

# 1

## INTRODUCTION

The principles of the English law of contract are almost entirely the creation of the English Courts, and the legislature has, until recently, played a relatively small part in their development. They are also, for the most part, a development of the last 200 years; for contract law is the child of commerce, and has grown with the growth of Britain from a mainly agricultural into a mainly commercial and industrial nation. In Blackstone's *Commentaries on the Laws of England*, which were first published in 1756, it is significant of the comparative unimportance of the subject that he devoted 380 pages to the law of real property, and only 28 to contract. The industrial revolution, however, brought about a fundamental change in the structure of the British economy. Land was no longer the primary source of wealth. Mills, mines, and factories sprang up and raw materials were converted by process of manufacture into products for sale in the markets of the world. The capital required for these enterprises was beyond the capacity of most private individuals and it was raised by public subscriptions for shares in joint stock companies or by loans from banks and other financial institutions. The growth of international trade further led to the creation of international commodity, shipping, insurance, and money markets, many of which were centred on London. All of these commercial developments depended and still do depend for their successful operation upon contract.

This introductory chapter considers briefly: first, the nature and function of contract; secondly, the history of contractual obligations in English law; thirdly, the content of the contract law as set out in this book which is concerned with the 'general principles' of contract rather than the detailed rules applicable to different types of contracts; fourthly, the location of contract as part of the law of obligations and its relation to other parts of the law of obligations, tort and restitution of an unjust enrichment, and to property law.

### 1. THE NATURE AND FUNCTION OF CONTRACT

#### (a) PROMISE OR AGREEMENT

The law of contract may be provisionally described as that branch of the law which determines the circumstances in which a promise shall be legally binding on the

person making it. Section 1 of the American Law Institute's *Restatement Second of the Law of Contracts*<sup>1</sup> gives the following definition:

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

This definition is broadly acceptable, provided that it is realized that, in law, a promise may be constituted by an assurance that a thing *has been* or *is* (for example, that the engine of a car has been recently overhauled or is now in good mechanical condition) as well as that a thing *will be*, and provided that it is also appreciated that most, but not all, contracts take the form of an agreement by which each party agrees to accept the promise or promises of the other in return for the promise or promises made by itself.<sup>2</sup>

### (b) FUNCTIONS OF CONTRACT

The above definition is, however, very much a lawyer's definition and gives little indication of the nature of contract, and still less of its function. Most readers of this book will have some general notion of what a contract is. Indeed, they will enter into a contract very frequently, in some cases almost every day, for example, a contract of carriage (travel by bus or train), or a contract for the sale of goods (the purchase of groceries), or for the supply of services (a haircut), or one involving both sale and the supply of services (having a meal at a restaurant). But the law which will be found in the following pages of this book is law which is derived, for the most part, not from such simple consumer transactions, but from commercial transactions between businesspeople and companies. Commercial transactions involve the exchange of land, goods, or services for money. This exchange is not immediate, as in a supermarket, but is to take place in the future. Contract has an important function of securing that the expectations created by a promise of future performance are fulfilled, or that compensation will be paid for its breach.

Take the example of the construction of an office building. The developer must first purchase the site, and this will often be done with money borrowed from a bank, the developer promising to repay the loan with interest at some future date. It must then engage an architect to design the building, a quantity surveyor to draw up bills of quantities, and a solicitor to do the legal work connected with the development. The building work will be put out to tender and the successful tenderer will be awarded the contract as main contractor. In its turn, the main contractor will often subcontract parts of the work to other contractors. It may be that the developer will put the office space on the market while the building is still under construction and would-be occupants will agree to take a tenancy once it is completed. All of these relationships will depend

<sup>1</sup> See below, p 21, n 100.

<sup>2</sup> Agreement is unnecessary for the enforcement of a promise in a deed (below, p 31) and is perhaps not an altogether appropriate description of a unilateral contract, on which see below, pp 30, 38, 54. A promise in a deed is sometimes characterized not as contract (because of the lack of requirement of agreement) but as a unilateral act, binding by virtue of the formality. In this book, however, it is included in the general definition of contract, being a promise binding in law; see also Supply of Goods and Services Act 1982, s 1(2)(d).

on the promise of the participating parties that they will carry out their obligations in the future, whether these consist in the payment of money, or otherwise, and that they will be legally bound to their promised performance. No doubt, as a normal rule, each participant will duly fulfil its promise without the need for any intervention, or threatened intervention, by the law.<sup>3</sup> But, in the last resort, the recipient of the promise ('the promisee') will rely upon the law to reinforce by appropriate sanctions the promise of performance given. By entering into a contract, the promisee is able to have recourse to those sanctions.

Another important function of contract is a constitutive one: to facilitate forward planning of the transaction and to make provision for future contingencies.<sup>4</sup> The more complex the transaction the greater will be the need for such planning and the more detailed the provisions that are likely to be made. First, and most obviously, contract will normally establish the value of the exchange, that is, how much is to be paid for the land, goods, or services to be provided. In the above example, the developer will need to measure the likely cost of the development against anticipated revenue. While this may to a considerable extent be a matter of estimate, the developer will seek, so far as is practicable, to establish by contract the value of the items that go to make up that cost, for instance, the interest to be paid for the loan and the price to be paid to the main contractor.

Secondly, contract will establish what are the respective responsibilities of the parties and the standard of performance to be expected of them. The building contract will incorporate the specifications for the work, sorting out what is to be done, the nature and quality of the materials to be used, and the date for completion of the work. It will provide for stage payments to be made by the developer. The respective responsibilities of the developer, architect, contractor, and sub-contractors will also be established by contract.

Thirdly, contract enables the economic risks involved in the transaction to be allocated in advance between the parties. The building contract may provide, for example, for an increase in the price in the event of an increase in the cost of labour or materials to the contractor, and who is to bear the risk of strikes, bad weather, or fire. The party affected by the risk may then be able to cover it by insurance.

Finally, contract may provide for what is to happen if things go wrong. Suppose that the contractor fails to remedy defects when required to do so by the architect. Or suppose that the developer fails to pay for work which is certified to have been done. The contract can provide for payment in advance,<sup>5</sup> and can determine whether the party not in default is entitled to terminate the contract and on what terms.<sup>6</sup> The contract may also provide for payment by the contractor of a specified sum by way of 'liquidated damages'<sup>7</sup> in the event of delay in completion beyond the date fixed.

Contract is, in effect, the instrument by which the separate and conflicting interests of the participants can be reconciled and brought to a common goal.<sup>8</sup> The importance accorded by English law to the planning function is shown by its preference for rules

<sup>3</sup> Macaulay (1963) 28 *American Sociological Review* 55.

<sup>6</sup> See below, pp 139–40.

<sup>7</sup> See below, p 565.

<sup>4</sup> *Ibid.*

<sup>5</sup> See below, pp 574, 591.

<sup>8</sup> See Gurvitch, *Sociology of Law* (1947).

that provide certainty, particularly in commercial contracts where speed and certainty have been said to be of paramount importance.<sup>9</sup>

### (c) FREEDOM OF CONTRACT

The significance of the role played by contract in any economic system can scarcely be denied. The issue is the extent to which the law does, or should, assume that parties enjoy freedom of economic decision when entering into contracts. The concept of freedom of contract has two meanings. The first is the freedom of a party to choose to enter into a contract on whatever terms it may consider advantageous to its interests, or to choose not to. Contractual obligation is thereby attributed to the will of the parties. This was one of the cornerstones of nineteenth-century *laissez-faire* economics.<sup>10</sup> Adam Smith in his *Wealth of Nations*, published in 1776, offered the first systematic account of economic affairs, championing the cause of freedom of trade against the economic protectionism current at that time, and freedom of contract was taken up as an ideal into classical economic theory.

When, therefore, in 1861, Sir Henry Maine wrote his *Ancient Law*, he postulated that the movement of progressive societies had hitherto been a *movement* from status (with its entrenched protection of privilege by legal and social restrictions) to contract. He considered this movement to be not only desirable, but inevitable. ‘Imperative law’, he said,<sup>11</sup> ‘has abandoned the largest part of the field which it once occupied, and has left men to settle rules of conduct for themselves with a liberty never allowed to them till recently.’

But freedom of contract also referred to the idea that as a general rule there should be no liability without consent embodied in a valid contract. This second and negative aspect of freedom of contract was influential in narrowing the scope of those parts of the law of obligations which deal with liability imposed by law: tort and restitution of an unjust enrichment.<sup>12</sup>

Today the position is seen in a different light. Freedom of contract is generally regarded as a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large. In the more complicated social and industrial conditions of modern society it has ceased to have much idealistic attraction except, perhaps, to the proponents of a completely free market economy, who have advanced it in recent years in a modern and sophisticated way, some using the tools of micro-economic analysis.<sup>13</sup> But whatever its status may be as an ideal, the concept of freedom of contract has suffered severe inroads as the result of developments in modern social life and policy.

<sup>9</sup> See below, pp 33, 61, 144, 149, 566.

<sup>10</sup> See Friedmann, *Law in a Changing Society* (1959) ch 4; Gilmore, *The Death of Contract* (1977); Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Cornish and Clark, *Law and Society in England, 1750–1950* (1989) 201–3, 226.

<sup>11</sup> *Ancient Law* (1930) ch ix, p 322.

<sup>12</sup> Below, p 17.

<sup>13</sup> Posner, *Economic Analysis of Law* (7th edn, 2007) ch 4; Cooter and Ulen, *Law and Economics* (5th edn, 2007) ch 6. Fried, in *Contract as Promise* (1981), provides a non-economic approach.

**(i) Statutory restrictions**

In the first place, statute law today interferes at numerous points with inroads into the freedom of the parties to make what contract they like. The relations between employers and employees, for example, have been regulated by statutes designed to ensure that employees are properly protected against redundancy and unfair dismissal, and that they know their terms of service. The public has been protected against economic pressure by such measures as the Rent Acts,<sup>14</sup> the Unfair Contract Terms Act 1977,<sup>15</sup> the Unfair Terms in Consumer Contracts Regulations 1999,<sup>16</sup> the Consumer Credit Act 1974,<sup>17</sup> and other similar enactments. These legislative provisions will override any contrary terms which the parties may make for themselves. Freedom of contract is also affected by statutorily imposed ‘implied terms’ which set the ‘default’ rule, although in certain circumstances this can be varied by the parties.<sup>18</sup> Further, both national<sup>19</sup> and European Community<sup>20</sup> legislation has been enacted to promote competition in industry and to safeguard the interests of consumers, and the Financial Services and Markets Act 2000 contains provisions to safeguard the interests of investors.

There are also wide-ranging statutory restrictions on discrimination on the grounds of sex, race, and disability in the provision of goods, facilities, and services, and in the selection of employees and in the terms upon which they employed.<sup>21</sup> These are a significant departure from the general freedom at common law to refuse to contract.<sup>22</sup> Although they primarily give rise to compensation orders, these statutory provisions can exceptionally lead to specific relief.<sup>23</sup> The prohibition on discrimination in the provision of goods, facilities, and services applies where the provision is made to the public or a section of the public.<sup>24</sup>

**(ii) Standard form contracts: contracts of adhesion**

Most contracts entered into by ordinary people are not in fact the result of individual negotiation. An employee’s contract of employment, for example, will often be determined by a collective agreement made between trade unions and employers. Standard form contracts are also frequently used, even between businesses. These will lay down the terms on which the supplier is prepared to do business, or embody or incorporate

<sup>14</sup> In particular the Rent Act 1977 (providing security of tenure and rent control for private residential lettings, as amended by the Housing Acts 1988 and 1996), the Housing Acts 1980 and 1985 (public sector tenants) and the Landlord and Tenant Acts 1985 and 1987 (landlords’ duties of information and implied terms as to condition of premises and repair, and tenants’ right to buy). <sup>15</sup> Below, p 192.

<sup>16</sup> SI 1999 No 2083, below, p 206.

<sup>17</sup> Below, p 216 (as amended by the Consumer Credit Act 2006).

<sup>18</sup> eg Sale of Goods Act 1979, ss 12–15, below, p 159; Supply of Goods and Services Act 1982, ss 2–5, 7–10, 13–15.

<sup>19</sup> Fair Trading Act 1973 (now repealed); Restrictive Trade Practices Act 1976 (now repealed); Competition Act 1998, Enterprise Act 2002; below, p 408.

<sup>20</sup> Below, pp 408–10. Since 1 December 2009, the European Union has replaced the European Community under the Treaty of Lisbon.

<sup>21</sup> Race Relations Act 1976, ss 4(1)(c), 17, 20–1; Sex Discrimination Act 1975, s 6(1)(c); Disability Discrimination Act 1995, ss 4, 4B, 19 (amended by SI 2003 No 1673).

<sup>22</sup> *Timothy v Simpson* (1834) 6 C & P 499. Cf *Constantine v Imperial Hotels Ltd* [1944] AC 693.

<sup>23</sup> Race Relations Act 1976, s 56; Sex Discrimination Act 1975, s 65(1)(c); Disability Discrimination Act 1995, s 17A(2)(c). <sup>24</sup> *Gill v El Vino* [1983] QB 425; *Quinn v Williams Furniture Ltd* [1981] ICR 328.

by reference the terms of a trade association. The freedom of the parties to negotiate is limited by such standard form contracts. Although a party, often a consumer, is free to decide not to deal with a particular retailer and to negotiate prices, delivery dates and so on, in many areas similar terms will be offered by other retailers so that the individual has either to accept the terms laid down in their totality, or go without. Since, however, it is not feasible to go without many such goods or services, the individual is effectively compelled to adhere to those terms. In certain types of standard form contracts, however, for example those for the charter of ships, the standard form is often extensively modified or supplemented by other terms appropriate to the particular charterparty.

### (iii) 'Compulsory' transactions

In the case of utilities such as water or electricity, which are in effect necessities of modern life, but the supplier is a monopoly or near monopoly, there may be a legal compulsion to supply, at least, domestic consumers. Under the legislation regulating such utilities, including electricity and gas where it is now possible to choose an alternative supplier, there is a duty to supply those who wish to be supplied,<sup>25</sup> there are certain prohibitions on undue preference and undue discrimination,<sup>26</sup> and a statutory regulator is given power to control prices and other terms of supply. This may be the modern equivalent of the common law duty on common innkeepers and common carriers to serve all comers on a reasonable basis,<sup>27</sup> probably because of their monopoly or near monopoly position. These common law doctrines have not, however, been developed and the field has been left to the anti-discrimination legislation, and legislation for the control of monopolies and restrictive trade practices, and for regulating utilities. Where there is a statutory obligation to supply and no or little power to negotiate about the incidents of the relationship, the Courts may regard its compulsory nature as incompatible with its being contractual.<sup>28</sup>

### (iv) Implied terms and the standard of 'reasonableness'

Finally, the negative aspect of freedom of contract, that there should be no liability without consent embodied in a valid contract, sits uneasily with the practice of implication of terms into the contract, and the use of the standard of 'reasonableness' as a way of dealing with gaps in the contractual language.<sup>29</sup> Terms are implied not only under statute, but also at common law. Although the basis of such implication is said to be 'necessity'<sup>30</sup> or in the case of custom 'presumed consent',<sup>31</sup> in many cases this is

<sup>25</sup> Gas Act 1986, s 10 (substituted by Gas Act 1995); Electricity Act 1989, s 16 (substituted by Utilities Act 2000). See also Water Industry Act 1991, s 37.

<sup>26</sup> Gas Act 1986, s 9(2) (substituted by Gas Act 1995); Water Industry Act 1991, ss 2(3)(b) (substituted by Water Act 2003); see also Telecommunications Act 1984, ss 3, 8(1)(d) and Electricity Act 1989, ss 3(2) and 18(4) (now repealed).

<sup>27</sup> *Clarke v West Ham Corp* [1909] 2 KB 858, 879–82. Note that almost all carriers contract out of their common law liability.

<sup>28</sup> *Norweb plc v Dixon* [1995] 1 WLR 637; *Read v Croydon Corp* [1938] 4 All ER 631.

<sup>29</sup> eg *Tillmanns & Co v SS Knutsford Ltd* [1908] AC 406; *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2)* [1993] 1 Lloyd's Rep 397, 404.

<sup>30</sup> *Liverpool City Council v Irwin* [1977] AC 239, 254. See below, p 156.

<sup>31</sup> *Produce Brokers Co Ltd v Olympia Oil & Cake Co Ltd* [1916] 1 AC 314, 324. See below, p 157.

rather artificial, and in truth in many standard transactions the implied terms are the legal incidents of the transaction,<sup>32</sup> from which the parties are, subject to statute, often free to deviate although in practice many parties will simply be bound by those implied terms without seeking to negotiate otherwise. Freedom of contract is also difficult to reconcile with the adoption of the 'objective theory' which provides, in essence, that a person (A), whose conduct is such that the other party reasonably believes that A has assented to the terms of a contract, will be bound no matter what A's real intention is.<sup>33</sup> This rule can lead to the imposition of non-consensual obligations, since what creates the obligation is not consent in fact but acting as if consent is being given.

#### (v) Summary

In many areas of contract, freedom of contract in the classical sense is manifestly lacking. But English law and English judges still to a great extent proceed on the assumption that the parties are free to choose whether or not they will enter into a contract and on what terms. The formulation of the test for implied terms has been noted, and, as recently as 1980, in the House of Lords, Lord Diplock observed:<sup>34</sup> 'A basic principle of the common law of contract . . . is that the parties are free to determine for themselves what primary obligations they will accept' It may be objected that the general principles of contract law therefore present an inadequate, if not distorted, picture of modern economic life. This may be so, but it is nevertheless the fact that the law does still rest on the assumption of freedom of choice, and where a relationship is entered into in which there is no choice, a Court may hold that it is not contractual.<sup>35</sup>

#### (d) SANCTITY OF CONTRACTS

Closely associated with the concept of freedom of contract is yet another principle, that of the sanctity of contracts.<sup>36</sup> Businesspeople in particular are concerned to ensure that the parties to a contract keep to their bargain and that as few avenues as possible should be afforded for escape from contractual obligations. In general, English law is reluctant to admit excuses for non-performance. But the Draconian requirements of commercial convenience have to be reconciled with the moral qualifications introduced by the need to discourage the grosser forms of unfair dealing. Thus the common law, and even more so equity, the influence of which has been more apparent in recent times, have admitted defences based on fraud, misrepresentation, mistake, duress (including economic duress), and undue influence, and endeavoured to curb the economic exploitation (in particular) of employees by the doctrine of restraint of trade. Although there is no general principle of 'inequality of bargaining power',<sup>37</sup> Courts take account of this in interpreting the contract and applying these doctrines. Additionally, statutory protection overrides unfair terms in certain types of contracts, for instance those made between consumers and businesses, and employees and

<sup>32</sup> *Mears v Safecar Securities Ltd* [1983] QB 54, 78.

<sup>33</sup> Below, pp 32, 253. <sup>34</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848.

<sup>35</sup> Above, p 6.

<sup>36</sup> See Hughes Parry, *The Sanctity of Contracts in English Law* (1959), and below, pp 16–17.

<sup>37</sup> *National Westminster Bank plc v Morgan* [1985] AC 686, below, p 375.

employers. It should not be imagined, however, that contractual obligations can be repudiated by one party merely because that party was in the weaker bargaining position. In the 'rough and tumble' of commercial relationships, various types of pressure are frequently brought to bear and terms may be imposed which are, objectively, harsh; but the contract will still bind.

Further, the law will not permit a person of full age and understanding who failed to read the contract or to appreciate its full import and effect to escape from the contract. It will not rewrite a contract for the parties or imply additional provisions merely because it would be reasonable so to do. And it will, in general, give effect to a written contract in accordance with its recorded terms, and not admit evidence to show that one party intended them to be construed in a different way from that which they actually express.

In certain situations, however, the law will pronounce that the parties are relieved from performance of their obligations by reason of a change of circumstances occurring after the contract was made. But this principle—that of 'frustration of the contract'<sup>38</sup>—is very limited in scope, and will not apply, for example, merely because a subsequent event changes the financial equilibrium of the transaction and forces a party who expected to make a profit from the transaction into a position of loss. The event must be of such a serious and fundamental character that to enforce the contract in the changed circumstances would be to enforce a radically different contract from the one which the parties made.

#### (e) THE INTEREST PROTECTED BY CONTRACT

The entering into of a contract creates an interest in each party that the contract will be performed.<sup>39</sup> The obligation may be strict, for example a seller's undertaking that it has good title to the goods sold, or it may be qualified, for example to use reasonable care, as is the case in many aspects of contracts for services by professionals such as lawyers or surveyors. If one party fails, in whole or in part, to perform the obligations undertaken in the contract, the other party, whose economic, physical, and, in some cases, psychological interests will be affected, will be entitled to redress. But what form will that redress take?

Where the breach of contract consists of a failure to pay money, whether for goods bought and delivered or for services rendered, the redress for breach will often take the form of (direct) specific enforcement of the contract by an action (in debt) for the sum due.<sup>40</sup> Where the breach consists of the failure to render a non-monetary performance, for example, a seller's failure to deliver goods to a buyer, in some cases the injured party will also be entitled to (direct) specific performance of the other party's obligation. Normally, however, the redress will not take the form of specific performance of the contract, but will consist of monetary compensation.<sup>41</sup> How is that compensation to be assessed?

The object of compensatory damages in contract is to put the injured party, from the position it is now in after the breach, into the same position as it would have been

<sup>38</sup> See below, Chapter 14.

<sup>39</sup> See Fuller and Perdue (1936–37) 46 Yale LJ 52, 573; Atiyah (1978) 94 LQR 193; Taylor (1982) 45 MLR 139; Burrows (1983) 99 LQR 217; Friedmann (1995) 111 LQR 628; Coote [1997] CLJ 537.

<sup>40</sup> Below, p 573. Cf p 534.

<sup>41</sup> Below, p 539.

had the contract been duly performed. The injured party is entitled to protection of its interest in the performance of the contract. Suppose, for example,<sup>42</sup> a port authority by contract promises a car ferry operator that it will allow it to use the port facilities for car ferry operations during the coming year, but in breach of that contract repudiates the contract almost immediately after it is made. The wasted expenses sustained by the ferry operator may be no more than (say) the trifling expense of having prepared draft timetables of ship movements for the contract period. But it will nevertheless be entitled additionally to be compensated in damages for the profit which it would have made on the car ferry operations during the year in question. Compensation assessed on this basis is, in effect, a substitute for the performance of the other party's obligation, whether by the payment of a debt that has accrued due<sup>43</sup> or by the rendering of other forms of performance.<sup>44</sup> This protection of the 'expectation' or 'performance' interest (these two terms are synonymous) is not peculiar to the English law of contract. It is a consequence of contract in all developed legal systems. Even if the contract is wholly executory, that is to say, nothing has been done by either party under it at the time of its breach, damages for lost performance will be recoverable.<sup>45</sup>

It has sometimes been suggested that, as an alternative to the expectation or performance interest, compensation in contract protects the claimant's 'reliance' and 'restitution' interests.<sup>46</sup> This is misleading. While reliance damages can be awarded for breach of contract, they are best viewed as an alternative way of protecting the claimant's expectation interest and are not protecting a separate reliance interest.<sup>47</sup> Again, restitution of money paid or the value of services rendered can be awarded where a contract has been discharged for breach or frustration or where a contract is ineffective as well as in situations far removed from a contractual context. But that restitution is for the independent cause of action of unjust enrichment at the claimant's expense and is not a remedy for breach of contract.<sup>48</sup> Certainly it is true that restitutionary damages or an account of profits can now be awarded, as an alternative to compensatory damages, for breach of contract to remove some or all of the profits made by the contract-breaker. But that is an unusual and relatively rare remedy which has only been fully recognized recently since the decision of the House of Lords in *Attorney-General v Blake*.<sup>49</sup>

## 2. THE HISTORY OF CONTRACTUAL OBLIGATIONS IN ENGLISH LAW

The modern law of contract contains much which can properly be explained (if at all) only in the light of its history. Hence, even in a book which aims only at stating the principles of the modern law, it is desirable to give some account of how that law came

<sup>42</sup> See *Thoresen Car Ferries Ltd v Weymouth Portland BC* [1972] 2 Lloyd's Rep 614.

<sup>43</sup> Below, p 573.

<sup>44</sup> Below, p 575.

<sup>45</sup> But see the criticisms of Atiyah (1978) 94 LQR 193, and in *The Rise and Fall of Freedom of Contract* (1979).

<sup>46</sup> Fuller and Perdue (1936-37) 46 Yale LJ 52, 573.

<sup>47</sup> See below, p 542

<sup>48</sup> See below, p 587

<sup>49</sup> [2001] 1 AC 268. See below, pp 598-9.

to take the form which has just been indicated in outline. We shall see that it has not been by any process of analysis and elucidation of the essential nature of a contract that the law has been moulded. Indeed, the very idea of enforcing promises or agreements as such, which seems most natural to us, may not be an early one in the history of any legal system. We shall find the key to the story by examining the conditions which the Courts have attached at different stages to the actions which they were willing to admit for the enforcement of the kind of rights which we now regard as contractual. The story can here be given only in the barest outline,<sup>50</sup> and it should be understood that there are some points in it which remain obscure or controversial.

### (a) THE EARLY ACTIONS

#### (i) 'Wager of law'

Actions in what we call contract and tort were at first within the jurisdiction of local and manorial courts. The action would commonly end in a general denial of liability, upon which the defendant would 'wage his law', that is undertake to come at the next court day and swear to this denial in the presence of neighbours (their number specified by the Court) who would then swear to their belief in this oath. If on the day all the oaths were made correctly, the defendant won. The efficacy of this depended partly on the fear of damnation for perjury, and partly upon standing among the neighbours (the city of London, for example, which lived by the credit of its citizens, set particular store by this mode of proof). This social sanction would be lost as lawsuits were diverted from the local setting into royal courts in Westminster.

#### (ii) Trespass

In the field of tort, for which the very rough medieval equivalent is 'trespass', a case would come to a royal court only if there was some royal interest, normally a 'breach of the king's peace'. That allegation had two other effects. It precluded the defendant from answering by wager of law and required the case to go to a jury. And as between the main royal courts, it gave jurisdiction to the King's Bench concurrently with the Common Pleas. The allegation itself became increasingly fictionalized in the early fourteenth century; and around the middle of the century the Chancery began to make writs of trespass returnable into royal courts with no mention of the king's peace. This was the effective beginning of 'actions on the case'; and logically plaintiffs should not have been able to sue in the King's Bench, and defendants should have been permitted to wage their law. But on both points logic was overruled. All actions of trespass and case could go to either of the royal courts, and all went to jury trial; and this was a cause of developments to which we shall come, by which remedies in contract came to be sought by actions in tort.

<sup>50</sup> For fuller treatment, see Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Baker, *Introduction to English Legal History* (4th edn, 2002) 317–61; Baker and Milsom, *Sources of English Legal History* (1986) 209–96, 358–505, hereafter 'Baker and Milsom'; Cornish and Clark, *Law and Society in England, 1750–1950* (1989) 197–226; Milsom, *Historical Foundations of the Common Law* (2nd edn, 1981) 243–360; Simpson, *A History of the Common Law of Contract* (1975); Stoljar, *A History of Contract at Common Law* (1975).

In the field of contract, jurisdiction as between local and royal courts came to depend upon the amount at stake. From a beginning in the thirteenth century, originally concerned only with the recovery of debts, a general jurisdictional barrier developed at 40 shillings, then a sum so large that very few transactions of ordinary people would reach it. But the amount was never altered, so that a period of rapid inflation in the sixteenth century brought transactions of falling real value to Westminster, and therefore to the modes of proof in use there. In particular, since there had been no equivalent of the king's peace to affect proof as well as jurisdiction, wager of law was often available; but those who swore to the defendant would be not neighbours but persons hired in Westminster. In the old contract actions, therefore, the focus of attention for lawyers and litigants was not some substantive law of contract but modes of proof.

### (iii) Covenant

The word 'covenant' (*conventio*, agreement) is the nearest medieval equivalent to our 'contract'. But even in local courts an action for money due under a contract would be called not covenant but debt (or detinue if the action was for a specific chattel lent or bought, for example), so that actions called covenant mainly concern breaches of agreement for services like building or for sales or leases of land. The primary claim was for performance, and in royal courts the action was begun by a writ, known (from its opening word) as a *praecipe* writ,<sup>51</sup> ordering the defendant to keep the agreement; but judgments ceased to order specific performance and damages were awarded instead. Some think that the plaintiff would have to have done his part of the bargain, but we are not informed about the early requirements; and in the royal courts the question was suppressed by a new requirement about proof. Early in the fourteenth century it became settled that the plaintiff was not entitled to an answer unless he could produce a document under the defendant's seal (in illiterate times the equivalent of a signature) setting out the terms of the agreement. Soon after this the action of covenant fell out of use, not because of this requirement but because the kind of sealed document to which we are about to turn proved more effective. But covenant retained a negative importance: parties might contract for the building of a house, for example, not thinking of royal courts or sealing wax, and find the natural remedy barred.

### (iv) Debt

Any claim for a fixed sum of money or a fixed quantity of fungible goods would in the royal court be made by the *praecipe* writ of debt. At first even a claim for specific goods would be made by the same writ, so that one who borrowed money and a book was seen to owe the book in the same way that the money was owed; but the separation of detinue need not be discussed here. In royal as in local courts, the defendant could normally answer by wager of law; and one lending a large sum or selling goods for a large price might take precautions, and this led to a separation between two principal uses to which the single writ of debt might be put.

<sup>51</sup> Baker, *Introduction to English Legal History* (4th edn, 2002) 57–9.

(a) *Debt on an obligation.* The simplest precaution for, say, a lender was to require the borrower to execute a document under seal, a bond. This was evidence not of a promise to pay but of indebtedness itself, and it was conclusive. The defendant could not deny that the debt was owed, though he could deny that the deed was his (*non est factum*).<sup>52</sup> But that was a risky issue to take: it went to a jury, who would compare seals etc; and if they found against the defendant he would go to prison. At law the defendant could not even say that payment had been made; and though he eventually got equitable protection from the Chancery in this situation, that was only after a long struggle between the competing goods of general certainty and individual justice.

But bonds were put to wider uses than ensuring that a lender or a seller would get the money that was due. One hiring a builder to build a house, for example, would take from him a bond by which the builder would acknowledge that he owed the customer an essentially penal sum, which bond would be void if conditions (written sometimes on the back of the bond, sometimes in a separate indenture) were satisfied; and those conditions specified the site, dimensions, materials, completion date, etc. of the house. If the customer sued it would be on the bond for the penalty, and the builder could of course plead that he had satisfied the conditions. Conversely, the builder would take a bond from the customer, commonly for double the agreed price, to be void if the agreed price was duly paid. Such conditional bonds became the principal vehicle for large transactions; and they continued to be so until the Chancery began to relieve against penalties and until *assumpsit*<sup>53</sup> provided a simpler mechanism.

(b) *Debt on a covenant.* A sealed document was never required in debt as it was in covenant. The lender could always sue for the repayment of the money lent, the seller for the price, and the builder or other provider of services for the agreed payment. But normally this was only possible when the plaintiff had done his part of the bargain, when the defendant had had his *quid pro quo*. And the medieval word 'contract' did not have its modern meaning; it meant precisely the obligation 'contracted' by a debtor who had received his *quid pro quo*. But much of the reality is hidden by the defendant's usual denial by wager of law—not a denial of any specific facts but just that he owed. And the availability of wager had a further consequence. Only the debtor himself could swear that he did not owe: even if the debt had been publicly incurred it might have been privately paid. So the executor of a dead debtor could not wage law, and it was held by a perverse logic that the executor could not be sued. But that applied only to debt on a contract: the executor could be sued if the plaintiff had a bond which would any way exclude wager.

The combined effect of these actions may be described in terms of an agreement to build a house. Well-advised parties would set it up by conditional bonds, so that the party alleged to be in breach would be sued in debt for the penalty and could plead that the conditions had been satisfied. If the agreement was informally made, the builder who had built could sue in debt for the price (normally answerable by wager of law). But the customer could not bring covenant if the builder did not build, because he had no document under seal; and probably he could not even bring debt to recover any

<sup>52</sup> For the defence of *non est factum* in the modern law, see below, p 259.

<sup>53</sup> Below, pp 13 ff.

money he had paid. This inequity played its part in the rise of *assumpsit*, where the writ asserted that the defendant had ‘undertaken’ (*assumpsit*) to do something; but it is important not to suppose that from the beginning lawyers saw that *assumpsit* was to become a general contractual remedy.

## (b) ASSUMPSIT

### (i) MIFEASANCE

Among the tort actions which came to royal courts when the need to allege a breach of the king’s peace was dropped were some in which there was a contractual background to the wrong. In 1348 a ferry-man was sued: he had undertaken to ferry a horse across the Humber, but so mismanaged it that the horse was drowned.<sup>54</sup> Its owner sued in tort, and the defendant (knowing there was no sealed document) argued that the proper action would be covenant. The action was held to be rightly brought in tort: the plaintiff complained of the killing of his horse, not the failure to transport it; and such claims for ‘mifeasance’ regularly succeeded.

### (ii) NONFEASANCE

There was more difficulty if the defendant had made an undertaking but done nothing in the matter at all: this was clearly ‘covenant’ rather than ‘trespass’. Many attempts to get ‘trespass’ remedies were made, mostly in situations in which performance of the *praecipe* order in covenant would be impossible (eg the date by which the house was to be built has passed) or would be no sufficient remedy (eg timbers have rotted because the roof was not mended as promised). These would have been arguments for not suing in covenant even if the builder or roof-mender had made their promises under seal; and this may have been among the reasons why customers set up their agreements by conditional bonds in which the penalty would cover any consequential damage as well as the value of the performance. And one must remember that all these early attempts to use *assumpsit* for a nonfeasance were by plaintiffs who had omitted the proper formalities. Perhaps they were caught out by the only transaction of a lifetime large enough to come to a royal court. But their hard cases seemed to a judge in 1425 to threaten bad law: ‘if this action’ (against one who had not built a mill as promised) ‘should be maintained... then a man would have an action of trespass for every broken covenant in the world’.<sup>55</sup>

He was to be proved a prophet: but his logic was hard to overcome and we cannot be sure how and when it happened. A stage seems to be marked by a case of 1442 in which the defendant agreed to sell and convey land to the plaintiff from whom she took money. But she actually conveyed to a third party; and the plaintiff sued in tort for a deceit.<sup>56</sup> The agreement was made in London about land outside. If the land had been inside the city, the action would have been brought in city courts under the custom of London by which (a) actions in covenant did not require a document under seal,

<sup>54</sup> *Bukton v Tounesende, The Humber Ferry Case* (1348), translated in Baker and Milsom, above, n 50, 358.

<sup>55</sup> *Watkins’ (or Wykes’) Case* (1425) translated in Baker and Milsom, above, n 50, 380, 383 (Martin J).

<sup>56</sup> *Shepton v Dogge (Nos 1 and 2)* (1442), translated in Baker and Milsom, above, n 50, 390–5.

(b) the normal remedy in covenant was an order for performance, and (c) one who had put it out of his power to perform would be sued in deceit and imprisoned until he made fine with the city and repaid the money to his claimant. In London therefore the plaintiff's action would not have been a dodge to get round the absence of a sealed document but the natural remedy, essentially in rescission. In Westminster the logic got the plaintiff a remedy: but the Court could not order imprisonment (and therefore repayment of the money) but only damages.

This looked like enforcement rather than rescission, and the king's courts were left with a distinction without a real difference: the disappointed buyer who had paid for the land could get damages if his seller had conveyed to a third party, but not otherwise. Many approaches were tried; and around 1500 it begins to appear that nonfeasance was becoming remediable, at first only when the claimant had actually paid or there was some other detrimental reliance (and at any period one who has suffered no damage would normally prefer to hire somebody else rather than sue). Mutual promises do not become actionable until later in the century, by equally obscure stages; and the underlying illogicality is increasingly masked by elaborate and unreal allegations of deceit.

### (iii) Assumpsit for money

From the use of *assumpsit* in lieu of covenant (where the absence of a sealed document might leave a plaintiff entirely without remedy) we turn to its use in lieu of debt (where the plaintiff always had a remedy, but might be faced by wager of law). But again one must not think that the end was aimed at from the beginning. The beginning is early in the sixteenth century in cases involving not money but fungible goods: a brewer contracts to buy malt or barley, and when it is not delivered has either to buy at a much higher price or to let his brewery go off stream.<sup>57</sup> The substantial claim goes not to the goods themselves but to the damage flowing from reliance upon the promise to deliver them; and this may be reflected in the language of deceit. When money is involved the reliance claim seems first to have appeared in situations involving third parties. Seller sells to Buyer in reliance upon the promise of a third party to pay if Buyer does not. It is Buyer who got the *quid pro quo* and contracted the debt; and any liability of the third party must be on the basis of reliance.<sup>58</sup>

One must not assume that the first use of the same logic as between two parties was intended as a conscious circumvention of debt. Debtor owes Creditor, and when pressed promises to pay the amount at a specified future date. Relying upon this promise, Creditor makes other bargains with third parties. When Debtor does not pay Creditor, Creditor cannot pay the third parties; and, particularly if he is a merchant, this failure so damages his own credit that he is ruined. This consequential damage is the gist of this action, not the original debt, which is not in principle even claimed. But jurors would include the amount of the debt in their assessment of damages; and such actions soon came to be used to recover debts but exclude wager of law.

Since debt was in the exclusive jurisdiction of the Common Pleas, it was the King's Bench that led in this development and an unseemly difference of practice arose. On

<sup>57</sup> For example, see the cases in Baker and Milsom, above, n 50, 406 and 411.

<sup>58</sup> Such cases are cited in argument in Baker and Milsom, above, n 50, 414–15.

the general issue of '*Non assumpsit*', where the defendant denied the undertaking, the Common Pleas would direct the jury that if they were to find for the plaintiff they must find both that the defendant was *indebitatus* (indebted) and that he made an express promise to pay the debt, the King's Bench that they need find only the indebtedness (because every debtor could be presumed to promise to pay: every contract executory imports in itself an *assumpsit*). But since the issue would be tried at *nisi prius*,<sup>59</sup> the judge actually directing the jury might not come from the Court in which the action had been begun. It seems clear that in *Slade's Case* the judges at *nisi prius* made a conscious effort to have the matter resolved. The jury was induced to bring in a special verdict that the debt was owed but that there was no subsequent promise to pay it. This was reported to the King's Bench, in which the action had been started; and instead of giving judgment that Court referred it to the Court of Exchequer Chamber, not really a Court but an informal conference of all the judges. That body was unable to agree; the King's Bench gave judgment for the plaintiff in accordance with their own practice; and this result was unwillingly accepted by the Common Pleas.<sup>60</sup>

Various consequences followed. Since the *indebitatus assumpsit* action was formally for reliance damage and not the debt, it now had to be made clear that the debt itself was recoverable as well as any damage, that the actions were alternative, and that the one barred the other. And since formally the reliance damage flowed entirely from the promise to pay the debt, there was no logical need to specify how the debt had arisen; and so a defendant in the *indebitatus* action might not know the actual case he was to answer. The Courts therefore required minimum particulars to be given; and a series of 'common counts' developed stating that the debt was for goods sold and delivered, for work and materials, and so on. More importantly *Slade's Case* marked the effective end of wager of law; and it was necessary to make explicit the important consequence that executors could now be sued for simple contract debts. Nor was the ending of wager unmixedly beneficial: it turned out that jury trial could be manipulated by fraudulent plaintiffs; and in 1677 the Statute of Frauds provided that in certain situations action could be brought only if there was some written evidence signed by the defendant.

With the important exception of agreements supported by sealed documents, in which covenant or debt still could and had to be brought, all contract litigation after *Slade's Case* was brought in *assumpsit*; and it was from this that the modern law of contract developed. It is indeed a general law of contract rather than a law about particular contracts as in Rome.<sup>61</sup> But its beginnings in tort, which remained obvious in the persistent language of deceit until the nineteenth century, inhibited the development of a satisfactory theoretical structure. Instead we have the 'doctrine' of consideration.<sup>62</sup> There has been much speculation about its 'origin', on the basis that it must have developed

<sup>59</sup> Baker, *Introduction to English Legal History* (4th edn, 2002) 20–2.

<sup>60</sup> 1602 4 Co Rep 91a.

<sup>61</sup> In Roman law, a promise or agreement was given legal recognition and enforcement as a contract only if it fell within one of a number of particular types for which an action was provided (such as sale, hire, partnership, mandate, loan of a fungible, loan for use, or a unilateral promise made and accepted in a formal oral exchange between the parties): Nicholas, *Introduction to Roman Law* (1975) 165–7. Modern European civil law systems retain the Roman law legacy of a strong doctrine of particular contracts which have special regulation in their Codes but have also, unlike ancient Roman law, added a general law of contract: see, eg, Bell, Boyron and Whittaker, *Principles of French Law* (2nd edn, 2008) 297–8.

<sup>62</sup> For consideration in the modern law, see below, Chapter 4.

from some earlier phenomenon. Consideration as detriment to the claimant looks much like the damage he suffered when the case was put in terms of deceit or reliance, and this provides some explanation of the uselessness of past consideration and of the rule that consideration must move from the claimant. Consideration as benefit to the defendant looks much like the *quid pro quo* of debt; and it must be remembered that after *Slade's Case* the debt and therefore the *quid pro quo* was the only issue in *indebitatus*. Other origins have been suggested, such as the canonist idea of *causa* which indeed played some part in the Chancery. But the reality seems to be that sixteenth century pleadings used the word to mean the reason for which the promise was given, and judges then and later decided which of these were a sufficient basis for legal action. If so, consideration is not so much a 'doctrine' as a considerable body of the substantive rules of contract.

### (c) SUBSEQUENT DEVELOPMENTS

There has been much later development, too detailed and perhaps too little explored by historians, to consider in this summary. Lord Mansfield in the eighteenth century and Lord Denning in the twentieth sought to rationalize consideration, but the substantive changes needed were too obtrusive. The English promissory estoppel,<sup>63</sup> for example, is a pale shadow of the American, perhaps because the lesser weight given in the USA to deeds left more obvious injustice when gratuitous promises were relied on. And the American reliance basis for remedy, essentially as alternative to consideration, is a reminder of the mongrel nature of the common law of contract.

The law started with covenant (or contract) as something essentially different from trespass (or tort). That difference was the continuing obstacle in the rise of *assumpsit*; and its overcoming introduced continuing confusion. It was nineteenth century judges and writers, including Anson, who sought to restore contract law as a thing in itself: rules mostly about the formation of binding agreements, with ancillary rules about the damages recoverable for breach.<sup>64</sup> The impulse may have been partly juristic, partly due to commercial demands for certainty and for more sophisticated rules to deal adequately with the expansion of trade and commerce that resulted from the industrial revolution. Consideration (or a deed) is then represented as something like offer and acceptance: one of the requirements for formation. But it sprang from a law about tort, about damage suffered by the claimant at the end of the story rather than about the beginning of a binding relationship between the parties. Like many mongrels the result may not be elegant; but it is strong.

#### (i) The nineteenth century

We have noted that the concepts of freedom of contract and sanctity of contract were at their strongest during the nineteenth century. In 1875 Sir George Jessel MR stated:<sup>65</sup>

if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their

<sup>63</sup> Below, p 116.

<sup>64</sup> See Simpson (1975) 91 LQR 247.

<sup>65</sup> *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

This was said to have led to the reduction of supervision over the contractual terms to a bare minimum<sup>66</sup> and the deprivation of the tools available for such control of much of their effectiveness. The doctrine of consideration acquired a predominantly formal meaning, although it was on occasion used to invalidate unfair agreements.<sup>67</sup> A substantial part of the law of contract was attributed to the parties' agreement, and the role of equity, with its discretionary remedies, and its ability to avoid common law rules, was less central.

At the same time, non-contractual liability was kept within narrow boundaries. As regards liability to make restitution of an unjust enrichment (then known as quasi-contract), Bowen LJ's famous statement that '[l]iabilities are not to be forced upon people behind their backs'<sup>68</sup> was profoundly influential. Indeed, Lord Sumner and Sir William Holdsworth argued that all such claims were founded upon an implied contract.<sup>69</sup> If there could not be a contract, there could not be an implied contract; there was no independent non-contractual claim. Tort liability was restricted by what was later called the 'privity of contract' fallacy, that duties which originated in a contract were confined to the parties.<sup>70</sup> It was also mainly concerned with the protection of proprietary interests and with providing a remedy for certain categories of physical injury. Although a number of economic torts were developed, notably deceit, injurious falsehood, inducement of breach of contract, and conspiracy, they required wilful misconduct. There was no liability for pure economic loss which was inflicted negligently.

### (ii) The twentieth century

In the modern period there is evidence of the reshaping of contract law accompanied by an expansion of non-contractual obligations in tort, in particular for negligent misrepresentation causing purely economic loss, and in respect of restitution of unjust enrichment. There has been a dilution of formal requirements and increased regard is given to considerations of substantive fairness. The erosion of the doctrine of consideration in the context of contract re-negotiation, and its replacement by rules of equitable estoppel<sup>71</sup> and economic duress is perhaps the most prominent example, but there are others, including an approach to discharge of contract, whether by breach or frustration, that gives greater emphasis to the consequences of an event than to the, often fictional, intentions of the parties.<sup>72</sup> The evolution of new doctrines and approaches has been gradual, and there have been exceptions and inconsistencies. For instance, when, in 1976, economic duress was first recognized as a factor vitiating contract, its theoretical basis was said to be 'coercion of the will', ie absence of consent. But this was rejected in less than a decade,<sup>73</sup> whereas in the case of frustration, first

<sup>66</sup> Atiyah, *The Rise and Fall of Freedom of Contract* (1979). But cf Simpson (1979) 46 U Chi L Rev 533; Barton (1987) 103 LQR 118.

<sup>67</sup> *Stilk v Myrick* (1809) 2 Camp 317; 6 Esp 129, below, pp 108–11.

<sup>68</sup> *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch 234, 248.

<sup>69</sup> *Sinclair v Brougham* [1914] AC 398, 452 (overruled by *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669); Holdsworth (1939) 55 LQR 37. Cf Lord Wright (1938) 6 CLJ 305, 312 ff.

<sup>70</sup> *Winterbottom v Wright* (1842) 10 M & W 109.

<sup>71</sup> Below, p 116.

<sup>72</sup> Below, pp 487–8, 521–2.

<sup>73</sup> Below, p 351.

recognized in 1863, it took almost a hundred years for the Courts to turn away from regarding implied contract as the basis of that doctrine.<sup>74</sup>

### (iii) Legislation

The last hundred years have also seen a rapid growth in the importance of statute law. There were great codifying Acts of the nineteenth century for particular types of contract, such as the Bills of Exchange Act 1882 and the Sale of Goods Act 1893. We have noted the considerable, and increasing, amount of regulatory legislation, which is designed to protect certain classes of the community or to implement government policy. There are also a number of reforming statutes such as the Law Reform (Frustrated Contracts) Act 1943, the Misrepresentation Act 1967, the Civil Liability (Contribution) Act 1978, the Minors Contracts Act 1987, and the Contracts (Rights of Third Parties) Act 1999 which have been passed to remedy defects or to make good particular deficiencies in the common law.

### (iv) Codification

In 1872, the Indian Contract Act was enacted, which codified (with some variations) the general English law of contract for use in the Indian sub-continent. But English law remained, and still remains, predominantly judge-made law. In 1965, the Law Commission of England and Wales and the Scottish Law Commission announced their intention to codify the English and Scots law of contract.<sup>75</sup> The code as originally envisaged was to be a uniform body of law applying throughout England and Scotland, and it was to embody amendments to the existing law of both countries. Subsequently, however, the Scottish Law Commission withdrew from this enterprise. In 1973, therefore, the Law Commission decided to suspend its work on a contract code.<sup>76</sup> Since then it has examined particular areas of the law of contract, and has either recommended reform, such as in the case of minors' contracts, implied terms as to quality in the sale of goods, formalities and covenants of title in the sale of land,<sup>77</sup> contributory negligence as a defence in contract,<sup>78</sup> contracts for the benefit of third parties,<sup>79</sup> unfair contract terms<sup>80</sup> and consumer remedies for faulty goods,<sup>81</sup> or has concluded that no legislation is necessary, as in the case of the parol evidence rule<sup>82</sup> and illegal contracts.<sup>83</sup> It is now reviewing insurance contract law.<sup>84</sup> It seems, however, unlikely that the project of codification will be revived.

<sup>74</sup> Below, pp 486–7.

<sup>75</sup> Diamond (1968) 31 MLR 361.

<sup>76</sup> The draft as it stood when the project was abandoned has since been published: McGregor, *The Contract Code Drawn Up on Behalf of the Law Commission* (1993).

<sup>77</sup> Law Com No 79 (1977); Law Com No 134 (1984); Law Com No 160 (1987); Law Com No 164 (1987); Law Com No 199 (1991), implemented respectively by the Civil Liability (Contribution) Act 1978, Minors Contracts Act 1987, the Sale and Supply of Goods Act 1994, and the Law of Property (Miscellaneous Provisions) Acts 1989 and 1994.

<sup>78</sup> Law Com No 219 (1993), rejected by the Government.

<sup>79</sup> Law Com No 219 (1993), on which see below, pp 562–3 and Law Com No 242 (1996) implemented by the Contracts (Rights of Third Parties) Act 1999, on which see below, p 624.

<sup>80</sup> Law Com No 292 (2005).

<sup>81</sup> Law Com No 317 (2009).

<sup>82</sup> Law Com No 154 (1986), below, p 138.

<sup>83</sup> Law Com No 320 (2010).

<sup>84</sup> Law Com No 319, *Consumer Insurance Law: Pre-Contract Disclosure and Misrepresentation* (2009), part of a wider review of consumer and business insurance law: Law Com No 316, *Annual Report 2008–09*, paras 4.1–4.7.

#### (v) Extra-judicial controls on contract

The law of contract as presented in this book is that applied by the English courts. It comprises common law and legislation. However, it is important to realize that, in practice, there are controls on contracts other than through the courts. Arbitration is the most obvious example albeit that, if English law applies to the dispute, arbitrators will be seeking to apply the law of contract as presented in this book in the same way as a judge would do. The Office of Fair Trading has an important role in, for example, controlling unfair terms not only by occasionally bringing actions in the courts but also, and much more commonly, by informally negotiating with businesses and seeking undertakings from them.<sup>85</sup> There is also, for example, the Financial Ombudsman who has wide powers to make awards, enforceable in the courts, without being bound to apply the strict rules of contract law.<sup>86</sup> Finally one should bear in mind the increasing encouragement to parties to mediate because it is seen as a relatively inexpensive and quick way of resolving disputes without going to court.<sup>87</sup>

### 3. EUROPEAN AND INTERNATIONAL INFLUENCES

The English law of contract is beginning to be exposed to the influence of the European Union and the predominantly civilian systems of its Members because of the perceived importance of its harmonization in the development of the single market. To date the most significant initiatives affecting contract law have been the Directives on Unfair Terms in Consumer Contracts<sup>88</sup> and Consumer Sales,<sup>89</sup> and those which seek to ensure that there is no discrimination in tendering procedures for major contracts for public works, supplies, and services.<sup>90</sup>

There is also a movement to develop common principles of European contract law.<sup>91</sup> Those who favour this argue that there are many benefits to be derived from a formulation of principles of contract law within Europe. These include the facilitation of cross-border trade, the strengthening of the European single market, the provision

<sup>85</sup> See below, pp 207, 205.

<sup>86</sup> See Financial Services and Markets Act 2000, Part XVI and Sch 17 and Consumer Credit Act 2006, s 59. For discussion, see Smith, *Atiyah's Introduction to the Law of Contract* (6th edn, 2005) 250–1, 330–1.

<sup>87</sup> Courts now commonly stay proceedings to allow for mediation and there may be cost penalties for a party that refuses to go to mediation.

<sup>88</sup> Council Directive 93/13/EEC (OJ L 95, 21 April 1993, p 29), implemented by the Unfair Terms in Consumer Contracts Regulations 1994 (SI No 3159), now the 1999 Regulations (SI 1999 No 2083), below, p 206.

<sup>89</sup> Directive 99/44/EC (OJ L 171, 7 July 1999, p 12), implemented by the Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002 No 3045), amending the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982; below, pp 512, 577. See also the Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992 No 3288), below, pp 200, 216, 326, 346, 618, 642 and the Timeshare Act 1992.

<sup>90</sup> For the current provisions, see Directive 2004/17/EC, implemented by the Utilities Contracts Regulations 2006 (SI 2006 No 6) and Directive 2004/18/EC, implemented by the Public Contracts Regulations 2006 (SI 2006 No 5).

<sup>91</sup> See Lando and Beale, *Principles of European Contract Law Parts I & II* (2000); Lando, Clive, Prüm and Zimmermann, *The Principles of European Contract Law Part III* (2003); Kötz, *European Contract Law* (trans Weir) (1997).

of an infrastructure for European Union laws governing contract and of guidelines for national courts and legislatures, and the construction of a bridge between common law and civil law systems. Following the publication of the *Principles of European Contract Law Parts I and II* by the (independent) Commission of European Contract Law,<sup>92</sup> the European Commission produced an Action Plan designed to increase the coherence of the EC *acquis* (existing law) in the area of contract law, to promote the elaboration of EU-wide general contract terms, and to examine whether there should be an 'optional instrument' which contracting parties could choose as their governing terms.<sup>93</sup> This movement towards the drafting of a new instrument to give effect to these aspirations, called the 'Common Frame of Reference', has gained significant momentum in recent years and two significant documents have been published: the 'Acquis Principles' in 2007, drawing together a set of general principles derived from the existing European contract law (such as Directives on consumer contracts)<sup>94</sup> and the 'Draft Common Frame of Reference' in 2009, which contains principles, definitions and model rules not only for the general law of contract but also for certain particular types of contract and other areas of private law such as tort and unjust enrichment.<sup>95</sup>

Furthermore, the provisions of the European Convention for the Protection of Human Rights, in particular the right to a fair trial under Article 6 and to the protection of property under Article 1 of the First Protocol to the Convention also have an impact on English contract law as a result of the Human Rights Act 1998.<sup>96</sup>

There are, moreover, wider international initiatives, such as the Unidroit Principles for International Commercial Contracts, the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (the 'CISG'), and growing numbers of international standard form contracts. Renewed consideration is being given to the ratification by the United Kingdom of the CISG<sup>97</sup> which has not yet been ratified because of a perception by some that English contract law is more sophisticated, and fear that uncertainty would result from the broadly formulated provisions of the Convention.<sup>98</sup>

While this book is concerned with English law, the approach of other European systems is mentioned where, as in the case of the use by the Unfair Terms in Consumer Contracts Regulations of the civilian concept of good faith, these are now directly

<sup>92</sup> Above, n 91. For the origin, composition and sponsorship of the Commission see Lando and Beale, *Principles of European Contract Law Parts 1 & II*, xi–xvi.

<sup>93</sup> Communication from the Commission to the European Parliament and the Council: a more coherent European contract law; an action plan: COM(2003) 68 final (12.2.2003) (OJ 2003/C63/01), following Communication from the Commission to the Council and the European Parliament on European Contract Law COM(2001) 398 final (11.07.2001). The idea of a new European Contract Code (see Resolution of the European Parliament 26 June 1989, OJ 1989 C 158/400; COM(2001) 398 final (11.07.2001), paras 61–9) is now seen as at most a very distant project.

<sup>94</sup> Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I: Precontractual Obligations, Conclusion of Contract, Unfair Terms*.

<sup>95</sup> Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. The provisions of the DCFR on the general law of contract are based on the *Principles of European Contract Law* (above, n 91).

<sup>96</sup> *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; *Shanshal v Al Kishtaini* [2001] EWCA Civ 264, [2001] 2 All ER (Comm) 601.

<sup>97</sup> Moss (2005–2006) JL & Com 483.

<sup>98</sup> *Hobhouse* (1990) 106 LQR 530. Cf Steyn, in Birks (ed), *The Frontiers of Liability* (vol II) 11.

germane to English law.<sup>99</sup> There are also brief references to European principles and international conventions, as well as to other approaches and developments in common law countries, including the American Law Institute's *Restatement Second of the Law of Contracts*,<sup>100</sup> where these might be helpful in giving a comparative perspective to problems faced by English law.

## 4. THE CONTENT OF CONTRACT LAW

### (a) A LAW OF CONTRACT OR OF CONTRACTS

The increasingly complex social and commercial relationships of the twentieth century have produced a situation where it is no longer safe to assume that there is a law of contract rather than of contracts. Particular principles and rules of law are applicable, sometimes as the result of statutory definition, say, to contracts of sale of goods, insurance, the carriage of goods by sea, contracts of employment and consumer contracts, which are peculiar to those contracts. In the past, a number of commercial contexts, such as shipping, insurance, and construction, have been particularly influential in the development of contract law. Some have suggested that they have been disproportionately influential. Whatever the influence of particular contexts, however, apart from statutory intervention the ideology of the common law of contract remains that of a single body of general principles of contract law which apply, with or without modification, across the range of such contracts. It is those general principles of contract law that this book seeks to expound.

The contract law contained in this book follows, for the most part, the subject-matter established by Sir William Anson in the seventh edition of his *Principles of the English Law of Contract and of Agency in its Relation to Contract*. It deals with the Formation of Contract, Performance and Discharge, Remedies for Breach of Contract, the Limits of the Contractual Obligation, and Agency. It also deals with those factors which tend to vitiate a contract, such as incapacity, misrepresentation, duress and undue influence, mistake, and illegality. A word must be said about these.

### (b) EFFECT OF VITIATING FACTORS

Not all the factors that vitiate a contract are uniform in effect. Some of them may render a contract void or illegal, others voidable, while others still may make the contract unenforceable at the suit of one or other of the parties. These terms (void, illegal, voidable, and unenforceable) therefore denote different degrees of ineffectiveness, and they are in constant use in the law of contract. They are, however, not infrequently used with insufficient precision,<sup>101</sup> and even the same term may have a different meaning in different situations.

<sup>99</sup> Below, p 213.

<sup>100</sup> The Restatement is not a binding legislative text, but a very influential and 'acute interpretation of American case law': Winfield (1929) 11 J Comp Leg 179, 189 (on the first edition).

<sup>101</sup> See Turpin (1955) 72 SALJ 58; Honoré (1958) 75 SALJ 32.

**(i) Void contracts**

In the case of a void contract, for example, the basic position is that such a contract is simply one which the law holds to be no contract at all, a nullity from the beginning. The parties would be in the same position as they would have been had the contract never been made. No property would pass under such a contract; so, for example, a third party who purchased goods which had been the subject of a void contract would acquire no title to the goods and have to deliver them up to the true owner.<sup>102</sup> Conversely, money paid in pursuance of a void contract could be recovered from the person to whom it had been paid.<sup>103</sup> This indeed is the meaning of 'void' where a contract is said to be void for mistake. In other cases, however, a void contract may not be so completely without legal effect. A contract for the sale of an interest in land 'can only be made in writing'<sup>104</sup> so that one that is not in writing is not merely unenforceable but void,<sup>105</sup> but, if it is executed, it appears that property will nevertheless pass.<sup>106</sup>

**(ii) Illegal contracts**

Again, an illegal contract is commonly said to be 'void', but the effects of illegality may vary considerably according to the degree of moral turpitude involved, the culpability of the parties, and whether or not the contract itself is rendered illegal.<sup>107</sup> In this case, the invalidity is imposed by the law, and it is not at the discretion of the contracting parties.

**(iii) Voidable contracts**

A voidable contract, however, is a contract which one of the parties has the option to rescind or affirm. If the choice is to affirm the contract, or if the right to rescind is not exercised within a reasonable time so that the position of the parties has, in the meantime, become altered, the option to rescind may be lost and the party who had it will be bound by the contract; otherwise that party is entitled to repudiate its liability. Nevertheless, the contract is not a nullity from the beginning. Until it is rescinded, it is valid and binding. A third party, therefore, who in good faith purchases goods which have been the subject of a voidable contract without notice of the prior defect acquires a good title to the goods and cannot be compelled to surrender them to their former owner.<sup>108</sup>

**(iv) Unenforceable contracts**

An unenforceable contract is one which is good in substance, though, by reason of some technical defect, one or both of the parties cannot be sued on it. The difference between what is voidable and what is unenforceable is mainly a difference between substance and procedure. A contract may be good, but incapable of enforcement because it is not

<sup>102</sup> *Cundy v Lindsay* (1878) 3 App Cas 459; below, p 270.

<sup>103</sup> *Couturier v Hastie* (1856) 5 HLC 673; below, p 284; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, below, p 590.

<sup>104</sup> Law of Property (Miscellaneous Provisions) Act 1989, s 2(1), below, p 84.

<sup>105</sup> Harpum, Bridge and Dixon, *Megarry & Wade's Law of Real Property* (7th edn, 2008) 618. See also *United Bank of Kuwait plc v Sahib* [1997] Ch 107, 122 (Chadwick J) and in the Court of Appeal at 136 (Peter Gibson LJ).

<sup>106</sup> *Tootal Clothing Ltd v Guinea Properties Ltd* (1991) 64 P & CR 452, 455, below, p 87.

<sup>107</sup> *Aratra Potato Co Ltd v Taylor Johnson Garrett* [1995] 4 All ER 695, 708–10; *Mohamed v Alaga* [2000] 1 WLR 1815. See further below, Chapter 11.

<sup>108</sup> Sale of Goods Act 1979, s 23; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, below, p 311.

evidenced by writing as required by statute.<sup>109</sup> But, in some cases, the defect is curable: the subsequent execution of a written memorandum may satisfy the requirements of the law and render the contract enforceable, but it is never at any time in the power of either party to avoid the transaction. The contract itself is unimpeachable, but it cannot be directly enforced in Court.

## 5. CONTRACT AS PART OF THE LAW OF OBLIGATIONS

The law of obligations has traditionally been divided into contractual obligations, which are voluntarily undertaken and owed to a specific person or persons, and obligations in tort which are primarily based on the wrongful infliction of harm to certain protected interests, primarily imposed by the law, and typically owed to a wider class of persons.<sup>110</sup> Recently it has been accepted that there is a third category, restitutionary obligations, primarily based on the unjust enrichment of the defendant at the claimant's expense,<sup>111</sup> such as where the claimant has mistakenly paid the defendant money or discharged the defendant's debt. Contractual liability, reflecting the constitutive function of contract,<sup>112</sup> is generally for failing to make things better (by not rendering the expected performance), liability in tort is generally for action (as opposed to omission) making things worse, and liability in unjust enrichment is generally for unjustly receiving the benefit of the claimant's money or work. It accordingly follows that it is a defence to a claim for restitution of an unjust enrichment that the defendant has changed its position, for example by incurring expenditure in reliance on a payment received from the claimant, so as to make it inequitable to order that the money be repaid.<sup>113</sup>

Although this tripartite division is a useful starting point, as the summary of the history of contract above indicates, it is a rationalization of a less tidy common law. The recent expansion of all these types of obligation also increases the occasions in which the different categories will overlap and it has been argued that the division made between duties which are voluntarily assumed and duties which are imposed by law is an oversimplification.<sup>114</sup> Moreover, care must be taken not to reverse the contractual allocation of risks by non-contractual actions.<sup>115</sup>

### (a) CONCURRENCE OF CLAIMS IN CONTRACT AND TORT

Although the Court may decline to find a duty in tort where the parties are in a contractual relationship,<sup>116</sup> or may hold that a term of a contract has excluded or

<sup>109</sup> Below, p 80 (contract of guarantee).

<sup>110</sup> Winfield, *Province of the Law of Tort* (1931) 380; Cane, *The Anatomy of Tort Law* (1997).

<sup>111</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153. See Burrows, *The Law of Restitution* (3rd edn, 2010).

<sup>112</sup> Above, p 3.

<sup>113</sup> *Lipkin Gorman v Karpnale Ltd*, above, n 111, 579–80.

<sup>114</sup> Atiyah (1978) 94 LQR 193, 223. Cf Burrows (1983) 99 LQR 217.

<sup>115</sup> eg *Marc Rich & Co AG v Bishop Rock Marine Co Ltd* [1996] AC 211, and see below, p 650.

<sup>116</sup> *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80, 107; *Greater Nottingham Co-operative Society v Cementation Piling and Foundations Ltd* [1989] QB 1.

limited what would otherwise be a tortious duty, pre-contractual events, such as misrepresentation, may give rise to an action in tort.<sup>117</sup> Additionally, it is clear that in many cases, exemplified by negligent failure by professionals, such as solicitors and surveyors, to carry out their undertakings to their clients, a defendant may be liable to the same claimant in both contract and in tort.<sup>118</sup> Indeed the fact that tort liability in these contexts may be grounded in an ‘assumption of responsibility’,<sup>119</sup> means that a negligent breach of contract may often give rise to claims in both contract and tort.<sup>120</sup> Where this is so, the claimant ‘can advance his claim, as he wishes, either in contract or in tort, and no doubt he will ... advance the claim on the basis which is most advantageous to him.’<sup>121</sup> The practical differences between contract and tort include, for example, the measure of recovery,<sup>122</sup> the period of limitation,<sup>123</sup> the relevance of the claimant’s contributory fault (it is generally irrelevant in contract but relevant in tort),<sup>124</sup> and assignability, since only a contractual claim can generally be assigned.

### (b) CONTRACT AND UNJUST ENRICHMENT

Historically, the effect of the implied term theory was that contract was thought in effect to have swallowed up restitution of an unjust enrichment. While it is now clear that the two are independent of each other and that ‘implied contract’ is a fictional explanation for restitution,<sup>125</sup> it is in the context of money having been paid and services having been rendered under ineffective contracts and contracts discharged by breach or by frustration that many restitutionary claims are made.<sup>126</sup> Sometimes it can be difficult to distinguish the enforcement of a contract or promise from the restitution of an unjust enrichment, as where one person has ‘freely accepted’ or ‘acquiesced’ in services rendered by the other.<sup>127</sup> Where there is a contract and it makes provision for repayment or recompense, there will be no claim for restitution of an unjust enrichment.<sup>128</sup> Where, however, it does not, a claim may lie, and, for example, in the case of a contract discharged for breach, the innocent party’s restitutionary claim may be greater than the contractual claim for damages.<sup>129</sup> We shall also see that a remedy for restitution of an unjust enrichment may be available in respect of work done by one party during pre-contractual negotiations which do not ripen into a contract.<sup>130</sup>

The restitution of an unjust enrichment, independent from contract, is significantly different from restitutionary damages, or an account of profits, given as a remedy for

<sup>117</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, below, p 323.

<sup>118</sup> *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1979] Ch 384; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. Cf *Williams v National Life Health Foods* [1998] 1 WLR 830.

<sup>119</sup> Cf *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181.

<sup>120</sup> *White v Jones* [1995] 2 AC 207, below, p 629, on which see Weir (1995) 111 LQR 357.

<sup>121</sup> *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136, 1153 (Robert Goff LJ). See also Lord Goff’s speech in the leading case of *Henderson v Merrett Syndicates* [1995] 2 AC 145, 193–4.

<sup>122</sup> Below, pp 307 and 549 (remoteness of damage).

<sup>123</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 185.

<sup>124</sup> Below, p 561.

<sup>125</sup> *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669.

<sup>126</sup> Below, pp 231, 239, 500, 587–96.

<sup>127</sup> See Beatson, *The Use and Abuse of Unjust Enrichment* (1991) ch 2.

<sup>128</sup> *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161.

<sup>129</sup> Below, p 595.

<sup>130</sup> Below, pp 42–3, 64.

breach of contract. The basis of such a restitutionary remedy is the contract and not an independent cause of action in unjust enrichment. Traditionally, such a restitutionary remedy, while available for civil wrongs, such as breach of fiduciary duty and some torts, was not available for breach of contract. But that was departed from by the House of Lords in *Attorney-General v Blake*<sup>131</sup> in which it was accepted that, in exceptional circumstances, an account of profits can be awarded for breach of contract.

## 6. CONTRACT AND PROPERTY

The law of obligations must be distinguished from the law of property which essentially governs the acquisition and content of the rights persons have in things, which may be land or moveables. In a wider sense, the law of property deals with all assets, including intangibles such as a debt, shares in a company, a beneficiary's right under a trust, or a patent.<sup>132</sup> Whereas a person's property right in a thing is generally valid against the whole world, the rights under the law of obligations, including contract, are personal and valid only against a specific person or persons. Property rights may be *protected* by the law of tort, as where the use and enjoyment of land is protected by the torts of trespass and nuisance. Property rights may be *transferred* by contract, as where A sells goods to B, and the property passes under section 18 of the Sale of Goods Act 1979, but they may also be transferred in other ways, for example by delivery with the requisite intention, as where a gift is made. As we have seen, property can pass under voidable and unenforceable contracts as well as valid ones, but not normally under void contracts.<sup>133</sup> Where property has so passed (whether under the contract or by delivery), B may in turn resell the goods and pass the property in them to C, even though B may not have paid A, or may have committed some other breach of contract, but an unpaid seller in possession of goods has the power to dispose of them in certain cases.<sup>134</sup> Where property has not passed to B, B is only able to confer a contractual right to the goods upon C. The position of a person who only has a contractual right to a thing is less secure than that of a person who has a property right since contractual rights may generally only be enforced against the other party to the contract (in our example, B) whereas property rights are generally enforceable against all persons. C would therefore only be able to enforce a contractual right against B, and not against A, or anyone who acquires the goods from A. There is, however, a tendency to reduce the discrepancy between the two and in certain circumstances contractual rights will be protected against third parties.<sup>135</sup>

<sup>131</sup> [2001] 1 AC 268. See below, pp 597–603.

<sup>132</sup> Lawson and Rudden, *The Law of Property* (3rd edn, 2003) ch 2.

<sup>134</sup> See Sale of Goods Act 1979, ss 39(1)(c), 48(3)–(4).

<sup>135</sup> eg *Lumley v Gye* (1853) 3 E and B 216, below, p 654.

<sup>133</sup> Above, p 22.