CHAPTER 5

FORM

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1. GENERAL RULE

5–001 **Form and consideration.** A legal system is said to require that a contract shall be made in a certain form if it lays down the manner in which the conclusion of the contract must be marked or recorded. In modern legal systems, such formal requirements generally consist of writing, sometimes with additional requirements, e.g. those of a deed or (in some countries) of authentication by a notary. It has even been said that consideration is a form,[1] but more usually "form" refers to requirements which have nothing to do with the contents of an agreement. In this sense consideration is not generally a form, though the giving of a peppercorn to make a gratuitous promise binding might be so regarded.[2]

5–002 **Form as a necessary requirement.** Form may be *sufficient* to make a promise binding, as we have seen in discussing the effect of a gratuitous promise made in a deed.[3] But in this chapter we shall discuss cases in which form is a *necessary* requirement which must be satisfied (granted that there is agreement, consideration and contractual intention) before the contract is fully effective. Such a requirement may serve one or more of several purposes. First, it promotes certainty, as it is usually relatively easy to tell whether the required form has been used. A requirement of writing also simplifies the problem of ascertaining the contents of the agreement. Secondly, form has a cautionary effect: a person may

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[1] Holmes, *The Common Law*, p.273: "Consideration is a form as much as a seal." See also Fuller 41 Col. L. Rev. 799.
[2] See *The Alev* [1989] 1 Lloyd's Rep. 138 at 147.
[3] See above, para.3–170.

hesitate longer before executing a deed than he would before making an oral promise. Thirdly, form has a protective function: it is used to protect the weaker party to a contractual relationship by ensuring that he is provided with a written record of the terms of the contract.[4] Both the second and the third purposes of form are illustrated by the elaborate formal requirements that protect a debtor under certain consumer credit agreements.[5] It is scarcely fanciful to suggest that these boxes fulfil in a modern context some of the functions formerly performed by use of the seal. Form may finally serve what has been called a "channelling" purpose:[6] that is, the use of a certain form may help to distinguish one type of transaction from another.

5–003 **General rule: no formality required.** Form has, on the other hand, the disadvantage that it is time-consuming and clumsy and that it is a source of technical pitfalls. Even the relatively simple requirement of writing is open to these objections and has therefore been regarded as inconvenient from a commercial point of view. Thus the general rule is that contracts can be made quite informally.[7]

2. STATUTORY EXCEPTIONS

5–004 The general rule is subject to many exceptions. These now all depend on legislation dealing with specific types of contracts. Some such contracts must be made by deed, some must be in writing, and others must be evidenced by a note or memorandum in writing. No attempt can be made in this book to give a complete list of these exceptions. A few illustrations must suffice; after these have been discussed, an attempt will be made to consider the impact on the subject of contracting by electronic means.

(a) Contracts which must be made by Deed

5–005 **Lease for more than three years.** A lease for more than three years must be made by deed.[8] If it is not so made, it is "void for the purpose of creating a legal estate".[9] But it operates in equity as an agreement for a lease,[10] which can be specifically enforced if it complies with the formal requirements (to be discussed below)[11] for contracts for the disposition of interests in land.[12] Thus between the parties to the lease lack of a deed is not fatal. But, unless the tenant has registered

[4] See, e.g. Employment Rights Act 1996 ss.1, 2–4; Landlord and Tenant Act 1985 s.4.
[5] Consumer Credit (Agreements) Regulations (SI 1983/1553), as amended.
[6] Von Mehren 72 H.L.R. 1009 at 1017.
[7] *Beckham v Drake* (1841) 9 M. & W. 79 at 92.
[8] Law of Property Act 1925 ss.52, 54(2).
[9] Law of Property Act 1925 s.52.
[10] *Walsh v Lonsdale* (1882) 21 Ch. D. 9.
[11] Below, para.5–008.
[12] See, e.g. *Hardy v Haselden* [2011] EWCA Civ 1387; [2011] N.P.C. 122 (where the alleged agreement was neither enforceable as a lease, nor as a contract).

the lease as a land-charge or, in the case of registered land, is in actual occupation, he can be turned out by a third party to whom the landlord has sold the land.[13]

(b) Contracts which must be in Writing

(i) *Bills of exchange, etc*

5–006 Under nineteenth-century legislation, contracts which must be in writing include bills of exchange, promissory notes[14] and bills of sale.[15] A bill of sale is void unless it is in writing in the statutory form.[16] But if the sort of promise which is normally contained in a bill of exchange or promissory note is made orally, it can result in a perfectly valid contract. The contract is not invalid[17] but will not have the legal and commercial characteristics[18] of a bill or note.

(ii) *Consumer credit agreements*

5–007 Under the Consumer Credit Act 1974,[19] regulated consumer credit agreements, and certain other agreements[20] are "not properly executed"[21] unless certain formalities are complied with. A regulated consumer credit agreement is one by which a creditor provides an individual debtor with credit[22] of any amount.[23] Both parties must sign a document in the form prescribed by regulations.[24] This must legibly set out all the express terms of the contract[25] and contain a notice of the debtor's statutory right to cancel during the "cooling off" period (where this applies),[26] as well as certain other information.[27] A copy must also be given to the debtor.[28]

An agreement which is not properly executed can be enforced *against the debtor* "on an order of the court only".[29] In the absence of such an order, no restitutionary remedy is available against the borrower at common law since the award of such a remedy to the lender would be inconsistent with the legislative scheme that, in the case of an improperly executed document, "subject to the

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[13] At present under Law of Property Act 1925 s.199(1)(i); Land Registration Act 2002 Sch.3 para.2.
[14] Bills of Exchange Act 1882 ss.3(1), 17(2).
[15] Bills of Sale Act 1878 (Amendment) Act 1882.
[16] Bills of Sale Act 1878 (Amendment) Act 1882.
[17] *Hitchens v General Guarantee Corp* [2001] EWCA Civ 359; *The Times*, March 13, 2001.
[18] See below, paras 15–046—15–049.
[19] As amended by Consumer Credit Act 2006.
[20] Such as consumer hire agreements (s.15) and security instruments (s.105).
[21] Section 61(1).
[22] As defined by s.9.
[23] Section 8(1).
[24] Section 61(1)(a); for exceptions, see s.74; cf. above, para.5–002.
[25] Section 61(1)(b) and (c).
[26] Section 64(5); for "cooling off" periods, see below, para.10–046.
[27] Consumer Credit Act 1974 s.55(1).
[28] Sections 62, 63.
[29] Section 65(1). The defective agreement is thus unenforceable only and not void: *R. v Modupe* [1991] C.C.L.R. 29.

enforcement powers of the court, the debtor should not have to pay".[30] An application for an enforcement order shall be dismissed only if the court considers it just to do so.[31] In this regard, the court has a wide discretion. It can take into account the prejudice caused to the debtor and the degree of culpability of the creditor;[32] order enforcement conditionally or subject to variations;[33] or reduce the amount payable by the debtor.[34] This flexible approach, together with the repeal of provisions which had completely prevented the grant of an order for certain formal defects,[35] goes far to meet the objection that formal requirements can give rise to unmeritorious defences based on technical slips.

(iii) Contracts for the sale or disposition of an interest in land

5–008 **Requirements.** Under s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, most contracts for[36] the sale or disposition of an interest in land[37] must be "made in writing".[38] All the terms[39] expressly[40] agreed by the parties must be incorporated in the document (or in each document, where contracts are exchanged).[41] The terms may be incorporated either by being set out in the document, or by reference.[42] The document (or documents) must also be signed

[30] *Dimond v Lovell* [2002] 1 A.C. 384 at 398.
[31] Section 127(1).
[32] Section 127(1)(i).
[33] Section 127(1)(ii).
[34] Section 127(2); *National Guardian Mortgage Corp v Wilks* [1993] C.C.L.R. 1.
[35] Section 127(3) and (4) which are repealed by Consumer Credit Act 2006 s.15.
[36] i.e. not a contract of disposition: see para.5–012 below.
[37] As defined in Law of Property (Miscellaneous Provisions) Act 1989 s.2(6). A "lock-out" agreement is not within the section: *Pitt v PHH Asset Management Ltd* [1993] 1 W.L.R. 327 (contrast *Lane v Robinson* [2010] EWCA Civ 384 at [11]). Nor is a compromise agreement which merely "relates" to the sale of land: *Nweze v Nwoko* [2004] EWCA Civ 379; [2004] 2 P. & C.R. 33, or trivial dispositions of land consciously made pursuant to an informal boundary agreement: *Joyce v Rigolli* [2004] EWCA Civ 79; [2004] All E.R. (D) 203; cf. *Nata Lee Ltd v Abid* [2014] EWCA Civ 152, or a settlement under CPR Pt 36 which requires the sale or other disposition of an interest in land: *Orton v Collins* [2007] EWHC 803 (Ch); [2007] 1 W.L.R. 2953. But see also: *Kilcarne Holdings Ltd v Targetfollow* [2004] EWHC 2547; [2005] 2 P. & C.R. 8 at [203] (a contract for the sale of land cannot escape s.2 "merely because it is wrapped up in an alleged partnership" (affirmed [2005] EWCA Civ 1355, without consideration of this point)).
[38] Section 2(1). In the case of electronic conveyancing this may be satisfied through the use of certain qualifying electronic documents: Land Registration Act 2002 s.91.
[39] See *Enfield LBC v Arajah* [1995] E.G.C.S. 164 (where only the *main* terms were set out in the document).
[40] The inclusion of any implied terms is not required (and would be curious if it were): *Markham v Paget* [1908] 1 Ch. 697.
[41] Law of Property (Miscellaneous Provisions) Act 1989 s.2(1). An agreement reached in pre-exchange correspondence between the parties will not satisfy s.2(1) where no single document contains all the terms expressly agreed or is signed by both parties; nor will such correspondence amount to an "exchange" since this process refers to exchange of the formal documents described at para.4–010, above: see *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259 at 285, 293 disapproving the concession to the contrary which had apparently been accepted in *Hooper v Sherman* [1995] C.L.Y. 840.
[42] Section 2(2); *Courtney v Corp Ltd* [2006] EWCA Civ 518; cf. *Record v Bell* [1991] 1 W.L.R. 853, where this requirement was not satisfied, but there was a collateral contract (below, fn.57).

"by or on behalf of"[43] each party[44] to the contract.[45] For this purpose "signed" should be given the meaning which "the ordinary man would understand it to have", which appears to require that the parties must write their own names with their own hands upon the document,[46] but more recently it has been said that this does not rule out the use of a signature writing machine.[47] It has been held that it is no longer satisfied (as it was under earlier legislation superseded by s.2 of the 1989 Act)[48] by merely typing a party's name and address on the document,[49] but it is enough that a party has written his initials, provided it is clear that he intended to authenticate all the terms.[50] Further, the development in relation to guarantees that it is sufficient for the parties to have inserted their names in an email[51] appears also to apply under s.2.[52] The requirement of writing does not apply to short leases for less than three years, to sales at public auctions or to transactions in certain forms of investment securities (e.g. unit trust investing in land).[53]

5–009 **Failure to include all terms.** Where the document fails to include *all* the terms on which the parties are alleged to have orally agreed, a number of possibilities call for discussion. If the failure was due to the parties' having *deliberately* omitted the term from the written document, then it will not be a term expressly agreed so as to form part of the contract, so that its omission will not affect the validity of the contract as set out in the document.[54] If the failure was due to a mistake in recording those terms,[55] it may be possible to rectify the document, i.e.

[43] Signature by an agent who is liable and entitled under the contract suffices: *Braymist v Wise Finance Co Ltd* [2002] EWCA Civ 127; [2002] 2 All E.R. 333; below, para.16–074. See, further: *McLaughlin v Duffill* [2008] EWCA Civ 1627; [2010] Ch. 1; *Rabiu v Marlbray Ltd* [2013] EWHC 3272 (Ch).
[44] Section 2(3). In the case of an option to purchase, the agreement granting the option is within the section, but the notice exercising it is not, and so does not have to be signed by the vendor: *Spiro v Glencrown Properties Ltd* [1991] Ch. 537; cf. *MP Kemp Ltd v Bullen Developments Ltd* [2014] EWHC 2009 (Ch).
[45] For a somewhat relaxed application of this requirement in the context of execution by or on behalf of a company under the Companies Act 2006 s.44(2), see *Williams v Redcard Ltd* [2011] EWCA Civ 466; [2011] 4 All E.R. 444.
[46] *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567 at 1576 citing with approval: *Goodman v J Eban Ltd* [1954] 1 Q.B. 550 at 561.
[47] *Ramsay v Love* [2015] EWHC 65 (Ch) at [7].
[48] i.e. Law of Property Act 1925 s.40.
[49] *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567.
[50] *Newell v Tarrant* [2004] EWHC 772.
[51] Paragraph 5–023, below.
[52] This was conceded in *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch); [2012] 1 B.C.L.C. 297 at [44].
[53] Section 2(5).
[54] *Grossman v Hooper* [2001] EWCA Civ 615; [2001] 2 E.G.L.R. 82. This might be achieved by an appropriately drafted entire agreement clause: *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277; [2010] 1 W.L.R. 2715.
[55] But not if it was the result of an express agreement to omit the terms: *Oun v Ahmad* [2008] EWHC 545 (Ch); [2008] 13 E.G. 149; cf. *Helden v Strathmore Ltd* [2011] EWCA Civ 542; [2011] Bus L.R. 1592 at [29].

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to bring it into line with what was actually agreed.[56] If the failure is due to some other cause, it is sometimes possible to treat the omitted term as a separate or "collateral" contract, independent of the (main) contract set out in the document,[57] which will then satisfy the requirements of s.2. The omitted term cannot, however, be so treated if it is intended to form part of the main contract,[58] e.g. if it is so "interwoven with the substance of the transaction"[59] as to form an essential part of it; for to treat a document as sufficient even though it omitted such a term would be inconsistent with the statutory requirement that the document must incorporate all the expressly agreed terms. It seems that a term can for the present purpose be treated as a collateral contract only if it was intended to take effect as an independent contract, separate from that set out in the document. If it can be so treated, two consequences follow. First, a document which omits the term can nevertheless satisfy the statutory requirement of incorporating *all* the express terms of the main contract. Secondly, the collateral contract is binding, even if oral, so long as it is not itself one which is required to be in writing,[60] and so long as evidence of it is admissible under the parol evidence rule.[61]

5–010 **Effect of non-compliance.** The effect of the requirement that it must be "made in writing" is that a contract for the sale or other disposition of an interest in land does not come into existence if the parties fail to comply with the statutory formal requirements. This could cause hardship where one party has partly performed[62] such a contract, or otherwise acted in reliance on it, e.g. by making improvements to the land in question. But such hardship can be avoided by other judicially developed doctrines, such as proprietary estoppel or constructive trust.[63] Where payment has been made under a contract which does not exist for failure to comply with the requirements of s.2 of the 1989 Act, restitution of the payment will normally be ordered unless payment was also made for other benefits which have still been conferred on the payor.[64]

5–011 **Proprietary estoppel and constructive trusts.** Under these doctrines, the court may make an order for the transfer of the land to the party who has acted in reliance on the contract.[65] But the remedy is limited in various ways[66] and does

[56] See *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch. 259. For the conditions in which rectification is available, see below, para.8–059 et seq.; the possibility of which is recognised by Law of Property (Miscellaneous Provisions) Act 1989 s.2(4).
[57] e.g. *Record v Bell* [1991] 1 W.L.R. 853.
[58] *Grossman v Hooper* [2001] EWCA Civ 615; [2001] 2 E.G.L.R. 82 at [21].
[59] *Preece v Lewis* (1963) 186 E.G. 113, decided under Law of Property Act 1925 s.40 but, *semble*, equally applicable under Law of Property (Miscellaneous Provisions) Act 1989 s.2(1); see also Law Com. No.164, paras 5.7, 5.8.
[60] *Angell v Duke* (1875) L.R. 10 Q.B. 174 (and see next note); *Record v Bell* [1991] 1 W.L.R. 853; *Business Environment Bow Lane Ltd v Deanwater Estates* [2007] EWCA Civ 622; [2007] 32 E.G. 90.
[61] See below, para.6–029; in *Angell v Duke* (1875) L.R. 10 Q.B. 174 the evidence of the collateral contract was later rejected under the parol evidence rule: (1875) 32 L.T. 320.
[62] For the position in relation to fully performed contracts, see para.5–012 below.
[63] See below, para.5–011.
[64] *Sharma v Simposh* [2011] EWCA Civ 1383; [2013] Ch. 23; cf. *Singh v Sanghera* [2013] EWHC 956 (Ch) (restitution ordered on both sides)
[65] See above, para.3–139.

not necessarily lead to enforcement of the contract as such.[67] Thus, while they may play a role similar to that of "part performance",[68] the position of the party who has acted in reliance on the defective contract is now less favourable than it was before the 1989 Act.[69] Section 2(5) of the 1989 Act states only that nothing in s.2 "affects the creation or operation of resulting, implied or constructive trusts". This has led to the view that a "mere estoppel" unassociated with a constructive trust cannot be relied upon.[70] The preferable view, it is submitted, is that the saving provision in s.2(5) should not be so limited, since it was the retention of the very flexibility of proprietary estoppel which was contemplated.[71] It should therefore depend upon the facts of the particular case whether the proprietary estoppel in question would offend the policy underlying the Act.[72]

Contracts fully performed. A contract which is void under s.2 can still, in fact, be performed. A party who wishes to take the point that the contract is void has to do so before it has been fully performed: "an actual transfer, conveyance or assignment, an actual lease, or an actual mortgage are not within the scope of section 2 at all".[73] A wider proposition said to be derived from a dictum of Scott LJ in *Tootal Clothing v Guinea Properties Management*[74] that s.2 is inapplicable once all the "land elements" have been fully performed[75] was rejected by the Court of Appeal in *Keay v Morris Homes (West Midlands) Ltd*:[76] 5–012

> "I . . . find it impossible to derive from what Scott LJ said[77] that he was subscribing to a principle that, in a case in which a purported land contract is void for want of compliance with section 2, the practical completion of the *land*elements of the void contract will thereupon cause the hitherto void, non-land, terms of the purported contract to become enforceable".

[66] See above, para.3–139; cf. also above, para.3–143.
[67] See above, para.3–152.
[68] *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; [2005] 6 E.G. 140 at [32].
[69] Under Law of Property Act 1925 s.40 (re-enacting part of s.4 of the Statute of Frauds 1677 and now repealed) failure to comply with the statutory requirement of written evidence only made the contract unenforceable; and "part performance" (below, para.5–027) enabled the party so performing to enforce the contract.
[70] *Kinane v Mackie-Conteh* [2005] EWCA Civ 45; [2005] 6 E.G. 140 at [45]–[46], per Neuberger LJ (contrast Arden LJ at [28]); *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752 at [29] per Lord Scott; cf. *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [99] per Lord Neuberger; *Lancashire Mortgage Corp Ltd v Scottish and Newcastle Plc* [2007] EWCA Civ 684 at [55]; *McGuane v Welch* [2008] EWCA Civ 785; (2008) 40 E.G. 178 at [37]; *Herbert v Doyle* [2010] EWCA Civ 1095; [2011] 1 EG.L.R. 119 at [57]; *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619; [2011] 2 All E.R. 745 at [107].
[71] Law Com. No.164, paras 4.3, 5.4 and 5.5; *Yaxley v Gotts* [2000] Ch. 162 at 182 *Whittaker v Kinnear* [2011] EWHC 1479 (Ch) at [30].
[72] *Yaxley v Gotts* [2000] Ch. 162 at 174, 182. Other forms of estoppel are likely to fail: *Yaxley v Gotts* [2000] Ch. 162 at 174, 182; *Eyestorm Ltd v Hoptonacre Homes Ltd* [2007] EWCA Civ 1366 at [51]; cf. the position in relation to guarantees: below, para.5–027.
[73] *Helden v Strathmore Ltd* [2011] EWCA Civ 542; [2011] Bus L.R. 1592 at [27].
[74] (1992) 64 P. & C.R. 452 at [5].
[75] *Kilcarne Holdings Ltd v Targetfollow* [2004] EWHC 2547; [2005] 2 P & C.R. 8 at [198].
[76] [2012] EWCA Civ 900; [2012] 1 W.L.R. 2855 at [46] per Rimer L.J.
[77] In the *Tootal* case, above fn.74.

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(c) Contracts which must be Evidenced in Writing

(i) In general

5–013 Some statutes do not require contracts to be *made* in writing, but only to be *evidenced* by a written document. A contract of marine insurance, for example, is "inadmissible in evidence" unless it is embodied in a marine policy signed by the insurer.[78] This is not a requirement of the making or validity of such a contract: it is enough if the policy is executed *after* the making of the contract. Other statutory provisions are less exacting; they are satisfied if there is merely a "note or memorandum" in writing. The Statute of Frauds 1677 applied this requirement to six classes of contracts. Its object was to prevent fraudulent claims based on perjured evidence; but it sometimes gave rise to technical defences which had little merit, so that it was restrictively interpreted by the courts. This process can be illustrated by reference to contracts of guarantee, the only type of contract to which the formal requirements imposed by the Statute still apply.

(ii) Contracts of guarantee

5–014 **Statute of Frauds 1677 section 4.** In its current form s.4 of the Statute of Frauds 1677 provides:

> "No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised".

This provision applies whether the liability guaranteed is contractual or tortious.[79] It applies only where the defendant's promise to pay the debt is made to the creditor. It does not apply where that promise is made to the debtor.[80] In addition, it does not apply in the cases discussed in paras 5–015 to 5–017.

5–015 **Guarantee or indemnity?** The Statute applies to a guarantee, but not to an indemnity (including an "on demand guarantee").[81] A guarantee is a promise to pay another's debt if he fails to pay.[82] An indemnity is a promise to indemnify the creditor against loss arising out of the principal contract.[83] In the case of a guarantee the liability of the principal debtor is primary and that of the guarantor only secondary; thus if for some reason the principal debtor is not liable, the

[78] Marine Insurance Act 1906 ss.22 and 24.
[79] *Kirkham v Marter* (1819) 2 B. & Ald. 613.
[80] *Eastwood v Kenyon* (1840) 11 A. & E. 438.
[81] *WS Tankship II BV v Kwangju Bank Ltd* [2011] EWHC 3103 (Comm); [2011] C.I.L.L. 3155 at [151].
[82] *Lep Air Services v Rolloswin Investments Ltd* [1973] A.C. 331.
[83] *Birkmyr v Darnell* (1704) 1 Salk. 27; *Argo Caribbean Group v Lewis* [1976] 2 Lloyd's Rep. 289; cf. below, para.9–149.

guarantor is not liable either. A promise to indemnify creates primary liability which arises even though the promisee has no enforceable rights under the principal contract.[84]

It follows from the nature of a guarantee that there can be no guarantee if there never was a principal debtor, e.g. if A promises to pay B for doing work for C, which C has not ordered so that C is not liable to pay B for it.[85] Nor is a contract a guarantee if there once was a principal debtor, but if the whole object of the new contract is that his liability should cease and the liability of the new promisor be substituted for it. Thus a promise by a father to pay his son's creditor, if the creditor will release the son, is an indemnity.[86] But a promise may be an indemnity in spite of the fact that there is a principal debtor whose liability continues. This is the position if the person making the promise undertakes not merely to pay if the principal debtor fails to do so, but "to put the [creditor] in funds in any event".[87]

It can hardly be said that there is less danger of perjury in the case of an indemnity than in the case of a guarantee. The distinction between them has accordingly been criticised for having "raised many hair-splitting distinctions of exactly that kind which bring the law into hatred, ridicule and contempt by the public".[88] It can only be explained historically as a device for restricting the scope of the Statute of Frauds.

5–016 **Guarantee part of larger transaction.** The Statute applies to a guarantee which stands alone but not to one which is part of a larger transaction. It did not, for example, apply where the defendant introduced clients to a firm of stockbrokers on the terms that he was to receive half the commissions earned, and to pay half the losses incurred, by the stockbrokers on transactions with such clients.[89] The promise to pay losses was enforceable, though oral, as it formed part of a larger transaction in which the defendant was interested otherwise than as guarantor. Similarly the guarantee given by a *del credere* agent is not within the Statute. Such an agent guarantees the solvency of the third party between whom and his principal he makes a contract: that is, he promises the principal to pay if the third party does not. The main object of a *del credere* agency is to enable the principal to sell and the agent to earn his commission: "Though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given."[90] On the wording of the Statute, it is hard to justify the

[84] *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828.
[85] *Lakeman v Mountstephen* (1874) L.R. 7 H.L. 17.
[86] *Goodman v Chase* (1818) 1 B. & Ald. 297.
[87] *Guild & Co v Conrad* [1894] 2 Q.B. 885 at 892; cf. *Thomas v Cook* (1828) 8 B. & C. 728; *Wildes v Dudlow* (1874) L.R. 19 Eq. 198; *Re Hoyle* [1893] 1 Ch. 84.
[88] *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828 at 835; *Associated British Ports v Ferryways NV* [2009] EWCA Civ 189; [2009] 1 Lloyd's Rep. 595 at [1] (an "old chestnut" which is "technical and inconvenient", where the issue was not form, but the effect of a variation to the underlying debt (discharge in the case of a guarantee)).
[89] *Sutton & Co v Grey* [1894] 1 Q.B. 285. cf. *Pitts v Jones* [2007] EWCA Civ 1301; [2008] Q.B. 76 (where the argument failed).
[90] *Couturier v Hastie* (1852) 8 Ex. 40 at 56, reversed on another point: (1856) 5 H.L.C. 673; below, para.8–009.

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CHAPTER 9

MISREPRESENTATION[1]

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[1] Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3rd edn (2012).

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9–001 Our concern in this chapter is with the remedies available to a person who has been induced to enter into a contract by a statement which is misleading. These remedies are available only if the statement is of a kind which the law recognises as giving rise to liability, and if certain general conditions of liability are satisfied. The representee may then be able to claim damages or to rescind the contract or to do both these things. Similar remedies may also in certain cases be available where there has been mere non-disclosure of material facts, as opposed to active misrepresentation.

9–002 **Claims available to consumers.** The Unfair Commercial Practices Directive[2] which is implemented by the Consumer Protection from Unfair Trading Regulations 2008[3] and the Business Protection from Misleading Marketing Regulations 2008,[4] includes, among the specific prohibitions, the provision of "false information",[5] or the omission of "material information".[6] The Directive itself operates "without prejudice to contract law, and, in particular, the rules on the validity, formation and effect of a contract",[7] but as a result of amendments to the Consumer Protection from Unfair Trading Regulations 2008[8] (the 2008 Regulations) remedies are now provided to "consumers"[9] who have entered into a contract with a "trader"[10] for the sale or supply of a product[11] by the trader, or for the sale of goods to a trader, or made a payment to a trader as a result of[12]

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[2] Directive 2005/29 [2005] O.J. L149/22; Twigg-Fleisner 121 L.Q.R. 386.
[3] SI 2008/1277.
[4] SI 2008/1276.
[5] Article 6.
[6] Article 7.
[7] Article 3(2).
[8] Consumer Protection (Amendment) Regulations 2014 (SI 2014/870). The amended 2008 Regulations apply to contracts entered into, or payments made, on or after 1 October 2014.
[9] As defined in reg.2(1) in a way which is very similar to the definition under the Consumer Rights Act 2015, s.2(3): below, para.23–087.
[10] As defined in reg.2(1) in a way which is very similar to the definition under the Consumer Rights Act 2015, s.2(3): below, para.23–086.
[11] For limitations on the meaning of "product", see reg.27C (immoveable property), reg.27D (financial services).
[12] The prohibited practice must have been "a significant factor" in the consumer's decision to enter into the contract or make the payment: reg.27A(6).

"prohibited practice" amounting to "misleading action"[13] (but not "misleading omissions")[14] or "aggressive practice".[15] The requirement that a trader or someone for whom the trader is made responsible[16] must have engaged in a "commercial practice" that amounts to misleading action does not necessarily rule out a single instance of misrepresentation, but it seems that it must have been the result of a "systems" or "process" failure.[17]

The new forms of redress potentially available to consumers include the right to "unwind" the contract and claim a refund[18] (which is very similar in process to rescission of the contract for misrepresentation),[19] the right to a discount[20] and to claim damages.[21] The latter remedy not only includes "financial loss" other than "in respect of the difference between the market price of a product and the amount payable for it under a contract",[22] but also damages for "alarm, distress or physical inconvenience or discomfort" caused by the prohibited practice.[23] In both cases the loss must have been reasonably foreseeable at the time of the prohibited practice.[24] The consumer's right to damages is subject to the trader's defence of "reasonable precautions" and "due diligence".[25]

9–003 **Effect on the law of misrepresentation.** For the most part, the law which is set out in the rest of this chapter is unaffected by this development since nothing in the amendments made to the 2008 Regulations "affects the ability of a consumer to make a claim under a rule of law or equity, or under an enactment, in respect of conduct constituting a prohibited practice".[26] However, a consumer may not recover compensation under both the 2008 Regulations and another rule of law or equity or an enactment.[27] Further, a specific amendment is made to s.2 of the Misrepresentation Act 1967 which means that any right to damages thereunder is not available to a consumer who has rights of redress under the 2008 Regulations.[28]

[13] This is extensively defined in reg.5.
[14] Regulations 27A–27B.
[15] Regulation 7. "Aggressive practice" is more akin to duress and undue influence: see below, para.10–048.
[16] Regulation 27A(4).
[17] *R v X Ltd* [2013] EWCA Crim 818; [2013] C.T.L.C. 145.
[18] Regulations 27E–27H. The right to unwind exists for 90 days from the date when the consumer enters the contract or the relevant day (as defined: reg.27E(4)) whichever is the later: reg.27E(1). There is no right to unwind if the right to a discount has been exercised: reg.27E(10).
[19] See below, para.9–083.
[20] Regulation 27I. A scale of discounts is applied depending upon the level of seriousness of the prohibited practice.
[21] Regulation 27J.
[22] Regulation 27J(1)(a),(3).
[23] Regulation 27J(1)(b).
[24] Regulation 27J(4).
[25] Regulation 27J(5).
[26] Regulation 27L(1).
[27] Regulation 27L(2).
[28] SI 2014/870 reg.5 (subject to the qualification which is referred to below): see para.9–045, fn.249.

1. General Conditions of Liability

9–004 Where a representation does not have contractual force, it will give rise to the remedies discussed in ss.2 and 3 of this chapter only if it is a false statement of fact (or law), material and if the representee has relied on it.

(a) False statement of fact or law

9–005 **General rule.** The general rule is that no relief will be given for a misrepresentation as such unless it is a statement of existing fact or, it now seems, of law.[29]

9–006 **Objective meaning given to representations.** Whether any and if so what representation has been made is to be "judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee."[30] In the case of an express statement, "the court has to understand what a reasonable person would have understood from the words used in the context in which they were used."[31] In the case of an implied representation, the court has to "consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context."[32] The same objective approach is taken to determine the falsity of any statement. It will be treated as true if it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimant to enter into the contract.[33]

9–007 **Implied representations.** The terms, if any, upon which the parties have exchanged information will be a material factor in determining whether any implied representation has been made.[34] Thus, in *IFE Fund SA v Goldman Sachs International*[35] the defendant arranger of a syndicated loan supplied to the

[29] See para.9–017, below.

[30] *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957 at [30]; [2004] 2 All E.R. (Comm) 833; cf. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [81]; *Springwell Navigation Corporation v JP Morgan Chase Bank* [2010] EWCA Civ 1221; [2010] 2 C.L.C. 705 at [121]

[31] *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264 at [50], affirmed [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep. 449; cf. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [82].

[32] *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264 at [50]; cf. *Taberna Europe CDO II Plc v Selskabet* [2015] EWHC 871 (Comm) at [164] (test to be applied with "a degree of caution"). For representations implied by conduct, see below para.9–137

[33] *Avon Ins Plc v Swire Fraser Ltd* [2000] 1 All E.R. (Comm) 573 at [17]; cf. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [149]. This is consistent with the test for materiality: below, para.9–020.

[34] *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [97].

[35] [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264; affirmed [2007] EWCA Civ 811; [2007] 2 Lloyd's Rep. 449.

claimant, as a potential lender, pre-acquisition reports on the target company which had been purchased but failed to pass on post-acquisition reports which it was claimed cast doubt on the reliability of the earlier reports. It did so pursuant to an information memorandum in which it was stated that no representation, express or implied, was made as to the "accuracy or completeness" of the information supplied[36] or that the information supplied "will be updated." The claimants argued that that still left room for an implied and continuing representation that the defendant knew nothing which showed that the information which had been supplied was *or might be* materially incorrect. According to Toulson J this went too far and would "open up wide and uncertain territory".[37] The only implied representation was that in supplying the information the defendant was acting in good faith, i.e. it did not actually know of anything which made the information given misleading.[38] The claimant in the *IFE* case was a sophisticated commercial entity. In light of the statement above that the courts will take into account the known characteristics of the actual representee, a consumer who is told that no representations are being made to him may be treated differently.[39]

9–008 **Statements made by another and passed on by the representor.** In the *IFE* case above[40] the court was concerned with the representations which were impliedly made in circumstances where the representor passed on information or statements provided by another. In *Webster v Liddington*[41] Jackson LJ provided a non-exhaustive list of the potential implications to be drawn from such a situation in the following terms:[42] (i) the representor may warrant that the information is correct and therefore assume contractual liability;[43] (ii) the representor may adopt the information as his own, thereby taking on such responsibility as he would have if he were the maker of the statement; (iii) the representor may represent that he believes, on reasonable grounds, the information supplied to be correct.[44] That involves a lesser degree of responsibility than implication (ii); or (iv) the representor may simply pass on the information as material coming from another, about which the representor has no knowledge or belief. The representor then has no responsibility for the accuracy of the information beyond the ordinary duties of honesty and good faith.[45] Which of these implications, or any others, is to be drawn will depend on the objective test referred to above.[46] In *Webster v*

[36] The principal significance of this type of provision is the effect that it can have on *excluding* liability for representations that *have been made*: see below, para.9–126.

[37] *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264 at [58].

[38] *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep. 264 at [60].

[39] *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [81].

[40] See para.9–007.

[41] *Webster v Liddington* [2014] EWCA Civ 560; [2014] P.N.L.R. 26.

[42] *Webster v Liddington* [2014] EWCA Civ 560; [2014] P.N.L.R. 26 at [46].

[43] See below, para.9–050.

[44] See, e.g. *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch).

[45] See, e.g. the *IFE* case discussed in para.9–007 above.

[46] See above, para.9–006.

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Liddington itself, the representors were clinicians who passed on to the representees brochures provided by the manufacturers of certain beauty products which contained false statements about the products which were then used on the representees.[47] Given the "stark imbalance of knowledge" between the representors as qualified clinicians, and the representees, as consumers, and the absence of any disclaimer, the Court of Appeal held that the false statements had been adopted by the representors as their own representations, i.e. implication (ii).[48]

9–009 **Representations set out in the contract.**[49] In some cases, the representations which the representee claims to have relied upon to enter the contract are set out in the contract itself.[50] If such representations are made for the first time in the contract, it is difficult to see how they can be said to have been relied on as *pre-contractual* representations which induced the very contract in which they are to be found and this would rule out at least some claims for misrepresentation, e.g. a claim under s.2(1) of the Misrepresentation Act 1967.[51] A representation may amount to both a contractual and a pre-contractual representation as, for example, where it appears in earlier drafts of the contract which are considered by the parties during negotiations.[52] In one case, however, the statements relied upon by the representee were set out in the contract only as "warranties" and the court held that any earlier drafts would only have indicated to the representee what the representor was willing to state by way of a warranty in the contract; such statements were not therefore being made as representations at all.[53]

9–010 **Ambiguous representation.** A statement may be intended by the representor to bear a meaning which is true, but be so obscure that the representee understands it in another sense, in which it is untrue. In such a case the representor is not liable if his interpretation is the correct one;[54] and even if the court holds that the representee's interpretation was the correct one, the representor is not guilty of

[47] No claim was brought against the manufacturers because they had gone into administration.
[48] *Webster v Liddington* [2014] EWCA Civ 560; [2014] P.N.L.R. 26 at [51]–[52].
[49] The incorporation of a representation as a term of the contract does not preclude a claim in misrepresentation, including the right to rescind: see below, para.9–099. In this paragraph we are concerned with the question of whether the claimant can point to any pre-contractual representation at all.
[50] Increasingly, representees are confined to relying on such representations because of the effect of clauses in the contract under which the representee acknowledges that no representations have been made, or none have been relied on, *save for those set out in the contract*: see para.9–126, below.
[51] *Senate Electrical Wholesalers Ltd v STC Submarine Systems Ltd* unreported 26 May 1994; *Leofelis SA v. Lonsdale Sports Ltd* [2008] EWCA Civ 640; [2008] E.T.M.R. 63 at [141]; see para.9–043 below.
[52] *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235 at [20]; *Bikam OOD v Adria Cable S.a.r.l.* [2012] EWHC 621 (Comm) at [27].
[53] *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) at [209]; cf. *Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB) at [291]; contrast *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch); and *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch); [2012] P.N.L.R. 35 at [133] (a warranty by an auction house that a painting was by Kustodiev did not preclude an implied representation that that was the opinion of the auction house and that it had reasonable grounds for the opinion).
[54] *McInerny v Lloyds Bank Ltd* [1974] 1 Lloyd's Rep. 246 at 254; contrast *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15; [2002] E.M.L.R. 27 at [67], where there was held to be no ambiguity in the representation.

fraud.[55] This is so in spite of the fact that the representor's interpretation was an unreasonable one, so long as he honestly believed in it.[56] A fortiori the representee has no remedy in deceit if the representation is ambiguous and he did not in fact understand it in a different sense from that intended by the representor.[57] A representor is guilty of fraud if he makes an ambiguous statement intending it to bear a meaning which is to his knowledge untrue,[58] and if the statement is reasonably understood in that sense by the representee. In such a case it is no defence for the representor to show that, on its true construction, the statement bore a meaning that was in fact true.[59]

9–011 **Mere puffs.** Mere puffs are statements which are so vague that they have no effect at law or in equity. To describe land as "fertile and improvable" is mere sales talk which affords no ground for relief.[60] But there is a liability for more precise claims, e.g. that use of a carbolic smoke-ball will give immunity from influenza.[61] The distinction is between indiscriminate praise, and specific promises or assertions of verifiable facts.

9–012 **Statements of opinion or belief.** Even where a statement is not so vague as to be a mere puff, it may nevertheless have no legal effect because it is not a positive assertion that the fact stated is true, but only a statement of the maker's opinion or belief.[62] Assertions that an anchorage was safe and that a piece of land had the capacity to support 2,000 sheep have been held to be of this character;[63] for in each case, the party making the statement had (as the other party knew) no personal knowledge of the facts on which it was based: it was understood that he could only state his belief.

A statement may, in terms, be one of opinion or belief, but by implication involve a statement of fact: "All depends upon the particular statement in its particular context",[64] including the terms, if any, under which it has been provided.[65] Thus, an incorrect forecast may amount to a misrepresentation, not because the forecast is incorrect, but because of the implied, but false, statement that reasonable care has been taken in making it.[66] It is also a misrepresentation of fact for a person to say that he holds an opinion which he does not hold, e.g. to

[55] *Akerhielm v De Mare* [1959] A.C. 789; *Gross v Lewis Hillman Ltd* [1970] Ch. 445; *Leni Gas and Oil Investments Ltd v Malta Oil Pty Ltd* [2014] EWHC 893 (Comm) at [7] and cf. below, para.9–143.
[56] See below, para.9–034.
[57] *Smith v Chadwick* (1884) 9 App. Cas. 187.
[58] *Henry Ansbacher & Co Ltd v Binks Stern*, *The Times*, 26 June 1997.
[59] *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep. 293 at 318.
[60] *Dimmock v Hallett* (1866) L.R. 2 Ch. App. 21; cf. above, para.4–004.
[61] *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256.
[62] Or a contention, or statement of position, e.g. as to the meaning of a prior contract between parties: *Kyle Bay Ltd v Underwriters Subscribing Under Policy No.019057/08/01* [2007] EWCA Civ 57 at [29]–[37]; cf. *Royal Bank of Scotland v Chandra* [2011] EWCA Civ 192; [2011] N.P.C. 26 at [39] (no misrepresentation in an "over-optimistic" forecast).
[63] *Anderson v Pacific Fire & Marine Ins Co* (1872) L.R. 7 C.P. 65; *Bissett v Wilkinson* [1927] A.C. 177.
[64] *Jaffray v Society of Lloyds* [2002] EWCA Civ 1101 at [59]; *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [197].
[65] See above, para.9–007.
[66] *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [207]

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say that he thinks a picture is a Rembrandt when he thinks it is a copy.[67] If that party has or professes to have some special knowledge or skill as to the matter stated, the statement is also likely to be treated as one of fact.[68] And if the facts on which an opinion is based are particularly within the knowledge of the person stating the opinion, he may be taken to have represented that those facts exist. For example, where the vendor of a house describes it as "let to a most desirable tenant", when the tenant has for long been in arrears with his rent, he misrepresents a fact, "for he impliedly states that he knows facts which justify his opinion".[69] The same principle applies where a person honestly makes a statement of belief but fails to check the facts on which it appears to be based, when he could easily have done so and therefore impliedly represents that he had reasonable grounds for his opinion.[70] A statement that the representor had been informed of a particular fact has also been held to be a representation, not merely that the representor had been so informed, but that the fact existed.[71]

9–013 **Representations as to the future.** A representation as to the future does not, of itself, give rise to any cause of action[72] unless it is binding as a contract. Thus if A induces B to lend him money by representing that he will not borrow from anybody else, and then does borrow elsewhere, he is not liable to B unless the representation is a term of the contract of loan or amounts to a collateral contract.[73]

9–014 **Statement of present intention as a statement of fact.** A person who promises to do something may simply be making a statement as to his future conduct; if so, he does not misrepresent a fact merely because he fails to do what he said he would do.[74] But he may also be making a statement of his present intention; if so, he does misrepresent a fact if, when he made the statement, he had no such intention. The courts tend to construe statements as to the future in the second of these two ways in order to protect the interests of persons deceived by them. In *Edgington v Fitzmaurice*[75] the directors of a company procured a loan of money

[67] *Jendwine v Slade* (1797) 2 Esp. 571 at 573; *Brown v Raphael* [1958] Ch. 636 at 641; contrast *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 Q.B. 564.

[68] e.g. *Esso Petroleum Co Ltd v Mardon* [1976] Q.B. 801; below, para.9–042; *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573 at 594–595.

[69] *Smith v Land & House Property Corp* (1884) 28 Ch. D. 7 at 15.

[70] *Brown v Raphael* [1958] Ch. 636; *Thomson v Christie Manson & Woods Ltd* [2004] EWHC 1101 (QB); [2004] P.N.L.R. 42 at [199] (decision reversed [2005] EWCA Civ 555; [2005] P.N.L.R. 38, without reference to this point)); *Avrora Fine Arts Investment Ltd v Christie Manson & Woods Ltd* [2012] EWHC 2198 (Ch); [2012] P.N.L.R. 35. Contrast *Humming Bird Motors v Hobbs* [1986] R.T.R. 276; *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016.

[71] *Sirius International Ins Corp v Oriental Assurance Corp* [1999] 1 All E.R. (Comm) 699; presumably the latter representation arose by implication from the former.

[72] It may be a ground for refusing specific performance: below, para.21–031. It may also, in combination with other circumstances, give rise to a proprietary estoppel: see above, para.3–118 et seq.

[73] cf. *Ex p. Burrell* (1876) 1 Ch. D. 537 at 552; *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd (No.2)* (1998) 87 B.L.R. 52.

[74] *The Seaflower* [2000] 2 Lloyd's Rep. 37 at 42; but the eventual outcome was that the representee was entitled to rescind *for breach*: *The Seaflower* [2001] 1 Lloyd's Rep. 341; below, para.18–053.

[75] (1885) 29 Ch. D. 459.

to their company by representing that the money would be used to improve the company's buildings and to expand its business. In fact the directors intended to use the money to pay off the company's existing debts. They were held liable to the lender in deceit. Bowen LJ said:

> "There must be a mis-statement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion … A misrepresentation as to the state of a man's mind is, therefore, a mis-statement of fact".[76]

9–015 **Statement of present expectation or belief as statement of fact.** The principle stated above is not restricted to statements of intention. A person may misrepresent a fact if he states an *expectation* or a *belief* which he does not hold as to some future event. A statement of expectation or belief may also be held to contain an implied assertion that the representor had reasonable grounds for making it. For example, a shipowner who in a charterparty says that his ship is "expected ready to load" at a particular port on or about a specified date impliedly represents that he honestly holds that belief, and that he does so on reasonable grounds. If he has no reasonable grounds for holding the belief, he misrepresents a fact.[77]

At present, the Marine Insurance Act 1906 provides that a marine policy can be avoided for an untrue representation of expectation or belief by the insured;[78] but that such a representation "is true if it be made in good faith".[79] These rules apply also to other types of non-consumer insurance[80] and under them a person would be guilty of misrepresentation if he stated a belief which he did not in fact hold. The standard imposed by them is no more than one of honesty.[81] When Pt 2 of the Insurance Act 2015 comes into force[82] the insured will be under a "duty of fair presentation" which is satisfied if "every material representation as to a matter of expectation or belief is made in good faith".[83]

9–016 **Statement of intention coupled with statement of fact.** A statement of intention may also be coupled with an *express* statement of existing fact. Thus a statement

[76] *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459 at 482; cf. *Smith Kline & French Laboratories Ltd v Long* [1988] 1 W.L.R. 1; *Kleinwort Benson Ltd v Malaysian Mining Corp* [1989] 1 W.L.R. 379 at 396; *East v Maurer* [1991] 1 W.L.R. 461 at 463; *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch. 53 at 67–68.

[77] *The Mihalis Angelos* [1971] 1 Q.B. 164 at 194, 205; *Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at [207].

[78] Section 20(1) and (3).

[79] Section 20(1), (3) and (5); *The Zephyr* [1985] 2 Lloyd's Rep. 529 at 538.

[80] "Consumer insurance contracts" (as defined by s.1) are now regulated by the Consumer Insurance (Disclosure and Representations) Act 2012 under which the consumer is under a duty to take reasonable care not to make a misrepresentation to the insurer (s.2(2)). There is no reference in the 2012 Act to the consumer's "expectations" or "belief", but a misrepresentation made dishonestly is always to be taken as showing lack of reasonable care (s.3(5)).

[81] *Economides v Commercial Union Assurance Plc* [1998] Q.B. 587 rejecting (at 599, 606) so far as *contra*, dicta in *Highlands Ins Co v Continental Ins Co* [1987] 1 Lloyd's Rep. 109.

[82] On 12 August 2016 (s.23(2)).

[83] Section 3(3)(c); s.20 of the Marine Insurance Act 1906 will be repealed: 2015 Act s.21(2); it no longer applies to a consumer insurance contract: Consumer Insurance (Disclosure and Representations) Act 2012 s.11(2)(c).

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by A that he *had* sold flour and *would* pay over the proceeds to B is a misrepresentation of fact if A had made no such sale.[84]

9–017 **Statements of law.** The traditional view, at common law, was that no right to rescind nor any right to damages could be based on a misrepresentation of law, and the same was probably true of claims for damages under the Misrepresentation Act 1967.[85] In equity, too, a money claim could not be based on a misrepresentation of law,[86] though it was more doubtful whether it was a ground for rescission in equity.[87] It has been said that *wilful* misrepresentation of law was ground for equitable relief.[88] And equity gave relief for misrepresentation as to private rights[89] whether or not these were rightly called misrepresentation of fact.

In *Kleinwort Benson Ltd v Lincoln City Council*[90] the House of Lords removed the bar preventing recovery of payments made under a *mistake* of law. This has led the Court of Appeal to remove the bar which prevents a mistake of law from rendering a contract void[91] and, in so doing, the view was expressed that the effect of the decision in the *Kleinwort Benson* case "now permeates the law of contract".[92] Furthermore, in *Pankhania v Hackney LBC*,[93] it was held that the "misrepresentation of law" rule "has not survived" the decision in the *Kleinwort Benson* case. A degree of caution is perhaps still needed before it can finally be concluded that the distinction between fact and law is no longer relevant to misrepresentation. It is submitted, however, that the decision in *Pankhania* is very likely to be followed by the higher courts. The distinction between representations of fact and representations of law was sometimes hard to draw and its effects were hard to justify,[94] and a person who has acted to his prejudice in reliance on a misrepresentation of law has at least as strong a claim for relief as one who is entitled to relief because he has spontaneously made a mistake of law.

9–018 **Representation made by another.** As a general rule the representation must have been made by the party against whom relief is sought, or by his agent. In some cases relief may be available even where the representation was made by another party who was not acting as agent, e.g. where A, by a misrepresentation addressed to B, induces B to guarantee A's overdraft with the C bank. The bank's ability to enforce such a transaction depends on whether it is "put on enquiry"[95] as to the circumstances in which it was concluded. Since in most of the recent

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[84] *Babcock v Lawson* (1880) 5 Q.B.D. 284; cf. *Ismail v Polish Ocean Lines Ltd* [1976] Q.B. 893: statement that goods *were* so packed that they *would* withstand the voyage.
[85] *André & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep. 427 at 432, 434–435.
[86] See *Rashdall v Ford* (1866) L.R. 2 Eq. 750; *Eaglesfield v Londonderry* (1876) 4 Ch. D. 693.
[87] e.g. in *Wauton v Coppard* [1899] 1 Ch. 92 and *Mackenzie v Royal Bank of Canada* [1934] A.C. 468. But in each of these cases the representation was held to be one of fact.
[88] *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360 at 362–363.
[89] *André & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep. 427 at 431, 432.
[90] [1999] 2 A.C. 349; below, para.22–017.
[91] *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] Q.B. 303; below, para.8–022.
[92] *Brennan v Bolt Burdon* [2004] EWCA Civ 1017; [2005] Q.B. 303 at [10].
[93] [2002] EWHC 2441 (Ch) at [57].
[94] See *André & Cie SA v Ets Michel Blanc* [1997] 2 Lloyd's Rep. 427 at 431; *Brikom Investments Ltd v Seaford* [1981] 1 W.L.R. 863 at 869; cf. *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] Q.B. 84 at 122.
[95] *Royal Bank of Scotland v Etridge (No.2)* [2001] UKHL 44; [2002] 2 A.C. 773 at [44].

cases of this kind the alleged vitiating factor has been undue influence (sometimes together with misrepresentation),[96] a full discussion of the effect of such factors on the rights of the third party will be found in Ch.10.[97]

9–019 **Non-disclosure amounting to representation.** As a general rule, a person who is about to enter into a contract is under no duty to disclose material facts known to him but not to the other party. There are a number of exceptions to this rule and in relation to some the true nature of the non-disclosure is that a representation can be inferred from conduct or from the surrounding circumstances, e.g. where a representation is falsified by later events,[98] or where a statement is literally true but misleading,[99] or where disclosure is required by custom.[100] They are dealt with in more detail below along with other exceptions to the general rule.[101]

(b) Material

9–020 **General rule.** A misrepresentation generally has no legal effect unless it is material.[102] That is, it must be one which would affect the judgment of a reasonable person in deciding whether, or on what terms, to enter into the contract; or one that would induce him to enter into the contract without making such inquiries as he would otherwise make.[103] Thus in a contract of insurance it is material that the subject-matter has been grossly overvalued[104] or that a previous proposal for insuring it has been declined;[105] and in a contract for a loan of money it is material that the lender is a notoriously ruthless money-lender.[106] Conversely, a representation as to the identity of the purchaser may be material where the vendor is willing to sell to X but not to Y. In such a case the vendor can rescind if the purchaser knows that the representation is material, even though he

[96] The same test applies to both: *Annulment Funding Company Ltd v Cowey* [2010] EWCA Civ 711; [2010] B.P.I.R. 1304 at [64].
[97] Below, paras 10–038—10–042.
[98] See below, para.9–141.
[99] See below, para.9–143.
[100] See below, para.9–144.
[101] See below, para.9–139 et seq.
[102] *McDowell v Fraser* (1779) 1 Dougl. 247 at 248, per Lord Mansfield; *Lonrho Plc v Fayed (No.2)* [1992] 1 W.L.R. 1 at 6; cf. (in cases of non-disclosure) below, para.9–146.
[103] *Traill v Baring* (1864) 4 D.J. & S. 318 at 326; *Whurr v Devenish* (1904) 20 T.L.R. 385; cf. *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm); [2011] 1 Lloyd's Rep. 123 at [149]; Marine Insurance Act 1906 s.20(2), expressing the general law: *Industrial Properties Ltd v A E I Ltd* [1977] Q.B. 580 at 597, 601; *Highland Ins Co v Continental Ins Co* [1987] 1 Lloyd's Rep. 109; *Pan Atlantic Ins Co Ltd v Pine Top Ins Co Ltd* [1995] 2 A.C. 501. On 12 August 2016 s.20(2) of the 1906 Act will be repealed by the Insurance Act 2015, but see s.7(5) of the 2015 Act; it no longer applies to a consumer insurance contract: Consumer Insurance (Disclosure and Representations) Act 2012 s.11(2)(c).
[104] *Ionides v Pender* (1874) L.R. 9 Q.B. 531.
[105] *Locker & Woolf Ltd v W Australian Insurance Co Ltd* [1936] 1 K.B. 408.
[106] *Gordon v Street* [1899] 2 Q.B. 641.

Chapter 13

PLURALITY OF PARTIES

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13–001 A promise may be made by or to more than one person. Such a promise must be distinguished from a multilateral contract.[1] If three persons agree to run a race subject to certain rules, there are three sides to the contract, but each side consists of only one person.[2] If two persons promise to pay a third £10, or if one person promises to pay £10 to two others, there may only be two sides to the contract, one consisting of two persons and the other of one person. This chapter is concerned with promises of this kind.

1. Plurality of Debtors[3]

(a) Definitions

13–002 **Independent promises.** If A and B *each separately* promise to pay C £10 this does not amount to one promise by several to one, but to two independent promises. Thus C is entitled to £10 from A and a further £10 from B. This was, for example, the position where C granted licences to A and B under agreements

[1] See above, para.2–076.
[2] cf. *Rockeagle Ltd v Alsop Wilkinson* [1992] Ch. 47 at 50 ("tripartite agreement").
[3] Williams, *Joint Obligations* (1997).

providing for payment of a weekly sum by each of them,[4] and where a group of Lloyd's underwriters issued an insurance policy to an assured by which they bound themselves "each for his own part and not one for another".[5] There may be two such separate promises even where both are contained in the same document.[6]

13–003 **Joint or joint and several promises.** If A and B *together* promise to pay £10, the promise may be joint, or joint and several.[7] It is joint if A and B make only one promise binding both of them; it is joint and several if they make one promise binding both of them and if in addition each makes a separate promise binding him alone. A joint and several promise is distinguishable from two entirely separate promises in that it does not involve the promisors in cumulative liability. If A and B jointly and severally promise to pay C £10, C is not entitled to more than £10 in all. It is a question of construction whether a promise is joint, or joint and several.[8] A promise by two persons together is deemed to be joint, unless it is qualified in some way.[9] To make a promise joint and several, it is advisable to say expressly "we promise jointly and severally," or "we, and each of us, will pay". But this is not the only way of creating joint and several liability. In *Tippins v Coates*[10] three persons executed a bond by which they bound themselves "jointly and our respective heirs". This was held to be a joint and several promise, since that was evidently the intention of the parties: if it were held to be a joint bond, the *respective* heirs of the promisors would not be bound, but only the heir of the survivor.[11]

13–004 **Express provision by statute.** In some cases the question of whether liability is joint, or joint and several, is expressly dealt with by statute. For example, s.9 of the Partnership Act 1890, provides that "every partner in a firm is liable jointly with the other partners … for all debts and obligations of the firm incurred while he is a partner". On the other hand promissory notes made by a number of persons are deemed to be joint and several.[12]

[4] *Mikeover v Brady* [1989] 3 All E.R. 618.

[5] *Touche Ross & Co v Colin Baker* [1992] 2 Lloyd's Rep. 207 at 209.

[6] *Collins v Prosser* (1823) 1 B. & C. 682; *Gibson v Lupton* (1832) 9 Bing. 297; *Lee v Nixon* (1834) 1 A. & E. 201.

[7] In identifying the mutual obligations of the debtors it is unlikely to make any difference whether their covenant was joint, joint and several or only several: *Stroude v Beazer Homes Ltd* [2005] EWHC 2686; (2005) 48 E.G. 223 (implied term that one landowner had right to enter land of another to fulfil concurrent obligation to construct bypass).

[8] *In re Rhinegold Publishing Ltd* [2012] EWHC 587 (Ch).

[9] *Levy v Sale* (1877) 37 L.T. 709; *White v Tyndall* (1888) 13 App. Cas. 263; *The Argo Hellas* [1984] 1 Lloyd's Rep. 296 at 300.

[10] (1853) 18 Beav. 401.

[11] See below, para.13–009.

[12] Bills of Exchange Act 1882 s.85(2); see also Law of Property Act 1925 s.119; Landlord and Tenant (Covenants) Act 1995 s.13(1).

(b) Differences Between Joint, and Joint and Several, Promises

(i) Parties to the action

13–005 **Action on a joint promise.** At common law, an action on a *joint* promise had to be brought against all the surviving joint debtors.[13] If this was not done the defendants could plead the non-joinder of their co-debtors in abatement. Although pleas in abatement no longer exist, it is still the general rule that the action must be brought against all the joint debtors.[14] But the court has discretion to allow the action to proceed against one joint debtor if the other is out of the jurisdiction, or cannot be traced.[15] If one joint debtor is bankrupt, the other or others may be sued without him.[16]

13–006 **Action on a joint and several promise.** An action on a *joint and several* promise could at common law be brought against one or all the co-debtors but not, it seems, against some (but not all). The creditor could either sue each debtor individually on his several promise or all on their joint promise; but he could not, by suing some, treat the contract as joint without also joining all the others.[17] It seems that in such a case the court now has discretion to order all the other joint and several debtors to be joined to the action since it may order the names of persons to be joined to an action if their presence is "desirable … so that the court can resolve all matters in dispute in the proceedings".[18] The court might order such joinder so that the amount of the debt may be conclusively established for the purpose of the contribution[19] between all the debtors. It seems that the onus is on the debtor who is sued to bring his co-debtors before the court as third parties, with a view to claiming contribution from them.[20]

(ii) Judgment

13–007 **Judgment against one joint debtor.** If one *joint* debtor is sued alone and does not plead non-joinder of the others, judgment may be given against him alone. After the creditor had recovered such a judgment, it was formerly the rule that he could not take further proceedings against any of the other joint debtors (even though the judgment remained unsatisfied) because the original cause of action was merged in the judgment.[21] This rule was, however, likely to cause hardship to

[13] *Cabell v Vaughan* (1669) 1 Wms. Saund. 291; *Richards v Heather* (1817) 1 B. & Ald. 29.

[14] *Norbury, Natzio & Co Ltd v Griffiths* [1918] 2 K.B. 369; it is up to the defendant to take the point; *Wegg-Prosser v Evans* [1895] 1 Q.B. 108. And see CPR r.19.2(1).

[15] *Wilson, Sons & Co Ltd v Balcarres Brook SS Co Ltd* [1893] 1 Q.B. 422; *Robinson v Geisel* [1894] 2 Q.B. 685.

[16] Insolvency Act 1986 s.345(4).

[17] *Cabell v Vaughan* (1669) 1 Wms. Saund. 291, n.4.

[18] CPR r.19.2(2)(a).

[19] See below, para.13–017.

[20] cf. *Wilson, Sons & Co Ltd v Balcarres Brook SS Co Ltd* [1893] 1 Q.B. 422 at 428 (where the contract was joint).

[21] *Kendall v Hamilton* (1879) 4 App. Cas. 504.

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the creditor; and it has been abolished by statute,[22] so that a creditor is no longer precluded from suing one joint debtor merely because he has previously obtained a judgment against another.

13–008 **Judgment against one joint and several debtor.** Where the contract is *joint and several*, judgment against one debtor was never regarded as a bar to proceedings against another.[23] Each is liable on his separate promise, as well as on the joint promise: hence there are several causes of action only some of which are merged in the first judgment.[24] A claim against joint and several debtors is barred only if one of them satisfies it, whether under a judgment or otherwise.

(iii) Survivorship

13–009 **Common law.** At common law the liability of a *joint* debtor passed on his death to the surviving joint debtors.[25] The creditor therefore had no claim against the estate of the deceased, but only one against the surviving joint debtors. If they paid, they might be able to recover contribution from the estate of the deceased;[26] but the creditor himself had no direct right against the estate. On the death of the last surviving joint debtor, the creditor could recover the debt from his estate.[27]

On the death of a *joint and several* debtor, on the other hand, his several (though not his joint) liability remained enforceable against his estate.[28]

13–010 **Equity.** The rule that joint liability passed to the surviving debtors might be convenient where the debtors were engaged in administering a trust, but it was highly inconvenient in commercial affairs. If only one of a number of joint debtors was solvent, and that one happened to die, the creditor would lose all substantial remedy. The difficulty was particularly acute in partnership cases. Equity therefore treated partnership debts as joint and several to this extent, that they could be enforced against the estate of a deceased partner.[29] This rule is confirmed by s.9 of the Partnership Act 1890.[30]

The equitable right to enforce a joint debt against the estate of a deceased joint contractor was applied mainly in partnership cases, but there is some authority for saying that it was not confined to such cases, nor even to cases involving mercantile transactions.[31] It is therefore arguable that on the question of

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[22] Civil Liability (Contribution) Act 1978 ss.3, 7(1). For a situation not covered by these provisions, see *The Argo Hellas* [1984] 1 Lloyd's Rep. 296 at 304. Section 3 also does not apply where a debt is discharged by an accord and satisfaction which is later embodied in a court order: *Morris v Molesworth* [1998] N.L.J. 1551; cf. CPR r.12.8 (default judgment): *Otkritie International Investment Management Ltd v Urumov* [2012] EWHC 890 (Comm).

[23] *Balgobin v South West Regional Health Authority* [2012] UKPC 11; [2013] 1 A.C. 582 at [21].

[24] *Blyth v Fladgate* [1891] 1 Ch. 337.

[25] *Cabell v Vaughan* (1669) 1 Wms. Saund. 291, n.4(f); *Godson v Good* (1816) 6 Taunt. 587 at 594.

[26] *Batard v Hawes* (1853) 2 E. & B. 287; below, para.13–017.

[27] *Calder v Rutherford* (1822) 3 Brod. & B. 302.

[28] *Read v Price* [1909] 1 K.B. 577.

[29] See *Kendall v Hamilton* (1879) 4 App. Cas. 504 at 517.

[30] But under this section separate debts of a deceased partner must be paid in priority to the partnership debts.

[31] *Thorpe v Jackson* (1837) 2 Y. & C. Ex. 553.

survivorship, there was, before the Judicature Act 1873, a conflict between common law and equity, so that equity now prevails.[32] It is also arguable that the principle of survivorship has been abolished by s.1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which provides that all causes of action subsisting against a person at the time of his death shall (with certain exceptions) survive against the estate. The object of this provision was to abolish the common law rule that actions *in tort* could not be brought against the estate of a deceased tortfeasor; but its words seem apt to abolish the rule that the liability of a joint debtor passed on his death to the surviving joint debtors (so that it could no longer be enforced against his estate).

(c) Similarities Between Joint, and Joint and Several, Promises

(i) Defence of one

13–011 **Whether defence of one is a defence for all.** If one of several co-debtors has a defence to the action, the question whether that defence also avails the others depends on its nature. If it goes to the root of the claim, and wholly destroys it, the other debtors can take advantage of it. Thus they can do so if one co-debtor can prove that the debt has been paid, or that the creditor is not entitled to payment because of his own breach of contract, or that a written contract is a forgery, or that the creditor was guilty of fraud.[33] But if the defence is personal to one co-debtor, e.g. that he was a minor or that he had been discharged as a result of bankruptcy proceedings, it does not avail the others as co-debtors.[34]

13–012 **Contracts of guarantee.** Special rules apply to contracts of guarantee, under which the guarantor generally undertakes joint and several liability with the principal debtor.[35] It has been held that the guarantor is not liable if the principal debt is illegal,[36] or if the principal debtor has been discharged as a result of the creditor's breach,[37] or if the principal debt is unenforceable under the rule against penalties.[38] A guarantor of a debt that was unenforceable under the Moneylenders Acts was not liable on the guarantee;[39] and the Consumer Credit Act 1974 (which repeals those Acts) lays down a similar rule in the case of a guarantee given in respect of a regulated agreement.[40] These rules cannot be deduced from the general principles governing joint and several contracts, but appear to be based

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[32] Judicature Act 1873 s.25(11); now Senior Courts Act 1981 s.49(1).

[33] *Porter v Harris* (1663) 1 Lev. 63; *Gardner v Walsh* (1855) 5 E. & B. 83; *Pirie v Richardson* [1927] 1 K.B. 448.

[34] *Burgess v Merrill* (1812) 4 Taunt. 468; *Lovell & Christmas v Beauchamp* [1894] A.C. 607; *Pirie v Richardson* [1927] 1 K.B. 448, cf. *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch. 71.

[35] e.g. *Anderson v Martindale* (1801) 1 East 497; *Read v Price* [1909] 1 K.B. 577.

[36] *Swan v Bank of Scotland* (1836) 10 Bli. (N.S.) 627; *Heald v O'Connor* [1971] 1 W.L.R. 497.

[37] *Unity Finance Ltd v Woodcock* [1963] 1 W.L.R. 455, explained on another ground in *Goulston Discount Co Ltd v Clark* [1967] 2 Q.B. 493.

[38] *Azimut-Benetti SpA v Healey* [2010] EWHC 2234 (Comm); 132 Con L.R. 113 (where the debt did not amount to a penalty).

[39] *Eldridge & Morris v Taylor* [1931] 2 K.B. 416; *Temperance Loan Fund Ltd v Rose* [1932] 2 K.B. 522.

[40] Section 113(1) and (2); see above, para.5–007 for the meaning of "regulated" agreement.

on considerations of policy.[41] It is obviously undesirable to allow a person who lends for an illegal purpose, or a lender who tries to evade the Consumer Credit Act, to recover his loan from any person whatsoever.

On the other hand, a guarantee may be valid where the principal debtor is a corporation acting ultra vires. Whether it is actually valid depends on its construction: did the guarantor undertake to pay only what the corporation could lawfully be required to pay, or what it had in fact promised to pay?[42] Where the principal debt is incurred by a company incorporated under the Companies Act 2006, the validity of that debt can no longer (as a general rule) be called into question on the ground of lack of the company's capacity by reason of anything in its constitution;[43] it follows that the guarantee cannot be called into question on this ground. The position is the same where the principal debt arises out of a contract which is made by a person dealing with the company in good faith, but which is, under the company's constitution, beyond the power of the board of directors: in favour of the other contracting party, the power of the board is (as a general rule) deemed to be free from any limitation under the company's constitution,[44] so that the contract giving rise to the debt, and consequently also the guarantee, cannot be challenged on the ground that it was beyond the powers of the board. The general rule is that the principal contract will be invalid only if the other party to it dealt with the company in bad faith; and mere knowledge of the fact that the contract was beyond the powers of the directors is not sufficient to constitute bad faith.[45] It seems that some kind of actual dishonesty is required to constitute bad faith; and if the principal transaction is invalid on this ground, then it is submitted that the guarantee should also be invalid. This submission is based on the analogy of the rule relating to illegal contracts,[46] for the principal contract in our last example would be, or would come close to being, one to defraud the company.[47] The only other situations in which the principal contract is now likely to be invalid on the ground that it is *ultra vires* are: (i) those in which a statutory corporation was not incorporated under the Companies Act, so that the common law doctrine of ultra vires still applied to it;[48] and (ii) those in which, though the company was incorporated under the 2006 Act, the statutory modifications of the ultra vires doctrine, described above, exceptionally do not apply.[49] If in such cases the creditor is induced to enter into the contract in reliance on a guarantee given by one of the corporation's directors or officers, it is

[41] Mitchell 63 L.Q.R. 354.
[42] *Yorks Ry & Wagon Co v Maclure* (1882) 21 Ch. D. 309; *Garrard v James* [1925] Ch. 616, as explained in *Heald v O'Connor* [1971] 1 W.L.R. 497.
[43] Companies Act 2006 s.39(1) (modified rules apply to companies which are charities: ss.39(2), 42; above, para.12–068.
[44] Companies Act 2006 s.40(1) (modified rules apply to companies which are charities: ss.40(6), 42; and transactions with directors and their associates: ss.40(6), 41; above, para.12–069).
[45] Companies Act 2006 s.40(2)(b)(iii).
[46] See above, at fn.36.
[47] cf. above, para.11–015.
[48] See above, para.12–072; subject to the exceptions there stated relating to local authorities.
[49] i.e. charitable companies and transactions with directors or their associates; above, fnn.43, 44.

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submitted that the guarantor should be liable on the guarantee: there seems to be no ground of policy for allowing him to rely on the invalidity of the principal debt.[50]

Similar policy considerations apply where the principal debtor is a minor: it would be wrong to allow the guarantor on this ground to escape from a liability deliberately undertaken since such a result would not be necessary for the protection of minors. It has therefore been provided by statute that the guarantee shall not be unenforceable against the guarantor merely because the principal obligation was unenforceable against the debtor because he was a minor when he incurred it.[51]

(ii) Release of one

13–013 **Release of one debtor by the creditor is a release of all.** If the creditor releases one co-debtor, the release is available for the benefit of all the others since it wholly destroys the cause of action.[52] At first sight, the application of this rule to joint and several debtors looks illogical, since there are several causes of action against them; but it may be justified on the ground that it would make the release partly futile to hold that only one of the co-debtors was released. If the others could still be sued, they could claim contribution from the one who had been released, who would thus indirectly be made liable, notwithstanding the release.[53] But in spite of this argument, a covenant not to sue a single co-debtor releases him alone and does not release the other co-debtors.[54]

13–014 **Reservation of right to sue co-debtors.** It used to be thought that a release granted to one co-debtor released the others even though it reserved the creditor's rights against them.[55] But the courts originally evaded this rule by distinguishing between a release and a covenant not to sue. The former released all the co-debtors; the latter released only the debtor with whom it was made.[56] The distinction turned on the construction of the document and the present approach is to go directly to the question of construction without first distinguishing between "release" and "covenant not to sue".[57] Accordingly, if the document

[50] For the possibility that an enforceable "guarantee" might be given by the company itself, see the discussion in para.12–081 below.
[51] Minors' Contracts Act 1987 s.2 (reversing *Coutts & Co v Browne-Lecky* [1947] K.B. 104); and see s.4, amending Consumer Credit Act 1974 s.113(7).
[52] *Nicholson v Revill* (1836) 4 A. & E. 675; *Re WEA* [1901] 2 K.B. 642; *Morris v Molesworth* [1998] N.L.J. 1551. In tort, the rule applies where the liability is joint: *New Zealand Guardian Trust Ltd v Brooks* [1995] 1 W.L.R. 96; and where it is concurrent: *Jameson v CEGB* [2000] 1 A.C. 455.
[53] *Jenkins v Jenkins* [1928] 2 K.B. 501 at 508.
[54] See the authorities cited in fn.56, below.
[55] *Nicholson v Revill* (1836) 4 A. & E. 675 at 683.
[56] *Hutton v Eyre* (1815) 6 Taunt. 289; *Webb v Hewitt* (1857) 3 K. & J. 438; *Ex p. Good* (1876) 5 Ch. D. 46. In *Duck v Mayeu* [1892] 2 Q.B. 511 and *Gardiner v Moore* [1969] 1 Q.B. 55 the same rule was applied in tort; the latter case also shows that reservation of the rights against one of the persons liable may be implied; cf. *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466; [2014] P.N.L.R. 11; *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs AG* [2014] EWHC 3068 (Comm); [2014] 2 Lloyd's Rep. 579 at [58].
[57] *Johnson v Davies* [1999] Ch. 117 at 127–128, following *Watts v Aldington, The Times*, December 16, 1993.

releases one co-debtor but reserves the creditor's rights against the other or others, the courts will give effect to the intention of the parties as so expressed.[58] But a document which simply released one co-debtor without expressly or impliedly[59] reserving the creditor's rights against the others would still wholly extinguish those rights.[60]

13–015 **Release of one debtor by operation of law is no release of co-debtors.** The rules discussed above apply only to release by act of the parties. Where one co-debtor is released by operation of law (e.g. by an order of discharge in bankruptcy) the others are not released.[61] If the creditor appoints one co-debtor his executor, both the co-debtor and the others are released when probate is obtained. The reason for this rule is that "the debt is deemed to have been paid by the debtor [*qua* debtor] to himself as executor" and thus discharged.[62] In equity the executor is then deemed to have the amount of the debt in his hands as assets of the testator, and is thus accountable for it to the estate.[63]

13–016 **Release of one debtor under an independent promise.** Problems similar to those discussed above can arise where A and B are not joint, or joint and several, debtors but are persons who have entered into, and then broken, two entirely separate contracts with C.[64] The losses suffered by C in consequence of these breaches may be related, e.g. where A and B are associated companies and A's wrongful termination of an agency contract with C on the ground of C's alleged but unsubstantiated misconduct leads B wrongfully to terminate a similar (but not identical) contract, also with C.[65] An agreement by which C settles his claim against A may be expressed to release C's claim against A in respect of loss suffered by C by reason, not only of A's, but also of B's, wrongful termination of the contracts with C;[66] and the effect, if any, of this agreement on C's claim against B depends on its construction.[67] If it meant that the sum paid in pursuance of it were intended to represent the full amount of C's loss, resulting from both

[58] *Johnson v Davies* [1999] Ch. 117; for earlier cases reaching the same conclusion, see *Price v Barker* (1855) 4 E. & B. 760; *Apley Estates Co v De Bernales* [1947] Ch. 217 (tort); cf. *Banco Santander SA v Bayfern Ltd* [2000] 1 All E.R. (Comm) 776 at 780 (release of one joint and several debtor by assignment of the creditor's right to that one). If payments made by the co-debtors who have been released extinguish the debt in full, there can be no surviving cause of action against any remaining co-debtor notwithstanding a reservation of rights against him: *Crooks v Newdigate Properties Ltd* [2009] EWCA Civ 283; [2009] C.P. Rep. 34.

[59] See *Gardiner v Moore*, [1969] 1 Q.B. 55.

[60] cf. *Cutler v McPhail* [1962] 2 Q.B. 292; *Deanplan Ltd v Mahmoud* [1993] Ch. 151 (where the liability of successive assignees of a lease was cumulative).

[61] Insolvency Act 1986 s.281(7); *Re Garner's Motors Ltd* [1937] Ch. 594.

[62] *Jenkins v Jenkins* [1928] 2 K.B. 501 at 509; Administration of Estates Act 1925 s.21A, as inserted by Limitation (Amendment) Act 1980 s.10.

[63] *Jenkins v Jenkins* [1928] 2 K.B. 501 at 509; *Commissioner of Stamp Duties v Bone* [1977] A.C. 511.

[64] For the distinction between the two types of promises, see above, para.13–002.

[65] As in *Heaton v Axa Equity and Law Life Assurance Society Plc* [2002] UKHL 15; [2002] 2 A.C. 329.

[66] *Heaton v Axa* [2002] UKHL 15; [2002] 2 A.C. 329, where A's (unsubstantiated) allegations of misconduct may also have influenced B.

[67] *Heaton v Axa* [2002] UKHL 15; [2002] 2 A.C. 329 at [8], [9], [27], [41].

breaches, then C, having been fully compensated for that loss by A, would have no further claim in respect of it against B.[68] But such an agreement to release A from liability for A's breach will not bar C's claim against B in respect of other causes of action (than B's breach of contract) which C may have against B or in respect of loss caused by B's breach to the extent to which that loss was attributable to B's (rather than to A's) breach.[69] The only effect of C's settlement with A on such a claim results from the principle that C cannot recover twice over the same loss: that is, C must give credit to B for sums paid by A under the settlement so far as they represent the loss suffered by C as a result of B's breach[70] for which A nevertheless accepted liability on the ground that this breach was a consequence of A's prior breach.

(iii) Contribution

13–017 If one co-debtor, being liable to pay the entire debt,[71] has paid it in full, he is entitled to recover contribution from the others.[72] Prima facie, he is entitled to recover from each co-debtor the amount of the debt divided by the number of co-debtors. If one of the co-debtors has died, his estate is liable to contribute, even if he was a joint debtor. The general rule may be varied by the terms of the contract or by the bankruptcy of one co-debtor.

13–018 **Terms of the contract.** The co-debtors can make any provision they like as to contribution. Where the co-debtors are principal debtor and surety, it is implied that the surety, if called on to pay, is entitled to be wholly indemnified by the principal debtor. Conversely, if the principal debtor pays the whole debt, he has no right of contribution against the surety. Several sureties for the same debt are prima facie entitled *inter se* to contribution in proportion to their number; but where one surety (A) promises to pay only if neither the debtor nor another surety (B) does so, and B pays on the debtor's default, then B will not be entitled to contribution from A.[73]

13–019 **Bankruptcy.** At common law, the rule that the amount of contribution was the amount of the debt divided by the number of co-debtors prevailed even though some of the co-debtors were insolvent.[74] Equity adopted the fairer rule that the

[68] *Heaton v Axa* [2002] UKHL 15; [2002] 2 A.C. 329 at [8].

[69] This was the outcome in the *Heaton* case.

[70] In the *Heaton* case, C accepted the need to give credit for such sums (paid by A) in their claim against B and this concession was evidently regarded as correct by Lord Mackay: [2002] UKHL 15; [2002] 2 A.C. 329 at [47], with whose reasoning Lords Bingham, Steyn and Hutton agreed.

[71] For this requirement, see *Legal & General Assurance Society v Drake Ins Co Ltd* [1992] Q.B. 887 where a debtor who was liable for only part of the debt, but had paid it in full, was held not to be entitled to contribution. Where a guarantee provided for payment on demand and one guarantor paid more than his share before any such demand had been made, he was nevertheless held entitled to contribution as the payment had not been made "officiously" and the making of the demand was said not to be a "condition precedent" of his liability: *Stimpson v Smith* [1999] 2 All E.R. 833.

[72] e.g. *Davitt v Titcumb* [1990] Ch. 110 at 117.

[73] *Scholefield Goodman & Sons Ltd v Zyngier* [1986] A.C. 562.

[74] *Lowe v Dixon* (1885) 16 Q.B.D. 455 at 458.

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amount of contribution was the amount of the debt divided by the number of sureties who were *solvent* when the right to contribution arose.[75] This equitable rule now prevails.[76]

2. PLURALITY OF CREDITORS

(a) Definitions

13–020 If X promises to pay A and B £10, he may make two separate promises, under which A and B are entitled to £10 *each*, so that X's total liability is to pay £20. No special problems arise out of such promises. But if X makes only one promise to A and B, so that he is liable to pay only £10 in all, it becomes important to determine whether his promise to A and B is made to them jointly, or whether it is made to them severally.

13–021 **Joint or several.** At common law, the question whether a contract was made with two persons jointly or with them severally depended on the wording of the contract, and on the interests of the parties in enforcing it. If the contract was made with a number of persons "jointly" and their interests were joint, it was a joint contract;[77] if it was made with a number of persons severally, i.e. "with them and each of them" and their interests were several, it was a several contract.[78] If the contract was ambiguous, or did not state whether it was joint and several, then it was joint if the interests of the creditors were joint, and otherwise several.[79] The interests of the creditors were joint if each had the same interest in the performance of the contract, even though they had separate interests in the property affected. Hence a covenant to repair made with a number of lessors jointly was joint, though they did not hold the land jointly, but in common, so that their interests in it were several.[80] On the other hand, where land was sold by tenants in common and the purchaser promised to pay them the price in fixed proportions corresponding with their shares in the land, the promise was regarded as several.[81] The position was less clear where the contract was expressly joint and the interests several, or conversely; but the prevailing view appears to be that the court would give effect to the intention of the parties, as expressed in the agreement.[82]

[75] *Hitchman v Stewart* (1855) 3 Drew. 271.
[76] *Lowe v Dixon* (1885) 16 Q.B.D. 455. The rules as to assessment of contribution laid down in Civil Liability (Contribution) Act 1978 s.2 do not alter this position: they apply to *damages* but not to *debts*; for this distinction, cf. below, para.21–001.
[77] cf. *Sorsbie v Park* (1843) 12 M. & W. 146 at 158.
[78] *James v Emery* (1818) 5 Price 529.
[79] e.g. *Anderson v Martindale* (1801) 1 East 487; *Palmer v Mallett* (1887) 36 Ch. D. 411.
[80] *Bradburne v Botfield* (1845) 14 M. & W. 559; *Thompson v Hakewill* (1865) 19 C.B. (N.S.) 713. For the position between the tenants in common *inter se*, see *Beer v Beer* (1852) 12 C.B. 60.
[81] *James v Emery* (1818) 5 Price 529.
[82] *Sorsbie v Park* (1843) 12 M. & W. 146 at 158; *Keightley v Watson* (1849) 3 Ex. 716; *Beer v Beer* (1852) 12 C.B. 60; for the earlier view that the interest of the parties was always decisive, see *Slingsby's Case* (1588) 5 Co. Rep. 18b.; *Withers v Bircham* (1824) 3 B. & C. 254 at 256; *Hopkinson v Lee* (1845) 6 Q.B. 964.

13–022 **Joint and several.** The common law did not originally recognise the possibility that a promise *to* a number of persons could be joint *and* several.[83] The possibility was, however, recognised in the late nineteenth century;[84] and the question is now of little importance as s.81 of the Law and Property Act 1925 provides that a covenant, and a contract made under seal[85] and a bond or obligation under seal made with two or more persons jointly, shall, if made after 1925, "be construed as being also made with each of them"[86] unless a contrary intention is expressed; where the instrument is executed by an individual, s.1 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that it need no longer be sealed: execution as a deed in accordance with the requirements of that section is sufficient.[87] Such covenants, etc. are now prima facie joint and several.[88] Section 81 of the 1925 Act applies only to promises in deeds;[89] its object seems to have been to avoid in relation to such promises the common law rule that on the death of a joint creditor his rights passed by survivorship[90] to the other or others. In this respect, it resembles the rule under which a contract for the repayment of money lent by a number of lenders was presumed in equity to create a several right in each lender, even though under the common law rules the contract was joint.[91] The presumption could be rebutted, e.g. if the lenders were trustees;[92] here survivorship was administratively convenient, and created no substantive injustice. It seems that promises regarded as several under s.81 and under the equitable presumption will be so regarded not only for the purpose of limiting the doctrine of survivorship, but also for the other purposes to be discussed below.

[83] *Slingsby's Case* (1588) 5 Co. Rep. 18b; *Anderson v Martindale* (1801) 1 East 487; *Bradburne v Botfield* (1854) 14 M. & W. 559 at 573; *Keightley v Watson* (1849) 3 Ex. 716 at 723 (criticising the rule).
[84] *Thompson v Hakewill* (1865) 19 C.B. (N.S.) 713 at 726; *Palmer v Mallett* (1887) 36 Ch. D. 410 at 421.
[85] See now Law of Property (Miscellaneous Provisions) Act 1989 s.1(7).
[86] The section does not affect the law relating to joint *debtors*: *Johnson v Davies* [1999] Ch. 117 at 127.
[87] Law of Property (Miscellaneous Provisions) Act 1989 s.1(8) and Sch.1. And see above, para.3–170 for execution of deeds by corporations.
[88] See *Josselson v Borst* [1938] 1 K.B. 723; for a statutory exception, see Law of Property Act 1925 s.119 (covenants with several mortgagees deemed to be joint).
[89] The primary meaning of "covenant" is a promise by deed: see *Rank Xerox Ltd v Lane (Inspector of Taxes)* [1981] A.C. 629 at 639. It seems that in Law of Property Act 1925, s.81, "covenant" refers to a promise which would not be binding unless it were under seal, and "contract … under seal" to one which would be binding even if it were not sealed.
[90] See below, para.13–025.
[91] *Steeds v Steeds* (1889) 22 Q.B.D. 537.
[92] *Steeds v Steeds* (1889) 22 Q.B.D. 537 at 542.

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same if, before that time, the contract was discharged by operation of law under the doctrine of frustration;[436] it would, in such a case, make no difference if the repudiating party had been unable to perform even if the frustrating event had not occurred.[437]

[436] *Avery v Bowden* (1855) 5 E. & B. 714; (1856) 6 E. & B. 953; cf. *The Playa Larga* [1983] 2 Lloyd's Rep. 171 at 186; for frustration, see below, Ch.19.

[437] *Continental Grain Export Corp v STM Grain Ltd* [1979] 2 Lloyd's Rep. 460 at 470.

CHAPTER 18

TERMINATION FOR BREACH[1]

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1. INTRODUCTION

18–001 **Terminology.** Termination in the present context is used to describe the remedy by which one party (the "injured party") is released from his obligation to perform because of the other party's defective or non-performance. It differs from other remedies such as damages, or specific performance, which seek to put the injured party into the position in which he would have been if the contract had been performed. It may, and often will, be used in combination with a claim for damages, provided the failure to perform also amounts to a breach.[2] In some circumstances, the injured party may wish not only to be released from his own obligation to perform, but to "undo" the transaction by returning the defective

[1] Devlin [1966] C.L.J. 192; Reynolds 79 L.Q.R. 534; Treitel 30 M.L.R. 139; Shea 42 M.L.R. 623; Beatson 97 L.Q.R. 389; Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012); Stannard & Capper, *Termination for Breach of Contract* (2014); *Carter's Breach of Contract* (2012).

[2] In the vast majority of cases failure to perform will amount to a *breach* of contract and that is the assumption made in this chapter, while acknowledging that in some cases there may be no breach because of a lawful excuse, see, e.g. *Poussard v Speirs & Pond* (1876) 1 Q.B.D. 410 at 414; below, para.18–035, fn.184. On lawful excuse generally, see above, para.17–059.

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performance and claiming back the consideration which he provided for it, e.g. he may return defective goods and sue for recovery of the price which he had paid for them.[3]

In earlier editions the term "rescission" was employed, rather than "termination". No term seems ideally suited.[4] In the *Photo Production* case, Lord Diplock described the use of either "determination" or "rescission" as "misleading" unless it was borne in mind that such rescission did not deprive the injured party of his right to claim damages for breach.[5] The chief source of this possible confusion seems, however, to lie with the word "rescission"[6] and the contrast with rescission *for misrepresentation*, the effect of which is to deprive the injured party of his claim in damages *for breach*. Therefore, while the courts and Parliament[7] may sometimes continue to use the term "rescission", "termination" is preferred here so as to distinguish clearly the remedy available specifically for breach.

18–002 **Policy considerations.** The law governing the right to terminate for breach is complex and difficult; and in this it reflects the difficulty which the courts have experienced in balancing or reconciling the conflicting interests of the parties in respectively seeking, and resisting, the remedy of termination.[8]

18–003 **Interests of the injured party.** The interests of the injured party in seeking termination may be grouped under three heads. First, termination will be his only remedy where the failure in performance is not, in fact, a breach.[9] Secondly, termination may, even where the failure is a breach, lead to a result which is more favourable to the injured party in monetary terms than a claim for damages. This will be true where the contract would have been a bad bargain for the injured party even if it had been duly performed;[10] and also where the loss or injury which he suffers is one for which he might not recover damages in an action for breach of contract, e.g. if his loss (or part of it) is irrecoverable because it is too remote.[11] Thirdly, the injured party may, by terminating, get a quicker and more efficacious remedy. A buyer who has not yet paid for defective goods will often prefer to "terminate" (in the sense of rejecting the goods and refusing to pay) than

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3 This remedy is more fully discussed below, paras 22–002—22–012.

4 It is also now quite common to see the remedy discussed in this chapter described as "discharge by breach". "Discharge" may be appropriate to describe the effect of the remedy on the obligations of the parties, but is not ideal vis-à-vis the contract itself: "[T]he aggrieved party is *discharged* from his obligations and can *rescind* the contract": Devlin [1966] C.L.J. 192. Even the word "by" may not be thought entirely appropriate since it tends to suggest an automatic process rather than one which depends on the election of the injured party; below, para.18–005.

5 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 851; below, para.18–020; cf. *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 C.L.R. 342.

6 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 844, per Lord Wilberforce; cf. an earlier criticism in *Heyman v Darwins Ltd* [1942] A.C. 356 at 399.

7 e.g. the Sale of Goods Act 1979 s.48(4).

8 Honnold 97 U. of Pa. L. Rev. 457.

9 See above, fn.2.

10 This is a constantly recurring problem: see above, para.17–039; below, paras 18–036, 18–048, 18–049.

11 See below, para.20–098 et seq.

to perform his side of the bargain and be left to pursue a claim for damages. By terminating he avoids the delays of litigation, and the risk that the seller's credit may fail.

Interests of the defaulting party. The party who fails to perform in accordance with the contract may have equally strong interests in resisting terminating. He may have incurred expenses in the course of performance, e.g. by paying commission on a sale or by transporting goods to a distant place; and these expenses will be thrown away if the contract is terminated. He may, in addition, have conferred benefits on the injured party who may be unjustly enriched by being allowed to terminate: termination of partly performed building contracts may, for example, produce this result.[12] And he may suffer hardship if the injured party is allowed to terminate on a falling market: he may be left with goods whose value has diminished by an amount far in excess of the loss which the defect in his performance would have caused to the injured party. 18–004

In balancing these conflicting interests, the courts have developed a number of rules and distinctions which prima facie determine the availability of termination as a remedy for breach. Further rules specify that the right to terminate, even where it is prima facie available, may be limited or barred by certain supervening factors. Before they are considered it is necessary to understand the nature and effect of termination.

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2. NATURE AND EFFECT OF TERMINATION

(a) Nature

No automatic termination.[13] A breach which justifies termination (sometimes referred to as a "repudiatory breach") does not automatically determine the contract.[14] It only gives the injured party the option either to terminate the contract or to affirm it and to claim further performance. This is generally the case, even if the contract says that it is to become "void" on breach.[15] Normally such a stipulation is construed[16] restrictively so as to prevent one party from 18–005

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12 See above, para.17–042.

13 cf. Carter 128 L.Q.R. 283.

14 *Heyman v Darwins Ltd* [1942] A.C. 356 at 361; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 at 368, 375, 381; *The Simona* [1989] A.C. 788 at 800; cf. the overruling in *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 of *Harbutt's "Plasticine" Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B. 447. See Thompson 41 M.L.R. 137, suggesting a possible reconsideration of the rule stated in the text.

15 cf. *Davenport v R.* (1877) 3 App. Cas. 115; *New Zealand Shipping Co v Société des Ateliers, etc., de France* [1919] A.C. 1. Automatic termination results only if the event on which the contract is expressed to come to an end occurs without breach of duty, as in *Brown v Knowsley BC* [1986] I.R.L.R. 102.

16 e.g. *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587; for the status of the rule as one of construction, capable of being excluded by contrary provision, see *Cheall v APEX* [1983] 2 A.C. 180 at 189; cf. *The Bonde* [1991] 1 Lloyd's Rep. 136 at 144; *BDW Trading Ltd v JM Rowe Investments Ltd* [2011] EWCA Civ 548 at [31]; but it may be more accurate to regard it as an implied term: see below, para.6–047.

relying on his own breach of duty to the other party.[17] The reason for the rule that termination depends on the injured party's election is that the guilty party should not be allowed to rely on his own wrong so as to obtain a benefit under the contract,[18] or to excuse his own failure of further performance, or in some other way to prejudice the injured party's legal position under the contract.[19] Thus the guilty party is not allowed to take advantage of the breach by arguing that the original contract is discharged, so as to be entitled to a quantum meruit for work done by him,[20] or that he need pay only at the market rate (below that fixed by the contract) for services rendered to him.[21] Nor is he allowed to rely on the breach so as to prevent the injured party from enforcing provisions in the contract which are advantageous to that party and which may operate after the breach (such as a valid exclusive dealing clause);[22] or so as to deprive the injured party of the chance of claiming specific relief,[23] or of obtaining a lien on the guilty party's property.[24]

18–006 **Employment contracts.**[25] There is some support for the view that termination is automatic where an employee does not continue to work for the employer after a repudiatory breach,[26] e.g. because he has been wrongfully dismissed.[27] One argument in support of this view is that, where the employee is no longer working for the employer (in consequence of the repudiation), the employment *relationship* has plainly come to an end,[28] even against the wishes of the injured party. But it does not follow from this that the *contract* of employment is similarly terminated:[29] the argument that the repudiating party should not be allowed to rely on his own wrong to deprive the injured party of valuable rights under the contract has as much force where the contract is one of employment as it has in relation to other contracts.

A further argument for the view that a contract of employment is automatically terminated by repudiatory breach is that, if the contract were not so terminated, a wrongfully dismissed employee would be entitled to sue for his wages until the time of his election to terminate; whereas it is settled that his remedy is in damages and not by action for the agreed wages.[30] But this argument fails to distinguish between the continued existence of the *contract*, and the *remedies* for its breach.[31] This point is by no means restricted to contracts of employment. Suppose, for example, that a buyer wrongfully repudiates an instalment contract for the sale of goods by refusing to accept further instalments. If the seller elects to treat the contract as remaining in existence, it does not follow that he can sue for the price of the undelivered instalments. His remedy is normally in damages, though the amount recoverable may depend on whether he elects to terminate.[32] Similarly, where a time charter is wrongfully repudiated by the charterer, the shipowner is not bound to accept the repudiation; but even if he elects to affirm his remedy may be in damages rather than for the agreed hire:[33] "It is ... the range of remedies which is limited, not the right to elect."[34] The same is true of contracts of employment: it does not follow from the continued existence of the contract that a wrongfully dismissed employee's *remedy* is by action for the agreed sum.[35] Thus it is submitted that the general rule applies to such contracts, i.e. that a repudiatory breach by either party does not lead to automatic termination, but only gives the injured party an option to terminate the contract.[36] This view was confirmed by a majority of the Supreme Court in *Geys v Société Générale*[37] in which the practical issue was the date of termination for the purpose of calculating a severance payment due to the employee.

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[17] For the requirement that the duty must be owed to the other party, see *Thompson v ASDA-MFI Group Plc* [1988] Ch. 241; contrast *Cheall v APEX* [1983] 2 A.C. 180 (breach of duty to third party).
[18] See *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587.
[19] *Alghussein Establishment v Eton College* [1988] 1 W.L.R. 587; contrast *Cheall v APEX* [1983] 2 A.C. 180 (breach of agreement with third party).
[20] *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch. D. 339 at 364. The circumstances in which the injured party may terminate for breach and claim a quantum meruit are discussed below: para.22–023 et seq.; cf. above, para.17–046.
[21] Example based on *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] A.C. 1 (where there was no breach).
[22] e.g. *Decro-Wall International v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361; cf. *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch. 227; *WPM Retail v Laing* [1978] I.C.R. 787 (employee preserving right to bonus after wrongful dismissal); *Lusograin Commercio Internacional de Cereas Ltda v Bunge AG* [1986] 2 Lloyd's Rep. 654 (seller's right to "carrying charges" (below, para.20–143) after repudiation by buyer). For exclusion of the rule by contrary agreement, see above, fn.16.
[23] See *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361; *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 588.
[24] *G Barker v Eynon* [1974] 1 W.L.R. 462.
[25] Ewing [1993] C.L.J. 405; Cabrelli and Zahn (2012) 41 I.L.J. 346.
[26] *Sanders v Ernest A Neale* [1974] I.C.R. 565; *Gannon v Firth* [1976] I.R.L.R. 415; cf. *Hare v Murphy Bros Ltd* [1974] I.C.R. 603; Thomson 38 M.L.R. 347; Napier [1975] C.L.J. 36.
[27] This is clearly not the position where he is able to continue to work: *Rigby v Ferodo Ltd* [1988] I.C.R. 29.
[28] *Micklefield v SAC Technology* [1990] 1 W.L.R. 1002 at 1006; *Delaney v Staples* [1992] 1 A.C. 687 at 692; *Wilson v St Helens BC* [1998] I.C.R. 1141 at 1152.
[29] *Gunton v Richmond-upon-Thames LBC* [1981] Ch. 448 at 474; followed, though with reluctance, in *Boyo v Lambeth LBC* [1995] I.C.R. 727; cf. above, para.15–052; *Micklefield v SAC Technology* [1990] 1 W.L.R. 1002; *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 A.C. 546 at 568. Conversely, the *relationship* may continue after the *contract* has come to an end: *Eastbourne BC v Foster* [2001] EWCA Civ 1091; [2002] I.C.R. 234.
[30] *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699 at 726; *Gunton v Richmond-upon-Thames LBC* [1981] Ch. 448 at 474; *Marsh v National Autistic Society* [1993] I.C.R. 453; cf. *Delaney v Staples* [1992] 1 A.C. 687 at 693; *Cerberus Software Ltd v Rowley* [2001] EWCA Civ 78; [2001] I.C.R. 376.
[31] See below, para.21–010, fn.29.
[32] See below, para.20–076.
[33] See below, para.21–013.
[34] *The Alaskan Trader (No.2)* [1983] 2 Lloyd's Rep. 645 at 651.
[35] e.g. *Silvey v Pendragon Plc* [2001] EWCA Civ 784; [2001] I.R.L.R. 685.
[36] *Simmons v Hoover Ltd* [1977] Q.B. 284; *Gunton v Richmond-upon-Thames LBC* [1981] 1 Ch. 448; *Burdett-Coutts v Hertfordshire CC* [1984] I.R.L.R. 91; *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 586 at 593, 595; cf. also *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361 at 369–370, 375–376, 380–381; the same assumption seems to underlie *Miles v Wakefield MDC* [1987] A.C. 539; below, para.18–024; Thompson 97 L.Q.R. 8 at 235; 98 L.Q.R. 423; 42 M.L.R. 91; McMullen [1982] C.L.J. 110; *Visscher v Honourable President Justice Giudice* (2009) 239 C.L.R. 361.
[37] [2012] UKSC 63; [2013] 1 A.C. 523 (Lord Sumption dissenting). Without suggesting that the decision was incorrect, it has been said to give rise to a number of "consequential conundrums": *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373; [2015] I.C.R. 272 at [58], per Longmore LJ.

An employment contract may, of course, confer an express power to terminate the contract[38] and may dispense with the need to give formal notice if some other mechanism is provided, e.g. making payment in lieu of notice.[39]

18–007 **Insurance Contracts.** At present,[40] in the law of insurance "warranty" is used in a sense similar to that now more usually given to "condition", i.e. to refer to a term, the breach of which justifies the injured party's refusal to perform.[41] But the exact legal effects of a breach of "warranty" in insurance law are not identical with those elsewhere given to a breach of "condition": in particular, there is no requirement in insurance law that an insurer who is the victim of a breach of "warranty" must take any steps to exercise his option to avoid liability. A statutory statement of the current position is given in s.33(3) of the Marine Insurance Act 1906, which provides that "[a] warranty is a condition which must be exactly complied with. If it be not so complied with, then … the insurer is discharged from liability as from the date of the breach of warranty."

The effect of these words was considered in *The Good Luck*,[42] where a ship had been insured under a policy entitling the insurers to declare certain areas as prohibited and containing a "warranty" that the shipowner would comply with any such prohibition. The policy was assigned to a bank (to which the ship had been mortgaged) and the insurers undertook to notify the bank "promptly" if they "ceased to insure" the ship. Some months later the ship was struck by an Iraqi missile while trading in the Persian Gulf (which had been declared by the insurers to be a prohibited area) and became a constructive total loss. A claim on the policy having been rejected, it was held that the insurers were liable on their undertaking to the bank. They had "ceased to insure" the ship as soon as she had entered the prohibited area: this breach of "warranty" released the insurers automatically,[43] without any election on their part.[44] This followed from the wording of s.33(3), by which the insurer "is discharged from liability as from the date of the breach of warranty". These words should be contrasted with those of the Sale of Goods Act 1979, giving a buyer, in cases of breach of condition, "a right to treat the contract as repudiated".[45] The principle of automatic discharge for breach of "warranty" in insurance law was explained by Lord Goff in *The Good Luck* on the ground that "fulfilment of the warranty is a condition precedent to the liability [or further liability] of the insurer".[46] At first sight this gives rise to some difficulty, for if performance of the warranty were a condition precedent it would follow that the insurer never became liable at all; while s.33(3) says that he is "discharged", thus suggesting that a pre-existing liability has been brought to an end. It may be that this difficulty can be resolved by reference to the special nature of an insurance contract. Such a contract differs from a more typical contract (such as one of sale) in which the parties bargain for an exchange of performances (i.e. of the goods for the price). In a contract of indemnity insurance the position is that the performance of one party (i.e. payment of the premium by the assured) is exchanged for the promise of the other[47] (i.e. that of the insurer to indemnify against the loss), and in the great majority of cases this promise does not have to be performed at all because the event insured against does not occur. The occurrence of this event is thus a contingent condition precedent[48] of the insurer's liability *to pay*, while on breach of the "warranty" he is "discharged" from his conditional promise even before the event occurs.

18–008 **Changes introduced by the Insurance Act 2015.** Part 3 of the Insurance Act 2015 will come into force on 12 August 2016[49] and will significantly alter the law as described in the preceding paragraph.[50] Section 33(3) of the Marine Insurance Act 1906 will no longer state that the insurer is discharged from liability as from the date of the breach of warranty[51] and, more generally, any rule of law that breach of warranty in an insurance contract results in discharge of the insurer's liability is abolished.[52] But while s.33(3) will continue to state that a warranty "is a condition which must be exactly complied with", the legal effects of a breach of "warranty" are still not made identical with those elsewhere given to a breach of "condition". Rather, for so long as a breach has occurred and has not been remedied,[53] the insurer's liability is only suspended, i.e. the insurer will have no liability for anything which occurs, or which is attributable to something happening,[54] during this period.[55] The insurer will remain liable in respect of losses occurring before the breach of warranty, or after it has been remedied, if capable of remedy.[56] The insurer's liability is not suspended if the warranty ceases to be applicable to the circumstances of the contract, or if compliance with

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[38] See below, para.18–063 et seq.
[39] In *Geys v Société Générale* [2012] UKSC 63; [2013] 1 A.C. 523, the employer was unable to rely on this alternative method of termination because it failed to comply with the procedure laid down: see below, para.18–064; cf. *Gisda Cyf v Barratt* [2010] UKSC 41; [2010] I.C.R. 1475 (effective date of termination for the purpose of claims under the Employment Rights Act 1996 s.97(1)).
[40] See the changes which will be introduced by the Insurance Act 2015: below, para.18–008.
[41] See below, para.18–042.
[42] [1992] 1 A.C. 233.
[43] cf. *Hussain v Brown* [1996] 1 Lloyd's Rep. 627 at 630, where, because of this "draconian" consequence of breach, the court refused to hold the "warranty" to be a *continuing* one.
[44] It follows that an insurer setting up breach of warranty as a defence does not thereby "rescind" the contract within the meaning of an exemption clause in the policy: *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep. 161 at [122].
[45] Sale of Goods Act 1979 s.11(3).

[46] *The Good Luck* [1992] 1 A.C. 233 at 263; the words in square brackets do not occur in this report but do occur in [1991] 3 All E.R. 1 at 16 and in [1991] 2 Lloyd's Rep. 191 at 202.
[47] cf. below, para.22–003.
[48] See above, para.2–103.
[49] Section 23(2).
[50] In addition to the change in the law discussed in the text, see also s.11 which limits the extent to which an insurer can exclude, limit or discharge its liability for non-compliance with any term of the contract (other than a term defining the risk as a whole) which would reduce the risk of loss of a particular kind, or at a particular location, or at a particular time.
[51] Section 10(7)(a).
[52] Section 10(1).
[53] As to which, see s.10(5) and (6).
[54] i.e. it is the relevant event which must have happened even if the loss is suffered after the breach has been remedied.
[55] Section 10(2).
[56] Section 10(4).

it is rendered unlawful by any subsequent law, or if the insurer waives the breach.[57] Where it takes effect, the suspension of the insurer's liability is automatic.

18–009 **Restrictions on injured party's choice.** Although termination depends (except in the insurance situation discussed) on the election of the injured party, that party's option is to some extent curtailed by the rule that the damages to which he is entitled may be reduced if he fails to take reasonable steps to mitigate his loss.[58] This rule will sometimes put pressure on the injured party to terminate, for one common way of mitigating loss is to make a substitute contract; and the effect of doing this will often be to put it out of the injured party's power to perform the old contract. Where this is the case, the making of the substitute contract will involve the termination of the original one. Thus if a wrongfully dismissed employee mitigates his loss by taking another job he will thereby be "taken to have accepted his wrongful dismissal as a repudiatory breach leading to a determination of the contract of service".[59] The same would be true where a seller, on the buyer's repudiation, disposed elsewhere of the subject-matter. In these cases the injured party is not under any legal obligation to make the substitute contract;[60] so that in this sense he remains free to choose between affirmation and termination. But his freedom of choice is limited in that, if he acts unreasonably in failing to make such a contract, he will suffer a reduction in the damages to which he is entitled by reason of breach of the original contract.

Conversely, the mitigation rules may require the injured party to accept performance from the party in breach even though it is not in accordance with the contract, e.g. they may require a buyer to accept late delivery.[61] In such a case, the mitigation rules again do not, strictly speaking, restrict the injured party's right to terminate, but they do require him, having terminated, to enter into a new contract for late performance at the original price (subject to damages for delay).[62] The injured party does not commit any breach of duty by failing to enter into such a new contract, but his failure to do so will reduce the damages to which he is entitled for breach of the original contract. Hence his freedom of choice will, as a practical matter, be restricted, this time in the direction of putting him under pressure to accept performance, though subject to relatively minor modifications.

18–010 **Exercise of the option to terminate: an "unequivocal" intention.** The question whether the option to terminate has been exercised has been described as one of fact;[63] but this description assumes that a number of legal requirements have been

[57] Section 10(3).
[58] See below, para.20–114.
[59] *Gunton v Richmond-upon-Thames LBC* [1981] Ch. 448 at 468. The same result can follow where the employee continues to work for the employer "on an entirely different basis" from that of the repudiated contract: *Eastbourne BC v Foster* [2001] EWCA Civ 1091; [2002] I.C.R. 234.
[60] See below, para.20–114.
[61] *The Solholt* [1981] 2 Lloyd's Rep. 574 (affirmed [1983] 1 Lloyd's Rep. 605).
[62] *The Solholt* [1983] 1 Lloyd's Rep. 605, criticising *Strutt v Whitnell* [1975] 1 W.L.R. 870 for failing to observe the distinction drawn in the text.
[63] *Kish v Taylor* [1912] A.C. 604 at 617; *Agrokor AG v Tradigrain SA* [2000] 1 Lloyd's Rep. 497 at 500.

satisfied. The prime requirement is that the behaviour of the injured party must unequivocally indicate his intention to exercise the option.[64] For example, a notice which purports to terminate the contract, but stipulates *unilaterally* that it shall continue to be performed on a without prejudice basis is not effective.[65] A notice of intended termination at a later date if certain conditions are not fulfilled is not effective unless the threatened termination is then implemented.[66]

18–011 **Silence and inactivity.** Normally mere "silence and inactivity"[67] will not suffice for this purpose, but there is no absolute rule to this effect. Thus in *Vitol SA v Norelf Ltd*[68] a contract for the sale of propane was wrongfully repudiated by the buyer and, after receiving the repudiation, the seller made no attempt to take any of the steps which he would have been expected to take for the purpose of performing the contract,[69] if he were treating it as still in force. The House of Lords held that an arbitrator's finding that the seller had accepted the repudiation was not wrong in law; for, even if the seller's reaction to the breach could be described as "inactivity", it was in the circumstances not equivocal since it clearly conveyed to the buyer that the seller was treating the contract as at an end.

18–012 **Whether notice of termination required.** The option to terminate will commonly be exercised by giving notice to this effect to the party in breach,[70] and sometimes such notice must be given, e.g. where the injured party seeks the return of property with which he has parted under the contract.[71] But there is plainly no such requirement where "inactivity" suffices for the exercise of the option; nor does notice seem to be necessary where the injured party has put it out of his power to perform the original contract by making a substitute contract to

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[64] *Sookraj v Samaroo* [2004] UKPC 50 at [17].
[65] *Leofelis SA v Lonsdale Sports Ltd* [2008] EWCA Civ 640; [2008] E.T.M.R. 63. After termination, the parties may *agree* to the continued performance of the contract on a without prejudice basis, which *may* avoid a finding of repudiation by the party serving the notice if it is later found to be invalid (cf. *Federal Commerce Navigation Co Ltd v Molena Alpha Inc* [1979] A.C. 757), and will serve to mitigate any loss if there is a finding of repudiation.
[66] *Standard Bank Plc v Agrinvest International Inc* [2010] EWCA Civ 1400; [2010] 2 C.L.C. 886. The wording of the relevant letter in that case ("we will close out …") does not rule out an effective "conditional" termination without the need to take any additional steps.
[67] *State Trading Corp of India v M Golodetz Ltd* [1989] 2 Lloyd's Rep. 277 at 286; *Glencore Grain Rotterdam BV v LORICO* [1997] 2 Lloyd's Rep. 386 at 394. cf. below, para.17–079.
[68] [1996] A.C. 800.
[69] Such as tendering shipping documents as "a precondition to payment of the price": *Vitol SA v Norelf Ltd* [1996] A.C. 800 at 811. Contrast *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep. 89 at 96 (failure to take steps to perform another contract with a third party not sufficient).
[70] Notice to a third party may suffice where the defendant cannot be traced: *Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG* [2002] C.L.C. 1246 at [30]. A notice *of termination* is valid notwithstanding that it refers to a notice *of default* which is found to be invalid, in circumstances where it is possible to rely instead on an earlier valid notice of default: *Reinwood Ltd v L Brown & Sons Ltd* [2008] EWCA Civ 1090; 121 Con L.R. 1 (based on the general rule referred to in para.17–062).
[71] *Lakshmijit v Sherani* [1974] A.C. 605.