

[1-56] The common law thus committed itself early to a law of contract in which more than a serious promise was required; there also needed to be a bargain towards which each party had contributed. This reflected the accelerating emergence of a commercial spirit in English life as the feudal Middle Ages waned and England assumed a leading role in the European transition to modernity.

(e) *Early-modern contracts*

[1-57] The development of medieval English contract law is part of the story of the common law more broadly. The common law is a highly adaptive and flexible system. Broadly reflective of custom, it is part of the common law's genius that it is in a constant process of adaptation to the gradually shifting general practices and expectations of the community it serves. It is not, however, infinitely flexible. Having introduced the requirement of a deed for pursuing an action in Covenant before the royal courts, it could not simply perform a reversal and restore the old rule. Like a stately river winding its way to the sea, the common law frequently meanders but it rarely flows backwards. Indeed, it is precisely the almost complete absence of exposure to sudden reversal that principally lends the common law a greater degree of certainty than is possessed by legislation-based systems.

[1-58] The common law does not change by revolution. It proceeds instead by piecemeal adaptations. The cobbling together of solutions that are reflective of the community's customs, and with the juridical tools which already lie at hand, characterise the common law's adaptive method. Working with these tools, the common law bridged the gap between the medieval contractual landscape and the modern law of contract in two phases. The first phase, in the late fourteenth and early fifteenth centuries, was a temporary return to actions of Trespass. The second phase was the emergence out of Trespass in the latter half of the sixteenth century, of a distinct action of Assumpsit. Although Assumpsit was the soil from which modern contract law ultimately sprang forth, until the sixteenth century it was treated by lawyers merely as a sub-species of Trespass on the Case.⁸⁴

(f) *Special trespass (trespass on the case)*

[1-59] In responding to the changed conditions of English economic, social and customary life as the middle ages gave way to early modernity, the King's Bench in the later fourteenth century accepted certain claims advanced with a view to circumventing the requirement of a seal in actions of Covenant.

⁸⁴ Simpson (1975), n 42 above, p 199.

The way forward in actions of Debt having been effectively blocked,⁸⁵ these successful claims manifested a tactical return by plaintiffs to actions of Trespass.⁸⁶

[1-60] As we have seen, the action of Covenant arose out of the action of Trespass in the thirteenth century. Actions of Trespass were heard in local courts prior to the establishment of the royal courts and their attendant system of writs. Trespass provided relief for the commission of civil wrongs, which originally extended to breaches of agreements or undertakings. The civil wrongs covered were not governed by any general theory, but depended on customary understandings that defied neat theoretical unification: 'A collection of separate substantive wrongs had been given a terminological unity for procedural reasons.'⁸⁷ In addition to its early inclusion of matters later covered by Covenant, Trespass extended to losses caused by events as diverse as biting dogs, fire, assault, injuring patients while treating their illnesses, accidentally discharging weapons, and badly shoeing horses. Indeed, so flexible was the action of Trespass that Maitland styled it, 'that fertile mother of actions.'⁸⁸

[1-61] With the royal courts came access to them by writs. Not every civil wrong, however, entitled a plaintiff to the jurisdiction of the royal courts. Only serious misconduct would suffice. The conduct complained of originally needed to be expressible in the writ formula, '*vi et armis et contra pacem regis*' ('with force of arms and in breach of the king's peace'). By the mid-thirteenth century, however, plaintiffs in actions of Trespass were increasingly obtaining access to royal justice without pleading either armed force or violation of the king's peace.⁸⁹ The Statute of Gloucester (1278) attempted to arrest this tendency by requiring such Trespass actions to be heard exclusively in the local courts.⁹⁰

[1-62] Exchequer continued issuing writs, however, when the plaintiff employed the *vi et armis et contra pacem regis* drafting formula. This formalism encouraged 'creative' pleading by plaintiffs in order to secure the writ that would open the door to royal justice. The King's Bench would also

⁸⁵ In actions of Debt generally, the way forward was blocked by the requirement of a sum certain and the requirement that goods needed to be in existence at the time of the agreement. In the case of Debt *sur obligation*, there was the additional requirement of a sealed bond. In the case of Debt *sur contract*, there were the additional problems that it was usually not available against executors of a deceased debtor and the risk posed to the plaintiff by the defendant's right to wage his law.

⁸⁶ See generally: Simpson (1975), n 42 above, pp 207-210; Milsom (1981), n 18 above, pp 283-313; Teeven (1990), n 18 above, pp 13-20; Ibbetson (1999), n 37 above, pp 39-56; Baker (2002), n 28 above, pp 329-331.

⁸⁷ Milsom (1981), n 18 above, p 299.

⁸⁸ Maitland (1936), n 28 above, p 48.

⁸⁹ As to some possible reasons why plaintiffs increasingly preferred royal justice to local courts in actions of Trespass at this time, see: Teeven (1990), n 18 above, p 15.

⁹⁰ 6 Edw I, c8.

usually accept such writs as conferring jurisdiction on them, even if they were unrealistically or disingenuously framed, provided the correct formula was observed.⁹¹ In likely recognition of the reality lying behind the ritual drafting of many of the writs of Trespass, in the 1360s Chancery began issuing them without even the camouflage of the *vi et armis et contra pacem regis* formula.⁹²

[1-63] An important step in the direction of a modern common law of contract was taken in 1372 by the King's Bench in *The Farrier's Case*⁹³ in which the court accepted jurisdiction in a claim against a smith who had killed or seriously injured a horse by negligently driving a nail into its hoof. The writ was issued in the form of a local court plaint with no allegation of an armed breach of the King's peace.⁹⁴ The significance of *The Farrier's Case* is that actions of Trespass were soon thereafter effectively divided into two categories. There was 'Common Trespass' (or 'General Trespass') which required the *vi et armis et contra pacem regis* formula; and then there was 'Special Trespass' (or 'Trespass on the Case')⁹⁵ for redressing private wrongs which did not involve the use of armed force or violation of the King's peace.⁹⁶

(g) *Special trespass (assumpsit)*

[1-64] Among the private wrongs not involving armed force were those resulting from breaches of certain agreements or undertakings. This species of Special Trespass eventually came to be known as 'Assumpsit' because the

91 For example, in an action of Trespass before the King's Bench in 1317 the plaintiff claimed that he had bought a tun of wine from the defendants who, before the plaintiff took possession, drew off some of the wine and substituted salt water thereby entirely spoiling the purchase. According to the plaintiff's count, the defendant had drawn off the wine 'with force of arms to wit with swords and bows and arrows ... against the king's peace': *Rattlesdene v Grunestone* YB 10 Edw II, 140 (1317). See also Milsom (1981), n 18 above, p 289.

92 Teeven suggests that 'the royal courts were filling a gap in non-forcible trespass relief created by the decline of county courts in the fourteenth century': Teeven (1990), n 18 above, p 16.

93 Y B Trin 46 Edw III, pl 19, f 19 (1372).

94 Milsom (1981), n 18 above, pp 290-291.

95 'Trespass on the Case' was not a term that entered into wide usage until the sixteenth century. Special Trespass writs commenced with the phrase '*quare cum*' or '*quod cum*' with 'cum' being understood as 'whereas'. This opening phrase would be followed by a statement of the facts and the violated legal duty, each statement being varied to fit the requirements of the particular case. Hence the eventual emergence of the phrase, 'Trespass on the Case': Teeven (1990), n 18 above, pp 17-18; see also Milsom (1981), n 18 above, pp 283-284.

96 The reason to sustain the distinction between common Trespass and special Trespass was probably the availability only in the quasi-criminal common Trespass cases of the process of *capias* which could result in the arrest and imprisonment of the defendant. *Capias* was not extended to special Trespass until 1504. It is, indeed, possible that the royal courts 'ceased demanding the fiction of *vi et armis* in non-forcible wrongs ... in order to spare the non-violent defendant the extremes of *capias* process': Teeven (1990), n 18 above, p 16.

writ, in recounting the defendant's undertakings said to have been violated, employed the formula '*assumpsit super se*' ('took upon himself').

[1-65] The retreat from Covenant back into Trespass required changes in the latter which would permit it to serve as the midwife of a law of contractual obligations corresponding to the changing customs of a modernising society and economy. Because the common law is a system which responds gradually and pragmatically to changing customs and expectations, there was never a plan which provided a road map for the transition from medieval Trespass to modern contract law. With the benefit of hindsight, however, we can see that the transition consisted of four elements.

[1-66] The first of these elements was the adaptation of Special Trespass to serve as a vehicle for actions on the misperformance (or 'misfeasance', in terms of tort) of agreements or undertakings, and not just on biting dogs, accidental fires, bolting horses, carelessly discharged arrows, and similar tortious mishaps. The common law co-opted the existing law on misfeasance to achieve the necessary purpose. The second element was the incorporation into Special Trespass of rules which would cope with — to employ the language of modern contract law — breach of warranty and misrepresentation. The existing law on fraud was the chosen device, which was stretched and modified to meet the required exigency. The extension of Special Trespass to cover non-performance (as distinct from misperformance) of an agreement or undertaking was the third element. This was achieved by regarding a duty of performance on certain occupations as giving rise to an attendant liability for non-performance, on a flexible deployment of Deceit to cover certain types of non-performance whereby the defendant was disabled from future performance, and then by dropping the camouflage of Deceit and disablement altogether. Finally, the common law freed Special Trespass from the medieval stricture on *quid pro quo* requiring that the plaintiff's *quid* must have been executed thereby denying the enforceability of wholly executory contracts.

(h) *Special trespass and misfeasance*

[1-67] When breaches of agreements were actioned in Debt or Covenant, the plaintiff was asserting a right the primary remedy for which was performance by the defendant. In the royal courts, *praecipe* ('instruct', or 'order') was the appropriate form of writ under the authority of which the sheriff ordered the defendant to satisfy the plaintiff's claim. Only if the defendant defaulted would he be summoned to court in order to show cause. Specific performance was the primary remedy, but damages for violation of the plaintiff's right could be awarded in lieu.

[1-68] If a plaintiff was proceeding by action of Trespass, however, he asserted a wrong that had been committed against him rather than the denial

of a right owed to him. The appropriate form of writ was *ostensurus quare* ('show why') by which the sheriff summoned the defendant to court in order to justify himself. This procedure was consistent with the quasi-criminal nature of medieval Trespass. The requirement of the *ostensurus quare* writ meant that, in formulating an action of Special Trespass for breach of an agreement or undertaking, the plaintiff needed to frame his case in a different way than if he had proceeded by way of a *praecipe* writ of Debt or Covenant. In particular, the stress on the commission of a wrong rather than the denial of a right meant that emphasis was placed on misperformance of the agreement (misfeasance, in tort terms) causing injury or loss rather than non-performance (nonfeasance).

[1-69] Even before the formalisation of Special Trespass in the 1370s, actions of Trespass for misfeasance on the performance of an agreement had already been successful before the King's Bench. In *Bukton v Tounesende*,⁹⁷ for instance, the defendant ferryman agreed to carry the plaintiff's mare across the River Humber. The animal perished because the defendant had overloaded the ferry. Upon a bill of trespass brought while the court was sitting locally, the King's Bench rejected the defendant's argument that the action should have been brought of Covenant.⁹⁸ The court held that the action properly sounded in Trespass. The loss resulted from improper performance of the defendant's undertaking — not simply its non-performance — and the defendant would probably have been liable in trespass even without an antecedent agreement.

[1-70] In *Waldon v Mareschal*⁹⁹ another horse was dead. This time the cause was negligent treatment by the defendant veterinary surgeon, and the writ used the expression '*assumpsisset*' ('had undertaken') to recount the terms of the undertakings breached. Once again, the defendant argued that the proper action was Covenant, and once again the court held that the defendant's negligent performance of his undertakings properly sounded in Trespass. Actions of Special Trespass for misfeasance in the context of an agreement or undertaking thereafter began to flourish. Within 70 years of *Waldon v Mareschal*, the Yearbook could summarise the position in the following terms:¹⁰⁰

If a carpenter makes a covenant with me to make me a house good and strong and of a certain form, and he makes me a house which is weak and bad and of another form, I shall have an action of trespass on my case. So if a smith makes a covenant with me to shoe my horse well and properly, and he shoes him and lames him, I shall have a good action. So if a doctor takes upon himself to cure me of my diseases, and he gives me medicines, but does not cure me, I shall have action on

97 (1348) B & M 358 (also known as *The Humber Ferry Case*); Milsom (1981), n 18 above, pp 316–318; Palmer (1993), n 48 above, pp 173–176; Ibbetson (1999), n 37 above, pp 46–48.

98 If this had been correct the plaintiff must necessarily have failed because (1) the covenant was not sealed; and (2) an action of Covenant lay within the jurisdiction of Common Bench, not King's Bench.

99 (1369) B & M 359; sub nom *Dalton v Mareschal* (1369) Palmer B D 343.

100 YB 14 Hy VI 18 (1436). See also Holdsworth (1966), n 56 above, p 430.

my case. So if a man makes a covenant with me to plough my land in seasonable time, and he ploughs in a time which is not seasonable, I shall have action on my case. And the cause is in all these cases that there is an undertaking and a matter in fact beyond the matter which sounds merely in covenant. ... In these cases the plaintiffs have suffered a wrong.

[1-71] By the fifteenth century, as we have seen, actions of Covenant had become unavailable where the claim was for improper performance as distinct from non-performance. The 'matter in fact [that was] beyond the matter which sounds merely in covenant' was the commission of a wrong in the form of a misperformance of the defendant's undertaking. Losses caused by improperly performed agreements, even absent a deed, had been successfully encompassed by actions of Special Trespass.

(i) *Special trespass and deceit*

[1-72] As the English economy and English society became increasingly liberated from feudal strictures and informal contract-making became more frequent and widespread to the point of becoming the customary norm, the problem of purchasers being induced to conclude agreements on the basis of untrue statements made by vendors became more common.

[1-73] The vendor of a horse at the Smithfield horse and cattle market in London might, for instance, state that the animal was in good health when it was blind. The purchaser might then acquire the horse, only to discover the defect after completion of the transaction. Such were the facts in the 1382 King's Bench case of *Aylesbury v Watts*.¹⁰¹ When the defendant argued that the action should have been brought of Covenant (which would have failed for want of a deed), Skipworth J rejoined: 'Do you suppose that a man can always carry his indentures in his purse in Smithfield?'¹⁰² The court's recognition of the incongruity between the requirement of sealing in actions of Covenant and the customary practices in horse trading doomed the defendant's jurisdictional argument.

[1-74] The plaintiff in *Aylesbury v Watts* successfully pleaded that the defendant had 'falsely and fraudulently' warranted the soundness of the animal, 'knowing the horse to be blind.' This form of pleading, which became standard in cases of breach of warranty, suggests dishonesty on the vendor's part. However, it appears that in actions of Special Trespass (or Deceit on the Case)¹⁰³ for breach of warranty, the defendant's deceitful intent was much less

101 (1382) YB Mich 6 Ric II, p 119, pl 27. See also, on very similar facts, *Rempston v Morley* (1383) YB Trin 7 Ric II, p 30, pl 11.

102 (1382) YB Mich 6 Ric II, p 120.

103 Although the origins of Deceit are not entirely clear, it seems that Deceit emerged from Trespass: S F C Milsom, 'Not Doing is No Trespass: A View of the Boundaries Case' [1954] Cambridge Law Journal 105–117, 107–108.

important than the fact that the plaintiff had been deceived.¹⁰⁴ By not later than the sixteenth century the defendant's state of mind had become irrelevant, and only the factual falseness of the warranty was important.¹⁰⁵ We thus see a flexible borrowing from, and adaptation of, fraud in order to patch Trespass into the task of developing a more serviceable law of contract.

[1-75] The statement needed to be a false warranty of present fact, and not one of future intention or a prediction. A vendor's false warranty that seeds about to be sold were from a certain county would be deceitful, but an incorrect statement that the seeds will grow or that a horse will travel 30 leagues in one day would not be a deceit.¹⁰⁶ Statements of the latter sort could potentially be actionable of Covenant if they were promissory. The trespass was the fact of deception, not an executory promise subsequently broken. An actual statement was necessary because the general rule as to quality or fitness was simply *caveat emptor*, although a vendor who sold goods knowing that he lacked title to them may have been liable.¹⁰⁷ Where a vendor was under a statutory duty to comply with certain obligations as to quality, such as to provide victuals which were not corrupt, a failure to comply could also expose him to an action of Special Trespass for deceit even absent an express warranty.¹⁰⁸

[1-76] On the other hand, because the plaintiff was required to be deceived, no action would lie where the plaintiff knew or should have known that the warranty was false; thus a plaintiff could not be deceived by a false warranty that a horse was blind unless the plaintiff lacked an opportunity to inspect the horse before sale.¹⁰⁹

(j) *Special trespass and nonfeasance*

[1-77] A significant barrier on the road from medieval to modern contract law was the problem of non-performance (as distinct from misperformance) of an informal agreement. In medieval English law the remedy for non-performance of a contractual obligation resided in an action of Covenant, but the requirement of a deed closed off royal justice to plaintiffs. The royal courts

104 Ibbetson (1999), n 37 above, pp 84–85.

105 Baker (2002), n 28 above, p 331.

106 *Anon* (1471) B & M 511; YB 11 Ed IV Trin, pl 10; Holdsworth (1966), n 56 above, 430–431; Ibbetson (1999), n 37 above, pp 84–85; Baker (2002), n 28 above, p 332.

107 Holdsworth (1966), n 56 above, p 431.

108 Baker (2002), n 28 above, pp 332, 336, 357. However, according to Ibbetson (1999), n 37 above, p 85 (footnote omitted): 'Statute had forbidden the sale of corrupt food, and it was consequently held that such a seller would automatically be liable to the buyer. Liability here stemmed straightforwardly from the breach of the statute and it was irrelevant whether or not there had been any warranty. The two grounds of liability were treated as wholly distinct, although both were litigable by superficially similar forms of action of trespass on the case.'

109 *Drew Barantine's Case* (1411) B & M 509, YB M 13 Hen IV, f 1, pl 4; Ibbetson (1999), n 37 above, p 84.

prohibited multiple remedies for the same wrong, and this disposition appeared to stymie the development of an alternative remedy in Special Trespass.¹¹⁰

[1-78] Where the plaintiff had a bond or a sealed agreement, he could bring his action of Debt *sur obligation* or Covenant in the royal courts. However, the rise in informal contract-making that accompanied market-based economic development, the operation of the 40 shilling rule in a context of currency inflation, and the continuing decline of the local courts in the fourteenth and fifteenth centuries meant that there was mounting pressure from plaintiffs for the common law to provide a remedy in the royal courts for non-performance of informal contractual obligations.¹¹¹

The increase of commerce was rendering some satisfactory law for the enforcement of contracts an absolute necessity; and, if the common law courts had not supplied it, the Court of Chancery would have.

[1-79] Non-performance was an obstacle mainly because medieval Trespass required more than a mere failure to act.¹¹² For much of the fifteenth century, the trespassorial corset into which unsealed covenants had been squeezed operated to constrain the use of Special Trespass in response to the non-performance of an undertaking. Unconcealed attempts to smuggle complaints of contractual non-performance into actions of Special Trespass would be met by the ritually dismissive reply: 'This sounds in covenant; not doing is no trespass.'¹¹³

[1-80] There is a reasonably clear theoretical difference between nonfeasance and misfeasance; nonfeasance is rarely wrong at common law without a contract, but liability for misfeasance can often arise independently of contract. In practice, however, the distinction is frequently not obvious; if I informally contract with a carrier to bring me a cartload of oats, but he brings me a cartload of hay, has he misperformed his undertaking or left it unperformed? If misperformance, I would have an action of Special Trespass in the royal courts; if non-performance I would need to try my hand in Covenant before a local court, but I must claim for less than 40 shillings. Furthermore, the apparent arbitrariness on the nonfeasance rule exposed it to constant attempts at either subversion or circumvention, 'for granted that a man may sue a carpenter on an informal agreement for building badly, what

110 Teeven (1990), n 18 above, p 29.

111 W J V Windeyer, *Lectures on Legal History*, (Law Book Co, Sydney, 2nd rev edn, 1957) p 107.

112 Some modern manifestations of trespass also require a positive act and not simply a failure to act; eg, *Ladd v Thomas* (1840) 12 Ad & El 117, 113 ER 755 (trespass *ab initio*); *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, [1968] 3 All ER 442, [1968] 3 WLR 1120 (battery).

113 Milsom (1954), n 103 above, p 108; Teeven (1990), n 18 above, p 29.

sense can there be in saying that the same carpenter is immune from suit if he fails to build at all?¹¹⁴

[1-81] By the turn of the sixteenth century the obstacle to using Special Trespass in order to make a claim for non-performance of an agreement had been overcome. The modus of change, which occurred over the course of the fifteenth century,¹¹⁵ was the common law's characteristically pragmatic process of gradual adaptation employing existing concepts stretched and adapted as needed to accommodate the people's evolving customs.

[1-82] The rule against nonfeasance in Trespass actions was in place by the first decade of the fifteenth century. In the 1400 case of *Watton v Brinth*¹¹⁶ and in another case nine years later,¹¹⁷ actions for nonfeasance were brought against carpenters who had failed to perform agreed work. The court said that an action of Covenant could have been brought without a deed because the defendants were obliged to perform under the Statute of Labourers and an action of Trespass could have been brought for misfeasance, but the present actions for nonfeasance would not lie.

[1-83] Certain classes of persons were under a public legal duty to perform services, and this furnished the first breach in the wall excluding actions of Special Trespass for nonfeasance. The Statute of Labourers, for instance, was enacted shortly after the Black Death of 1348–49 in order to prevent certain workers from leaving their employment.¹¹⁸ The Statute was interpreted as permitting an action of Trespass where the defendant failed to comply with his statutory duty to work.¹¹⁹ Although a more obvious line of analysis might have been to view the legal duty to perform as substituting for a seal in an action of

114 Milsom (1981), n 18 above, p 224.

115 Holdsworth (1966), n 56 above, pp 434–441; Simpson (1975), n 42 above, pp 248–280; Milsom (1981), n 18 above, pp 322–339; John Barton, 'The Action on the Case', in Barton (1990), n 42 above, pp 39–47; Teeven (1990), n 18 above, pp 28–37; Ibbetson (1999), n 37 above, pp 30–38, 126–130; Baker (2002), n 28 above, pp 333–339.

116 (1400) YB 2 Hen IV, f 3, pl 3; sub nom *Wotton v Brinth* YB 2 Hy IV Mich pl 9, Holdsworth (1966), n 56 above, pp 433–434.

117 *Anon* (1409) B & M 379.

118 'And if a reaper or mower, or other workman or servant, of whatever standing or condition he be, who is retained in the service of any one, do depart from the said service before the end of the term agreed, without permission or reasonable cause, he shall undergo the penalty of imprisonment, and let no one, under the same penalty, presume to receive or retain such a one in his service': (1349–1351) 23 Edw III, 25 Edw III, st 2 (Ordinance and Statute of Labourers), second paragraph of the Statute. The Statute was enacted in order to facilitate enforcement of the Ordinance; Ibbetson (1999), n 37 above, p 38; At common law certain occupations — including innkeepers, carriers, physicians, attorneys and some court officials — were regarded as engaging public duties involving a duty to perform once their services were engaged: Simpson (1975), n 42 above, p 271; Teeven (1990), n 18 above, pp 29–30; Baker (2002), n 28 above, pp 335–336, 407–408.

119 YB Mich 28 Edw III, f 21, pl 18 (1354); YB Mich 29 Edw III, f 27 (1355); *Thelneham v Penne* (1378) 88 Selden Society 7; Teeven (1990), n 18 above, pp 29–30.

Covenant with its *praecipe* writ requiring compliance with the plaintiff's right, the royal courts instead specified Trespass as the plaintiff's appropriate form of action.¹²⁰ Once the principle was admitted that a non-performance could be actionable of Trespass where public law duties to perform had been breached, it became more difficult to maintain the nonfeasance rule in cases of purely contractual non-performance.

[1-84] Common Bench made a decision in 1425 that had the potential to hasten significantly the availability of Trespass for nonfeasance. In *Watkins' Case*¹²¹ an action of Trespass was brought against a builder who undertook¹²² to construct a mill by a specified date but then failed to do any work on the project. The defendant argued that the action should have been brought of Covenant, which would have failed for want of a deed. Babington CJ, on the majority's behalf permitting the writ of Trespass to stand, eschewed a theoretical discussion of misfeasance and nonfeasance. He instead focused on several hypothetical circumstances in which non-performance might cause loss to a plaintiff; damage to furniture by non-repair of a roof, failure to repair a ditch leading to flood damage, and loss to a client caused by a lawyer's failure to plead. In all these cases, according to the majority, an action of Trespass would lie. Martin J in dissent and, evidently displeased at the prospect of dissolving the distinction between Covenant and Trespass, said: 'If this action can be held up on these facts, then for every broken covenant in the world one shall have an action of trespass.'¹²³ No doubt, Martin J would have been appalled to learn that he was prescient. His prophecy would, however take some 140 years to be fully realised. The radical approach embraced by the majority in *Watkins' Case* was emulated eleven years later,¹²⁴ but most cases from the fifteenth and early sixteenth centuries would continue to insist on

120 Teeven (1990), n 18 above, p 30.

121 YB Hil 2 Hen VI, pl 33, f 36v (1425), B & M 380; Teeven (1990), n 18 above, pp 30–31.

122 'Empris' in the writ, French for 'assumpsit'.

123 In the fifteenth century there were also possibly perceived juridical dangers, associated with prevailing procedures of proof, in allowing Special Trespass to encroach very far into the domain of Covenant. What Martin J was 'perhaps concerned about was the danger involved in abandoning formality in the common law of contract, a danger which must have been very obvious at the time when the common law courts possessed only a rudimentary technique for establishing the truth by evidence, and a grossly unsatisfactory and as yet unidealized oracle, the jury, for deciding questions of fact. Had the defendant been protected from groundless claims by the right to wage his law [not only in Debt *sur contract*, but also in Trespass], the feeling might have been different. But in the context of the fifteenth century common law there was perfectly good sense in resisting ingenious attempts to bring tort actions upon agreements without producing respectable proof that there had in truth been an agreement. Such attempts, if encouraged, would inevitably lead to the collapse of the whole structure of the medieval common law of contract (as indeed happened in the end), a prospect which was hardly likely to be viewed with enthusiasm by the legal profession as a whole.': Simpson (1975), n 42 above, p 223.

124 *Anon* YB 14 Hy VI, f 18, pl 58 (1436); Holdsworth (1966), n 56 above, pp 434–435.

Ltd ('Gold King') at the latter's freight premises in Hong Kong. When the clothing was delivered, it was in good condition. Pursuant to a contract with Cosmo, Gold King stored the clothing on its premises before stuffing it into containers and shipping it to the ultimate consignee in New York. Upon arrival in New York, the consignee discovered that the clothing was spoiled because the containers were wet, mouldy and musty-smelling. The consignee sued Cosmo in a New York court, which found that the clothing was spoiled as a result of rain which fell in Hong Kong on 31 December prior to the stuffing of the containers at Gold King's premises. The New York court awarded damages of US\$104,000 against Cosmo. After negotiations between Cosmo and Gold King, the parties entered into an agreement whereby Cosmo agreed to accept HK\$300,000 from Gold King as contribution towards Cosmo's liability for damages in New York. The first instalment was agreed to be HK\$45,000, with the balance payable by 36 monthly instalments. Gold King made a number of instalments totalling HK\$172,800, but then ceased making payments thereby leaving HK\$127,200 outstanding. Cosmo sued Gold King for the outstanding balance.

Kaplan J:

... the defendant sought to argue that the agreement to pay \$300,000 was void for want of consideration on the grounds that the plaintiff never had a good claim against the defendant nor was there any negligent handling of the goods on the defendant's part.

To support this somewhat surprising proposition, the defendant relied upon six particulars, the first three of which seem to me to be the most important and I will, thus, quote them in full.

- (1) The defendant's contract with the plaintiff for the provision of Container Freight Station Services dated 13 January 1988 expressly stated that the area included 6,500 sq ft with cover and 5,600 sq ft open yard.
- (2) The plaintiff therefore knew that any goods delivered to the defendant might be stored in open area.
- (3) The plaintiff further knew or ought to have known that the goods stored in open area are exposed to the risk of water damage through heavy rain. ...

Pleaded particular (1) is correct and not in dispute. However, Mr Chu [witness for Cosmo] told me, and I accept, that it never crossed his mind that goods such as these cartons would be stored in the open air. The open yard was for containers and trunks. He also told me, and I accept, that before the Master Agreement was entered into with the defendant he inspected their premises, and was satisfied that there was sufficient covered storage space. Particular (3) is self-evident.

It is clear law that the 'compromise of a disputed claim which is honestly made, whether legal proceedings have been instituted or not, constitutes valuable consideration, even if the claim ultimately turns out to be unfounded. It is not necessary that the question in dispute should be really doubtful, it is sufficient if the parties in good faith believe it to be so, even if such belief is founded on a misapprehension of a clear rule of law.' (*Halsbury's Laws of England*, Vol 9, para 321.)

However, Mr Miu [counsel for Gold King] relied on the next paragraph from *Halsbury* which states:

However, the compromise of a claim will not constitute consideration where the claim is not made in good faith, either because the plaintiff in the action knows that his claim is unfounded, or where there is no sufficient evidence of any intended claim, ...

In my judgment, the defendant gets nowhere near to establishing that this claim was not made in good faith, or that the plaintiff knew that the claim was unfounded, or that there was no sufficient evidence of any intended claim. It is perfectly true that the plaintiff's witnesses did not say expressly to the defendant, 'If you do not agree to compensate us we will sue you.' However, Mr Lee [witness for Gold King] must have been under no illusion as to what would have happened if he had not agreed to contribute something to the plaintiff's loss of US\$104,000. It is necessary to approach these situations with some degree of commercial reality. ...

In my judgment ... there was ample consideration to support the promise to pay \$300,000. I am satisfied that the plaintiff and its witnesses thought that they had a claim against the defendant and this was a view honestly and reasonably held.

Judgment for the plaintiff.

[5-33] Where, however, the party compromising the claim knows it to be unfounded he does not provide consideration.¹³ This is so notwithstanding that the promisor avoids the expense and trouble of litigation by agreeing to the compromise of the unfounded claim. This exception can be justified on the grounds that the conduct of the compromising party in such circumstances would be fraudulent,¹⁴ and therefore an abuse of the judicial process.

(4) Detriment to promisee

[5-34] Even where it is difficult rationally to sustain the view that a thing requested by the promisor can be of any real value to him, common law courts are nevertheless distinctly ready to find that the thing constitutes sufficient consideration because it is a detriment to the promisee. *Patteson J in Bainbridge* held that the plaintiff's loss of use of the boiler, even for a short period of time, was a detriment to him even if there could be no demonstrable benefit to the defendant. The result was that the loss of the boiler's use by the plaintiff was sufficient consideration for the defendant's promise to restore it the plaintiff in working order. Similarly, Lord Reid in *Chappell* observed that the acquisition by the customer of the chocolate wrappers 'required expenditure by the acquirer which he might not otherwise have incurred' and that such acquisition and their delivery to Nestlé by the customer 'was certainly part of the consideration'.

[5-35] In *Yue Tai Plywood & Timber Co Ltd v Far East Wagner Construction Ltd*,¹⁵ it was held that the drawee of a cheque had provided consideration for the drawer's promise to pay by suffering the detriment of accepting the cheque in post-dated form and consenting to delayed presentation. Similarly, in *Kao, Lee & Yip v Euro Treasure Ltd*,¹⁶ the drawee of a cheque was held to have

¹³ *Wade v Simeon* (1846) 2 CB 548, 135 ER 1061; *Callisher v Bischoffsheim* (1870) LR 5 QB 449, 39 LJQB 181.

¹⁴ *Callisher v Bischoffsheim* (1870) LR 5 QB 449 at 452, per Cockburn CJ.

¹⁵ [2001] 2 HKLRD 446 (HKCFI).

¹⁶ [1985] 1 HKC 46 (HKCA).

suffered a detriment sufficient to constitute consideration for the drawer's promise to pay merely by issuing receipts for the cheque:

The giving of the receipts ... constituted detriment to the plaintiff, since by granting them he had acknowledged that the debts which were due to him from the third parties had been satisfied.¹⁷

[5-36] An illustration frequently offered both by courts and academic commentators is the hypothetical promise to pay £100 if the promisee will walk from London to York.¹⁸ Such an act will be a detriment, in the form at least of an inconvenience, to the promisee even if there is no benefit to the promisor. The promisee might have spent the same time and effort devoted to some other activity.

[5-37] Similarly, the thing requested by the promisor may be regarded as a detriment to the promisee even where it involves pursuing a course of action which is objectively in the promisee's own best interests.

Hamer v Sidway

Court of Appeals (New York)
124 NY 538; 27 NE 256 (1891)

Parker J:

... The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E Story became indebted to his nephew William E Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that 'on 20 March 1869, William E Story agreed to and with William E Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E Story, would at that time pay him, the said William E Story, 2d, the sum of \$5,000 for such refraining, to which the said William E Story, 2d, agreed,' and that he 'in all things fully performed his part of said agreement.'

[Hamer, the plaintiff, was the nephew's assignee. Sidway, the defendant, was executor of the uncle's estate. Hamer sought to recover the \$5,000 assigned to her, but the executor refused to comply.]

The defendant contends that the contract was without consideration to support it, and, therefore, invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the

¹⁷ Ibid at 49.

¹⁸ This celebrated example was first rendered judicially by Brett J in *Great Northern Railway Co v Witham* (1873) LR 9 CP 16.

promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875 [*Currie v Misa* (1875) LR 10 Ex 153 at 162], defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' ...

Pollock, ... after citing the definition given by the Exchequer Chamber already quoted, says: 'The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. ...

All concurred.

[5-38] Although *Hamer* is a United States judgment and must therefore be approached with some caution in Hong Kong, it is widely regarded as reflecting the common law position in England.¹⁹ Notwithstanding that the thing requested by the promisor is objectively in the promisee's best interest, it will nevertheless be regarded as a detriment to the promisee where it involves the suspension or surrender of a right or liberty enjoyed by the promisee. It is this surrender or suspension which represents the 'detriment' and which thereby constitutes the consideration.

[5-39] To similar effect is the virtually contemporaneous Australian judgment in *Dunton v Dunton*.²⁰ The defendant agreed with his former wife to pay her £6 per month on condition that she should 'conduct herself with sobriety, and in a respectable, orderly, and virtuous manner.' The former wife sought to enforce payment, but the defendant submitted that the agreement was unsupported by consideration. The Supreme Court of Victoria held by majority²¹ that the former wife was free, within the law, to conduct herself in

¹⁹ Eg P S Atiyah, *Consideration: A Restatement*, in *Essays on Contract*, (Oxford University Press, Oxford, 1986) p 195; H G Beale, W D Bishop and M P Furmston, *Contract Cases & Materials*, 4th edn, (Oxford University Press, Oxford, 2005) p 106.

²⁰ (1892) 18 VLR 114.

²¹ Higinbotham and Williams JJ, Hood J dissenting. But see *Chan Man Tin v Cheng Leeky* [2008] 3 HKLRD 593 (HKCFI) in which the plaintiff orally promised, 'in consideration of the plain loyalty and chastity' of the defendant, to provide the defendant with accommodation, material support and to 'cohabit ... and live happily together'. Among the

any manner she chose; surrendering that freedom was a detriment to her and provided good consideration for the defendant's promise to pay.

[5-40] The liberal approaches to finding consideration in *Hamer* and *Dunton* are to be preferred to the older English authority of *White v Bluett*,²² a case which has been characterised as 'notorious'.²³ Bluett owed a sum of money to his father for which Bluett had given a promissory note. After the father's death, his executor sought to recover on the promissory note. Bluett resisted recovery by alleging an oral agreement between him and his father according to which the father undertook not to enforce the promissory note if Bluett would stop complaining about the father's distribution of property among his children. The executor submitted that the agreement alleged to exist was unenforceable for lack of consideration, but Bluett argued that he had a right to complain and that an agreement to forego that right constituted valid consideration. The court held that the contract was unenforceable. According to Pollock CB:²⁴

In reality, there was no consideration whatsoever. The son had no right to complain for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

[5-41] Bluett had, if not exactly a right, certainly a liberty to complain. The surrender of that liberty should have constituted valid consideration. It has also been suggested that 'despite satisfying the modern definition of consideration the agreement was not enforced because it was made in a domestic setting (or alternatively, because it was made under duress).'²⁵ It is also possible that the real explanation for the court's decision was that it took a skeptical view of Bluett's testimony; there were no witnesses to the alleged oral agreement with his father, and the promissory note was still in the father's possession at the time of his death. The obvious problem with these alternative explanations is that they were not among the reasons expressed by the court, which rested its judgment solely on the absence of consideration. *White v Bluett* is probably best regarded as an anomaly produced by its peculiar facts.

(e) Performance of contractual duty owed to third party

[5-42] If consideration consists of either a benefit to the promisor or a detriment to the promisee, it is fair to question whether the performance

reasons why the defendant's counterclaim failed was that it lacked enforceability 'for want of clarity and certainty' because the terms 'loyalty', 'chastity' and 'live happily together' were too 'abstract' to constitute consideration ([2008] 3 HKLRD 593 at 603.

22 (1853) 23 LJ Ex 36, 2 CL R 301, 2 WR 75.

23 Janet O'Sullivan and Jonathan Hilliard, *The Law of Contract*, (Oxford University Press, Oxford, 5th edn, 2012) p 103.

24 (1853) 23 LJ Ex 36.

25 Stephen A Smith, *Atiyah's Introduction to the Law of Contract*, (Clarendon, Oxford, 6th edn, 2005) pp 110–111.

of a contractual duty already owed to a third party can provide sufficient consideration for a promise. The promisee is, after all, undertaking to do only that which he is already obliged to do under another contract. Nevertheless, the well-established common law position is that the performance of a pre-existing contractual duty owed to a third party can provide sufficient consideration to support a promise.

[5-43] In *Shadwell v Shadwell*²⁶ the plaintiff had entered into a contract to marry his fiancée. The plaintiff's uncle then promised to pay the plaintiff the sum of £150 annually until his annual income as a Chancery barrister shall have reached 600 guineas. The plaintiff claimed to be entitled to 16 payments, but to have received only 12. He sued his uncle's estate for the outstanding four promised payments. The court rejected by majority the defendants' submission that the agreement, properly construed, did not involve a request that the plaintiff should marry his fiancée. The defendants' secondary submission was that the honouring of an existing contractual obligation owed to a third party could not constitute consideration to support a promise; thus the plaintiff's marriage to his fiancée could not contractually support the uncle's promise to pay £150 annually. This submission, too, was rejected by majority.²⁷ It was held that the marriage requested by the uncle constituted both a benefit to him and a detriment to the plaintiff. The marriage was a benefit to the uncle because it was an object of interest to him. It was a detriment to the plaintiff because he 'may have made the most material changes in his position, and have induced the object of his affections to do the same, and have incurred pecuniary liabilities resulting in embarrassments, which would be in every sense a loss, if the income which had been promised should be withheld.'²⁸

[5-44] The promisor's benefit identified in *Shadwell* is consistent with the nominalist approach taken in *Bainbridge v Firmstone*.²⁹ The promisor requested it, therefore it may be presumed to be of value to him. However, the promisee's detriment identified by the *Shadwell* court is more problematic. There was no ascertained detriment, but merely the possibility that the plaintiff might have made certain material changes to his position in reliance on the uncle's promise. A more fundamental problem with *Shadwell* is that the promisee/plaintiff was already legally bound to perform the very act requested by the promisor/uncle, and neither the promisor nor the promisee was the subject of any new benefits or detriments. The *Shadwell* court, relying on assertion, did not address this conundrum.

[5-45] The challenge of providing a more compelling rationale for the rule articulated in *Shadwell* was taken up more than a century later in *New Zealand*

26 (1860) 9 CB (NS) 159, 142 ER 62.

27 In each instance, the majority consisted of Erle CJ and Keating J, with Byles J dissenting.

28 (1860) 9 CB (NS) 159 at 174.

29 (1838) 1 Per & Dav 2, 8 Ad & El 743, 112 ER 1019. See Section 5.3(a) above.

Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon).³⁰ The Privy Council held that the owner of drilling equipment, which was shipped from London to Wellington, had agreed with the New Zealand stevedores not to sue them for any damage caused by the stevedores to the drill unless the action was commenced within twelve months of the damage. The owner attempted to sue the stevedores for damage to the drill during its unloading, but after the agreed limitation period had expired. The stevedores raised the promised limitation period as a defence, but the owner argued that the stevedores had given no consideration for the promise. According to the owner, because the stevedores were already under a contractual obligation to the carrier to unload the drilling equipment, such unloading could not constitute sufficient consideration for the owner's promise not to sue. The Privy Council, by majority,³¹ rejected the owner's submission. According to Lord Wilberforce, speaking for the majority:³²

In their Lordships' opinion, consideration may quite well be provided by the appellant [stevedores] ... even though (or if) it was already under an obligation to discharge to the carrier. ... An agreement to do an act which the promisor [*in casu*, the stevedores in relation to their promise to unload the drill] is under an existing obligation to a third party to do, may quite well amount to valid consideration and does so in the present case: the promisee [*in casu*, the owner of the drill to whom the promise to unload was made] obtains the benefit of a direct obligation which he can enforce. This proposition is illustrated and supported by *Scotson v Pegg* (1861) 6 H & N 295 which their Lordships consider to be good law.

[5-46] Lord Wilberforce thus identifies a real benefit to the promisee which is not already present in the promisor's obligation to perform a contractual obligation owed to a third party. Because of the common law rules on privity,³³ only the parties to a contract may enforce its terms.

[5-47] In *The Eurymedon* Lord Wilberforce invoked the authority of *Scotson v Pegg*³⁴ in which a promise to pay for the delivery of coal was enforceable once the coal was actually delivered notwithstanding that the promisee was already contractually obliged to deliver the same coal to the promisor under a contract with a third party. Both cases involved a promise in exchange for the executed performance of a contractual obligation owed to a third party. It was not entirely clear whether either case provided authority for the proposition that an unexecuted undertaking to perform a contractual obligation owed to a third party could provide consideration for a promise. This issue was resolved

30 [1975] AC 154, [1974] 1 All ER 1015, [1974] 2 WLR 865.

31 Lords Wilberforce, Hodson and Salmon, Viscount Dilhorne and Lord Simon of Glaisdale dissenting.

32 [1975] AC 154 at 168.

33 See Ch 16.

34 (1861) 6 H & N 295, 158 ER 121.

in the affirmative by a subsequent decision of the Privy Council on appeal from Hong Kong.

Pao On v Lau Yiu Long

Privy Council on appeal from Hong Kong

[1980] AC 614; [1979] 3 All ER 65;

[1979] HKLR 225; [1979] 3 WLR 435

Pao and two other plaintiffs (his wife and son, 'the Paos') owned all the shares in Tsuen Wan Shing On Estate Co Ltd ('Shing On'). Shing On's principal asset was the 21-storey Wing On Building, then still under construction. Lau and another defendant (his brother, 'the Laus') were majority shareholders in a company, Fu Chip Investment Co Ltd ('Fu Chip'). The Laus had recently caused Fu Chip to be publicly listed with the Far East Stock Exchange. The Laus wanted Fu Chip to acquire the Wing On Building, but rather than have Fu Chip purchase the property from Shing On, it was thought preferable for Fu Chip to buy all the shares in Shing On. In February 1973 the Paos entered into two agreements with Fu Chip. Under the main agreement between the Paos and Fu Chip, the Paos promised to sell all their shares in Shing On for \$10.5m. The main agreement stipulated that Fu Chip was to pay for the purchase not in cash, but by transferring to the Paos 4.2m Fu Chip shares at a deemed value of \$2.435 each. The completion date was the end of March 1973, but was later extended by mutual consent to the end of April 1973. The main agreement also stipulated that the Paos were not to sell 60% of their Fu Chip shares before the end of April 1974 (this was because the Laus were concerned to protect the market price of Fu Chip shares against any large sell-off by the Paos). In order to obtain protection against a decline in the market price of their Fu Chip shares subject to the temporary sales embargo, the Paos entered into a separate subsidiary agreement with Lau whereby he was to purchase 60% of the Paos' Fu Chip shares for \$2.435 each on or before the end of April 1974. The Paos then realised that the subsidiary agreement was not to their advantage because it deprived them of the benefit of any appreciation in the market value of 60% of their Fu Chip shares. The Paos told the Laus that they would not proceed with the sale of their Shing On shares to Fu Chip under the main agreement unless the subsidiary agreement was cancelled and replaced by a guarantee that the value of the embargoed 60% of Fu Chip shares would be worth at least \$2.435 at the end of April 1974, and an indemnity in the event that the shares were worth less than \$2.435 on that date. The Laus were very concerned that the market price of Fu Chip shares would be adversely affected were Fu Chip not to acquire the Wing On Building, and so in May 1973 they entered into an agreement with the Paos whereby they cancelled the subsidiary agreement and gave the requested guarantee and indemnity. The Paos then sold all their Shing On shares to Fu Chip in exchange for the Fu Chip shares stipulated in the main agreement. Unfortunately Fu Chip's shares did not perform well in the stock market, and by the end of April 1974 they were worth only \$0.36. The Paos then sought to recover almost \$5.4 million from the Laus, being the difference between the market price and the guaranteed value of 60% of their Fu Chip shares. One of the grounds upon which the Laus sought to resist the claim was that the promise to guarantee and indemnify the Paos was not supported by consideration. In this regard, the Laus argued, inter alia, that the Paos had promised to do only that which they were already contractually obliged to do under the main agreement with Fu Chip, so that they gave nothing of value for the Laus' promise to indemnify. The Paos brought proceedings against the Laus. The

Paos succeeded at trial,³⁵ but lost on appeal.³⁶ They then brought a further appeal to the Privy Council.

Lord Scarman:

... The extrinsic evidence in this case shows that the consideration for the promise of indemnity, while it included the cancellation of the subsidiary agreement, was primarily the promise given by the Paos to the Laus, to perform their contract with Fu Chip, which included the undertaking not to sell 60% of the shares allotted to them before 30 April 1974. Thus the real consideration for the indemnity was the promise to perform, or the performance of, the Paos' pre-existing contractual obligations to Fu Chip. This promise was perfectly consistent with the consideration stated in the guarantee. Indeed, it reinforces it by imposing upon the Paos an obligation now owed to the Laus to do what, at Lau's request, they had agreed with Fu Chip to do.

Their Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration. In *New Zealand Shipping Co Ltd v Satterthwaite Ltd (The Eurymedon)*³⁷ the rule and the reason for the rule were stated as follows:—

An agreement to do an act which the promisor is under an existing obligation to a third party to do, may quite well amount to valid consideration: ... the promisee obtains the benefit of a direct obligation ... This proposition is illustrated and supported by *Scotson v Pegg* (1861) 6 H & N 295 which their Lordships consider to be good law.

Unless, therefore, the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress, the extrinsic evidence establishes that it was supported by valid consideration. ...

When one turns to consider cases where a pre-existing duty imposed by law is alleged to be valid consideration for a promise, one finds cases in which public policy has been held to invalidate the consideration. A promise to pay a share in consideration of his performing his legal duty, a promise to pay for discharge from illegal arrest, are to be found in the books as promises which the law will not enforce: see the cases cited in footnote 2, para 326, *Halsbury's Laws of England*, 4th ed, Vol 9. Yet such cases are also explicable upon the ground that a person who promises to perform, or performs, a duty imposed by law has been treated as valid consideration, the courts have usually (but not invariably) found an act over and above, but consistent with, the duty imposed by law: see *Williams v Williams*.³⁸ It must be conceded that different judges have adopted differing approaches to such cases: contrast, for example, Denning LJ at p 149 et seq. with the view of the majority in *Williams' case*.

But, where the pre-existing obligation is a contractual duty owed to a third party, some other ground of public policy must be relied on to invalidate the consideration (if otherwise legal); the respondents submit that the ground can be extortion by the abuse of a dominant bargaining position to threaten the repudiation of a contractual obligation. ...

The American Law Institute in its *Restatement of the Law of Contracts* (para 84D) has declared that performance (or promise of performance) of a contractual duty

³⁵ [1973–1976] HKC 377 (Li J).

³⁶ Sub nom *Lau Yiu-Long v Pao On* [1976] HKLR 892 (McMullin and Leonard JJ, Biggs CJ dissenting).

³⁷ [1975] AC 154 at 168.

³⁸ [1957] 1 All ER 305, [1957] 1 WLR 148.

owed to a third person is sufficient consideration. This view (which accords with the statement of our law in *Satterthwaite's Case*³⁹ [ie *The Eurymedon*] appears to be generally accepted but only in cases where there is no suggestion of unfair economic pressure exerted to induce the making of what Corbin [*Corbin on Contracts*] calls 'the return promise'. ...

[Lord Scarman went on to find that the Laus had not established a case for economic duress.]

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed and that the judgment of the trial judge be restored ...

[5-48] The salient facts and legal principles of *Pao On* may thus be summarised as follows:

February 1973. The main agreement between the Paos and Fu Chip was concluded. The Paos contracted to sell all their shares to Fu Chip in exchange for 4.2 million Fu Chip shares at a deemed value of \$2.435 each (that is, a deemed total value of about \$10.2 million). The Paos also agreed with Fu Chip not to sell 60 percent of their acquired Fu Chip shares until April 1974.

February 1973. The subsidiary agreement between the Paos and Laus (owners of Fu Chip) was concluded. In consideration of the Paos entering into the main agreement, the Laus agreed to purchase by not later than April 1974 60 percent of the Paos acquired shares in Fu Chip for \$2.435 each by not later than April 1974.

May 1973. The guarantee and indemnity agreement between the Paos and the Laus was concluded. The subsidiary agreement was cancelled. In consideration of the Paos entering into the main agreement, the Laus guaranteed that the value of 60 percent of the Paos acquired Fu Chip shares as at April 1974 would be worth not less than \$2.435 each as at April 1974. The Laus also promised to indemnify the Paos should the value of the shares fall below the guaranteed value.

After the guarantee and indemnity agreement. The transaction required by the main agreement proceeded in accordance with its terms.

April 1974. The Shares in Fu Chip declined in value to \$0.36 each. The Paos sought to enforce the guarantee and indemnity agreement against the Laus (involving a claim of about \$5.2 million).

The Laus denied contractual enforceability of the guarantee and indemnity agreement for lack of consideration. They advanced two propositions.

1. *Past Consideration.* According to the Laus, there was no consideration for their promises under the guarantee and indemnity agreement. Those

³⁹ [1975] AC 154, [1974] 1 All ER 1015, [1974] 2 WLR 865 (PC).

CHAPTER 9

Implied Terms

9.1 Implied Terms Generally

[9-1] Sometimes a term will be implied into a contract even though neither party discussed it or even turned their mind to it. For instance, when you next buy a new electric kettle you might not think to ask whether the seller actually owns it or whether it will boil water, and you probably will not seek an express assurance that it will not electrocute you when you switch it on. Similarly, you might not ask for a promise from the painter who decorates your flat that the paint will not peel off your walls within two weeks. The last time you received an inoculation for flu pursuant to an agreement with your physician, you probably did not obtain a promise from him that the needle was not infected with HIV. Nevertheless, each of these contracts will contain terms dealing with the unfortunate events hypothesised.

[9-2] These terms are present not because a party signed them, or because they were written in a notice by one party and were drawn to the other party's attention, or because they were expressed in a document or a conversation which formed part of the agreement between the parties. Such terms are neither written down nor orally discussed, but are nevertheless implied into the contract.

9.2 Terms Implied by Necessity

(a) *Business efficacy*

[9-3] Where a contract is silent about a matter which becomes important for the agreement to work as intended by the parties, a clause will be implied where it is necessary to give the contract business efficacy.

The Moorcock

Court of Appeal (England and Wales)
 (1889) LR 14 PD 64; [1886–1890] All ER Rep 530; 5 TLR 316; 60 LT 654

The defendants operated a wharf in the River Thames, and the plaintiff owned a steamship known as *The Moorcock*. The parties agreed that the defendant would unload and load cargo aboard the vessel, and that the defendant's wharf should be used for the purpose. It was agreed that before the stevedoring work could commence, it would be necessary for the vessel to be tied to the wharf and for the tide to go out so that the vessel would be resting on the river bed. When the vessel came to rest on the river bed, its hull was damaged by a ridge of hard ground beneath the mud. The plaintiff sued in contract for damage to the vessel.

Bowen LJ:

... The question which arises here is whether when a contract is made to let the use of this jetty to a ship which can only use it, as is known by both parties, by taking the ground, there is any implied warranty on the part of the owners of the jetty, and if so, what is the extent of the warranty. Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions, such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

Now what did each party in a case like this know? For if we are examining into their presumed intention we must examine into their minds as to what the transaction was. Both parties knew that this jetty was let out for hire, and knew that it could only be used under the contract by the ship taking the ground. They must have known that it was by grounding that she used the jetty; in fact, except so far as the transport to the jetty of the cargo in the ship was concerned, they must have known, both of them, that unless the ground was safe the ship would be simply buying an opportunity of danger, and that all consideration would fail unless some care had been taken to see that the ground was safe. In fact the business of the jetty could not be carried on except upon such a basis. The parties also knew that with regard to the safety of the ground outside the jetty the shipowner could know nothing at all, and the jetty owner might with reasonable care know everything. The owners of the jetty, or their servants, were there at high and low tide, and with little trouble they could satisfy themselves, in case of doubt, as to whether the berth was reasonably safe. The ship's owner, on the other hand, had not the means of verifying the state of the jetty, because the berth itself opposite the jetty might be occupied by another ship at any moment.

Now the question is how much of the peril of the safety of this berth is it necessary to assume that the shipowner and the jetty owner intended respectively to bear — in order that such a minimum of efficacy should be secured for the transaction,

as both parties must have intended it to bear? Assume that the berth outside had been absolutely under the control of the owners of the jetty, that they could have repaired it and made it fit for the purpose of the unloading and the loading. If this had been the case, then the case of *The Mersey Docks Trustees v Gibbs*¹ shews that those who owned the jetty, who took money for the use of the jetty, and who had under their control the locus in quo, would have been bound to take all reasonable care to prevent danger to those who were using the jetty — either to make the berth outside good, or else not to invite ships to go there — either to make the berth safe, or to advise persons not to go there. But there is a distinction in the present instance. The berth outside the jetty was not under the actual control of the jetty owners. It is in the bed of the river, and it may be said that those who owned the jetty had no duty cast upon them by statute or common law to repair the bed of the river, and that they had no power to interfere with the bed of the river unless under the licence of the Conservators. Now it does make a difference, it seems to me, where the entire control of the locus in quo — be it canal, or be it dock, or be it river berth — is not under the control of the persons who are taking toll for accommodation which involves its user, and, to a certain extent, the view must be modified of the necessary implication which the law would make about the duties of the parties receiving the remuneration. This must be done exactly for the reason laid down by Lord Holt in his judgment in *Coggs v Bernard*², where he says "it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." Applying that modification, which is one of reason, to this case, it may well be said that the law will not imply that the persons who have not the control of the place have taken reasonable care to make it good, but it does not follow that they are relieved from all responsibility. They are on the spot. They must know that the jetty cannot be used unless reasonable care is taken, if not to make it safe, at all events to see whether it is safe. No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so. This is a business transaction as to which at any moment the parties may make any bargain they please, and either side may by the contract throw upon the other the burden of the unseen and existing danger. The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction. So far as I am concerned I do not wish it to be understood that I at all consider this is a case of any duty on the part of the owners of the jetty to see to the access to the jetty being kept clear. The difference between access to the jetty and the actual use of the jetty seems to me, as Mr Finlay says it is, only a question of degree, but when you are dealing with implications which the law directs, you cannot afford to neglect questions of degree, and it is just that difference of degree which brings one case on the line and prevents the other from approaching it. I confess that on the broad view of the case I think that business could not be carried on unless there was an implication to the extent I have laid down, at all events in the case where a jetty like the present is so to be used, and, although the case is a novel one, and the cases which have been cited do not assist us, I feel no difficulty in drawing the inference that this case comes within the line.

Lord Esher MR and Fry LJ agreed with Bowen LJ that the appeal should be dismissed.

¹ Law Rep 1 HL 93.

² Ld Raym 909 (918), 1 Sm LC, 9th ed, 201 (216).

[9-4] According to Bowen LJ the implied term must not only be necessary, it must also be one which the parties would have agreed to if they had turned their minds to the matter at the time of concluding the agreement.

[9-5] The existence of conflicting commercial motives or interests might mean that reasonable persons in the position of the parties probably would not have been able to agree a term had they turned their minds to the problem at the time of contracting. In such a case, a term will not be implied. In *Luxor (Eastbourne) Ltd v Cooper*,³ there was an agreement by which the defendants would pay a 'procuration fee' of £10,000 to the plaintiff estate agent if he introduced a buyer for two of the defendants' cinemas. The plaintiff found a buyer willing to pay the defendants' price, but the defendants' changed their minds about selling and decided not to proceed. The plaintiff claimed that he was still entitled to the procuration fee because of an asserted implied term in the agreement forbidding the defendants from unreasonably preventing completion of the sale. The House of Lords refused to imply such a term; there was an express term requiring payment only upon completion of the sale and estate agents always bear the risk of a vendor withdrawing unless there is an express term to the contrary.

(b) Five conditions for implied terms

[9-6] In the decades following *The Moorcock*, numerous overlapping were expounded for implying contractual terms. The Privy Council drew the numerous threads together in an appeal from Victoria concerning a major development project. In so doing, it identified five overlapping conditions all of which must be satisfied before a term can be implied.

BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings

Privy Council
(1977) 180 CLR 266; 16 ALR 363; 52 ALJR 20

BP Refinery (Westernport) Pty Ltd ('BP') entered into an agreement with the government of the Australian State of Victoria by which it would construct and occupy an oil refinery ('the refinery agreement'). According to the refinery agreement, which received statutory sanction, BP could assign the refinery agreement and any interest therein to any other company in the group of companies to which BP belonged. The refinery agreement also permitted performance by third parties. Subsequently, BP entered into an agreement ('the rating agreement') with the local government authority of the Shire of Hastings ('the Shire') in whose area the refinery was to be located. According to the rating agreement, BP was to receive concessionary treatment in the payment of rates for a period of 40 years. The rating agreement made no mention of an entitlement by BP to assign that agreement or any interest therein to any other party, or for performance by third parties. During the course

³ [1941] AC 108, [1941] 1 All ER 33.

of a general corporate reorganisation in Australia, BP began voluntary winding up and another company from the group was assigned BP's rights and interests in the refinery agreement. The Shire then informed BP's group of companies that it regarded the rating agreement as terminated, because that agreement was personal to BP and could not be assigned to any other company. Thereupon, BP's group terminated BP's voluntary winding up process and reinstated BP to occupancy of the refinery. The Shire still refused, however, to assess BP's rating obligations in accordance with the rating agreement. On a case stated, the Full Court of the Supreme Court of Victoria found that there was an implied term in the rating agreement according to which the agreement would terminate once BP ceased to occupy the refinery. BP brought an appeal to the Privy Council.

Lord Simon of Glaisdale:

... Their Lordships turn to the first issue — namely whether there was an implied term in the rating agreement that it should come to an end on the appellant company ceasing to be in occupation of the refinery site. ...

Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

Their Lordships venture to cite only three passages — albeit they are familiar to every student of this branch of the law. In *The Moorcock*⁴ Bowen LJ said:

I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men ...

It is because the implication of a term rests on the presumed intention of the parties that the primary condition must be satisfied that the term sought to be implied must be reasonable and equitable. It is not to be imputed to a party that he is assenting to an unexpressed term which will operate unreasonably and inequitably against himself.

In *Reigate v Union Manufacturing Co*,⁵ Scrutton LJ said:

A term can only be implied if it is necessary in the business sense to give efficacy to the contract, ie if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case?", they would both have replied: "Of course, so and so will happen; we did not trouble to say that; it is too clear."

In *Shirlaw v Southern Foundries (1926) Ltd*,⁶ MacKinnon LJ said:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were

⁴ (1889) 14 PD 64 at 68.

⁵ [1918] 1 KB 592 at 605, [1918–19] All ER Rep 143 at 149.

⁶ [1939] 2 KB 206 at 227, [1939] 2 All ER 113 at 124.

making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, "Oh, of course."

The main thrust of the argument for the appellant company was that it was not necessary to give business efficacy to the rating agreement to imply a term in it that it should come to an end on the appellant company going out of occupation of the refinery site, notwithstanding reoccupation after however short an interval. Their Lordships feel the force of this contention. But the alleged implied term is, in their Lordships' view, to be rejected on a simpler and clearer ground.

In their Lordships' view the term which the Full Court held should be implied in the rating agreement must be rejected on the ground that, taking into account the matrix of facts in which that agreement was set, to imply such a term would be wholly unreasonable and inequitable. A group of companies such as the B.P. group may from time to time for good reasons wish to make changes in its corporate structure — particularly when a period of as long as forty years is envisaged. This possibility was, as has been said, recognized in the refinery agreement, and the identity of the member of the B.P. group occupying the refinery site cannot have been of the least importance to the respondents. If it was the case, as it must have been, that tripartite negotiations took place between the State, the Shire and representatives of the B.P. group before the refinery agreement was made and that the offer of substantial rating concessions for a period of more than forty years was an inducement to the B.P. group to enter into the refinery agreement and to incur the massive capital expenditure necessary to establish a refinery at Crib Point — and it may be that in the absence of that inducement the B.P. representatives would not have wanted and would not have agreed to establish one there — then it was, to say the least, inequitable to imply a term the application of which in the circumstances of this case means that the rating benefits conferred by the rating agreement were only enjoyed for five and a half years from 7 May 1964, instead of for more than forty years. When the rating agreement itself contained no provision for its termination before the expiry of forty years from the commissioning date, to imply a term which operated to deprive those who had been induced to establish the refinery of the advantages of those rating concessions on the ground that those advantages were only to endure so long as the appellant company remained in occupation of the premises, cannot, in their Lordships' opinion, be regarded otherwise than as unreasonable and inequitable.

In the light of the provisions of the refinery agreement to which attention has been drawn, it cannot have been the presumed intention of the parties that such a term should be included in the agreement. If an officious bystander had asked the appellant company at the time the rating agreement was negotiated whether that was what was intended, he would have been suppressed — well, "testily" will do — with "Of course not!". Indeed, their Lordships doubt whether the reaction of the respondents at the time the agreement was being negotiated would have been any different, even though years later they sought to take advantage of the change of occupation of the site.

Whatever else be the outcome of the appeal, their Lordships are satisfied that it would not be legitimate to imply a term in the rating agreement involving that it should come to an end on assignment in accordance with the refinery agreement.

Appeal allowed. Lord Simon of Glaisdale spoke for the majority of the Board, who also included Viscount Dilhorne and Lord Keith of Kinkell. Lord Wilberforce and Lord Morris of Borth-y-Gest dissented.

[9-7] The Privy Council in *BP Refinery* thus recognised five overlapping conditions which must be satisfied before a term will be implied into a contract. The putative implied term must be (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) so obvious that it 'goes without saying'; (4) capable of clear expression; and (5) not in contradiction to any express term. The Court of Final Appeal has confirmed the necessity of satisfying these five conditions in order to imply a contractual term in a Hong Kong contract.⁷

[9-8] The *BP Refinery* test was applied in *Yau Chin Kwan v Tin Shui Wai Development Ltd.*⁸ The plaintiffs had contracted to purchase land in a development project. There was a written term requiring the defendant to complete the project by a specified date. Failure to complete by the deadline would permit the plaintiffs to rescind the contract within 28 days, failing which they would be treated as having elected to wait for completion. The project was not completed by the deadline, but the plaintiffs were unaware of this and did not rescind within the prescribed period of 28 days. They purported to rescind some 16 months after the project completion deadline and after the defendant had demanded that the plaintiffs complete the purchase. The plaintiffs sued and stated that there were three terms implied into the sale and purchase agreement; the defendant was putatively obliged to:

- (a) inform the plaintiffs of the state of completion within 28 days of the project completion deadline;
- (b) provide timely information on the development's progress to enable the plaintiffs to exercise their right of rescission; and
- (c) answer the plaintiffs' questions as to the completion of the development (although the plaintiffs never, in fact, asked any questions as to the completion of the development).

The Hong Kong Court of Appeal rejected implied terms (a) and (b), on the basis that the contract could work without them, especially because implied term (c) would provide all the information the plaintiffs might need. Furthermore, according to the court, it could not be said that implied terms (a) and (b) 'went without saying' because the completion of the development 'would be a matter of judgment and thus open to query and challenge'.⁹

[9-9] More recently, the five conditions were reaffirmed by the Privy Council in *Attorney General of Belize v Belize Telecom Ltd.*¹⁰ Speaking for the Board, Lord Hoffmann remarked that these conditions or factors should not be seen

⁷ *Kensland Realty Ltd v Whale View Investment Ltd* [2002] 1 HKC 243, (2001) 4 HKCFAR 381, [2002] 1 HKLRD 87, paras 23 (Bokhary PJ) and 59 (Ribeiro PJ) (HKCFA).

⁸ [2003] 2 HKLRD 1 (HKCA).

⁹ *Ibid* at 10 (per Rogers VP, Le Pichon JA agreeing).

¹⁰ [2009] UKPC 10, [2009] 2 All ER 1127, [2009] 2 All ER (Comm) 1, [2009] 1 WLR 1988, [2009] Bus LR 1316.

as a 'series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so'.¹¹ In Lord Hoffmann's view, these five factors were different ways of approaching the one truly important question; 'is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?'¹² Although *Belize Telecom* concerned the implication of terms into a company's articles of association, Lord Hoffmann made it reasonably clear that the approach favoured by the Board was applicable to all legal instruments including contracts.

[9-10] Furthermore, the five conditions identified in *BP Refinery* are not all equally fundamental. In particular, a term must first and foremost be 'reasonable and equitable.' The Privy Council in *BP Refinery* cited the failure of the asserted implied term to satisfy this first condition as the more fundamental reason for rejecting it; the term's lack of necessity to give the agreement business efficacy provided another reason.¹³ This approach is perfectly rational, as it is quite conceivable that a term can be reasonable but unnecessary, but it is much harder to envisage a term that is simultaneously unreasonable but necessary. Indeed given that implied terms spring from the presumed will of the parties as reasonable persons at the time they conclude the agreement, it should never be possible to imply an unreasonable term.

(c) Reasonableness of term insufficient

[9-11] In a case involving a disputed residential tenancy agreement, Lord Denning MR posited that a term may be implied if it is reasonable, and that an additional test of necessity is not required. The House of Lords decisively rejected that view on appeal, insisting that no term can be implied in order to give efficacy to any contract unless the term is necessary to achieve that objective.

Liverpool City Council v Irwin

House of Lords
[1977] AC 239; [1976] 2 All ER 39; [1976] 2 WLR 562

Irwin resided in a maisonette on the 9th and 10th floors of a 15-storey tower block owned by the Liverpool City Council. He stopped paying rent in protest at the dilapidated state of the common facilities, notably the lifts, staircase and rubbish chute. The disrepair was the result of repeated acts of vandalism and lack of co-operation by many of the building's tenants. The Council commenced proceedings

11 Ibid at para 27.

12 Ibid at para 21.

13 See also *Kenworth Engineering Ltd v Airport Authority* [2002] 1 HKLRD 796 (HKCFI).

against Irwin for possession. Irwin responded with a counterclaim for £10 nominal damages alleging, inter alia, breach of an implied term to maintain the common facilities. At trial, the Council obtained its order for possession but Irwin was awarded his £10 damages. The Council successfully appealed to the Court of Appeal, two members of which (Roskill and Ormrod LJ) held that there was no term implied of the sort contended for by Irwin because it was not necessary to do so in order to give the contract efficacy. Lord Denning MR agreed that the appeal should be dismissed but on the alternative grounds that: (i) a term can be implied into a contract provided it is reasonable (as distinct from necessary) to imply it; (ii) it is reasonable to imply a term requiring the landlord to take reasonable care to maintain the lifts and staircase in a state reasonably fit for use; (iii) Irwin had not, however, proved that the Council was in breach of the implied term. Irwin brought this further appeal to the House of Lords.

Lord Wilberforce:

... I consider first the tenants' claim in so far as it is based on contract. The first step must be to ascertain what the contract is. This may look elementary, even naive, but it seems to me to be the essential step and to involve, from the start, an approach different from, if simpler than, that taken by the members of the Court of Appeal. We look first at documentary material. As is common with council lettings there is no formal demise, or lease or tenancy agreement. There is a document headed 'Liverpool Corporation, Liverpool City Housing Dept.' and described as 'Conditions of Tenancy.' This contains a list of obligations upon the tenant — he shall do this, he shall not do that, or he shall not do that without the corporation's consent. This is an amalgam of obligations added to from time to time, no doubt, to meet complaints, emerging situations, or problems as they appear to the Council's officers. In particular there have been added special provisions relating to multi-storey flats which are supposed to make the conditions suitable to such dwellings. We may note under 'Further special notes' some obligations not to obstruct staircases and passages, and not to permit children under 10 to operate any lifts. I mention these as a recognition of the existence and relevance of these facilities. At the end there is a form for signature by the tenant stating that he accepts the tenancy. On the landlords' side there is nothing, no signature, no demise, no covenant: the contract takes effect as soon as the tenants sign the form and are let into possession.

We have then a contract which is partly, but not wholly, stated in writing. In order to complete it, in particular to give it a bilateral character, it is necessary to take account of the actions of the parties and the circumstances. As actions of the parties, we must note the granting of possession by the landlords and reservation by them of the 'common parts' — stairs, lifts, chutes, etc. As circumstances we must include the nature of the premises, viz, a maisonette for family use on the ninth floor of a high block, one which is occupied by a large number of other tenants, all using the common parts and dependent upon them, none of them having any expressed obligation to maintain or repair them.

To say that the construction of a complete contract out of these elements involves a process of 'implication' may be correct; it would be so if implication means the supplying of what is not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract

a case in which the evidence does not justify a finding that the 1996 mortgage was procured by Mr Li's undue influence.

34. I do not wish to leave this issue without expressing the hope that in future cases, where undue influence has to be proved but where the relationship between the parties is not a relationship that falls within Slade LJ's Class 2A category, the parties will concentrate on whether the evidence justifies the inference that, on a balance of probabilities, the impugned transaction was procured by undue influence, that is to say, by an abuse by the allegedly dominant party of the trust and confidence reposed in him by the allegedly subservient party. References in such cases to, and attempts to invoke the assistance of, an alleged evidential presumption of undue influence are, in my opinion, likely to be, as they have been in this case, a source of confusion and an impediment to the evaluation of the available evidence.

44. ...I would dismiss this appeal.

Lord Fosco NPJ delivered the judgment of the court, the other members of which were Bokhary PJ, Chan PJ, Ribeiro PJ, and Mortimer NPJ.

[14-53] The Court of Final Appeal's judgment in *Li Sau Ying* confirms the applicability in Hong Kong of the revised test for presumed undue influence as formulated by the House of Lords in *Etridge*. It also neatly illustrates the practical significance of that revision. The Court of Final Appeal accepted that Ms Li 'had been brought to a high degree of trust and confidence in Mr Li's financial judgment and business acumen'. Yet this was not sufficient to establish a presumption of undue influence. More was required in the form of an agreement which indicated that Mr Li was 'unconscionably abusing the trust and confidence she placed in him'; in other words, an agreement which 'called for an explanation' (*Etridge*), or which could not be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act' (*Alicard v Skinner*). Whereas some earlier mortgage agreements were vulnerable on this basis because they were so clearly disadvantageous to Ms Li, the 1996 mortgage which superceded those previous agreements was not. Rather, the 1996 mortgage improved Ms Li's position by allowing her to discharge an earlier mortgage and refinance at a lower rate of interest. To the extent that Mr Li's involvement influenced Ms Li's decision to conclude the 1996 mortgage, it did not constitute any undue influence; that transaction could be explained on the basis of ordinary commercial considerations.

(d) *Undue influence and third parties*

[14-54] It has already been noted that operative undue influence entitles the weaker party to rescind the contract, but that rescission will be barred where a third party without notice acquires interests that would be adversely affected by rescission. This type of situation will typically arise where, for instance, the dominant party unduly influences the weaker party to transfer property to

him, and then sells it to a third party who was unaware of the tainted means by which the stronger party came into ownership.

[14-55] There is, however, another type of third-party situation which since the early 1990s has generated significant developments in the law of undue influence. Typically, the situation involves a contract of surety entered into by a financial institution and the wife of a person who has borrowed, or proposes to borrow, from the institution. The wife guarantees her husband's debts and/or mortgages her property (or property she owns together with her husband) as security for her husband's loan. Repayments on the loan fall into arrears, and the financial institution seeks to exercise its contractual rights against the wife. The wife then resists the financial institution's claim by arguing that her contractual undertakings were induced by her husband's undue influence of which the bank had actual or constructive notice, thereby entitling her to rescind the agreement.

[14-56] Prior to the 1990s the prevailing doctrine was that the financial institution, as a third party to the alleged undue influence, would not be responsible unless it had actual knowledge of the husband's conduct or unless the husband was acting as the financial institution's agent. Agency in such a situation rarely arises.¹⁰⁴ Certainly, the 'mere fact that a debtor is required by his bank to obtain security for facilities and the debtor then approaches the surety does not mean that the debtor is acting as the agent of the Bank.'¹⁰⁵ The wife would therefore generally be liable on her agreement with the financial institution.

[14-57] This area of the law underwent a significant shift in 1993 with the House of Lords decision in *Barclays Bank plc v O'Brien*.¹⁰⁶ The defendant's husband (Mr O'Brien) had an interest in a business which was running up an increasing overdraft with the plaintiff bank. The bank required additional security in exchange for continuing and increasing the overdraft, and asked for a charge over Mr and Mrs O'Brien's matrimonial home. Mr O'Brien falsely represented to his wife that the proposed charge was temporary and limited to £60,000. When the bank presented the documents to Mrs O'Brien for her signature, including a side letter recommending that the couple receive independent legal advice, she signed them without reading. The indebtedness to the bank eventually reached £154,000, and the bank sought to enforce the charge against the matrimonial home. Mrs O'Brien resisted on the basis that her signature had been procured by her husband's misrepresentations, that the bank had notice of such misrepresentations, and that she was therefore entitled to rescind her agreement with the bank. The House of Lords agreed. Although the case turned on issues of misrepresentation, Lord Browne-Wilkinson (with

¹⁰⁴ Cf *Avon Finance Co Ltd v Bridger* [1985] 2 All ER 281.

¹⁰⁵ *Bank of China (Hong Kong) Ltd v Tsang Sheung Bun* [2013] 5 HKLRD 62 at 75 (HKCA).

¹⁰⁶ [1994] 1 AC 180, [1993] 4 All ER 417, [1993] 3 WLR 786.

whom the other members of the Board agreed) discussed the circumstances in which a lender would be placed on constructive notice of undue influence when a borrower's wife is providing surety for her husband's debts:¹⁰⁷

... a creditor is put on notice when a wife offers to stand surety for her husband's debts by the combination of two factors: (a) the transaction is on its face not to the financial advantage of the wife; and (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

It follows that, unless the creditor who is put on inquiry takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained, the creditor will have constructive notice of the wife's rights.

[14-58] The current obligations of a bank to advise and warn before accepting a surety from a wife, husband or similar domestic partner, or any other person standing in a non-commercial relationship to the debtor, have been effectively codified in a more recent landmark decision of the House of Lords.

Royal Bank of Scotland v Etridge (No 2)

House of Lords
[2002] AC 773; [2001] 4 All ER 449; [2001] 3 WLR 1021;
[2002] 1 Lloyd's Rep 343

For a brief statement of the facts, see paragraph 5 of Lord Nicholls' speech extracted at para [14-44] above.

Lord Nicholls of Birkenhead:

... The Complainant and Third Parties

34. The problem considered in *Barclays Bank plc v O'Brien*¹⁰⁸ and raised by the present appeals is of comparatively recent origin. It arises out of the substantial growth in home ownership over the last 30 or 40 years and, as part of that development, the great increase in the number of homes owned jointly by husbands and wives. More than two-thirds of households in the United Kingdom now own their own homes. For most home-owning couples, their homes are their most valuable asset. They must surely be free, if they so wish, to use this asset as a means of raising money, whether for the purpose of the husband's business or for any other purpose. Their home is their property. The law should not restrict them in the use they may make of it. ... Finance raised by second mortgages on the principal's home is a significant source of capital for the start-up of small businesses.

35. If the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign. Otherwise banks will not be willing to lend money on the security of a jointly owned house or flat.

107 [1994] 1 AC 180 at 196, [1993] 4 All ER 417 at 429.

108 [1994] 1 AC 180, [1993] 4 All ER 417.

36. At the same time, the high degree of trust and confidence and emotional interdependence which normally characterises a marriage relationship provides scope for abuse. One party may take advantage of the other's vulnerability. Unhappily, such abuse does occur. Further, it is all too easy for a husband, anxious or even desperate for bank finance, to misstate the position in some particular or to mislead the wife, wittingly or unwittingly, in some other way. The law would be seriously defective if it did not recognise these realities.

37. In *O'Brien's* case this House decided where the balance should be held between these competing interests. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money. The problem lies in finding the course best designed to protect wives in a minority of cases without unreasonably hampering the giving and taking of security. The House produced a practical solution. The House decided what are the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. ...

38. ... In *O'Brien's* case Lord Browne-Wilkinson prayed in aid the doctrine of constructive notice. In circumstances he identified, a creditor is put on inquiry. When that is so, the creditor 'will have constructive notice of the wife's rights' unless the creditor takes reasonable steps to satisfy himself that the wife's agreement to stand surety has been properly obtained.¹⁰⁹

39. Lord Browne-Wilkinson would be the first to recognise this is not a conventional use of the equitable concept of constructive notice. ... The transferor wife is seeking to resile from the very transaction she entered into with the bank, on the ground that her apparent consent was procured by the undue influence or other misconduct, such as misrepresentation, of a third party (her husband). She is seeking to set aside her contract of guarantee and, with it, the charge she gave to the bank.

40. ... The law imposes no obligation on one party to a transaction to check whether the other party's concurrence was obtained by undue influence. But *O'Brien's* case has introduced into the law the concept that, in certain circumstances, a party to a contract may lose the benefit of his contract, entered into in good faith, if he ought to have known that the other's concurrence had been procured by the misconduct of a third party.

41. There is a further respect in which *O'Brien's* case departed from conventional concepts. Traditionally, a person is *deemed* to have notice (that is, he has 'constructive' notice) of a prior right when he does not actually know of it but would have learned of it had he made the requisite inquiries. A purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. In the present type of case, the steps a bank is required to take, lest it have constructive notice that the wife's concurrence was procured improperly by her husband, do not consist of making inquiries. Rather, *O'Brien's* case envisages that the steps taken by the bank will reduce, or even eliminate, the risk of the wife entering into the transaction under any misapprehension or as a result of undue influence by her husband. The steps are not concerned to discover whether the wife has been wronged by her husband in this way. The steps are concerned to minimise the risk that such a wrong may be committed. ...

43. The route selected in *O'Brien's* case ought not to have an unsettling effect on established principles of contract. *O'Brien's* case concerned suretyship

109 See [1994] 1 AC 180 at 196, [1993] 4 All ER 417 at 429.

transactions. These are tripartite transactions. They involve the debtor as well as the creditor and the guarantor. The guarantor enters into the transaction at the request of the debtor. The guarantor assumes obligations. On the face of the transaction the guarantor usually receives no benefit in return, unless the guarantee is being given on a commercial basis. Leaving aside cases where the relationship between the surety and the debtor is commercial, a guarantee transaction is one-sided so far as the guarantor is concerned. The creditor knows this. Thus the decision in *O'Brien's* case is directed at a class of contracts which has special features of its own. That said, I must at a later stage in this speech return to the question of the wider implications of the *O'Brien* decision.

The Threshold: When the Bank is Put on Inquiry

44. In *O'Brien's* case the House considered the circumstances in which a bank, or other creditor, is 'put on inquiry'. Strictly this is a misnomer. As already noted, a bank is not required to make inquiries. But it will be convenient to use the terminology which has now become accepted in this context. The House set a low level for the threshold which must be crossed before a bank is put on inquiry. For practical reasons the level is set much lower than is required to satisfy a court that, failing contrary evidence, the court may infer that the transaction was procured by undue influence. Lord Browne-Wilkinson said:¹¹⁰

Therefore, in my judgment a creditor is put on inquiry when a wife offers to stand surety for her husband's debts by the combination of two factors:

- (a) the transaction is on its face not to the financial advantage of the wife; and
- (b) there is a substantial risk in transactions of that kind that, in procuring the wife to act as surety, the husband has committed a legal or equitable wrong that entitles the wife to set aside the transaction.

In my view, this passage, read in context, is to be taken to mean, quite simply, that a bank is put on inquiry whenever a wife offers to stand surety for her husband's debts. ...

46. ... I read (a) and (b) as Lord Browne-Wilkinson's broad explanation of the reason why a creditor is put on inquiry when a wife offers to stand surety for her husband's debts. These are the two factors which, taken together, constitute the underlying rationale.

47. The position is likewise if the husband stands surety for his wife's debts. Similarly, in the case of unmarried couples, whether heterosexual or homosexual, where the bank is aware of the relationship (see *O'Brien's* case¹¹¹). Cohabitation is not essential. The Court of Appeal rightly so decided in *Massey v Midland Bank plc*.¹¹²

48. As to the type of transactions where a bank is put on inquiry, the case where a wife becomes surety for her husband's debts is, in this context, a straightforward case. The bank is put on inquiry. On the other side of the line is the case where money is being advanced, or has been advanced, to husband and wife jointly. In such a case the bank is not put on inquiry, unless the bank is aware the loan is being made for the husband's purposes, as distinct from their joint purposes. That was decided in *CIBC Mortgages plc v Pitt*.¹¹³

110 [1994] 1 AC 180 at 196, [1993] 4 All ER 417 at 429.

111 [1994] 1 AC 180 at 198, [1993] 4 All ER 417 at 431, per Lord Browne-Wilkinson.

112 [1995] 1 All ER 929 at 933, per Steyn LJ.

113 [1994] 1 AC 200, [1993] 4 All ER 433.

49. Less clear cut is the case where the wife becomes surety for the debts of a company whose shares are held by her and her husband. Her shareholding may be nominal, or she may have a minority shareholding or an equal shareholding with her husband. In my view the bank is put on inquiry in such cases, even when the wife is a director or secretary of the company. Such cases cannot be equated with joint loans. The shareholding interests, and the identity of the directors, are not a reliable guide to the identity of the persons who actually have the conduct of the company's business.

The Steps a Bank Should Take

50. The principal area of controversy on these appeals concerns the steps a bank should take when it has been put on inquiry. In *O'Brien's* case Lord Browne-Wilkinson said that a bank can reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice.¹¹⁴ That test is applicable to past transactions. All the cases now before your Lordships' House fall into this category. For the future a bank satisfies these requirements if it insists that the wife attend a private meeting with a representative of the bank at which she is told of the extent of her liability as surety, warned of the risk she is running and urged to take independent legal advice. In exceptional cases the bank, to be safe, has to insist that the wife is separately advised. ...

My Lords, it is plainly neither desirable nor practicable that banks should be required to attempt to discover for themselves whether a wife's consent is being procured by the exercise of undue influence of her husband. This is not a step the banks should be expected to take. Nor, further, is it desirable or practicable that banks should be expected to insist on confirmation from a solicitor that the solicitor has satisfied himself that the wife's consent has not been procured by undue influence. As already noted, the circumstances in which banks are put on inquiry are extremely wide. They embrace every case where a wife is entering into a suretyship transaction in respect of her husband's debts. Many, if not most, wives would be understandably outraged by having to respond to the sort of questioning which would be appropriate before a responsible solicitor could give such a confirmation. In any event, solicitors are not equipped to carry out such an exercise in any really worthwhile way, and they will usually lack the necessary materials. Moreover, the legal costs involved, which would inevitably fall on the husband who is seeking financial assistance from the bank, would be substantial. To require such an intrusive, inconclusive and expensive exercise in every case would be an altogether disproportionate response to the need to protect those cases, presumably a small minority, where a wife is being wronged.

54. The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.

55. This is the point at which, in *O'Brien's* case, the House decided that the balance between the competing interests should be held. A bank may itself provide the necessary information directly to the wife. Indeed, it is best equipped to do so. But banks are not following that course. Ought they to be obliged to do so in every case? I do not think Lord Browne-Wilkinson so stated in *O'Brien's* case. I do not understand him to have said that a personal meeting was the only way a bank

114 [1994] 1 AC 180 at 196-197, [1993] 4 All ER 417 at 429-430.

could discharge its obligation to bring home to the wife the risks she is running. It seems to me that, provided a suitable alternative is available, banks ought not to be compelled to take this course. Their reasons for not wishing to hold a personal meeting are understandable. Commonly, when a bank seeks to enforce a security provided by a customer, it is met with a defence based on assurances alleged to have been given orally by a branch manager at an earlier stage: that the bank would continue to support the business, that the bank would not call in its loan, and so forth. Lengthy litigation ensues. Sometimes the allegations prove to be well founded, sometimes not. Banks are concerned to avoid the prospect of similar litigation which would arise in guarantee cases if they were to adopt a practice of holding a meeting with a wife at which the bank's representative would explain the proposed guarantee transaction. It is not unreasonable for the banks to prefer that this task should be undertaken by an independent legal advisor.

56. I shall return later to the steps a bank should take when it follows this course. Suffice to say, these steps, together with advice from a solicitor acting for the wife, ought to provide the substance of the protection which *O'Brien's* case intended a wife should have. Ordinarily it will be reasonable that a bank should be able to rely upon confirmation from a solicitor, acting for the wife, that he has advised the wife appropriately.

57. The position will be otherwise if the bank knows that the solicitor has not duly advised the wife or, I would add, if the bank knows facts from which it ought to have realised that the wife has not received the appropriate advice. In such circumstances the bank will proceed at its own risk.

The Content of the Legal Advice ...

61. ... in the present type of case it is not for the solicitor to veto the transaction, or declining to confirm to the bank that he has explained the documents to the wife and the risks she is taking upon herself. If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect. But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.

62. That is the general rule. There may, of course, be exceptional circumstances where it is glaringly obvious that the wife is being grievously wronged. In such a case the solicitor should decline to act further. ...

63. In *Etridge's* case,¹¹⁵ the Court of Appeal said that if the transaction is 'one into which no competent solicitor could properly advise the wife to enter', the availability of legal advice is insufficient to avoid the bank being fixed with constructive notice. It follows from the views expressed above that I am unable to agree with the Court of Appeal on this point.

64. I turn to consider the scope of the responsibilities of a solicitor who is advising the wife. In identifying what are the solicitor's responsibilities the starting point must always be the solicitor's retainer. What has he been retained to do? As a general proposition, the scope of a solicitor's duties is dictated by the terms, whether express or implied, of his retainer. In the type of case now under consideration the relevant retainer stems from the bank's concern to receive confirmation from the solicitor that, in short, the solicitor has brought home to the wife the risks involved in the proposed transaction. As a first step the solicitor will need to explain to the wife the purpose for which he has become involved at all. He should explain that, should it ever become necessary, the bank will rely upon his involvement to counter

115 [1998] 4 All ER 705 at 722 (para 49).

any suggestion that the wife was overborne by her husband or that she did not properly understand the implications of the transaction. The solicitor will need to obtain confirmation from the wife that she wishes him to act for her in the matter and to advise her on the legal and practical implications of the proposed transaction.

65. When an instruction to this effect is forthcoming, the content of the advice required from a solicitor before giving the confirmation sought by the bank will, inevitably, depend upon the circumstances of the case. Typically, the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband's business does not prosper. Her home may be her only substantial asset, as well as the family's home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife's financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband's business should fail. These matters are relevant to the seriousness of the risks involved.

(3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband's present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities. The solicitor should not give any confirmation to the bank without the wife's authority.

66. The solicitor's discussion with the wife should take place at a face-to-face meeting, in the absence of the husband. It goes without saying that the solicitor's explanations should be couched in suitably non-technical language. It also goes without saying that the solicitor's task is an important one. It is not a formality.

67. The solicitor should obtain from the bank any information he needs. If the bank fails for any reason to provide information requested by the solicitor, the solicitor should decline to provide the confirmation sought by the bank. ...

Independent Advice

69. I turn next to the much-vexed question whether the solicitor advising the wife must act for the wife alone. Or, at the very least, the solicitor must not act for the husband or the bank in the current transaction save in a wholly ministerial capacity, such as carrying out conveyancing formalities or supervising the execution of documents and witnessing signatures. Commonly, in practice, the solicitor advising the wife will be the solicitor acting also for her husband either in the particular transaction or generally. ...

71. Next, a simple and clear rule is needed, preferably of well-nigh universal application. ...

74. ... The advantages attendant upon the employment of a solicitor acting solely for the wife do not justify the additional expense this would involve for the husband. When accepting instructions to advise the wife the solicitor assumes responsibilities directly to her, both at law and professionally. These duties, and this is central to the reasoning on this point, are owed to the wife alone. In advising the wife the solicitor is acting for the wife alone. He is concerned only with her interests. I emphasise, therefore, that in every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her. If he decides to accept instructions, his assumption of legal and professional responsibilities to her ought, in the ordinary course of things, to provide sufficient assurance that he will give the requisite advice fully, carefully and conscientiously. Especially so, now that the nature of the advice called for has been clarified. If at any stage the solicitor becomes concerned that there is a real risk that other interests or duties may inhibit his advice to the wife he must cease to act for her. ...

Obtaining the Solicitor's Confirmation

79. I now return to the steps a bank should take when it has been put on inquiry and for its protection is looking to the fact that the wife has been advised independently by a solicitor. (1) One of the unsatisfactory features in some of the cases is the late stage at which the wife first became involved in the transaction. ... in future the bank should communicate directly with the wife, informing her that for its own protection it will require written confirmation from a solicitor, acting for her, to the effect that the solicitor has fully explained to her the nature of the documents and the practical implications they will have for her. She should be told that the purpose of this requirement is that thereafter she should not be able to dispute she is legally bound by the documents once she has signed them. She should be asked to nominate a solicitor whom she is willing to instruct to advise her, separately from her husband, and act for her in giving the necessary confirmation to the bank. She should be told that, if she wishes, the solicitor may be the same solicitor as is acting for her husband in the transaction. If a solicitor is already acting for the husband and the wife, she should be asked whether she would prefer that a different solicitor should act for her regarding the bank's requirement for confirmation from a solicitor. The bank should not proceed with the transaction until it has received an appropriate response directly from the wife. (2) Representatives of the bank are likely to have a much better picture of the husband's financial affairs than the solicitor.

If the bank is not willing to undertake the task of explanation itself, the bank must provide the solicitor with the financial information he needs for this purpose. Accordingly it should become routine practice for banks, if relying on confirmation from a solicitor for their protection, to send to the solicitor the necessary financial information. ... If this consent is not forthcoming the transaction will not be able to proceed. (3) Exceptionally there may be a case where the bank believes or suspects that the wife has been misled by her husband or is not entering into the transaction of her own free will. If such a case occurs the bank must inform the wife's solicitors of the facts giving rise to its belief or suspicion. (4) The bank should in every case obtain from the wife's solicitor a written confirmation to the effect mentioned above. ...

A Wider Principle

82. ... As noted by Professor Peter Birks QC, the decision in *O'Brien's* case has to be seen as the progenitor of a wider principle (see 'The Burden on the Bank' in *Restitution and Banking Law*, ed Rose (1998) p 195). This calls for explanation. In *O'Brien's* case the House was concerned with formulating a fair and practical solution to problems occurring when a creditor obtains a security from a guarantor

whose sexual relationship with the debtor gives rise to a heightened risk of undue influence. But the law does not regard sexual relationships as standing in some special category of their own so far as undue influence is concerned. Sexual relationships are no more than one type of relationship in which an individual may acquire influence over another individual. The *O'Brien* decision cannot sensibly be regarded as confined to sexual relationships, although these are likely to be its main field of application at present. What is appropriate for sexual relationships ought, in principle, to be appropriate also for other relationships where trust and confidence are likely to exist.

83. The courts have already recognised this. Further application, or development, of the *O'Brien* principle has already taken place. In *Credit Lyonnais Bank Nederland NV v Burch*¹¹⁶ the same principle was applied where the relationship was employer and employee. Miss Burch was a junior employee in a company. She was neither a shareholder nor a director. She provided security to the bank for the company's overdraft. She entered into a guarantee of unlimited amount, and gave the bank a second charge over her flat. Nourse LJ (at 146) said the relationship 'may broadly be said to fall under [*O'Brien's* case]'. The Court of Appeal held that the bank was put on inquiry. It knew the facts from which the existence of a relationship of trust and confidence between Miss Burch and Mr Pelosi, the owner of the company, could be inferred.

84. The crucially important question raised by this wider application of the *O'Brien* principle concerns the circumstances which will put a bank on inquiry. A bank is put on inquiry whenever a wife stands as surety for her husband's debts. It is sufficient that the bank knows of the husband/wife relationship. That bare fact is enough. The bank must then take reasonable steps to bring home to the wife the risks involved. What, then, of other relationships where there is an increased risk of undue influence, such as parent and child? Is it enough that the bank knows of the relationship? For reasons already discussed in relation to husbands and wives, a bank cannot be expected to probe the emotional relationship between two individuals, whoever they may be. Nor is it desirable that a bank should attempt this. Take the case where a father puts forward his daughter as a surety for his business overdraft. A bank should not be called upon to evaluate highly personal matters such as the degree of trust and confidence existing between the father and his daughter, with the bank put on inquiry in one case and not in another. As with wives, so with daughters, whether a bank is put on inquiry should not depend on the degree of trust and confidence the particular daughter places in her father in relation to financial matters. Moreover, as with wives, so with other relationships, the test of what puts a bank on inquiry should be simple, clear and easy to apply in widely varying circumstances. This suggests that, in the case of a father and daughter, knowledge by the bank of the relationship of father and daughter should suffice to put the bank on inquiry. When the bank knows of the relationship, it must then take reasonable steps to ensure the daughter knows what she is letting herself into. ...

86. But the law cannot stop at this point, with banks on inquiry only in cases where the debtor and guarantor have a sexual relationship or the relationship is one where the law presumes the existence of trust and confidence. That would be an arbitrary boundary, and the law has already moved beyond this, in the decision in the *Credit Lyonnais* case. As noted earlier, the reality of life is that relationships in which undue influence can be exercised are infinitely various. They cannot be exhaustively defined. Nor is it possible to produce a comprehensive list of relationships where there is a substantial risk of the exercise of undue influence, all others being excluded from the ambit of the *O'Brien* principle. Human affairs do not

116 [1997] 1 All ER 144.