Foundations of Contract Law in Hong Kong

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Contents

CHAPTER 2

Formalities

1. Nature of Formalities

[2-1] Formalities may be understood as legal requirements affecting the way in which certain acts or expressions of intention must be performed in order to produce desired legal effects. For example, a cheque is an unconditional order in writing, drawn on a banker, addressed by one person to another, signed by the person giving it, and requiring the person to whom it is addressed to pay on demand a sum certain in money to, or to the order of, a specified person or to bearer.[1] If the cheque does not comply with these formalities, it is not enforceable as a bill of exchange. Understood in this way, formalities serve a negative purpose; unless the formality is observed, the desired legal effect is not produced.

[2-2] Conversely, it is also possible for formalities to serve a positive purpose; if a particular form is observed, then a legal effect will or may result even if it was not desired or intended. Thus, where a person signs a legal document he will be held to its terms even if he has not read it unless there was fraud or misrepresentation,[2] or mistake, *non est factum*, duress, undue influence, lack of mental capacity,[3] or unconscionability.[4]

[2-3] The usual requirements of legal formalities are stipulations involving some combination of written evidence, signing, sealing, the making of oaths or declarations, notarisation, certification, the presence or attestation of witnesses, or other physical acts such as the actual delivery of things. Legal formalities serve several important functions and purposes.

Lon L Fuller

'Consideration and Form' (1941) 41 Columbia Law Review 799 at 800–803, 805–806 (Italics in original)

I. The Functions Performed by Legal Formalities

§ 2. *The Evidentiary Function* — The most obvious function of a legal formality is, to use Austin's words, that of providing "evidence of the existence and purport of the contract, in case of controversy." The need for evidentiary security may be satisfied in a variety of ways: by requiring a writing or attestation, or the certification of a notary. It may even be satisfied, to some extent, by such a device as the Roman stipulation, which compelled an oral spelling out

1 Bills of Exchange Ordinance (Cap 19), ss 3 and 73.

2 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, [1934] All ER Rep 16 (KB).

3 *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334, [2006] 2 HKLRD 831, [2006] HKCU 811 (CFA).

4 *Lo Wo v Cheung Chan Ka Joseph* [2001] 3 HKC 70 (CA); see also, Unconscionable Contracts Ordinance (Cap 458), s 5.

of the promise in a manner sufficiently ceremonious to impress its terms on participants and possible bystanders.

§ 3. *The Cautionary Function* — A formality may also perform a cautionary or deterrent function by acting as a check against inconsiderate action. The seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness — was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future. To a less extent any requirement of a writing, of course, serves the same purpose, as do requirements of attestation, notarization, etc.

§ 4. *The Channeling Function* — Though most discussions of the purposes served by formalities go no further than the analysis just presented, this analysis stops short of recognizing one of the most important functions of form. That a legal formality may perform a function not yet described can be shown by the seal. The seal not only insures a satisfactory memorial of the promise and induces deliberation in the making of it. It serves also to mark or signalize the enforceable promise; it furnishes a simple and external test of enforceability.

The thing which characterizes the law of contracts and conveyances is that in this field forms are deliberately used, and are intended to be so used, by the parties whose acts are to be judged by the law. To the business man who wishes to make his own or another's promise binding, the seal was at common law available as a device for the accomplishment of his objective.

In this aspect, form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention. It is with this aspect of form in mind that I have described the third function of legal formalities as "the channeling function."

In seeking to understand this channeling function of form, perhaps the most useful analogy is that of language, which illustrates both the advantages and dangers of form in the respect we are now considering. One who wishes to communicate his thoughts to others must force the raw material of meaning into defined and recognizable channels; he must reduce the fleeting entities of wordless thought to the patterns of conventional speech. One planning to enter a legal transaction faces a similar problem. His mind first conceives an economic or sentimental objective, or, more usually, a set of overlapping objectives. He must then, with or without the aid of a lawyer, cast about for the legal transaction (written memorandum, sealed contract, lease, conveyance of the fee, etc.) which will most nearly accomplish these objectives. Just as the use of language contains dangers for the uninitiated, so legal forms are safe only in the hands of those who are familiar with their effects. ...

§ 5. *Interrelations of the Three Functions* — Though I have stated the three functions of legal form separately, it is obvious that there is an intimate connection between them. Generally speaking, whatever tends to accomplish one of these purposes will also tend to accomplish the other two. He who is compelled to do something which will furnish a satisfactory memorial of his intention will be induced to deliberate. Conversely, devices which induce deliberation will usually have an evidentiary value. Devices which insure evidence or prevent inconsiderateness will normally advance the desideratum of channeling, in two different ways. In the first place, he who is compelled to formulate his intention carefully will tend to fit it into legal and business categories. In this way the party is induced to canalize his own intention. In the second place, wherever the requirement of a formality is backed by the sanction of the invalidity of the informal transaction (and this is the means by which requirements of form are normally made effective), a degree of channeling results automatically. Whatever may be the legislative motive, the formality in such a case tends to effect a categorization of transactions into legal and non-legal.

... There is an evidentiary value in the clarity and definiteness of contour which such a device accomplishes. Anything which effects a neat division between the legal and the non-legal, or between different kinds of legal transactions, will tend also to make apparent to the party the consequences of his action and will suggest deliberation where deliberation is needed.

§ 6. *When are Formalities Needed? The Effect of an Informal Satisfaction of the Desiderata Underlying the Use of Formalities* — ... The question is: In what situations does policy or legislative policy demand the use of formality? One part of the answer to the question is ...

at the outset. Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.

But assuming that the transaction in question is of sufficient importance to support the use of a form if a form is needed, how is the existence of this need to be determined? A general answer would run somewhat as follows: The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises—including in those "forces" the habits and conceptions of the transacting parties. ...

An example from the law of gifts will make this point clear. To accomplish an effective gift of a chattel without resort to the use of documents, delivery of the chattel is ordinarily required and mere donative words are ineffective. It is thought, among other things, that mere words do not sufficiently impress on the donor the significance and seriousness of his act. ...

So far as the channeling function of a formality is concerned it has no place where men's activities are already divided into definite, clear-cut business categories. Where life has already organized itself effectively, there is no need for the law to intervene. It is for this reason that important transactions on the stock and produce markets can safely be carried on in the most "informal" manner. At the other extreme we may cite the negotiations between a house-to-house book salesman and the housewife. Here the situation may be such that the housewife is not certain whether she is being presented with a set of books as a gift, whether she is being asked to trade her letter of recommendation for the books, whether the books are being offered to her on approval, or whether — what is, alas, the fact — a simple sale of books is being proposed. Some "channeling" here would be highly desirable, though whether a legal form is the most practicable means of bringing it about is, of course, another question. What has been said in this section demonstrates, I believe, that the problem of "form," when reduced to its underlying policies, extends not merely to "formal" transactions in the usual sense, but to the whole law of contracts and conveyances. ... If our object is to avoid giving sanction to inconsiderate engagements, surely the case for legal redress is stronger against the man who has spelled out his promise than it is against the man who has merely drifted into a situation where he appears to hold out an assurance for the future.

2. General Rule as to Formalities

[2-4] The general rule at common law, as in most legal systems, is that there are no formal requirements which need to be met in order to establish an enforceable contract. Contracts can be made entirely orally, entirely in writing, or partly orally and partly in writing. Thus, even a 'handshake agreement'—if supported by the essential contractual elements of *consensus ad idem*, consideration and intention to create legal relations—will usually bind the parties contractually. Indeed, even the handshake is unnecessary.

P S Atiyah

An Introduction to the Law of Contract
(4th edn, Oxford University Press 1989) at 172–173

Non-lawyers are often surprised at the fact that most private legal actions do not have to be in any specified form in modern times, but insistence on form is widely thought by lawyers to be characteristic of primitive and less well-developed legal systems. It reflects lack of confidence in the ability of the courts to discover the truth about a case without the trappings of formalities, and perhaps other rituals. In most modern systems of private law there is little emphasis on form and a much greater emphasis on substance. In England at least this is largely due to the fact that there is confidence in the ability of the courts to discover the whole truth, even about the most complicated facts. Once this confidence exists, the requirement of formalities for legal actions becomes less insistent and is often thought to be a hindrance rather than a help to doing justice.

In the particular case of contracts, absence of any formal requirements may also reflect the emphasis of classical contract theory on the central role of intention. If a person is liable in contract because of what he promised or agreed to do, then insistence on writing may be a hindrance to giving effect to that person's intentions. To require writing is thus a paternalistic device which may protect people from the consequences of hasty or ill-thought-out promises or agreements.

The Statute of Frauds, in so far as it required writing for certain classes of contracts, may have been inspired partly by these paternalistic ideals, but was more likely the outcome of weaknesses in legal procedure, and the prevalence of frauds.

[2-5] Where a contract is in writing, it can be made either by deed or 'under hand', that is, not as a deed. A deed is a written transaction, including a contract, made in a special form. Any contract that is not made by deed, whether the agreement is oral or written, is referred to as a 'simple contract'.

[2-6] There are some exceptional circumstances in which the law in Hong Kong requires contracts to be in writing or to be evidenced in writing. Where they are required to be in writing, they are also sometimes required to be made by deed.

3. Contracts Required to be Made by Deed

[2-7] At common law, an agreement that is unsupported by consideration will not be enforceable as a contract unless it is made in the form of a deed.

[2-8] Legislation also requires that certain transactions be concluded in the form of a deed. A power of attorney and an enduring power of attorney must be created by deed,[5] as must a grant of authority to execute a deed.[6] The most important transaction requiring creation by deed is a conveyance of a legal interest in land. This includes the creation or transfer of a lease for a term longer than three years.

Conveyancing and Property Ordinance (Cap 219)

4. Legal Estate to be disposed of etc. by deed

(1) A legal estate in land may be created, extinguished or disposed of only by deed.
(2) This section does not apply to—
...
(d) the grant, disposal or surrender of a lease taking effect in possession for a term not exceeding 3 years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without a premium; ...

[2-9] The expressions 'legal estate' and 'land' are both defined in section 2(1) of the Conveyancing and Property Ordinance (Cap 219). 'Legal estate' means:

(1) a term of years absolute in land;
(2) the legal interest in any easement, right or privilege in or over land for an interest equivalent to a term of years absolute; and
(3) a legal charge.

5 Powers of Attorney Ordinance (Cap 31), s 2(1); Enduring Powers of Attorney Ordinance (Cap 501) ...
6 Law Amendment and Reform (Consolidation) Ordinance (Cap 23), s 26 (not applicable if the deed is ... a foreign corporation incorporated in a jurisdiction that does not impose a similar requirement).

'Land' is defined to include:

(1) land covered by water;
(2) any estate, right, interest or easement in or over any land;
(3) the whole or part of an undivided share in land and any estate, right, interest or easement in or over the whole or part of an undivided share of land; and
(4) things attached to land or permanently fastened to anything attached to land.

[2-10] A lease for a term longer than three years is not, however, without juridical effect simply because it is not embodied in a deed. Provided it complies with the other legislative requirements of writing, it will operate as an agreement for a lease in equity. Consequently the lease agreement can be specifically enforced between the parties to it, although a third party who acquires a legal lease over the land can turn out the tenant unless the tenant is in actual occupation or has registered the equitable lease as a land charge.

4. Form of Deeds

[2-11] At common law, a deed is a document made under seal which:[7]

(1) effects the transference of an interest, right or property;
(2) creates an obligation binding on some person or persons; or
(3) confirms some act whereby an interest, right or property has already passed.

Although it is commonly said that a deed is a document which has been 'signed, sealed and delivered', there is no common law requirement of signature; sealing alone is sufficient.

[2-12] Legislation now requires that deeds be signed, and regulates the requirements for sealing.

Conveyancing and Property Ordinance (Cap 219)

19. Execution of deed by individual

(1) A deed by an individual shall be signed by him.
(2) A document shall be presumed to have been sealed by an individual if the document signed by him—
(a) describes itself as a deed; or
(b) states that it has been sealed; or
(c) bears any mark, impression or addition intended to be or to represent a seal or the position of a seal. ...

20. Execution of deed by corporation

(1) In favour of a person dealing with a corporation aggregate in good faith, his successors in title or persons deriving title under or through him or them, a deed shall be deemed to have been duly executed by the corporation if the deed purports to bear the seal of the corporation affixed in the presence of and attested by its secretary or other permanent officer and a member of the corporation's board of directors or other governing body or by 2 members of that board or body. ...

7 *Chitty on Contracts*, vol I (35th edn, Sweet & Maxwell 2024) at para 1–099.
8 *Halsbury's Laws of England* (5th edn, 2012) vol 32, paras 201 and 230.

2. The purchaser writes back: 'I agree that, in the course of negotiation, we arrived at a figure of £10,000 for Blackacre, but the whole matter is still in course of negotiation: we have not finally agreed.' That would also be no suffi memorandum. It cannot be distinguished from the first case.
3. The purchaser writes back: 'I know that I agreed to buy Blackacre for £10,0 but I made it clear to you that it was subject to contract, and I repeat it now was all subject to contract.' That, too, is no sufficient memorandum. It cannot distinguished from the second case.

I cannot myself see any difference between a writing which— (i) denies there was any contr (ii) does not admit there was any contract; (iii) says that the parties are in negotiation, or says that there was an agreement 'subject to contract,' for that comes to the same thing. reason why none of those writings satisfies the statute is because none of them contains recognition or admission of the existence of a contract. …

Such is sufficient for the decision of this case. But I may say that there is another objection to the alleged note or memorandum. It does not contain all the terms of the contract as sworn to by Mr Nadir in his affidavit. The draft omits the term that: 'within a time of completion, the Tiverton company would move out, giving vacant possession of parts of the premises occupied by his company.' The draft adds a term that: 'the prescribe rate of interest will be 12 per cent per annum.' Those seem to me to be material term which, being omitted from the note or memorandum, are fatal to its validity: see Hawkins v Price.[50]

Stamp LJ and Scarman LJ gave concurring judgments. Appeal dismissed.

[2-35] *Tiverton* confirms that a memorandum or note made subject to a formal contract being concluded, indicating that important terms remain to be set or including material terms not part of the earlier agreement, will not satisfy requirements of section 3(1) of the Conveyancing and Property Ordinance (Cap

7.5 Joinder of documents

[2-36] Where a party seeks to prove the existence of an enforceable agree concerning land by reliance on a written memorandum or note of that agreem may be that no single note contains a record of all the necessary terms, that is, par property, price, and particular terms. As indicated in *Kwok Chor Shan*, a memoran or note for the purposes of section 3(1) of the Conveyancing and Property Ordi may be constituted by reading two or more documents together.

[2-37] This joinder of documents may occur only if the memorandum sig by the party to be charged expressly or by reasonable implication refer another existing document (which need not itself be signed by anyone). If so be, extrinsic evidence will be admitted linking the other document to the sig memorandum provided the signed memorandum contains the required expre implied reference. Thus, in *Pearce v Gardner*,[51] a signed letter recording all necessary terms except the plaintiff's identity (it was addressed simply 'Dear S was read together with the covering envelope which set out the plaintiff's iden Neither of the joined documents need be addressed to the party seeking relief the contract.

50 *Eccles v Bryant and Pollock* [1948] Ch 93, [1947] 2 All ER 865 (CA, Eng).
51 *Pearce v Gardner* [1897] 1 QB 688, [1895–99] All ER Rep Ext 1819 (CA, Eng).

7.6 Errors in memorandum or note

[2-38] Minor mistakes in accurately recording the terms of the agreement may be corrected or ignored.[52]

Chan Yat v Fung Keong Rubber Manufactory Ltd

Supreme Court
[1967] HKLR 364

In July or August 1964, the plaintiff and Mr Lai (as manager of the defendant company) entered into an oral agreement under which the plaintiff would lease to the defendant a factory at Tsuen Wan at a monthly rental of $57,000, for a period of ten years commencing seven days after notification to the company by the plaintiff of the issue of an occupation permit. At the time of the oral agreement, the factory was still under construction. In September 1964, the defendant paid a deposit of $171,000 by cheque, representing three months' rent under the oral agreement. On 26 October 1964, the defendant wrote a letter to its bankers enclosing a brochure from the plaintiff setting out the terms of the lease agreement. The letter, however, mis-stated by about ten days the commencement date of the agreed lease. On 17 May 1965, the defendant's solicitors rejected a formal draft lease prepared by the plaintiff and refused to proceed with the agreement. The plaintiff treated the defendant's conduct as a repudiation of the agreement and sued for breach of contract. The defendant submitted, inter alia, that there was no enforceable lease agreement because there was no memorandum or note recording all the necessary terms which had been signed by the defendant.

Pickering J:

… Having decided that the verbal arrangements between the plaintiff and Mr Lai constituted a concluded agreement …, I turn to the defence of the Statute of Frauds. It is the contention of the defence that there is no adequate memorandum or note of the agreement signed by or on behalf of the defendant company or some other person lawfully authorized by that company, which would support an action. Mr Cheung, for the plaintiff, maintains that there are several documents which constitute such a note or memorandum. …

More relevant are the cheque for $171,000 given to the plaintiff by the managing director of the defendant company and the receipt handed over in exchange. Although the framers of the Statute of Frauds undoubtedly contemplated the inclusion of all the contractual terms in a single document, it has long been settled that a plaintiff can rely on two or more documents to prove his case. At one period it was necessary that the one document should specifically and on its face refer to the other[53] but the severity of this attitude has since been relaxed. In *Long v Millar*,[54] Long had orally agreed with Millar to buy certain land and had paid a deposit and signed a memorandum containing all the essential terms of the bargain except the vendor's name. On the same day Millar (the vendor) signed a receipt identifying Long and referring to 'the purchase of three plots of land at Hammersmith'. In that case Bramwell LJ said—

> But the point to be established by the plaintiff is that the defendant has bound himself, and a receipt was put in evidence signed by him, and containing the name of the plaintiff, the amount of the deposit, and some description of the land sold. The receipt uses also the word "purchase" which must mean an agreement to purchase, and it becomes apparent that the agreement alluded to is the agreement signed by the plaintiff. So soon as the two documents are placed side by side the agreement referred to may be identified by parol evidence. …

The matter was expressed thus in *Timmins v Moreland Street Property Co Ltd* by Jenkins LJ:[55]

> The rule has no doubt been considerably relaxed since *Peirce v Corf* was decided in 1874, but I think it is still indispensably necessary, in order to justify the reading of documents

52 As to mistake and rectification more generally, see **Chapter 14**.
53 *Boydell v Drummond* (1809) 11 East 142; *Peirce v Corf* (1874) LR 9 QB 210 (QB); *Dobell v Hutchinson* (1835) 3 Ad & E 355 at 371.
54 *Long v Millar* (1879) 4 CPD 450, [1874–80] All ER Rep 556 (CA, Eng).
55 *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110, [1957] 3 All ER 265, [1957] 3 WLR 678 (CA, Eng).

no equitable interest in land can be created or disposed of except by writing signed by the person creating or disposing of the same, or by his agent.

[2-50] A non-complying agreement or transfer is not merely unenforceable, it is void in the sense that it fails to create any equitable interest at all.

[2-51] It was not until 1852 with the decision in *Leroux v Brown*,[67] that the Statute of Frauds 1677 (Eng) was held to render unenforceable a non-conforming contract. Previously, contracts made in non-conformity with the Statute were held to be void. Section 3(1) of the Conveyancing and Property Ordinance (Cap 219), however, expressly provides that non-complying agreements are unenforceable.

[2-52] The distinction between unenforceable and void agreements is potentially important. For instance, a landlord's claim for outstanding rent must fail if it is due under a lease which is unenforceable for non-conformity with section 3(1) of the Conveyancing and Property Ordinance. Equally, a tenant cannot recover rent already paid under the same lease merely because it does not conform to section 3(1); the lease will be legally valid and available as a defence, even if it is unenforceable. Similarly, a vendor of land can resist a claim brought by a defaulting purchaser for return of a deposit on the purchase price notwithstanding the failure of the contract of sale to comply with the legislative requirements as to writing.[69] A contract in non-compliance with section 3(1) is, therefore, available as a shield but not as a sword.

[2-53] A plaintiff will not always, however, be able to rely on a non-conforming contract as a defence to a counter claim. In *Take Harvest Ltd v Liu*,[70] a plaintiff sought a refund of a tenancy deposit on grounds specified in an oral agreement. The defendant counterclaimed for rent under another contract which conformed to the requirements of section 3(1), and the plaintiff then submitted that its claim for a refund was itself a defence to the counterclaim. The court rejected the plaintiff's contention:

> Their Lordships cannot accept in its unqualified form the proposition that, in a case such as this, an oral agreement is available as a defence in the same way and to the same extent as any enforceable contract. If due regard is to be paid to the statute, the question in any given case must be whether the party who relies on the oral agreement is in substance seeking to enforce it. If he is so seeking, it matters not whether he happens to be plaintiff or defendant in the proceedings or whether, as a matter of formal pleading, he is seeking to enforce the oral agreement by way of claim, defence, counterclaim or otherwise: compare *Delaney v TP Smith Ltd* [1946] KB 393, 399–401, per Tucker Parry J. In any such case due effect must be given to the statute.

[2-54] Furthermore, severable promises falling outside the legislation's scope will remain actionable in contract notwithstanding a failure to comply with the legislative requirement of writing.[71] Whether a promise is severable from the main agreement is a question of construction in each case. A severable promise may be collateral to the main agreement in such a way that the main agreement is consideration for the collateral promise. Where this is the case, there will be a failure of consideration for

67 *Leroux v Brown* (1852) 12 CB 801, (1852) 138 ER 1119 (CP).
68 eg, *Carrington v Roots* (1837) 2 M & W 248, (1837) 150 ER 748 (Ex).
69 *Thomas v Brown* (1876) 1 QBD 714, [1874–80] All ER Rep Ext 2108 (QB).
70 *Take Harvest Ltd v Liu* [1993] AC 552, [1993] 2 All ER 459, [1994] 1 HKLR 32, [1992–1993] HKC 554 (PC) (on appeal from Hong Kong).
71 *Mayfield v Wadsley* (1824) 3 B & C 357, (1824) 107 ER 766 (KB).

the collateral promise if the main agreement is void. Where the main agreement is merely unenforceable, however, it can be effective to supply the collateral promise with consideration.

[2-55] Claims based on grounds other than contract, such as quantum meruit or restitution, may also remain open notwithstanding an agreement's non-compliance with the Statute of Frauds.[72]

10. Part Performance

[2-56] The requirement of writing in section 3(1) of the Conveyancing and Property Ordinance (Cap 219) is designed to prevent fraudulent claims. Yet it is quite possible that the provision's technical requirements might assist a party to avoid contractual obligations dishonestly. This was the experience in England, where the equivalent Statute of Frauds requirement was used by unscrupulous promisors to avoid obligations they had freely undertaken for value. A statute which was enacted to prevent fraud sometimes became, ironically, an aid to fraud.

[2-57] In order to address this species of injustice, the courts of equity soon began developing a doctrine which came to be known as 'part performance'. Indeed, only eight years after the Statute of Frauds was enacted, a court ordered specific performance of an unsigned agreement for the sale of land so as to avoid a fraud.[73] According to the doctrine, a court could order the equitable remedy of specific performance of a land contract that did not comply with the Statute of Fraud's requirements of writing where the party seeking relief had already partly performed the agreement. Once that party's part performance was established, parol evidence was admissible as to all the contract's terms. The equitable doctrine's rationale rested on a version of estoppel; a party who has permitted another to perform acts in reliance on an agreement may not insist that the agreement is bad, or that he is entitled to treat those acts as if the agreement had never existed.[74]

[2-58] The doctrine of part performance no longer applies in England,[75] but has been expressly preserved in Hong Kong by section 3(2) of the Conveyancing and Property Ordinance.

10.1 Conduct constituting part performance

[2-59] Payment of the purchase price and entering into possession of the land are the 'clearest possible acts of part performance'.[76]

[2-60] It was long believed that payment of a deposit for the purchase or lease of land could not constitute part performance because payment of money was supposedly an equivocal (ie, ambiguous) act which did not necessarily indicate the existence

72 *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853 (Ch).
73 *Butcher v Stapely* (1685) 1 Vern 363, (1685) 23 ER 524 (Ch).
74 *Morphett v Jones* (1818) 1 Swanst 173, (1818) 36 ER 344, [1814–23] All ER Rep 612 (Rolls).
75 Law of Property (Miscellaneous Provisions) Act 1989 (UK), s 2; *Godden v Merthyr Tydfil Housing Association* [1997] 74 P & CR 91, [1997] 1 NPC 1 (CA, Eng).
76 *Wu Koon Tai v Wu Yau Loi* [1996] 3 HKC 559, [1996] 2 HKLR 477 (PC) (on appeal from Hong Kong) (parties followed Chinese customary law procedures for conveying land, and possession was delivered in exchange for payment of purchase price).

be determined, but then that determination must be a determination which depend on the agreement between the parties', and 'a certain part of the may be settled by somebody else'.[11]

3.1.1 Agreement to agree or negotiate

[4-14] The mechanism established by the parties can be anything depend simply on their future agreement. By extension, an agreement void for uncertainty. In *Walford v Miles*,[12] the plaintiffs negotiated the purchase defendants' photographic processing business. The defendants sold to but the plaintiffs alleged that the defendants had promised to continue only with them. The plaintiffs sued for breach of the alleged contract negotiating. The House of Lords unanimously rejected the claim. According Ackner, 'the concept of a duty to carry on negotiations in good faith repugnant to the adversarial position of the parties when involved in As a result, negotiating parties are free to pursue their own interests and agreement: 'The reason why an agreement to negotiate, like an agreement unenforceable is simply because it lacks the necessary certainty'.[13]

[4-15] In *Bonds Group Co Ltd v Kwan Daniel*,[14] the defendants plaintiff with a letter of intent to sell shares in a company. The letter of intent that the defendants would in the future supply three further documents purchase agreement, a shareholders' agreement, and defendants' undertaking documents had not been supplied when the plaintiff commenced proceedings breach of a contract of sale putatively embodied in the letter of intent. The Court of Appeal ruled in favour of the defendants, reasoning that: (1) any outlined in the letter of intent was rendered void for uncertainty as to several terms, and (2) citing *Walford v Miles*, the provisions relating to the three were an invitation to pursue further negotiations.[15]

3.1.2 Unilateral determination and good faith

[4-16] That there is no duty to negotiate in good faith is an instance of proposition that there is no general duty of good faith in the common law of

11 *May and Butcher Ltd v R* [1934] 2 KB 17 at 22, [1929] All ER Rep 679 (HL) at 683–684
12 *Walford v Miles* [1992] 2 AC 128, [1992] 1 All ER 453, [1992] 2 WLR 174 (HL).
13 *Walford v Miles* [1992] 2 AC 128 at 138, [1992] 1 All ER 453 at 460, [1992] 2 WLR Ackner accepted, however, the validity of a lock-out agreement according to which the that one or both of them will negotiate only with the other party for a certain period an agreement does not lack certainty. The agreement in *Walford v Miles* was not agreement because it did not specify the period of time for which the obligation was *Miles* [1992] 2 AC 128 at 139, [1992] 1 All ER 453 at 461–462, [1992] 2 WLR 174 also, *Hong Jing Co Ltd (泓景置業發展有限公司) v Zhuhai Kwok Yuen Investment Co Ltd 源投資有限公司)* [2013] 1 HKLRD 441 at 460, [2012] HKCU 1463 (CA) (agreement with third parties for a period of 19 days).
14 *Bonds Group Co Ltd (寶璽(集團)有限公司) v Kwan Daniel (關秩安)* [2023] HKCA 2 HKC 461, [2024] 1 HKLRD 541.
15 *Bonds Group Co Ltd (寶璽(集團)有限公司) v Kwan Daniel (關秩安)* [2023] HKCA 2 HKC 461, [2024] 1 HKLRD 541 at para 37.
16 eg, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 at 439, ER 348 at 352–353, [1988] 2 WLR 615 (CA, Eng), per Bingham LJ: 'English law has, committed itself to no such overriding principle [of good faith] but has developed piecemeal in response to demonstrated problems of unfairness'.

This is not to say, however, that there are no manifestations of an obligation of good faith in some specific aspects of contractual relations. Indeed, it has been observed in Hong Kong that the common law, rather than importing any general concept of good faith, embraces 'a number of individual rules which provide remedies against specific forms of bad faith'.[17]

[4-17] As Viscount Dunedin recognised in *May and Butcher*, the task of supplying an essential term could be settled on a third party. The mechanism might also take the form of designating one of the contracting parties to determine unilaterally a missing term, or to determine matters relevant to the agreement, without the need to obtain the other party's assent. It is easy to imagine how such an arrangement might be abused by the party on whom the discretion is conferred. Loan agreements providing for variable rates of interest are a common example. In all such cases, there exists a specific obligation of good faith on the party endowed with the discretion. Where the agreement allows one of the parties unilaterally to determine a term of the contract, or to determine a matter affecting the other party's rights, that discretion will be subject to implied constraints similar to those imposed on official administrative authorities exercising judicially reviewable powers.

[4-18] In *Paragon Finance plc v Nash*,[18] the plaintiff financial institution exercised its right conferred under loan contracts unilaterally to raise interest rates payable by the defendants, who argued that the increased rates were unlawfully extortionate. The plaintiff succeeded on the basis that, although its power to raise rates was not completely unfettered, its decision had not been motivated by non-commercial considerations. In particular, it had not exercised its contractual powers dishonestly, capriciously, arbitrarily, or taken into account any irrelevant consideration, or acted in a way that no reasonable lender would have done in the same circumstances (ie, in a way analogously inconsistent with the strictures of '*Wednesbury* reasonableness').[19]

[4-19] Similarly, in *Chan Kam Yau v The Hong Kong University of Science & Technology*,[20] the defendant university exercised its unilateral discretion under contracts of employment to alter the terms on which the plaintiffs (two of its employees) participated in a provident fund. All the other 166 employees in a similar situation voluntarily agreed to the new terms. The plaintiffs argued that the new terms, under which their eventual pay out would depend on the fund's performance rather than the previously prevailing fixed pre-determined formula, was an impermissible exercise of the defendant's unilateral contractual discretion. The defendant succeeded on the basis that the new provident scheme was 'not without merits' and the high administration costs of maintaining the old scheme for only two employees was 'not worthwhile'. Consequently, the defendant had not exercised its unilateral contractual discretion

17 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] 6 HKC 443, (2013) 16 HKCFAR 336 (CFA) at para 20, per Lord Hoffmann NPJ.
18 *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685.
19 ie, the test for procedural reasonableness in the exercise of judicially reviewable official decision-making powers recognised in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680 (CA, Eng).
20 *Chan Kam Yau v The Hong Kong University of Science & Technology* [2007] HKCU 2129 (unreported, DCCJ 4016/2002, 21 December 2007) (DC).

be ascertained, for it is an elementary principle of the English law of contract id cer... *quod certum reddi potest*.[45] True it is that the agreement for the sale of land remains ... until transfer of title to the land and payment of the purchase price; but if this is the ... which the agreement is said not to be complete it is only executory contracts that ... enforcement by the courts; and such enforcement may either take the form of requiring ... to perform his primary obligation to the other party under it (specific performance) or, ... failed to perform a primary obligation, of requiring him to perform the secondary obligation ... arises only on such failure, to pay monetary compensation (damages) to the other party ... resulting loss that he has sustained.

...

Why should the presence in the option clause of a convenient and sensible ... for ascertaining what is a fair and reasonable price, which the lessors, in breach of ... contractual duty, prevent from operating, deprive the lessees of the only remedy which ... result in justice being done to them? It may be that where on the true construction ... contract the price to be paid is not to be a fair and reasonable one assessed by ... objective standards used by valuers in the exercise of their professional task but a price ... by a named individual applying such subjective standards as he personally thinks ... that individual, without being instigated by either party to the contract of sale, refuses ... the price or is unable through death or disability to do so, the contract of sale is then ... determined by frustration. But such is not the present case. In the first place the contract ... its true construction is in my view a contract for sale at a fair and reasonable price assessed ... by applying objective standards. In the second place the only thing that has prevented ... machinery provided by the option clause for ascertaining the fair and reasonable price ... operating is the lessors' own breach of contract in refusing to appoint their valuer. So ... synallagmatic contract created by the exercise of the option were allowed to be treated by ... lessors as frustrated the frustration would be self-induced, a circumstance which English ... does not allow a party to a contract to rely on to his own advantage.

Lord Fraser, Lord Scarman and Lord Bridge agreed with Lord Diplock that the appeal ... be allowed. Lord Russell dissented.

[4-31] In *Sudbrook*, the mechanism for establishing the reversion price did not ... simply upon the parties' future agreement. That mechanism was, however, ... the lessor's refusal to appoint a valuer. The court might have resolved the ... deadlock produced by the lessor's refusal to co-operate in the agreed dispute ... mechanism by stepping into the lessor's shoes and appointing a valuer in his ... However, this would have involved the court in a de facto re-write of the contract ... parties themselves had agreed on the identity of the persons to appoint the ... The touchstone for a common law court in interpreting contracts is always to ... the intentions of the parties and enforce the agreement they have themselves made ... lessor's non-cooperation in the agreed mechanism therefore posed a conundrum ... court resolved the difficulty by taking the process of ascertaining the parties' ... to a new level; the deeper purpose of appointing valuers (as distinct from ... with another background) must have been to provide a mechanism for ascertaining ... market price. Such an exercise is susceptible to judicial determination by the ... and evaluation of evidence. Hence, the parties' intentions could be effected ... by the court deciding, upon appropriate evidence, what was the market value ... reversion. Such a neat solution might not have been available had the ... agreed by the parties been different.

45 That is certain which can be made certain.

3.2 Contextual construction

[4-32] It sometimes transpires that an essential term in an agreement is so obscurely or incompletely expressed that, viewed in isolation, it is impossible to assign it a reasonably certain meaning. Modern principles of contract interpretation are, however, antithetical to an approach which interprets contract terms in isolation from the agreement as a whole. In *Jumbo King Ltd v Faithful Properties Ltd*, Lord Hoffmann NPJ expressed the idea as follows:[46]

> The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve.

3.2.1 Factual context and language

[4-33] In interpreting any contractual term, including a poorly expressed essential term, it is therefore necessary to avoid viewing the term in isolation. Rather, one must construe it in the factual context in which the agreement was made and the language employed elsewhere in the agreement. Once this approach is taken, the parties' intention will sometimes be rendered reasonably certain.

Hillas & Co Ltd v Arcos Ltd

House of Lords
[1932] All ER Rep 494, (1932) 43 Ll L Rep 359, (1932) 147 LT 503

Arcos Ltd sold timber from the Soviet Union, and Hillas & Co Ltd were timber merchants. On 21 May 1930, the parties concluded an agreement by which Hillas & Co were to buy '22,000 standards of softwood goods of fair specification over the season 1930'. There were a number of other clauses in the agreement, one of which referred to '50,000 standards' (clause 7) and another which provided that: '9. *Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that whatever the conditions are, buyers shall obtain the goods on conditions and at prices which shout to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931*'. On 22 December 1930, Hillas & Co wrote to Arcos exercising the option in Clause 9 of the agreement. Arcos had already sold the entire 1931 stock of softwood to third parties, and could not fill Hillas & Co's order. Hillas & Co commenced proceedings for breach of contract, and Arcos defended by submitting that Clause 9 was void for uncertainty; it did not sufficiently describe the goods and it contemplated future agreement on essential terms. Unsuccessful before the Court of Appeal, Hillas & Co brought the matter to the House of Lords. In the following extracts, the speeches of Lord Tomlin and Lord Wright are reproduced in reverse order.

Lord Wright:

...

The document of 21 May 1930, cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents

46 *Jumbo King Ltd v Faithful Properties Ltd* [1999] 4 HKC 707 at 726, (1999) 2 HKCFAR 279 at 296, [1999] 3 HKLRD 757 (CFA) at 773.