in an FOB contract[171] and a stipulation "linerterms Rotterdam" in a CIF contract[172] have been held to be conditions.

13-037 Classification of time stipulations.[173] A number of cases have arisen relating to the question whether contractual stipulations as to the time of performance should

[163] See Vol.II, paras 39-382, 44-056, 44-074—44-115. The Consumer Rights Act 2015 (which applies to consumer contracts made on or after October 1, 2015: see below, Vol.II, para.38-465) does not refer to the terms to be treated as included in contracts that fall within the scope of Ch.2 of Pt 1 of the Act as conditions or warranties but rather sets out the remedies to which the consumer is entitled if his or her statutory rights under such contracts are not met in ss.19–24: see below, Vol.II, paras 38-512 et seq.

[164] [1976] Q.B. 44. See also *Tradax International SA v Goldschmidt* [1977] 2 Lloyd's Rep. 604 (provision as to impurities); *Aktion Maritime Corp of Liberia v S. Kasmas & Brothers Ltd* [1987] 1 Lloyd's Rep. 283 (condition of vessel on delivery); *Total International Ltd v Addax BV* [1996] 2 Lloyd's Rep. 333 (provision as to quality); *R G Grain Trade LLP v Feed Factors International Ltd* [2011] EWHC 1889 (Comm), [2011] 2 Lloyd's Rep. 432 (provision as to impurities). Contrast *Tradax Export SA v European Grain & Shipping Co* [1983] 2 Lloyd's Rep. 100 (fibre content included in description).

[165] [1976] 1 W.L.R. 989. See also *Sanko Steamship Co Ltd v Kano Trading Ltd* [1978] 1 Lloyd's Rep. 156.

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

[167] *Oppenheimer v Fraser* (1876) 34 L.T. 524.

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

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

[170] *Bowes v Shand* (1877) 2 App. Cas. 455.

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

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

[173] This paragraph was approved by Langley J. in *Haugland Tankers AS v RMK Marine Gemi Yapin Sanayii ve Dentz Tasimaciligi Isletmesi AS* [2005] EWHC 321 (Comm), [2005] 1 Lloyd's Rep. 573 at [31]. See also *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [130].

be construed as making time of the essence of the contract (i.e. as conditions) or as intermediate terms. At common law, stipulations as to the time of performance were normally regarded as being of the essence of a contract.[174] But in equity they were not generally so regarded,[175] in particular in relation to contracts for the sale of land, and today the equitable rule prevails.[176] The relationship between the common law and equitable rules was considered by the House of Lords in *United Scientific Holdings Ltd v Burnley BC*,[177] where it was held that the timetable specified in rent review clauses for the completion of the various steps for determining the rent payable in respect of the period following the review was not of the essence. It is, however, clear that, although stipulations as to time will not ordinarily be construed as being of the essence, they will be so construed if expressly stated to be such[178] or if the court infers from the nature of the subject matter of the contract or the surrounding circumstances that the parties intended them to have that effect.[179] In mercantile contracts, where it is of importance that the parties should know precisely what their obligations are and be able to act with confidence in the legal results of their actions, the courts will readily construe a stipulation as to time as a condition of the contract.[180] Thus stipulations, for example, as to the time within which a ship must be nominated[181] or is expected ready to load under a charterparty,[182] goods must be delivered under a contract of sale,[183] the loading port must be nominated,[184] the vessel provided,[185] notice of readiness to load must be given[186] and the goods must be ready to be delivered[187] under an FOB contract, goods must be shipped,[188] documents tendered[189] and notice of appropriation given[190] under a CIF contract, a letter of credit must be opened,[191] have been held to be conditions, entitling the innocent party in the event of default in punctual performance to treat

[174] See below, para.21-011.

[175] See below, para.21-011.

[176] Law of Property Act 1925 s.41; below, para.21-012.

[177] [1978] A.C. 904 (especially at 928); below, para.21-012.

[178] *Steadman v Drinkle* [1916] 1 A.C. 275, 279; *Financings Ltd v Baldock* [1963] 2 Q.B. 104, 120; *Bunge Corp v Tradax Export SA* [1980] 1 Lloyd's Rep. 294, 305, 307, 309, 310 (affirmed [1981] 1 W.L.R. 711); *Lombard North Central Plc v Butterworth* [1987] Q.B. 527.

[179] [1978] A.C. 904, 937, 941, 944, 950, 958; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 728–729; *Universal Bulk Carriers Ltd v André et Cie SA* [2000] 1 Lloyd's Rep. 459, 464; *B.S. & N. Ltd v Micado Shipping Ltd (The Seaflower)* [2001] 1 Lloyd's Rep. 341, 348, 350, 354; *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 (Ch).

[180] *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 716.

[181] *Greenwich Marine Inc v Federal Commerce and Navigation Co Inc* [1985] 1 Lloyd's Rep. 580.

[182] *The Mihalis Angelos* [1971] 1 Q.B. 164. See also *Behn v Burness* (1863) 3 B. & S. 751; *Compania de Naviera Nedelka SA v Tradax Internacional SA* [1974] Q.B. 264.

[183] *Hartley v Hymans* [1920] 3 K.B. 475, 484; *Scandinavian Trading Co A/B v Zodiac Petroleum SA* [1981] 1 Lloyd's Rep. 81.

[184] *Gill & Duffus SA v Société pour l'Exportation des Sucres* [1986] 1 Lloyd's Rep. 322.

[185] *Olearia Tirrena SpA v NV Algemeene Oliehandel* [1973] 2 Lloyd's Rep. 86.

[186] *Bunge Corp v Tradax Export SA* above.

[187] *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337.

[188] *Bowes v Shand* (1877) 2 App. Cas. 455.

[189] *Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep. 143; *Cerealmangimi SpA v Toepfer* [1981] 1 Lloyd's Rep. 337.

[190] *Reuter v Sala* (1879) 4 C.P.D. 239; *Bunge GmbH v Landbouwbelang G.A.* [1980] 1 Lloyd's Rep. 458. See also *Société Italo-Belge pour le Commerce et L'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn. Bhd.* [1981] 2 Lloyd's Rep. 695 (notice of shipment).

[191] *Pavia & Co SpA v Thurmann-Nielsen* [1952] 1 Lloyd's Rep. 153; *Ian Stach Ltd v Baker Bosley Ltd* [1958] 2 Q.B. 130; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep. 46; *Transpetrol Ltd v Transol Olieprodukten BV* [1989] 1 Lloyd's Rep. 309. See also *Warde v Feedex International Inc*

himself as discharged. But there is no presumption of fact or rule of law that time is of the essence in mercantile contracts[192] and a stipulation as to time in such a contract, may on its true construction, be found to be merely an intermediate term.[193]

13-038 **Effect of failure to perform on time** Where one party to a contract fails to perform an obligation by the date fixed by the contract, the other party may be entitled, in certain circumstances, immediately to serve notice that he will treat the contract as discharged if the obligation is not performed within a reasonable time as stipulated in the notice. This matter is discussed in Ch.21 (Performance) later in this work[194]; but it is to be noted that, as a general rule, where the original stipulation as to the time of performance was merely an intermediate term, failure to perform the obligation within the time limited by the notice does not, in itself, constitute a repudiation irrespective of the consequences of the breach.[195]

13-039 **Force majeure clauses** A clause in a contract of sale excusing delivery, or permitting the seller to postpone or suspend delivery upon the happening of events beyond his control (a force majeure clause)[196] may require that certain procedures are to be followed or notices given to the buyer before the seller is entitled to rely on the clause. Such measures may be a condition precedent on which the availability of the protection provided by the clause depends, or merely an intermediate term, the non-compliance with which does not necessarily deprive the seller of his right to rely on the clause.[197] The classification depends, as Lord Wilberforce said in *Bremer*

[1985] 2 Lloyd's Rep. 289 (nomination of bank). Contrast *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277 (opening of counter-trade guarantee).

192 *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711, 719; *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277; *Compagnie Commerciale Sucres et Denrees v Czarnikow Ltd* [1990] 1 W.L.R. 1337, 1347; *Phibro Energy A.G. v Nissho Iwai Corp* [1991] 1 Lloyd's Rep. 38, 45, 48; *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447 at [56].

193 See, for example, *State Trading Corp of India Ltd v M. Golodetz Ltd* [1989] 2 Lloyd's Rep. 277 (opening of counter trade guarantee); *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159 (indemnity clause); *Torvald Klaveness A/S v Arni Maritime Corp* [1994] 1 W.L.R. 1465 (charterer's re-delivery of ship); *Universal Bulk Carriers Ltd v André et Cie SA* [2000] 1 Lloyd's Rep. 459 (obligation to narrow laycan period prior to first lay day); *ERG Raffinerie Mediterranée SpA v Chevron USA Inc* [2007] EWCA Civ 494, [2007] 1 C.L.C. 807 (loading time in FOB contract); *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep. 447.

194 Below, para.21-014.

195 See *Eshun v Moorgate Mercantile Co Ltd* [1971] 1 W.L.R. 722, 726; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch. 1, 12; *Re Olympia & York Canary Wharf Ltd (No.2)* [1993] B.C.C. 159; *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 (Comm), [2006] 1 Lloyd's Rep. 599 at [131]; *Shawten Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359, [2006] B.L.R. 1; *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm), 132 Con. L.R. 177; *Samarenko v Dawn Hill House Ltd* [2011] EWCA Civ 1445, [2013] Ch. 36 at [42], [65]. But see *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EHWC 2026 (Ch), 139 Con. L.R. 23 at [201] and Stannard (2004) 120 L.Q.R. 137, 155. See below, para.21-018.

196 See below, para.15-152.

197 However, the analogy with an intermediate term may not be exact, given that it has been held that there is no rule of law according to which the consequence of a breach of a procedural requirement specified in the contract is the loss of the right to claim relief on the ground of force majeure. The inability of a party to invoke the force majeure clause in the contract arises as a consequence of the construction of the contract and would appear not to follow from the application of a rule of law: *Scottish Power UK Plc v BP Exploration Operating Co Ltd* [2015] EWHC 2658 (Comm), [2016] 1 All E.R. (Comm) 536 at [234].

Handelsgesellschaft v Vanden Avenne-Izegem PVBA[198] on "(i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general considerations of law". In that case, the House of Lords had to consider two such provisions. The first was a prohibition of export clause which required the sellers to advise the buyers "without delay" of impossibility of shipment by reason of such prohibition.[199] This was held to be an intermediate term, since it did not establish any definite time limit within which the advice was to be given.[200] The second provision, which took effect upon a number of events of force majeure, established a timetable of fixed periods within which the occurrence was to be notified, an extension of the shipping period claimed, and the buyers were to have the option of cancelling the contract. The stipulation as to time for claiming an extension was held to be a condition, punctual compliance with which was required as part of a "complete regulatory code". It was further held that a requirement of this second provision that the sellers should notify the buyers of the port or ports of loading from which it was intended to ship in consequence of the event of force majeure had to be precisely complied with.[201]

Conclusion The conclusion[202] to be drawn from these cases is that a term of a contract will be held to be a condition: **13-040**

(i) if it is expressly so provided by statute;
(ii) if it has been so categorised as the result of previous judicial decision (although it has been said that some of the decisions on this matter are excessively technical and are "open to re-examination by the House of Lords")[203];
(iii) if it is so designated in the contract[204] or if the consequences of its breach, that is, the right of the innocent party to treat himself as discharged, are provided for expressly in the contract[205]; or
(iv) if the nature of the contract or the subject matter or the circumstances of

198 [1978] 2 Lloyd's Rep. 109, 113.

199 The clause is not accurately set out in the headnote.

200 But see *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep. 1 ("shall give prompt notice to the other party" held to be a condition); [2003] EWCA Civ 617, [2003] 2 Lloyd's Rep. 645 at [34].

201 See also *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep. 416; *Berg (V.) & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep. 499; *Toepfer v Schwarze* [1980] 1 Lloyd's Rep. 385.

202 The conclusion set out in this paragraph was approved by the Court of Appeal in *B.S. & N. Ltd v Micado Shipping Ltd (The Seaflower)* [2001] 1 Lloyd's Rep. 341, 348, 350, 353.

203 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 998. The reference to the House of Lords should now be read as a reference to the Supreme Court.

204 *Bettini v Gye* (1876) 1 Q.B.D. 183, 187; *Financings Ltd v Baldock* [1963] 2 Q.B. 104, 120; *Bunge Corp v Tradax Export SA* [1980] 1 Lloyd's Rep. 294, 305, 307, 309, 310 (affirmed [1981] 1 W.L.R. 711); *Lombard North Central Plc v Butterworth* [1987] Q.B. 527; *Personal Touch Financial Services Ltd v Simplysure Ltd* [2016] EWCA Civ 46, [2016] Bus. L.R. 1049 at [28]–[31]; cf. *L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd* [1974] A.C. 235; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191.

205 *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26, 70; *United Scientific Holdings Ltd v Burnley BC* [1978] A.C. 904, 937, 941, 944, 950, 958; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep. 109, 113; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; *Bunge Corp v Tradax Export SA* [1981] 1 W.L.R. 711; *George Hunt Cranes Ltd v Scottish Boiler & General Insurance Ltd* [2001] EWCA Civ 1964, [2002] 1 All E.R. (Comm) 366. But see *Rice v Great Yarmouth BC* [2001] 3 L.G.L.R. 4, CA (right to terminate for "any" breach of contract limited to repudiatory breaches).

it is only necessary to show that the contract has been made and broken, while in C's action in tort, C must establish that there was a relationship between himself and A by virtue of which A owed him a duty of care and that C has suffered loss as a result of A's breach of that duty[158]; and that, while in contract liability for economic loss is imposed as a matter of course, in tort such liability arises only where there is an "assumption of responsibility" by the party in breach giving rise to "duties of care co-extensive with [that party's] contractual obligations".[159] Whether the party in breach has assumed such responsibility depends partly on the nature of the contract and partly on its terms. Thus such an assumption is readily inferred where the breach is committed by a person who has contracted to render professional services to a client[160]; but is unlikely to be inferred where the breach in question is one by a builder of a building contract, especially where such a contract expressly sets out the builder's warranties of quality and the client's remedies in the event of their breach and where it further contains an exclusion clause[161] which is inconsistent with the builder's alleged assumption of responsibility for economic loss suffered by the employer in consequence of the breach.

18-029 **Restrictions on scope of the duty of care** A relationship giving rise to a duty of care[162] is not established merely by showing that C has suffered foreseeable loss as a result of A's defective performance of his contract with B. In the *Junior Books* case, there were many special factors giving rise to such a relationship: A were nominated as sub-contractors by C; A were specialists in flooring and knew of C's requirements; C relied on A's special skills in laying floors; and A must have known that defects in the work could necessitate repairs and lead to C's suffering economic loss.[163] These factors (and in particular the extent of C's reliance on A's special skills) may have given rise to a "special relationship" and hence to a duty of care.[164] But such factors are unlikely to arise in the ordinary case where C suffers loss as a result of the defective performance by A of his contract with B. Accordingly, later authorities[165] have emphasised the exceptional nature of the circumstances in the *Junior Books* case. It has been said that those circumstances were "unique"[166]; that

where a period of limitation longer than that applicable to the contract claim applied (by virtue of Limitation Act 1980 s.14A) to the tort claim, which failed for the reason given at the end of this paragraph.

158 *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 A.C. 281. The question whether the claimants in that case had a claim against the defendants in contract (where proof of loss is not a requirement of a cause of action) was left open by Lords Hope (at [59]), Scott (at [74]) and Mance (at [105]). But that question could arise only where there was a contractual relationship between claimant and defendant; and the discussion in the text above is of situations in which there is *no* such relationship.

159 *Robinson v P E Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [68], [72], [83], [84].

160 *Robinson v P E Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [74], [80]; see, for example, the "disappointed beneficiaries" cases, discussed in para.18-039 below.

161 See below, para.18-032.

162 Above, para.18-024.

163 [1983] 1 A.C. 520, 546.

164 *Murphy v Brentwood DC* [1991] 1 A.C. 398, 466, 481.

165 Below, para.18-038.

166 *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, 202; cf. *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 1 All E.R. 273, 289; affirmed [1990] 1 W.L.R. 235; *Duncan Stevenson MacMillan v A.W. Knott Becker Scott Ltd* [1990] 1 Lloyd's Rep. 98; *Nitrigin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 498, 504.

the case "cannot now be regarded as a useful pointer to the development of the law"[167]; or as "laying down any principle of general application in the law of tort"[168]; that "it is really of no use as an authority on the general duty of care"[169]; and that the statement of principle in Lord Brandon's dissenting speech is to be preferred to the views of the majority.[170] The authority of the case is further undermined by the fact that the reasoning of the majority is to a considerable extent based on earlier decisions[171] which (so far as they hold defendants liable for economic loss)[172] have since been overruled by the House of Lords.[173] In consequence of these developments, the decision in the *Junior Books* case has been described as "discredited",[174] as "virtually extinguished"[175]; and "as aberrant, indeed as heretical".[176]

The duty owed by A to C in tort may also be less extensive than that owed by A **18-030** to the other contracting party. This was, for example, the position where A was employed as solicitor by B who was guarantor of C's mortgage. It was held[177] that, although A might owe a duty of care to C, this duty did not extend to requiring A to explain the implications of the mortgage to C, since the imposition of such an extensive duty might give rise to a conflict between A's duty to his own client (B) and the alleged duty to C.

Persons to whom duty is owed The law finally restricts the range of persons to **18-031** whom the duty of care may be owed. Where, for example, a valuer was requested by a borrower to address a valuation of the property on which the loan was to be secured to "the prospective lender," it was held that the valuer owed no duty to that lender's assignee.[178] Similarly, counsel who had given advice to his client in litigation has been held to owe no duty of care in respect of that advice to the other party to the litigation[179]; and a solicitor engaged by one party to a transaction will not normally owe a duty of care to the other party, since the imposition of such a duty could give rise to a conflict of interest.[180] Such a duty may, however, arise in exceptional circumstances, e.g. where, in relation to a loan to be secured on a leasehold flat, the borrower engaged the defendants as his solicitors and they knew

167 *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 784.

168 *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177 at 202.

169 *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177 at 215.

170 *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177 at 202, 215; *Department of the Environment v Thomas Bates & Son Ltd* [1989] 1 All E.R. 1075, 1084; affirmed [1991] 1 A.C. 499; *Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All E.R. 826, 829; cf. *Murphy v Brentwood DC* [1991] 1 A.C. 398, 466, 469; and, in Scotland, *Strathford East Kilbride Ltd v Film Design Ltd*, 1997 S.C.L.R. 877.

171 i.e. *Anns v Merton LBC* [1978] A.C. 728; *Dutton v Bognor Regis B. Co Ltd* [1972] 1 Q.B. 373.

172 *Stovin v Wise* [1996] A.C. 923, 949.

173 *Murphy v Brentwood DC* [1991] 1 A.C. 398. Contrast in Australia *Bryan v Maloney* (1995) 182 C.L.R. 609; in New Zealand (as accepted by the Privy Council) *Invercargill City Council v Hamlin* [1996] A.C. 624; in Canada *Winnipeg Condominium Corp v Bird Construction Co Ltd* (1995) 121 D.L.R. (4th) 193 (where the defect made the building dangerous); and in Singapore *RSP Architects Planners & Engineers v Ocean Front Ltd* (1998) 14 Const. L.J. 139.

174 *Société Commerciale de Reassurance v ERAS International Ltd* [1992] 1 Lloyd's Rep. 570, 599.

175 *Saipem SpA v Dredging VO2 BV (The Volvox Hollandia) (No.2)* [1993] 2 Lloyd's Rep. 315, 322; *Losinjska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395, 401.

176 *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [9].

177 *Woodward v Wolferstans, The Times,* April 8, 1997.

178 *Barex Brothers Ltd v Morris Dean & Co* [1999] P.N.L.R. 344.

179 *Connolly-Martin v Davis*, [1999] Lloyd's Rep. P.N. 790.

180 *Dean v Allin & Watts* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep. 249, at [33].

that the lender had not engaged and did not intend to engage his own solicitor. The defendants were held liable in tort to the lender for failing effectively to secure the loan on the flat.[181] The existence of a duty of care to a person with whom the defendant was not in any contractual relationship may also be negatived by the fact that that person has an adequate remedy in respect of the loss in question against another potential defendant.[182]

18-032 Duty restricted by terms of contracts The scope of any duty of care owed by A to C may, finally, be restricted by the terms of the contracts between A and B and between B and C. These contracts may be relevant for this purpose either in specifying exactly what it is that A is required to do, or in showing that C has assented to a term of the contract which validly excluded A's liability for defective performance.[183]

18-033 Economic loss and physical harm Except where there is a special relationship between the parties, as in the misrepresentation cases discussed in Ch.7, and in those in which the third party's claim is based on the defendant's breach of a contract, such as one to perform professional services, which involves, in addition to his obligations under that contract to the other party to it, an assumption of responsibility to a third party,[184] a claimant cannot rely on the breach of a contract to which he was not a party as giving him a cause of action in tort merely[185] because, as a result of the breach, he has suffered economic loss, that is loss not taking the form of either personal injury or of physical damage to his property.[186] The importance

[181] This was the actual result in *Dean v Allin & Watts*, above.

[182] *Briscoe v Lubrizol Ltd* [2000] I.C.R. 694; *Realstone Ltd v J & E Shepherd* [2008] CSOH 31, [2008] P.N.L.R. 21.

[183] *Junior Books* case [1983] 1 A.C. 520, 546, applied in *Southern Water Authority v Carey* [1985] 2 All E.R. 1077; doubted (though in another context) in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785, 817 (below para.18-036); see also *Pacific Associates Inc. v Baxter* [1990] 1 Q.B. 993; cf. *Norwich C.C. v Harvey* [1989] 1 All E.R. 1180, 1187; *John F. Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2007] TCLR 6; *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 (above, para.18-028), where the outcome was based in part (see at [84]) on the facts that the contract contained terms excluding the defendant building contractor's liability to his own client for economic loss and that these terms satisfied the requirement of reasonableness to which they were subject under the Unfair Contract Terms Act 1977. No third party issue arose in this case. And see above para.15-057.

[184] As, for example, in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, *White v Jones* [1995] 2 A.C. 207 and *BP Plc v Aon Ltd* [2006] EWHC 424, [2006] 1 All E.R. (Comm) 789; and see the other authorities cited in para.18-024 above; cf. *Parkinson v St James & Seacroft University NHS Trust* [2001] EWCA Civ 530, [2002] Q.B. 266; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 A.C. 309, esp. at [131]. For a possible extension of the scope of such an "assumption" beyond contracts for professional services, see below.

[185] The restrictions, discussed in this paragraph, on the recoverability of damages in tort in respect of economic loss do not apply where the claimant suffers such loss in consequence of damage caused by the defendant's tortious conduct to a profit-earning thing owned by the claimant: *Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] EWCA Civ 644, [2012] 1 All E.R. (Comm) 692.

[186] *Tate & Lyle Industries Ltd v G.L.C.* [1983] 2 A.C. 509, 530–531; cf. *London Congregational Union Inc. v Harriss* [1988] 1 All E.R. 15, 25; *Simaan General Contracting Co Ltd v Pilkington Glass Ltd (No.2)* [1988] 1 Q.B. 758, 781; *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundation Ltd* [1989] Q.B. 71, 94; *Verderame v Commercial Union Assurance Co Plc, The Times*, April 2, 1992; *Preston v Torfaen B.C.* [1993] E.G. 137 (C.S.); *Abou-Rahmah v Abacha* [2005] EWHC 2662 (QB), [2006] 1 All E.R. (Comm) 268 at [67]; affirmed [2006] EWCA Civ 1492, [2007] 1 All E.R. (Comm) 827 on other grounds, there being no appeal against the dismissal of the negligence claim: see at [7]. cf, as to the restricted scope of such a duty, *Hill Samuel Bank v Frederick*

of this point is illustrated by *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)*,[187] where the defendants had been nominated as suppliers of glass for incorporation in a building which was being erected by the claimants as main contractors for a client in Abu Dhabi. The glass had been sold by the defendants to a sub-contractor engaged by the claimants, so that there was no contract between claimants and defendants; the glass was perfectly sound but not of the colour specified in the contract of sale or in the main building contract. In consequence of this shortcoming, the claimants were not paid by their client and so suffered financial loss; but it was held that the defendants' breach of their contract with the subcontractors did not give the claimants any right of action in tort against the defendants merely because that breach had caused the claimants to suffer financial loss. Similarly, it was held in *Balsamo v Medici*[188] that a sub-agent who negligently paid over the proceeds of the sale of the principal's property to a fraudulent impostor was not liable in tort to the principal for such negligence in handling the money; nor was he liable to the principal in contract as there was no privity of contract between the sub-agent and the principal. To uphold a tort claim in such a situation would, it was said, "come perilously close to abrogating the doctrine of privity altogether".[189] A doctor employed by a company to assess replies of job applicants to medical questionnaires has likewise been held to owe no duty in tort to those applicants[190];

Broad Partnership (1994) 10 Const. L.J. 72. See also *West Bromwich Football Club v El Safty* [2006] EWCA Civ 1299, (2006) B.M.L.R. 179 at [58]–[63], [80]–[84]; *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [99] ("Even liability for causing economic loss by negligence is very limited"); *An Informer v A Chief Constable* [2012] EWCA Civ 197, [2013] Q.B. 579 at [67] (no duty of care on police authority, either in contract or in tort, to protect police informer against "pure economic loss" (at [57])). For discussion of the tests which determine whether a defendant owes a duty of care in tort not to cause economic loss to the claimant, see *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28, [2007] 1 A.C. 181 where the claimant suffered such loss because the defendant bank failed to comply with an injunction which the claimant had obtained to freeze an account held by one of the bank's customers; and it was held that the bank owed no such duty to the claimant. The case does not directly affect the discussion in this chapter since the claimant's loss did not result from any breach of the contract between the bank and its customer. In *European Gas Turbines Ltd v MSAS Cargo International Ltd* [2001] C.L.C. 880 a cargo-owner (C) recovered damages from a sub-contracting carrier (A) for purely economic loss resulting from breach of A's subcontract with the contracting carrier (B) as to the mode of carriage. There was no contract between A and C so that this conclusion is at first sight hard to reconcile with the other authorities cited in this note. The case may be explicable on the ground that C's agent had notified A of the importance to C of carriage by the stipulated mode and that A had accepted this position so as to give rise to an "assumption of responsibility" to C to observe that stipulation.

[187] [1988] 1 Q.B. 758.

[188] [1984] 1 W.L.R. 951; Whittaker (1985) 48 M.L.R. 86. It seems that on facts such as those of *Balsamo v Medici* the requirements of s.1(1), (2) and (3) of the Contracts (Rights of Third Parties) Act 1999 (below, paras 18-091—18-095) would not now be satisfied. cf. also *Michael Salliss & Co v E.C.A. Call* (1984) 4 Const. L.J. 125.

[189] [1984] 1 W.L.R. 951, 959–960. The soundness of the decisions discussed in this paragraph is not questioned in *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145, where the liability in tort of a subagent to a principal with whom he was in no contractual relationship was said at 195 to be based on the "most unusual" situation in that case. cf. *Hamble Fisheries Ltd v L. Gardner & Sons Ltd (The Rebecca Elaine)* [1999] 2 Lloyd's Rep. 1 at 8: "the dubious and lethal colonisation by the tort of negligence of the conceptual territory of contract" (engine manufacturer held not liable in negligence for purely economic loss, caused by failure of the engine, to owner of fishing boat with whom he was not in any contractual relationship); *Amiri Flight Authority v BAE Systems Ltd* [2003] 1 Lloyd's Rep. 50 at [35], varied, without reference to this point, [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep. 767.

[190] *Kapfunde v Abbey National Plc* [1998] I.R.L.R. 583 disapproving *Baker v Kaye* [1997] I.R.L.R. 219

while conversely a consultant surgeon who had given negligent advice in breach of his contract with a professional football player has been held not liable for financial loss suffered by the club which had employed the player but with which the surgeon was not in any contractual relationship.[191]

18-034 **Requirement of "proximity"** The point that is emphasised in cases such as the *Simaan* and *Balsamo* cases[192] is that the claimants in them suffered no physical harm as a result of the defendants' acts or omissions. It does not follow that the mere fact of the claimant's having suffered foreseeable harm in this way is a sufficient condition of the defendant's liability in tort. The claimant must, in addition, show that there was a relationship of "proximity" between him and the defendant, and that it is fair, just and reasonable to impose a duty of care on the defendant.[193] The last of these requirements was held not to have been satisfied in *The Nicholas H*,[194] where a ship classification society had, in breach of its contract with shipowners, advised them that their ship could proceed on her current voyage until the cargo which she was then carrying had been discharged. In the course of that voyage the ship sank, and it was held that the owners of the cargo had no cause of action in tort against the society in respect of the loss of their cargo. The main reason given by the House of Lords for this conclusion was that the shipowners were, in turn, in breach of their contract of carriage with the cargo-owners; and that it was not fair, just or reasonable to impose on the classification society a liability to the cargo-owners in tort[195] since this would not be subject to the limitations of liability available to the shipowners under international Conventions[196] which have the force of law. The effect of holding classification societies liable in tort to cargo-owners would be to

so far as it holds that a duty was owed by the doctor to the applicant.

191 *West Bromwich Albion Football Club v El Safty* [2006] EWCA Civ 1299, (2006) 92 B.M.L.R. 179.

192 *Simaan General Contracting Co Ltd v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758 and *Balsamo v Medici* [1984] 1 W.L.R. 951, see above, para.18-033.

193 For these requirements, see, inter alia, *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605, 617–618 (where it is also said at 632 that "these requirements are, at least in most cases, merely facets of the same thing"); *Murphy v Brentwood DC* [1991] 1 A.C. 398, 480, 486; *X (Minors) v Bedfordshire C.C.* [1995] 2 A.C. 633, 739.

194 *Marc Rich & Co AG v Bishop Rock Marine Co Ltd (The Nicholas H.)*, [1996] A.C. 211; see also *X (Minors) v Bedfordshire C.C.* [1995] 2 A.C. 633, 749; *Reeman v Department of Transport* [1997] 2 Lloyd's Rep. 648; *Architype Projects Ltd v Dewhurst McFarlane & Partners* [2003] EWHC 3341, [2004] P.N.L.R. 38; *R.M. Turton & Co Ltd v Kerslake & Partners* [2000] Lloyd's Rep. P.N. 967 (New Zealand CA).

195 Nor had there been an "assumption of responsibility" (above, para.18-033) since the cargo-owners were "not even aware of [the classification society's] examination of the ship:" [1996] A.C. 211, 242.

196 The Convention in question related to tonnage limitations; effect was given to this Convention by Merchant Shipping Act 1979 s.17 and Sch.4, now superseded by Merchant Shipping Act 1995 s.185 and Sch.7 Pt I. The reasoning of the House of Lords is equally applicable to the contractual limitations and exceptions which protect the carrier under the Hague-Visby Rules, which have the force of law by virtue of Carriage of Goods by Sea Act 1971 s.1(2) and Sch.: see *Marc Rich & Co v Bishop Rock Marine (The Nicholas H)* [1996] A.C. 211, 238; (and see below, footnotes to para.18-036 for the possible replacement of the Hague-Visby Rules by the Rotterdam Rules). No similar policy reasons for protecting an aircraft inspection authority from liability for personal injury to a passenger were said to exist in *Perrett v Collins* [1998] 2 Lloyd's Rep. 225; cf. *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134. Contrast *Sutradhar v Natural Environment Research Council* [2006] UKHL 33, [2006] 4 All E.R. 490 where a body which had carried out hydrogeological tests of artesian wells was held not liable to a consumer who had developed arsenical poisoning as a result of drinking water from the wells. *Perrett v Collins* (above) was distinguished at [37] on the ground that there, but not in the *Sutradhar* case, the defendants had a "measure of control" over the activity which caused the injury to persons with whom they had no contractual relationship.

deprive shipowners of the benefits of these Conventions since the societies would pass this liability on to shipowners; and this would be an undesirable conclusion,[197] particularly as loss suffered by cargo-owners in excess of the Convention limits was "readily insurable".[198]

Defects in the very thing supplied insufficient Even where A's negligence in the performance of his contract with B has resulted in damage to "property," the scope of C's tort remedy is further restricted by the fact that "property" in this context normally refers to property belonging to C *other* than the very thing supplied by A under his contract with B.[199] Thus where A sold goods to B who resold them to C, it was held that A would not be liable in tort to C merely because those goods disintegrated on account of a defect in them amounting to a breach of A's contract with B.[200] Nor, where goods are bought from a retailer, is the manufacturer liable to the buyer in tort[201] for negligence if the goods are defective and the defect is discovered before any injury, or harm to other property, has resulted. Even if the goods deteriorate by reason of the defect, the buyer's only loss is the financial or economic loss which he suffers because the defect has made them less valuable or because he discards them or incurs the cost of repairing them. Loss of this kind is not generally recoverable in tort,[202] though there may be an exception to this general rule where the defect is a source of danger in respect of which the claimant could become liable to third parties, so that money has to be spent in averting this danger.[203] The *Junior Books* case appears, indeed, to be inconsistent with the general rule; for the only "property" which could be said to have been damaged was the factory floor (which had cracked), and that damage was no more than a defect in the very thing supplied by A. The fact that A was nevertheless held liable in tort to C is now explicable (if at all) only by reference to the same special, or "unique," fac- **18-035**

197 cf. below para.18-036.

198 *The Nicholas H* [1996] A.C. 211, 242.

199 *Robinson v P.E. Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2011] B.L.R. 206 at [93] ("the crucial distinction is between a person who supplies something defective and a person who supplies something which, because of its defects, causes loss or damage to something else"); cf. *Robinson v P.E. Jones (Contractors) Ltd* at [94] and the reference at [68] to "personal injury or damage to other property"; for this case, see above, para.18-028.

200 *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1; cf. *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177, 202, 216; *Reid v Rush & Tompkins Group Plc* [1990] 1 W.L.R. 212, 224; *Warner v Basildon Development Corp* (1991) 7 Const. L.J. 146; *Holding & Management (Solitaire) Ltd v Ideal Homes Northwest Ltd* [2004] EWHC 2408, 96 Con. L.R. 114; affirmed [2005] EWCA Civ 59; cf. *Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 All E.R. (Comm) 335 at [18] (where contaminated ingredient used in manufacturing had made the finished product useless); *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC), 13 Con. L.R. 133 (building sub-contractor held to owe no duty in tort to the employer in respect of the cost of replacing corroded pipes, because damage to them was "damage to the thing itself" (at [114], [119]) supplied by the sub-contractor), followed in *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC), [2011] B.L.R. 569 (designer of houses not liable in tort for economic loss suffered by the current occupier of one of the houses as this was damage to the thing itself supplied by the designer).

201 For possible liability under a manufacturer's guarantee, see above, para.18-005.

202 *Murphy v Brentwood DC* [1991] 1 A.C. 398, 469, 475; cf. *Nitrigin Eirann Teoranta v Inco Alloys Ltd* [1992] 1 W.L.R. 498.

203 *Losinjska Plovida v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyd's Rep. 395, 402, where it was also arguable that the defective thing supplied by the defendant had caused physical harm to *other* property in which the claimant had a prior interest as lessee.

tors[204] which were there held to have given rise to the relationship of proximity in that case.

18-036 Claimant having no title to thing damaged Even where A's breach of his contract with B does result in physical damage, the mere fact that the loss so occasioned falls on C will not necessarily give C a right of action in tort against A in respect of that loss. In *The Aliakmon*[205] A, a carrier, had contracted with B for the carriage of a quantity of steel coils which B had sold to C. The goods were damaged, as a result of A's negligent breach of the contract of carriage, after the risk in them had passed to C under the contract of sale, but while B remained their owner. C had no claim under the contract of carriage as he was not a party to it[206]; and the House of Lords held that he also had no cause of action against A in tort in respect of the loss which he had suffered as a result of remaining liable for the full price of the goods in spite of the fact that they had been damaged in transit. This conclusion was based on a long line of authority[207] which had established "the principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title[208] to the property concerned at the time when the loss or damage occurred".[209] Later authorities have mitigated the rigor of this principle in two ways. First it has been held that a claim in tort could also be brought by a beneficial owner in equity of the property, so long as he joined the legal owner of it as a party to the proceedings[210]; and secondly, where the loss is caused by a continuing process it suffices for the claimant to have had title to the property when the cause of action in respect of it accrued.[211] But it is not enough for him at the relevant time "to have only had contractual rights in relation to such property".[212]

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[204] Above, para.18-029.

[205] *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785; Treitel [1986] L.M.C.L.Q. 294; Markesinis (1987) 103 L.Q.R. 354, 384–390; Tettenborn [1987] J.B.L. 12; cf. *Transcontainer Express Ltd v Custodian Security Ltd* [1988] 1 Lloyd's Rep. 128; *Mitsui & Co Ltd v Flota Mercante Grancolombiana SA (The Ciudad de Pasto)* [1988] 1 W.L.R. 1145; *Anonima Petroli Italiana S.p.A. v Marlucidez Armadora SA (The Filiatra Legacy)* [1991] 2 Lloyd's Rep. 337 at 339; *Mitsui & Co v. Novorossiysk Shipping Co (The Gudermes)* [1993] 1 Lloyd's Rep. 311 at 326; *The Hamburg Star* [1994] 1 Lloyd's Rep. 399 at 404–405; *The Seven Pioneer* [2001] 2 Lloyd's Rep. 57 (High Court of New Zealand). For a possible qualification, see *Virgo Steamship Co SA v Skaarup Shipping Corp (The Kapetan Georgis)* [1988] 1 Lloyd's Rep. 352.

[206] The benefit of the contract of carriage had not been transferred to C under Bills of Lading Act 1855 s.1 as the property in the goods had not passed to him. On the facts of *The Aliakmon* rights under the contract of carriage would now be transferred to C by virtue of the Carriage of Goods by Sea Act 1992 s.2: see *White v Jones* [1995] 2 A.C. 207, 265. But cases can still be imagined where this would not be the case: see *Carver on Bills of Lading*, 3rd edn (2011) para.5-108.

[207] Stretching from *Cattle v Stockton Waterworks Co* (1875) L.R. 10 Q.B. 453 to *Candlewood Navigation Corp v Mitsui O.S.K. Lines (The Mineral Transporter)* [1986] A.C.1.

[208] A bailor of goods has been held to have a sufficient possessory title even after the transfer by him of his contractual rights under the contract giving rise to the bailment: *East West Corp v DKBS 1912* [2003] EWCA Civ 83, [2003] 1 Lloyd's Rep 265 at [38]–[39], [49], [86]; *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 at [46].

[209] [1986] A.C. 785 at 809.

[210] *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 Q.B. 86 at [119]; the same possibility had been foreshadowed by Lord Brandon in *The Aliakmon* [1986] A.C. 785, above n.210, at 812.

[211] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2001] EWCA Civ 56, [2001] 1 Lloyd's Rep. 437, at [96] per Rix L.J., whose judgment was on this point affirmed on appeal: [2003] UKHL 12, [2004] 1 A.C. 715 at [40], [64], [90], [139].

[212] [1986] A.C. 785, 809. Griew (1986) 136 N.L.J. 1201 suggests that the principle may have been qualified by Latent Damage Act 1986 s.3; but there is no hint in the legislative history of s.3 that such a qualification was intended. It can, in any event, only apply where the damage was still latent when the claimant became owner; and this was not the position in *The Aliakmon*. The point was left open in *The Starsin*, above, [2001] EWCA Civ 56 at [119]–[128], [134], [202], [203], and not discussed in the House of Lords [2003] UKHL 12.

The House of Lords refused to create an exception to this principle where (as in *The Aliakmon*) the contractual right which C had under his contract of sale with B was one to have property and possession of the goods transferred to him at a later date. The main reason for this refusal was that the contract of carriage between A and B was expressed to be subject to an international Convention[213] which gave A (as carrier) the benefit of certain immunities from, and limitations of, liability; and to have held A liable in tort to C would have produced the undesirable result of depriving A of the protection of that contract,[214] since C (being a stranger to it) was no more bound by its terms than entitled to assert rights under it.

Tort and contract damages contrasted Where a third party can recover dam- **18-037**
ages in tort for the negligent performance of a contract between two others, the damages in such a tort action will not normally be assessed in the same way as they would be in a contractual action. In particular, certain kinds of loss are generally regarded as being recoverable only in a contractual action. This follows from the general principle that the object of awarding damages for breach of contract is to put the claimant into the same position as that in which he would have been if the contract had been performed, while in an action in tort that object is to put him back into the position in which he was before the tort was committed. The distinction is well illustrated by *Muirhead v Industrial Tank Specialities Ltd*[215] where the plaintiff, who owned a lobster farm, had entered into a contract for the installation of pumps, which later failed because of a defect in their electric motors. There was no contract between the plaintiff and the supplier of the motors but the plaintiff's claim against that supplier succeeded in tort in respect of the physical damage caused by that

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[213] i.e. the Hague Rules set out in the Schedule to the Carriage of Goods by Sea Act 1924, now superseded in England by Carriage of Goods by Sea Act 1971, known as the Hague Visby Rules. These rules will in turn be superseded if a new "Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea" (also known as "the Rotterdam Rules") is given the force of law in the United Kingdom. This Convention was drafted by UNCITRAL (document A/63/17, Appendix 1) and approved by the United Nations in December 2008 (General Assembly Resolution 63/112 § 2).

[214] cf. *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758, 782–783. For the suggestion that the position may be different where the potential tortfeasor has no such protection, see *Triangle Steel & Supply Co v Korean United Lines Inc.* (1985) 63 B.C.L.R. 66, 80 (the reasoning of which is in other respects inconsistent with that of *The Aliakmon*). See also *Sidhu v British Airways Plc* [1997] A.C. 430, 450–451 stating that, in a case governed by the Conventions on international carriage by air, the only persons having the right to sue in respect of loss or damage to the goods were those specified in the Conventions for this purpose; in an action by such persons, the carrier would be entitled to the protection of the Conventions; see also *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] UKHL 72, [2006] A.C. 495 at [3], [27], [29] and [62]. Under such Conventions, the carrier may be protected by their terms even against a person who is not a party to the contract but has a cause of action against the carrier by virtue of his title to the goods. It has been held that such an action can be brought only subject to the "scheme of liability" imposed by the Conventions: *Western Digital Corp v British Airways Plc* [2001] Q.B. 733 at 750, 754–755, 769; and see *Hook v British Airways Plc* [2011] EWHC 379 (QB), [2011] 1 All E.R. (Comm) 1128 at [28], [29]. Where an original shipper transfers his contractual rights to a third party, he may retain rights against the carrier in bailment, but such rights will remain subject to the contractual terms on which the goods were originally bailed by him to the carrier: see *East West Corp v DKBS 1912 A/S* [2003] EWCA Civ 83, [2003] Q.B. 1509, especially at [50], [69].

[215] [1986] Q.B. 507; Whittaker (1986) 49 M.L.R. 469; Oughton [1987] J.B.L. 370.

failure (i.e. the value of the lobsters which had died); and "any financial loss suffered by the plaintiff in consequence of that physical damage".[216] (i.e. the loss of profits on the sale of *those* lobsters). But a further claim "in respect of the whole economic loss suffered"[217] by the plaintiff (i.e. for loss of profits that he would have made from the installation, had it not been defective) was rejected: such damages might have been recoverable from the installer of the pumps in contract but they could not be claimed from the suppliers of the motors in tort.

18-038 Considerable difficulty again arises in this connection from the *Junior Books*[218] case. The main question discussed in that case was whether any economic or financial loss could be recovered in a tort action in the absence of any allegation that the cracks in the floor were a source of danger to persons or to other property. In the exceptional circumstances of the case, this question was answered in the affirmative and on that basis most of the items of loss, in respect of which damages were said to be recoverable, can be explained in terms of the principles governing the assessment of damages in tort: this is, for example, true of the profits lost and of the wages and overheads wasted while the factory was closed for repairs to the floor. But it was also said that factory owners were entitled to the *cost of replacing the floor*[219]; and such an award would, by putting them into the position in which they would have been if the sub-contractor's promise had been performed, amount to an award of contract damages in spite of the fact that there was no contract between the factory owners and the sub-contractors.[220] On the normal basis of assessment in tort, the damages in respect of defects in the floor should not have included the cost of replacing the floor with a good one.[221] In the *Junior Books* case, Lord Keith explained this aspect of the case on the ground that, in replacing the floor, the factory owners had simply mitigated the loss of profit resulting from the defects in the floor originally provided[222]; and it is well established that expenses

[216] [1986] Q.B. 507 at 533.
[217] [1986] Q.B. 507 at 533.
[218] [1983] 1 A.C. 520; above, paras 18-025—18-035; Grubb [1984] C.L.J. 111; Holyoak (1983) 99 L.Q.R. 591; Smith and Burns (1983) 46 M.L.R. 1 & 7.
[219] This was one of the items claimed; the question whether the claim was proved was not before the House of Lords, which decided only that there was a cause of action in respect of it if negligence were established.
[220] The case was governed by Scots law, which recognises a *jus quaesitum tertio*, but the conditions giving rise to such a right were not satisfied. Nor were they satisfied in *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18 where those conditions are stated at [47]: "the parties to the contract must intend to benefit the particular third party … and the party upon whom the benefit is conferred must be identified in the contract." The Scottish Law Commission's proposals for the reform and clarification of this branch of Scots Law are set out in the Commission's *Review of Contract Law: Report on Third Party Rights*, Scot Law Com No.245 (2016); Ch. 2 of the Report summarises the law on this subject at the date of the Report. The draft Contract (Third Party Rights) (Scotland) Bill appended to this Report differs significantly from the English Contracts (Rights of Third Parties) Act 1999 (discussed in paras 18-090 et seq.). The Report was substantially implemented when the Bill was passed by the Scottish Parliament on September 21, 2017 (see paras 3 and 4 of the Policy Memorandum accompanying the Bill) and received the Royal Assent on October 30, 2017.
[221] cf. *Murphy v Brentwood DC* [1991] 2 A.C. 398, 469. Lord Roskill in the *Junior Books* case at 545 discusses (without reaching a definite conclusion) the question whether the pursuer in *Donoghue v Stevenson* [1932] A.C. 562 could have recovered damages "for the diminished value of the ginger beer"—not for the cost of replacing the contaminated with pure ginger beer. Even the former basis of assessment would seem to be ruled out by the authorities on defective goods cited in para.18-035 above.
[222] [1983] 1 A.C. 520, 536.

reasonably incurred in mitigation are recoverable.[223] But as this reasoning was not adopted by the other members of the House of Lords, an alternative explanation was given in the *Muirhead* case, namely that the same special (or unique) factors in the *Junior Books* case, which gave rise to the duty of care there,[224] also explain the assessment of damages.[225] This narrow view of the *Junior Books* case is supported by dicta in the *Junior Books* case itself[226]; by the fact that there is no subsequent similar[227] case in which a third party has recovered damages in tort to put him into the position in which he would have been if the contract between two others *had been performed* (as opposed to that in which he was *before it was broken*); and by the fact that many later decisions[228] have made it highly unlikely that such damages will, in a future tort case of this kind be awarded to a third party. On the contrary, two House of Lords decisions have specifically rejected such claims.[229] In each case, a lessee claimed damages in tort for the cost of remedying defects allegedly due to the negligence of a building contractor in the performance of a contract to which the lessee was not a party. In each case, the contractor was held not liable to the lessee in tort, even if he was negligent,[230] since the defects had been discovered before they had caused any personal injury, or damage to other property belonging to the lessees. To make the contractor liable for the purely economic loss suffered by the lessee in remedying the defect would "impose upon [the contractor] for the benefit of those with whom he had no contractual relationship the obligation of one who warranted the quality of"[231] his work. Such a result would have been inconsistent with the common law doctrine of privity; and these cases reinforce the view that tort liability in negligence to third parties has not wholly subverted (though it may have limited the scope of) that doctrine.

18-039 **Damages in "disappointed beneficiary" cases** The general principle that a third party cannot recover damages in tort to put him into the position in which he would have been if a contract between two others had been performed is, at least at first sight, hard to reconcile with cases such as *White v Jones*,[232] where A had instructed

[223] cf. below para.26-112.
[224] Above para.18-029.
[225] [1986] Q.B. 507, 523, 533–535.
[226] [1983] 1 A.C. 520, 533 (per Lord Fraser, who took the same narrow view of the *Junior Books* case in *The Mineral Transporter* [1986] A.C. 1, 24–25); and [1983] 1 A.C. 520, 546 (per Lord Roskill).
[227] For the different treatment of the "disappointed beneficiary" and analogous cases, see below, paras 18-039—18-041.
[228] i.e. *Tate & Lyle Industries Ltd v G.L.C.* [1983] 2 A.C. 509; *Balsamo v Medici* [1984] 1 W.L.R. 951; *Candlewood Navigation Corp v Mitsui O.S.K. Lines (The Mineral Transporter)* [1986] A.C. 1; *Muirhead v Industrial Tank Specialities Ltd* [1986] Q.B. 507; *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] A.C. 785; *Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 W.L.R. 1; cf. also *Smith v Littlewoods Organisation Ltd* [1987] A.C. 241, 280; *Yuen Kun Yeu v Att.-Gen. of Hong Kong* [1988] A.C. 175; *Simaan General Contracting Co v Pilkington Glass Ltd (No.2)* [1988] Q.B. 758; *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundation Ltd* [1989] Q.B. 71, 84; *Davies v Radcliffe* [1990] 1 W.L.R. 821; *Parker-Tweedale v Dunbar Bank Plc* [1991] Ch. 12, 24; *Deloitte Haskins & Sells v National Mutual Life Nominees* [1993] A.C. 774.
[229] *D. & F. Estates Ltd v Church Commissioners for England* [1989] A.C. 177; *Department of the Environment v Thomas Bates & Son Ltd* [1991] 1 A.C. 499.
[230] In the *D. & F. Estates* case, there was no such negligence as the builders had employed competent sub-contractors.
[231] *D. & F.* case [1989] A.C. 177, 207; cf. at 211–212.
[232] [1995] 2 A.C. 207 (Lords Keith and Mustill dissenting), approving the result (though not the reason-

his solicitor B to draw up a will containing bequests in favour of his daughters C and D, but B negligently and in breach of his contract with A had done nothing to carry out these instructions by the time of A's death. The House of Lords by a majority held that B was liable in tort to C and D, and that the damages to which they were entitled consisted of the amounts which they would have obtained under A's will, if B had duly carried out A's instructions.[233] The case presented certain special features, namely that C had discussed A's testamentary intentions with B, and that the letter setting out A's wishes had been drafted by D's husband. The majority do not seem to restrict the principle of liability to such special circumstances[234] though they accept that there must be "boundaries to the availability of the remedy" which "will have to be worked out … as practical problems come before the courts".[235] It is, for example, an open question whether such a remedy would be available to a prospective beneficiary who had no previous connection with the testator or knowledge of his testamentary intentions; and it has been said that the solicitor would not be liable for the amount of the intended benefit where it would have been reasonable for the beneficiary to have taken proceedings against the estate for rectification of the will and so to have obtained that benefit.[236] But where the principle (whatever its precise scope may turn out to be) does apply, its effect is to put C into the position in which he would have been if the contract between A and B had been properly performed. Such cases are, however, distinguishable in several respects from those which hold that building contractors are not liable to third parties in respect of purely economic loss caused by defective work.[237] In the building cases, the third party's complaint is that he has not received the benefit of the contractor's performance. In the disappointed beneficiary cases, the benefit of which the third party is deprived is not that of the solicitor's work: the lost benefit was to be provided, not by the solicitor, but by the testator; it was not to be created by the solicitor's work, but existed independently of it. The third party is not entitled to the cost of curing the defects in the solicitor's work (e.g. to the cost of employing another solicitor to give effect to the testator's intention[238]). On the contrary, it has

ing) in *Ross v Caunters* [1980] Ch. 287, where B's negligence took the form, not of simply failing to carry out A's instructions, but of carrying them out ineffectively; this was also the position in *Martin v Triggs Turner Burtons* [2009] EWHC 1920 (Ch), [2010] P.N.L.R. 3, where a widow recovered damages from solicitors for negligently carrying out her late husband's instructions to draft his will, so that her benefits under it were less than they would have been if those instructions had been duly carried out (at [74]). cf. *Esterhuizen v Allied Dunbar Assurance Plc* [1988] 2 F.L.R. 668 (similar liability of company providing will making services) and (in Australia) *Hill v Van Erp* (1997) 142 A.L.R. 687, a case of actual misfeasance by the solicitor.

233 Or if B had committed some other breach of duty, as in *Feltham v Bouskell* [2013] EWHC 1952 (Ch), [2013] W.T.L.R. 1363, where B not only delayed in carrying out his instructions in drawing up A's will but also committed a further breach of duty by encouraging beneficiaries under A's earlier will to challenge the new will. C settled the claim of these beneficiaries and recovered the sums so paid from B (at [81]–[85], [113]–[117] as damages under the reasoning of *White v Jones* [1995] 2 A.C. 207: see [2013] EWHC 1952 (Ch) at [56]–[59].

234 [1995] 2 A.C. 207, 295.

235 [1995] 2 A.C. 207, 269. The alleged beneficiary's claim clearly cannot succeed without proof of the requisite testamentary intention in his favour: see *Gibbons v Nelsons* [2000] Lloyd's Rep. P.N. 603.

236 On the question whether it would have been reasonable for the beneficiary to take rectification proceedings, contrast *Walker v Geo. H. Medlicott & Son* [1999] 1 All E.R. 685 with *Horsfall v Hayward* [1999] F.L.R. 1182.

237 Above, para.18-038. cf. also *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 A.C. 309 at [131].

238 cf. *Marquess of Aberdeen and Temair v Turcan Connell* [2008] CSOH 183, [2009] P.N.L.R. 18,

been held that, if the defect is discovered when cure is still possible, the solicitor owes no duty to the beneficiary.[239] There are also the points that, if any duty is to be imposed on the solicitor to the disappointed beneficiary, the only realistic measure of damages is the value of the lost benefit; and that no more than nominal damages could be recovered from the solicitor by the client's estate, since it would have suffered no loss. The negligent solicitor would thus escape all substantial liability if he were not held liable to the disappointed beneficiary for the value of the lost benefit. In the building contract cases, on the other hand, the employer will usually have a substantial remedy against the defaulting builder for damages, amounting either to the cost of curing the defects in the work or to the difference between the value of the work which was done and that which should have been done; and such a remedy may be available to the employer, not only in respect of his own loss, but also (in appropriate circumstances) in respect of loss suffered by the third party.[240] For these reasons, it is submitted that the building contract cases can be distinguished from disappointed beneficiary cases such as *White v Jones*.

Analogous situations The principle of the "disappointed beneficiary" cases[241] has been extended to a number of closely analogous situations. One such extension was made in *Carr-Glynn v Frearsons*[242] where the solicitors' negligence took the form, not of failing to secure the proper execution of the will, but of failing to take steps to ensure that property specifically bequeathed to the beneficiary remained within the client's estate after her death.[243] Loss was thus suffered by the estate but the solicitors were nevertheless held liable to the intended legatee since the proceeds of any claim by the estate would have benefited, not that legatee, but the person entitled under the will to the residuary estate,[244] thus defeating the intention of the testatrix.[245] The decision can be explained on the ground that "the estate" is **18-040**

where a beneficiary under a trust, who was not a party to the contract between the settlor and the latter's solicitor, was said at [48] to have "no claim under the principle of *White v Jones*" in respect of expenses incurred, after discovery of the effect of the solicitor's breach of duty in the administration of the trust, in curing that breach. It was the settlor who had an arguable case against the solicitor in respect of that loss (at [53]); and insofar as the loss had been incurred by the beneficiary, the settlor had an arguable case for recovery of such loss "on behalf of" the beneficiary (at [54]); cf. below, paras 18-054 et seq.

239 *Hemmens v Wilson Browne* [1995] Ch. 223. But a claim by a person in a position analogous to that of a disappointed beneficiary may be available where the consequences of the adviser's negligence do not become apparent for many years after the transaction in question: *Richards v Hughes* [2004] EWCA Civ 266, [2004] P.N.L.R. 35.

240 Below, paras 18-055 et seq.

241 Above, para.18-039.

242 [1999] Ch. 326.

243 The testatrix was joint owner of the property in question and the solicitors had negligently failed to advise her to sever the joint tenancy, so that on her death her share passed to the other co-owner by right of survivorship.

244 For the right of an executrix to recover damages for the benefit of a residuary legatee in respect of loss to the estate caused by the negligence of a solicitor engaged by the executrix to administer the estate, see *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch. 19, below, para.18-049.

245 cf. *Corbett v Bond Pearce* [2001] EWCA Civ 531, [2001] 3 All E.R. 769, where residuary gift in favour of a disappointed beneficiary was held invalid in legal proceedings the costs of which were paid out of the testatrix's estate. The solicitors whose negligence was the cause of the invalidity of that gift then settled the disappointed beneficiary's claim for the full value of the residuary estate, undiminished by those costs. It was held that the solicitors were not liable to the estate for such costs since to hold them so liable would (1) make them liable twice over the same loss; and (2) result in

restitution claim which C may have against A is more closely analogous to cases in which restitution is granted in respect of benefits conferred under anticipated contracts which fail to come into existence.[279]

4. CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

(a) Effects of a Contract for the Benefit of a Third Party

18-045 **General** Although a contract for the benefit of a third party generally does not, at common law, entitle the third party to enforce rights arising under it, the contract remains nevertheless binding between promisor and promisee. The fact that the contract was made for the benefit of a third party does, however, give rise to special problems so far as the promisee's remedies against the promisor are concerned. Actual performance of the contract may also lead to disputes between promisee and third party. These points are discussed below: the first in paras 18-046—18-073; the second in paras 18-074—18-078.

(i) Promisee's Remedies

18-046 **Specific performance** The promisee (or those acting for his estate) may seek specific performance of the contract. If, as in *Beswick v Beswick*,[280] such an order is obtained, the third party will in fact receive the benefit contracted for. But the scope of the remedy of specific performance is limited in various ways; these limitations, and their applicability to cases involving third parties, will be discussed in Ch.27 below.[281] In the following paragraphs we shall therefore consider what other remedies may be available to the promisee if the contract is broken.

18-047 **Restitution** The promisee might claim restitution of the consideration provided by him on the ground that the promisor would be unjustly enriched if he retained that consideration while failing or refusing to perform his promise in favour of the third party. But the promisor's part performance of the promise in favour of the third party could defeat this remedy,[282] and it might also be unjust to restrict the promisee (or his estate) to it: for example, return of premiums could be a quite inadequate remedy where a policy of life insurance had been taken out for the benefit of a third party and had matured.[283]

18-048 **Claim for the agreed sum** The promisee might sue for payment to himself of the agreed sum. It may be objected that to allow such a claim would force the promisor to do something which he had never contracted to do, viz to pay the promisee when he contracted to pay the third party; and one view therefore is that the promisee cannot sue for the agreed sum,[284] save in the exceptional circumstances

[279] Above, paras 2-222, 2-219; below, paras 29-070 and 29-071.
[280] [1968] A.C. 58; above, para.18-022.
[281] Below, paras 27-066—27-070.
[282] As there would be no "total failure of consideration"; and as "rescission" for breach could probably not be allowed unless the third party was willing to restore any performance received.
[283] e.g. where the person on whose death the policy moneys were payable had died after only a relatively small number of premiums, amounting to much less than the sum payable on that death by the promisor, had been paid by the promisee.
[284] See *Coulls v Bagot's Executor and Trustee Co Ltd* [1967] A.L.R. 385 at 409–411; cf. *Beswick v*

to be described later in this chapter.[285] But the objection to allowing the promisee to claim payment to himself loses most of its force where the promisor would not in fact be prejudiced by having to pay the promisee rather than the third party (so long as such payment gave him a good discharge). In such a case, the contract may, on its true construction, be one to pay the third party or as the promisee shall direct,[286] so that it would not be inconsistent with its terms to allow the promisee to claim payment for himself. The promisee is a fortiori so entitled where the contract is one to pay him (the promisee) as nominee for the third party[287]: such a contract is not one for the benefit of a third party[288] in the sense of one purporting to give that party a right against the promisor.

18-049 **Damages in respect of promisee's loss** The promisee might claim damages where he has suffered loss as a result of the promisor's failure to perform in favour of the third party. But in *Beswick v Beswick* the majority of the House of Lords[289] evidently thought that no such loss had been or would be suffered by the promisee, and that accordingly the damages recoverable by the uncle's (i.e., the promisee's) estate for breach of the nephew's promise would be merely nominal. This would have been the case because, as Lord Upjohn said, the promisee:

> "... died *without any assets* save and except the agreement which he hoped would keep him and then his widow for their lives."[290]

It seems possible to deduce from this statement that damages might have been substantial if the promisee had had other assets—either because the widow might then have had a claim against those assets if the promise were not performed[291] or because the promisee or his estate would in fact, even if not legally obliged to do so, have made some other, wholly voluntary, provision for the widow. The loss suffered by the promisee would be the cost of making such an alternative provision, and there is some authority for the view that damages for breach of contract may be recovered to compensate for such loss even though the provision is wholly voluntary.[292] A fortiori the promisee can recover substantial damages where he is

Beswick [1968] A.C. 58 at 88, 101 (dealing with the remedy of damages: see below, para.18-049).
[285] See *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147; below, para.18-086.
[286] *Tradigrain SA v King Diamond Shipping SA (The Spiros C)* [2000] 2 Lloyd's Rep. 319 at 331; below, para.18-075.
[287] *The Turiddu* [1999] 2 Lloyd's Rep. 401 at 407.
[288] *The Turiddu* [1999] 2 Lloyd's Rep. 401 at 407.
[289] Lord Pearce thought that damages would be substantial: [1968] A.C. 58 at 88. It was not entirely clear whether he had in mind an action for *damages* or one for the *agreed sum*: see his reference at p.87 to "separate actions as each sum falls due".
[290] [1968] A.C. 58 at 102 (italics supplied). See further para.18-064, below.
[291] e.g. under (at that time) the Inheritance (Family Provision) Act 1938, now Inheritance (Provision for Family and Dependants) Act 1975.
[292] *Admiralty Commissioners v S.S. Amerika* [1917] A.C. 38, 61, where the actual decision was that payments voluntarily made to the victim of an alleged tort could not be recovered; on this point, see also *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* [1989] A.C. 643 (where there was no causal link between the voluntary payment and the defendants' wrongdoing). For the possibility of recovering, as damages for breach of contract, voluntary payments to or benefits voluntarily conferred on, third parties see also *Banco de Portugal v Waterlow & Son Ltd* [1932] A.C. 452, where a bank recovered damages in respect of payments which it was not legally liable to make: below, para.26-090. And see the discussion in paras 18-055 and 18-060—18-068 below of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] A.C. 85 and of *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518.

under a legal obligation to make a payment to the third party and where this obligation would have been discharged if the promisor had paid the third party in accordance with the contract. Where loss is suffered by the promisee, substantial damages can, moreover, be recovered by the promisee even though the promisee is legally bound to pay those damages over to a third party. Thus where loss of income was suffered by the estate of a deceased person as a result of the negligence of solicitors retained by that person's executrix to administer the estate, the executrix recovered substantial damages in respect of that loss in her representative capacity as owner of the deceased's estate.[293] It made no difference that she was not entitled beneficially to the estate and was therefore obliged, as executrix, to hand over the damages to the residuary legatee under the deceased's will.

18-050 **Whose loss?** The question whether any loss had been suffered by the promisee arose in *Glory Wealth Shipping Co Pte Ltd v Flame SA*,[294] where a contract between A and B would, if the contract had been duly performed by B, have resulted in B's making payments to A, who, because A had become insolvent and wished to "protect its monetary assets"[295] from its creditors, directed B to make those payments to two companies (C1 and C2) which "were not acting as agents of [A] and so would not have held the [moneys] on behalf of [A]".[296] In breach of the contract between A and B, B failed to make the stipulated payments; and Teare J. held that this breach had caused a loss to A of (as was found by the arbitrators) more than USD 3 million.[297] The reason for this conclusion was that, but for B's breach, A would have been "entitled to receive the [payments] … and to dispose of [them]"[298] and the breach had:

> "… deprived [A] of the right to receive and dispose of [the payments]. Just as it would not matter to the assessment of loss if [A] had intended to give the [payments] away once it had received [them], so it matters not that [A] had previously decided that the payments should be [made to C1 and C2]."[299]

The question whether the loss had been suffered by the promisee or by a third party arose in *De Jongh Weill v Mean Fiddler Holdings*[300] where the claimant had been engaged by the defendant company as a financial consultant. He was to be remunerated partly by a specified fee but also on the terms that "warrants to purchase shares in the [defendant] company will be granted to a company representing my family interests".[301] It was clear from the antecedent negotiations that the grant of these

293 *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch. 19.
294 [2016] EWHC 293 (Comm), [2016] 1 Lloyd's Rep. 571.
295 At [6]. There was no appeal against the arbitrator's decision that this "turpitude", being only "incidental", did not give rise to the "defence of illegality": at [8].
296 [2016] EWHC 293 (Comm) at [12].
297 [2016] EWHC 293 (Comm) at [18], [25].
298 [2016] EWHC 293 (Comm) at [25].
299 [2016] EWHC 293 (Comm) at [25]. Teare J. reached this conclusion "without enthusiasm" because of A's "dishonest concealment and turpitude" [2016] EWHC 293 (Comm) at [28] but (no doubt because there was no appeal against the arbitrator's finding of turpitude, see above) these matters "could not affect the court's consideration of the question of law raised by this appeal". For the formulation of this question, see [2016] EWHC 293 (Comm) at [3].
300 [2005] All E.R. (D) 331 (Jul), QBD, July 22, 2005; for earlier proceedings in this case, see [2003] EWCA Civ 1058.
301 [2005] All E.R. (D) 331 (Jul), at [2], [25].

warrants was to be the claimant's principal remuneration[302] and that:

> "… it was *he* who was to benefit in reality and the idea of a nominated company was just the way *he* was to be paid."[303]

Judge Bruce Coles Q.C., after referring[304] to part of the discussion of the promisee's remedies in a previous edition of this book,[305] held that the loss resulting from the defendant's failure to issue the warrants to the nominated company had been suffered by the claimant himself and that damages in respect of it were therefore recoverable under the principle stated in para.18-049 above.

Damages in respect of third party's loss: general rule The starting point of the discussion in paras 18-051—18-069 below is the general rule that, in an action for damages, the claimant cannot recover more than the amount required to compensate him for his loss,[306] so that the a promisee cannot, in general, recover damages for breach of a contract made for the benefit of a third party[307] in respect of loss suffered, not by the promisee himself, but by that third party.[308] This general rule, was, indeed, denied by Lord Denning M.R. in *Jackson v Horizon Holidays Ltd*,[309] where the defendants had contracted with the claimant to provide holiday accommodation for the claimant, his wife and their two three-year-old children; and it was assumed that the wife and children were not parties to the contract.[310] The accommodation fell seriously short of the standard required by the contract, and the claimant recovered damages including £500 for "mental distress".[311] Lord Denning said that this sum would have been excessive compensation for the claimant's own distress.[312] He nevertheless upheld the award on the ground that the claimant had made a contract for the benefit both of himself and of his wife and children[313]; **18-051**

302 [2005] All E.R. (D) 331 (Jul) at [30].
303 [2005] All E.R. (D) 331 (Jul) at [30].
304 [2005] All E.R. (D) 331 (Jul) at [26].
305 i.e., 29th edn, paras 18-044—18-049.
306 Below, para.26-047; cf. *White v Jones* [1995] 2 A.C. 207 (above, para.18-039), where the damages recoverable by the estate of the other contracting party would have been no more than nominal.
307 A fortiori, a promisee cannot recover damages in respect of loss suffered by a third party *other* than one for whose benefit the contract was made. Thus if A agrees to buy goods from B which B intends to acquire from C, and A repudiates the contract so that B does not in turn buy the goods from C, then B cannot recover damages in respect of any loss suffered by C: *And so to Bed Ltd v Dixon*, Transcript November 21, 2000 at 46–49, 54 (Ch. D.). Similarly, it has been said that B could not recover damages in respect of loss suffered by B's intended supplier C in a case falling within an exception to the general rule stated in the present paragraph: *Smithkline Beecham Plc v Apotex Ltd* [2006] EWCA Civ 658, [2007] Ch. 71 at [94], where the main reason for actual decision was that there was no contract between A and B (at [86], [88]). Of course if B had *contracted* to acquire the goods from C and was in consequence of A's repudiation liable in damages to C, then B could recover the amount for which he was so liable from A as damages in respect of his (B's) *own* loss.
308 *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774, 846; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, and see below, para.18-060; Weir [1977] C.L.J. 24. See also *Ramco (UK) Ltd v International Insurance Co of Hanover* [2004] EWCA Civ 675, [2004] 2 All E.R. (Comm) 866 at [32]; the actual decision (that an insurance policy did not cover a third party's loss) turned on the wording of the policy.
309 [1975] 1 W.L.R. 1468; Yates (1975) 39 M.L.R. 202.
310 Contrast *Daly v General Steam Navigation Co Ltd (The Dragon)* [1979] 1 Lloyd's Rep. 257, 262; affirmed [1980] 2 Lloyd's Rep. 415, above, para.18-014.
311 [1975] 1 W.L.R. 1468 at 1472.
312 [1975] 1 W.L.R. 1468 at 1474.
313 [1975] 1 W.L.R. 1468. cf. *McCall v Abelesz* [1976] Q.B. 585, 594.

and that he could recover damages in respect of their loss as well as in respect of his own. But the authorities cited in support of this conclusion seem to contradict, rather than to favour, it.[314] Moreover, in *Beswick v Beswick*[315] a majority of the House of Lords said that the promisee's estate could have recovered no more than nominal damages as it had suffered no loss.[316] This is scarcely consistent with the view that the promisee under a contract for the benefit of a third party is, as a general rule, entitled to damages in respect of the third party's loss. James L.J. in *Jackson*'s case seems to have regarded the £500 as compensation for the claimant's own distress.[317] No doubt this was increased by his witnessing the distress suffered by his wife and children; and if the promisee himself suffers loss he should not be prevented from recovering for it in full merely because the contract was in part one for the benefit of third parties, who also suffered loss.[318]

18-052 Lord Denning's approach to the question of damages in *Jackson's* case was disapproved by the House of Lords in *Woodar Investment Development Ltd v Wimpey Construction Co Ltd*[319]; though the actual decision in *Jackson's* case was supported on the ground that the damages there were awarded in respect of the claimant's own loss[320]; or alternatively on the ground that cases such as the booking of family holidays or ordering meals in restaurants[321] might "call for special treatment".[322] In the *Woodar* case itself, a contract for the sale of land provided that on completion the purchaser should pay £850,000 to the vendor and also £150,000 to a third party. The vendor claimed damages on the footing that the purchaser had wrongfully repudiated the contract and the actual decision was that there had been no such repudiation,[323] so that the issue of damages did not arise. But the question, what damages would have been recoverable in the *Woodar* case if there had been a wrongful repudiation, was described as "one of great doubt and difficulty"[324];

[314] Lord Denning M.R. relied on a dictum of Lush L.J. in *Lloyd's v Harper* (1880) 16 Ch. D. 290, 331, said to have been quoted by Lord Pearce in *Beswick v Beswick* "with considerable approval": [1975] 1 W.L.R. 1468 at 1473. In fact, Lord Pearce said that the dictum "cannot be accepted without qualification and regardless of the context": [1968] A.C. 58, 88; cf. at 101; he agreed with the view expressed in *Coulls v Bagot's Executor & Trustee Co Ltd* [1967] A.L.R. 385, 411, that Lush L.J.'s dictum must be confined to cases in which the contract creates a trust in favour of the third party: below, paras 18-080—18-088. *Lloyd's v Harper*, above, was treated as a case of trust by Fry J. at first instance, and by James and Cotton L.JJ in the Court of Appeal. Cases of trust fall within the exceptions stated in para.18-054, below to the general rule that in an action for damages the claimant can recover damages only in respect of his *own* loss.

[315] [1968] A.C. 58.

[316] Above, para.18-049.

[317] [1975] 1 W.L.R. 1468 at 1474.

[318] cf. *Radford v de Froberville* [1977] 1 W.L.R. 1262 (damages for failure to perform a contract to build a wall not reduced merely because the promisee had entered into the contract not only for his own benefit, but also for that of his tenants).

[319] [1980] 1 W.L.R. 277.

[320] [1980] 1 W.L.R. 277 at 283, 293, 297. Where a contract is made with a company and the breach causes loss to its subsidiary, damages can be recovered by the company since the value of its holding in the subsidiary will be reduced in consequence of the loss: *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 B.C.L.C. 260.

[321] cf. *Lockett v A.M. Charles Ltd* [1938] 4 All E.R. 170, where agency reasoning was used in such a situation.

[322] [1980] 1 W.L.R. 277, 283. cf. *Calabar Properties Ltd v Stitcher* [1984] 1 W.L.R. 287, 290 where it was not disputed that a tenant's damages for her landlord's breach of his covenant to repair should include compensation for ill-health suffered by her husband.

[323] Below, para.24-018.

[324] [1980] 1 W.L.R. 277 at 284.

presumably it would turn on such factors as whether the vendor was under a legal obligation to ensure that the third party received the payment, or whether, on the purchaser's failure to make the payment, the vendor had actually made it, or procured it to be made, from other resources available to him.

Criticism of the general rule The assumption underlying *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*[325] thus seems to be that damages for breach of a contract for the benefit of a third party cannot, as a general rule, be recovered by the promisee in respect of a loss suffered only by the third party. At the same time, this position was described as "most unsatisfactory"[326] and said to be in need of reconsideration, either by the legislature or by the House of Lords in its judicial capacity.[327] It is unsatisfactory because it can give rise to what has been called a "legal black hole"[328] that is, to a situation in which the promisor has committed a plain breach which has caused loss to the third party whom the contracting parties intended to benefit[329] but none to the promisee, and in which no other remedy[330] (than damages in respect of the third party's loss) is available against the promisor. The general rule was again criticised in *Forster v Silvermere Golf and Equestrian Centre*,[331] where the claimant transferred land to the defendant who undertook to build a house on it and to allow the claimant and her children to live in it rent free for life. It was held that the claimant could recover damages in respect (1) of her own loss but not (2) in respect of any rights of occupation which her children might have enjoyed after her death. Dillon J. described the second of these conclusions as "a blot on our law and most unjust". It is submitted (on the basis of the explanation of *Beswick v Beswick*[332] given above)[333] that any expenses incurred by the claimant in making alternative provision for the accommodation of her children after her death could have been recovered as forming part of her own loss.[334] On the other hand, it is unlikely that the claimant could have secured the intended benefit for her children by seeking specific performance, for it does not seem that the defendant's obligation to build was defined with sufficient precision to enable the court to enforce it specifically.[335] **18-053**

Damages in respect of third party's loss: exceptions in general Judicial awareness of the unsatisfactory results which can flow from the general rule stated in para.18-051 above and reaffirmed in the *Woodar* case[336] has led the courts to create a number of exceptions to that rule. For example substantial damages for breach of contract can be recovered by a trustee even though the loss is suffered by his **18-054**

[325] [1980] 1 W.L.R. 277, above, para.18-052.

[326] [1980] 1 W.L.R. 277 at 291; cf. 297–298; 300–301.

[327] cf. above, para.18-022.

[328] *Darlington B.C. Wiltshier (Northern) Ltd* [1995] 1 W.L.R. 68 at 79; for the origins of this metaphor, see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 529.

[329] See above, para.18-051 at n.306 for this requirement.

[330] e.g., by way of specific performance, as in *Beswick v Beswick* [1968] A.C. 58.

[331] (1981) 125 S.J. 397.

[332] [1968] A.C. 58.

[333] Above, para.18-049.

[334] Such a result could also, on the facts of the case, follow from the reasoning in para.18-056, below.

[335] Below, para.27-044.

[336] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 W.L.R. 277, see above, paras 18-052 and 18-053.

cestui que trust[337]; by an agent even though the loss is suffered by his undisclosed principal[338]; by a local authority even though the loss is suffered by its inhabitants[339]; and by a shipper of goods for breach of his contract of carriage with the shipowner in respect of the loss of the goods, even though that loss is suffered by a person to whom the shipper has sold the goods and to whom the risk and property in them has passed but who has not himself acquired any rights under the contract of carriage against the ship-owner[340]: it will be convenient to refer to this last rule as "the *Albazero* exception", after the leading modern case in which it is recognised.[341] In all these exceptional cases, a person recovers substantial damages for breach of contract, even though the breach caused loss, not to him, but only

[337] See, for example, below para.18-085. cf. *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1988] 2 Lloyd's Rep. 505; below para.18-133; *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] 1 Q.B. 86 (above, para.18-036) at [141], [144] can be explained on the ground either that the beneficial owner could itself sue (joining the legal owner to the action) for the loss it had suffered, or on the ground that "if formality is necessary … [the legal owners] can recover the amount which [the beneficial owner (B)] has lost, but will hold the sums so recovered as trustees for" B (at [144]). According to *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All E.R. (Comm) 129 a contracting party cannot recover damages in respect of the third party's loss where the other contracting party did not, when the contract was made, know or have reason to know that the former party was contracting as trustee.

[338] See *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 A.C. 199, 207.

[339] *St Albans C.C. v International Computers Ltd* [1996] 4 All E.R. 481.

[340] *Dunlop v Lambert* (1839) 6 Cl. & F. 600, 626, 627 (as to which see *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 523 et seq.). cf. *Obestain Inc. v National Mineral Development Corp Ltd (The Sanix Ace)* [1987] 1 Lloyd's Rep. 465. See also *Pegasus Management Holdings SCA v Ernst & Young* [2008] EWHC 2720 (Ch), [2009] P.N.L.R. 11 at [30] and *Fehn Schiffahrts GmbH & Co KG v Romani SPA* [2018] EWHC 1606 (Comm). The reasoning in *The Sanix Axe* was followed in *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All E.R. (Comm) 999 at [30] to enable an owner of property to recover damages in tort in respect of negligent valuation of property (in this case, choses in action) by virtue of his ownership of that property, even though that owner was not a party to the contract with the valuer. *Wibau Maschinenfabric Hartman SA v Mackinnon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep. 494 (overruled on another point in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 1 All E.R. (Comm) 801). The rule was recognised by the House of Lords in *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] A.C. 774, but held inapplicable as the buyer had acquired his own contractual rights against the shipowner under Bills of Lading Act 1855 s.1 (now repealed and replaced by Carriage of Goods by Sea Act 1992); Weir [1977] C.L.J. 24; *The Albazero* was distinguished in *Titan Europe 2006-3 Plc v Colliers International UK Plc* [2015] EWCA Civ 1083, [2016] 1 All E.R. (Comm) 999 at [32] on the ground that the loss in the latter case had been suffered by an owner in respect of property which he had retained while the claimant in the former case had, at the relevant time, parted with the property in question. In *Rolls Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC) the rule in *Dunlop v Lambert* (above) was said at [124] to apply only if, at the time of the contract, it was "in the actual contemplation of the parties that an identified third party or a third party who was a member of an identified class might suffer damage in the event of a breach of the contract." In the case of goods carried under a transferable bill of lading, this requirement will generally be satisfied since the transfer of such a bill must be within the carrier's contemplation. For discussion of another aspect of *Dunlop v Lambert*, above, see *Scottish & Newcastle International Ltd v Othon Ghalanos Ltd* [2008] UKHL 11, [2008] 1 Lloyd's Rep. 462 at [12], [39]–[40]. In the case of contracts to which the Carriage of Goods by Sea Act 1992 applies, a special statutory exception is created by s.2(4) of the Act to the general rule that a person can recover damages only in respect of his own loss; for a full discussion of this subsection, see *Carver on Bills of Lading*, 3rd edn (2011), paras 5-077—5-088. For the possible effects of arts 57 and 58 of the Rotterdam Rules (above, para.18-036) on s.2 of the 1992 Act, see below, para.18-117. These Rules contain no provision resembling s.2(4) of the 1992 Act.

[341] *The Albazero* [1977] A.C. 774.

to a third party.[342] A similar possibility is recognised in the law of tort which, like the law of contract, starts with the principle that the claimant can recover "no more and no less than he has lost".[343] But where a third party voluntarily renders services in caring for a claimant who has suffered personal injury as a result of a tort, the claimant can recover damages from the wrongdoer in respect of the value of those services; and the "central objective" of such an award has been described as "compensating the voluntary carer,"[344] for whom such damages must be held on trust by the claimant.[345] In substance, though not in form, the claimant in such a case recovers damages in respect of the loss which has been suffered by the third party in (for example) giving up his or her job so as to look after the injured claimant.

Further exceptions: building contracts The list of exceptions stated in para.18-054 above should not be regarded as closed and the possibility of extending them or of creating further exceptions is illustrated by a line of building contract cases beginning with *Linden Gardens Trust v Lenesta Sludge Disposals Ltd*.[346] The speeches in that case raise the further question (also discussed in a number of later cases[347]) how far the process of extending the development there initiated can be taken in the direction of allowing the promisee to recover damages in respect of the third party's loss merely because the contract which has been broken was one for the benefit of a third party. In the *Linden Gardens* case, a building contract between parties described in it as employer and contractor provided for work to be done by the contractor by way of developing a site owned by the employer as shops, offices and flats. The site (but not the benefit of the contract) was later transferred by the employer to a third party, and it was assumed[348] for the purpose of the proceedings that the third party had suffered financial loss as a result of having to remedy breaches of the building contract committed after the transfer. In an action for breach of the building contract brought by the employer, the contractor argued that no loss had been suffered by the employer as he was no longer owner of the land

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[342] Exceptions to the general rule that a contracting party cannot recover damages in respect of loss suffered, not by himself, but by a third party (above, para.18-051) are further discussed by the Supreme Court in *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 W.L.R. 1161. Lord Neuberger in that case described some of these exceptions (in particular those discussed in paras 18-052—18-069 above) as "anomalous" (a word that perhaps carries a note of disapproval); and it is interesting to note that neither he nor any other member of the Supreme Court in that case made any reference to the judicial criticism of the general rule discussed in para.18-053 above, perhaps because these criticisms were not drawn to the attention of the Supreme Court in the *Swynson* case.

[343] *Hunt v Severs* [1994] 2 A.C. 350, 357.

[344] *Hunt v Severs* [1994] 2 A.C. 350, at 363.

[345] *Hughes v Lloyd* [2007] EWHC 3133 (Ch), [2008] W.T.L.R. 473; and see below, para.18-078. No such damages can be recovered where the voluntary carer is the tortfeasor: *Hunt v Severs* [1994] 2 A.C. 350; below para.18-078.

[346] [1994] 1 A.C. 85. The discussion in paras 18-055—18-064 below is directly concerned only with the extension of the reasoning of the "*Albazero* exception" (above, para.18-054) to *building* contract cases, but the view that these cases have extended this exception to "contracts generally" (*Swynson Ltd v Lowick Rose Ltd* [2017] UKSC 32, [2017] 2 W.L.R. 1161 per Lord Sumption at [15], and see below para.18-057 line 24) does not mean that the exception necessarily applies to all contracts whatsoever: it is, for example, still an open question whether the reasoning of the *Albazero* exception would apply to a contract by which A promised B to pay a sum of money to C, as in the *Woodar* case [1980] 1 W.L.R. 277 (above, para.18-052). For the scope of the *Albazero* exception in bill-of-lading contracts, see also *Carver on Bills of Lading*, 4th edn (2017), para.5-070.

[347] Below, paras 18-058—18-069.

[348] The case is reported on a preliminary issue of law, so that the alleged facts had not been proved.