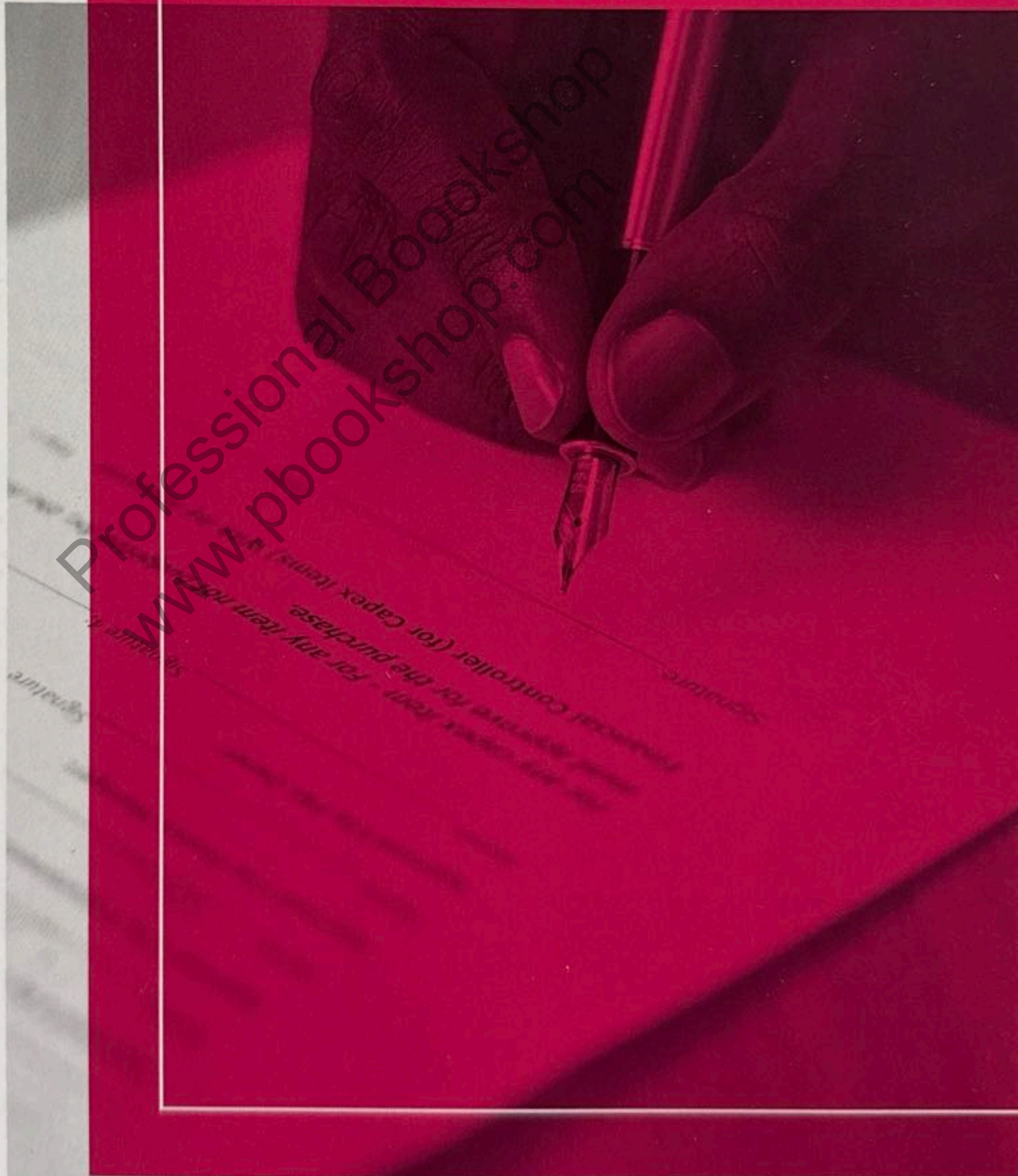




Contract Law

Ewan McKendrick

Sixteenth Edition



Hart Law Masters

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PREFACE

My aim in writing the sixteenth edition of this book has not changed from the stated aim of previous editions: namely, to provide a clear and straightforward account of the basic rules of English contract law. I have also sought to introduce the reader to some of the debates about the nature, the scope and the functions of the law of contract and to discuss some of the wider controversies which surround certain basic doctrines of English contract law, such as consideration. In discussing these issues I have attempted to build a bridge between this introductory work and some of the more advanced and detailed writings on the law of contract by making frequent reference throughout the book to both the periodical literature and the standard textbooks on the law of contract (full citations are contained in the Bibliography located at the end of the book). My hope is that these references will encourage the reader to pursue the issues raised in this book in greater detail in the writings to which I have made reference.

A number of changes have been made to the structure of the book. A new introductory chapter has been added, providing an initial overview of the subject. The chapter on the sources of contract terms has been divided into two chapters, one dealing with the identification and incorporation of contract terms and the other with interpretation, implication and rectification of contracts. This division has enabled fuller consideration to be given to the interpretation of contracts and to the relationship between interpretation, implication and rectification. A new chapter has also been added dealing with the subject of good faith, a topic of increased importance and controversy in the modern law of contract.

The text has also been fully revised and updated to take account of the various developments in the law which have taken place since the publication of the previous edition. The principal changes in this edition take account of recent Supreme Court and Privy Council decisions dealing with duress, undue influence, illegality, force majeure clauses, implied terms, mitigation, rectification, the Contracts (Rights of Third Parties) Act 1999 and the availability of an injunction the effect of which is to amount to indirect specific performance of the contract. Other cases of note deal with the incorporation of terms into a contract that has been concluded over the internet, the penalty clause rule, the interpretation of exclusion clauses and the application of the reasonableness test to be found in the Unfair Contract Terms Act 1977.

Finally, I must acknowledge the debts which I have incurred in writing this edition. I must acknowledge the assistance which I have derived from colleagues

credit agreement unenforceable by the creditor where the debtor does not sign a document which contains all the prescribed terms of the agreement. The Court of Appeal held that this absolute ban on the enforceability of the agreement was incompatible with the defendant pawnbroker's human rights. The problem identified by the Court of Appeal was that section 127(3) imposes an absolute ban on enforcement, and this was held to be a disproportionate response to the problems created by consumer credit agreements which are not in the prescribed form. In this respect, section 127(3) was contrasted with sections 127(1) and (2) of the 1974 Act, which give to the court a discretion to enforce a consumer credit agreement notwithstanding the failure to comply with formal requirements. The Court of Appeal stated that the contrast between sections 127(1) and 127(3) was 'striking', and they concluded that no reason had been advanced which could justify an 'inflexible prohibition' on the enforcement of such agreements when it was possible to regulate the issue by giving the court the power 'to do what is just in the circumstances of the particular case'.

The House of Lords held that the Court of Appeal had erred in concluding that section 127(3) was incompatible with Article 6(1) of the Convention. In so deciding, their Lordships emphasised that Article 6(1) cannot be used in order to create a substantive civil right of action which otherwise has no basis in national law. The target of Article 6(1) is procedural bars on bringing claims to court. As Lord Nicholls recognised (at [35]): 'the distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case'. But on the present facts, no such difficulty arose. Section 127(3) was a restriction on the scope of the right which the creditor acquired, and it did not bar access to the court in order to decide whether the case was caught by the restriction.

In relation to the claim that there had been a violation of Article 1 of the First Protocol, their Lordships concluded that Article 1 was applicable on the facts of the case but that it had not been breached. Importantly, the House of Lords concluded that the word 'possessions' includes contractual rights so that the deprivation of a contractual right may raise human rights issues in an appropriate case (see, for example, *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100; [2004] Ch 296). On the facts, the majority concluded that section 127(3) did operate to deprive the creditor of his contractual rights in such a way as to trigger the operation of Article 1 but that on the facts there had been no breach. Section 127(3) was held to be a 'legitimate exercise in consumer protection'. Borrowers who fall within the scope of the Consumer Credit Act are often 'vulnerable' and do not bargain on an 'equal footing' with lenders. Parliament was entitled to conclude that the protection of such borrowers required the automatic invalidation of contracts which did not satisfy the requirements of the subsection in order to give lenders the strongest incentive

to comply with its clear and transparent requirements. The fact that the aim could possibly have been achieved by conferring a discretion on the court to invalidate the contract could not be dispositive. The response of Parliament could not be said to be disproportionate to the policy which underpinned the legislation, and it did not amount to a breach of the Article.

HOT TOPIC 1 ...

What impact will the departure of the UK from the EU have on the English law of contract? It remains difficult to tell. It is clear that the UK will not be bound by subsequent developments in EU law and thus one might reasonably expect there to be greater differences in future between EU law and English law. These differences may act as a barrier to trade between the UK and the EU, although the practical reality is that it is the EU-UK Trade and Co-operation Agreement that will play the biggest role in terms of determining the extent to which trade between the UK and the EU is either to be encouraged or hindered.

In terms of retained or assimilated EU law that has been incorporated into UK law, it will be interesting to see how the English courts develop that law and the extent to which they will continue to follow the jurisprudence of the CJEU. The courts may come under political pressure to chart their own course, but considerations of judicial comity and respect for the European origin of

the legislation that is being interpreted may incline many courts to follow an approach which is very similar to, if not identical with, the jurisprudence of the CJEU.

The final question in this context relates to the standing of English law in the wider world. Contracting parties who have no other connection with the UK have frequently chosen English law as the law that is to govern their contract. One of the reasons they have done so is because of the certainty which English law is said to provide. The experience of the journey from the referendum to exit from the EU has put at risk the view that English law provides security and certainty for contracting parties. It may be that contracting parties will in future respond by choosing the law of another jurisdiction as the law that is to govern their contract, to the detriment of English law and the economy of the UK. This is not to say that we will inevitably see a move away from reliance on English law. But it is a risk that cannot be ignored.

These statements establish the important point that the test for the existence and the scope of an agreement is objective rather than subjective. A subjective test attempts to ascertain the actual intention of the contracting parties, whereas an objective test examines what the parties said and did and not what they actually intended to say or do (see Section 3.3). The commercial justification for the adoption of an objective test is that great uncertainty would be caused if a person who appeared to have agreed to certain terms could escape liability by claiming that he had no 'real' intention to agree to them.

A good example of the application of the objective test is provided by *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158. The claimants let premises to the defendants at a yearly rent of £68,320, subject to review from 25 December 1982. The parties were obliged by their contract to endeavour to reach agreement before 25 December 1982 on the then current market rental value of the property and to certify the amount of the current market rental value. In June 1982 the claimants wrote to the defendants inviting them to agree that the current market rental value should be £65,000. The defendants accepted. When the claimants received the defendants' written acceptance they immediately contacted the defendants to inform them that they had meant to propose £126,000 and not £65,000. The defendants refused to agree to this new figure and insisted that a contract had been concluded at a rental value of £65,000. So the claimants sought a declaration that no legally binding agreement had been entered into between the parties. They sought summary judgment against the defendants but the Court of Appeal gave the defendants unconditional leave to defend the action on the basis that the claimants had failed to demonstrate that the defendants had no defence to the claim. It was held that the claimants had failed to 'negative the existence of the apparent agreement of the parties to treat £65,000 as the current market rental value for the purpose of the Lease and to deprive the defendants of the right to defend this action on the basis of such agreement'. Slade LJ said that:

it is contrary to the well-established principles of contract law to suggest that the offeror under a bilateral contract can withdraw an unambiguous offer, after it has been accepted in the manner contemplated by the offer, merely because he has made a mistake which the offeree neither knew nor could reasonably have known when he accepted it.

An alternative argument which was relied upon by the claimants in *Centrovincial* was that the objective test of intention was founded upon the principle of estoppel. Estoppel is based upon the proposition that a representor will be prevented from going back on his representation when the representation was intended to be acted upon and is acted upon to his detriment by the representee (see Sections 6.25–6.27). The claimants argued that the defendants had not relied upon the claimants' offer to their detriment because the proposed rent of £65,000 was lower than the original

rent of £68,320. This argument was rejected by the court on the ground that 'the mutual promises alone will suffice to conclude the contract'.

Professor Atiyah (1986f) has attacked the decision in *Centrovincial* on the ground that he can see no reason why an offeree should be entitled 'to create legal rights for himself by the bare act of acceptance when he has in no way relied upon the offer before being informed it was made as a result of a mistake and did not in reality reflect the intention of the offeror'. He has further argued that the decision of the House of Lords in *The Hannah Blumenthal* [1983] 1 AC 834 lends support to his argument that *Centrovincial* was wrongly decided.

The Hannah Blumenthal concerned an agreement between two parties to settle a dispute by reference to arbitration. There was then a delay of some six years, during which time nothing happened in relation to the arbitration. When the buyers attempted to fix a date for the arbitration, the sellers sought an order that the buyers were not entitled to proceed with the arbitration because of the delay which had occurred. One of the grounds relied upon by the sellers was that the parties had, by their silence and inactivity, agreed to abandon the reference to arbitration; the offer being made by the buyers and the acceptance by the sellers (see Section 4.11). Lord Brandon held that there were two ways in which the parties could agree to abandon a contract to arbitrate. The first was where they actually agreed to do so. The second was where one party created a situation in which he was estopped from asserting that he had not abandoned the contract. In the latter context it was held that the sellers must have 'significantly altered [their] position in reliance' upon their belief that the contract had been abandoned. Lord Diplock also placed emphasis upon the need for detrimental reliance, saying that this was 'an example of a general principle of English law that injurious reliance on what another person did may be a source of legal rights against him'.

However it must be remembered that *The Hannah Blumenthal* is a rather unusual case in that it was alleged that the parties had entered into a contract to abandon an arbitration by mere inactivity on both sides. In the absence of express communication between the buyers and the sellers, the only way of showing that the sellers had accepted the buyers' offer to abandon the arbitration was to show that they had acted in reliance on the fact that the contract had been abandoned. The function of reliance was therefore to provide evidence of the fact that the sellers had accepted the buyers' offer to abandon the agreement to arbitrate; it is not the case that the House of Lords was laying down a rule that such reliance was a prerequisite to the formation of any contract. Thus interpreted, *The Hannah Blumenthal* does not cast doubt upon the correctness of *Centrovincial* because in *Centrovincial* the defendants' acceptance was evidenced by the fact that they wrote and accepted the claimants' offer. In such a case, the acceptance concludes the contract without the need for any further act in reliance upon the offer.

3.2 A residual role for a subjective approach?

It should not, however, be assumed that the subjective intentions of the parties are irrelevant to the law of contract. In many cases the subjective intentions of the parties will coincide with the interpretation put upon their intentions by the objective test, and to that extent their subjective intentions are protected. Further, as was made clear by Slade LJ in *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd*, there are two situations in which the objective test is either displaced or modified by a test which at least on the face of it appears to place greater emphasis upon the subjective intentions of the parties.

The first arises where the offeree actually knows that the offeror is suffering from a mistake as to the terms of the offer. In such a case the offeree cannot create a contract between the parties by purporting to accept the mistaken offer. This principle is illustrated by the case of *Hartog v Colin and Shields* [1939] 3 All ER 566. The defendants entered into a contract to sell 3,000 Argentinian hare skins to the claimant. However by mistake they offered them for sale at 10d per pound instead of 10d per piece. When they discovered their mistake, the defendants refused to deliver the skins. The claimant brought an action in respect of the defendants' non-delivery of the skins. It was held that the claimant was not entitled to succeed with his claim because the negotiations had proceeded on the basis that the skins were to be sold at a price per piece and, as there were three pieces to the pound, the claimant could not have thought that the defendants' offer matched their true intention. In the words of Singleton J, on the evidence before him, the claimant 'must have realised, and did in fact know, that a mistake had occurred'. The claimant was therefore prevented from snatching a bargain which he knew was not intended by the defendants.

An issue of controversy has been whether the entitlement of a party to set aside a contract on the ground of unilateral mistake in a case such as this depends upon that party proving that the other party had actual knowledge of its mistake or whether it suffices to show that the other party ought as a reasonable person to have known of the mistake (so-called constructive knowledge). On the facts of *Hartog* it was found that the claimant did know of the mistake but Singleton J also referred to the fact that the claimant 'could not reasonably have supposed that that offer contained the offerors' real intention'. On the basis of the latter statement it could be said that Singleton J did not rule out the possibility that constructive knowledge of the mistake would suffice to entitle the other party to set aside the contract. However, in *Longley v PPB Entertainment Ltd* [2022] EWHC 977 (QB), [94] Ellenbogen J held that constructive knowledge was not sufficient and that only actual knowledge of the mistake sufficed to entitle a party to set aside a contract on the ground of unilateral mistake. In her judgment constructive knowledge was only of relevance in so far as it was 'merely one means by which to ascertain, on the balance of probabilities, whether [the party seeking to enforce the contract] possessed the requisite actual knowledge'.

While actual knowledge of a mistake will in principle suffice to entitle the mistaken party to set aside the contract, the mistake made must be one which relates to the terms of the contract and not to the facts on which the mistaken party has based his decision to enter into the agreement. In the latter case, the contract remains binding on the offeror, even in the case where the offeree was aware of the mistake made by the offeror (*Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm); [2008] 2 Lloyd's Rep 685). But where the offeror's mistake relates to the terms of the offer or to the terms of the contract, and the offeree knows that the offeror is so mistaken, then there is no contract between the parties. In such a case the courts, on one view, have regard to the subjective understanding of the offeree (see *Statoil* at [87]).

The view that cases such as *Hartog* rest on the subjective understandings of the parties has, however, been challenged on the ground that the case can be explained by adopting the stance of a reasonable person in the position of the offeree. Thus in a case such as *Hartog* it has been argued that it is not necessary to have resort to a purely subjective test in order to explain the outcome of the case. It can be accommodated within an objective test on the basis that the reasonable person in the position of the claimant would have known that the offer made by the defendants did not reflect their true intention. While support for such a view can be found within the judgment of Singleton J in *Hartog* (to the extent that he refers to the fact that the claimant could not reasonably have supposed that the defendants' offer gave effect to their real intention), it encounters the difficulty that the claimant in *Hartog* was found to have had actual knowledge of the mistake and Ellenbogen J has subsequently concluded that actual knowledge of the mistake is a necessary element of the claim to set aside the contract. On this basis, cases such as *Hartog* would appear to be cases in which a court will have regard to the subjective understandings of at least one of the parties to the contract.

The second situation in which it has been argued that the subjective intentions of the parties are relevant is where the offeree is at fault in failing to note that the offeror has made a mistake. Such was the case in *Scriven Bros v Hindley* [1913] 3 KB 564. An auctioneer acting for the claimants put up for sale lots of hemp and tow. The auction catalogue was misleading because it implied that the lots were the same when, in fact, the second lot only contained tow. Tow was considerably cheaper than hemp. The defendants bid for the lot, thinking that it was hemp when in fact it was tow. The auctioneer did not realise that the defendants had misunderstood what was being auctioned; he merely thought that they had overvalued the tow. When the defendants discovered their mistake, they refused to pay the price and so the claimants sued them for the price. It was held that no contract for the sale of the tow had been concluded when the tow was knocked down to the defendants, because the auctioneer intended to sell tow and the defendants intended to purchase hemp.

and the defendants' mistake had been induced by the carelessness of the claimants in preparing the auction catalogue.

The importance of the misleading nature of the auction catalogue can be seen in the fact that, had it not been misleading, a contract would have been concluded on the claimants' terms because, in the usual case, an auctioneer is entitled to assume that a bidder knows what he is bidding for. Thus, in the ordinary case, a contract would have been concluded for the sale of tow. But, once again, it is not necessary to have regard to the subjective understandings of the parties in order to explain the outcome of the case. The case simply stands for the proposition that the carelessness of the claimants prevented them from enforcing their understanding of the contract. The result can be explained in terms of 'defendant' objectivity (see Section 3.3) on the basis that the court was concerned to scrutinise the understanding of the reasonable person in the position of the defendants. Given that the reasonable person in the position of the defendants would have been misled by the auction catalogue, the claimants were not entitled to enforce their version of the contract against the defendants.

A further situation in which it has been argued (see Spencer, 1974) that the subjective intentions of the parties are relevant arises where the parties are subjectively agreed but that subjective agreement is at variance with the result achieved by applying the objective test. Spencer gives the admittedly rather far-fetched example of two immigrants who have little command of the English language and who enter into a contract under which one is to sell to the other a 'bull'. Both parties intend to use the word 'bull' but they both think that the word 'bull' means cow. The application of the objective test, Spencer argues, leads to the conclusion that a contract has been concluded for the sale of a bull. But, as Spencer points out, this is absurd as the seller does not have a bull to sell and the buyer does not want one. He argues that while:

it may be acceptable for the law occasionally to force upon *one* of the parties an agreement he did not want ... surely there is something wrong with a theory which forces upon *both* of the parties an agreement which neither of them wants.

Thus Spencer concludes that the subjective intentions of the parties must prevail. But if both parties in fact wished to contract to sell a cow and a cow was delivered and accepted then the law of contract would not force upon the parties an agreement which neither of them wanted because, in such a case, the objective approach would lead to the conclusion that a contract had been made for the sale of a cow. The actions of the parties, in delivering and accepting delivery of the cow, would displace the inference which had been raised by the words which they had used. So, in this example, there is no question of the law forcing upon the parties an agreement which neither of them wants and no need to invoke any reference to the subjective understandings of the parties.

It is, however, important to understand that the subjective understandings of the parties will not generally prevail over their intention, objectively ascertained. As Lord Normand stated in *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC (HL) 38:

when the parties to a litigation put forward what they say is a concluded contract and ask the Court to construe it, it is competent for the Court to find that there was in fact no contract and nothing to be construed.

Conversely, it has been stated that 'if the parties' correspondence and conduct shows [objectively that they intend to make a contract] it will not, or may not, matter that neither privately intended to make a contract' (*The Amazonia* [1990] 1 Lloyd's Rep 236, 243). The existence or non-existence of a contract is ultimately a question for the court which will generally be decided by the application of an objective test.

3.3 The objective test

So the general rule is that the intention of the parties is to be assessed objectively. Thus far, it has been assumed that there is only one objective test which can be applied by the courts, but it has been argued (Howarth, 1984) that there are, in fact, three different interpretations of the objective test which can be applied by the courts. The first is the standard of detached objectivity. This approach takes as its standpoint the perspective of the detached observer or the 'fly on the wall'. In other words, it asks what interpretation would a person watching the behaviour of the contracting parties place upon their words and actions. The second possible interpretation suggested by Howarth is to interpret the words as they were reasonably understood by the promisee (called 'promisee objectivity' by Howarth). This is the standard which finds the greatest support in the case law (see *Smith v Hughes* (1871) LR 6 QB 597 (above)). The third and final interpretation is the standard of the reasonable person in the shoes of the person making the offer (called 'promisor objectivity' by Howarth). The approach which is preferred by Howarth is 'detached objectivity' but there is little judicial support for such a test (Vorster, 1987).

However, the distinction which Howarth draws between 'promisor' and 'promisee' objectivity has been criticised on the ground that it is misleading because, in a bilateral contract, each party is both a promisor and a promisee (Vorster, 1987, especially 276–78). Thus, for example, in *Scriven Bros v Hindley* [1913] 3 KB 564 (above) the defendant purchaser was a promisor in relation to his promise to pay for the lot and a promisee concerning the auctioneer's promise to sell him the tow. On the other hand, the auctioneer was a promisor in relation to the promise to sell the lot and a promisee concerning the defendant's promise to purchase the lot. It is true that the nomenclature which Howarth employs is rather misleading but it should not blind us to his essential point, which is that there are two parties to a contract and that a court could elect to apply the perspective of one or the other contracting party. One could meet the criticism by restyling the classification as 'claimant' and

'defendant' objectivity to underline the point that one is simply looking at the contract from the position of one or the other contracting party. Although it is true that, in our terminology, 'defendant' objectivity has the greatest support in the case law this may be a product of the way in which the cases have come before the courts rather than distinct judicial preference.

The case of *Scriven Bros v Hindley* (above) provides a good example of this point. In that case the court considered whether the claimants were entitled to recover the price of the lot which they alleged that the defendants had contracted to buy. The emphasis of the court was upon the defendants' understanding of the offer made by the auctioneer. This was because the defence to the claim was based on the defendants' understanding of the offer and therefore the court was forced to examine that understanding. It is crucial to note that the defendants simply denied liability; they did not take the further step of asking the court to enforce their version of the 'contract'. This had the consequence that the court did not consider whether the defendants would have been able to sue the claimants for breach of a contract to sell hemp. Had the defendants counterclaimed for breach of their version of the 'contract', the roles would have been reversed and the court would have been compelled to consider the claimants' understanding of the bid made by the defendants. The infrequency of such counterclaims by defendants means that 'defendant' objectivity is most commonly considered by the courts, but it does not follow that the courts are averse to applying 'claimant' objectivity; it is simply the case that they are not often asked by defendants to apply such a standard.

3.4 Has agreement been reached?

An instructive example of the approach which the courts adopt in deciding whether or not the parties have reached agreement is provided by the case of *Butler v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401. The sellers, Butler, offered to sell a machine tool to the buyers, the offer being made on Butler's standard terms of business, which included, *inter alia*, a price variation clause. The buyers sent an order for the machine tool which, in turn, was on their own standard terms of business, which made no provision for a price variation clause and stated that the price of the machine tool was to be fixed. The buyers' order form contained a tear-off acknowledgement slip, which stated that 'we [the sellers] accept your order on the terms and conditions stated thereon'. The sellers signed and returned this slip to the buyers, together with a letter stating that they were carrying out the order on the terms of their original offer. After constructing the machine tool, but before delivering it, the sellers sought to invoke the price variation clause contained in their original offer and claimed the additional sum of £2,892. The buyers refused to pay this increase in price, claiming that they were not contractually bound to do so. The sellers accordingly sued the buyers for £2,892 in damages. The Court of Appeal held that they were not entitled to recover the sum claimed because a contract had been

concluded on the buyers' terms which did not include the price variation clause. Although the Court of Appeal was unanimous in holding that a contract had been concluded on the buyers' terms, the court was divided in its reasoning.

3.4.1 The reasoning of the majority

The reasoning of the majority, Lawton and Bridge LJJ, proceeded by applying the traditional 'mirror image' rule of contractual formation. According to this rule, the court must be able to find in the documents which passed between the parties a clear and unequivocal offer which is matched or 'mirrored' by an equally clear and unequivocal acceptance. A purported acceptance which seeks to introduce new terms is not in fact a true acceptance at all but is a counter-offer which 'kills off' the original offer and amounts to a new offer which can in turn be accepted by the other party. Applying this, they held that the buyers' order could not be construed as an acceptance of the sellers' offer because it did not mirror exactly the terms of the sellers' offer and therefore amounted to a counter-offer. They held that this counter-offer was accepted by the sellers when they signed the tear-off acknowledgement on the buyers' order form. The letter accompanying the acknowledgement slip was held not to be an attempt to reintroduce the terms of the sellers' original offer and so was not a counter-offer, but was simply a means of identifying the order for the machine tool.

This traditional approach has a number of advantages. The first is that it provides some degree of certainty because legal advisers at least know the principles which the courts will apply in deciding whether or not a contract has been concluded (a point recognised by the Court of Appeal when applying the traditional approach in *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209; [2010] 1 Lloyd's Rep 357, [25]). Further, there is no separation between the formation of the contract and the ascertainment of the terms of the contract because the offer and acceptance must mirror each other exactly before a contract is concluded. Thus this approach gives the parties a clear standard against which to measure their conduct and sends out a message that a failure to reach agreement on all points may lead a court to hold that a contract has not been concluded. The second advantage of this approach is that it provides a standard which is of general application.

However, the traditional approach has also been subjected to considerable criticism. One such criticism is that it is excessively rigid. It produces an 'all or nothing' result, in the sense that it is either the terms of the buyer or the terms of the seller which govern the relationship of the parties; the court cannot pick and choose between the respective sets of terms and conditions or seek to find an acceptable compromise. This is unfortunate in cases involving the 'battle of the forms' (as cases such as *Butler* are commonly called), where both parties may reasonably believe that their terms are the ones which govern their relationship and where a compromise may produce the fairest result on the facts of the case.

The traditional approach has also been criticised in its application to battle of the forms cases on the ground that it encourages business people to continue to exchange their standard terms of business in the hope of getting the 'last shot' in and it places the party in receipt of the last communication in a very difficult position. If he refuses to accept the goods, it is likely that it will be held that no contract has come into existence, but if he accepts the goods it is possible that he will be held to have accepted them on the sellers' terms (as happened in *Tekdata Interconnections Ltd v Amphenol Ltd* (above)).

However, there is no rule of law to the effect that the last shot will always win the battle of the forms. In some cases it may be won by the party who fires the first shot. Such was the case in *TRW Ltd v Panasonic Industry GmbH* [2021] EWCA Civ 1558 (discussed further in the Hot topic section at the end of this chapter) where the first shot was fired by the defendants and it took the form of a customer file document which the defendants required all of its customers to sign. The claimants signed the file document but maintained that the contract between the parties was governed by their terms and conditions as referred to in their purchase order. The Court of Appeal rejected this submission and held that there is no universal rule to the effect that the party who fires the last shot will win the battle of the forms (to similar effect see *BP Oil International Ltd v Glencore Energy UK Ltd* [2022] EWHC 499 (Comm); [2022] 2 Lloyd's Rep 221, [128]). On the facts the Court of Appeal held that the decisive act was the claimants' signature attached to the customer file document which demonstrated that the claimants had agreed that the relationship between the parties was to be governed by the defendants' terms and not those of the claimants.

The fact that the first shot was the decisive document in this case does not carry with it the implication that the first shot will win in all cases. Just as there is no universal rule that the last shot will win in all cases, so there is no universal rule that the first shot will win in all cases. This being the case, it is necessary in each case to pay careful attention to the documentation which has passed between the parties and to decide on the basis of the evidence whether an offer sent by one party to the other has been accepted by the other. As both the present case and *Butler* demonstrate, attaching a signature to the terms and conditions put forward by the other party may be very influential in terms of persuading a court that the signature signifies assent to the other party's terms and conditions.

3.4.2 The approach of Lord Denning

The strains on the traditional approach have led some judges to reject it in favour of a new approach. In *Butler*, Lord Denning, who was in the minority (in terms of reasoning, but not result), rejected the traditional mirror image approach to contractual formation, holding it to be 'out-of-date' (see too his judgment in the case of *Gibson v Manchester City Council* [1978] 1 WLR 520, 523, where he said that

'to my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance'). He stated that the:

better way is to look at all the documents passing between the parties and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points, even though there may be differences between the forms and conditions printed on the back of them.

He also held that, even where the terms used by the parties were mutually contradictory, it was possible for a court to 'scrap' the terms and replace them by a 'reasonable implication'. Applying this reasoning, he held that the signing of the tear-off acknowledgement by the sellers was the 'decisive document', which made it clear that the contract was concluded on the buyers' terms.

A case which demonstrates that a court may, in an appropriate case, find that a contract has been concluded on terms other than those to be found in the parties' respective standard terms is *GHSP Inc v AB Electronic Ltd* [2010] EWHC 1828 (Comm); [2011] 1 Lloyd's Rep 432. In this case Burton J concluded that there was a conflict between the parties' standard terms of business and that neither party had accepted the other's terms. But, rather than find that there was no contract between the parties, he held that the terms of the contract were to be found in the terms to be implied into the contract by the Sale of Goods Act 1979. But in this case it is important to note that counsel for both parties agreed that 'there was plainly a contract' between the parties. Had it not been for this concession, Burton J might not have been so willing to find the existence of a contract given the parties' failure to reach agreement on the terms that were to apply to their relationship. However, these doubts may be misplaced. In *Transformers & Rectifiers Ltd v Needs Ltd* [2015] EWHC 269 (TCC); [2015] BLR 336 Edwards-Stuart J was content to find that, notwithstanding the fact that neither party had succeeded in incorporating its own standard terms and conditions into the agreement, the parties had nevertheless entered into a binding contract. It is not entirely clear what the terms of this contract were but the case serves to demonstrate the strength of the judicial impulse to find the existence of a contract where substantial performance has taken place even in the case where the paperwork, in the sense of the written terms of the deal, has not all been put in place.

The approach adopted by Lord Denning clearly conflicts with the mirror image approach to contractual formation because it adopts a two-stage approach. At the first stage, it must be decided whether a contract has been concluded and, at the second stage, it must be decided what the terms of the contract are. At the latter stage, the court has considerable discretion in filling the gaps. The approach adopted by Lord Denning seeks to construct a more flexible framework for the law of contract which can accommodate inconsistent terms and an apparent lack of consensus within the law of contract.

This approach has in turn been criticised on the ground that it produces uncertainty because it gives too little guidance to the courts, or to legal advisers, in determining whether or not an agreement has been reached. Certainty is a particularly important commodity in the law of contract because business people will often want to know the standard which the law applies so that they can plan their affairs accordingly.

3.4.3 Evaluation of the two approaches

Despite the attempt by Lord Denning to introduce this new general approach to the issue of agreement, English law remains wedded to the traditional approach. This was confirmed by Lord Diplock in *Gibson v Manchester City Council* [1979] 1 WLR 294, 297 when he said that, although there may be certain 'exceptional' cases which do not 'fit easily into the normal analysis of a contract as being constituted by offer and acceptance', these cases were very much the exception and they have not displaced the traditional rule. The survival of the traditional approach was more recently affirmed by the Court of Appeal in *Tekdata Interconnections Ltd v Amphenol Ltd* (above), where Dyson LJ stated (at [25]) that 'the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases'. It should be noted that this is a 'general' rule and, as such, it admits of exceptions. But a court is likely to be slow to recognise such exceptions, at least in cases involving the battle of the forms. As Longmore LJ observed in *Tekdata Interconnections Ltd v Amphenol Ltd* (at [21]), 'it will always be difficult to displace the traditional analysis, in a battle of the forms case, unless it can be said that there was a clear course of dealing between the parties'. So in the case where the parties have an established course of dealing and that course of dealing is governed by certain terms, the courts may give effect to these terms without the need to apply the traditional analysis. But these cases are the exception. In the vast majority of cases, the traditional analysis will be applied.

It would be a mistake, however, to think that the traditional rule is always rigidly applied by the judiciary. For example, in the case where the parties both sign a written agreement containing the terms of their contract, there is no need to look for an offer and a matching acceptance. The fact that the parties have signed an agreed text will in general suffice to establish the existence of an agreement. Thus, it has been stated that 'where there is agreement, it is unnecessary to identify the precise mechanics of offer and acceptance' (*Premier Paper Group Ltd v Buchanan McPherson Ltd* [2018] EWCA Civ 15, [29]). Further, in *The Eurymedon* [1975] AC 154, 167 Lord Wilberforce stated that 'English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration'. We shall see, when discussing issues such as the application of the rules of offer and acceptance to transactions in the supermarket

(see Section 4.2), that the courts do have some room for manoeuvre in identifying the offer and the acceptance and so have some flexibility in applying the rules in a particular factual context.

In the next chapter we shall give consideration to the schematic approach to agreement by examining in greater detail the constituent elements of offer and acceptance. Then, in Chapter 5, we shall give further consideration to the application of the objective test.

HOT TOPIC 2 ...

The battle of the forms continues to give rise to litigation in the courts. A case which illustrates how the battle might be won is the decision of the Court of Appeal in *TRW Ltd v Panasonic Industry GmbH* [2021] EWCA Civ 1558. The issue before the court was whether the courts of Hamburg, Germany had exclusive jurisdiction over the claim brought by the claimant. All customers of the defendants were required to sign a customer file document which contained a jurisdiction clause stating that Hamburg was the place of performance and jurisdiction. One of the terms to be found in the document provided:

Even if no reference is made to them in particular cases, the following terms and conditions shall apply exclusively to the entire business relation with us, particularly to all agreements for deliveries and services, unless different conditions, particularly conditions of purchase of the contracting party, have expressly been confirmed by us in writing.

The judge at first instance held that the defendants' terms prevailed given that it was understood between the parties that the relationship between the parties was governed by these terms and this had been acknowledged by the claimant in signing the document. The Court of Appeal upheld this conclusion.

In reaching this conclusion the Court of Appeal affirmed that there is no universal rule to the effect that the party who fires the last shot wins the battle of the forms. Coulson LJ stated that the only document which had been signed by the parties was the claimant's signature attached to the customer file supplied by the defendants and that this 'was the only occasion when one side walked across no man's land, and fraternised with the enemy'. The signature therefore sufficed to incorporate the defendants' terms into the contract notwithstanding the fact that the document issued by the defendants was one of the first shots in this particular battle of the forms.