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# Chapter 3

## Contents

**Jason Chuah**

The first four editions of this chapter were written by Elizabeth Macdonald. The editors would like to say that it still owes a great deal to her.

Most contracts can be made orally, in writing, or a combination of both. A question of whether what is said is an express term of the contract will depend on a number of factors developed and discussed in-depth in this document. The following are addressed: statements in contracts; collateral contracts; parole evidence rule; written terms or notices from signed contractual documents; and notice of contractual terms from unsigned documents.

## A Express Terms

### *Statements*

#### Basic approach

##### [3.1]

Most contracts can be made orally or in writing or there may be a combination of oral and written terms<sup>1</sup>. The question will be whether what was said became a term of the contract and it is often put in terms of whether the statement was a warranty or a representation. In this context warranty is used 'in its ordinary English meaning to indicate a binding promise'<sup>2</sup>, rather than a particular type of term, in contrast to those situations in which what is in question is the type of term and 'warranty' is then used in distinction to the classification of terms as conditions or innominate terms<sup>3</sup>. A statement may be both a term and a misrepresentation, and if it is not a term but a mere representation, a remedy may, nevertheless, be available, if it is untrue, if it constitutes a misrepresentation. Damages<sup>4</sup> are now quite readily available for

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But see para [2.261](#) ff.

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*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 374.

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*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 374:

'They use [warranty] to denote a subsidiary term in a contract as distinct from a vital term which they call a "condition". In doing so they depart from the ordinary meaning not only of the word 'warranty' but also of the word "condition". There is no harm in this, so long as they confine this technical use to its proper sphere, namely to distinguish between a vital term, the breach of which gives the right to treat the contract as at an end, and a subsidiary term which does not. But the trouble comes when one person uses the word "warranty" in its ordinary meaning and another uses it in its technical meaning ...'

On conditions, warranties and innominate terms see para [3.34](#).

4

Damages are awarded on different bases for a breach and a misrepresentation.

misrepresentation<sup>5</sup>, but, before the mid-1960s, they were only available for misrepresentations which were fraudulent<sup>6</sup> and, although any misrepresentation makes a contract voidable<sup>7</sup>, at that time, their very limited availability for misrepresentation provided an added impetus for the courts to find that such statements had become terms<sup>8</sup>. It is possible that a statement may be found not to be a term of the main contract but of a collateral contract<sup>9</sup>.

'To create a warranty no special form of words is needed'<sup>10</sup> but it is well established that a statement 'can only be a warranty provided it appear on evidence to be so intended'<sup>11</sup>. In other words, the basic test is that of the intention of the parties<sup>12</sup>, and it 'depends on the conduct of the parties, on their words and

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Section 2(1) Misrepresentation Act 1967: see chapter 4.

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le prior to the provision of a damages remedy in Misrepresentation Act 1967, s 2(1) and prior to the provision of a common law remedy for negligent misstatement in *Hedley, Byrne & Co v Heller & Partners* [1964] AC 465 (and the recognition that it was still available even if the statement became a term: *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

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Rescission may become barred: para 3.51 ff.

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See *Esso Petroleum v Mardon* [1976] QB 801, Lord Denning MR at 817:

'Ever since *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30 we have had to contend with the rule as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege ... that the misrepresentation was fraudulent, or alternatively a collateral warranty. At that time we nearly always succeeded on collateral warranty ... more often than not the court elevated the innocent misrepresentation into a collateral warranty and thereby did justice in advance of the Misrepresentation Act 1967.'

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See para 3.3.

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*De Lasalle v Guildford* [1901] 2 KB 215, AL Smith MR at 222.

11

*Heilbut Symons & Co v Buckleton* [1913] AC 30, Viscount Haldane at 38, Lord Moulton at 50; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 375, Hodson LJ at 378; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623, Salmon LJ at 629; *De Lasalle v Guildford* [1901] 2 KB 215 at 222; *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615.

12

But see the *dictum* of Lord Denning MR in *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623 at 627:

'It seems to me that if a representation is made in the course of dealing for a contract for the very purpose of inducing that other party to act upon it, by entering into the contract, that is prima facie ground for inferring it was intended as a warranty ... But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, in that he was in fact innocent of fault in making it, and that it would not be reasonable in the circumstances for him to be bound by it.'

behaviour, rather than on their thoughts<sup>13</sup>. It is their intention, objectively ascertained. It must be deduced 'from the totality of the evidence'<sup>14</sup>. There are factors which have been identified as highly relevant<sup>15</sup> in the determination of whether the requisite intention that the statement was to have contractual effect was present, but none of them is decisive<sup>16</sup>.

## Factors

### [3.2]

The importance of a statement to the making of the contract may be a highly relevant factor. It may be clear to both sides that a certain element was very important to one of the parties in the decision to contract. It may be that, in the absence of a statement on that element, by the other party, there would have been no contract<sup>1</sup>, or no contract at the price agreed<sup>2</sup> and the statement may then well be found to have been intended as a term<sup>3</sup>. As, for example, where one party stated that he would not even ask the price of the other party's hops if sulphur had been used in growing them and that other party then named his price. It was found to be a term of the contract that sulphur had not been used in growing the hops<sup>4</sup>.

An indication that a statement by one party, can be relied upon, and need not be verified, may indicate that it should be regarded as a term. A prospective seller may indicate to a potential buyer that he, or she, can rely upon the seller's statement as to the condition of the goods, and need not check them for him-, or

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The latter part of this may be seen as indicating a test of reasonable reliance for a term but when it was referred to in *Esso Petroleum v Mardon* [1976] QB 801, it was only the first part, with its reference to intention which was quoted. In addition, it is possible to see the latter part of the dictum as merely in keeping with the fact that the intention test is objective.

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*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 375; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623 Lord Denning MR at 627; *Eyre v Measday* [1986] 1 All ER 488, Slade LJ at 492-3; *Thake v Maurice* [1986] QB 644.

14

*Heilbut Symons & Co v Buckleton* [1913] AC 30, Lord Moulton at 50.

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Delay between the making of the statement and the contract has been seen as of some relevance: *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615. But see *Schawel v Reade* [1913] 2 IR 64.

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*Heilbut Symons & Co v Buckleton* [1913] AC 30, Lord Moulton at 50; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 376, Hodson LJ at 378.

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*Bannerman v White* (1861) 10 CBNS 844; *De Lassalle v Guildford* [1901] 2 KB 215; *Couchman v Hill* [1947] KB 554; *Harling v Eddy* [1951] 2 KB 739.

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*Esso Petroleum v Mardon* [1976] QB 801. But see *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370.

3

*Bannerman v White* (1861) 10 CBNS 844; *De Lassalle v Guildford* [1901] 2 KB 215; *Esso Petroleum v Mardon* [1976] QB 801.

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*Bannerman v White* (1861) 10 CBNS 844.

her- self and that may then lead to the conclusion that the seller's statement is a term of the contract of sale<sup>5</sup>. For example, the soundness of a horse became a term of a contract because when the purchaser had been inspecting it, the seller had said 'You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse, I would tell you'<sup>6</sup>. In such a situation, 'it becomes plain by the words, and the action, of the parties that it is intended that in the purchase the responsibility of the soundness shall rest upon the vendor'<sup>7</sup>. However, the situation may be otherwise where the statement is accompanied by some indication that it should not be relied upon. There may be, for example, some qualifying phrase added to the statement, such as 'so far as the vendor knows'<sup>8</sup> or a suggestion that an independent assessment of the contract goods should be obtained<sup>9</sup>. Alternatively, the fact situation may make it clear that the statement is one that the other party would normally be expected to verify<sup>10</sup>, or there may be a trade practice to that effect<sup>11</sup>.

Disparity of knowledge, expertise or experience between the parties may be relevant factors in determining if a term is intended. When a statement of fact is in question, it is more likely to be found to be a warranty if it is within the maker of the statement's own knowledge<sup>12</sup> or if that person is in the better position to ascertain the truth<sup>13</sup>. The relevant intention is less likely to be found if the maker of the statement has to rely on some secondary source of information, particularly if he, or she, is in no better position to ascertain the facts than the other party<sup>14</sup>. For example, when a consumer told a dealer the age

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*Schawel v Reade* [1913] 2 IR 64.

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*Schawel v Reade* [1913] 2 IR 64.

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*Schawel v Reade* [1913] 2 IR 64, Loud Moulton at 86.

8

*Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493. Or the qualification that the statement is made 'to the best of [his or her] knowledge and belief' by its maker: *Hummingbird Motors Ltd v Hobbs* [1986] RTR 276. But see the discussion of statements of opinion, in this para.

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*Ecay v Godfrey* (1947) 80 LI L Rep 286.

10

See *Mahon v Ainscough* [1952] 1 All ER 337 and *Strover v Harrington* [1988] Ch 390 for an analogous situation.

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This would seem to be the explanation of the different conclusion in *Hopkins v Tanqueray* (1854) 15 CB 130 to that reached in *Schawel v Reade* [1913] 2 IR 64.

12

*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 375; *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615, Denning LJ at 623.

13

*Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623.

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As was the case in *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370. See also *Routledge v McKay* [1954] 1 All ER 855, [1954] 1 WLR 615. But see *Beale v Taylor* [1967] 3 All ER 253, [1967] 1 WLR 1193.

of the car he wished to sell, relying on the log book, which he produced for the dealer, the age of the car, which was wrong, was not found to be a term of the contract<sup>15</sup>. In contrast, a car dealer was held liable in relation to erroneous statements about the mileage of a car he was selling<sup>16</sup>. In relation to a statement of opinion, it has been said that 'a representation of fact is much more likely to be intended to have contractual effect than a statement of opinion'<sup>17</sup>, but if there is a disparity of expertise or experience between the parties, so that the maker of the statement is in the better position to reach the relevant opinion, the necessary intention may be found<sup>18</sup>. However, when what is in question is, for example, an opinion as to future sales, such as an estimate of the annual sales of a new petrol station, the warranty found may not be a guarantee that the amount estimated will be achieved but rather that the estimate was arrived at by the use of reasonable care and skill<sup>19</sup>.

Some aspects of these propositions are likely to change when the Consumer Rights Bill 2014 is adopted. As regards consumer contracts for the supply of goods, any pre-contractual information required to be provided by the supplier under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013<sup>20</sup> shall be treated as terms of the contract<sup>21</sup>. As for consumer contracts for the supply of services, the Bill states that:

every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or on behalf of the trader, about the trader or the service, if—

- (a) it is taken into account by the consumer when deciding to enter into the contract, or
- (b) it is taken into account by the consumer when making any decision about the service after entering into the contract.<sup>22</sup>

The parole evidence rule is considered below<sup>23</sup>. Here it can be noted that the recording of contract terms in writing, omitting the contested statement, may indicate that the statement was not intended to be of

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*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370.

16

*Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65, [1965] 1 WLR 623.

17

*Esso Petroleum Ltd v Mardon* [1976] QB 801 at 826.

18

*Esso Petroleum Ltd v Mardon* [1976] QB 801 at 826; *De Lassalle v Guildford* [1901] 2 KB 215, AL Smith MR at 222 (but note that no factor is decisive: *Heilbut Symons & Co v Buckleton* [1913] AC 30, Lord Moulton at 50).

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*Esso Petroleum Ltd v Mardon* [1976] QB 801; see also *Hummingbird Motors Ltd v Hobbs* [1986] RTR 276, Kerr LJ at 281.

20

SI 2013/3134.

21

Clause 12, Consumer Rights Bill 2014 (as presented to the House of Lords for second reading, July 2014).

22

Clause 50, Consumer Rights Bill 2014 (as presented to the House of Lords for second reading, July 2014).

contractual effect<sup>24</sup>. It may be found that the document was intended to record all the terms<sup>25</sup>, but, even where the other terms are in writing, oral statements may be found to be intended to have contractual effect, either as terms of the main contract or of a collateral contract<sup>26</sup>. It will be a matter of what other factors are present.

## *Collateral contracts*

### [3.3]

The courts may, on occasion, find that although a statement is not part of the main contract, it is part of a collateral contract<sup>1</sup>. Collateral contracts have tended to be found where there is some obstacle in the way of finding that the statement is a term of the main contract or where it would be ineffective if such a finding was made. They have, for example, in appropriate cases, been found to avoid the effect (or the perceived effect) of the parole evidence rule<sup>2</sup>, of exemption clauses<sup>3</sup> and of the doctrine of privity of contract<sup>4</sup>. They require all of the elements of any other contract such as an intention to create legal relations and consideration<sup>5</sup> and in *Heilbut, Symons & Co v Buckleton*<sup>6</sup> Lord Moulton said:

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See para 3.4.

24

*Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 376.

25

*T & J Harrison Ltd v Knowles and Foster* [1918] 1 KB 608, Pickford LJ at 609.

26

*Birch v Paramount Estates (Liverpool) Ltd* (1956) 167 EG 396; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, [1957] 1 WLR 370, Lord Denning MR at 376.

1

*Mann v Nunn* (1874) 30 LT 526; *Angell v Duke* (1875) 32 LT 320; *Henderson v Arthur* [1907] 1 KB 10; *Heilbut, Symons & Co v Buckleton* [1913] AC 30; *Jameson v Kinmell Bay Land Co* (1931) 47 TLR 593; *Couchman v Hill* [1947] KB 554; *Hill v Harris* [1965] 2 QB 601; *Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078; *Charnock v Liverpool Corpn* [1969] 3 All ER 473, [1968] 1 WLR 1498; *Brown and Davies Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *Brikom Investments v Carr* [1979] QB 467; *IBA v EMI Electronics Ltd* (1980) 14 BLR 1; *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Thinc Group v Armstrong* [2012] EWCA Civ 1227.

2

[1951] 2 KB 854.

3

See further in this para.

4

*Eg Webster v Higgin* [1948] 2 All ER 127; *Andrews v Hopkinson* [1957] 1 QB 229.

5

See below in this para.

6

[1913] AC 30 at 47.

‘Such collateral contracts, the sole effect of which is to vary or add to the terms of the written contract, are therefore viewed with suspicion by the law ... Not only the terms of such contracts but the *animus contrahendi* on the part of the parties to them must be shown.’

However, the strength of the impetus against a collateral contract must be doubted<sup>7</sup>, and albeit against the background of the making of the main contract, consideration should be given to the same type of factors<sup>8</sup> as those indicated above as relevant to the question of whether a statement was intended as a term of a contract<sup>9</sup>. Where it is a collateral contract which is in question, the indicator of the intention that the statement should be a term will often be that the main contract would not have been made without it<sup>10</sup>. In *De Lassalle v Guildford*<sup>11</sup>, for example, a tenant had only executed a lease after the landlord gave an assurance that the drains were in a satisfactory condition. No term to that effect was included in the lease, but the defects in the drains made the landlord liable under a collateral contract.

Collateral contracts have been found where it has been argued that an oral statement cannot be part of the main contract because of the parol evidence rule. It has been said that the finding of a collateral contract ‘eases the consciences of those who believe that the parol evidence rule is a strict and meaningful prohibition’<sup>12</sup>. It was originally thought a statement could be found to be part of a separate collateral contract only if the statement merely added to the written document and did not vary or contradict it<sup>13</sup>. However, that must now be doubted. In *City & Westminster Properties Ltd v Mudd*<sup>14</sup> a

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Although (distinguishing *Shanklin Pier v Detel Products Ltd* [1951] 2 KB 854 – see below) the point has recently been made that, ‘Lord Moulton’s words apply even more strongly to the present case where it is sought not to vary the terms of a written contract but to make the defendants additionally liable to the another party for the same performance but with greater potential liabilities.’: *Jonathan Wren & Co Ltd v Microdec plc* (1999) 65 Con LR 157, [64].

8

It has been indicated that there cannot be a collateral contract in relation to something ‘central’ to the main contract: *Hamed El Chiaty & Co v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd’s Rep 399 at 407. But see Law Com Rep No 154 (note 86, p 20):

‘... We are not aware of an English case in which it has been suggested that a collateral contract might not be valid because its subject matter is so important to the transaction as a whole that the contract can no longer be described as “collateral”... In addition, it may be noted that the ordinary meaning of collateral does not necessarily denote subordination.’

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See para 3.2.

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Eg *Morgan v Griffith* (1871) LR 6 Exch 70; *Erskine v Adeane* (1873) 8 Ch App 756; *Newman v Gatti* (1907) 24 TLR 18 at 20; *Couchman v Hill* [1947] KB 554; *Webster v Higgin* [1948] 2 All ER 127; *Harling v Eddy* [1951] 2 KB 739; *City & Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129; *Evans (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078; *Brikomm Investments v Carr* [1979] QB 467; *Hamed El Chiaty & Co v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd’s Rep 399 at 407.

11

[1901] 2 KB 215.

12

Wedderburn ‘Collateral Contracts’ [1959] CLJ 58 at 69. On the parol evidence rule see para 3.4.

13

*Mann v Nunn* (1874) 30 LT 526; *Angell v Duke* (1875) 32 LT 320; *Henderson v Arthur* [1907] 1 KB 10.



collateral contract was found which rendered unenforceable a right of one of the parties under the main contract. The case was concerned with the renewal of a lease of a shop by Mr Mudd, who also slept on the premises. At the renewal, the plaintiff wished to include a new term stating that the premises were only to be used for business purposes. Mr Mudd made it clear that he wished to go on residing on the premises and that he would not accept the new term. He only accepted the new lease, with the new term, after the plaintiff stated that, if he signed the lease, no objection would be made to his continuing to live on the premises. Had Mr Mudd not thought that he would be able to continue to live on the premises he would not have signed the new lease, but moved to other premises which were available at the time. Subsequently, the plaintiff sought forfeiture of Mr Mudd's lease on the basis that he was in breach of its terms by residing on the premises. Harman J dismissed the action for forfeiture. 'There was a clear contract acted upon by the defendant to his detriment and from which the plaintiff [could not] be allowed to resile'<sup>15</sup>.

Collateral contracts have also been found where the main contract is not made between the same two parties and, in effect, the finding of a collateral contract avoids the effect of the privity rule. In *Shanklin Pier Ltd v Detel Products Ltd*<sup>16</sup> the pier owners, who had wished to have their pier painted, had been assured by Detel Products that their paint was suitable and would last for seven to ten years. On the basis of that assurance, the pier owners had specified that the painters, with whom the pier owners had contracted for the painting of the pier, should use Detel Products' paint. The painters used the paint but it proved unsatisfactory and only lasted about three months. The pier owners wished to sue Detel Products but it was the painters who had purchased the paint from Detel. Nevertheless, it was held that the pier owners could succeed in an action for breach of contract against Detel Products. The statement as to the suitability of the paint formed a collateral contract of the form 'if Detel Products' paint is specified for purchase by the painters then we (Detel Products) undertake its suitability for the job'<sup>17</sup>.

As has been indicated, a collateral contract, just like any other, requires there to be an intention to be bound<sup>18</sup> and consideration<sup>19</sup>. The consideration for the promise in the collateral contract is usually entering into the main contract. Lord Moulton stated:<sup>20</sup>

'It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. "If you will make such and such a contract I will give you one hundred pounds," is in every sense of the word a complete legal contract. It is collateral to

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[1959] Ch 129, see Wedderburn [1959] CLJ 58, at 83–84. Based on *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133 a no conflict rule still applies in Australia.

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[1959] Ch 129 at 145–146. See also *Couchman v Hill* [1947] KB 554; *Brikom Investments v Carr* [1979] QB 467.

16

[1951] 2 KB 854. But see *Jonathan Wren & Co v Microdec plc* (1999) 65 Con LR 157, n 7 above.

17

See also *Charnock v Liverpool Corpn* [1968] 3 All ER 473, [1968] 1 WLR 1498; *Brown and Davies Ltd v Galbraith* [1972] 3 All ER 31, [1972] 1 WLR 997.

18

*Heilbut, Symons & Co v Buckleton* [1913] AC 30, Lord Moulton at 45–46.

19

*Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47.

20

*Heilbut, Symons & Co v Buckleton* [1913] AC 30 at 47.

the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.’

In addition, as was pointed out in the *Shanklin Pier* case, there is ‘no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A’<sup>21</sup>.

## *The parol evidence rule*

### **The rule**

#### **[3.4]**

The parol evidence rule may be seen as encompassing three rules<sup>1</sup>:

- (i) A version of the ‘best evidence’ rule<sup>2</sup>.
- (ii) A rule dealing with the admissibility of evidence for the purposes of varying, contradicting or subtracting from the terms of a document.
- (iii) A rule dealing with the admissibility of evidence to aid the construction of documents.

It is the second of these ‘rules’ which must be considered here and which will now be referred to as the parol evidence rule. The type of situation to which it is relevant is that in which there is a written document<sup>3</sup> containing contract terms and the question arises whether evidence can be given to show that the parties agreed to additional express terms which were not contained within the written document. It has been said that it ‘is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written document’<sup>4</sup> and it has been seen as ‘a salutary rule which prevented great inconvenience and troublesome litigation in many instances’<sup>5</sup>. Although referred to as the

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<sup>21</sup>

[1951] 2 KB 854 at 856.

<sup>1</sup>

Law Com WP No 70, paras 4–7, Law Com Rep No 154, para 1.2. *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd’s Rep 127.

<sup>2</sup>

is a rule dealing with the proof of the contents of a document by means other than the production of the document.

<sup>3</sup>

Or documents where there is incorporation from another document by reference: *Jacobs v Batavia and General Plantations Trust Ltd* [1924] 1 Ch 287.

<sup>4</sup>

*Jacobs v Batavia and General Plantations Trust* [1924] 1 Ch 287, Lawrence J at 295; *Evans v Roe* (1872) LR 7 CP 138; *Inglis v Buttery* (1878) 3 App Cas 552; *Leggott v Barrett* (1880) 15 Ch D 306; *Miller v Travers* (1832) 8 Bing 244; *National Bank of Australasia v Falkingham & Sons* [1902] AC 585 at 591; *Henderson v Arthur* [1907] 1 KB 10; *Hitchings & Coulthurst Co v Northern Leather Co of America* [1914] 3 KB 907; *O’Connor v Hume* [1954] 2 All ER 301, [1954] 1 WLR 824 at 830; *Thorne (LG) & Co Pty Ltd v Thomas Borthwick & Sons (Australasia) Ltd* (1956) 56 SRNSW 81 at 88; *Edwards v O’Connor* [1991] 2 NZLR 542; *Mercantile Bank of Sydney v Taylor* [1893] AC 317; *Pickering v Dowson* (1813) 4 Taunt 779; *Bank of Australasia v Palmer* [1897] AC 540 at 545; *National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785 at 818–819; *WF Trustees Ltd v Expo Safety Systems Ltd* (1993) Times, 24 May.

<sup>5</sup>

'parol evidence rule' it has extended beyond oral statements to written documents which were not part of the relevant document<sup>6</sup>, such as earlier proposed terms<sup>7</sup>, drafts<sup>8</sup> or preliminary agreements<sup>9</sup>.

## Misnomer as a rule

### [3.5]

However, the idea of the parole evidence rule as a 'rule', was considerably undermined by the numerous exceptions to it, particularly as further terms could be found in a collateral contract<sup>1</sup> but, even more fundamentally, in its non-applicability where the written document, or documents, was (or were) simply found not to be intended<sup>2</sup> to contain the whole of the parties' contract<sup>3</sup>. In *J Evans & Son (Portsmouth) Ltd v Andre Merzario Ltd*<sup>4</sup> it was said that the rule 'has little or no application where one is not concerned with a contract in writing ... but with a contract which ... was partly oral, partly in writing and partly by conduct'<sup>5</sup>. The impact of that 'exception' was recognised in *Yani Haryanto v E D & F Man (Sugar) Ltd*<sup>6</sup>. Staughton LJ said<sup>7</sup>:

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*Mercantile Agency Co Ltd v Flitwick Chalybeate Co* (1897) 14 TLR 90, Lord Halsbury at 90.

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Or added to it by reference: *Jacobs v Batavia & General Plantations Trust Ltd* [1924] 1 Ch 287.

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*Inglis v Buttery* (1878) 3 App Cas 552.

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*Miller v Travers* (1832) 8 Bing 244; *National Bank of Australasia v Falkingham & Sons* [1902] AC 585 at 591.

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*Hutton v Watling* [1948] Ch 398; *Leggott v Barrett* (1880) 15 Ch D 306.

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See para 3.3. It will often make no difference whether the disputed 'term' is found to be part of the main contract or of a collateral contract eg *De Lassalle v Guildford* [1901] 2 KB 215; *Mendelssohn v Normand Ltd* [1970] 1 QB 177 at 186; *J Evans & Son (Portsmouth) Ltd v Andre Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078. See also Wedderburn 'Collateral Contracts' [1959] CLJ 58 at 71; Law Com no 154, para 2.34.

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The intention of the parties must be objectively ascertained: see Law Com No 154, para 2.14.

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*Allen v Pink* (1838) 4 M & W 140 at 144; *Harris v Rickett* (1859) 4 H & N 1 at 7; *Malpas v London and South Western Rly Co* (1866) LR 1 CP 336; *Mercantile Bank of Sydney v Taylor* [1893] AC 317 at 321; *Gillespie Bros & Co v Cheney, Eggar & Co* [1896] 2 QB 59; *Turner v Forward* [1951] 1 All ER 746 at 749; *J Evans & Son (Portsmouth) Ltd v Andre Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078; *Yani Haryanto v E D & F Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44 at 46; *Guardian Ocean Cargoes Ltd v Banco Do Brasil SA* [1991] 2 Lloyd's Rep 68 at 80.

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[1976] 2 All ER 930, [1976] 1 WLR 1078.

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[1976] 2 All ER 930, [1976] 1 WLR 1078, Roskill LJ at 1083.

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‘Having heard all the evidence, I am left in no doubt whatever that the parties did not intend the written contracts to contain the whole terms of their bargain ... If it be objected that there can scarcely be anything left of the parol evidence rule when this case is within an exception to it, so be it. The rule may once have been beneficial in discouraging litigation, but I do not see that it has any tendency to promote justice.’

On close consideration of the rule the Law Commission indicated the inappropriateness of viewing it as a rule<sup>8</sup>, as such, and ‘clearly discussed and explained’ the ‘circular nature of the rule’<sup>9</sup>:

‘When it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be as recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract.’<sup>10</sup>

They continued to use the label ‘parol evidence rule’ for the sake of established practice, but it may be seen as doing nothing more than expressing a presumption<sup>11</sup> and it was seen as such by Lord Russell CJ in *Gillespie Bros & Co v Cheney, Eggar & Co*<sup>12</sup>:

‘although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement.’

However, even viewing it as a ‘presumption’ must be treated with caution. It may be said that ‘the rule has no application unless it is first determined that the terms of the agreement are wholly contained in a written document’<sup>13</sup> and:

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[1976] 2 All ER 930, [1986] 2 Lloyd's Rep 44.

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[1976] 2 All ER 930, [1986] 2 Lloyd's Rep 44 at 46

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Law Com Rep No 154. See also *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127, Beldam LJ at 140.

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*Wild v Civil Aviation Authority* (25 September 1987, unreported), Ralph Gibson LJ.

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Law Com Rep No 154, para 2.7. See also *Harris v Rickett* (1859) 4 H & N 1 at 7; *Howden Bros Ltd v Ulster Bank Ltd* [1924] 1 IR 117; *Turner v Forward* [1951] 1 All ER 746; *Degeld Options Ltd v Malook* (1 July 1996, unreported), Popplewell J:

‘... the rule has no application unless it is first determined that the terms of the agreement are wholly contained in a written document. In one sense, this is a somewhat circular argument because in deciding whether the parties intended that the whole agreement should be in the written document it may be necessary to have regard to oral evidence.’

See also *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April 1993, unreported), QBD (Off Ref).

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Wedderburn [1959] CLJ 58 at 62.

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[1896] 2 QB 59 at 62.

‘In reaching a conclusion as to whether a document which looks like a complete contract was the whole contract, the court does not apply any presumption of law. Rather it will reach its conclusion on the evidence tendered, applying to its judgment the prima facie probability derived from its experience of how people normally behave in a given situation.’<sup>14</sup>

It may be viewed as ‘an important factor to be placed in the scales ... that businessmen do not ordinarily put their names to written contracts when they intend a different bargain’.<sup>15</sup>

It seems that terms found outside the written document which vary or contradict it, may nevertheless be found to be intended to be part of the contract<sup>16</sup> and it would also seem that it is possible to have such terms in a collateral contract<sup>17</sup>. Where there are oral terms contradicting the written terms of a contract, the situation:<sup>18</sup>

‘is no different in principle from that in which the parties agree two inconsistent terms both of which are set out in the same document. The court will have to decide which of the two inconsistent terms more nearly represents the intention of the parties.’

The conclusion that the parol evidence rule is of very limited effect does not, of course, affect the situation in which there are formality requirements in relation to the contract. Irrespective of the view taken of the parol evidence rule, in those situations such requirements will impact upon attempts to introduce additional terms, beyond those contained in the written document<sup>19</sup>.

If a mistake has been made in the contents of a written contract, so that it does not say what it was intended to say, the document may be rectified<sup>20</sup> and the parol evidence rule is not relevant – ‘after rectification the written document does not continue to exist with a parol variation; it is to be read as if it

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*Degeld Options Ltd v Malook* (1 July 1996, unreported), Poplewell J.

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Law Com no 154, para 2.13. Eg *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April 1993, unreported). QBD (Off Ref) – ‘Although I have heard much evidence of oral negotiations and agreements, it is quite clear that the parties intended that whatever was agreed should be reduced into writing and every meeting was followed by an exchange of documents. The contractual relationship between the parties is to be found in the documents’.

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*Yani Haryanto v E D & F Man (Sugar) Ltd* [1986] 2 Lloyd's Rep 44, Staughton LJ at 46.

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*Young v Austen* (1869) LR 4 CP 553; *Maillard v Page* (1870) LR 5 Exch 312; *J Evans (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078; *Couchman v Hill* [1947] KB 554; *Harling v Eddy* [1951] 2 KB 739. But see *Angell v Duke* (1875) 32 LT 320; *Henderson v Arthur* [1907] 1 KB 10.

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See para [3.3](#).

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Law Com no 154, para 2.16.

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See para [2.261](#).

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*Hamed El Chiaty & Co v Thomas Cook Group, The Nile Rhapsody* [1992] 2 Lloyd's Rep 399, Hirst J 407–409 (affd [1994] 1 Lloyd's Rep 382).

had been originally drawn in its rectified form<sup>21</sup>. In addition, 'the parol evidence rule only applies to the ascertainment of the original intention of the parties when the contract was made. The rule does not apply to the subsequent variation of the contract<sup>22</sup> or its discharge<sup>23</sup>.

## 'Exceptions'

### [3.6]

A number of 'exceptions' to the parol evidence rule have been found, although the identification of the 'rule' as a 'circular statement' may make it more appropriate simply to label them as 'examples of situations in which the ... rule ... could never apply'<sup>1</sup>.

It has already been indicated that the applicability of the rule is determined by whether the document was intended to contain the whole of the agreement, and if it was not, evidence of other terms is admissible<sup>2</sup>. This may occur, for example, where the written document is merely intended to provide some record of the contract but not to set out all the terms of the agreement as, for example, when it is merely a receipt<sup>3</sup>. The document may be intended 'merely as a memorandum ... not as containing the terms of the contract itself'<sup>4</sup>. The situation may occur in which a standard form document was originally intended by one party to set out the whole contract but, before the conclusion of the contract, that was overridden by some oral term. There may be, for example, in the standard terms, a broad discretion as to how containers are to be transported but also a clear oral guarantee that particular containers will be shipped below deck, overriding the standard term<sup>5</sup>. Similarly, there may be an assurance given as to the subject matter of a sale, so as to procure the sale, which overrides a broad exemption clause in the standard form contract<sup>6</sup>.

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*Craddock Bros v Hunt* [1923] 2 Ch 136, Lord Sterndale at 159.

22

*McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, Morritt LJ at 1006; *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64. Oral variations may not be effective if the original contract required formalities.

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*Morris v Baron & Co Ltd* [1918] AC 1.

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Law Com No 154, para 2.31.

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See para 3.5.

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*Allen v Pink* (1838) 4 M & W 140; *Graves v Key* (1832) 3 B & Ad 313; *Lee v Lancashire and Yorkshire Rly Co* (1871) 6 Ch App 527; *Beckett v Nurse* [1948] 1 KB 535.

4

*Allen v Pink* (1838) 4 M & W 140; *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239. But see *Hutton v Watling* [1948] Ch 398.

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*J Evans & Sons (Portsmouth) Ltd v Andre Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078. See also *BCT Software Solutions Ltd v Arnold Laver & Co Ltd* [2002] EWHC 1298 (Ch), 2 All ER (Comm) 85. On interpretation in such cases see para 3.5.

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In addition, as has been indicated, a statement may be found to be a term of a collateral contract, rather than of the main contract<sup>7</sup>, and implied terms have also been seen as beyond the scope of the rule, with evidence admitted to show that the situation is appropriate to imply a term in law<sup>8</sup> or by custom<sup>9</sup>. (Custom or usage may also be used to show that the words used in the contract had a particular meaning, as for example where a contractual reference to '1,000 rabbits' was shown to mean 1,200 rabbits<sup>10</sup>.)

The parole evidence rule relates to the content of the contract and not to its validity as a contract. Evidence as to contractual intention<sup>11</sup> and consideration<sup>12</sup> may be given and the rule does not impinge upon issues of validity such as mistake<sup>13</sup> or *non est factum*<sup>14</sup>, or upon fraud<sup>15</sup>, illegality<sup>16</sup> or misrepresentation<sup>17</sup>. In

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*Couchman v Hill* [1947] KB 554; *Harling v Eddy* [1951] 2 KB 739. On interpretation in such cases see para 3.5.

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See para 3.3.

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*Gillespie Bros & Co v Cheney Eggar & Co* [1896] 2 QB 59; *Burges v Wickham* (1863) 3 B & S 669.

9

'It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent': *Hutton v Warren* (1836) 1 M & W 466, Parke B at 475; *R v Inhabitants of Stoke-on-Trent* (1843) 5 QB 303; *Syers v Jonas* (1848) 2 Exch 111; *Dashwood v Magniac* [1891] 3 Ch 306; *Re Walkers, Winser & Hamm and Shaw Son & Co* [1904] 2 KB 152; *Produce Brokers Co Ltd v Olympic Oil & Cake Co Ltd* [1916] 1 AC 314. See terms implied in custom: para 3.25.

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*Smith v Wilson* (1832) 3 B & Ad 728. See also *Bold v Rayner* (1836) 1 M & W 343; *Hutchison v Bowker* (1839) 5 M & W 535; *Spicer v Cooper* (1841) 1 QB 424; *Grant v Maddox* (1846) 15 M & W 737; *Leidemann v Schultz* (1853) 14 CB 38; *Myers v Sarl* (1860) 3 E & E 306; *Norden Steamship Co v Dempsey* (1876) 1 CPD 654; *Aktieselskab Helios v Ekman* [1897] 2 QB 83; *Peterson v Freebody* [1895] 2 QB 294.

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*Bowes v Foster* (1858) 2 H & N 779; *Rogers v Hadley* (1863) 2 H & C 227; *Clever v Kirkman* (1875) 33 LT 672; *Pattle v Hornibook* [1897] 1 Ch 25; *Zakham International Construction Ltd v Nippon Kokkan KK* [1987] 2 Lloyd's Rep 596; *Kleinwort Benson v Malaysia Mining Corpn* [1989] 1 All ER 785, [1989] 1 WLR 379 at 392; *Orion Insurance plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239.

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*Solly v Hinde* (1834) 2 Cr & M 516; *Abbott v Hendricks* (1840) 1 Man & G 791; *Young v Austen* (1869) LR 4 CP 553 at 556; *Abrey v Crux* (1869) LR 5 CP 37 at 45; *Equitable Office v Ching* [1907] AC 96. But see *Roberts v Security Co Ltd* [1897] 1 QB 111; *Gale v Williamson* (1841) 8 M & W 405; *Clifford v Turrell* (1845) 1 Y & C Ch Cas 138; *Pott v Todhunter* (1845) 2 Coll 76; *Goldshade v Swan* (1847) 1 Exch 154; *Booker v Seddon* (1858) 1 F & F 196; *Hoad v Grace* (1861) 7 H & N 494; *Re Hollard* [1902] 2 Ch 360 at 388.

13

*Pym v Campbell* (1856) 6 E & B 370 at 374; *Raffles v Wichelous* (1864) 2 H & C 906; *Campbell Discount v Gall* [1961] 1 QB 431.

14

*Foster v Mackinnon* (1869) LR 4 CP 704; *Lewis v Clay* (1897) 67 LJQB 224; *Roe v Naylor* (1918) 87 LJKB 958 at 964.

addition, evidence has been admitted to show the nature of the agreement, for example, that an apparent conveyance is a mortgage<sup>18</sup> and also that terms appearing to create a licence, rather than a lease, were a 'mere sham' attempting to evade statutory restrictions<sup>19</sup>. Evidence has also been accepted of an oral agreement between the parties that the terms of the written document were not to have effect as a contract until a condition had been fulfilled<sup>20</sup>. In *Pym v Campbell*<sup>21</sup> it was shown that there had been an oral agreement that the written terms for the sale of a patent were only to become effective on the approval of the invention in question by a third party, whose approval was not given.

Agency has also provided a situation seen as falling outside of the rule. A party acting as an undisclosed agent will appear to contract as principal, but evidence may be introduced to allow the undisclosed principal to sue or be sued on the contract<sup>22</sup> unless that is expressly<sup>23</sup> or impliedly<sup>24</sup> excluded by the terms of the contract or if the contract was made 'for reasons personal to the agent which induced the

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*Pickering v Dowson* (1813) 4 Taunt 779; *Dobell v Stevens* (1825) 3 B & C 623.

16

*Collins v Blantern* (1767) 2 Wils 341; *Doe d Chandler v Ford* (1853) 3 Ad & El 649; *Reynell v Sprye* (1852) 1 De GM & G 660 at 672; *Madell v Thomas & Co* [1891] 1 QB 230; *Woods v Wise* [1955] 2 QB 29.

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*Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167.

18

*Re Duke of Marlborough* [1894] 2 Ch 133. See also *Madell v Thomas & Co* [1891] 1 QB 230; *Polsky v S & A Services Ltd* [1951] 1 All ER 1062n (sale and hire – a bill of sale); *Maas v Pepper* [1905] AC 102 (sale – loan with security).

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*AG Securities v Vaughan* [1990] 1 AC 417 at 469; *Mikeover Ltd v Brady* [1989] 3 All ER 618 at 625; *Chase Manhattan Equities Ltd v Goodman* [1991] BCLC 897.

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*Pym v Campbell* (1856) 6 E & B 370; *Wallis v Littell* (1861) 11 CBNS 369; *Lindley v Lacey* (1864) 17 CBNS 578; *Pattle v Hornibrook* [1897] 1 Ch 25; *London Freehold and Leasehold Property Co v Baron Suffield* [1897] 2 Ch 608 at 622; *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26.

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(1856) 6 E & B 370.

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*Bateman v Phillips* (1812) 15 East 272; *Humfrey v Dale* (1857) 7 E & B 266; *Wake v Harrop* (1861) 30 LJ Ex 273; *F Drughorn Ltd v Rederiaktbolaget Trans-Atlantic* [1919] AC 203; *Danziger v Thompson* [1944] KB 654; *Epps v Rothnie* [1945] KB 562; *Finzel, Barry & Co v Eastcheap Dried Fruit Co* [1962] 1 Lloyd's Rep 370.

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*United Kingdom Mutual Steamship Assurance Association v Nevill* (1887) 19 QBD 110.

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*Humble v Hunter* (1848) 12 QB 310; *Formby Bros v Formby* (1910) 102 LT 116; *Danziger v Thompson* [1944] KB 654; *F Drughorn Ltd v Rederiaktbolaget Trans-Atlantic* [1919] AC 203; *Asty Maritime Co Ltd v Rocco Guiseppe & Figli SNC, The Astynax* [1985] 2 Lloyd's Rep 109; *Sui Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213 at 222.



third party to contract with the agent to the exclusion of his principal or anyone else<sup>25</sup>. These restrictions are somewhat obscure<sup>26</sup>.

## Entire agreement clauses

### [3.7]

The terms of the contract may contain a clause which is an attempt to produce the effect of a parol evidence 'rule' in the strictest sense, i.e., a clause which states that there are no terms in the contract other than those included in a particular document<sup>1</sup>. These clauses are known as 'entire' or 'whole' contract clauses<sup>2</sup> and are in common usage. Similar clauses ('non-reliance' clauses) may be used in an attempt to prevent pre-contractual statements being misrepresentations or may attempt to combine both objectives. Their effectiveness at common law needs to be addressed as does the impact upon them of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The common law will be addressed and then the legislation.

In relation to the use of entire agreement clauses to prevent what would otherwise be a term from being so regarded, the Law Commission took the view that at common law:<sup>3</sup>

'[An entire agreement clause] may have a very strong persuasive effect but if it were proved that notwithstanding the clause, the parties actually intended some additional term to be of contractual effect the court would give effect to that term because that was the intention of the parties.'

Certainly, it can be strongly contended that such a clause should not simply be taken at face value but that its effectiveness should be gauged by considering the interaction of the clause and the underlying factors from which conclusions are drawn as to the existence of terms, or, at the least, that they should be

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*Greer v Downs Supply Co* [1927] 2 KB 28; *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 All ER 886, Diplock LJ at 890; *Sui Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213. It has also been said that the principal cannot intervene in the contract if the third party would not have contracted with him or her, although they would have been content to contract with anybody else: see *Said v Butt* [1920] 3 KB 497 (personal element said to be 'strikingly present' but the personal nature of the contract seems doubtful); *Dyster v Randall & Sons* [1926] Ch 932 (no personal element found in the contract).

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*Crescent Oil Shipping Ltd v Importang UEE* [1997] 3 All ER 428.

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Although it may not do so in the same way as would a strictly operating parol evidence rule. See *Inntrepreneur Pub Co v East Crown* [2000] 2 Lloyd's Rep 611, [2000] 3 EGLR 31, Lightman J, [7] – 'The operation of the clause is not to render evidence of collateral warranty inadmissible as evidence as is suggested in *Chitty on Contract* (28th edn), vol 1, para 12-102; it is to denude what would otherwise constitute a collateral warranty of legal effect'. A somewhat different additional role was unsuccessfully sought to be given to an entire agreement clause in *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb). In allowing an appeal against a striking out Mummery LJ (at [40]) was of the view that the entire agreement clause was 'not apt to govern the construction of the written terms that the parties had included or to exclude evidence relevant to the ascertainment of their meaning'.

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E Peden and J W Carter 'Entire agreement – and similar – clauses' (2006) 22 JCL 1.

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Law Com Rep No 154, para 2.15.

seen as contradictory terms and a priority decided between them on the basis of the parties' intentions<sup>4</sup>. However, although there are some indications<sup>5</sup> of a different approach, currently the courts seem basically to be taking the line that such clauses should simply be taken at face value. Their mere existence as terms serve to provide the certainty that there is no need to consider the possibility of further terms beyond those stated in the identified contractual documents<sup>6</sup>, although, they will, of course, have to be appropriately drafted to cover the situation in question<sup>7</sup>. So, in *Deepak Fertilisers v ICI*<sup>8</sup> the contract contained a clause stating:

'This contract comprises the entire agreement between the parties, as detailed in various Articles and Annexures and there are not any agreements, understandings, promises or conditions, oral or written, expressed or implied concerning the subject matter which are not merged into this contract and superseded hereby. This contract may be amended in the future only in writing executed by the parties.'

The Court of Appeal took the view that Rix J, at first instance, had been 'perfectly correct to hold that this excluded liability in respect of collateral warranty'<sup>9</sup>. Similarly, in *Inntrepreneur v East Crown*<sup>10</sup> Lightman J viewed entire agreement clauses as of very significant effect. He said:<sup>11</sup>

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Support for these types of approach might be found in cases such as *Harling v Eddy* [1951] 2 KB 739; *Couchman v Hill* [1947] KB 554; *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd* [1976] 2 All ER 930, [1976] 1 WLR 1078; *Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 ConLR 46.

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*Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB), [2007] All ER (D) 345 (Dec), [139]–[141]; *Reeds Solicitors v Norwich Union Insurance Ltd* [2005] EWCA Civ 343, [2005] All ER (D) 112 (Mar); *Hotel Aida Opera SARL v Golden Tulip Worldwide BV* [2004] EWHC 1012 (QB), [2004] All ER (D) 74 (May) at [94]; *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWHC 221 (Comm) at [114], [2005] 1 Lloyd's Rep 470, [2005] All ER (D) 322 (Feb); *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2006] EWHC 733 (Comm), [2006] 2 Lloyd's Rep 280, [2006] All ER (D) 23 (Apr) at [34] but see [32]; *Cable & Wireless v Muscat* [2006] IRLR 354; *Bushway v RNLI* [2005] IRLR 674.

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*Deepak v Imperial Chemicals Industries plc* [1999] 1 Lloyd's Rep 387; *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611. See also *Alman & Benson v Associated Newspapers Group Ltd* (20 June 1980, unreported); *Kingsley IT Consultants Ltd v McIntosh* [2006] EWHC 1288 (Ch), [2006] All ER (D) 237 (Feb) at [62]–[63]; *Total Spares & Supplies v Antares SRL* [2004] EWHC 2626 (Ch), [2004] All ER (D) 255 (Nov); *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2007] EWCA Civ 58, [2007] 2 All ER (Comm) 756, [2007] 2 Lloyd's Rep 24 at [25].

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*Hotel Aida Opera SARC v Golden Tulip Worldwide BV* [2004] EWHC 1012 (QB), [2004] All ER (D) 74 (May) at [90]–[91]; *Cheverney Consulting v Whitehead Mann Ltd* [2005] EWHC 2431 (Ch), [2005] All ER (D) 115 (Nov) at [104]; *Cyprotex Discovery Ltd v University of Sheffield* [2004] EWCA Civ 380, [2004] All ER (D) 27 (Apr) at [63]; *Exxonmobil Sales and Supply Corp v Texaco Ltd* [2003] EWHC 1964 (Comm), [2004] 1 All ER (Comm) 435 at [25]–[27]; *Lloyd v MGL (Rugby) Ltd* [2007] EWCA Civ 153, [2007] 22 EG 162; *Personnel Hygiene Services Ltd v Mitchell* [2009] EWCA Civ 1047, [2009] All ER (D) 62 (Dec).

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[1999] 1 Lloyd's Rep 387.

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Stuart Smith LJ delivering the judgment of the court, at [34].

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‘Such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of collateral warranty inadmissible as evidence as is suggested in *Chitty on Contract*, 28th ed, vol 1, para 12-102; it is to denude what would otherwise constitute a collateral warranty of legal effect.’

Lightman J emphasised the certainty provided by this treatment of entire agreement clauses<sup>12</sup>. He also thought that it would have been sufficient had the clause ‘been worded merely to state that the agreement containing it comprised or constituted the entire agreement between the parties’<sup>13</sup>. Plainly, in his view, the clause prevented any successful argument from being made that there were other terms, no matter the strength of the factors supporting a claim that the parties had intended them. (Of course, if such factors were considered, the evidential value of the entire contract clause could be considerable in the appropriate context. If the clause was contained in a professionally drafted contract, and being used in a business context against someone who had received expert legal advice, it might be difficult for a convincing argument to be made that the underlying facts had not been affected by the clause so as to prevent the conclusion arising that there was an additional contract term<sup>14</sup>.)

On the whole, the approach currently indicated, to entire agreement clauses and the content of the contract, emphasises certainty at the expense of any consideration of the reality of the clause as a reflection of the transaction between the parties. The situation is now much the same in relation to the use of non-reliance clauses to prevent claims for misrepresentations, although the mechanism is somewhat different, being based on estoppel. It is now ‘contractual estoppel’ which is successfully used, ‘evidential estoppels’ having proved to be difficult to establish. Cases such as *EA Grimstead & Son Ltd v McGarrigan*<sup>15</sup> and *Watford Electronics v Sanderson*<sup>16</sup> took the line that ‘an acknowledgement of non-reliance ... is capable of operating as an evidential estoppel’. So that it was ‘apt to prevent the party who has given the acknowledgment from asserting in subsequent litigation against the party to whom it has

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[2000] 2 Lloyd's Rep 611.

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[2000] 2 Lloyd's Rep 611, para 7; *Cheverney Consulting v Whitehead Mann Ltd* [2005] EWHC 2431 (Ch), [2005] All ER (D) 115 (Nov) at [101]; *Kingsley IT Consultants Ltd v McIntosh* [2006] EWHC 1288 (Ch), [2006] All ER (D) 237 (Feb) at [62]; *Ravennavi SpA v New Century Shipbuilding Co Ltd* [2006] EWHC 733 (Comm), [2006] 2 Lloyd's Rep 280, [2006] All ER (D) 23 (Apr) at [32]. See also *Sere Holdings Ltd v Volkswagen Group United Kingdom Ltd* [2004] EWHC 1551 (Ch), [2004] All ER (D) 76 (Jul) at [22].

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See also *Hotel Aida Opera SARC v Golden Tulip Worldwide BV* [2004] EWHC 1012 (QB), [2004] All ER (D) 74 (May) at [94].

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[2000] 2 Lloyd's Rep 611, 614.

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*Reeds Solicitors v Norwich Union Insurance Ltd* [2005] EWCA Civ 343, [2005] All ER (D) 112 (Mar); *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWHC 221 (Comm) at [114], [2005] 1 Lloyd's Rep 470, [2005] All ER (D) 322 (Feb);.

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[1999] All ER (D) 1163, CA.

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[2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696.

been given that it is not true'<sup>17</sup>. However, that required (i) that the statements (ie as to non-reliance on the (mis)representation) in the clauses were clear and unequivocal, (ii) that the representee had intended that the representor should act upon those statements (as to non-reliance), and (iii) that the representor had believed those statements (as to non-reliance) to be true and had acted upon them'<sup>18</sup>. The difficulties which could arise in fulfilling those requirements are evident when it is remembered that the statements as to non-reliance were likely to be found in the standard form contract of the representor and they were being used to claim that the representee had so asserted his non-reliance that he was estopped from proving that he relied on a representation. In *Watford Electronics v Sanderson* it was recognised that those requirements for an evidential estoppel might 'present insuperable difficulties; not least because it may be impossible for a party who has made representations which he intended should be relied upon to satisfy the court that he entered into a contract in the belief that a statement by the other party that he had not relied upon those representations was true'<sup>19</sup>. However, in *Peekay v Intermark Ltd v Australia and New Zealand Banking Group Ltd*<sup>20</sup> the use of a different form of estoppel – 'contractual estoppel' – was recognised, which did not have this difficulty. Moore-Bick LJ stated:

'[56] There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. ... Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel: see *Colchester Borough Council v Smith* [1991] Ch 448, [1991] 2 All ER 29, [1991] 2 WLR 540, affirmed on appeal [1992] Ch 421.

[57] It is common to include in certain kinds of contracts an express acknowledgment by each of the parties that they have not been induced to enter the contract by any representations other than those contained in the contract itself. The effectiveness of a clause of that kind may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation. However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind,

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*Grimstead v McGarrigan* Chadwick LJ. See also *Watford Electronics v Sanderson* Chadwick LJ at 711.

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See *Grimstead v McGarrigan* Chadwick LJ – basing his statements as to the requirements for an evidential estoppel on *Lowe v Lombank* [1960] 1 All ER 611.

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[2001] 1 All ER (Comm) 696, Chadwick LJ at 711. In *Quest 4 Finance Ltd v Maxfield* [2007] EWHC 2313 (QB) at [38], [2007] All ER (D) 180 (Oct), Teare J took the line that 'In the ordinary case one would expect a contracting party who has required the other contracting party to make a declaration of non-reliance to believe the declaration to be true and to rely upon it. That is because the purpose of such a declaration is to ensure, in the interests of certainty, that the rights of the parties are governed by the terms of the written contract'. However, he immediately went on to say that the case was not 'an ordinary case' and there could 'be no presumption that the Claimant believed the declaration of self reliance to be true and relied on it'. In the instant case the 'Claimant had made clear and unequivocal [pre-contractual] statements in its brochure, calculated to be relied upon by' the defendants and the 'Claimant would expect [the defendants] to find these statements most attractive ... causing them to enter into a contract' (at [39]).

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[2006] 2 Lloyd's Rep 511.

if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council v Smith*.<sup>7</sup>

Obviously to be effective to generate a contractual estoppel, the 'non-reliance' clause must be appropriately drafted<sup>21</sup> and it will not, in any event, prevent claims of fraud<sup>22</sup>. However, the two forms of estoppel are different. If a contractual estoppel can be relied upon, there is no need to contend for an evidential estoppel<sup>23</sup> and 'in the case of a contractual estoppel the party relying on the clause does not need to prove that he believed the truth of the acknowledgment of non-reliance'<sup>24</sup>. 'Contractual estoppel' gives the same kind of mechanical effect to a clause in relation to prevention of a misrepresentation claim<sup>25</sup> as has been given to clauses preventing there from being additional terms.

However, what now needs to be considered is whether entire agreement clauses might be treated as exemption clauses and so subject to either the Unfair Contract Terms Act 1977 (if they are preventing additional terms) or the Misrepresentation Act 1967 (if they are preventing a claim for misrepresentation)<sup>26</sup>. In the context of the question of additional terms, any such approach would, of course, undermine the certainty generated by simply taking the clause at face value as effective to do what it says.

It would appear that a conventional entire agreement clause is not an exemption clause of the kind with which UCTA was and is principally concerned<sup>27</sup>. Since it prevents any collateral contract or warranty from coming into existence, it could not be the subject of s 3(2)(a) – simply because there would be no

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*BSkyB Ltd v HP Enterprise Services UK Ltd (formerly Electronic Data Systems Ltd)* [2010] EWHC 86 (TCC), [2010] BLR 267, [2010] All ER (D) 192 (Jan) – Clause referred to representations but did not refer to non-reliance and was not appropriately worded to generate a contractual estoppel in relation to a misrepresentation claim.

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See below para [3.95](#).

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*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2009] 1 All ER (Comm) 16.

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*Foodco UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch).

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*JP Morgan Chase Bank v Springwell Navigation Corpn* [2008] EWHC 1186 (Comm), [2008] All ER (D) 167 (Jun) at [538]–[568]; *Donegal International Ltd v Republic of Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397 at [465], [2007] All ER (D) 184 (Feb); *International Bottin Investments Ltd v Venson Group plc* [2006] EWHC 3112 at [154], [2006] All ER (D) 111 (Dec); *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2009] 1 All ER (Comm) 16; *FoodCo Uk LLP (t/a Muffin Break) v Henry Boot Developments Limited* [2010] EWHC 358 (Ch); *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), at [88]–[89], [2010] All ER (D) 137 (Feb).

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Eg *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, *Cremdean Properties Ltd v Nash* (1977) 244 Estates Gazette 547, *Walker v Boyle* [1982] 1 All ER 634. But see *McGrath v Shah* (1987) 57 P & CR 452 at 459–461; *Watford Electronics v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, Chadwick LJ at 711.

27

*AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133 at [49].

collateral contract, in the first place, which the relevant party could be found to have breached. Nor would s 13 materially assist for the same reason.

However, it might be said that different considerations would apply as regards s 3(2)(b)(i). That said, it is unclear how precisely that section would apply<sup>28</sup>; what is however limp is that the section seeks to prevent a party from using a fine print in the contract to allow itself to provide something other than that defined by the principal terms of the contract. It is especially pertinent that the section refers to performance 'which was reasonably expected' rather than the actual performance specified in the contract. It would seem thus to follow that it is not impossible that a pre-contractual representation or undertaking could affect the performance that is reasonably expected of a party<sup>29</sup>.

It would not be inappropriate therefore to subject entire agreement clauses to the reasonableness test in UCTA in relation to both collateral warranties and representations. However, s 3(2)(b)(i) will only be applicable if it is possible to identify both the performance that was reasonably expected and that defined by the contract.

The application of UCTA would undermine the certainty stemming from the 'face value' approach to entire agreement clauses. However, the extent of the artificiality of the current treatment of 'entire agreement' clauses at common law is the kind of approach which invites an active use of UCTA 1977 on occasion. To the contrary when the evidential estoppel approach is considered in relation to attempts to extend entire agreement clauses to prevent a successful claim for misrepresentation. The examination of the facts required to generate an evidential estoppel should have made it possible to contend that a clause should not be regarded as exemption clause if it is such as to generate an evidential estoppel and the Misrepresentation Act 1967, s 3 would not come into question<sup>30</sup>. However, again, the approach now taken in relation to non-reliance clauses and contractual estoppel is a very mechanical one which would invite the application of the statutory controls and they have been seen as applicable<sup>31</sup>. However, whatever the type of clause (whether dealing with terms or representations, or both), if it is a non-individually negotiated term, in a contract between a consumer and a seller or supplier, it will fall to be considered under the fairness test in the Unfair Terms in Consumer Contracts Regulations<sup>32</sup> and certainly the Office of Fair Trading, which was formerly empowered to challenge unfair terms<sup>33</sup>, took the view that such

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Note the somewhat tentative discussion in *Chitty on Contracts* (30th edn), at para 14-073.

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See also *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133; *SAM Business Systems Ltd v Hedley* [2002] EWHC 2733 (TCC), [2003] 1 All ER (Comm) 465 at [62]. See para [3.78](#) below.

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And see the comments of Chadwick LJ, *Watford Electronics v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, 711

31

*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2009] 1 All ER (Comm) 16.

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It might be contended that it fell within the exemption for certain 'core' terms in plain intelligible language (reg 6(2)). However, that would require a much wider approach to the 'core' than was indicated by the House of Lords in *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 All ER 97. E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations 1999' (2002) MLR 763. See below para [3.105](#).

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Now, alongside the 'qualifying bodies'. See para [3.98](#) below.

clauses will generally be unfair<sup>34</sup> and in *Office of Fair Trading v MB Designs (Scotland) Ltd*, an entire agreement clause was found to be unfair under the Regulations<sup>35</sup>.

It is not surprising that courts are unprepared to permit too easily an entire agreement clause to negate liability for misrepresentation. In *BSkyB Ltd v HP Enterprise Services UK Ltd*<sup>36</sup> the entire agreement clause provided that the agreement and its schedules 'constitute the whole agreement between the parties in relation to the subject matter and supersede any previous discussions, correspondence, representations and agreements between the parties with respect thereto'. The issue in that case was whether that clause excluded liability for non-fraudulent misrepresentation. Ramsey J concluded that it did not. In doing so, he distinguished between exclusion of liability for misrepresentation and exclusion of liability for collateral warranties. The judge considered that although there was reference in the clause to representations, there was nothing that indicated that it was intended to take away a right to rely on misrepresentations. As Browne-Wilkinson J said in *Alman and Benson v Associated Newspapers Group Ltd*: 'If it were designed to exclude liability for misrepresentation it would, I think, have to [be] couched in different terms, for example, a clause acknowledging that the parties had not relied on any representations in entering into the contract.'<sup>37</sup> Equally, as Jacob J stated in *Thomas Witter Ltd v TBP Industries Ltd*, 'In other words, if a clause is to have the effect of excluding or reducing remedies for damaging or untrue statements then the party seeking that protection cannot be mealy-mouthed in his clause. He must bring it home that he is limiting liability for falsehoods he may have told.'<sup>38</sup> It thus follows that clear words are needed to exclude a liability for negligent misrepresentation.

In *Axa Sun Life Services plc v Campbell Martin Ltd and Others*<sup>39</sup> the clause in question was fairly conventional and provided as follows:

'this Agreement shall supersede any prior promises, agreements, representations, undertakings or implications whether made orally or in writing between you and us relating to the subject matter of this Agreement'.

AXA had sued a number of financial advisers for the claw-back of various commissions. In their defence to those claims, the financial advisers argued that they had been induced to enter into the agreements by negligent and fraudulent misrepresentations and/or collateral warranties made by AXA. The Court of Appeal concluded that the entire agreement clause appearing in the contract was concerned with agreements rather than misrepresentations. As such, whilst it was effective to exclude liability for collateral warranties, it did not exclude liability for misrepresentations. As with *BSkyB Ltd v HP Enterprise Services UK Ltd*, whilst it was recognised that the word 'representation' did appear in the clause, the court held that as a matter of construction it was 'sandwiched between words of contractual import'.

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<sup>34</sup>

Although the OFT (now the CMA) saw no objection to clauses which merely provided an appropriate warning to consumers – OFT *Unfair Contract Terms Guidance* (Feb 2001) pp 35–36. See further para [3.118](#) below.

<sup>35</sup>

[2005] CSOH 85, 2005 SLT 691, 2005 SCLR 894, OH

<sup>36</sup>

[2010] EWHC 86 (TCC) at [359] .

<sup>37</sup>

20 June 1980 (unreported, Lexis transcript at p 30).

<sup>38</sup>

(1994) 12 Tr L 145 at p 168C.

<sup>39</sup>

[2011] EWCA Civ 133.

## Written terms or notices – signed

### Basic rule

#### [3.8]

The basic rule in relation to the incorporation of terms from signed contractual documents stems from *L'Estrange v Graucob*<sup>1</sup>. Scrutton LJ said:<sup>2</sup>

‘When a document containing contractual terms is signed, then in the absence of fraud, or ... misrepresentation, the party signing it is bound, and it is wholly irrelevant whether he had read the document or not’.

Maughan LJ also made it clear that not only is it irrelevant that the signatory has not read the signed document, it is also irrelevant that he, or she does not know of its contents. He also added the qualification of the application of the doctrine of *non est factum*<sup>3</sup>. The qualification of fraud or misrepresentation would seem to relate particularly to fraud or misrepresentation as to the terms<sup>4</sup>. The factors which will generally vitiate a contract such as duress, undue influence, and misrepresentation will, of course, do so whether a contract has been signed or not.

Other than these obvious qualifications, it has been assumed that there might be a possible exception to the rule in *L'Estrange v F Graucob Ltd* that where the terms are especially unusual or onerous, a party will not be able to rely on the clause unless he has done enough fairly to bring the clause to the attention of the other party<sup>5</sup>. However, it is not easy to show that commercial terms are unusual or onerous<sup>6</sup>. Moreover, there is no consensus that the exception would apply to signed contracts. In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*<sup>7</sup> the defendant was held not to be bound by a term in a

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*L'Estrange v F Graucob Ltd* [1934] 2 KB 394. See also *Parker v South Eastern Rly Co* (1877) 2 CPD 416; *The Luna* [1920] P 22; *Blay v Pollard and Morris* [1930] 1 KB 628; *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; Denning LJ at 808; *Bahamas Oil Refining Co v Kristiansands Tankrederie A/S, The Polyduke* [1978] 1 Lloyd's Rep 211; *Harvey v Ventilatoren-fabrik Oelde GmbH* (1988) 8 Tr L 138; *Charlotte Thirty Ltd & Bison Ltd v Croker Ltd* (1990) 24 Con LR 46; *Saphir (Merchants) Ltd v Zissimos* [1960] 1 Lloyd's Rep 490 at 499; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69; *One World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB); see also paragraphs 90–92 of *Do-Buy 925 Ltd v National Westminster Bank* [2010] EWHC 2862 for a good account of the authorities.

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[1934] 2 KB 394 at 403.

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[1934] 2 KB 394 at 406.

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See below para [3.10](#).

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*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; also, *One World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB).

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*One World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB); *Allen Fabrications Ltd v ASD Ltd (t/a ASD Metal Services and/or Klockner & Co Multi Metal Distribution)* [2012] EWHC 2213 (TCC).

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[1989] QB 433.



printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read. In *Ocean Chemical Transport v Exnor Crags Ltd*<sup>8</sup>, Evans LJ, with whom Henry and Waller LLJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract 'in an extreme case where a signature was obtained under pressure of time or other circumstances'. In *HIH v New Hampshire*<sup>9</sup>, Rix LJ questioned whether the principle could actually properly be applied outside the context of incorporation by notice<sup>10</sup>. In *Amiri Flight Authority v BAE Systems plc*<sup>11</sup>, Mance LJ, with whom Rix and Potter LLJ agreed, noted the doubts of Rix LJ in *HIH v New Hampshire* and stated that it was unnecessary to decide whether the principle could ever apply to signed contracts. He envisaged that it might do so where for example a car owner was asked to sign a ticket on entering a car park or a holidaymaker asked to sign a long small-print document when hiring a car, if, in either case, the relevant document proved on close reading to contain a provision of an extraneous or wholly unusual nature. In either case which document proved to have a provision of 'an extraneous or wholly unusual nature'; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document. He reiterated the normal rule that in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms. As Moore-Bick LJ said in *Peekay v Australia and New Zealand Banking Group*<sup>12</sup>:

'It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in *L'Estrange v Graucob* [1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community.'

Whether signed or not, a document cannot introduce new terms once a contract has been concluded, although it may lead the parties to vary an existing contract<sup>13</sup>.

## Contractual documents

### [3.9]

It has been emphasised that the document signed must be a 'contractual document' if signature of it is to incorporate terms into a contract and in *Michael Joseph Grogan v Robin Meredith Plant Hire and Triact*

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[2000] 1 Lloyds Rep 466.

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[2001] 2 Lloyds Rep 161.

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See para 209.

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[2004] 1 All ER 385 at 392.

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[2006] 2 Lloyds Rep 511 at 520 para 43; see also similar sentiments expressed in *One World (GB) Ltd v Elite Mobile Ltd* [2012] EWHC 3706 (QB) and *Do-Buy 925 Ltd v National Westminster Bank* [2010] EWHC 2862.

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*Michael Joseph Grogan v Robin Meredith Plant Hire and Triact Civil Engineering Ltd* (1996) 5 Tr L Rep 371. The 'timing' of the introduction of the document more usually arises for consideration in the context of unsigned documents: see para 3.12.

*Civil Engineering Ltd*<sup>1</sup> this led to the conclusion that signature of a time sheet could not incorporate the terms there referred to. The question has been put in terms of whether 'the document purport[ed] to have contractual effect'<sup>2</sup> but, more broadly, it would seem to depend upon how the reasonable person would have viewed it<sup>3</sup> taking account of 'the nature and purpose of the document' and 'the circumstances of its use as between parties'<sup>4</sup>.

## Misrepresentation

### [3.10]

In *Curtis v Chemical Cleaning & Dyeing Co*<sup>1</sup> consideration had to be given to a misrepresentation of the contents of the document which had been signed. In that case, before the claimant signed the document, the exemption clause was innocently stated to be far narrower than it was and it was held that the clause could not be relied upon in relation to a breach which it was appropriately worded to cover but which was beyond the scope of the clause as misrepresented<sup>2</sup>. If a misrepresentation is that the scope of a term is more limited than it is, as was the case in *Curtis*, it is not clear whether the term can be relied upon in relation to the limited scope it was misrepresented to have<sup>3</sup>.

## Artificiality

### [3.11]

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(1996) 15 Tr LR 371.

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*Bahamas Oil Refining Co v Kristiansands Tankrederie A/S, The Polyduke* [1978] 1 Lloyd's Rep 211, Kerr J at 215; *Grogan v Meredith*, Auld LJ at 374. See also *Noreside Construction Ltd v Irish Asphalt Ltd* [2011] IEHC 364, [2012] BLR 165, HC (Irl) where delivery dockets signed by the receiver of goods was held to be post-contractual and could not be said to vary the terms of the contract or to introduce a new contract.

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(1996) 15 Tr LR 371, Auld LJ at 375. If the signor viewed it as a document containing contractual terms that should be sufficient, no matter what the view of the reasonable person.

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(1996) 15 Tr LR 371, Auld LJ at 375.

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[1951] 1 KB 805.

2

See also *Charlotte Thirty Ltd & Bison Ltd v Croker Ltd* (1990) 24 ConLR 46 – colloquial assurance that the standard terms did not contain a 'wobbler' taken as a misrepresentation that they did not contain any unfair terms. In appropriate cases the misrepresentation may stem from the document itself: *Harvey v Ventilatoren-fabrik Oelde GmbH* (1988) 8 Tr L 138.

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[1951] 1 KB 805, Somervell LJ at 808: 'this exception never became part of the contract between the parties'; Denning LJ at 810: 'when the signature to a condition, purporting to exempt a person from his common law liabilities, is obtained by an innocent misrepresentation, the party who has made the misrepresentation is disentitled to rely on the exemption'. But note Denning LJ at 809: 'it was a sufficient misrepresentation to disentitle the cleaners from relying on the exemption, except in regard to beads and sequins' – the misrepresentation was that the clause only covered damage to beads and sequins.

The artificiality which may be present in incorporating contract terms in this way has not gone unnoted<sup>1</sup> and may now be relevant if the application of the 'reasonableness' test under the Unfair Contract Terms Act 1977 is in question<sup>2</sup>, or the fairness test under the Regulations on Unfair Terms in Consumer Contracts 1999<sup>3</sup>. In both situations, when the consent and knowledge of the relevant party is to be judged objectively, that should occur without the artificiality which may be present in the rules as to incorporation.

However, the recognition of the artificiality has led to arguments for the development of the common law in this area. It has been argued<sup>4</sup> that the common law could escape from such artificiality by following the approach taken in *Smith v Hughes*<sup>5</sup> and considering whether the party putting the forward the document for signature realised, or should have realised as a reasonable person, that the signor was not intending to agree to the clauses there set out. Such an approach is not unknown elsewhere. In the Canadian case of *Tilden-Rent-A Car v Clendenning*<sup>6</sup> unusual and onerous printed clauses were not incorporated and the line was taken that signature could only be relied upon as showing assent to a document when it was reasonable for the person relying on the signed document to believe that the signor assented to its contents. Further, it has also been suggested<sup>7</sup> that the reasoning on the 'red hand rule' in the context of incorporation by notice<sup>8</sup> in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*<sup>9</sup> could provide a basis for a requirement that for there to be incorporation by signature of unreasonable or unusual clauses, the proferens must show that his intention to incorporate a condition of that nature was fairly brought to the notice of the other party. There have been indications that the court would be willing to extend the 'red hand rule' from incorporation by notice to incorporation by signature<sup>10</sup>, but more generally

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*McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, Lord Devlin at 133; *Jones v Northampton Borough Council* (1990) Times, 21 May, Ralph Gibson LJ.

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Para [3.94](#).

3

Paras [3.106](#) and [3.110](#).

4

Spencer 'Signature, Consent and the Rule in *L'Estrange v Graucob*' [1973] CLJ 104.

5

(1871) LR 6 QB 597.

6

(1978) 83 DLR (3d) 400. See also *Trigg v MI Movers International Transport Services Ltd* (1991) 84 DLR (4th) 504. It has been contended that the line taken in *Grogan v Meredith Plant Hire* [1996] CLC 1127 (see above para [3.9](#)) 'might suggest' that the courts in England and Wales 'are not far away from' embracing the approach of the Canadian Court – E Mckendrick *Contract Law* (4th edn, Macmillan, 2000) p 185.

7

Rutherford & Wilson 'Signature of a document' (1998) 148 NLJ 380; Downes *Textbook on Contract* (5th edn, Blackstone) at 5.7.2.

8

See para [3.16](#)

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[1988] 1 All ER 348.

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the indications are against such an extension<sup>11</sup>. In most cases, any unfairness in the strict application of the signature rule will now be met by the extensive protection against 'unreasonable' clauses provided by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 and, against the background of that statutory protection the certainty produced by the strict application of the signature rule will normally outweigh its drawbacks<sup>12</sup>. However, in an extreme case, where the legislated protections do not deal with the considerable unfairness which would be created if a particular term was incorporated by signature, and without knowledge, the operation of the red hand rule may be extended into this context. Any such extension is, of course, unlikely then to be confined to the situations where there is no legislated protection.

## Notice – Unsigned documents<sup>1</sup>

### Time

#### [3.12]

No document, sign or notice can introduce new terms into an existing contract once it has been concluded, and that applies whether it has been signed or not, although the point generally arises in relation to unsigned documents<sup>1</sup>. In appropriate cases, clauses may be incorporated not because of the notice provided in the instant case, which is too late, but because there has been a sufficient course of past dealings between the parties to do so<sup>2</sup>. In addition, an attempt to introduce late terms might lead the parties to vary the existing contract.

### Notice

#### [3.13]

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*J P Chase Bank v Springwell Navigation* [2008] EWHC 1186 (Comm), [583]–[584], [2008] All ER (D) 167 (Jun); *Ocean Chemical Transport v Exnor Craggs* [2000] 1 All ER (Comm) 519, Evans LJ, [48], *Montgomery Litho Ltd v Maxwell* 2000 SC 56.

<sup>11</sup>

*Jonathan Wren & Co Ltd v Microdec plc* (1999) 65 Con LR 157, [53]; *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, [2001] 2 All ER (Comm) 39, Rix LJ, [209]; *Yoldings Ltd v Swann Evans* (12 October 2000, unreported), para 173. See also *Bankway Properties Ltd v Penfold-Dunsford* [2001] EWCA Civ 528, [2001] 1 WLR 1369, [2001] 2 EGLR 36, [41]; *Peninsula Business Services Ltd v Sweeney* [2004] IRLR 49, [25].

<sup>12</sup>

Note the approach of the High Court of Australia in continuing to apply the basic *L'Estrange* line – *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] 219 CLR 165 at [48]. E Peden & J Carter 'Incorporation of Terms by Signature: *L'Estrange* rules' (2006) 21 JCL 1.

<sup>1</sup>

Clarke 'Notice of Contractual Terms' (1976) 35 CLJ 51.

<sup>1</sup>

*Parker v South Eastern Rly Co* (1877) 2 CPD 416, Bramwell LJ at 426; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Olley v Marlborough Court Ltd* [1949] 1 KB 532; *Burnett v Westminster Bank Ltd* [1966] 1 QB 742; *Hollingsworth v Southern Ferries Ltd* [1977] 2 Lloyd's Rep 70; *Daly v General Steam Navigation Co Ltd* [1979] 1 Lloyd's Rep 257; *Dillon v Baltic Shipping Co, The Mikhail Lermontov* [1991] 2 Lloyd's Rep 155; *Metaalhandel JA Magnus BV v Aarfields Transport Ltd* [1988] 1 Lloyd's Rep 197, at 204; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450; *Mendelssohn v Normand* [1970] 1 QB 177 at 184.

<sup>2</sup>

Eg *Spurling v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461. See further para 3.18.

When one party, the proferens, has a set of terms on a document or sign the question arises as to whether the other party is bound by them when he, or she, has not signed them. There is no difficulty where their contents was known to that other party and that party knew, or should have known, as a reasonable person, that the proferens intended<sup>1</sup> to include them in the contract. In that situation, that other party's acceptance will clearly encompass the proferens' terms<sup>2</sup>. However, the more commonly arising situation is where that other party has no knowledge of the content of the terms and may not even be aware of their existence. Where there is no knowledge of the content or existence of the terms, the basic test for their incorporation is whether the proferens provided 'reasonably sufficient' notice of the terms<sup>3</sup>. This generally need only relate to their existence and the proferens intent to use them as terms of the contract. This means that when notice is provided the terms themselves need not normally be included, but merely a reference to them and the place where they may be found<sup>4</sup>, and it may not be necessary to refer to where they may be found if they are reasonably accessible (ie if the reasonable person would realise where they are to be found and could reasonably do so)<sup>5</sup>. However, the situation differs in relation to clauses which are unusual or unreasonable<sup>6</sup>. In relation to such clauses, additional efforts will be required by the proferens if 'reasonably sufficient' notice is to be provided. A signed acknowledgement of receipt of the notice by one party could go some way towards showing that sufficient and reasonable efforts had been taken to ensure that that party's attention was drawn to the terms of the agreement<sup>7</sup>.

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1

*Olley v Marlborough Court Ltd* [1949] 1 KB 532 at 549; *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70.

2

*Parker v South Eastern Rly Co* (1877) 2 CPD 416, Mellish LJ at 421, Bagallay LJ at 425, Bramwell LJ at 426; *Harris v Great Western Rly Co* (1876) 1 QBD 515.

3

*Parker v South Eastern Rly Co* (1877) 2 CPD 416, Mellish LJ at 424; *Hood v Anchor Line Ltd* [1918] AC 837; *Richardson, Spence & Co v Rowntree* [1894] AC 217; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 54.

4

*Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165; *Circle Freight Ltd International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427; *Poseidon v Davies Turner* [1996] 2 Lloyd's Rep 388 at 392–393. See further para 3.17.

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This would seem to be the conclusion to be drawn from the approach of the majority in *O'Brien v MGN Ltd* [2002] CLC 33.

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*Spurling v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70; *Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *Ceval Alimentos SA v Agrimpex Trading Co, The Northern Progress (No 2)* [1996] 2 Lloyds Rep 319. It should not however be assumed that limitation or exclusion of liability clauses are necessarily unusual or onerous – these are indeed quite common in practice (*Allen Fabrications Ltd v ASD Ltd (t/a ASD Metal Services and/or Klockner & Co Multi Metal Distribution* [2012] EWHC 2213 (TCC); *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC)). A higher threshold is required, especially, in relation to purely commercial contracts. See also para 3.16.

7

Just as in relation to incorporation by signature<sup>8</sup>, fraud or misrepresentation as to terms in unsigned documents or signs should prevent them being relied upon, at least to the extent that they were misrepresented<sup>9</sup>.

## Basic test

### [3.14]

Where there is no knowledge of the content of the terms or of their existence, the basic test of the incorporation of clauses in unsigned documents or signs is whether the proferens 'did what was reasonably sufficient to give the plaintiff notice of the condition'<sup>1</sup>. This has also simply been put in terms of whether 'reasonable notice of the terms [has] been given'<sup>2</sup> or even, in terms of whether the clause was 'fairly brought to the attention of the other party'<sup>3</sup>, although the latter formulation is primarily used when an unusual or unreasonable term is being considered. The test is objective<sup>4</sup>. It is a matter of sufficiency of

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*Allen Fabrications Ltd v ASD Ltd (t/a ASD Metal Services and/or Klockner & Co Multi Metal Distribution* [2012] EWHC 2213 (TCC).

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See para [3.8](#).

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*Mendelssohn v Normand* [1970] 1 QB 177, Phillimore LJ. See also *Roe v R A Taylor Ltd* [1917] 1 KB 712 at 714–715; *Glyn v Wittleder* [1959] 2 Lloyd's Rep 409; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 277.

1

*Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 424; *Hood v Anchor Line Ltd* [1918] AC 837; *Richardson, Spence & Co v Rowntree* [1894] AC 217; *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 54. In *Parker* Mellish LJ apparently also stated a more detailed test. He said (at 423):

'that if the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions; that if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions; that if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was ... reasonable notice that the writing contained conditions.'

Despite its citation (see eg *Thornton v Shoe Lane Parking* [1971] 2 QB 163; *Thompson v London, Scottish and Midland Rly Co* [1930] 1 KB 41), this three-stage test should not be regarded as an accurate statement of the current law. It is inconsistent with the emphasis on the basic test as one of fact. It is also inconsistent with a requirement of a greater degree of notice for unreasonable or unusual terms (see para [3.16](#)).

2

*Keeton Sons & Co Ltd v Carl Prior Ltd* [1986] BTLC 30, Lexis, Ackner LJ; *Circle Freight Ltd International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* (17 March 1995, unreported); *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265.

3

*Thornton v Shoe Lane Parking* [1971] 2 QB 163, 172; *Interfoto Picture Library v Stiletto Visual Programs Ltd* [1988] 1 All ER 348; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *O'Brien v MGN Ltd* [2002] CLC 33, para 20. See below para [3.16](#).

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notice for the reasonable person, not the particular individual, and some difficulty of the individual such as illiteracy<sup>5</sup> is irrelevant. The situation may, however, be different if the difficulty of the individual<sup>6</sup>, or the type of individual<sup>7</sup>, was, or should have been, realised by the proferens. More generally, past dealings between the parties may impact upon what amounts to reasonably sufficient notice in relation to a subsequent contract between them<sup>8</sup>.

The basic test of 'reasonably sufficient notice' is one of fact<sup>9</sup>, taking account of such factors as the smallness of the print<sup>10</sup>, the placing of the terms within a document<sup>11</sup>, whether a ticket has been folded over<sup>12</sup> or if the clause had been obscured by a date stamp<sup>13</sup>. It may be that there will not normally be reasonably sufficient notice of a clause printed on the back of a ticket if the front of the ticket does not plainly indicate that<sup>14</sup>, but it should depend upon all the facts of the particular case<sup>15</sup>. The use of a fax

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*Parker v South Eastern Rly Co* (1877) 2 CPD 416, Mellish LJ at 423; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41.

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*Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41.

6

*Geier v Kujawa Weston and Warne Bros (Transport) Ltd* [1970] 1 Lloyd's Rep 364.

7

*Richardson, Spence & Co v Rowntree* [1894] AC 217 at 223.

8

*TICC v Cosco (UK) Ltd* [2002] CLC 346, paras 19–24.

9

*Hood v Anchor Line* [1918] AC 837 at 844; *Cooke v T Wilson, Sons & Co Ltd* (1915) 85 LJKB 888; *Nunan v Southern Rly* [1923] 2 KB 703 at 705; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 52; *Cockerton v Naviera SA* [1960] 2 Lloyd's Rep 450 at 459; *Keeton Sons & Co Ltd v Carl Prior Ltd* [1986] BTLC 30, Lexis, Ackner LJ; *Circle Freight Ltd International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* (17 March 1995, unreported); *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *TICC v Cosco (UK) Ltd* [2002] CLC 346, para 19. But see *Henderson v Stevenson* (1875) LR 2 Sc & Div 470; *Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172; *White v Blackmore* [1972] 2 QB 651.

10

*Thompson* at 54; *Richardson, Spence & Co v Rowntree* [1894] AC 217 at 221; *Butler v Hearne* (1810) 2 Camp 415; *Roe v R A Taylor Ltd* [1917] 1 KB 712.

11

Not sufficient to show that the conditions were printed in a mass of other printed material such as advertisements: *Stephen v International Sleeping Car Co Ltd* (1903) 19 TLR 621.

12

*Richardson, Spence v Rowntree* [1894] AC 217.

13

*Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172.

14

*Henderson v Stevenson* (1875) LR 2 Sc & Div 470; *Sugar v London, Midland and Scottish Rly Co* [1941] 1 All ER 172; *White v Blackmore* [1972] 2 QB 651 at 664.

15

machine, transmitting only one side of a document, led to the terms on the back of the original not being incorporated, even though what was transmitted said 'for terms see back'. The situation was not regarded as equivalent to incorporation by reference. It was thought to be a 'more cogent inference that the terms were not intended to apply'<sup>16</sup>. A supplier's faxed page with 'Delivery based on our General Conditions of Sale' at its foot, when the 'Conditions' were not supplied, did not provide reasonably sufficient notice in a 'battle of the forms context' ie where the purchaser had already sent their own standard terms with their offer<sup>17</sup>. In general, the type of transaction may be relevant<sup>18</sup> and it may be easier to establish that reasonably sufficient notice has been provided if the transaction is of a type in which it is commonly known that standard terms will be used<sup>19</sup>. The opportunity for the other party to examine the document or sign by which the proferens seeks to provide notice may be relevant<sup>20</sup>.

## Type of document

### [3.15]

The type of document in which the clause is found will be relevant to the question of its incorporation. As has been indicated, a non-contractual document will not incorporate terms<sup>1</sup>. However, in the context of a general requirement of reasonably sufficient notice, the type of document may also be seen as relevant to that requirement<sup>2</sup> – even in relation to clauses which are not unreasonable or unusual, notice does not merely relate to the existence of the clauses, but their existence as intended contract terms. If it is a document which is not of a type which the reasonable person would expect to contain contract terms then that will indicate an absence of reasonably sufficient notice<sup>3</sup>. Clauses have failed to be incorporated from

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*Hood v Anchor Line* [1918] AC 837, Viscount Haldane at 844, explaining *Henderson v Stevenson* (1875) LR 2 Sc & Div 470.

<sup>16</sup>

*Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] 2 Lloyd's Rep 388, 394.

<sup>17</sup>

*Sterling Hydraulics Ltd v Dictomatik* [2006] EWHC 2004. The statement as to the supplier's General terms of sale was not seen as sufficient to prevent the supplier's faxed reply functioning as an acceptance rather than a counter offer and the contract was made on the purchaser's terms.

<sup>18</sup>

*Parker v South Eastern Rly* (1877) 2 CPD 416, 423; *Hood v Anchor Line* [1918] AC 837, 845; *Smith v Taylor* [1966] 2 Lloyd's Rep 231, 235; *O'Brien v MGN Ltd* [2002] CLC 33, para 20.

<sup>19</sup>

*Parker v South Eastern Rly Co* (1877) 2 CPD 416 at 424; *Hood v Anchor Line* [1918] AC 837 at 849; *Alexander v Railway Executive* [1951] 2 KB 882; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41; *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450 at 460; *Circle Freight Ltd International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427.

<sup>20</sup>

*Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41, 54; *Thornton v Shoe Lane Parking* [1971] 2 QB 163.

<sup>1</sup>

See para [3.09](#).

<sup>2</sup>

Clarke 'Notice of Contractual Terms' (1976) 35 CLJ 51.

<sup>3</sup>



a deck chair hire ticket<sup>4</sup> and a cheque book<sup>5</sup>. In contrast, if a contract is of a type commonly known to include standard terms that will assist incorporation. Such 'common knowledge' may relate to people in general<sup>6</sup> or to those normally undertaking the type of transaction in question<sup>7</sup>.

## The content of the clause

### [3.16]

'How much is required as being ... "reasonably sufficient notice of the condition", depends upon the nature of the ... condition'<sup>1</sup>. The point was graphically made by Denning LJ<sup>2</sup>:

'the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to [them] before the notice could be held to be sufficient.'

For obvious reasons, this is sometimes referred to as the 'red hand rule'. It applies to clauses which are unusual<sup>3</sup> or unreasonable<sup>4</sup>, although more recently the reference has usually been to 'onerous' clauses'

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*Parker v South Eastern Rly Co* (1877) 2 CPD 416, Mellish LJ at 422; *Chapelton v Barry UDC* [1940] 1 KB 532, Slesser LJ at 538. See also *Henson v London and North Eastern Rly Co* [1946] 1 All ER 653; *Walls v Centaur Co Ltd* (1921) 126 LT 242 at 245; *Dillon v Baltic Shipping Co Ltd, The Mikhail Lermontov* [1991] 2 Lloyd's Rep 155; *Fosbroke-Hobbes v Airwork Ltd* (1936) 53 TLR 254; *Taylor v Glasgow Corp'n* 1952 SC 440; *Skrine v Gould* (1912) 29 TLR 19; *Harling v Eddy* [1951] 2 KB 739 at 748; *Burnett v Westminster Bank Ltd* [1966] 1 QB 742 at 763. When a document is headed 'receipt' the reasonable person may regard it as being merely proof of payment, and not as containing terms, and in addition it may arrive too late, after the contract has been concluded: *Chapelton v Barry UDC* [1940] 1 KB 532; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125. However, there is no reason why a document headed 'receipt' should not successfully incorporate clauses into a contract if it arrives in time and the circumstances indicate its role to the reasonable person – *Watkins v Rymill* (1883) 10 QBD 178.

4

*Chapelton v Barry UDC* [1940] 1 KB 532.

5

*Burnett v Westminster Bank Ltd* [1966] 1 QB 742, 763.

6

*Alexander v Railway Executive* [1951] 2 KB 882, Devlin J 886 – 'most people nowadays know that railway companies have conditions subject to which they take articles into their cloakrooms'.

7

*Parker* Mellish LJ at 422 – 'in the great majority of cases persons shipping goods do know that the bill of lading contains terms'; *Nunan v Southern Rly Co* [1923] 2 KB 703 at 707; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 50. See also above in relation to the type of situations in which standard terms are expected to be used: para 3.14.

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*Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 Megaw LJ at 172. Megaw LJ referred to 'restrictive conditions' but it is established that the approach is not confined to exemption clauses: *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348.

2

*Spurling v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461 at 466.

3

rather than unreasonable ones<sup>5</sup>, but it would seem that 'onerous' clauses should be regarded merely as a type of unreasonable clause. In any event, the point has been made that the 'words "onerous or unusual" are not terms of art. They are simply one way of putting the general proposition ... that more is required in relation to certain terms than to others depending on their effect'<sup>6</sup>. It has been said that the rule requires the proferens to 'show that his intention to attach [a] ... condition of that nature was fairly brought to the notice of the other party'<sup>7</sup> and the type of clause was identified with some specificity as one 'restrictive of statutory rights' and 'relating to personal injury'. However, there have also been indications that notice of the type of clause, even at that level of particularity, will not suffice, but that what is required is that the proferens show that 'the particular condition was fairly brought to the attention of the other party'<sup>8</sup>.

The rule has been applied to a clause imposing an additional charge for retention of hired goods beyond a set period, when the hire charge was more per item per day than was charged by ten other hirers per item per week<sup>9</sup>. More commonly, it has been applied in the context of exemption clauses to clauses exempting liability for personal injury due to negligence<sup>10</sup>, and to terms removing rights given by statute,

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*Lewis v M'Kee* (1868) LR 4 Exch 58; *Crooks v Allan* (1879) 5 QBD 38 at 40; *Hood v Anchor Line* [1918] AC 837 at 846–847; *Thornton v Shoe Lane Parking* [1971] 2 QB 163, Megaw LJ at 172–173; *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70 at 76; *Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348, Dillon LJ at 351–352, Bingham LJ at 357; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427, Taylor LJ at 433; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] CLC 1529 at 1543. For a problematic approach to what amounts to an unusual clause see *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), 94 ConLR 81; *Munckenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr) – although there is no problem with the application of the rule as both clauses were also considered unreasonable. Also *Allen Fabrications Ltd v ASD Ltd (t/a ASD Metal Services and/or Klockner & Co Multi Metal Distribution* [2012] EWHC 2213 (TCC).

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*Parker Bramwell* LJ at 428; *Van Toll v South Eastern Rly Co* (1862) 12 CBNS 75, Byles J at 88, but contrast Erle CJ at 85; *Thompson v London, Midland and Scottish Rly Co* [1930] 1 KB 41 at 53 and 56; *Spurling v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, Denning LJ at 466; *Thornton v Shoe Lane Parking* [1971] 2 QB 163, Denning LJ; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] CLC 1529 at 1543.

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*Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427, Taylor LJ at 433; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265. But see *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] CLC 1529 at 1543.

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*O'Brien v MGN Ltd* [2002] CLC 33, Hale LJ, [23].

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*Thornton* [1971] 2 QB 163, Megaw LJ at 172.

8

*Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348, Dillon LJ. See also Bingham LJ.

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*Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348.

10

*Thornton* Denning LJ. See now UCTA 1977, s 2: see para [3.77](#).

particularly in the context of personal injury<sup>11</sup>, although it has also been extended to a clause restricting liability for breach of the terms implied by the Sale of Goods Act 1979<sup>12</sup> and to an arbitration clause which statute would not have inserted in the consumer context<sup>13</sup>. It was regarded as inapplicable in relation to a term limiting the right of appeal under s 69 of the Arbitration Act 1996 where the parties had agreed to arbitration<sup>14</sup>. However, the potential was recognised for it to apply to a clause requiring arbitration in Utah in relation to a distributorship agreement operating in the UK if it was uncommon or would 'in practice' mean that the claimant had 'no real prospect of pursuing her claim'<sup>15</sup>. It was regarded as inapplicable to a 'rule' in a newspaper scratchcard game which turned 'an apparent winner into a loser' but which was also seen as 'merely [depriving] the claimant of a windfall for which he [had] done very little in return'<sup>16</sup>.

Some consideration should be given to the potential evolution of the rule, particularly against the background of its overlap with legislative controls. (Artificialities in the contracting process may be relevant to both the 'requirement of reasonableness' under the UCTA 1977<sup>17</sup> and the fairness test under the Unfair Terms in Consumer Contracts Regulations 1999.<sup>18</sup>) This overlap can be seen as the basis of the difference of opinion in the Court of Appeal in *AEG (UK) Ltd v Logic Resource Ltd*<sup>19</sup> as to the operation of the rule. The majority thought that in considering whether a clause was unusual or unreasonable (and so within the scope of the rule), it was the particular clause which had to be addressed and which could therefore be unusual or unreasonable because of its extent or scope. Hobhouse LJ took a different view, claiming that a clause had to be unusual or unreasonable as a type of clause in order for the rule to apply<sup>20</sup>. Plainly the approach of the majority was in keeping with that previously taken<sup>21</sup>.

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*Thornton Megaw LJ at 173; Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70 at 76.

12

*AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265.

13

*Picardi v Cuniberti* [2002] EWHC 2923 (TCC), 94 ConLR 81 at [99].

14

*Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 243, [2007] 3 All ER 342, [2007] 2 All ER (Comm) 23.

15

*Kaye v Nu Skin UK Ltd* [2009] EWHC 3509, [2010] All ER (D) 177 (Feb).

16

*O'Brien v MGN Ltd* [2002] CLC 33, [21], Hale LJ.

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See para [3.94](#).

18

See paras [3.106](#) and [3.110](#).

19

[1996] CLC 265.

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This difference in view as to the scope of the red hand rule has been noted subsequently in *Ocean Chemical Transport Inc v Exnor Craggs Ltd* [2000] 1 All ER (Comm) 519.

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However, the approach of Hobhouse LJ, must be viewed against the background of his wider comments as to the desirability of the red hand rule. He said:<sup>22</sup>

‘In the past there may have been a tendency to introduce more strict criteria [for incorporation] but this is no longer necessary in view of the Unfair Contract Terms Act. The reasonableness of clauses is the subject matter of the Unfair Contract Terms Act and it is under the provisions of the Act that problems of unreasonable clauses should be addressed and the solution found.’

Hobhouse LJ, saw the rule as no longer required in the light of the Unfair Contract Terms Act 1977 and wished to see it restricted to limit the uncertainty which he saw it as generating. His approach to the rule – applying it only on the basis of the type of clause, rather than in relation to the particular clause – would considerably curtail the scope of the rule, and it might therefore be taken if it was considered generally that the rule now merely generated uncertainty without being of any significant benefit. However, neither UCTA 1977 nor the Unfair Terms in Consumer Contracts Regulations 1999 could have dealt with the onerous and unusual clause in *Interfoto Picture Library v Stiletto Visual Programmes*<sup>23</sup> – it imposed an obligation, rather than exempting liability and it was a business to business contract – and the rule is still perceived as useful<sup>24</sup>. In *Lacey's Footwear v Bowler International* Brooke LJ was an enthusiastic advocate of the rule, preferring its use to what he saw as the ‘Byzantine’ construction approach adopted by the majority<sup>25</sup> and there have been suggestions that its operation might be extended to the context of incorporation by signature<sup>26</sup>. In addition, in concluding that the Unfair Contract Terms Act 1977 should have a very limited application in the context of the Contracts (Rights of Third Parties) Act 1999 the Law Commission emphasised the use of common law devices to control exemption clauses<sup>27</sup> and noted<sup>28</sup> as of particular interest Bingham LJ's reference in *Interfoto*<sup>29</sup> to ‘a contractual principle of dealing in good faith’ of which the red hand rule was seen as forming a part. The balance seems to remain in favour of

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*Interfoto v Stiletto Visual Programmes* [1988] 1 All ER 348, for example, was concerned with whether the specific clause was unusual or unreasonable and not merely whether it was unusual or unreasonable as a type of clause – in deciding that the rule applied, the court compared the extent of the clause in *Interfoto* (ie the amount which had to be paid under it) with that used by other ten other agencies.

<sup>22</sup>

At p 277.

<sup>23</sup>

[1988] 1 All ER 348.

<sup>24</sup>

In *Picardi v Cuniberti* [2002] EWHC 2923 (TCC), 94 ConLR 81 it was suggested that in some cases the rule provided wider protection for the consumer than the Regulations did, ie it could impact upon clauses which would not be considered as creating a significant imbalance in the parties' rights and obligations under the contract.

<sup>25</sup>

[1997] 2 Lloyd's Rep 369 at 385.

<sup>26</sup>

See above, para [3.11](#).

<sup>27</sup>

Law Com No 242, para 13.10(iv).

<sup>28</sup>

Law Com No 242, para 13.10(iv), fn 10.

<sup>29</sup>

[1988] 1 All ER 348, 352.

the continued operation of the red hand rule in its original form<sup>30</sup> and this would seem to have been strengthened by the perception of the rule as an element of the common law (alongside the potential for claims as duress, undue influence and mistake) which means that an agreement to arbitrate can effectively waive rights under Human Rights Act 1998, Pt 1, Sch 1, art 6 rather than infringe them<sup>31</sup>.

## Reference

### [3.17]

It has long been accepted that incorporation can occur by reference, ie the ticket or other document need not contain the terms but can merely state that a set of terms is being incorporated and where they are to be found<sup>1</sup> and the route to the terms may be circuitous<sup>2</sup>. It may not be necessary to state where they may be found if they are reasonably accessible (ie if the reasonable person would realise where they are to be found and could reasonably do so)<sup>3</sup>. However, if the terms referred to contain unreasonable or unusual terms, then a mere reference to the terms as a whole will not suffice to incorporate terms of that type<sup>4</sup>. It will need to be shown that, at least, the intention to incorporate terms 'of that nature was fairly brought to

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In *Kaye v Nu Skin UK Limited* [2012] EWHC 958 (QB), it was clear that the red hand rule was very much adopted and applied in a commercial case involving a claim that the arbitration clause was unusual and unreasonable and therefore required specific notice to be given to the claimant at the time of contracting. The court, applying the rule, disagreed stating that it was commonplace for cross-border commercial contracts to contain an arbitration clause referring dispute to arbitration in Utah, USA when one of the parties had their headquarters in Utah. The court ruled that the provisions of the Uniform Arbitration Act (Utah) were very similar to the Arbitration Act 1996 and provided for clear and transparent rules governing the appointment and conduct of the arbitrator. The arbitration procedures in Utah were thus found to have been clearly set out and fair. Accordingly, the clause was not so unreasonable or onerous that it should very specifically have been brought to the claimant's attention. Neither was it unfair or unconscionable for the claimant to be bound by it. See also *Carewatch Care Services Limited v Focus Caring Services Limited, Anthony J Grace, Elaine C Grace* [2014] EWHC 2313 (Ch) at para 84.

31

*Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 All ER (Comm) 1, [2007] Bus LR 1052, [53].

1

*Thompson v London, Midland & Scottish Rly Co* [1930] 1 KB 41; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18.

2

*Thompson* [1930] 1 KB 41, Lord Hanworth MR at 48.

3

This would seem to be the conclusion to be drawn from the approach of the majority in *O'Brien v MGN Ltd* [2002] CLC 33.

4

*Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427, Taylor LJ at 433; *Ceval Alimentos SA v Agrimpex Trading Co Ltd, The Northern Progress (No 2)* [1996] CLC 1529 at 1543.

the notice' of the party it is sought to bind<sup>5</sup>. It should also be noted that in the 1999 Regulations on Unfair terms in Consumer Contracts, the list of terms<sup>6</sup> which may be regarded as unfair includes:

'Terms which have the object or effect of ...

- (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.'

In contracts between consumers and sellers or suppliers, this requires consideration of the accessibility of any terms it is sought to incorporate by reference and that will reflect upon the fairness of the referring term.

## Course of dealing and trade practice

### [3.18]

It may be that the relevant contract between the parties is not an isolated transaction but part of a pattern of dealing between them. In some cases, when the proferens has failed to incorporate his, or her, standard terms into the particular contract, those terms may nevertheless be incorporated on the basis of a course of dealing<sup>1</sup> between the parties<sup>2</sup>. The incorporation of terms by a prior course of dealing is a question of fact and degree<sup>3</sup>. It will depend, amongst other things, on the number of previous contracts, how recent they were, and the similarity in terms of subject matter and the manner in which they were concluded.

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*Thompson* [1930] 1 KB 41, Megaw LJ: see para 3.16. The same should apply where the party it was sought to bind knew of the existence of the terms but not their content.

6

Sch 3, para 4(4).

1

*Roe v R A Naylor Ltd* (1918) 87 LJKB 958 at 963; *Spurling v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461; *McCutcheon v David MacBrayne* [1964] 1 All ER 430, [1964] 1 WLR 125; *Kendall & Sons Ltd v Lillico & Sons Ltd* [1969] 2 AC 31; *PLM Trading Co (International) Ltd v Geogiou* [1987] CLY 430; *Circle Freight International v Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427; *Hollier v Rambler Motors Ltd* [1972] 2 QB 71; *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470; affd [1980] 1 Lloyd's Rep 53; *Transmotors Ltd v Robertson Buckley & Co* [1970] 1 Lloyd's Rep 224; *British Crane Hire Ltd v Ipswich Plant Hire* [1975] QB 303; *Walek v Chapman* [1980] 2 Lloyd's Rep 279; *Lampport & Holt Lines Ltd v Coubro & Scrutton Ltd, The Raphael* [1981] 2 Lloyd's Rep 659; *Victoria Fur Traders Ltd v Roadline* [1981] 1 Lloyd's Rep 570; *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported); *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 Lloyd's Rep 356; *Johnson Mathey Bankers Ltd v State Trading Corpn of India* [1984] 1 Lloyd's Rep 427; *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 ConLR 109; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* (17 March 1995, unreported).

2

Or between one of the parties and companies in the same group: *SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470; affd [1980] 1 Lloyd's Rep 53. See also *Eastman Chemical International AG v NMT Trading* [1972] 2 Lloyd's Rep 25.

3

*Capes (Hatherden) Ltd v Western Arable Services Ltd* [2010] Lloyd's Rep 477; also *Lisnave Estaleiros Navais Sa v Chemikalien Seetransport GmbH* [2013] EWHC 338.

In *Kendall v Lillico*<sup>4</sup>, for example, the parties made a contract on the telephone and that was followed by the despatch of a 'sold note' containing the terms in question. In each case, the sold note arrived too late to incorporate terms into the instant contract<sup>5</sup> but, by the time of the disputed transaction, the terms were instead incorporated on the basis of the course of dealing by the parties – three or four transactions a month following the same pattern over a three-year period<sup>6</sup>. The mechanism by which incorporation by a course of dealing occurs is that the circumstances are such that, at the time of contracting, both parties, as reasonable persons, would have assumed the inclusion of the proferens' standard terms in the offer and acceptance<sup>7</sup>. The test for such incorporation has been said to be:

‘what each party by his words and conduct reasonably led the other party to believe were the acts he was undertaking a legal duty to perform.’

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This refers not to the actual belief of the 'other party' but to what that party would have been led to believe as a reasonable person<sup>9</sup>. In addition, the point can be made that as both the instant case and the past dealings are significant in relation to such incorporation the test could be more fully formulated as:

‘whether, at the time of contracting, each party as a reasonable person was entitled to infer from the past dealings and the actions and the words of the other in the instant case, that the standard clauses were to be part of the contract.’

Three or four transactions a month for three years have been sufficient<sup>10</sup> to generate a course of dealing to incorporate terms, as have 11 transactions in six months<sup>11</sup>. 'Intermittent' contact between the parties

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*Kendall & Sons Ltd v Lillico & Sons Ltd* [1969] 2 AC 31.

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See para [3.12](#).

6

See also *Circle Freight International v Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427 – 11 such transactions in six months.

7

*Kendall & Sons Ltd v Lillico & Sons Ltd* [1969] 2 AC 31, Lord Morris at 90. *Petrotrade Inc v Texaco Ltd* [2000] CLC 1341, Clarke LJ, [26] – 'Given the course of dealing ... both parties will have made the oral agreement on the basis that the contract would be subject to the same terms as before ...'.

8

Diplock LJ in *Kendall v Lillico (sub nom Hardwick Game Farm Ltd v SAPP)* [1966] 1 All ER 309, [1966] 1 WLR 287 at 339 adopted in the House of Lords by Lord Wilberforce at [1969] 2 AC 31, 130 and for a similar formulation see Lord Pearce at 113, Lord Reid in *McCutcheon v MacBrayne* [1964] 1 All ER 430, [1964] 1 WLR 125 at 128, Donaldson J in *SIAT v Tradax* [1978] 2 Lloyd's Rep 470 at 490, Staughton J in *Johnson Mathey Bankers* [1984] 1 Lloyd's Rep 427 at 433, Clarke LJ in *Petrotrade Inc v Texaco Ltd* [2000] CLC 1341, para 27.

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*SIAT di del Ferro v Tradax Overseas SA* [1978] 2 Lloyd's Rep 470, Donaldson J at 490.

10

*Kendall & Sons Ltd v Lillico & Sons Ltd* [1969] 2 AC 31.

11

*Circle Freight International v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427.

and contracts which were then regarded 'isolated affairs' were not sufficient<sup>12</sup>, and neither were three or four transactions over a five-year period<sup>13</sup>. Not only the number of transactions and the time scale are relevant, but also such matters as the consistency of the introduction of the standard terms<sup>14</sup>. There is no requirement of complete consistency between previous transactions and the instant case, what is required is consideration of how the past and instant transactions would impact upon the perceptions of the parties<sup>15</sup>. Trade practice may be relevant to incorporation. Where there are only a small number of prior transactions, which in themselves might be insufficient to incorporate the proferens' standard terms, there may nevertheless be incorporation if the parties share a common trade background<sup>16</sup>. In general, it will be easier to establish incorporation by a course of dealing where both parties are in business<sup>17</sup>, rather than where one is a consumer<sup>18</sup>.

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*Metaalhandei JA Magnum BV v Ardfields Transport Ltd* [1988] 1 Lloyd's Rep 197 at 203.

13

*Hollier v Rambler Motors Ltd* [1972] 2 QB 71, [1972] 1 All ER 399 at 402.

14

See also *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyds Rep 369.

15

The majority in *McCutcheon v MacBrayne* might have been seen as indicating a requirement of complete consistency but see *Circle Freight International v Medeast Gulf Export Ltd* [1988] 2 Lloyd's Rep 427, Taylor LJ at 431; *SIAT v Tradax* [1980] 1 Lloyd's Rep 53, Megaw LJ at 56; *Banque Paribas v Cargill International SA* [1992] 1 Lloyd's Rep 96, Webster J at 98. There appears to be a more relaxed approach where the incorporation of the term is anticipated by EU law; for example, case law suggests that such an approach is to be adopted in respect of art 23 of Council Regulation 44/2001 which refers to provides for the incorporation of an exclusive jurisdiction clause by means of into a contract as a result of an established course of dealings. See *The Tilly Russ (MS)* [1985] 1 QB 931; *Mainschiffahrts-Genossenschaft eG v Les Gravières Rhénanes SARL* [1997] QB 1; *SSQ Europe SA v Johann & Backes OHG* [2002] 1 Lloyd's Rep 465; *Africa Express Line Ltd v Socofi SA* [2009] EWHC 3223 (Comm), [2010] 2 Lloyd's Rep 181.

16

*British Crane Hire Corp v Ipswich Plant Hire* [1975] QB 303, Lord Denning MR at 310–311, [1974] 1 All ER 1059 at 1061. See also *SIAT v Tradax* [1978] 2 Lloyd's Rep 470, Donaldson J at 490:

'Both Mr Johnson and Mr Eves approached the matter on the basis that terms can be incorporated in a contract either as a result of a course of dealing or by application of the *British Crane* doctrine which they seem to regard as different approaches. I do not think they are different. They are two different examples of a much wider concept, namely that a contract is not made in a vacuum but against a background of present and past facts and future expectations and that its terms are to be gathered not only from expressed words but also from their conduct viewed against that background.'

See also *Victoria Fur Traders Ltd v Roadline* [1981] 1 Lloyd's Rep 570; *Fal Bunkering of Sharjah v Grecale of Panama* [1990] 1 Lloyd's Rep 369.

17

*Circle Freight International v Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427. And see, in the context of two business parties, *Petrotrade Inc v Texaco Ltd* [2000] CLC 1341, Clarke LJ, [29] – 'neither party can have supposed that the only terms were those expressly referred to on the telephone'.

18

*British Crane Hire v Ipswich Plant Hire* commenting on *Hollier v Rambler Motors Ltd* [1972] 2 QB 71. See also *Mendelssohn v Normand* [1970] 1 QB 177.



Incorporation by a course of dealing may be seen as an extension of incorporation by 'reasonably sufficient notice'<sup>19</sup> with, in this context, the 'notice' provided by the past transactions, rather than an unsigned document introduced in the instant case. However, even if that is the case<sup>20</sup>, the test set out in this section draws attention to the elements more specifically relevant in the course of dealing situation and is, therefore, to be preferred. Raising the issue of the relationship of incorporation by a course of dealing to incorporation by 'notice' does, however, indicate the need to consider the application here of the 'red hand' rule<sup>21</sup> so that what would be sufficient to incorporate other terms may not incorporate unreasonable or unusual terms. In *Circle Freight International Ltd v Medeast Gulf Exports Ltd*<sup>22</sup>, in deciding that the clauses were incorporated by a course of dealing, it was noted that they were 'not particularly onerous or unusual'<sup>23</sup>.

Trade practice or trade terms of a particular trade or industry may also be incorporated by implication. As long as the parties are in a similar trade or industry and are aware generally of the content of those terms (or at least have easy access to them for reference) and that those terms are ordinarily and regularly imposed on transactions of the same a similar nature as that of the contract in question, they would be bound by those terms even if those terms were not mentioned during contractual negotiations<sup>24</sup>. The question is not whether those terms are reasonable but whether by means of relevant trade practice, the parties are said to have agreed to their incorporation<sup>25</sup>.

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*Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep 427 at 433, *McCutcheon v David McBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, Lord Devlin at 138. On incorporation by notice see para 3.13.

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See para 3.16.

21

Clearly the terms incorporated by a course of dealing are not present when the contract is made and are therefore, in a sense, 'implied' and the 'officious bystander test' for the incorporation of terms implied in fact (see para 3.20) has been viewed as relevant in this context (*McCutcheon v David McBrayne Ltd* [1964] 1 All ER 430, [1964] 1 WLR 125, Lord Reid at 128). However, this may be coupled with a 'business efficacy test' (see para 3.20) and terms implied in fact generally are often said only to be implied where it is necessary to do so (see para 3.20). Such a restrictive approach to the incorporation of terms implied in fact generally is to prevent there being, or being seen to be, an extensive rewriting of the parties' bargain by the court (eg *Trollope and Colls Ltd v North West Region Hospital Board* [1973] 2 All ER 260). Where terms are being imported less abstractly, because they have appeared in the parties' previous transactions, that same risk is not present.

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*Circle Freight International v Medeast Gulf Exports* [1988] 2 Lloyd's Rep 427.

23

Taylor LJ at 433 and compare *euNetworks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch), [2007] All ER (D) 373 (Dec), Briggs J at [217]–[218]. But see *Petrotrade Inc v Texaco Ltd* [2000] CLC 1341, [25].

24

*British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] QB 303; *Chevron International Oil Co Ltd v A/S Sea Team* [1983] 2 Lloyd's Rep 256; *Laceys Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep 369 at 378; *Balmoral Group Ltd v Borealis UK Ltd* [2006] EWHC 1900 (Comm); *Neptune Orient Lines Ltd v JVC (UK) Ltd* [1983] 2 Lloyd's Rep 438; *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm); *Matrix Europe Ltd v Uniserve Holdings Ltd* [2008] EWHC 11 (QB), [2008] 1 CLC 205.

25

When it comes to contracting by an exchange of emails, the prevailing view is that even if the final email making the formation of the contract complete does not refer to or include previous email exchanges leading to the conclusion of the exchange, those prior emails would be evaluated by the court when incorporating terms.

In addition to the terms expressly agreed upon by the parties, terms may be implied. This document discusses the implied terms of the contracts namely, terms implied in fact, terms implied in law and terms implied by custom.

## B Implied Terms

### [3.19]

In addition to the terms expressly agreed upon by the parties, terms may be implied. Often the express terms of a contract do not deal with every aspect of the performance and there may be scope to imply a term or terms. There are different types of implied term, with different requirements for the making of an implication. A term may be implied by custom<sup>1</sup>, on the basis that the parties contracted against the background of the relevant custom. Terms may also be implied in fact or law.

‘When it implies a term in a contract a court is sometimes laying down general rules that in all contracts of a certain type – sale of goods, master and servant, landlord and tenant and so on – some provision is to be implied unless the parties have expressly excluded it. ... Sometimes, however, there is no question of laying down a prima facie rule applicable to all cases of a defined type but what the court is being asked to do is to rectify a particular ... contract by inserting in it a term which the parties have not expressed.’<sup>2</sup>

Terms implied because a contract is of a certain type, may be referred to as terms implied in law<sup>3</sup>. Those implied into particular contracts on the basis that the parties intended to include them, may be referred to as terms implied in fact. In addition, terms which have not been expressed in the making of the particular contract, may nevertheless be imported into it on the basis of a course of dealing between the parties<sup>4</sup>, and terms may be implied by statute<sup>5</sup> into particular types of contract.

### *Terms implied in fact*

### [3.20]

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See *Attorney-General of Belize v Belize Telecom* [2009] UKPC 10.

1

See para 3.25.

2

*Liverpool City Council v Irwin* [1977] AC 239, Lord Cross at 257–258.

3

See para 3.21.

4

See para 3.18.

5

See eg Sale of Goods Act 1979, ss 12–15. Whether the parties can prevent the implication of statutorily implied terms will depend on statute. The exclusion of the terms implied by the Sale of Goods Act 1979 is regulated by UCTA 1977, s 6: see para 3.81.

In implying terms in fact, the intention of the parties (objectively ascertained) is sought<sup>1</sup>, 'collected from the words of the agreement and the surrounding circumstances'<sup>2</sup>. It is emphasised that the court will not 'improve the contract which the parties have made for themselves'<sup>3</sup> and traditionally the search for the parties' intention has occurred within restricted boundaries, through the use of a 'stringent'<sup>4</sup> test or tests (the 'business efficacy test' and the 'officious bystander test'). These tests have confined the search for the parties' intention to its least disputable area and have thus provided some assurance that the courts are not rewriting the parties' bargain.<sup>5</sup> However, in the Privy Council case *Attorney-General of Belize v Belize Telecom*<sup>6</sup>, Lord Hoffmann took the line that implying terms in fact is part of the construction of the contract and that the traditional tests should merely be seen as indicators of the intention of the parties and should not stand in the way of fulfilling that intention. He stated:<sup>7</sup>

'the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background would reasonably be understood to mean'.

Undoubtedly, the implication of terms in fact is founded on the objectively ascertained intention of the parties and plainly that can simply be seen as part of the process of construction. Nevertheless, even post-*Investors* construction of express terms is not simply a matter of applying basic principle. (There are, for example, artificial restrictions on the evidence of the background to the transaction which can be

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*Liverpool City Council v Irwin* [1977] AC 239, Lord Edmund-Davies at 266; *Rhodes v Forwood* (1876) 1 App Cas 256, Lord Chelmsford at 268; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, Lord Wright at 137; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, Jenkins LJ at 59; *Abbott v Sullivan* [1952] 1 KB 189, Morris LJ at 219; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, Lord Pearson at 267; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, Lord Denning MR at 254; *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 488; *Liverpool City Council v Irwin* [1977] AC 249; *Duke of Westminster v Guild* [1985] QB 688, Slade LJ at 699; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd*, *The Good Luck* [1990] 1 QB 818, [1989] 3 All ER 628; *National Bank of Greece SA v Pinios Shipping Co*, *The Maira* [1990] 1 AC 637, [1989] 1 All ER 213; *Ashmore v Corp of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 626; *Hughes v Greenwich London Borough Council* [1994] 1 AC 170, Lord Lowry at 179; *McVitae v UNISON* [1996] IRLR 33, Harrison J at 39; *Harrods Ltd v Harrods (Buenos Aires) Ltd* [1997] FSR 420, Neuberger J at 453; *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 2 All ER (Comm) 479, [33].

2

*Ali v Christian Salvesen Food Services Ltd* [1997] 1 All ER 721, Waite LJ at 726.

3

*Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, Lord Pearson at 267.

4

*Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127, Steyn J at 131; *Ashmore v Corp of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 627.

5

See n 3.

6

[2009] UKPC 10, [2009] 2 All ER (Comm) 1.

7

[2009] UKPC 10, [2009] 2 All ER (Comm) 1 at [21].

considered in the search for the parties' intention).<sup>8</sup> The exact impact of Lord Hoffmann's casting aside of the tests traditionally used to keep the implication of terms within narrow bounds is not yet clear. Although His Lordship's statement has been endorsed with approval by a number of high-level judicial decisions<sup>9</sup>, it should be noted that the Court of Appeal has subsequently confirmed that necessity remains the touchstone for the implication of any term<sup>10</sup>. The question which always has to be asked is whether the proposed implied term is necessary to make the contract work<sup>11</sup>. A case from Singapore, *Peng v Mai*<sup>12</sup>, decided that the Singapore courts would not follow to the extent that Lord Hoffmann's new formulation to the extent that it implied that the traditional 'business efficacy' and 'officious bystander' tests are no longer central, that would not be followed in Singapore<sup>13</sup>. This will be returned to below, but first consideration should be given to the restrictive tests traditionally used in relation to terms implied in fact.

The 'business efficacy' test was stated, and explained in *The Moorcock*<sup>14</sup>:

'the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should

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See para 3.43.

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For example, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The 'Reborn')* [2009] EWCA Civ 531; *Chantry Estates (Southeast) Ltd v Anderson* [2010] EWCA Civ 316; *KG Bominflot Bunkergesellschaft für Mineralöle MbH v Petroplus Marketing AG* [2010] EWCA Civ 1145; *Beazer Homes Ltd v Durham CC* [2010] EWCA Civ 1175; *Garratt v Mirror Group Newspapers Ltd* [2011] EWCA Civ 425, [2011] IRLR. 591; *Crema v Cenkos Securities plc* [2010] EWCA Civ 1444; *BDW Trading Ltd v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548; *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325; *Procter and Gamble Co v Svenska Cellulose Aktiebolaget SCA* [2012] EWCA Civ 1413.

10

See *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531, [2009] 1 CLC 909, Lord Clarke MR at [15].

11

*Ibid.*, at [15] and [18].

12

[2012] SGCA 55; 149 Con LR 117 (judgment by Andrew Phang JA).

13

See also *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43; 151 Con LR 170 where the Singapore Court of Appeal made it plain that it remains the law in Singapore that the implication of contract terms is to be considered using a three-step process: (a) ascertaining how the gap in the contract had arisen; (b) considering whether it was necessary in the business sense to imply a term to give the contract efficacy; (c) considering the specific term to be implied, applying the officious bystander test.

14

*The Moorcock* (1889) 14 PD 64, Bowen LJ; *Hamlyn & Co v Wood & Co* [1891] 2 QB 488; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51; *Bander Property Holdings v J S Derwen* [1968] 2 All ER 305; *Lupton v Potts* [1969] 3 All ER 1083, [1969] 1 WLR 1749, Plowman J at 1753; *Vosper Thornycroft v Ministry of Defence* [1976] 1 Lloyd's Rep 58 at 61; *Alpha Trading Ltd v Dunshaw – Patten Ltd* [1981] QB 290, Brandon LJ at 304; *Paula Lee Ltd v Robert Zehil & Co Ltd* [1983] 2 All ER 390, Mustill LJ at 396; *Duke of Westminster v Guild* [1985] QB 688, Slade LJ at 699; *Ben Shipping Co v An Bord Baine* [1986] 2 All ER 177, Bingham J at 182; *Barclays Bank v Taylor* [1989] 3 All ER 563, [1989] 1 WLR 1066, Lord Donaldson at 1074; *Sun Alliance etc v RJL* [1991] 2 Lloyd's Rep 410 at 412.

have. In business transactions such as this what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties.’

It is often said that the test is that of ‘necessity’. The ‘necessity’ referred to here relates to what is required ‘to render the contract workable’<sup>15</sup> and that will depend upon the construction of the contract<sup>16</sup>. The touchstone, as is often said, is necessity, not merely reasonableness or usefulness<sup>17</sup>. That said, there is some judicial opinion that in certain types of contracts it might be better to focus on questions of reasonableness, fairness and the balance of competing policy considerations rather than on the elusive or protean concept of ‘necessity’<sup>18</sup>.

In addition to the ‘business efficacy’ test, the ‘officious bystander’ test is also often cited. In *Shirlaw v Southern Foundaries Ltd* Mackinnon LJ said<sup>19</sup>:

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*Associated Japanese Bank (International) Ltd v Crédit Du Nord* [1988] 3 All ER 902, [1989] 1 WLR 255, Steyn J at 263.

16

See eg *CEL Group v Nedlloyd Lines* [2003] EWCA Civ 1716, [2004] 1 All ER (Comm) 689 at [15] – ‘Everything depends upon the true construction of the contract in question. If the agreement was that CEL would have the exclusive right to provide for all the defined haulage requirements of NLL’s business over the three year period, then there was no difficulty about implying a term ... that NLL would do nothing of their own motion to make it impossible for CEL to supply those requirements. If the agreement was simply that NLL would not go elsewhere for their haulage requirements, then there is nothing to prevent NLL disposing of their business in whatever way they saw fit’.

17

*Liverpool CC v Irwin* [1977] AC 239 at 266; *BP Refinery (Westenport) Pty Ltd v Shire of Hastings* (1977) 52 ALJR 20 at 26; *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1980] 1 Lloyd’s Rep 44; *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 at 104; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294; *Bedfordshire CC v Fitzpatrick Contractors Ltd* (1998) 62 Const LR 64 at 71; *Mousaka Inc v Golden Seagull Maritime Inc* [2002] 1 Lloyd’s Rep 797 at 802; *Meridian International Services Ltd v Richardson* [2008] EWCA Civ 609, [2008] Info TLR 139; *Brookfield Construction Ltd v Foster & Partners Ltd* [2009] EWHC 307 (TCC), [2009] BLR 246; *Arla Foods UK plc v Barnes* [2008] EWHC 2851 (Ch), [2009] 1 BCLC 699; *Mediterranean Salvage and Towage Ltd v Seamar Trading & Commerce Inc (The ‘Reborn’)* [2009] EWCA Civ 531, [2009] 2 Lloyd’s Rep 639 at [15]–[18]; *IMT Shipping and Chartering GmbH v Chansung Shipping Co Ltd (The ‘Zenovia’)* [2009] EWHC 739 (Comm), [2009] 2 Lloyd’s Rep 139 at [23]; *AET Inc Ltd v Arcadia Petroleum Ltd* [2009] EWHC 2337 (Comm), [2010] 1 Lloyd’s Rep 593 at [39]; *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB); *Chantry Estates (South East) Ltd v Anderson* [2010] EWCA Civ 316, 130 Con LR 11; *Re Agrimarche Ltd* [2010] EWHC 1655 (Ch), [2010] BCC 775; *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] PNLR 9; *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 at [544]; *Leander Construction Ltd v Mullaley & Co Ltd* [2011] EWHC 3449 (TCC) at [41]; *NSB Ltd v Worldplay Ltd* [2012] EWHC 927 (Comm); *Consolidated Finance Ltd v McCluskey* [2012] EWCA Civ 1325, [2012] CTLR 133; *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 584 (Comm), [2013] 1 BCLC 125; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468 (Comm), [2013] 1 All ER (Comm) 1244 at [41]; *Proton Energy Group SA v Orlen Lietuva* [2013] EWHC 2872 (Comm) at [43].

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See for example *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293 (per Morritt V-C with respect to a contract of employment); Peden, ‘Policy Concerns behind Implication of Terms in Law’ (2001) 117 LQR 459.

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‘Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common “Oh, of course”.’

The authorities by no means put the relationship of the traditional tests beyond doubt. It has not been uncommon to find them equated or joined as one test. In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* for example, Lord Pearson said<sup>20</sup>:

‘It must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, although tacit, is part of the contract the parties made for themselves.’

Such comments indicate that the tests should be regarded as cumulative, with terms being implied if they are both necessary to give the contract business efficacy and also so obvious that they go without saying<sup>21</sup>. However, they have also been referred to as separate tests<sup>22</sup>. It has been said that they are

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*Shirlaw v Southern Foundaries Ltd* [1939] 2 KB 206 at 227; *Spring v NASDS* [1956] 2 All ER 221, [1956] 1 WLR 585, Sir Leonard Sachs V-C at 599; *Gardner v Coutts & Co* [1968] 1 WLR 173, Cross J at 176–177, *Alpha Trading Ltd v Dunshaw – Patten Ltd* [1981] QB 290, Lawton LJ at 308; *Mosvolds Rederi A/S v Food Corpn of India, The Demoder General T J Parke and King Theras* [1986] 2 Lloyd's Rep 68, Steyn J at 71; *El Awadi v BCCI SA* [1990] 1 QB 606, [1989] 1 All ER 242, Hutchinson J at 252; *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 1 Lloyd's Rep 369.

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[1973] 2 All ER 260 at 267. See also *Reigate v Union Manufacturing Co (Ramsbottom)* [1918] 1 KB 592, Scrutton LJ at 605; *Comptoir Commercial Anversois v Power & Son & Co* [1920] 1 KB 868, Scrutton LJ at 898; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108; *Lupton v Potts* [1969] 1 WLR 1749, Plowman J at 1753; *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 488; *Frobisher (Second Investments) Ltd Kiloran Trust Co Ltd* [1980] 1 WLR 425, Walton J at 431; *Fraser v Thames Television Ltd* [1984] QB 44, Hirst J at 56; *Stubbs v Trower Still and Keeling* [1987] IRLR 321 at 324; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 628, May LJ at 665; *Spencer v Cosmos Air Holidays* (1989) Times, 6 December, Farquharson J; *McAuley v Bristol City Council* [1992] QB 134 at 147; *Hughes v Greenwich London Borough Council* [1994] 1 AC 170, Lord Lowry at 177–179; *Society of Lloyd's v Clementson* [1995] CLC 117; *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119 at 123; *Times Newspapers Ltd v George Weidenfeld & Nicolson Ltd* [2002] FSR 29; *Donington Park Leisure Ltd v Wheatcroft & Son Ltd* [2006] EWHC 904 (Ch), [2006] All ER (D) 94 (Apr) at [26].

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*Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337; *Libra Bank plc v Financiera de la Republica SA* [2002] EWHC 1480 (Ch), [80].

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*Mosvolds Rederi A/S v Food Corpn of India, The Demoder General T J Parke and King Theras* [1986] 2 Lloyd's Rep 68, Steyn LJ at 70; *Barrett v Lounova (1982) Ltd* [1989] 1 All ER 351, Kerr LJ at 354; *Associated Japanese Bank (International) Ltd v Crédit Du Nord* [1988] 3 All ER 902, [1989] 1 WLR 255, Steyn J at 263; *United Bank Ltd v Akhtar* [1989] IRLR 507, Knox J at 512; *Marcan Shipping (London) Ltd v British Steamship Co, The Manifest Lipkowsky* [1989] 2 Lloyd's Rep 138, May LJ at 142; *Industrie Chimiche Italia Centrale and Ceralfen SA v Alexander G Tsavlis & Sons Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, Parker LJ at 524, Slade LJ at 526; *Richco International Ltd v Alfred Toepfer International GmbH, The Bonde* [1991] 1 Lloyd's Rep 136, Potter J at 144; *White v Reflecting Roadstuds Ltd* [1991] ICR 73; *Mercers Co v New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365, Parker J at 370; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 626–627; *McClory v Post Office* [1992] ICR 758 at 764; *Harrods Ltd v Harrods (Buenos Aires) Ltd* [1997] FSR 420; *Weldon v GRE Linked Life Assurance* [2000] 2 All ER (Comm) 914, 919; *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, Rimer J 272; *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1

'distinct tests with the result that a term may sometimes be implied on the basis of one but not the other'<sup>23</sup>. As a distinct test, the 'officious bystander' test has been viewed as 'broader in scope than the *Moorcock* test', but nevertheless as 'a stringent test'<sup>24</sup>. Even if viewed as two tests, it has been recognised that 'they [would] often overlap'<sup>25</sup>. Whilst these views may be logical if the idea of terms to give a contract business efficacy or the idea of terms which are so obvious that they go without saying are considered in the abstract, there may be further legal restrictions to consider. It has been said that 'it is hornbook law that a term may only be implied [in fact] if it satisfies the legal test of strict necessity'<sup>26</sup>. If 'necessity' is a requirement of an implication based on the 'officious bystander' test<sup>27</sup>, as well as the 'business efficacy test', all cases covered by the 'officious bystander' test must also fall within the 'business efficacy' test<sup>28</sup> if a term is to be implied. However, even if they are viewed as distinct tests, with 'necessity' restricted to the 'business efficacy' test, they would still be very restrictive tests and the implication of terms in fact would be confined to those areas where there is least scope for dispute that the terms implied reflect the intention of the parties. There would seem to be little reason not to accept them as distinct tests, but the point may, of course, be made redundant by Lord Hoffmann's approach in *Belize Telecom*.

Some further consideration should now be given to Lord Hoffmann's approach in *Belize Telecom*. His dismissal of the traditional tests should be looked at. First, he sought to deprive the 'business efficacy' test of all impact. He took the line that it meant that a term would be implied where it was 'necessary to give effect to the reasonable expectations of the parties'.<sup>29</sup> Basically, Lord Hoffmann was simply saying that the 'business efficacy' test means no more than that if the parties intended the term, even if they did

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WLR 1192, [2001] All ER (D) 181 (Oct), [119]; *AB v CD* [2001] IRLR 808, [30]; *Hampton v Minns* [2002] 1 All ER (Comm) 481, [61].

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*Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 627.

<sup>24</sup>

*Associated Japanese Bank (International) Ltd v Crédit Du Nord* [1988] 3 All ER 902, [1989] 1 WLR 255, Steyn J at 263; *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, Rimer J 272.

<sup>25</sup>

*Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 627.

<sup>26</sup>

*Society of Lloyd's v Clementson* [1995] CLC 117, Steyn LJ at 132; *White v Reflecting Roadstuds Ltd* [1991] ICR 73; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 627. See also *Baker v Black Sea and Baltic General Insurance Co Ltd* [1998] 2 All ER 833, Lord Lloyd at 838; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418, Thomas J at 430; *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, [2000] 3 All ER 961, 970, HL.

<sup>27</sup>

*Kumar v AGF Insurance* [1998] 4 All ER 788, 794.

<sup>28</sup>

Something of this may be indicated in *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126 at 128. However, all 'officious bystander' cases would not also have to pass the 'business efficacy test if the overarching test of 'necessity' is simply 'whether the proposed implication is necessary if the reasonable expectations of the parties are not to be defeated'. For a formulation of the overarching necessity test in this way see *Golden Fleece Maritime Inc, The Elli and The Frixos v ST Shipping and Transport Inc (The Elli and the Frixos)* [2007] EWHC 1890 (Comm), [2008] 1 All ER (Comm) 497, [2008] 1 Lloyd's Rep 262, [25].

<sup>29</sup>

[2009] UKPC 10, [2009] 2 All ER (Comm) 1 at [23]

not express it, it is necessary for it to implied to fulfil their intentions. There have been some other indications that the test should be treated in this way<sup>30</sup>, but undoubtedly it is a new approach. Traditionally, the test has been confined to the production of a subset of the terms which could be implied on the basis of the parties' intentions – the subset of those it is necessary to imply to make the contract workable. So, for example, in *Liverpool City Council v Irwin*<sup>31</sup> Lord Wilberforce said<sup>32</sup> ‘the courts are willing to add a term on the ground that without it, the contract will not work – this is the case ... of the doctrine of *The Moorcock* as usually applied’. Secondly, Lord Hoffmann sought to take a similar approach to the ‘officious bystander test’, again seeking to say that it did no more than reflect that the test was simply that of the intention of the parties. He said:<sup>33</sup>

‘the requirement that the term must go “without saying” is no more than a way of saying that, although the instrument does not expressly say so, that is what a reasonable person would have understood it to mean’.

Again, the point can be made that the ‘officious bystander test’ has been used to identify a subset of those terms which would be found to be implied if the test was simply that of the intention of the parties. Again, it limits the scope for claims that the court is not basing the implication on the intention of the parties, but is seeking to improve the contract.

However, even if questions can be raised in relation to Lord Hoffmann's arrival at the conclusion that the ‘business efficacy’ test and the ‘officious bystander’ test have just assisted the courts to determine what the contract means, rather than themselves providing tests for the implication of terms, the real question to be asked is the extent to which his approach should be followed. Is Lord Hoffmann here doing for implied terms what he did for the construction of express terms in the *Investors Compensation Scheme* case – moving the law on from an artificially limited approach towards basic principle?<sup>34</sup> In the aftermath of *Investors* there was considerable concern that too much uncertainty had been introduced into the law. That did not stop the *Investors* approach becoming embedded in law, but in *Chartbrook Ltd v Persimmon Homes Ltd*<sup>35</sup> an artificial restriction on the background admissible to show the parties' intentions has recently been maintained by Lord Hoffmann to avoid uncertainty and costs. His approach to implied terms takes a larger step. There would seem to be greater scope for uncertainty here than in the *Investors* approach to the construction of express terms. More significantly, allowing more of the relevant

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*Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2001] 2 All ER (Comm) 1025, Dyson LJ, [36], [42]. That the ‘implication is essential to give effect to the reasonable expectations of the parties’ has been referred to as ‘the test’ for the implication of terms in fact (*Equitable Life v Hyman* [2000] 3 All ER 961, Lord Steyn at 971). In addition, that the implication is ‘necessary to give effect to the reasonable expectations of the parties’ has also been referred to (*Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] EWHC 2703 (Ch), [2006] 1 BCLC 149, [2002] All ER (D) 141 (Dec), [92]) as one of three distinct tests for the implication of terms in fact, alongside the ‘business efficacy’ test and the ‘officious bystander’ test (see below).

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[1977] AC 239.

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[1977] AC 239 at 253.

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[2009] UKPC 10, [2009] 2 All ER (Comm) 1 at [25].

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See para 3.41.

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[2009] UKHL 38, [2009] 4 All ER 677; see para 3.43.



background evidence in interpreting express terms reduced the distortion of the contents of the contract by the process of construction. It is not obvious that restricting terms implied in fact to those least disputable causes distortion to anything like the extent that the historical approach to construction did. Further, the less restricted the approach taken to implied terms, the greater the risk of distorting the content of the contract through the introduction of terms which do not fulfil the intentions of the parties. There is a difference in interpreting express terms and in implying terms in fact. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*<sup>36</sup> Sir Thomas Bingham MR drew a distinction between interpreting express terms and implying terms, which might be seen as significant here. He said:<sup>37</sup>

‘The court's usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is potentially so intrusive that the law imposes strict constraints on the exercise of this extraordinary power’.

Lord Hoffmann's move towards basic principle in relation to terms implied in fact takes a bigger step than did his judgment in *Investors*. In *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc*<sup>38</sup> Lord Clarke MR predicted that Lord Hoffmann's analysis in *Belize Telecom* ‘will soon be as much referred to as his approach to the construction of contracts in *Investors*’. Nevertheless, Lord Clarke's analysis reflects the traditional approach. He re-emphasised the question of whether the implication is ‘necessary to make the contract work?’,<sup>39</sup> rather than adopting Lord Hoffmann's substitute of whether it is ‘necessary to give effect to the reasonable expectations of the parties’. Lord Clarke also stated, ‘Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term.’<sup>40</sup> Further, he quoted the above dictum from *Philips Electronique*. In addition, in *Graveholt v Hughes*<sup>41</sup> Arden LJ took the line that ‘in the light of the decision in *Mediterranean Salvage and Towage Ltd v Seamar Shipping*’ nothing in the approach taken in *Belize Telecom* affects ‘the conditions necessary for the implication of a term on the grounds of business efficacy’. Lord Hoffmann's approach is not readily displacing the traditional approach in the Court of Appeal. If anything at all, Arden LJ considers Lord Hoffmann's statement to have made the matter of necessity even more important. Her Ladyship said, ‘The party seeking to establish an implied term must therefore show not simply that the term could be a part of the agreement but that a term would be part of the agreement. It follows, as Lord Hoffmann made clear in *Belize*, that the starting point is that, if there is no express term, none should be implied because if the parties intended that a particular term

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[1995] EMLR 472, CA.

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[1995] EMLR 472 at 481.

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[2009] EWCA Civ 531, [2010] 1 All ER (Comm) 1.

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[2009] EWCA Civ 531 at [15], [2010] 1 All ER (Comm) 1.

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Ibid.

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[2010] EWCA Civ 538 at [45]. But see *Town Quay Developments Ltd v Eastleigh Borough Council* [2009] EWCA Civ 1391 at [31], [2010] 2 P & CR 19, [2009] All ER (D) 315 (Oct).

should apply to their relationship they would have included a term to that effect, rather than left it to implication.<sup>42</sup>

Although when considering the implication of a term in fact, each case will be dependent upon its individual facts, the courts have identified some factors of recurring relevance. As these are dependent upon the underlying basis of the implication being the intention of the parties, these remain of relevance whether or not Lord Hoffmann's new approach is fully adopted<sup>43</sup>. In addition, as the foundation of any implication in fact is the fulfilment of the parties' intentions, it is always determinative where it is clear that one party would not have agreed to the particular term<sup>44</sup>. In such cases, no implication in fact can be made<sup>45</sup> (although, subject to that lack of agreement being embodied in an express term, a term may be implied in law<sup>46</sup>). The other commonly occurring factors cannot have the same impact, but must be viewed against the background of all the facts.

Knowledge of what the term refers to has been seen as relevant to the question of the implication of a term in fact. In *Spring v NASDS*<sup>47</sup>, it was said<sup>48</sup>:

‘If ... the bystander had asked the plaintiff ... “won’t you put into it some reference to the Bridlington Agreement?,” I think (indeed I have no doubt) the plaintiff would have answered “What’s that?”.’

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*Marks and Spencer plc v BNP Paribas Securities Services Trust Company* [2014] EWCA Civ 603 at [24]–[25]; see also *Gateway Plaza Limited v John David White* [2014] EWCA Civ 555 where the Court of Appeal applied a narrow interpretation of *Belize Telecom*.

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See Lord Hoffmann's approach in *Belize Telecom* [2009] UKPC 10, [2009] 2 All ER (Comm) 1 at [26]–[27] to the ‘test’ from *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20, (1977) 180 CLR 266 at 282–283, PC.

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That may be focused on by the use of the ‘officious bystander’ test, indicating that both parties would not have said that of course the term was included: *National Bank of Greece SA v Pinios Shipping, The Maira* [1989] 1 All ER 213; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 665, May LJ at 667.

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*Liverpool City Council v Irwin* [1977] AC 239; *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, Lord Denning MR at 254; *El Awadi v BCCI SA* [1989] 1 All ER 242, Hutchinson J at 252; *National Bank of Greece SA v Pinios Shipping, The Maira* [1989] 1 All ER 213; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 665, May LJ at 667; *Spencer v Cosmos Air Holidays* (1989) Times, 6 December, Farquharson LJ; *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212, Ralph Gibson LJ at 220; *Mitsui & Co v Novorossiysk Shipping Co, The Gudermes* [1993] 1 Lloyd's Rep 311; *Ali v Christian Salverson Food Services Ltd* [1997] 1 All ER 721.

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*Liverpool City Council v Irwin* [1977] AC 239.

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[1956] 2 All ER 221, [1956] 1 WLR 585.

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Sir Leonard Sachs V-C at 599.

This was related to the 'officious bystander test' but it is not dependent upon that test. The parties will not intend that the contract should cover something of which they have no knowledge. However, the point should be made that the question of the parties' knowledge should be addressed objectively.

The fact that there are several possible versions of the implied term will militate against any implication in fact, as will the inability to state the term precisely<sup>49</sup>. Such factors indicate that a particular version of the term is not so obvious that it goes without saying or necessary to give business efficacy to the contract, and the problems of trying to deal with these objections were noted in *Ashmore v Corpn of Lloyds (No 2)*<sup>50</sup>:

'In summary, the original way in which the implied [term] was pleaded was too wide to be reasonable, let alone a matter of necessity. This was recognised by the plaintiff's counsel and successive attempts were made to overcome these difficulties. These inevitably became more complex and less likely to satisfy the officious bystander test. There is no possibility of both parties answering the question posed ... with an immediate "yes of course, that is so obvious it goes without saying".'

More simply, and more broadly, there is an obvious problem in trying to argue that a term should be implied on the basis of the parties' intention if the content of the term is not clear.

The existence of detailed express terms will also militate against the implication of a term<sup>51</sup>. In those cases there is no 'obvious lacuna which the court can fill in confidence that it is doing no more than giving effect to what the parties intended'<sup>52</sup>. That is particularly the case if there is a term, or terms, dealing with

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*R v Paddington and St Marylebone Rent Tribunal, ex p Bedrock Investments* [1947] KB 984, Lord Goddard CJ at 990; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260; *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 488; *Liverpool City Council v Irwin* [1977] AC 239, Lord Wilberforce at 255; *Watford Borough Council v Watford RDC* (1986) 86 LGR 524 at 528; *El Awadi v BCCI SA* [1989] 1 All ER 242, Hutchinson J at 253; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 627–628; *Ali v Christian Salveson Food Services Ltd* [1997] 1 All ER 721; *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Ellis and the Frixos)* [2007] EWHC 1890 (Comm), [2008] All ER (Comm) 497, [77].

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[1992] 2 Lloyd's Rep 620, Gatehouse J at 627–628. But see *Orient Overseas Management and Finance Ltd v File Shipping Co Ltd, The Energy Progress* [1993] 1 Lloyd's Rep 355, Gatehouse J at 359.

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*Hamlyn v Woods* [1891] 2 QB 488; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, Singleton LJ at 57; *Lupton v Potts* [1969] 3 All ER 1083, [1969] 1 WLR 1749, Plowman J at 1753; *Duke of Westminster v Guild* [1985] QB 688, Slade LJ at 699; *Ben Shipping Co v An Bord Baine, The C Joyce* [1986] 2 All ER 177, Bingham J at 182; *Spencer v Cosmos Air Holidays* (1989) Times, 6 December, Lexis, Farquharson LJ; *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212 at 220; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451, [49]. See also *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, 272 where Rimer J regarded it as 'the reverse of obvious' that terms should be implied to mirror regulations to which the parties were already subject.

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*Ben Shipping Co v An Bord Baine, The C Joyce* [1986] 2 All ER 177, Bingham J at 182; *Hamlyn v Wood* [1891] 2 QB 488; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, Singleton LJ at 57; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 628, May LJ at 667; *Crédit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep 200.

the area in relation to which it is claimed that there should be an implied term<sup>53</sup>. In contrast, it has been viewed as strongly favouring an implication that the express terms do not provide a complete contract<sup>54</sup>, to the extent that such a factor may seem at times to be referred to as a separate basis of implication<sup>55</sup>. However, in *Society of Lloyd's v Clementson*<sup>56</sup> Steyn LJ made the point that<sup>57</sup>:

‘It is not analytically right to say there is an independent ... category [of] incomplete contracts, cases of so-called incomplete contracts are covered by principles governing terms implied by fact or by law.’

The situation may also be such that the incompleteness of the contract may not indicate that the parties intended there to be further terms. Where there was a carefully negotiated collective agreement across a broad front, representing a compromise between the objectives of employer and employee it was said:<sup>58</sup>

‘should any topic be left uncovered by an agreement of that kind, the natural inference ... is not that there has been an omission so obvious as to require judicial correction, but rather that the topic was omitted advisedly from the terms of the agreement on the ground that it was too controversial or too complicated to justify any variation of the main terms of the agreement to take account of it.’

More broadly, the point has been made that:<sup>59</sup>

‘If the parties appreciate that they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.’

## An implied term of good faith?

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*National Bank of Greece SA v Pinios Shipping, The Maira* [1989] 1 All ER 213; *Lupton v Potts* [1969] 3 All ER 1083, [1969] 1 WLR 1749, Plowman J at 1753. It will also indicate that there should be no implication if there are alternative standard terms used in the trade and it is sought to imply into a contract based on one, the distinctive term from the other. In *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, Singleton LJ said (at 57):

‘There are apparently two forms of contract in use in the jute trade and it must be assumed that the parties ... are familiar with both. One is a “clear contract”, which this was, and the other which is subject to quota. It is the “subject to quota” term which the sellers now wish to have.’

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*Harrods Ltd v Harrods (Buenos Aires) Ltd* [1997] FSR 420, Neuberger J at 453. *Crest Nicholson v McAllister* [2002] EWHC 2443 (Ch), [2003] 1 All ER 46, Neuberger J, [51].

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*Weldon v GRE Linked Life Assurance* [2000] 2 All ER (Comm) 914, 919; *AB v CD* [2001] IRLR 808, [30].

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[1995] CLC 117.

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[1995] CLC 117 at 131.

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*Ali v Christian Salvesen Food Services Ltd* [1997] 1 All ER 721 at 726.

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*Phillips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472, Bingham MR at 482.

Implied terms serve to fill gaps left by the parties. Some jurisdictions take the view that there is an overriding duty of good faith implicitly incorporated in the parties' contractual relations<sup>60</sup>. In a High Court decision, *Yam Seng Pte Limited v International Trade Corporation Limited*<sup>61</sup>, Leggatt J took the view that given that the factual matrix or background to the contract is relevant to the process of implying terms (following Lord Hoffmann's approach in *Attorney-General of Belize v Belize Telecom Limited*<sup>62</sup>), it is entirely possible to imply a duty of good faith or honest dealings. In his opinion, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. The judge stated, 'Some of these are norms that command general social and business acceptance. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement ... A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce which depends critically on trust.'<sup>63</sup> Leggatt J also pointed out that 'the essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit'<sup>64</sup> and the duty of fair dealing rests on standards of conduct with 'which, objectively, the parties must reasonably have assumed compliance without the need to state them'<sup>65</sup>. It is thus not inconceivable that a duty to act in good faith or honestly could be implied, according to the judge.

However these assumptions are not likely to be universally recognised or appreciated. Indeed, many would disagree with those thoughts about the 'essence of contracting'<sup>66</sup>. It might be argued for instance that it is the parties' freedom of contract to pursue self-interests without an externally imposed duty to

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In *Smith v Bank of Scotland* 1997 SC (HL) 111, Scots law for example seems to recognise a general duty of good faith. It would also be helpful to quote Bingham LJ in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439: 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.'; see also McKendrick, *Contract Law* (9th edn), pp 221–22. It should be noted that the English position is not entirely representative of the common law as practised elsewhere – in the US, for example, the Uniform Commercial Code provides in section 1-203 that 'every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement'. Similarly, the Restatement (Second) of Contracts states in section 205 that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'.

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[2013] EWHC 111 (QB).

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[2009] UKPC 11.

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[2009] UKPC 11 at [134]–[135].

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[2009] UKPC 11 at [148].

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[2009] UKPC 11 at [150].

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Whittaker, (2013) LQR 129 at 463.

cooperate for the mutual benefit. It should not be assumed thus that Leggatt J's decision provides a legal basis for the imposition of a *general* duty of good faith into English contract law. As regards the possibility of implying a term of good faith into the parties' *particular* contract, that is a far less controversial matter. Such a term could be used as a gap-filler, as long as the tests on implication of terms can be satisfied<sup>67</sup> – including the requirement to find a 'clear lacuna' in the contract where such a term is necessary to make the contract work commercially<sup>68</sup>. It would however be a step too far to use the vehicle of an implied term to impose a general duty of good faith in performance<sup>69</sup>. It is important to remember Lord Hoffmann's words, 'It cannot introduce terms to make it fairer or more reasonable.'<sup>70</sup>

## Terms implied in law

### [3.21]

'Terms implied in fact are individualised gap fillers, depending on the terms and circumstances of a particular contract. Terms implied in law<sup>1</sup> are in reality incidents attached to standardised contractual relationships, or perhaps more illuminatingly, such terms can in modern US terminology be described as standardised default rules'<sup>2</sup>. More specifically, terms are implied in law where the contract is of a defined type, encompassing 'those relationships which are of common occurrence, such as ... seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contracts for building work and so forth'<sup>3</sup>. The implication is not based on the parties' intention 'but on more general considerations'<sup>4</sup>. There are two basic requirements for the implication of a term in law, and it has been

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Granger, [2013] LMCLQ 418.

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*Carewatch Care Services Limited v Focus Caring Services Limited, Anthony J Grace, Elaine C Grace* [2014] EWHC 2313 (Ch), Henderson J at [109].

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Chuah, (2013) 69 SL Rev 36; see also Norris J's views in *Hamsard 3147 Limited Trading as 'Mini Mode Childrenswear', JS Childrenswear Limited (in liquidation) v Boots UK Ltd* [2013] EWHC 3251 (Pat).

70

*Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [16].

1

E Peden 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 LQR 459.

2

*Society of Lloyd's v Clementson* [1995] CLC 117, Steyn LJ at 131; *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 487; *Mears v Safecar Security Ltd* [1983] QB 54. See also *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All ER 136, Potter LJ at 147:

'Considerations of business efficacy, particularly when based on the "officious bystander" test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract ... whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics.'

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*Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 487; *El Awadi v BCCI* [1989] 1 All ER 242, Hutchinson J at 253; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd* [1989] 3 All ER 628 at 665.

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said that 'the first requirement is that the contract in question should be of a defined type ... The second requirement is that the implication of the terms should be necessary'<sup>5</sup>. However, it is increasingly clear that it is inappropriate to refer to the second requirement as one of 'necessity', and that is returned to below. Here the point can be made that as the implication is not based on the parties' intention, it can be made even if such a term was not intended by both parties, provided there is no contrary express term<sup>6</sup>. 'In these relationships the parties can exclude or modify the obligation by express words, but unless they do so, the obligation is a legal incident of the relationship which is attached by the law itself'<sup>7</sup>. However, in some situations, even where there is a clear, express, contrary term, the Unfair Contract Terms Act 1977<sup>8</sup> or the Unfair Terms in Consumer Contracts Regulations 1999<sup>9</sup>, may render it ineffective and allow the implication.

It was noted above that it would militate against the implication of a term in fact where several possible versions of the putative implied term are put forward, or the content of the term contended for is uncertain<sup>10</sup>. Such circumstances will not usually prevent a term being implied in law because in making that implication the court does not have to try to find the term the parties would have agreed upon, and an implication in law can introduce a more complex term<sup>11</sup>. However, even in relation to a potential implication in law, the complexities of the situation may sometimes be such as to lead the court to refuse to make the implication. In *Reid v Rush & Tompkins Group plc*<sup>12</sup> it was said:<sup>13</sup>

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*Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlis & Sons Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, Slade LJ at 526; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, Lord Wright at 137; *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 487. It has been suggested that 'the essence of the test is a consideration of the contract and how to maximize the social utility of the relationship' – E Peden 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 LQR 459, 460.

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*El Awadi v BCCI* [1989] 1 All ER 242, Hutchinson J at 253.

6

*Liverpool City Council v Irwin* [1977] AC 239; *Tadd v Eastwood* [1985] ICR 132, Eveleigh LJ at 138; *Ashmore v Corp'n of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 626; *Jani-King (GB) v Pula Enterprises* [2007] EWHC 2433 (QBD), [2008] 1 All ER (Comm) 451, [63].

7

*Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning MR at 487.

8

*Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293, see paras [3.22](#) and [3.75](#).

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See para [3.97](#) onwards.

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See para [3.20](#).

11

*Liverpool City Council v Irwin* [1977] AC 239, Lord Wilberforce at 255; *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576; *El Awadi v BCCI* [1989] 1 All ER 242 at 253.

12

[1989] 3 All ER 228, [1990] 1 WLR 212.

13

[1989] 3 All ER 228, [1990] 1 WLR 212, Ralph Gibson LJ at 220.

‘As to treating such a term as implied by law, the arguments in favour of a social policy which would require employers to provide some level of personal accident insurance for the benefit of men and women working overseas and for their dependants, are obvious but there appears to be no way in which the court could embody this policy in the law without the assistance of the legislature.’

If it is to be implied, the substance of the term should be reasonable<sup>14</sup>.

‘To say as Lord Reid said in *Young & Marten v McManus Childs Ltd* [1969] 1 AC 454 at 465 that ‘no warranty ought to be implied in a contract unless it is in all circumstances reasonable’, is in my view quite different from saying that warranty or term which is, in all circumstances, reasonable ought to be implied in a contract. I am confident that Lord Reid meant no more than that unless a warranty or term is in all circumstances reasonable there can be no question of implying it into a contract, but before it is implied much else besides is necessary ....’

The implication of terms in law occurs in relation to types of contracts and, in relation to the long established types of contracts, there are also established terms to be implied in law. For example, in relation to the lease of a furnished house, it has long been accepted that a term will be implied that at the time of commencement of the tenancy, the house will be reasonably fit for habitation<sup>15</sup> and the same applies in relation to a contract for the sale of land and the building of a house on it<sup>16</sup>.

In English contract law, a duty of good faith is also not implied as a matter of law. There is no general legal requirement that the parties should conduct their business transactions in good faith<sup>17</sup>. That said, as discussed above, it appears uncontroversial that it may be possible to imply a term of good faith based on the parties’ presumed intention as demonstrated by their particular contractual relationship and the factual background<sup>18</sup>.

## Subject to contrary express term

### [3.22]

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<sup>14</sup>

*Liverpool City Council v Irwin* [1977] AC 239, Lord Salmon at 262; *Society of Lloyd's v Clementson* [1995] CLC 117, Hoffmann LJ at 134.

<sup>15</sup>

*Smith v Marrable* (1843) 11 M & W 5; *Wilson v Finch Hatton* (1877) 2 Ex D 336; *Collins v Hopkins* [1923] 2 KB 617.

<sup>16</sup>

*Perry v Sharon Development Ltd* [1937] 4 All ER 390; *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303; *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317. See also Defective Premises Act 1972.

<sup>17</sup>

*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; *Walford v Miles* [1992] 2 AC 12.

<sup>18</sup>

*Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); *Hamsard 3147 Limited Trading as ‘Mini Mode Childrenswear’, JS Childrenswear Limited (in liquidation) v Boots UK Ltd* [2013] EWHC 3251 (Pat); *Carewatch Care Services Limited v Focus Caring Services Limited, Anthony J Grace, Elaine C Grace* [2014] EWHC 2313 (Ch); see [3.20](#) above.



It is 'axiomatic that the scope of an express term cannot be cut down by an implied term'<sup>1</sup>, but it may be difficult to discern whether the scope of the express term is such as to generate a conflict with a contended for implied term which would prevent the implication<sup>2</sup>. However, it has been indicated that where there is such a conflict the express term may be treated as a term excluding or restricting liability and, where the contract is an appropriate one, subject to the Unfair Contract Terms Act 1977<sup>3</sup> and, of course, there are also the Unfair Terms in Consumer Contracts Regulations 1999 to be considered in relation to an appropriate express term.

## A contract of a defined type

### [3.23]

There are clear examples of situations in which a term is implied because of its type rather than because of the parties' intention in the particular case. In *Liverpool City Council v Irwin*<sup>1</sup> Lord Cross referred to 'sale of goods, master and servant, landlord and tenant and so on'. They are commonly occurring and recognisable types of contract. It has been said that the 'issue and purchase of traveller's cheques is self evidently' a contract of a defined type<sup>2</sup>, but it was thought it would not be 'acceptable' to put a 'solus agreement between supplier and buyer' into that category although such agreements were viewed as 'of common occurrence'<sup>3</sup>. It has been denied that a single standard form contract, however widely used, could be a contract of a defined type on the basis that 'it is not part of a *genus* it is *sui generis*' and that 'there must first be established a *genus*'<sup>4</sup>.

The 'type' of contract may be stated with much greater precision than simply that of sale of goods or employment and there is an interaction between that delimitation and whether the implication can be

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*Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293, Leggat LJ; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, Lord Wright at 137; *National Bank of Greece SA v Pinios Shipping, The Maira* [1989] 1 All ER 213; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 628; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 626; *McClory v Post Office* [1992] ICR 758 at 763; *County Homesearch Co (Thames & Chilterns) Ltd v Cowham* [2008] EWCA Civ 26, [2008] 1 WLR 909, [2008] All ER (D) 281 (Jan).

2

See eg the discussion in *Johnstone v Bloomsbury Health Authority* [1992] QB 333, [1991] 2 All ER 293.

3

See para [3.75](#).

1

*Liverpool City Council v Irwin* [1977] AC 239 at 257–258.

2

*El Awadi v BCCI* [1989] 1 All ER 242, Hutchison J at 253.

3

*Shell UK v Lostock Garage* [1977] 1 All ER 481.

4

*Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 630. The case was concerned with contracts between Lloyd's Names and 'Lloyds' and in *Society of Lloyd's v Clementson* [1995] CLC 117 no such difficulty was envisaged. It may have been viewed as coming within the type of 'agreements by which members of an organisation [agree] to be bound by its rules and regulated by a committee or similar organisation' (at 133).

regarded as passing the second part of the test. In *Scally v Southern Health and Social Services*<sup>5</sup> Lord Bridge said:<sup>6</sup>

‘Carswell J accepted the submission that any formulation of an implied term of this kind which would be effective to sustain the plaintiff’s claim in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe however that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision.’

The case was concerned with doctors’ contracts of employment, which included a contributory pension scheme requiring 40 years’ contribution for maximum benefit. However, the terms were varied to give the employees an opportunity, for a limited period, to purchase extra years of contribution to make their pensions equivalent to one based on 40 years’ service. The problem arose because the plaintiffs were not informed of that opportunity and did not exercise their right. It was held that a term, requiring notice to have been given to them, would be implied in law. The implication was viewed as one which should be made because the contract was one arrived at by collective bargaining, not individual negotiation, and the doctors could not reasonably be expected to know of the opportunity unless given notice. That this reasoning falls short of ‘necessity’ is returned to below. The point to be made here is that the contracts in which such an implication would be made were of a carefully stated ‘defined type’, reflecting this rationale for the implication. Lord Bridge said<sup>7</sup>:

‘I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention.’

## Second requirement

### [3.24]

In the *Liverpool City Council*<sup>1</sup> case Lord Cross said<sup>2</sup> that in implying a term in law, ‘the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert’<sup>3</sup>. However, Lord Wilberforce asserted that<sup>4</sup> ‘such obligations should be read into the

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[1992] 1 AC 294.

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[1992] 1 AC 294 at 307.

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[1992] 1 AC 294 at 307. See also *Spring v Guardian Assurance plc* [1994] 3 All ER 129, Lord Woolf at 178; *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119.

1

[1977] AC 239.

2

[1977] AC 239 at 258.

3

contract as the nature of the contract itself requires, no more, no less; a test in other words of necessity' and it is 'necessity', as the test for terms implied in law, which became the stated test<sup>5</sup>. However, it has been acknowledged that 'historically terms implied by law ... emerged which did not satisfy a test of necessity in the ordinary sense'<sup>6</sup>, and describing the test as one of 'necessity' has been the subject of criticism<sup>7</sup>. As will be seen below, it is coming to be recognised that a test encompassing much broader issues is in question. The restrictions on implication in law were recognised as 'less stringent' than in relation to terms implied in fact<sup>8</sup>. In *Scally v Southern Health and Social Services* it was said that:<sup>9</sup>

'A clear distinction is drawn ... between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship.'

In that case, the right to add to an employee's pension entitlement was of no effect unless the employee was aware of it, but he could not reasonably be expected to be aware of it unless his attention was drawn to it, and it was regarded as 'necessary to imply an obligation on the employer to bring it to his attention to render efficacious the very benefit which the contractual right ... was intended to confer'<sup>10</sup>. Nevertheless,

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See also Lord Denning MR in *Liverpool City Council v Irwin* [1975] 3 All ER 658, CA, *Shell UK v Lostock Garages* [1977] 1 All ER 481.

4

[1977] AC 239 at 254. See also Lord Salmon at 262.

5

*Mears v Safecar Securities* [1983] QB 54, Stephenson LJ at 78; *Tai Hing Cotton Mill v Liu Chong Hing Bank* [1986] AC 80 at 104; *National Bank of Greece SA v Pinios Shipping Co, The Maira* [1989] 1 All ER 213, Lloyd LJ at 219; *El Awadi v BCCI* [1989] 1 All ER 242, Hutchison J at 253; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck* [1989] 3 All ER 628, May LJ at 665; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlis & Sons Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, Slade LJ at 526; *White v Reflecting Roadstuds Ltd* [1991] ICR 733; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 630; *McClory v Post Office* [1992] ICR 758; *McAuley v Bristol City Council* [1992] QB 134, Ralph Gibson LJ at 146; *Star Shipping AS v China Navigation Foreign Trade Transportation Corpn, The Star Texas* [1993] 2 Lloyd's Rep 445, Steyn LJ at 452; *Spring v Guardian Assurance plc* [1994] 3 All ER 129, Lord Woolf at 178, Lord Slynn at 166; *Society of Lloyd's v Clementson* [1995] CLC 117; *Clarion Ltd v National Provident Institution* [2000] 2 All ER 265, 273. But see *Courtaulds Northern Spring Ltd v Sibson and TGWU* [1988] IRLR 305 at 309, *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119 at 123, in the context of contracts of employment.

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*Society of Lloyd's v Clementson* [1995] CLC 117, Steyn LJ at 132. He gave the example of the implied term of fitness for purpose in sale of goods contracts which is now embodied in Sale of Goods Act 1979, s 14(3).

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For example, E Peden 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 LQR 459; P S Atiyah *An Introduction to the Law of Contract* (5th edn, OUP, 1995) p 207.

8

*Glencore Grain Rotterdam BV v Lorico* [1997] 1 Lloyd's Rep 578, Longmore J at 582; *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119 at 123.

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[1992] 1 AC 294 at 307. See also *Spring v Guardian Assurance* [1994] 3 All ER 129, Lord Woolf at 178.

10

it was still thought that such an implied term might 'be stretching the doctrine of implication for the sake of business efficacy beyond its proper reach'<sup>11</sup>. However, even if not 'necessary' in any strict sense, this may not be seen as too divorced from necessity in more everyday usage. In addition, some of the other factors considered by the courts do not sit too oddly alongside a test stated in terms of necessity – the existence of established terms implied in law in relation to the type of contract in question<sup>12</sup>, and whether the agreement is in some sense 'incomplete'<sup>13</sup>. However, much broader factors are also looked at, which do not have any real relationship to a test stated in terms of 'necessity'. Imbalance in bargaining power in contracts of the type in question has been considered<sup>14</sup>, and even more broadly, considerations 'of justice and social policy'<sup>15</sup> have been looked at.

Such broader considerations have most obviously been at work in recent years in the context of contracts of employment, for example, in relation to the implication of a term that the employer will not engage in conduct which is likely to undermine the trust and confidence required if the employment relationship is to continue<sup>16</sup>. It has been recognised that there are evolutionary social forces active in this area.

'But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem.

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[1992] 1 AC 294, Lord Bridge at 306.

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[1992] 1 AC 294 at 306–307.

12

*Tai Hing Cotton Mill v Lui Ching Hing Bank* [1986] AC 80; *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlis & Sons Maritime Co (The Choko Star)* [1990] 1 Lloyd's Rep 516 at 526.

13

*Liverpool City Council v Irwin* [1977] AC 239; *Sim v Rotherham Metropolitan Borough Council* [1987] Ch 216; *Tadd v Eastwood* [1985] ICR 132, Eveleigh LJ at 138; *Duke of Westminster v Guild* [1985] QB 688; *Mears v Safecar Security Ltd* [1983] QB 54, Stephenson LJ at 78; *Ashmore v Corpn of Lloyds (No 2)* [1992] 2 Lloyd's Rep 620, Gatehouse J at 626; *Star Shipping AS v China Navigation Foreign Trade Transportation Corpn, The Star Texas* [1993] 2 Lloyd's Rep 445, Steyn LJ at 452; *Aparau v Iceland Frozen Foods plc* [1996] IRLR 119. At times incompleteness has appeared to be treated as a separate basis of implication (eg *Customs and Excise Comrs v Sai Jewellers* [1996] STC 269; *Asparau v Iceland Frozen Food* [1996] IRLR 119; *Glencore Grain Rotterdam BV v Lorico* [1997] 1 Lloyd's Rep 578, Longmore J at 582), but 'it is not analytically right to say that there is an independent ... category of terms implied on such a basis' (*Society of Lloyd's v Clementson* [1995] CLC 117, Steyn LJ at 131).

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*Tai Hing Ltd v Liu Chong Hing Bank* [1986] AC 80. See also *Timeload v British Telecommunications plc* [1995] EMLR 459, where Sir Thomas Bingham MR viewed it as relevant that it was 'correct, speaking very generally to regard BT as a privatised company, no longer a monopoly, but still a very dominant supplier closely regulated to ensure that it operates in the interests of the public and not simply in the interests of its shareholders should those be in conflict'. Against that background he could see 'strong grounds for the view that ... BT should not be permitted to exercise a potentially drastic power of termination without demonstrable reason or cause'.

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*Star Shipping AS v China Navigation Foreign Trade Transportation Corpn, The Star Texas* [1993] 2 Lloyd's Rep 445, Slade LJ at 526. *Lister v Romford Ice and Cold Storage Co* [1957] AC 555; *Reid v Rush Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212.

16

*Malik v BCCI* [1997] 3 All ER 1 at 5.

The law has changed to recognise this social reality. Most of the changes have been made by Parliament ... And the common law has adapted itself to the new attitudes...<sup>17</sup>

Further, in *Crossley v Faithful & Gould Holdings Ltd*<sup>18</sup>, again in the context of an employment contract, the Court of Appeal explicitly recognised the inefficacy of a test stated in terms of necessity. Dyson LJ said:<sup>19</sup>

‘It seems to me that rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations.’

Such an approach should not be seen as confined to contracts of employment<sup>20</sup>. Characterising the test as one of ‘necessity’ did warn against too easily implying terms, but that can be achieved more explicitly. It has been recognised:

‘the decision of the court concerned to imply a term “in law” ... established a precedent for similar cases in the future for all contracts of that particular type ... Hence ... Courts ought to be as – if not more – careful in implying terms in this basis compared to the implication of terms [in fact]’.<sup>21</sup>

There is much to be said generally for the recognition that there are broader issues to be weighed than can be appropriately encompassed in a test referred to in such terms. The point has been made that:<sup>22</sup>

‘[It] would be appropriate for the courts to be more open about the policy issues with which they are wrestling. Policies and principles which are established by prior judicial observations provide good reasons for future judicial decisions. More openness would allow judges to feel less that they were creating the law, and more that they were ensuring continuity of the common law’s development.’

A final point should be made. Recognition that the nature of the test encompasses far broader issues than a reference to ‘necessity’ would imply does not deny an interaction between the weight of the factors

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<sup>17</sup>

*Johnson v Unisys Ltd* [2001] 2 All ER 801, Lord Hoffmann at [35].

<sup>18</sup>

[2004] EWCA Civ 293, [2004] 4 All ER 447.

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[2004] EWCA Civ 293, [2004] 4 All ER 447 at [36], referring to E Peden ‘Policy Concerns Behind Implication of Terms in Law’ (2001) 117 LQR 459; *Deane Public Works Ltd v Northern Ireland Water Ltd* [2009] NICH 8 at [16]; *Pertamina Energy Trading Ltd v Credit Suisse* [2006] SGCA 27, [2007] LRC 253 at [54], Sing CA; *Ng Gian Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19 at [39]. But see *Makers UK Ltd v Camden London Borough Council* [2008] EWHC 1836 (TCC) at [27], 120 ConLR 161, [2008] 44 EG 116.

<sup>20</sup>

But see *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2006] EWHC 1774 (QB), [2006] All ER (D) 205 (Jul) at [86].

<sup>21</sup>

*Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927 at [44] quoted in *Ng Gian Hon v Westcomb Securities Pte Ltd* [2009] SGCA 19 at [38], [2009] 5 LRC 378, Sing CA.

<sup>22</sup>

E Peden ‘Policy Concerns Behind Implication of Terms in Law’ (2001) 117 LQR 459 at 476– Three categories of issues for the courts to weigh were identified: ‘(i) the concern of how the implied term will sit with the existing law; (ii) the concern of how the implied term will affect parties to the relationship; and (iii) wider issues of fairness and society’.

considered and the scope of the type of contract being looked at. The limited implication in the correspondingly limited category of relationships in *Scally* was seen as one which could appropriately be made<sup>23</sup>. A broader term to be implied into contracts of employment generally, that the employer will take reasonable care of the economic well being of the employee, was denied as one which would impose an 'unfair and unreasonable burden on employers'.<sup>24</sup>

## Custom

### [3.25]

Terms may be implied on the basis of an established custom or usage of the relevant market or trade<sup>1</sup>. The parties need have no knowledge of the custom<sup>2</sup> but it must be notorious<sup>3</sup>. In *Hutton v Warren*<sup>4</sup> although there was no express term to that effect, it was held, on the basis of custom, that the tenant of a farm, on being given notice to quit, was entitled to an allowance for seeds and labour. In that case Parke B said that the basis of such implication was the intention of the parties. He stated<sup>5</sup>:

'It has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts on matters on which they are silent. The same rule has also been applied in transactions of life, in which known usages have been established and prevailed, and this has been done on the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.'

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<sup>23</sup>

See above para [3.23](#).

<sup>24</sup>

*Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293, [2004] 4 All ER 447 at [43].

<sup>1</sup>

*Hutton v Warren* (1836) 1 M & W 466; *Gibson v Small* (1853) 4 HL Cas 353; *Dale v Humfrey* (1858) EB & E 1004; *Tucker v Linger* (1882) 21 Ch D 18; *Pike, Sons & Co v Ongley & Thornton* (1887) 18 QBD 708; *Fox-Bourne v Vernon & Co Ltd* (1894) 10 TLR 647; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314; *Lord Eldon v Hedley Bros* [1935] 2 KB 1; *E E & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302; *Mount v Oldham Corpn* [1973] QB 309; *Novorossisk Shipping Co v Neoptera Co Ltd* [1990] 1 Lloyd's Rep 425 at 431.

<sup>2</sup>

*Sutton v Tatham* (1839) 10 Ad & El 27; *Bayliffe v Butterworth* (1847) 1 Exch 425; *Reynolds v Smith* (1893) 9 TLR 494; *Hunt v Chamberlain* (1896) 12 TLR 186.

<sup>3</sup>

In *R v Forrest and Others* [2014] EWCA Crim 308, the prosecution attempted to show that there was a particular custom or usage in the mortgage market to be implied in the mortgage agreement. The court implied suggested that evidence from a few select witnesses was not enough to prove existence of the custom or usage.

<sup>4</sup>

(1836) 1 M & W 466.

<sup>5</sup>

(1836) 1 M & W 466 at 475–476.

It is, however, very artificial to regard such an implication as based on the intention of the parties. No such intention need be established. It is simply that the term will be excluded if the contract evidences a contrary intention.

‘An alleged custom can be imported into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and further that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the documents as a whole.’<sup>6</sup>

In *Walford's case*<sup>7</sup>, for example, a custom that a broker's commission was payable only when hire was earned under a charter, could not be implied into a contract with an express term stating that the owners were to pay commission on the signing of a charter.

In order for a practice to be regarded as a custom or usage that will be implied as such, into appropriate contracts, it must be<sup>8</sup>:

‘certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist, that those who conduct business in the market contract with the usage as an implied term; and it must be reasonable.’

If a custom is unreasonable, ‘the courts have said they will not recognise it as binding on people who do not know of it and who have not consented to act upon it’<sup>9</sup>. However, the basic question is whether ‘there was in the trade, a “uniform ... practice so well defined and recognised that contracting parties must be assumed to have had it in their minds when they contracted”’<sup>10</sup>. When it is attempted to establish a

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*London Export Corp'n Ltd v Jubilee Coffee Roasting Co* [1958] 2 All ER 411, [1958] 1 WLR 661, Lord Jenkins at 675; *Cunliffe-Owen v Teather & Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421, Ungood Thomas J at 1437 – ‘usage may be admitted to explain the language used in a written contract or to add an implied incident to it, provided that if expressed in the written contract it would not make its terms or its tenor insensible or inconsistent’; *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439 at 445; *Affréteurs Réunis Société Anonyme v Walford* [1919] AC 801; *Palgrave, Brown & Sons Ltd v SS Turid* [1922] 1 AC 397; *Re L Sutro & Co v Heilbut, Symons & Co* [1917] 2 KB 348; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58 at 63.

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*Affréteurs Réunis Société Anonyme v Walford* [1919] AC 801.

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*Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421, Ungood Thomas J at 1438; *Vitol SA v Phibro Energy AG, The Maturaki* [1990] 2 Lloyd's Rep 84, Evans J at 88. See also *Yates v Pym* (1816) 6 Taunt 446; *Nelson v Dahl* (1879) 12 Ch D 568; *Re Walkers, Winder & Hamm and Shaw, Sons & Co* [1904] 2 KB 152; *John W Pryke v Gibbs Hartley Cooper Ltd* [1991] 1 Lloyd's Rep 602, Waller J at 615; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep 58 at 63. See also *Baker v Black Sea and Baltic General Insurance Co Ltd* [1998] 2 All ER 833; *Crema v Cenkos Securities* [2010] EWHC 461 (Comm), [2010] All ER (D) 143 (Mar).

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*Perry v Barnett* (1885) 15 QBD 388, Brett MR at 393; *Blackburn v Mason* (1893) 68 LT 510; Lord Esher MR at 511 – ‘A person may agree to be bound by an unreasonable custom of the market, but he is only bound if, when he entered on the dealing, the custom was made known to him, and he agreed to be bound’; *Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421, Ungood Thomas J at 1438.

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custom or usage, there may be 'considerable force' in the contention that there cannot be any such practice or usage in the trade if there is a 'difference of opinion among independent expert witnesses'<sup>11</sup>. It can also be said that 'arrangements or compromises to the same effect as the alleged usage do not establish usage; they contradict it. They may be the precursors of usage but usage presupposes that arrangements and compromises are no longer required'<sup>12</sup>.

This document is an examination of the classification of terms of contracts in relation to the contracting party's right to sue for damages or rescind the contract upon occurrence of breach. In detail it covers the contingent conditions and the warranties and innominate terms of the contracts.

## C Classification of Terms

### *Contingent conditions*

#### Terminology

##### [3.26]

A wide variety of meanings is given to the word 'condition' in the contractual context. It 'is a source of recurring confusion'<sup>1</sup>. It may be used loosely, simply to mean any term, or as designating a particular type of term, as distinct from a warranty or an innominate term. However, it may also be used in relation to contingencies – designating, for example, an event upon the happening of which, a contractual obligation becomes operative<sup>2</sup>. Contingent conditions, both promissory and non-promissory, are considered first

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*Vitol SA v Phibro Energy AG, The Maturaki* [1990] 2 Lloyd's Rep 84, Evans J at 88, quoting *Fox-Bourne v Vernon & Co Ltd* (1894) 10 TLR 647, Russell LJ; *Fyffes Group Ltd v Reefer Express Lines Pty Ltd, The Kriti Rex* [1996] 2 Lloyd's Rep 171, Moore-Bick J:

'the implied obligation to proceed with reasonable dispatch arises from the nature of the contract and is necessary in order to give it commercial efficacy. Its existence is by now so well established that it can be regarded as an ordinary incident of any contract of carriage by sea which exists unless the parties have expressly or impliedly provided otherwise.'

In the context of contracts of employment and the impact of policies adopted by the employer it was said in *Duke v Reliance System Ltd* [1982] IRLR 347 that 'a policy adopted by management unilaterally cannot become a term of the employee's contract on the ground that it is established custom and practice unless it is at least shown that the policy has been drawn to the attention of the employees or has been followed without exception' (Browne Wilkinson J). And see also *Quinn v Calder Industrial Materials Ltd* [1996] IRLR 126, EAT at 128: 'in our view, the question is not whether the period has been "substantial" in some abstract sense, but whether in relation to the other circumstances it is sufficient to support a contractual term. Again with regard to communication, the question seems to us to be not so much whether the policy has been made or become known directly to the employees or through intermediaries, but whether the circumstances in which it was made or has become known support the inference that employers intended to become contractually bound by it.'

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*Vitol SA v Phibro Energy AG, The Maturaki* [1990] 2 Lloyd's Rep 84, Evans J at 88.

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*Cunliffe-Owen v Teather and Greenwood* [1967] 3 All ER 561, [1967] 1 WLR 1421, Ungood Thomas J at 1438.

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*Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209, Lord Steyn.

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here, before an examination of the classification of terms as conditions, warranties or innominate terms, ie classification which is important to the injured party's right to rescind on the occurrence of a breach<sup>3</sup>.

## Non-promissory contingent conditions

### [3.27]

There may be an event upon the occurrence of which the existence, or the operation, of the contract is contingent. Such an event may be referred to as a condition and it may be that the contract, or some obligation, will not become operative, or even into being<sup>1</sup>, until the occurrence of a condition precedent, or will cease to operate upon the occurrence of a condition subsequent. The contingencies considered here are non-promissory in themselves, with neither party having undertaken that, for example, a condition precedent will occur. However, one or both parties may have undertaken subsidiary obligations in relation to the contingency. Whether there is a contingent condition, and whether there are any subsidiary obligations is a matter of construction<sup>2</sup>.

There may be conditions subsequent, upon the occurrence of which the contract ceases to operate<sup>3</sup>. It was a contingent condition of an employees' share option scheme that the particular employing

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In *Heritage Oil and Gas Ltd, Heritage Oil plc v Tullow Uganda Ltd* [2014] EWCA Civ 1048, for example, the contract provided that before a duty of indemnification had to be performed, the party being indemnified must give notice within a particular period of time. That was considered by the contract to be a 'condition precedent'. Such conditions precedent usually attract very severe consequences; as such, the courts are always careful to construe and apply them strictly. In the context of insurance contracts, this appreciation is reflected by some reluctance to classify notification of loss provisions as conditions precedent: see, for example, Colman J in *Alfred McAlpine plc v BAI (Run Off) Ltd* [1998] 2 Lloyd's Rep 694 at 699–700. It has been held that in such contracts a 'conditional link' between the assured's obligation to give notice and the underwriters' obligation to pay the claim needs to be established (*Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601, [2006] Lloyd's Rep IR 45, Mance LJ at [31]). Be that as it may, it is clear that such conditions are enforceable as long as the words are explicit and apt in evincing the 'clear intention of the parties' (*George Hunt Cranes v Scottish Border and General Insurance* [2001] EWCA Civ 1964, [2002] Lloyd's Rep IR 178, Potter LJ at [11]; and *Eagle Star Insurance v Cresswell* [2004] EWCA Civ 602, [2004] Lloyd's Rep IR 537, Longmore LJ at [20]).

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See para 3.34.

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A 'prerequisite to the very existence of an agreement' was referred to as the 'proper' meaning of 'condition' by Lord Denning MR in *Wickman Machine Tool Sales Ltd v Schuler AG* [1972] 2 All ER 1173, [1972] 1 WLR 840.

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*Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437 at 453; *Alfred McAlpine plc v BAI (Run-off) Ltd* [1998] 2 Lloyd's Rep 694, 66 ConLR 57: 'It is clearly unnecessary that express words referring to the term as a condition precedent should be used for it may be inferred from the context and other provisions.' However, there may be a practice in relation to particular types of contracts of expressly stating that terms are conditions precedent where that is intended, and the lack of any express indication may then be seen as indicating that a provision is not a condition precedent, particularly where other provisions of the contract are expressly so labelled (see eg *Alfred McAlpine plc v BAI (Run-off) Ltd* in the context of insurance).

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*Head v Tattersall* (1871) LR 7 Exch 7 (but see Stoljar 'The Contractual Conception of Condition' (1953) 69 LQR 485, 506–511); *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919]

subsidiary should remain a member of the relevant group of companies and the plaintiff employee's option to purchase shares lapsed when the employing subsidiary was sold off by the group<sup>4</sup>. There may be an obligation not to prevent the occurrence of a condition precedent<sup>5</sup>, and similarly, an obligation may exist not to bring about the occurrence of a condition subsequent<sup>6</sup>, but none was found in that case. No express or implied term was found which obliged the group not to sell off the subsidiary.

## Preventing a contract coming into existence

### [3.28]

A condition precedent may prevent the coming into being of a contract at all, rather than merely suspending its obligations. In *Pym v Campbell*<sup>1</sup> the plaintiff wished to sell to the defendants a share in an invention of the plaintiff. A written document appeared to contain an agreement for the purchase. The plaintiff sought to rely upon it, but the defendant established that the parties had further agreed that the written document was only to be the agreement if the plaintiff's invention was approved of by a third party, who had not given his approval of the invention. Lord Campbell CJ said that:

‘there never was any agreement entered into ... it was explained to the plaintiff that the defendants did not intend the paper to be an agreement till Abernethie had been consulted ... and that the paper was signed before he was seen only because it was not convenient to the defendants to remain. The plaintiff assented to this and received the writing on those terms.’

## Suspending obligations

### [3.29]

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AC 1; *Atlantic Maritime Co Inc v Gibbon* [1954] 1 QB 88; *Brown v Knowsley Borough Council* [1986] IRLR 102; *Thompson v ASDA-MFI plc* [1988] Ch 241; *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403. However, it may sometimes not be relevant whether the classification is of a condition subsequent or precedent:

‘provided that the effect of the condition is clearly understood, its classification may be merely a matter of words ... it probably does not matter in the present case whether the condition is described as “precedent” or “subsequent”, provided it is understood that its non-fulfilment did not prevent a binding contract coming into existence but did have the effect that the respondent was under no obligation to complete the sale unless the condition was fulfilled or waived. (*Perri v Coolagatta Investments Ltd* [1982] 149 CLR 537, Gibbs CJ at 541.) See also *Charles H Windschuegh Ltd v Alexander Pickering Ltd* (1950) 84 Ll L Rep 89, Devlin J at 92, *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209, Lord Hutton, Lord Steyn.’

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*Thompson v ASDA-MFI plc* [1988] Ch 241.

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See para 3.31.

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*Thompson v ASDA -MFI plc* [1988] Ch 241, Scott J at 251; *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1; *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 AC 180.

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(1856) 6 E & B 370; *Marks v Board* (1930) 46 TLR 424; *Bentworth Finance Ltd v Lubert* [1968] 1 QB 680; *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81; *Albion Sugar Co Ltd v William Tankers Ltd, The John S Darbyshire* [1977] 2 Lloyd's Rep 457; *Wishart v Citizens' Advice Association* [1990] ICR 794.

In contrast, a condition precedent may not prevent the coming into being of a contract but merely suspend the obligations<sup>1</sup>. In *Marten v Whale*<sup>2</sup> two linked sales of a car and a piece of land were conditional on the approval of the title and restrictions on the land by the solicitor of the purchaser of the land. The condition was not fulfilled but, in the interim period, there had been a contract in existence and the sale of the car by the party to whom title to it had not passed, could nevertheless pass good title to it to a bona fide third party under what is now Sale of Goods Act 1979, s 25. The 'seller' had no title but, because the contract was in existence, albeit with its obligations suspended and subject to the condition precedent, there was an 'agreement to sell' the car, which was sufficient for the purposes of s 25<sup>3</sup>.

## Distinguishing the two

### [3.30]

When there is no contract in existence prior to the fulfilment of the condition precedent, it might be referred to as the situation in which there is a 'condition precedent to the contract', whilst the situation in which the contract exists but obligations are suspended could be distinguished by referring to it as a 'condition precedent to the performance'<sup>1</sup>. In whatever way the two categories are referred to, it has been said that there is not 'a method by which it can readily be determined into which category a particular collection of words falls'<sup>2</sup>. However, it can be suggested that the question which should be focused on is whether the parties intended there to be any obligations prior to the fulfilment of the condition. If, for example and most commonly, it was intended that they should not be free to withdraw unless the

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*Mackay v Dick* (1881) 6 App Cas 251; *Smith v Butler* [1900] 1 QB 694; *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 WLR 74; *Smallman v Smallman* [1972] Fam 25, Lord Denning MR at 31; *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 511; *Haslemere Estates v Baker* [1982] 1 WLR 1109; *Graham v Pitkin* [1992] 1 WLR 403; *Roadworks (1952) Ltd v Charman* [1994] 2 Lloyd's Rep 99 at 103; *North Sea Energy Holdings NV v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep 418, Thomas J at 429. Gibbs CJ, *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 546:

'I consider that when the time has elapsed for performance of a condition which is not a promissory condition, but a condition precedent to the obligation to complete a contract of sale, either party, if not in default, can elect to treat the contract as at an end if the condition has not been fulfilled or waived.'

See also *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209.

2

[1917] 2 KB 480.

3

The question of whether a condition suspends obligations or prevents the existence of a contract is most commonly important in determining if the parties were under any obligations prior to the fulfilment of the condition precedent – see para 3.31. In *Albion Sugar Co Ltd v William Tankers Ltd, The John S Darbyshire* [1977] 2 Lloyd's Rep 457 at 464 the question was important in relation to the effectiveness of an arbitration clause.

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*Albion Sugar Co Ltd v William Tankers Ltd, The John S Darbyshire* [1977] 2 Lloyd's Rep 457, Mocatta J at 464.

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*Albion Sugar Co Ltd v William Tankers Ltd, The John S Darbyshire* [1977] 2 Lloyd's Rep 457, Mocatta J at 465.

condition is not fulfilled by the appropriate time<sup>3</sup>, then there must be a contract in existence, but with its major obligations suspended<sup>4</sup>.

The established phrase 'subject to contract' normally<sup>5</sup> prevents a contract from coming into being prior to the execution of the formal document, because the parties still have to agree to that document<sup>6</sup>. The mere fact that one party pressed for the completion of formal documentation should not be taken as an indication that the agreement could not be legally binding until such documentation had been completed<sup>7</sup>. Documentation could be intended merely to be a record of what had already been agreed. The words 'subject to details' have a recognised meaning when used in the context of the sale of ships: there is no binding agreement until all the details of the proposed formal agreement have been agreed' but the precise wording and the context must be looked at in each case<sup>8</sup>. In *Lee Parker v Izzett (No 2)*<sup>9</sup> the

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Lord Jenkins, delivering the judgment of the Privy Council in *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115:

'(i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fixed within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference) the date by which the condition must be fulfilled, then the date so fixed must be strictly adhered to...'

*Smith v Butler* [1900] 1 QB 694; *Re Sandwell Park Colliery Co* [1929] 1 Ch 277; *Re Longlands Farm etc* [1968] 3 All ER 552. But see *29 Equities Ltd v Bank Leumi (UK) Ltd* [1986] 1 WLR 1490.

4

*Ee v Kakar* (1979) 40 P & CR 223.

5

But see *Richards Properties Ltd v Corpn of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416; *Alpenstow v Regalian Properties Ltd* [1985] 2 All ER 545, [1985] 1 WLR 721.

6

Devlin J, *Windschuegh v Pickering & Co Ltd* [1950] 84 Ll L Rep 89 at 92:

'The phrase "subject to contract" has of course, been construed as meaning that no contract is made, but I think that is purely because of the word "contract" in "subject to contract". The phrase means "subject to the making of a contract hereafter" and, partly because it is becoming so usual now, has to be regarded as a term which signifies to anyone who uses it that the matter has not progressed beyond the stage of negotiations.'

See also *Derby & Co Ltd v ITC Pension Trust Ltd* [1977] 2 All ER 890 in relation to leases. Apart from the strength of the accepted formula, the mere fact that the parties envisage that their agreement is to be embodied in a formal document does not mean that it is not operative before that. 'I think that the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up': *Rossiter v Miller* (1878) 3 App Cas 1124, Lord Blackburn. *Oxford v Provan* (1868) LR 2 PC 135; *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284; *Branca v Cobarro* [1947] KB 854; *Boots UK Ltd v Goldpine Estates Ltd* (18 June 2014) (unreported) (annotated at [2014] Comm Leases 2092–2093)..

7

*Williams v Jones* (QBD, 25 February 2014) (unreported).

8

*Thoresen & Co (Bangkok) Ltd v Fathom Marine Co Ltd* [2004] EWHC 167 (Comm), [2004] 1 All ER (Comm) 935 at [35]–[36]. See also case note by DR Thomas, [2004] 10 JIML 240.

agreement was 'subject to the purchaser obtaining a satisfactory mortgage'. It was held that it would have been a condition precedent to the contract coming into existence but that, in any event it was void for uncertainty as 'everything was at large, not only matters like rate of interest and ancillary obligations ... but also those two most essential points – the amount of the loan and the terms of repayment'. That conclusion has not gone uncriticised<sup>10</sup>, it could simply be treated as a matter of whether the mortgage was satisfactory to the purchaser<sup>11</sup>. The phrase 'subject to survey' was considered in *Marks v Board*<sup>12</sup> – when a contract for the purchase of a house was 'subject to surveyor's report' it was understood to mean that the prospective purchaser 'would not decide whether he would take the house until he had seen what the surveyor said about it and that he reserved to himself the absolute right and undisputed right to say whether he liked the surveyor's report. In short there was no contract, because the buyer was not yet bound and, therefore the seller was not bound either'<sup>13</sup>. In *Astra Trust Ltd v Adams and Williams*<sup>14</sup> the purchase of a yacht was made 'subject to satisfactory survey' and *Marks v Board* was followed, with Megaw J commenting<sup>15</sup> that he 'did not regard the word satisfactory as adding to or subtracting from what would have been the meaning and effect in law in the absence of that word'<sup>16</sup>. However, in *Ee v Kakar*<sup>17</sup> the condition that the agreement was 'subject to survey of the property' was held not to prevent the existence of a contract but merely to suspend the major obligations<sup>18</sup>, with it being indicated that the

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[1972] 2 All ER 800, [1972] 1 WLR 775, Goulding J.

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Furmston (1983) 3 Ox J Legal Studies 438.

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In *Janmohamed v Hassam* (1976) 241 Estates Gazette 609 the condition was that the purchaser should obtain a mortgage 'satisfactory to himself' within one month. Having considered *Lee Parker v Izzett*, Slade LJ regarded it as making all the difference that the satisfaction was expressed to be the purchaser's satisfaction. However, this could be considered to be implicit in the contingency 'subject to satisfactory mortgage', or even 'subject to mortgage' – note the views of Rowlatt J in *Marks v Board*. Contingency sales subject to obtaining satisfactory finance have not been seen as too uncertain in all jurisdictions: *Barber v Crickett* [1958] NZLR 1057; *Martin v Macarthur* [1963] NZLR 403; *Scott v Rania* [1966] NZLR 527; *Meehan v Jones* (1982) 56 AJLR 813. See Furmston 'Subject to Finance' (1983) 3 Ox J Legal Studies 438.

12

(1930) 46 TLR 424.

13

Rowlatt J.

14

[1969] 1 Lloyd's Rep 81. See also *Albion Sugar Co Ltd v William Tankers Ltd*, *The John S Darbyshire* [1977] 2 Lloyd's Rep 457 (time charterparty – 'subject to satisfactory completion of two trial voyages'); *Wishart v Citizens Advice Association* [1990] ICR 794 (employment – 'subject to satisfactory references').

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[1969] 1 Lloyd's Rep 81 at 86.

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See also *John Howard and Co (Northern) Ltd v J P Knight Ltd* [1969] 1 Lloyd's Rep 364, Megaw J.

17

(1979) 40 P & CR 223.

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purchaser would be bound to obtain such a report and that the decision on it should be made bona fide<sup>19</sup>. In *Astra Trust v Adams*<sup>20</sup>, having decided that there was no contract prior to the fulfilment of the condition, Megaw J considered what the position would have been had a contract been in existence but with its operation suspended. Under those circumstances he took the view that there would be an obligation to use all reasonable diligence to have a survey carried out by a competent surveyor. In addition, he did not think that the satisfactoriness of the report could be subjected to an objective test but he did think that, under those circumstances, any dissatisfaction with it would have to be bona fide<sup>21</sup>.

## Subsidiary obligations

### [3.31]

It has been indicated that where there is a contract in existence prior to the satisfaction of the condition precedent, there may be subsidiary obligations on one or both parties<sup>1</sup>. This may simply be an obligation not to withdraw<sup>2</sup> prior to the point at which the contingency had to be fulfilled<sup>3</sup>, or there may be obligations relating to the fulfilment of the contingency. Whether these obligations exist and, if they do, their extent, will depend upon the construction of the agreement. An obligation may be found simply not to prevent the

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This view was also taken in *Varverakis v Compagnie Navegacion Artico SA, The Merak* [1976] 2 Lloyd's Rep 250 in relation to the survey of a vessel, but in that case, there were very specific express terms incorporated into the agreement which clearly dealt with the survey.

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Walton J at 230:

'I can see no reason why, although of course retaining the right to be satisfied with any kind of report, a purchaser should not be bound if presented with a report which is basically satisfactory to have to act bona fide, ... Although the two tests are quite clearly not the same, if a reasonable man would be satisfied with the report I would have thought that a purchaser would experience some difficulty in persuading a court that his failure to proceed was bona fide.'

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[1969] 1 Lloyd's Rep 81.

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[1969] 1 Lloyd's Rep 81 at 87; *Hudson v Buck* (1877) 7 Ch D 683; *Caney v Leith* [1937] 2 All ER 532.

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*Mackay v Dick* (1881) 6 App Cas 251; *Smith v Butler* [1900] 1 QB 694; *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115; *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077; *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74; *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 511; *Haslemere Estates v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109. See also *Felixstowe Dock and Rly Co v British Transport Docks Board* [1976] 2 Lloyd's Rep 656; *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209.

2

*Smith v Butler* [1900] 1 QB 694; *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115; *Alan Estates Ltd v W G Stores Ltd* [1982] Ch 511, Lord Denning MR at 520:

'If it is handed over to another unconditionally it is handed over as a deed. If it is handed over to another conditionally, it is delivered as an escrow. It only becomes a deed when the conditions are fulfilled... The question in this case is: what is the effect of an escrow before the conditions are fulfilled? One thing is clear. Whilst the conditions are in suspense, the maker of the escrow cannot recall it ... He is bound to adhere to the grant for a reasonable time to see whether the conditions are fulfilled.'

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See para 3.30, note 9.

condition being fulfilled<sup>4</sup>, or where the contingency implies a test which requires the co-operation of both parties, an obligation to do what is necessary to facilitate it<sup>5</sup>, or to appoint the third party whose approval is required<sup>6</sup>, or, where the condition relates to the issuing of a licence, the granting of planning permission, or reaching an agreement with a third party, one party may be under an obligation to use reasonable efforts to obtain that licence<sup>7</sup> or permission<sup>8</sup> or agreement<sup>9</sup>.

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*Rede v Farr* (1817) 6 M & S 121 at 124; *Inchbald v Western Neilgherry Coffee, Tea and Cinchona Plantation Co Ltd* (1864) 17 CBNS 733; *Mona Oil Equipment and Supply Co Ltd v Rhodesia Rlys Ltd* [1949] 2 All ER 1014; *Bournemouth and Boscombe Athletic Football Club v Manchester United Football Club* (1980) Times, 22 May. See also *Thompson v ASDA-MFI plc* [1988] Ch 241, Scott J at 251; *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1; *Cheall v Association of Professional Executive, Clerical and Computer Staff* [1983] 2 AC 180; *Little v Courage* [1995] CLC 164, Millett LJ at 168; *Grant v Cigman* [1996] 2 BCLC 24. There is normally no requirement that a principal should not prevent the agent from earning his commission – *Rhodes v Forward* (1876) 1 App Cas 256; *L French & Co Ltd v Leeston Shipping Co Ltd* [1922] 1 AC 451; *Luxor (Eastbourne) Ltd v Cooper* [1941] 1 All ER 33. But see *Turner v Goldsmith* [1891] 1 QB 544. Where the agent's commission is dependent upon the entering into and performance of a contract with a third party, by the principal, the principal may be found to have undertaken not to deprive the agent of commission by breaching that contract: *Alpha Trading Ltd v Dunnshaw-Patten* [1981] QB 290; *George Moundreas & Co SA v Navimpex Centrale Navala* [1985] 2 Lloyd's Rep 515; *The Energy Progress* [1993] 1 Lloyd's Rep 355.

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*Mackay v Dick* (1881) 6 App Cas 251 – Condition precedent necessitated the trial of A's machine on B's site – Lord Blackburn (at 263):

'I think I may safely say as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'

See too *Renewal Leeds Ltd v Lowry Properties Ltd* [2010] EWHC 2902 (Ch). There, the overage clause was triggered by the final sale of a completed house. The developers refused to complete the sale of the final few units and claimed that they were permitted to do so under the contract. The court held that there was an implied term requiring the developer to complete and sell all the houses as soon as reasonably practicable and not to sterilise the last house so as to prevent the payment of overage.

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In *Marten v Whale* [1917] 2 KB 480 it was said that there was 'an implied provision that the [relevant party] should appoint a solicitor and consult him in good faith'.

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*Re Anglo-Russian Merchant Traders and John Batt & Co (London) Ltd* [1917] 2 KB 679; *H O Brandt & Co v H N Morris & Co* [1917] 2 KB 784; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497; *A V Pound & Co v M W Hardy & Co* [1956] AC 588; *Coloniale Import-Export v Loumidis & Sons* [1978] 2 Lloyd's Rep 560; *Overseas Buyers Ltd v Granadex SA* [1980] 2 Lloyd's Rep 608.

8

*Re Longlands Farm etc v Superior Developments* [1968] 3 All ER 552; *Hargeaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424; *Tesco Stores v Gibson* (1970) 214 Estates Gazette 835; *Fisher v Toumazos* [1991] 2 EGLR 204. See also *Smallman v Smallman* [1972] Fam 25 ('subject to approval of court').

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*Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep 209.

In this connection, an element of cooperation and fair dealing is implied in the contractual relationship. There is thus an implied term to the extent that where the performance of the condition precedent is subject to the approval or satisfaction of the other party, that other party must not make his decision capriciously, perversely, irrationally or arbitrarily. In *Socimer Bank v Standard Bank*<sup>10</sup> Rix LJ summarised the implication to be made as follows:

‘It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused.’<sup>11</sup>

As far as Rix LJ was concerned, implications of good faith and rationality, and of lack of arbitrariness or perversity, were ‘standard’, and ‘they represent the very essence of business, and other, relationships’.<sup>12</sup> On occasion one party may even have undertaken to obtain the licence or permission. The condition will then be promissory<sup>13</sup> and there will be a breach in failing to obtain what was required<sup>14</sup>.

## Waiving the condition precedent

### [3.32]

The parties may waive a condition precedent so that, for example, an agreement, ‘subject to contract’, becomes legally binding<sup>1</sup>. Where the condition precedent is for the benefit of one party rather than both, that party can waive it and the contract will become enforceable without the occurrence of the condition<sup>2</sup>. In relation to a contract the operation of which was suspended on the basis of the condition that the sale of the house was ‘subject to survey of the property’, the condition was held to be simply for the benefit of

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<sup>10</sup>

[2008] Bus LR 1304; see also *Deutsche Bank (Suisse) SA v Gulzar Ahmed Khan & Others* [2013] EWHC 482 (Comm).

<sup>11</sup>

At para 66.

<sup>12</sup>

At para 106; indeed, it is often incorporated in the contract clauses which specifically require the decision-maker's decision to be made in accordance with objective criteria, such as where it has to be made ‘in a commercially reasonable manner’ (*Barclays v Unicredit* [2012] EWHC 3655 (Comm)) or provide that the decision-maker's consent ‘shall not be unreasonably withheld’ (*Porton Capital v 3M Holdings* [2011] EWHC 2895).

<sup>13</sup>

See para [3.33](#).

<sup>14</sup>

*Peter Cassidy Seed Co Ltd v Osuustukukauppa IL* [1957] 1 All ER 484, [1957] 1 WLR 273; *C Czarnikow Ltd v Centrala Handlu Zagraniczenko ‘Rolimpex’* [1979] AC 351 at 371; *Congimex Companhia Geral v Tradax SA* [1983] 1 Lloyd's Rep 250; *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565.

<sup>1</sup>

*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14 at [55], [86]–[87], [2010] 1 WLR 753, [2010] NLJR 421.

<sup>2</sup>

*Wood Preservation v Prior* [1969] 1 All ER 364, [1969] 1 WLR 1077; *Ee v Kakar* (1979) 40 P & CR 223; *Graham v Pitkin* [1992] 2 All ER 235; *Heron Garage Properties v Moss* [1974] 1 All ER 421.



the purchaser. He could waive its fulfilment and thereby make the contract operative without its fulfilment<sup>3</sup>. One party will not be able to waive a condition which was for the benefit of both. Where there was an agreement for the sale of land subject to the purchaser obtaining planning permission for the use of the land as a filling station, the condition could not be waived by the purchaser. The vendor was retaining adjoining land to build a car showroom. The condition was for the benefit of both parties. A filling station was viewed as a complementary business to that intended by the vendor<sup>4</sup>.

## Contingent promissory conditions

### [3.33]

In the context of contingent promissory conditions, the contrast is between conditions precedent and concurrent and also independent conditions<sup>1</sup>. In this context, the contingent conditions indicate a relationship between the timing of the performance of the parties' obligations. For example, the fulfilment by A of an obligation under the contract which A has made with B may be a condition precedent to B's performance of a particular obligation and such a condition precedent means that there is less risk in the contract for B than for A. B need not be left in the situation where he, or she, has performed the major obligations of the contract whilst A refuses to do so. The same, of course, does not apply to A.

Concurrent conditions provide some protection for both parties as each party must be at least willing to undertake his, or her, performance to claim that the other party should do so. The Sale of Goods Act 1979, s 28 provides an example. In the absence of contrary intention, it makes the seller's obligation to deliver and the buyer's obligation to pay concurrent conditions. When conditions are independent, they are not linked to the other party's performance. A landlord's obligations to repair and a tenant's to pay rent are normally independent<sup>2</sup>.

In many situations, it will be established whether particular obligations are conditional, concurrent, or independent. In contracts of employment, for example, it is usual for the work to precede the obligation to pay. But the 'question always must be one of the intention of the parties as gathered from the instrument as a whole'<sup>3</sup>. Where the performances could occur at the same time and the situation is unclear, the

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*Ee v Kakar* (1979) 40 P & CR 223; *Graham v Pitkin* [1992] 2 All ER 235.

4

*Heron Garage Properties v Moss* [1974] 1 All ER 421.

1

*Kingston v Preston* (1773) Lofft 194, Lord Mansfield said that there were three kinds of covenant:

- (1) such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege breach of covenants on the part of the plaintiff;
- (2) covenants which are conditions and dependant, in which the performance of one depends on the prior performance of another, and, therefore until this prior condition is performed, the other party is not liable to an action on his covenant;
- (3) mutual conditions to be performed at the same time; and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and has offered has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act.'

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*Taylor v Webb* [1937] 2 KB 283.

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security thereby provided for both parties may mean that the courts should lean in favour of finding concurrent conditions<sup>4</sup>, and against finding independent ones. However, there may be factors indicating that the obligations were intended to be independent. Where there was a charterparty with one document stating how the hire was to be determined and a separate 'sideletter' which provided for payment back of part of those charges in a certain situation, it was concluded that 'the very fact that they were put into separate documents, with the charter appearing to be complete in itself, points to the conclusion that the respective obligations under them were intended to be independent and not interdependent'<sup>5</sup>. Similarly, circumstances might make it clear that one party must perform an obligation if the other is to be able to do so, and that might indicate that the first party's obligation should be regarded as a condition precedent to that of the other.

The term 'promissory condition', has been used above to indicate contingency and the order of performance. However, the label 'condition' may also be applied to a contractual obligation to contrast its status with that of a warranty or an innominate term. When contrasted with warranties and innominate terms the label 'condition' is applied to a term to indicate the legal consequences of the breach, in the sense of whether the injured party has a right to terminate the contract because of the breach. The classification of a term as a contingent promissory condition relates to the order of performance. Conditions, when contrasted with warranties and innominate terms, relate to the conformity of the performance rendered with that promised<sup>6</sup>.

## *Conditions, warranties and innominate terms*

### **Types of term**

[3.34]

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*Tito v Waddell (No 2)* [1977] Ch 106, Megarry V-C.

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Treitel *The Law of Contract* (9th edn, 1995) at 678. Restatement 2d, *Contracts*, paras 233–234.

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*The Odenfield* [1978] 2 Lloyd's Rep 357, Kerr J. See also *Wilkinson v Clements* (1872) 8 Ch App 96.

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Treitel "Conditions" and "Conditions Precedent" (1990) 106 LQR 185. *Bayerische Vereinsbank v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59, Mance J at 65:

'It is however necessary to remember that the phrase "condition precedent" is capable of referring to two different things (a) a provision non-compliance with which may simply mean that the other party has no obligation to perform a particular term unless and until compliance takes place (b) that class of condition ... any breaches of which will discharge the other party from, all further obligation to perform under a contract. The two things may of course inter-relate upon the true construction of a particular contract. To take one possible example, a condition precedent in the former sense may, if not performed within a specified time or within a frustrating time, entitle the other party to treat itself as discharged.'

See also *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Inc* [1996] CLC 749, Mance J at 754:

'The presentation of documents complying with such a contract is a pre-condition of the buyer's obligation to accept the documents. But rejection of non-complying documents does not terminate any further obligation or right to perform on either side. The seller may represent complying documents, within the contractually appointed period. Only if the seller fails to present complying documents by the conclusion of the contract may the buyer treat himself as discharged from further performance and claim damages for non-delivery.'

The modern usage of the classification of terms<sup>1</sup> as 'conditions', 'warranties' and 'intermediate or innominate terms'<sup>2</sup> categorises them according to the consequences which follow their breach<sup>3</sup>. Basically, when a condition is breached the injured party has the right to sue for damages and also to rescind the contract. A breach of warranty gives rise to the right to sue for damages. When an innominate term is breached the legal consequences of the breach depend upon its factual consequences, ie there is a right to rescind the contract, in addition to suing for damages, if the breach of an innominate term is such as to deprive the injured party of substantially all the benefit which he, or she, was intended to derive from the contract<sup>4</sup>.

This usage of condition and warranty was only settled with the enactment of the Sale of Goods Act 1893. Section 11(1)(b) defined a condition as a term 'the breach of which may give rise to a right to treat a contract as repudiated' and a warranty as a term 'the breach of which may give rise to a claim for damages but not to a right to reject the goods'. It was also stated that a warranty is 'collateral to the main purpose of the contract'<sup>5</sup>. Under the influence of that Act, with its reference to only two types of term, it was largely thought that a twofold division was all that was required<sup>6</sup>. However, in *Hong Kong Fir Shipping Ltd v Kawasaki Kisen Kaisha Ltd*<sup>7</sup> the court was faced with a breach of a term that the ship should be 'seaworthy', which it was particularly inappropriate to simply categorise as a condition or a warranty because it could be breached in many different ways, some serious and some trivial, and Diplock LJ said<sup>8</sup>:

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G Treitel *Some Landmarks of Twentieth Century Contract Law* (2002, OUP) Ch 3.

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*Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711 at 714; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109; *Aktion Maritime Corpn of Liberia v S Kamas & Bros Ltd* [1987] 1 Lloyd's Rep 283; *Phibro Energy AG v Nissho Iwai Corpn* [1991] 1 Lloyd's Rep 38.

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As regards the relationship between anticipatory breach and the classification of terms, given that an anticipatory breach had to be always repudiatory in character, it has to be a breach of a condition, or breach of an innominate term which went to the root of the contract or would deprive the innocent party of substantially the whole benefit of the contract. That means the principles which govern anticipatory breach play little role when the 'anticipatory breach' claimed relates to a warranty (*Geden Operations Ltd v Dry Bulk Handy Holdings Inc ('The Bulk Uruguay')* [2014] EWHC 885 (Comm) especially para [15]).

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See para [3.39](#).

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Sale of Goods Act 1893, s 62.

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*Eg Wallis, Son & Wells v Pratt and Haynes* [1910] 2 KB 1003, Fletcher Moulton LJ, approved [1911] AC 394.

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[1962] 2 QB 26.

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[1962] 2 QB 26 at 70.

‘There are however many contractual undertakings of a more complex character which cannot be categorised as being “conditions” or “warranties” ... Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking ... depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a “condition” or a “warranty”.’

It has been said that ‘the effect of *Hong King Fir* was to liberate the common law from the consequences of a temporary aberration’<sup>9</sup>. It was shown that a categorisation into conditions or warranties was insufficient and the threefold<sup>10</sup> classification came to be recognised. To an extent, that threefold classification impacts upon contracts for the sale of goods. The courts have recognised that even in such contracts, terms not categorised by statute as conditions or warranties, can be innominate terms<sup>11</sup>. Additionally, however, the Sale of Goods Act 1979 has now been amended<sup>12</sup>. It still does not classify any terms as innominate but, under certain circumstances, it now deems breaches of the terms implied by ss 13–15<sup>13</sup>, which are otherwise conditions, to be warranties, preventing the rejection of the goods for the breach in question. Such deemed classification occurs where the buyer does not ‘deal as consumer’<sup>14</sup>, and the breach is so slight that it would be unreasonable to reject the goods. The onus is on the seller in relation to the question of whether the buyer deals as consumer as well as in relation to whether the breach is so slight that it would be unreasonable to reject the goods because of it. The statutory test has

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*Compagnie General Maritime v Diakan Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574, Robert Goff J at 583.

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It is sometimes suggested that only the two categories of conditions and other terms are required (*Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44, Lord Denning MR at 59–60, but see at 61) but the question is of little practical significance (*Compagnie General Maritime v Diakan Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574, Robert Goff J at 583) and generally a threefold classification is referred to (eg *Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711; *Regent OHG Aisenstadt und Barig v Francesco of Jermyn Street* [1981] 3 All ER 327 at 324; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, Lord Diplock at 849; *Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580 at 583). See further para 3.35.

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*Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Reardon Smith Line v Hansen Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109; *Toepfer v Lenerson-Poortman NV* [1980] 1 Lloyd's Rep 143, Brandon LJ at 147.

12

See s 15A, inserted by the Sale and Supply of Goods Act 1994. The Supply of Goods and Services Act 1982 has been similarly amended. See Law Com No 160, Cmnd 137, 1987.

13

Terms as to the goods correspondence with description and sample (s 13, s 15) and as to their satisfactory quality (s 14(2), as amended – formerly merchantability) and their reasonable fitness for the buyer's particular purpose (s 14(3)).

14

Within the meaning of Unfair Contract Terms Act 1977, s 12 (see para 3.83): Sale of Goods Act 1979, s 61(5A).

a different emphasis to that of the common law innominate term<sup>15</sup>, but the basic idea is the same. The right to reject is linked to the seriousness of the breach.

As regards consumer contracts, the Consumer Rights Bill 2014, which is making its way through Parliament at the time of writing, does not classify terms. When the Bill becomes law, large parts of the Sale of Goods Act 1979 (and the Supply of Goods and Services Act 1982) will cease to apply to consumer sales. The current provisions on quality, description, title, quantity, time and sample will all be subsumed into the new law. The new law will encompass the sale of goods, supply of services and sale of digitised goods, to the consumer. Although the Bill does not classify terms, it provides for specific remedies available to the consumer in the event of a breach<sup>16</sup>. Those remedies include the right to partial or complete rejection of the goods<sup>17</sup>, to ask for repairs or replacement<sup>18</sup>, a reduction in price<sup>19</sup>, damages and specific performance<sup>20</sup>. Thus, the element of uncertainty in relation to remedies for consumers should be reduced considerably, relatively speaking.

It should be noted that the classification of terms as conditions, warranties and innominate terms also applies to implied terms<sup>21</sup>.

## The classification

### [3.35]

The parties may expressly classify a term as a condition, warranty or innominate term but if they do not it is a matter of construing the contract<sup>1</sup> and the basic test to be applied is that of the intention of the parties. In *Bentsen v Taylor, Sons & Co (No 2)*<sup>2</sup>. Bowen LJ said<sup>3</sup>:

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<sup>15</sup>

Under the statute, the right to reject is only lost where the breach is slight. At common law the right to reject for breach of an innominate term only arises if the breach is very serious.

<sup>16</sup>

Clause 19, Consumer Rights Bill 2014 (as at August 2014).

<sup>17</sup>

Clauses 19–22.

<sup>18</sup>

Clause 23.

<sup>19</sup>

Clause 24.

<sup>20</sup>

Clauses 61 and 62 respectively.

<sup>21</sup>

*Wuhan Ocean Economic & Technical Cooperation Co Ltd v Schiffahrts-Gesellschaft Hansa Murcia mbH & Co* [2012] EWHC 3104 (Comm).

<sup>1</sup>

*Bettini v Gye* (1876) 1 QBD 183; *Behn v Burness* (1863) 3 B & S 751, Williams J at 755:

‘The court must be influenced in ... construction, not only by the language of the instrument, but also by the circumstances under which and purposes for which, the charterparty was entered into.’

<sup>2</sup>

[1893] 2 QB 274.

‘There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability.’

Although Bowen LJ only referred to conditions<sup>4</sup> and warranties, the basic test still applies even after the recognition of the third type of term and this was made clear by the House of Lords in *Bunge Corpn v Tradax SA*<sup>5</sup>, but obviously the possibility of that third type of classification must be added. In practical terms, the question will be whether the term in question was a condition or an innominate term, but the parties may ‘make it plain’ that a term is intended as a warranty<sup>6</sup>. In the past, if the term was a standard one in a particular type of contract and it had an established classification, it would normally have been taken to have been intended to be classified accordingly<sup>7</sup>. Any such use of precedent in the construction of the contract must now, however, be viewed in the light of the evolution in construction generally which was recognised in the *Investors Compensation Scheme* case<sup>8</sup>.

Some emphasis should be placed on the ‘time frame’ of the assessment of the classification of a term. It is that of the making of the contract and this means, inter alia, that the actual breach and its

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[1893] 2 QB 274 at 281. See also *Graves v Legg* (1854) 9 Exch 709; *Glaholm v Hays* (1841) 2 Man & G 257; *Bettini v Gye* (1876) 1 QB 183; *Re Comptoir Commercial Anversois and Power, Son & Co* [1920] 1 KB 868 at 899; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26 at 60; *Astley Industrial Trust Ltd v Grimley* [1963] 1 WLR 584; *L G Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; *Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711 at 719, 725; *State Trading Corpn of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep 277; *Compagnie Commerciale Sucres et Denrées v Czarnikow Ltd* [1990] 3 All ER 641, [1990] 1 WLR 1337; *Torvald Klaveness A/S v Arni Maritime Corpn* [1993] 2 Lloyd's Rep 335.

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The reference is to conditions precedent but conditions in the sense used here were what was being considered.

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[1981] 2 All ER 513, [1981] 1 WLR 711; *Michael I Warde v FedEx International Inc* [1985] 2 Lloyd's Rep 289, Bingham J at 298.

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*Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159 at 166. But see para 3.34 note 9.

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*Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164; *Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612; *Nichimen Corpn v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, Woolf LJ at 55.

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See below paras 3.37 and 3.43.

consequences are not relevant<sup>9</sup>, although the potential breaches, as viewed at that time frame, may be taken into account. In *Bentsen v Taylor, Sons & Co (No 2)*, Bowen LJ said<sup>10</sup>:

‘one of the first things you would look to is to what extent the accuracy of the statement – the truth of what is promised – would be likely to effect the substance and foundation of the adventure which the contract is intended to carry out ... it may well be that such a test can only be applied after getting the jury to say what the effect of a breach of such a condition would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.’

The actual breach, and its consequences, only become relevant if a term is classified as innominate and, in that case, those factors will be looked at in considering whether the injured party could rescind the contract on the basis of the breach<sup>11</sup>.

The classification has to take place against the background of a tension between certainty and flexibility. If a term is a condition, then, at least once that classification is established, there is the benefit of certainty<sup>12</sup> – the right to rescind exists in relation to any breach and the injured party need give no consideration to whether the breach is serious enough to justify taking that step<sup>13</sup>. So, for example, in deciding that the place of shipment was a condition, it was said<sup>14</sup>:

‘if the place of shipment were only an innominate term, disputes would frequently arise as to the buyer's right to reject a tender of goods at a port other than that contracted for. There would be an issue whether it was so far from, or had such different characteristics from the port of delivery identified in the contract as to deprive the buyer of substantially the whole benefit of the sale contract. The uncertainty to which such disputes would give rise and the certainty which is achieved if the place of shipment is a condition of the contract is clearly a highly relevant consideration in deciding how to classify a term.’

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It is clear that, at least prior to the recognition of the innominate term, the courts did not always avoid taking account of the actual breach before them – Contrast *Bettini v Gye* (1876) 1 QB 183 and *Poussard v Spiers* (1876) 1 QB 410.

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[1893] 2 QB 274 at 281.

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See para [3.39](#).

12

*Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711; *A/S Awilco of Oslo v Fulvia SpA, The Chikuma* [1981] 1 WLR 314 at 322; *Compagnie Commerciale Sucres et Denrées v Czarnikow Ltd* [1990] 3 All ER 641, [1990] 1 WLR 1337; *Richco International Ltd v Bunge & Co Ltd* [1991] 2 Lloyd's Rep 93 at 99; *Building Society & N Ltd v Micado Shipping Ltd (Malta) (No 2)* [2001] 1 All ER (Comm) 240, Rix LJ, [77], Jonathan Parker LJ, [84].

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*Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580.

14

*Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142, Coleman J at 150.

However, the disadvantage of the classification of a term as a condition is that the injured party can rescind no matter how trivial the breach<sup>15</sup> and seize the opportunity to rescind for a trivial breach to escape from what has become a bad bargain<sup>16</sup>. The innominate term classification has the disadvantage of uncertainty and the advantage of flexibility, providing the significant right to rescind only when the breach is also significant. Against that background, the flexibility of the classification, means that the court 'leans in favour of' construing terms as innominate<sup>17</sup>. In *Hansa Nord*<sup>18</sup> Roskill LJ said:

'In my view a court should not be over ready, unless required by a statute or authority to do so, to construe a term in a contract as a 'condition' any breach of which gives rise to a right to reject ... In principle contracts are made to be performed and not to be avoided according to the whims of market fluctuations and where there is a free choice between two possible constructions I think the court should tend to prefer the construction which will ensure performance and not encourage avoidance of contractual obligations.'

However, whatever the merits of the classification, not all terms are to be construed as innominate. A balanced approach is required, and in *Bunge Corpn v Tradax Export SA*<sup>19</sup>, Lord Roskill made that clear<sup>20</sup>:

'While recognising the modern approach and not being over-ready to construe terms as conditions unless the contract clearly requires the court so to do, none the less the basic principles of construction for determining whether or not a particular term is a condition remain as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy.'

In suitable cases, terms will be construed as conditions:

'It remains true, as Lord Roskill said in *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* that the courts should not be too ready to interpret contractual clauses as conditions. And I

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<sup>15</sup>

Eg *Re Moore & Co Ltd and Landauer & Co Ltd* [1921] 2 KB 519 and the comments of Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989 at 998.

<sup>16</sup>

*Antaios Compania Naviera SA v Salen Reederiarna AB* [1985] AC 191, Lord Diplock: 'a typical case of a shipowner seeking to find an excuse to bring a long term charter to a premature end in a rising freight market'. See also *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44.

<sup>17</sup>

*Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep 143, Brandon LJ; *Bunge Corpn v Tradax Export SA* [1981] 2 All ER 513, [1981] 1 WLR 711; *Compagnie General Maritime v Diakan Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574, Robert Goff J at 583.

<sup>18</sup>

*Cehave NV v Bremer Handelsgesellschaft mbH* [1976] QB 44. See also *Heritage Oil and Gas Ltd, Heritage Oil plc v Tullow Uganda Ltd* [2014] EWCA Civ 1048.

<sup>19</sup>

[1981] 2 All ER 513, [1981] 1 WLR 711.

<sup>20</sup>

[1981] 2 All ER 513, [1981] 1 WLR 711 at 727.



have myself commended and continue to commend, the greater flexibility in the law of contracts to which *Hong Kong Fir* points the way ... But I do not doubt that in suitable cases, the courts should not be reluctant, if the intention of the parties as shown by the contract so indicates, to hold that an obligation has the force of a condition and that indeed they should usually do so in the case of time clauses in mercantile contracts.’<sup>21</sup>

## Express classification

### [3.36]

It has been said that the ‘parties may think some matter apparently of very little importance, essential, and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition ... it will be one’<sup>1</sup>. The parties may expressly classify a term for themselves. However, it must be borne in mind that there are numerous meanings of the word condition and mere use of that word may not lead a court to conclude that it is being used in the technical sense considered here<sup>2</sup>. In *Schuler A G v Wickman Machine Tool Sales Ltd*<sup>3</sup> a German manufacturing company made an agreement with Wickman for Wickman to have the sole right to sell Schuler's goods in the UK for about four years. The agreement contained provisions relating to the promotion of Schuler's goods by Wickman. Clause 7 stated that it was a ‘condition’ that one of two named representatives of Wickman should visit six named UK automobile manufacturers each week. Wickman failed to carry out all of the specified visits and Schuler argued that cl 7 was expressly made a condition of the contract and, as such, there was a right to terminate the contract for any breach of it no matter how trivial. The House of Lords, with Lord Wilberforce dissenting, refused to accept that argument. Lord Reid said:

‘no doubt some words used by lawyers do have a rigid and inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word “condition” is an indication – even a strong indication – of such intention but by no means conclusive.’

The majority saw the argument that it was intended that Schuler should be able to rescind the contract if Wickman missed even one visit as producing too unreasonable a result to be accepted without clearer words:

‘The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear.’<sup>4</sup>

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[1981] 2 All ER 513, [1981] 1 WLR 711, Lord Wilberforce at 715–716.

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*Bettini v Gye* (1876) 1 QBD 183.

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*Dawsons Ltd v Bonnin* [1922] 2 AC 413.

3

[1973] 2 All ER 39. *Australia and New Zealand Banking Group Ltd v Beneficial Finance Corpn Ltd* (1982) 44 ALR 241.

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Lord Reid at 45. But Lord Wilberforce took a very different view (at 55):

‘to call the clause arbitrary, capricious, or fantastic, or to introduce as a test of its validity the ubiquitous reasonable man ... is to assume, contrary to the evidence, that both parties to this contract adopted a

Similarly, where the charterparty provided 'on any breach of this charterparty the owners shall be at liberty to withdraw the vessel' the specified right to withdraw was construed as limited to breaches of conditions and fundamental breaches of innominate terms. An interpretation which would have allowed withdrawal even for trivial breaches of terms which were not conditions was rejected as 'wholly unreasonable, totally uncommercial and in total contradiction of the whole purpose of the' charter<sup>5</sup>. However, some emphasis should be placed upon the decision in *Lombard North Central plc v Butterworth*<sup>6</sup> where the court felt constrained to accept that the use of the time-honoured phrase that time was 'of the essence' meant that the term was a condition and that any breach of it justified rescission, despite the fact that that allowed the injured party to achieve much the same result as under another clause which was ineffective as a penalty clause<sup>7</sup>.

On the other hand, where the contract explicitly states that a particular obligation is a condition of the contract, the defaulting party may not rely on a general clause elsewhere in the contract to qualify the import of the express classification. In *Mt Højgaard a/s v E.on Climate and Renewables UK Robin Rigg East Limited, E.on Climate and Renewables UK Robin Rigg West Limited*<sup>8</sup> where the contract made it a condition that the wind turbine to be supplied must strictly conform to international standards, it was no defence for the defendants to argue that elsewhere in the contract was a general clause providing for due diligence (which they claimed to have complied with).

## Standard classifications

### [3.37]

In the past if the term is a standard one in a particular type of contract and it has an established classification, it would normally have been taken to have been intended to be classified accordingly<sup>1</sup>. So,

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standard of easygoing tolerance rather than one of aggressive, insistent punctuality and efficiency. This is not an assumption which I am prepared to make, nor do I think myself entitled to impose the former standard on the parties if their words indicate, as they plainly do, the latter.'

And see *A/S Awilco v Fulvia SpA, The Chikuma* [1981] 1 All ER 652 at 658–659.

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*Antaios Compania Naviera SA v Salen Rederiarna AB* [1985] AC 191. See also *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, Lord Denning at 253; *Rice v Great Yarmouth Borough Council* [2001] 3 LGLR 4.

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[1987] QB 527.

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Nicholls LJ viewed the result with 'considerable dissatisfaction' but he also said:

'it was a matter of importance to the plaintiffs that the agreed instalments should be paid, and should be paid promptly. I can see no reason to doubt that the interest charges were calculated by reference to the agreed hire instalment dates, on the footing that the instalments would be paid regularly and with reasonable promptness. To the plaintiffs a hirer who is repeatedly and significantly late with his payments and who has to be chased with reminders and warnings, time after time, is an unattractive hirer whose transaction may eventually become an unprofitable one.'

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[2014] EWHC 1088 (TCC).

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*Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164, Megaw LJ:

for example, it has been noted that 'terms relating to time of performance by sellers of their obligations under cif contracts have, in general been held to be conditions. That was decided so far as a term relating to time of shipment was concerned in *Bowes v Shand*<sup>2</sup>; and again so far as a term relating to notice of appropriation is concerned in *Reuter v Sala*<sup>3</sup>. The reason is no doubt the need for certainty in commercial matters ... It is difficult to see why a term in a cif contract relating to time for the sellers to tender documents should not equally ... be regarded as a condition<sup>4</sup>. Similarly, the port of shipment in a cif contract has been classified as a condition<sup>5</sup>. The non-payment of deposits have been seen as breaches of condition<sup>6</sup> and 'usually a term requiring a letter of credit to be opened by a specified date should be regarded as a condition<sup>7</sup>. It would also seem that the time of completion of sales of shares has generally been viewed as a condition as 'shares continually vary in price from day to day'<sup>8</sup>. However, any such references to previous decisions must now be viewed in the light of the treatment of precedent, and of standard terms, in relation to construction since the recognition of the general evolution of contractual construction in the *Investors Compensation Scheme* case<sup>9</sup>.

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'One of the important elements of the law is predictability. At any rate in commercial law, there are obvious and substantial advantages in having, where possible, a firm and definite rule for a particular class of legal relationship; for example, as here the legal categorisation of a particular definable type of contractual clause in common use.'

*Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612; *Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, Woolf LJ at 55.

This should perhaps be applied against the background of the approach to interpretation generally following Lord Hoffmann's statement of principle in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 at 114 (see para 3.41 below) and in particular, the treatment of past decisions on the interpretation of terms and of standard terms (see para 3.43 below).

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(1877) 2 App Cas 455.

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(1879) 4 CPD 239.

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*Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep 143, Brandon LJ.

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*Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142, Colman J at 150, 'commercial lawyers have for years assumed that such a term is a condition'.

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*Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422 (land); *Damon Compania Naviera SA v Hapag Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435 (ships).

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*Nichimen Corp v Gatoil Overseas Inc* [1987] 2 Lloyd's Rep 46, Woolf LJ at 55.

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*Re Schwabacher, Stern v Schwabacher* (1907) 98 LT 127, Parker J at 129; *Hare v Nicoll* [1966] 2 QB 130 at 147, Winn LJ. However some caution must be exercised – 'a property company may be different from a trading company, and a company in one line of business may be different from a company in another less dynamic market': *Grant v Cigman* [1996] 2 BCLC 24.

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See para 3.43 below.

## Making the classification in general

### [3.38]

However, more generally, and in practical terms, it has been noted that the basic impetus is towards the labelling of terms as innominate rather than as conditions because of the flexibility provided by that classification, but in 'suitable cases' conditions will be found<sup>1</sup>. It is a factor pointing to the term being classified as innominate that not all breaches of it will substantially deprive the injured party of all the benefit he, or she, was intended to obtain under the contract<sup>2</sup>, but that can be outweighed by other factors<sup>3</sup>, such as the interdependence of the obligation with others or with other contracts<sup>4</sup>. In general the interdependence of the obligation with others<sup>5</sup> or with other contracts<sup>6</sup> is indicative that the term is a condition – for example, where the performance of one party's obligation, such as timely notification of expected readiness to load, was necessary for the other party to be able, themselves, to comply with a condition of the contract, such as nomination of a loading port and ensuring the goods would be ready to be shipped at the appointed time<sup>7</sup>, or where, for example, 'breach of the owner's obligation could well cause the charterers to be in breach of a condition of a contract with others'<sup>8</sup>.

Terms as to quality will often be innominate terms<sup>9</sup>, but that may not be the case where the quality is specified with greater precision than is usual, such as where there was a statement not merely of a fibre

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See para [3.35](#).

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*Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142; *Bayerische Vereinsbank v National Bank of Pakistan* [1997] 1 Lloyd's Rep 59 at 65.

3

*Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711.

4

*Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142.

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*Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711, Lord Roskill at 729; *Gill & Duffus SA v Société pour l'Exportation de Sucres SA* [1986] 1 Lloyd's Rep 322, Sir John Donaldson MR at 325. But see *ERG Petroli SpA v Vitol SA, The Ballenita* [1992] 2 Lloyd's Rep 455.

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*Toepfer v Lenersan-Poortman NV* [1980] 1 Lloyd's Rep 143; *Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetrican* [1985] 1 Lloyd's Rep 580; *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep 142.

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*Bunge Corpn v Tradax SA* [1981] 2 All ER 513, [1981] 1 WLR 711.

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*Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Vetrican* [1985] 1 Lloyd's Rep 580.

9

*Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44; *Total International Ltd v Addax BV* [1996] 2 Lloyd's Rep 333, Waller J at 341; *Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612. But see *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd's Rep

percentage in the goods but of a maximum percentage<sup>10</sup>. In general, the importance of the term to the contract is a very significant indicator of whether it is apt to classify it as a condition<sup>11</sup>. It has been said that 'the classification of an obligation as a condition or an innominate term is largely determined by its practical importance in the scheme of the contract'<sup>12</sup>. A term that the supplier of a car under a conditional sale agreement had the right to sell it was 'fundamental' to the contract and a condition<sup>13</sup>. As has been indicated, the need for certainty is indicative of the categorisation of a term as a condition<sup>14</sup> and, in particular, it has been indicated that this means that time clauses in mercantile contracts will generally be conditions<sup>15</sup> – traditionally, in relation to time clauses, it is not asked whether the term is a condition but whether 'time is of the essence' of the contract, but there is no additional significance in this terminology<sup>16</sup>. The impetus to classify time clauses in mercantile contracts as conditions may be strengthened by a phrase such as 'at latest'<sup>17</sup>. But not all time clauses in mercantile contracts will be categorised as conditions<sup>18</sup>. The relative importance of the clause may indicate that it would be

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142 – term assumed to be a condition; *Tradax Export SA v European Grain and Shipping Co Ltd* [1983] 2 Lloyd's Rep 100, Bingham J at 105.

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*Tradax Export SA v European Grain and Shipping Co Ltd* [1983] 2 Lloyd's Rep 100, Bingham J at 105.

11

*Glaholm v Hays* (1841) 2 Man & G 257, 266; *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274, Bowen LJ at 281; *State Trading Corp'n of India v Golodetz Ltd* [1989] 2 Lloyd's Rep 277. See also *Bannerman v White* (1861) 10 CBNS 844; *Couchman v Hill* [1947] KB 554; *Building Society & N Ltd v Micado Shipping Ltd, The Seaflower* [2001] 1 All ER (Comm) 240.

12

*Torvald Klaveness A/S v Arni Maritime Corp'n, The Gregos* [1995] 1 Lloyd's Rep 1, Lord Mustill at 9.

13

*Barber v NWS Bank plc* [1996] 1 All ER 906, Sir Roger Parker at 911 – 'It was fundamental to the transaction that the bank had the property in the Honda under the agreement. Only on this basis could the agreement operate ...'.

14

*Bunge v Tradax* [1981] 2 All ER 513, [1981] 1 WLR 711; *Building Society & N Ltd v Micado Shipping Ltd, The Seaflower* [2001] 1 All ER (Comm) 240, Rix LJ, [77], Jonathan Parker LJ, [84].

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*Bunge v Tradax* [1981] 2 All ER 513, [1981] 1 WLR 711, Lord Wilberforce at 716. And see *Cie Commerciale Sucres et Denrées v C Czarnikow Ltd, The Naxos* [1990] 3 All ER 641; *Hyundai Merchant Marine Co Ltd v Karander Maritime Co Inc* [1996] CLC 749, Mance J at 754–755.

16

*United Scientific Holdings v Burnley Borough Council* [1978] AC 904; *Gill & Duffus SA v Société pour l'Exportation de Sucres SA* [1986] 1 Lloyd's Rep 322, Sir John Donaldson MR at 325; *Michael I Warde v Feedex International Inc* [1985] 2 Lloyd's Rep 289, Bingham J at 298. But see *ERG Petroli SpA v Vitol Sa, The Ballenita* [1992] 2 Lloyd's Rep 455.

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*Gill & Duffus SA v Société pour l'Exportation de Sucres SA* [1986] 1 Lloyd's Rep 322.

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See *Valilas v Januzaj* [2014] EWCA Civ 436 where the High Court reiterated the position that unless there is an express or implied term that time of payment shall be a condition, it will usually be treated only as an innominate term.

inappropriate to classify the term as a condition, as where a time clause in relation to the giving of a guarantee was not classified as a condition because it did not relate to the main transaction and it was made clear that a more significant time clause was not to be regarded as a condition<sup>19</sup>. Similarly, a charterer's failure to provide timely notice narrowing a laycan spread was not seen as a breach of condition when the performance was not important to the owners in relation to whose obligations there was not a 'natural interdependence' with the notice<sup>20</sup>. In addition, even against the background of the general impetus, a clause as to the time of delivery of a ship at the end of a charter was categorised as an innominate term, as it was not regarded as sufficiently vital to require classification as a condition<sup>21</sup>. A time requirement in relation to notification of a terminal acceptance was held to be innominate on the basis that the number of parties involved would make the contract unworkable if it was a condition requiring strict compliance, but doubts were cast on this on appeal<sup>22</sup>, and the argument that trade practice was more relaxed and that compliance with strict punctuality posed difficulties in the sugar trade, did not prevent the classification, as a condition, of a term as to the time of loading of a cargo of sugar<sup>23</sup>. If a time clause is imprecise then that may indicate that the term does not require the certainty of the condition classification, as with the phrase 'as soon as reasonably practicable'<sup>24</sup>. Similarly, a clause which stated that the sellers were to advise the buyers 'without delay' if shipment had become impossible for any one of a number of stated reasons<sup>25</sup>, was categorised as innominate. 'The generality of the words 'without delay' [told] against the buyer's contention [that the term was a condition]; if a condition was intended a definite time limit would be more likely to be set'<sup>26</sup>. However, trade practice may give apparently indefinite time requirements a more precise meaning, making classification as a condition not inappropriate. In addition, the apparent imprecision of the statement 'expected ready to load' or as to the 'expected' arrival

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*State Trading Corpn of India v Golodetz Ltd* [1989] 2 Lloyds Rep 277, Kerr LJ at 283:

'At the end of the day, if there is no other more specific guide to the correct solution to a particular dispute, the court may have no alternative but to follow the general statement of Bowen LJ in *Bentsen v Taylor* ... by making what is in effect a value judgment about the commercial significance of the term in question.'

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*Universal Bulk Carriers Pte Ltd v Andre et Cie SA* [2001] CLC 1179, Clarke LJ, [40]. Contrast *Hyundai Merchant Marine v Karander Maritime Inc, The Nizura* [1996] CLC 749.

21

*Torvald Klaveness A/S v Arni Maritime Corpn, The Gregos* [1995] 1 Lloyd's Rep 1; *Atlantic Lines & Navigation Co Inc v Didymi Corpn* [1984] 1 Lloyd's Rep 583.

22

*Phibro Energy AG v Nissho Iwai Corpn and Bomar Oil Inc, The Honam Jade* [1991] 1 Lloyd's Rep 38.

23

*Gill & Duffus SA v Société pour l'Exportation de Sucres SA* [1986] 1 Lloyd's Rep 322 – the term was an interdependent one and the classification was reinforced by the phrase 'at latest'.

24

*British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 3 All ER 492.

25

*Bremer Handelgesellschaft mbH v Vanden Izegem PVBA* [1978] 2 Lloyd's Rep 109.

26

Lord Wilberforce at 113. But see *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2003] EWCA Civ 1031, [2003] 2 All ER (Comm) 640, [2003] 2 Lloyd's Rep 635 at [34].

time of a ship, has not prevented such terms becoming established as conditions<sup>27</sup>. Commenting on the lack of precision in these terms, it was said<sup>28</sup>:

‘It does not follow ... that the terms as to the expected time of arrival of the vessel and such like are of no importance to the charterers and ought not to be regarded as conditions. Indeed the very fact that the fortunes of a sea voyage may result in delay after the estimate has been given may make it the more important that the estimate be given honestly and on reasonable grounds.’

A further factor to be considered in the classification of terms was indicated in *Bunge v Tradax*<sup>29</sup> in distinguishing the time clause in that case from the ‘seaworthiness’ clause in *Hong Kong Fir*. It was pointed out that<sup>30</sup>:

‘the breaches which might occur of the [seaworthiness clause are] various. They might be extremely trivial, the omission of a nail; they might be extremely grave, a serious defect in the hull or in the machinery.’

It was considered that this made the term as to seaworthiness one in which it was appropriate for the legal consequences of the breach to depend upon the factual consequences<sup>31</sup>, and a time clause was viewed as ‘totally different in character’ – ‘As to such a clause there is only one kind of breach possible, namely to be late’. However, whilst it may be that a clause like that in *Hong Kong Fir*, which can be breached in many different ways, will usually be appropriately classified as an innominate term<sup>32</sup>, it does not follow that a term which can only be breached in one way will normally be classified as a condition or a warranty. Even though a term may only be breached in one way, such as by being late, it may still be capable of being breached to different degrees and there may be variations in the seriousness of the consequences which flow from any breach.

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*Maredelanto Compania Naviera SA v Bergbau-Handel GmbH, The Mihalis Angelos* [1971] 1 QB 164; *Greenwich Marine Inc v Federal Commerce & Navigation Co Ltd, The Mavro Veltronic* [1985] 1 Lloyd's Rep 580, Staughton LJ at 584; *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215, Neill LJ at 225.

28

*Greenwich Marine Inc v Federal Commerce & Navigation & Co Ltd, The Mavro Vetranic* [1985] 1 Lloyd's Rep 580, Staughton J at 584.

29

[1981] 2 All ER 513, [1981] 1 WLR 711.

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Lord Wilberforce at 715.

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See also *Nitrate Corpn of Chile Ltd v Pansuiza Compagnia de Navegacion SA* [1980] 1 Lloyd's Rep 638; *Rice v Great Yarmouth Borough Council* (2001) 3 LGLR 4, Hale LJ.

32

*Federal Commerce & Navigation v Molena Alpha* [1979] AC 757, Lord Wilberforce at 778. *Compagnie General Maritime v Diaken Spirit SA, The Ymnos* [1982] 2 Lloyd's Rep 574, Robert Goff J at 583:

‘When I turn to consider the so-called contract guarantee clause in the present case, I am satisfied that it cannot properly be classified as a condition ... the function of the ... clause is to provide an undertaking by the owners that such containers can be loaded and presumably discharged, without any stability problems. But it is obvious ... that the effect of a breach of this clause can be slight or serious ... such a term surely cannot, in the absence of any indication to the contrary, be properly classified as a condition.’

## Terms classified as innominate

### [3.39]

If a term is classified as innominate, a further test has to be applied to determine if its breach gives the injured party the right to rescind. As has been indicated, the test has been put in terms of whether the breach substantially deprives the innocent party of the whole of the benefit he, or she, was intended to derive from the contract<sup>1</sup>. The test has also been put in terms of whether the breach went to the root of the contract<sup>2</sup>, equated with the test for frustration<sup>3</sup>, and it has also been said that 'only a serious and substantial breach' entitles the injured party to rescind<sup>4</sup>. A useful test is provided by Hale LJ in *Rice v Great Yarmouth*: 'The question for the court ... in any case like this is whether the cumulative effect of the breaches of contract complained of is so serious as to justify the innocent party in bringing the contract to an end.'<sup>5</sup>

The right to rescind for breach of an innominate term was recognised where it meant that 'the charters would have become useless for the purposes for which they were granted'<sup>6</sup>. A breach of a term as to quality was not considered sufficient to justify rescission, but it was indicated that that remedy would be available had the difference in quality between that contracted for and that supplied been such that it 'resulted in the cargo being unavailable for the further refining process to be expected from having paid a premium for the same'<sup>7</sup>. In addition, the views of 'commercial men' as to whether 'the kind of deviation in quality would not be treated as entitling a rejection' have been seen as of great weight<sup>8</sup>.

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*Hong Kong Fir v Kawasaki Kisen Kaisha* [1962] 2 QB 26, Diplock LJ at 66, Upjohn LJ at 65; *Bunge v Tradax* [1981] 2 All ER 513, [1981] 1 WLR 711.

2

*Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1975] 3 All ER 739, Lord Denning MR at 747, Roskill LJ at 757; *Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612; *Total International Ltd v Addax BV* [1996] 2 Lloyd's Rep 333, Waller J at 341–342. It has, however, more than once been pointed out that the reference to breaches 'going to the root of the contract' is not a particularly helpful formulation. In *Telford Homes (Creekside) Ltd v Ampurius Nu Home Holdings* [2013] EWCA Civ 577, Lewison LJ, after citing Lord Wilberforce's speech in *The Nanfri*, said, at [50]: 'The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. Also, as the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, (2007) 82 AJLR 345 at [54] to describe a breach as "going to the root of the contract" is: "... a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party".'

3

*Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, Diplock LJ at 26, Upjohn LJ at 65; *Trade and Transport Inc v Iino Kaiun Kaisha Ltd, The Angelia* [1973] 2 All ER 144, [1973] 1 WLR 210, Kerr LJ at 219; *Phibro Energy AG v Nissho Iwai Corpn, The Honam Jade* [1991] 1 Lloyd's Rep 38, Neill LJ at 59.

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*Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612.

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[2001] LGLR 41 at [35].

6

*Federal Commerce & Navigation v Molena Alpha* [1979] AC 757, Lord Wilberforce at 779.

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The construction of the document is a question of law and fact for the courts to decide. This document covers the: basic approach in the interpretation of contracts including the principles stated by Lord Hoffmann in the case of *Investors' Compensation Scheme v West Bromwich Building Society* [1998]; construction of the 'natural and ordinary meaning of the words', the background or 'matrix of fact', and the commercial sense and unreasonable result of the contracts; weighing the different types of evidence of the parties' intention; special meanings of the terms of contracts; construction of documents forming part of the same transaction, to save the contract and to correct mistakes; and the principles of 'against the offeror'(contra proferentem), 'of the same kind' (ejusdem generis) rule and when parts of a class, expressly mentioned, exclude others(expression unius).

## D Construction

### [3.40]

The construction of the document is 'a question of law for the courts'<sup>1</sup>. It has been said that<sup>2</sup>:

'The expression "construction" as applied to a document, at all events as used by English lawyers, includes two things; first the meaning of the words and secondly their legal effect, or the effect to be given to them. The meaning of the words I take to be a question of fact in all cases, whether we are dealing with a poem or a legal document. The effect of the words used is a question of law.'

The objective when construing or interpreting a contract has traditionally been put in terms of ascertaining the parties' intention:

'The object sought to be achieved in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations each assumed by the contractual words in which they sought to express them.'<sup>3</sup>

However, to 'ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind'<sup>4</sup>. It is said that it is the intention of both parties<sup>5</sup>, and it is objectively ascertained:<sup>6</sup>

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*Total International Ltd v Addax BV* [1996] 2 Lloyd's Rep 333, Waller J at 341.

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*Tradax Internacional SA v Goldschmidt SA* [1977] 2 Lloyd's Rep 604, Slynn J at 612.

1

*Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co* [1972] AC 741, Lord Salmon at 770; *Shawa Oil Tanker Co Ltd of Japan v Maravan SA of Caracas, The Larissa* [1983] 2 Lloyd's Rep 325, Hobhouse J at 330.

2

*Chatenay v Brazilian Submarine Telegraph Co Ltd* [1891] 1 QB 79, Lindley LJ at 85; *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724.

3

*Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724, Lord Diplock. Also *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, Lord Neuberger at [17].

4

*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, Lord Bingham at [8]. That might be contrasted with the approaches taken by the Vienna Convention on Contracts for the International Sale of Goods 1980 (art 8) and the UNIDROIT Principles of International Commercial Contracts 2010 (ch 4). In the case of the former, the general rule is that a statement would be interpreted according to the actual subjective intention of the party making it if that is ascertainable or

‘The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.’<sup>7</sup>

It has been emphasised that it is the objective intention as embodied in the words of the contract<sup>8</sup> – the ‘intention as expressed’<sup>9</sup> – and, traditionally, there was a restrictive approach to what further evidence of the parties’ intention could be adduced. However, whilst it is the words used which are being construed, it has been sought to ‘dispel the idea that English Law is left behind in some island of literal construction’<sup>10</sup>

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can be inferred from the circumstances. Where that is not possible, art 8(2) then permits ‘statements made by and other conduct of a party ... to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances’. As regards the UNIDROIT Principles 2010, the contract would be interpreted according to the ‘common intention’ of the parties; where that is not possible, ‘the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances’ (art 4.2).

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*Zoan v Rouamba* [2000] 2 All ER 620, [43].

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*IRC v Raphael* [1935] AC 96, Lord Wright; *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, Lord Reid – ‘The judicial task is not to discover the actual intentions of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other’; *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381; *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989, Lord Wilberforce: ‘When one speaks of the intention of the parties to the contract one speaks objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties’; *Summit Investments Inc v British Steel Corpn* [1987] 1 Lloyd’s Rep 230 at 233; *Vitol BV v Compagnie Européenne des Pétroles* [1988] 1 Lloyd’s Rep 574, Saville J at 576; *Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717, [1995] 1 WLR 1580, Lord Steyn at 1587. For a discussion of objective intention see eg H Collins ‘Objectivity and Committed Contextualism in Interpretation’ in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003).

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*Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2005] 1 All ER (Comm) 117, Lord Steyn at [18]. Also *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 at [14].

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*Smith v Lucas* (1881) 18 Ch D 531 at 542; *Great Western Rly Co v Bristol Corpn* [1918] 87 LJ Ch 414; *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85; *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 at 1385; *Philpot’s (Woking) Ltd v Surrey Conveyancers Ltd* (1985) 277 Estates Gazette 61; *Hyundai Merchant Marine Co Ltd v Gesuri Chartering Co Ltd* [1991] 1 Lloyd’s Rep 100 at 103.

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*IRC v Raphael* [1935] AC 96, Lord Wright; *Inglis v Buttery* (1878) 3 App Cas 552; *Bank of New Zealand v Simpson* [1900] AC 182 at 188; *Lovell & Christmas v Wall* (1911) 104 LT 85; *Great Western Rly Co v Bristol Corpn* (1918) 87 LJ Ch 414; *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd’s Rep 570 at 591; *Hamed El Chiaty & Co v Thomas Cook Group* [1992] 2 Lloyd’s Rep 399 at 407.

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*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, Lord Wilberforce at 1384.

and context is now emphasised. In *Investors' Compensation Scheme v West Bromwich Building Society*<sup>11</sup> the House of Lords has taken the view that a 'fundamental change ... has overtaken this branch of the law'<sup>12</sup>. As Lord Hoffmann stated, the result has largely been:<sup>13</sup>

'to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal interpretation" has been discarded.'

## *Basic approach*

### [3.41]

What must now be regarded as the leading statement as to how construction is generally to be carried out is contained in the speech of Lord Hoffmann in *Investors' Compensation Scheme v West Bromwich Building Society*<sup>1</sup>. The idea that, basically, what is to be used are the 'common sense principles by which any serious utterance would be interpreted in ordinary life' has already been alluded to, above, but a summary of principles was also set out<sup>2</sup>:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.<sup>3</sup>
- (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is if anything an understated description of what the background may include. Subject to the requirement that it should be reasonably available to the parties and to the exception mentioned next, it includes absolutely anything which would have affected the

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[1998] 1 All ER 98.

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[1998] 1 All ER 98, Lord Hoffmann at 114.

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[1998] 1 All ER 98 at 114. See also *Mannai Investments Co Ltd v Eagle Star Life Assurance Co* [1997] 3 All ER 352; *Atari Corp v Electronics Boutique* [1998] 1 All ER 1010, Auld LJ at 1021–1022.

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[1998] 1 All ER 98.

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[1998] 1 All ER 98 at 114. *Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 102; *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244 at 256; *Bromarin AB v IMD Investments* [1998] STC 244 at 254; *WRM Group v Wood* [1998] CLC 189, Morrit LJ at 194–195; *Don King Productions v Warren* [1998] 2 All ER 608, Lightman J at 624; *Dattani v Trio Supermarkets* [1998] ICR 872; *Barclays Bank plc v Weeks, Legg & Dean* [1999] QB 309; *Scottish Power plc v Britoil* [1997] 47 LS Gaz R 30, Staughton LJ; *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, 81–82 (New Zealand Court of Appeal); *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 2 All ER (Comm) 387, [2008] 2 CLC 756 at [9].

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See *WRM Group v Wood* [1998] CLC 189, Morrit LJ at 194–195; *Don King Productions v Warren* [1998] 2 All ER 608, Lightman J at 624; *Dattani v Trio Supermarkets* [1998] ICR 872; *Barclays Bank plc v Weeks, Legg & Dean* [1999] QB 309; *Eridiana SpA v Oetker, The Fjord Wind* [2000] 2 All ER (Comm) 108, [10]; *Fountain v Banner* (26 October 2000, unreported), CA.

way in which the language of the document would have been understood by a reasonable man.<sup>4</sup>

- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only legal interpretation differs from the way we interpret utterances in ordinary life ...
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of a document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>5</sup>).
- (5) The rule that words should be given their “natural and ordinary meaning” reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had ...<sup>7</sup>.

Basically, it is the courts task ‘to construe the documents in a manner which effects the mutual intention of [the parties], against a background of the transaction as a whole, looking for the meaning which the language used ... would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties ... but excluding previous negotiations and evidence of subjective intent’.<sup>8</sup>

## ‘Natural and ordinary meaning’

### [3.42]

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*Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244 at 256; *Scottish Power plc v Britoil* [1997] 47 LS Gaz R 30, Staughton LJ; *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyds Rep 429, [2004] All ER (D) 04 (Apr) at [28].

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[1997] 3 All ER 352.

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See *Bromarin AB v IMD Investments* [1998] STC 244 at 254; *WRM Group v Wood* [1998] CLC 189, Morritt LJ at 194–195; *Don King Productions v Warren* [1998] 2 All ER 608, Lightman J at 624; *BCCI v Bugshan* [2001] EWCA Civ 244, [2001] All ER (D) 195 (Feb).

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*WRM Group v Wood* [1998] CLC 189, Morritt LJ at 194–195; *Don King Productions v Warren* [1998] 2 All ER 608, Lightman J at 624; *Scottish Power plc v Britoil* [1997] 47 LS Gaz R 30, Staughton LJ.

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*Rank Enterprises v Gerard* [2000] 1 All ER (Comm) 449, Mance LJ, 452.

Lord Hoffmann's first point, above, sets out the basic principle according to which construction is normally to be performed. However, traditionally, the view has been that the starting point should be the 'natural and ordinary meaning of the words'<sup>1</sup>, unless they stem from some specialist vocabulary<sup>2</sup>, and it has been said that that remains the case<sup>3</sup>, but it is 'crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account'<sup>4</sup>. The 'fact that a document appears to have a clear meaning on the face of it does not prevent, or indeed excuse, the court from looking at the background'<sup>5</sup>.

The point has been made that, bereft of context, there may be no 'natural meaning'. There may be 'chameleon-like' words which take their meaning from their context. 'Premises', for example, has been viewed as such a word and the task of the court was then seen as being to give to it 'the meaning which it most naturally bears in its context and as reasonably understood by the commercial men who entered into the agreement'<sup>6</sup>. More broadly in some cases the notion of words having a natural meaning may not be a very helpful one. Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts, their meaning may be different but no less natural.<sup>7</sup> In addition, the role of the 'natural and ordinary meaning' of words was addressed in Lord Hoffmann's fifth principle, above<sup>8</sup>. It may be that we should not 'easily accept that people have made linguistic mistakes ... in formal documents' but in some cases, the 'natural meaning', may have to give way to more forceful indications of the parties'

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*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, Lord Mustill; *Pratt v Aigaion Insurance Co SA* [2008] EWCA Civ 1314, [2009] 2 All ER (Comm) 387, [2008] 2 CLC 756 at [12]; *Robertson v French* (1803) 4 East 130 at 135; *Shore v Wilson* (1842) 9 Cl & Fin 355; *Mallan v May* (1844) 13 M & W 511 at 517; *Tielens v Hooper* (1850) 5 Exch 830; *Grey v Pearson* (1857) 6 HL Cas 61 at 106; *Beard v Moira Colliery Co* [1915] 1 Ch 257 at 268; *Royal Greek Government v Minister of Transport* [1949] 1 KB 525 at 528.

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See para [3.46](#).

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*Breadner v Granville-Grossman* [2000] 4 All ER 705, Park J, [36]; *P & O Overseas Holdings Ltd v Braintree Ltd* (5 July 2001, unreported), Lawrence Collins J, [31].

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*R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, Lord Steyn at [5] (statutory construction; quoting Lord Hoffman on interpretation of contractual document).

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*Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] EWCA Civ 392, Arden LJ at [27].

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*Spring House v Mount Cook Land* [2001] EWCA Civ 1833, [2002] 2 All ER 822, Ward and Rix LJJ, [28].

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*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, Lord Hoffmann; *International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd's Rep 344, Neill LJ at 350 – 'Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context.' *Bromarin AB v IMD Investments Ltd* [1998] STC 244 at 254.

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See para [3.41](#).

intention in the background to the contract<sup>9</sup>. Consideration of the words ‘actually paid’ in the context of a reinsurance contract as a whole led to them being construed so as to cover the situation where the insurer owed a certain sum, but had not been able to pay it due to insolvency<sup>10</sup>.

## *The background or ‘matrix of fact’*

### [3.43]

Lord Hoffmann's statement of principle in *Investors* emphasises the importance, in construction, of the background<sup>1</sup> against which the contract was made. Agreements are concluded against a background of facts which were known to, or which should have been known to the parties, as reasonable people, at the time when they concluded their agreement. Literal interpretation, divorced from that background has long been abandoned. In *Prenn v Simmonds*<sup>2</sup> Lord Wilberforce said:<sup>3</sup>

‘The time has long since passed when agreements ... were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations ... We must ... inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances, which the person using them had in view.’

As has been indicated<sup>4</sup>, in *Investors' Compensation Scheme v West Bromwich Building Society*, in stating the basic principles of construction, Lord Hoffmann viewed the ‘matrix of fact’ as, ‘if anything, an understated description of what the background may include’. Subject to certain exclusions, considered below, he viewed the relevant background, for the purposes of construction, as ‘absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man’<sup>5</sup>. That was, of course, ‘subject to the requirement that it should have been reasonably

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See para 3.49. *Bromarin AB v IMD Investments Ltd* [1998] STC 244.

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*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313.

<sup>1</sup>

D McLauchlan ‘The New Law of Contract Interpretation’ (2000) 19 NZULR 147, 172–175; J Chuah, ‘The Factual Matrix in the Construction of Commercial Contracts – The House of Lords Clarifies’ (2001) 12 ICCLR 294, 294–299; G McMeel ‘Prior negotiations and subsequent conduct – the next step forward for contractual interpretation’ (2003) 119 LQR 272, 290–297; D Nicholls ‘My Kingdom for a Horse: The Meaning of Words’ (2005) 121 LQR 577, 588–589; H Collins ‘Objectivity and Committed Contextualism in Interpretation’ in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003) pp 191–192; J Steyn ‘The Intractable Problem of the Interpretation of Legal Texts’ in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003) pp 125–126; E McKendrick ‘The Interpretation of Contracts: Lord Hoffmann's Restatement’ in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003); J W Carter and Andrew Stewart ‘Interpretation, Good Faith, and the “True Meaning” of contracts: The Royal Botanic Decision’ (2002) 18 JCL 182.

<sup>2</sup>

[1971] 3 All ER 237, [1971] 1 WLR 1381.

<sup>3</sup>

[1971] 3 All ER 237, [1971] 1 WLR 1381 at 1383–1384.

<sup>4</sup>

See para 3.41.

<sup>5</sup>

available to the parties', and it should be emphasised that that is objective, not requiring actual knowledge<sup>6</sup>, and means both parties:

'It would be contrary to basic principles of construction for the meaning of a document to be affected by facts which were known to one party but not reasonably available to the other.'<sup>7</sup>

It should also be emphasised that the time at which it should have been so available is when the contract was made<sup>8</sup> and it does not include subsequent conduct<sup>9</sup>. 'What the court must do must be to place itself in thought in the same factual matrix as that in which the parties were'<sup>10</sup>.

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This wide approach to the admissible background has caused some concerns about the costs of litigation ('It is often difficult for a judge to restrain the enthusiasm of counsel for producing a great deal of evidence under the heading of matrix, which on examination is found to contribute little or nothing to the understanding of the parties' contract. I have to say that such a wide definition of surrounding circumstances, background or matrix of fact seems likely to increase the cost to no obvious advantage':. *Scottish Power plc v Britoil* [1997] 47 LS Gaz R 30. Staughton LJ. See also *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244, Lightman J at 256) and the suggestion has been made that the background should be confined to 'the immediate context, and not facts in the past, distant or even recent' (Staughton 'How do the courts interpret commercial contracts?' (1999) 58 CLJ 303, 308). However, in *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, Lord Hoffmann emphasised that the admissible background only encompassed what the reasonable person would regard as relevant. Further in *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, [2004] All ER (D) 04 (Apr), Arden LJ said (at [29]), 'I am not aware that the fears expressed as to the opening of the floodgates have been realised. The powers of case management in the civil procedure rules could obviously be used to keep evidence within its proper bounds. The important point is that the principles in the ICS case lead to a more principled and fairer result by focussing on the meaning which the relevant background objectively assessed indicates that the parties intended'.

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*Reardon Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989, Lord Wilberforce at 996.

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*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, Lord Hoffmann, [49]; *Burrows v Jamaica Private Power* [2002] 1 All ER (Comm) 374, Moore-Bick J, [14].

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*Prenn v Simmonds* [1971] 1 WLR 1381, Lord Wilberforce at 1384.

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*James Miller & Partners Ltd v Whitworth Street Estates Ltd* [1970] AC 583; *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381; *English Industrial Estates v George Wimpey & Co Ltd* [1973] 1 Lloyd's Rep 118; *L G Schuler v Wickman Machine Tools Sales Ltd* [1974] AC 235; *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd's Rep 98; *Haydon v Lo & Lo and the Worldwide Marine and Fire Insurance Co Ltd* [1997] 1 Lloyd's Rep 336 at 340; *MSC Mediterranean Shipping Co SA v Owners of the Ship 'Tychy'* [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403. Subsequent acts may be admissible as evidence of what the terms were: *Wilson v Maynard Shipbuilding Consultants AG* [1978] QB 665; *Mears v Safecar Securities Ltd* [1983] QB 54; *Egon Oldendorff v Liberia Corpn* [1996] 1 Lloyd's Rep 380 at 384. *Maggs v Marsh* [2006] EWCA Civ 1058, [2006] All ER (D) 95 (Jul), Smith LJ at [26] – 'In my judgment it is clear that the principle set out in *Miller's* case does not apply to an oral contract. Determining the terms of an oral contract is a question of fact. Establishing the facts will usually, as here, depend upon the recollections of the parties and other witnesses. The accuracy of those recollections may be tested and elucidated by things said and done by the parties or witnesses after the agreement has been concluded. Receiving evidence of such words or actions does not mean that the judge is losing sight of his task of deciding what the parties agreed at the time of the contract. It is simply helping him to decide whose

The width of the admissible background can be emphasised. Lord Hoffmann has made the point that 'there is no conceptual limit to what can be regarded as background'<sup>11</sup>. It is not limited to matters of fact, but can include 'the state of the law'<sup>12</sup>, 'proved common assumptions which were in fact quite mistaken'<sup>13</sup>, and the objective 'aim' of the transaction<sup>14</sup>. In relation to a contract between two practitioners in a particular market, it can also include a 'general market practice' even though such a practice falls short of the requirements for a 'usage' which would generate an implied term<sup>15</sup>. As has been indicated, it does however, exclude negotiations and declarations of subjective intent. Some further elucidation of this can be made.

As has been indicated, in *Bank of Credit and Commerce International SA (in liquidation) v Ali* Lord Hoffmann expressly acknowledged the possibility that the admissible background could include 'the state

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recollection is right.' The general exclusion has been criticised – McLauchlan 'The New Law of Contract Interpretation' (2000) 19 NZULR 147, 172–175, G McMeel 'Prior negotiations and subsequent conduct – the next step forward for contractual interpretation' (2003) 119 LQR 272, 290–297, D Nicholls 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 588–589. And contrast the approach taken by the Supreme Court of New Zealand – *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 3 LRC 632.

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*Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989, Lord Wilberforce at 997; *Charrington & Co Ltd v Woodar* [1914] AC 71, Lord Dunedin at 82. Also *Amlin Corporate Member Ltd v Oriental Assurance Corp* ('The Princess of the Stars') [2014] EWCA Civ 1135.

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*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [39].

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*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961. See also Lord Clyde, [78]; *De Serville v Argee Ltd* (2001) 82 P & CR D24.

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*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961; *Household Global Funding Inc v British Gas Trading Ltd* (29 January, 2001, unreported), [24]. Discussed in *De Serville v Argee Ltd* (2001) 82 P & CR D24, Nicholas Strauss QC, [37]: 'This argument raises a question as to the extent to which it is open to the parties to establish that they did not know of a relevant background matter even though such knowledge was reasonably available to them. Clearly the fact that one party who should reasonably have known of it did not in fact know would be of no relevance. But if both parties, to each other's knowledge, held a mistaken belief, then it seems to me that the relevant background fact is the one in which the parties mistakenly believed. More difficult is the case where each party independently holds the mistaken belief but neither communicates it to the other ...'.

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*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, Lord Wilberforce; *Shore v Wilson* (1842) 9 Cl & Fin 355, Erskine J at 512, Parke B; *Hvalfangerselskabet Polaris A/S v Unilever Ltd* (1933) 46 Ll L Rep 29; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468; *Staffordshire Health Authority v South Staffordshire Waterworks* [1978] 3 All ER 769, [1978] 1 WLR 1387; *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 3 All ER 570, [1976] 1 WLR 989 at 995; *Ultisol Transport Contractors Ltd v Bouygues Offshore SA* [1996] 2 Lloyd's Rep 140 at 144; *Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 102; *Roar Marine v Bimeh Iran* [1998] 1 Lloyd's Rep 423, Mance J at 430.

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*Crema v Cenkos Securities* [2010] EWHC 461 (Comm), [2010] All ER (D) 143 (Mar) at [63]. In relation to terms implied on the basis of market usage, see above para 3.25.



of the law<sup>16</sup>. In doing so, he was envisaging cases in which, in construing an agreement, it is taken 'into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective'<sup>17</sup>. Even then, unless a public policy issue is seen to be involved, it should be a matter of whether the situation is such that the effect of the relevant statute, for example, is 'knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'<sup>18</sup> and that will be returned to below<sup>19</sup>. However, what requires consideration here is the approach to be taken to previous cases dealing with the same or similar clauses. In *Ali* Lord Hoffmann also said:<sup>20</sup>

'If interpretation is the quest to discover what a reasonable man would have understood specific parties to have meant by the use of specific language in a specific situation at a specific time and place, how can that be affected by authority? How can the question of what a reasonable man in 1990 would have thought BCCI and Mr Naeem meant by using the language of an Acas form be answered by examining what Lord Keeper Henley said in 1758 (*Salkeld v Vernon*, 1 Eden 64) I can understand that if parties in a legal context use words in what appears to have been a technical sense, it may be necessary to ascertain that technical meaning from authorities. But there is nothing of that kind here.'

Nevertheless, past decisions on the meaning of terms have been referred to post-*Investors*<sup>21</sup> and even Lord Hoffmann has found the need to justify drawing 'a line under the authorities to date and [making] a fresh start' in relation to the interpretation of an arbitration clause<sup>22</sup>. Consideration must be given to when

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[2001] UKHL 8, [2001] 1 All ER 961, [39].

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[2001] UKHL 8, [2001] 1 All ER 961.

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*Zoan v Rouamba* [2000] 2 All ER 620, [36].

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Para [3.49](#).

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[2001] 1 All ER 961, [51]. See also *City of London v Reeve & Co Ltd* [2000] BLR 211; *Sanofi-Synthelabo SpA v 3M Health Care* [2002] EWHC 707 (Ch), [2002] All ER (D) 181 (Apr), Laddie J, [20]–[22]. *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429 at [16] – 'identical words may be given completely different interpretations in two different guarantees' (referring to Andrews and Millett *The Law of Guarantees* (3rd edn, 2000) at 4-01).

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*Lymington Marina Ltd v McNamara* [2006] EWHC 704 (Ch), [2006] 2 All ER (Comm) 200 and see below. In *GE Frankona Reinsurance Ltd v CMM Trust No 1400, The Newfoundland Explorer* [2006] EWHC 429 (Admlty), [2006] 1 All ER (Comm) 665, Gross J (at [30]) found the observations' of Aiken J in *Brownsville Holdings v Adamjee Insurance Ltd* [2000] 2 All ER (Comm) 803 'of considerable persuasive force and, albeit dealing with a clause differently worded, [lending] some support'. He did not, however, base his decision on the case but 'on the wording of the warranty in the present contract, construed in context', but he took 'comfort from the fact that the view [he had] come to [was] consistent with the observations of Aikens J in the case'.

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*Fiona Trust and Holding Corpn v Privalov* [2007] UKHL 40, [2007] 4 All ER 951, [2007] 2 All ER (Comm) 1053 at [12] – he particularly pointed to s 7 of the Arbitration Act 1996 as justifying the change in approach.

it is appropriate to refer to past cases in interpreting terms. There will be some situations, for example, in which a past decision, or its general approach, can be viewed as falling within the *Investors'* principles on the basis that it would have been reasonably known to the parties. In *MDIS Ltd v Swinbank*<sup>23</sup>, for example, Clarke LJ acknowledged that the judgment of Devlin J in *West Wake Price & Co v Ching*<sup>24</sup> on a clause similar to that before him was in a 'different contract between different parties in different circumstances at a different time', but he nevertheless felt able to conclude that:<sup>25</sup>

'both the decision and the dicta in that case can in my judgement properly be treated as relevant to the construction of this clause since they have been known amongst insurance lawyers and indeed brokers for many years and would be likely to have been in the back of the minds of those negotiating this contract.'

In other words, the previous case was treated as so well known as to be part of the background 'reasonably available to the parties' when making the contract and so available for consideration in its construction under the *Investors'* approach<sup>26</sup>. Similarly in *The Fjord Wind*<sup>27</sup> Clarke LJ expressly stated that the 'general approach' taken in the earlier case of *Anglo-Saxon Petroleum Co Ltd v Adamastos*<sup>28</sup> would 'be included in the background knowledge (referred to by Lord Hoffmann) which the parties would have had in mind had they thought about it'<sup>29</sup>. Obviously, the appropriateness of such conclusions will depend upon all the circumstances. It can be noted, for example, that Clarke LJ in *MDIS v Swinbank* did not merely refer to the previous decision as well known among lawyers, but also as well known among 'brokers', and, in general, whether a past decision or approach falls within the *Investors'* 'background' will depend upon such factors as whether it is well known in the trade generally, or merely amongst lawyers, and the degree of involvement of legal advisers in the transaction in question. So, for example, in deciding to follow what was to a 'lawyer experienced in the field' a 'well recognised meaning' for a phrase in a settlement agreement of a dispute arising from a construction contract, the point was made that the agreement 'was drawn and accepted for the parties by lawyers who may be taken to be experienced in disputes arising from construction or construction management contracts'<sup>30</sup>. More broadly, the point has

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[1999] 2 All ER (Comm) 722.

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[1956] 3 All ER 821, [1957] 1 WLR 45.

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[1999] 2 All ER (Comm) 722, 728.

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See also the line taken by Thomas J in *Cero Navigation Corpn v Jean Lion & Cie* [2000] 1 All ER (Comm) 214, 217 following the approach to the use of previous case law by Staughton LJ in *The Kalliopi A* [1988] 2 Lloyd's Rep 101, 105 and *The Radauti* [1987] 2 Lloyd's Rep 276, 278.

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*Eridiana SpA v Oetker* [2000] 2 All ER (Comm) 108.

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[1959] AC 133.

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[2000] 2 All ER (Comm) 108, [15]. *Onego Shipping and Chartering BV v JSC Arcadia Shipping* [2010] EWHC 777 (Comm), [2010] All ER (D) 179 (Apr) at [31].

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*Mostcash plc v Fluor Ltd (No 3)* [2002] EWCA Civ 975, [2002] BLR 411, Chadwick LJ, [61].

been made that the court did not regard it as 'a particularly helpful exercise to attempt to derive the proper construction of [a] standard form contract from special facts'<sup>31</sup>. It has been said:<sup>32</sup>

'There may reasonably be attributed to the parties to a contract such as this such general commercial knowledge as a party to such a transaction would ordinarily be expected to have, but with a printed form of contract, negotiable by one holder to another, no inference may be drawn as to the knowledge or intention of any particular party. The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.'

The nature of a standard form contract has been acknowledged. The point has been made that 'it is not context-specific' and that 'its value would be considerably diminished if it could not be relied upon as having the same meaning on all occasions'<sup>33</sup>. In fact, it can be suggested that where a standard form contract is employed in the circumstances for which it was designed<sup>34</sup>, an established interpretation should be followed in the interests of certainty, whether or not that would be in keeping with the *Investors'* approach<sup>35</sup>. However, if, even in relation to such contracts, the *Investors'* approach must be maintained in full, it may be suggested that the fact that a contract is a standard form contract will in some cases, at least, be the dominating background factor<sup>36</sup> so that the court would be basically focused upon the words

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*Rank Enterprises v Gerard* [2000] 1 All ER (Comm) 449, [20]; *AIB Group (UK) plc v Martin* [2001] UKHL 63, [2002] 1 All ER (Comm) 209, [7].

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*Dairy Containers Ltd v Tasman Orient Line CV, The Tasman Discoverer* [2004] UKPC 22, [2004] 2 All ER (Comm) 667, [2005] 1 WLR 215, Lord Bingham at [12]

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*AIB Group (UK) plc* (formerly Allied Irish Banks plc and AIB Finance Ltd) *v Martin* [2001] UKHL 63, [2002] 1 All ER 353, [2002] 1 All ER (Comm) 209, [7].

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*AIB Group (UK) plc* (formerly Allied Irish Banks plc and AIB Finance Ltd) *v Martin* [2001] UKHL 63, [2002] 1 All ER 353, [2002] 1 All ER (Comm) 209, [7].

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H Collins 'Objectivity and Committed Contextualism in Interpretation' in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003) pp 191–192; J Steyn 'The Intractable Problem of the Interpretation of Legal Texts' in S Worthington ed *Commercial Law and Commercial Practice* (Hart Publishing, 2003) pp 125–126; D Nicholls 'My Kingdom for a Horse: The Meaning of Words' (2005) LQR 577 at 587 – 'When interpreting a document intended for commercial circulation it may be reasonable to attach added weight to the meaning the words bear on their face. The context afforded by the nature of the document is one of the matters the notional reasonable reader will take into account'. See also *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb), Arden LJ at [57] – 'consideration may also have to be given to the question whether some matters should be given less weight where (for example) the context is one in which different persons advert at different points in time, such as a company's constitution, than in the case of a 'one-off' contract between two persons'. But see *Absalom (on behalf of Lloyd's Syndicate 957) v TCRU Ltd* [2005] EWHC 1090 (Comm), [2006] 1 All ER (Comm) 375, Aikens J at [23].

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A similar point has been made in relation to contracts commonly impacting on third parties – 'Some contracts are readily assignable in the market in the ordinary course of business and some are not. Where they are, that will be a fact well known to commercial parties and is likely to be a matter highly germane to the interpretation of the document, mandating a more or less literal approach to the terms

used in the standard form contract and limited background, commonly known in the relevant commercial context. It may be possible to identify particular types of factors which would normally dominate the background to a particular type of clause. So, for example, in relation to the scope of an arbitration clause, previous cases were referred to in relation to 'the likelihood that the parties would have wanted one stop adjudication'<sup>37</sup>. In such cases, the court is finding support for its inferences as to the likely motivations of the reasonable person, in the views of previous judges<sup>38</sup>. The validity of that support, within the *Investor's* principles, of course depends upon sufficient similarity in other surrounding circumstances, in so far as they are relevant.

As has been indicated, the admissible background, or matrix of fact, may include evidence of the "genesis" and objectively of the "aim" of the transaction<sup>39</sup>. It may be that one possible interpretation will 'better and more sensibly serve' the aim of a clause and so be indicated as the appropriate construction.<sup>40</sup> It must be emphasised that consideration of the aim or genesis of the transaction does not admit evidence of subjective intention<sup>41</sup>:

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expressed' – Lord Bingham 'A new thing under the sun? The interpretation of contracts and the *ICS* decision' [2008] Edin LR 374 at 388. See also *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571 at [36]–[37] – 'The security trust deed secures a variety of creditors, who hold different instruments, issued at different times in different circumstances. Consequently this is the type of case where the background or matrix of fact ought not to be relevant except in the most generalised way'.

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*Capital Trust v Radio Design* [2002] EWCA Civ 135, [2002] 1 All ER (Comm) 514, Clarke LJ, [52]. See also *Ing Lease (UK) Ltd v Harwood* [2007] EWHC 2292 (QB), [2008] 1 All ER (Comm) 1150 at [109] – the line was taken in relation to an 'all monies clause' in a guarantee that the past cases 'illustrate the type of provisions which may give an indication of the presumed intention of the parties'.

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See the approach taken to previous cases by Lord Bingham in *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961. Although noting that 'some of the cases ... contain statements more dogmatic and unqualified than would now be acceptable', he nevertheless regarded them as generating 'not a rule of law but a cautionary principle which should inform the approach of the court to the construction' of the document (at [17]). He took the view of the previous case that (at [10]) – 'a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware'.

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*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, Lord Wilberforce; *Shore v Wilson* (1842) 9 Cl & Fin 355, Erskine J at 512, Parke B; *Hvalfangerselkabet Polaris A/S v Unilever Ltd* (1933) 46 Ll L Rep 29; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468; *Staffordshire Health Authority v South Staffordshire Waterworks* [1978] 3 All ER 769, [1978] 1 WLR 1387; *Reardon-Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995; *Ultisol Transport Contractors Ltd v Bouygues Offshore SA* [1996] 2 Lloyd's Rep 140 at 144; *Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 102; *Roar Marine v Bimeh Iran* [1998] 1 Lloyd's Rep 423, Mance J at 430.

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*Rank Enterprises v Gerard* [2001] 1 All ER (Comm) 449, 457.

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*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381, Lord Wilberforce at 1385; *Plumb Bros v Dolmac (Agriculture) Ltd* (1984) 271 Estates Gazette 373; *Rabin v Gerson Association Ltd* [1986] 1 WLR 526; *Bromarin AB v IMD Investments Ltd* [1998] STC 244 at 254.

‘The commercial or business object of a provision, objectively ascertained, may be highly relevant ... But the court must try not to divine the purpose of the contract by speculating about the real intention of the parties. It may only be inferred from the language used by the parties, judged against the objective contextual background.’<sup>42</sup>

It should, however, be recognised that it may not always be possible to discern the aim or objective behind a contract or a particular term<sup>43</sup> and also that the drafting of a term may be such that its aim or objective has only been achieved in such a way that there are also other affects, going beyond that purpose. In *Deutsche Genossenschaftsbank v Burnhope*<sup>44</sup> Lord Hoffmann agreed with Lord Lloyd that the ‘obvious case which the parties intended to exclude [from the insurance cover] was theft by electronic means employed from a remote location’<sup>45</sup>. But he noted that ‘in order to achieve that the parties have drawn a line on a map which can have fairly arbitrary consequences’. It was concluded that where a thief used an innocent agent to collect the money from the bank, that situation was also excluded by the drafting of the insurance contract which was stated to cover ‘theft ... by persons present on the premises of the’ bank<sup>46</sup>.

As Lord Hoffmann indicated in *Investors*<sup>47</sup>, even though they might be relevant to the ‘common sense interpretation of any serious utterance’, there are some matters which are excluded from the matrix of fact to be considered in construing a contract. These are the parties’ ‘declarations of subjective intention’ and the prior negotiations of the parties<sup>48</sup>. The exceptional exclusion of prior negotiations has generated considerable criticism<sup>49</sup>. Nevertheless, it has recently been reaffirmed by the House of Lords in

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*Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717, [1995] 1 WLR 1580, HL, Lord Steyn.

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*Deutsche Genossenschaftsbank v Burnhope* [1995] 4 All ER 717, [1995] 1 WLR 1580, HL.

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[1995] 4 All ER 717, [1995] 1 WLR 1580.

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In general, the court did not agree on the object of the term in question.

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But see the dissenting judgment of Lord Steyn.

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See para [3.41](#).

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*Inglis v Buttery* (1878) 3 App Cas 552 at 558; *Leggott v Barrett* (1880) 15 Ch D 306 at 311; *Millbourn v Lyons* [1914] 2 Ch 231 at 240; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; *L G Schuler AG v Wickman Machine Tools Ltd* [1974] AC 235; *Arrale v Costain Civil Engineering Co Ltd* [1976] 1 Lloyd's Rep 98 at 101; *Sudatlantica Navegacion SA v Devamar Shipping Corpn* [1985] 2 Lloyd's Rep 271 at 274; *Alexiou v Campbell* [2007] UKPC 11, [2007] All ER (D) 319 (Feb), [15].

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D Nicholls ‘My Kingdom for a Horse’ (2005) LQR 577; E McKendrick *Contract Law Text Cases and Materials* (2nd edn, 2005) p 416; G McMeel ‘Prior Negotiations and Subsequent Conduct – the Next Step Forward for Contractual Interpretation’ (2003) 119 LQR 272; D W McLauchlan ‘The New Law of Contract Interpretation’ (2000) 19 NZULR 147, 172; *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb); *Lewis v Pensions Ombudsman* [2005] EWHC 103 (Ch), [2005] All ER (D) 66 (Feb). See also the comments of Thomas J in the Court of Appeal of New Zealand in *Yoshimoto v Canterbury Golf Club International Ltd* [2002] UKPC 40, [2002] All ER (D) 297 (Jul), [59]–[96], referred to

*Chartbrook Ltd v Persimmon Homes Ltd*<sup>50</sup> and this will be returned to below. The exception has led to the exclusion of drafts<sup>51</sup> and of the opinion of the drafting counsel<sup>52</sup>, and a comfort letter, despatched with a negotiating letter, has also been excluded<sup>53</sup>, although it may be possible to refer to what has been deleted from a standard form contract<sup>54</sup>. The exclusion does not, of course, cover previous contracts, although the point has been made that a 'cautious and sceptical approach' may need to be taken to the assistance they can provide in the construction of a later contract<sup>55</sup>. Evidence of negotiations is available to establish

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by Lord Nicholls in *Bank of Credit and Commerce International SA (in liquidation) v Ali*. And contrast the approach taken by the Supreme Court of New Zealand – *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37.

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[2009] UKHL 38, [2009] 4 All ER 677.

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*National Bank of Australasia v Falkingham* [1902] AC 585; *Youell v Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep 127.

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*Rabin v Gerson* [1986] 1 All ER 374, [1986] 1 WLR 526.

53

*Scottish Power plc v Britoil* [1997] 47 LS Gaz R 30.

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*Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 92; *Timber Shipping Co SA v London & Overseas Freighters Ltd* [1972] AC 1, Lord Reid at 15. See also *Baumvoll Manufactur Von Schreiber v Gilcrest & Co* [1892] 1 QB 253, Lord Esher at 256; *Gray v Carr* (1871) LR 6 QB 522; *Stanton v Richardson* (1874) LR 9 CP 390; *Glynn v Margetson* [1893] AC 351 at 357. *Caffin v Aldridge* [1895] 2 QB 648 at 650; *Sanday & Co v Cox, McEuen & Co* (1921) 10 LI L Rep 450 at 460; *Ross, Smythe & Co v Bailey, Sons & Co* [1940] 3 All ER 60; *Mottram Consultants Ltd v Bernard Sunley Ltd* [1975] 2 Lloyd's Rep 197 at 209; *Punjab National Bank v De Boinville* [1992] 3 All ER 104, [1992] 1 WLR 1138 at 1148; *Team Services plc v Kier Management & Design Ltd* (1993) 36 Con LR 32. But see *Louis Dreyfus & Cie v Parnaso Cia Naviera SA* [1959] 1 QB 498, Diplock J at 513 reversed on other grounds [1960] 2 QB 49; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129; *Ambatetielos v Jurgens* [1923] AC 175 at 185; *Sassoon & Sons Ltd v International Banking Corp* [1927] AC 711, Viscount Sumner at 721; *Finzel, Berry & Co v Eastcheap Dried Fruit Co* [1962] 2 Lloyd's Rep 11; *Compania Naviera Tremar SA v Tradax Export SA* [1965] 1 Lloyd's Rep 198 at 204; *Borthwick v Bunge & Co Ltd* [1969] 1 Lloyd's Rep 17; *Tradax Export v Volkswagenwerk* [1969] 2 QB 599 at 607; *Ben Shipping Co Ltd v An-Board Banne (The C Joyce)* [1986] 2 Lloyd's Rep 285 at 291; *Wales Construction (London) Ltd v Frantham Property Ltd* (1991) 7 Const LJ 243.

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*HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA 735, [2001] 2 All ER (Comm) 39, Rix LJ at [83] – 'The difficulty of course is that, where the later contract is intended to supersede the prior contract, it may in the generality of cases simply be useless to try to construe the later contract by reference to the earlier one. Ex hypothesi, the later contract replaces the earlier one and it is likely to be impossible to say that the parties have not wished to alter the terms of their earlier bargain. The earlier contract is unlikely therefore to be of much, if any assistance. Where the later contract is identical, its construction can stand on its own two feet, and in any event its construction should be undertaken primarily by reference to its own overall terms. Where the later contract differs from the earlier contract, prima facie the difference is a deliberate decision to depart from the earlier wording, which again provides no assistance.' *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451, [11].

that 'a fact which may be relevant as background was known to the parties'<sup>56</sup>. Also, evidence of negotiations has been seen as admissible to show that the parties had adopted a particular meaning of a word or phrase<sup>57</sup> (a 'private dictionary') and an entire agreement clause may not prevent that<sup>58</sup>. However, a 'private dictionary' rule of the scope previously adopted was seen by Lord Hoffmann in *Chartbrook v Persimmon* as 'infringing' the exclusionary rule and he took the line that it was confined to the situation where the parties had adopted an 'unconventional usage'<sup>59</sup> (he did emphasise the 'two legitimate safety devices', of rectification and estoppel by convention)<sup>60</sup>. However, extra-judicially, whilst agreeing with the general exclusion of evidence of negotiations, Lord Bingham had stated his approval of the original 'private dictionary' rule as encompassing evidence which 'should be admissible'<sup>61</sup>. Further, Lord Hoffmann's limitation of the 'private dictionary' rule to 'unconventional usages' has been seen as an 'impossible one'<sup>62</sup>. The question has been raised 'why is it that the court can admit evidence that, say, the parties always, or for a particular transaction, used "apples" to mean "pears" but not evidence that they used words in one of two conventional senses?'<sup>63</sup>

However, as has been indicated, the general exclusion of evidence of negotiations has been much criticised<sup>64</sup>. It creates a difficult borderline, particularly when it is the purpose of the contract which is

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*Chartbrook Ltd v Persimmon Homes Ltd (Chartbrook Ltd, Pt 20 defendants)* [2009] UKHL 38, [2009] 4 All ER 677 at [42]. This does not, however, infringe upon the 'without prejudice' rule in relation to communications made 'without prejudice' in trying to reach a settlement – *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] EWCA Civ 79, [2010] 09 LS Gaz R 16, [2010] All ER (D) 163 (Feb).

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*Partenreederei MS Karen Oltman v Scarsdale Shipping Co Ltd, The Karen Oltman* [1976] 2 Lloyd's Rep 708; *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326; *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218, McClaughlan (1997) LQR 237; *Newnham v British United Provident Association Ltd* (3 November 2000, unreported); *John v Price Waterhouse* (11 April 2001, unreported), Fox J, [127].

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*ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb).

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[2009] UKHL 38, [2009] 4 All ER 677 at [45]. Thus putting the *Karen Oltmann* case itself outside of the exception as a case which did not 'evidence any unconventional usage' but merely a choice 'between two perfectly conventional meanings' (Lord Hoffmann at [45]).

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[2009] UKHL 38, [2009] 4 All ER 677 at [47].

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'A new thing under the sun? The interpretation of contracts and the *ICS* decision.' [2008] Edin LR 374 at 389.

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D McLaughlan 'Charterbrook Ltd v Persimmon Homes Ltd: commonsense principles of interpretation and rectification?' (2010) LQR 8 at 12.

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D McLaughlan 'Charterbrook Ltd v Persimmon Homes Ltd: commonsense principles of interpretation and rectification?' (2010) LQR 8 at 12.

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See n 49 above.

looked for<sup>65</sup>. The general exclusion is chiefly based on concerns about avoiding moving from the objective to the subjective<sup>66</sup> and about the nature of the negotiating process. In *Prenn v Simmonds*<sup>67</sup> Lord Wilberforce said:<sup>68</sup>

‘In relation to such negotiations, the reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience... It is simply that such evidence is unhelpful. By the nature of things where negotiations are difficult, the parties’ positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records consensus.’

However, extra-judicially, Lord Nicholls has commented:<sup>69</sup>

‘[There] will be occasions where the pre-contract negotiations do shed light on the meaning the parties intended to convey by the words they used. There will be occasions, for instance, when the parties in their pre-contract negotiations make clear the meaning they intended by language they subsequently incorporated into their contract. When pre-contract negotiations assist in some such way, the notional reasonable person should be able to take that evidence into account in deciding how the contract is to be interpreted.’

Critical comment has also been made as to the appropriate reaction to the problems identified by Lord Wilberforce. It has been said that ‘the points made by Lord Wilberforce [in *Prenn v Simmonds*] are only valid as cautionary factors to be taken into account in determining the weight to be given to evidence of prior negotiations, not its admissibility’<sup>70</sup>. Care would need to be taken with the evidence provided by pre-contract negotiations but that has been recognised<sup>71</sup>. However, in *Chartbrook Ltd v Persimmon Homes Ltd*, having referred to practitioners’ concerns that the more background was admissible, the greater

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*MSC Mediterranean Shipping Co SA v Owners of the Ship ‘Tychy’* [2001] EWCA Civ 1198, [2001] 2 Lloyd’s Rep 403 at [29]; *Sykes v Pannell Kerr Foster* (30 March 2001). E McKendrick *Contract Law Text Cases and Materials* (2nd edn, 2005) p 417.

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*D Nicholls* ‘My Kingdom for a Horse’ (2005) LQR 577; J Steyn ‘Written Contracts; To what extent may evidence control language’ [1988] CLP 23; E McKendrick *Contract Law Text Cases and Materials* (2nd edn, 2005) p 416.

67

*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381. See also *C Itoh & Co Ltd v Compagnia De Naegacao Lloyd Brasileiro* [1999] 1 Lloyd’s Rep 115, Waller LJ at 124.

68

*Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 at 1384.

69

*D Nicholls* ‘My Kingdom for a Horse’ (2005) LQR 577, 583. Quoted in *ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb) at [34] and see [57].

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DW McLauchlan ‘The New Law of Contract Interpretation’ (2000) 19 NZULR 147, 172.

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*Lewis v Pensions Ombudsman* [2005] EWHC 103 (Ch), [2005] All ER (D) 66 (Feb) at [59] – ‘Although I consider that common sense suggests that there was an agreed basis, I prefer not to rest my decision on this point. Consent by silence is not easily to be inferred, and a party to a negotiation may well decide not to raise a point where he sees an ambiguity’.



would be the costs and uncertainty, Lord Hoffmann dismissed these arguments against the exclusionary rule on pragmatic grounds. He said:<sup>72</sup>

‘The conclusion I would reach is that there is no clearly established case for departing from the exclusionary rule. The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes. It is, after all, usually possible to avoid surprises by carefully reading the documents before signing them and there are safety nets of rectification and estoppel by convention.’

On this basis, he saw no reason to depart from the established exclusionary rule<sup>73</sup>. However, the weights in this type of balancing exercise may change and it can be suggested that the exclusion may come under renewed pressure, and the balance change, if complete acceptance is given to Lord Hoffmann's new approach to implying terms in fact in *A-G of Belize v Belize Telecom Ltd*<sup>74</sup>. His approach there simply equates such implication with construction and dismisses the traditional restrictive ‘business efficacy’ and ‘officious bystander’ tests. The point has been made that, in the absence of evidence of the parties’ negotiations, it is may be difficult to tell whether the omission of an express term is deliberate, in which case no term can be implied, or an oversight, when it can. In *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* Bingham LJ said:<sup>75</sup>

‘Given the rules which restrict evidence of the parties’ intentions when negotiating a contract, it may well be doubtful whether the omission was a result of the parties’ oversight or of their deliberate decision: if the parties’ appreciate they are unlikely to agree on what is to happen in a certain not impossible eventuality, they may well choose to leave the matter uncovered in their contract in the hope that the eventuality will not occur.’

The removal of the traditional, restrictive tests from the area of terms implied in fact would mean that there would be many more cases in which the issue of deliberate omission or oversight would be of vital importance and in which the evidence of the parties’ negotiations might therefore be helpful.

Further arguments have been made in relation to the exclusionary rule and were addressed by Lord Hoffmann. The criticism has been made that, in considering the exclusion, ‘it may be appropriate to consider a number of international instruments applying to contract’ which take a different approach<sup>76</sup>. Lord Hoffmann, however, took the line that:

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[2009] UKHL 38, [2009] AC 1101, [2009] 4 All ER 677 at [41].

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He did say (at 41) ‘Your Lordships do not have the material on which to form a view’ on where the balance lies. ‘It is possible that empirical study (for example by the Law Commission) may show that the alleged disadvantages or admissibility are in practice not very significant or that they are outweighed by the advantages of doing more precise justice in exceptional cases’. Baroness Hale, on the basis of her experience at the Law Commission, doubted whether this was the sort of area where legislative reform, rather than common law development was appropriate – at [99].

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[2009] UKPC 10, [2009] 2 All ER 1127, [2009] 2 All ER (Comm) 1; see above para 3.20.

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[1995] EMLR 472 at 481.

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‘One cannot ... simply transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a continental system.’

The argument has been made that the prior negotiations should continue to be inadmissible in the interests of third parties. In *Chartbrook Ltd v Persimmon Homes Ltd* Briggs J said, at first instance:<sup>77</sup>

‘If the parties negotiations were to the extent “helpful”, to be routinely admissible as an aid to contractual construction, then no ... third parties reading, dealing with or having transferred to them rights or obligations under the contract could make any safe assumption about its meaning without themselves carrying out an inquiry as to those negotiations, so as to put themselves in the same state of knowledge as the parties to the contract. Furthermore, since ambiguity is no longer (after the *Investors Compensation Scheme* case) a prerequisite for recourse to the admissible background, a third party's appreciation of the apparently unambiguous meaning of a word, phrase or term, could be subverted by reference to the original parties' negotiations, without which no secondary meaning was even capable of being guessed at.’

Similar concerns were initially raised in relation to the general admissibility of evidence of the background to the contract under the *Investors'* approach<sup>78</sup>. In *Chartbrook v Persimmon* Lord Hoffmann took the line:<sup>79</sup>

‘The law sometimes deals [with such] problem[s] by restricting the admissible background to that which would be available not merely to the contracting parties but also to others to whom the document is treated as having been addressed.... Ordinarily, however, a contract is treated as addressed to the parties alone and an assignee must either inquire as to any relevant background or take his chance on how that might affect the meaning a court will give to the document. The law has sometimes to compromise between protecting the interests of the contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say. In the present case, the construction of the agreement does not involve reliance upon any background which would not have been equally available to any prospective assignee or lender.’

The exclusion of evidence of the parties' negotiations does not, of course, apply where it is rectification which is in question, rather than interpretation<sup>80</sup>.

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*ProForce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69, [2006] All ER (D) 247 (Feb) at [57]. D Nicholls ‘My Kingdom for a Horse’ (2005) LQR 577 at 586; E McKendrick *Contract Law Text Cases and Materials* (2nd edn, 2005) p 425; G McMeel ‘Prior Negotiations and Subsequent Conduct – the Next Step Forward for Contractual Interpretation’ (2003) 119 LQR 272 at 288.

<sup>77</sup>

[2007] EWHC 409 (Ch), [2009] AC 1101, [2007] 1 All ER (Comm) 1083, Briggs J at [36].

<sup>78</sup>

*National Bank of Sharjah v Dellborg* (9 July 1997, unreported), CA, Saville LJ, quoted in M Clarke ‘Interpreting Contracts – the price of perspective’ (2000) CLJ 18, 20.

<sup>79</sup>

[2009] UKHL 38, [2009] 4 All ER 677 at [40].

<sup>80</sup>

*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 114; *Chartbrook Ltd v Persimmon Homes Ltd (Chartbrook Ltd, Pt 20 defendants)* [2009] UKHL 38, [2009] 4 All ER 677.

## Commercial sense and unreasonable results

### [3.44]

In general, in keeping with the relevance of the objectively ascertained aim of the contract<sup>1</sup>, the point has been made that business contracts should be construed in a way which makes 'good commercial sense'. In *Antaios Cia Naviera SA v Salen Rederierna AB* Lord Diplock said:

'if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'<sup>2</sup>

And this was referred to by Lord Hoffmann in making his fifth point in the *Investors Compensation Scheme* case<sup>3</sup> and is an important factor in showing that a linguistic or syntactical mistake has been made (on mistake, see para 3.49). What may be in issue is the need to perceive an overall scheme and not allow it to be derailed by a badly drafted point<sup>4</sup>. Of course, if what reveals the absurdity is a factor which would not have been 'reasonably available to the parties at the time of the contract', it is not something which can be taken into account<sup>5</sup>.

The point has been made that, where the question of construction of a clause might arise in relation to numerous different fact situations, the interpretation and the 'business common sense' factor had to be looked at in relation to all of them. In *Miramir Maritime Corp v Holborn Oil Trading Ltd*<sup>6</sup>, Lord Diplock said:

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1

See para 3.43.

2

[1985] AC 191 at 121; *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd* (20 November 1991, unreported), Staughton LJ; *Niobe Maritime Corp v Tradax Ocean Transportation SA, The Niobe* [1995] 1 Lloyd's Rep 579 at 582; *Astilleros Espanoles SA v Bank of America National Trust and Savings Association* [1995] 2 Lloyd's Rep 352, Evans LJ at 358–359; *International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd's Rep 344, Neill LJ at 350; *Mitsubishi Heavy Industries Ltd v Gulf Bank KSC* [1996] 1 Lloyd's Rep 499 at 506; *Axa Reinsurance (UK) Ltd v Field* [1996] 1 Lloyd's Rep 26, Staughton LJ at 29; *Cargill International SA v Bangladesh Industries Corp* [1996] 2 Lloyd's Rep 524 at 531; *Galaxy International Ltd v Novorossiysk Shipping Co, The Petr Schmidt* [1997] 1 Lloyd's Rep 284 at 286; *Bromarin AB v IMD Investments Ltd* [1998] STC 244 at 254; *WRM Group Ltd v Wood* [1998] CLC 189, Mance J at 195; *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244 at 264; *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429 at [16]; *Absalom (on behalf of Lloyd's Syndicate 957) v TCRU Ltd* [2005] EWCA Civ 1586, [2006] 1 All ER (Comm) 375, Longmore LJ at [7]; *Re Sigma Finance Corp* [2009] UKSC 2; [2010] 1 All ER 571 at [37].

3

See para 3.41.

4

*Chartbrook v Persimmon* [2009] UKHL 38, [2009] 4 All ER 677, Lord Hoffmann at [15]; *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571.

5

*Enviroco Ltd v Farstad Supply A/S* [2009] EWCA Civ 1399, [2009] All ER (D) 206 (Dec) at [21].

6

[1984] AC 676; *International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd's Rep 344, Neill LJ at 350.

‘The words in the ... bill of lading on which this appeal turns are the same irrespective of whether it is issued in respect of a complete or part of the cargo received on board at the first or subsequent loading port ... there must be ascribed to the words a meaning that would make good commercial sense in any of these situations, and not some meaning that imposed on the transferee to whom the bill of lading for goods afloat was negotiated a financial liability of unknown extent that no businessman in his senses would be willing to incur.’

It should, however, be borne in mind that, as Lord Hoffmann emphasised in a different context, interpretation ‘is the quest to discover what a reasonable man would have understood specific parties to have meant by the use of specific language in a specific time and place’<sup>7</sup>. Unless an exception is made for standard form contracts, the extent of the relevance of different potential contexts for the use of a standard form contract in a given case would seem to depend upon the extent to which they are part of the ‘background’ reasonably available to both parties when the contract was made.

At a more general level than the impetus to achieve ‘good commercial sense’ is the pressure against a construction which achieves an unreasonable result. In *L Schuler A G v Wickman Machine Tools Sales Ltd* Lord Reid said:

‘The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.’<sup>8</sup>

Whilst this may be seen as a ‘practical rule of thumb’ reflecting ‘the common understanding of how language is understood’<sup>9</sup>, the courts must still avoid substituting ‘for the bargain actually made one which the court believes could better have been made’<sup>10</sup>.

That should perhaps be qualified by a view occasionally taken – that the commercial sense approach to construction requires only that it is ‘the *manner* of the determination which must be commercially reasonable; it does not follow that the *outcome* has to be commercially reasonable although, if it is not, that would no doubt cause one to look critically at the manner of the determination’<sup>11</sup>.

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7

*Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [39] – in the context of a dismissal of the relevance of previous decisions on clauses similar to that before the court. See above 3.43.

8

[1974] AC 235 at 251; *International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd’s Rep 344, Neill LJ at 350; *Niobe Maritime Corp v Tradax Ocean Transport SA, The Niobe* [1995] 1 Lloyd’s Rep 579 at 583. See also *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576, Lord Denning at 587; *Centrax Ltd v Citibank NA* [1999] 1 All ER (Comm) 557. See also *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, Lord Bingham, [19]: ‘If the parties sought to achieve so extravagant a result they should ... have used language which left no room for doubt and which might at least have alerted Mr Naseem to the true effect of what (on that hypothesis) he was agreeing’.

9

*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313.

10

*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, Lord Mustill. *Kazakstan Wool v NCM* [2000] 1 All ER (Comm) 708, Peter Gibson LJ, [49]; *Pratt v Aigaion Ins* [2008] EWCA Civ 1314, [2008] 2 CLC 756 at [12].

11

*Barclays Bank plc v UniCredit Bank AG* [2014] EWCA Civ 302, Longmore LJ at [15] (emphasis added).

There is no need for there to exist an ambiguity or uncertainty in the literal reading of the contract before the commercial sense approach is used. As Lord Sumption observed in *Sans Souci Ltd v VRL Services Ltd*:

‘It is generally unhelpful to look for an “ambiguity”, if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity.’<sup>12</sup>

If a clause or provision is capable of two meanings, it is quite possible that neither meaning will flout common commercial sense. In such a circumstance, it is much more appropriate to adopt the more, rather than the less, commercial construction<sup>13</sup>. That said, there are, of course, challenges here. The admissible background facts may not point clearly to one of two or more possible constructions and a resort to the criterion of business common sense in order to identify the most commercial interpretation of the agreement may actually misjudge what the parties themselves would have seen as the appropriate balance of interest and liability<sup>14</sup>. There is support for view taken by Briggs J, in *Jackson v Dear*<sup>15</sup> first, that ‘commercial common sense’ is not to be elevated to an overriding criterion of construction and, second, that the parties should not be subjected to ‘the individual judge’s own notions of what might have been the sensible solution to the parties’ conundrum’<sup>16</sup>.

## *Weighing the different types of evidence*

### **[3.45]**

There has been some emphasis on the need to weigh appropriately the different types of evidence of the parties’ intention. At a narrow level the point can be made that when a printed standard form contract is used then, in general, greater weight will be given to any added written terms specific to that contract<sup>1</sup>.

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<sup>12</sup>

[2012] UKPC 6 at [14].

<sup>13</sup>

*Barclays Bank plc v HHY Luxembourg SARL* [2010] EWCA Civ 1248 at [26]; see too *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 where Lord Clarke said at [21]: ‘The language used by the parties will often have more than one potential meaning. I would accept the submission ... that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.’

<sup>14</sup>

*Fons HF (in liquidation) v Corporal Ltd* [2014] EWCA Civ 304 at [16].

<sup>15</sup>

[2012] EWHC 2060 (Ch) at [40].

<sup>16</sup>

As seen in Aikens LJ’s judgment in *BMA Special Opportunity Hub Finance Ltd and Others v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24].

<sup>1</sup>

The added terms are the 'immediate language and terms selected by the parties themselves'<sup>2</sup>. Again at the narrow level, the weighing of different evidence was considered where there was a conflict between the written terms of an option agreement and a plan. The line was taken that the 'modern approach' is not simply to take the view that the wording prevailed but rather that, 'whether a plan controls a verbal description or a verbal description controls a plan is a question of construction of the particular conveyance. There is no presumption either way.'<sup>3</sup> However, the weighing process is also a much more general one.

The basic clarity of the words used and the significance of the background interact. Even after the *Investors Compensation Scheme* case, the point has been made that 'Even if the most generous examination of surrounding circumstances is permitted, any decision on interpretation must pay due regard to the explicitness of particular wording and the nature and strength of any circumstances suggested as putting a different complexion on it'<sup>4</sup>. The origin of the terms may be relevant. It has been said that 'in a document drawn up or vetted by lawyers the starting point must be to assume that the words used were intended to bear their ordinary and correct meaning'<sup>5</sup>. Similarly, the point has been made that 'in the case of a package of agreements ... drafted by city solicitors for large companies in respect of a very substantial joint venture (most particularly where there is no claim to rectification), the court should be slow to assume that the language used does not express the parties' intentions and the court must beware the temptation to rewrite the parties bargain in a form which the court thinks just and reasonable'<sup>6</sup>. However, the points have also been made that mistakes 'may be particularly understandable in the case of a commercial contract made under pressure of time by business people'<sup>7</sup> and, the background may be seen to be 'particularly important' where what has to be construed is in

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*Robertson v French* (1803) 4 East 130; *Glynn v Margetson & Co* [1893] AC 351; *Neuchatel Asphalte Co Ltd v Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356; *The Athinoula* [1980] 2 Lloyd's Rep 481. *Christmas v Taylor Woodrow* [1997] 1 Lloyd's Rep 407 at 409; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [2003] 2 All ER 785; *Jani-King (GB) Ltd v Pula Enterprises Ltd* [2007] EWHC 2433 (QB), [2008] 1 All ER (Comm) 451, [27]. It has been indicated that the parties may include a clause giving paramountcy to the standard terms – *Homburg Houthinpost v Agrosin* [2001] EWCA Civ 56, [2001] 1 All ER (Comm) 455, Rix LJ, para 56: see further the discussion of the analogous 'entire agreement' clause 3.7.

2

*Robertson v French* (1803) 4 East 130, Lord Ellenborough. An even stronger case is provided where the standard terms are merely incorporated by reference into the specific terms which they contradict: *BCT Software Solutions Ltd v Arnold Laver & Co Ltd* [2002] EWHC 1298 (Ch), [2002] 2 All ER (Comm) 85, *Modern Building Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, 556.

3

*Smith v Royce Properties Ltd* [2001] EWCA 949, [2001] All ER (D) 114 (Jun), Tuckey LJ, [20], citing Lewison *Interpretation of Contracts* (2nd edn, 1997), para 10.07.

4

*Roar Marine v Bimeh Iran* [1998] 1 Lloyd's LR 423, Mance J at 428.

5

*HSBC Bank v Liberty Mutual Insurance Co (UK) Ltd* (2001) Times, 11 June, Patten J.

6

*Household Global Funding v British Gas Trading* (29 June 2001, unreported), Lightman J, [65].

7

*Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429, Arden LJ at [28].

'colloquial language'<sup>8</sup>. The court should 'always have an eye on the consequences of a particular construction, even if they only serve as a check on an obvious meaning or a restraint upon adoption of a conceivable but unbusinesslike one', but it may be regarded as 'especially important' to 'consider the implications of each interpretation' where a clause 'has no very natural meaning and is ... open to two possible meanings or interpretations'<sup>9</sup>. More basically, 'the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and businesslike intention'<sup>10</sup>. In addition, the point can be made that the level of scrutiny should be appropriate. It has been said that:

'Construction is a composite exercise neither uncompromisingly literal nor unswervingly purposive. The instrument must speak for itself but must do so in situ and not be transported to the laboratory for microscopic analysis.'<sup>11</sup>

In some cases it may be that it should be acknowledged that it is unlikely that 'any reasonable businessman' would have undertaken the type of 'detailed scrutiny' of a clause which counsel might well seek to undertake before the court and that it may be more appropriate to simply read the relevant clause or contract as a whole 'without pausing too long on detail', so as to gather 'its general thrust'<sup>12</sup>.

A related issue is whether special clauses will override and prevail over general terms in a contract. It appears that there is no general presumption that that is the case; the systemic approach to construction of contracts confirmed in *West Bromwich* suggests that it should always be a question of what meaning the two sets of conditions read together, where possible, are intended to convey. In *CLP Holding Co Ltd v Singh*<sup>13</sup> the Court of Appeal refused to recognise that there was a general presumption that the special conditions of the contract would trump the general terms, despite the existence of a clause in the contract providing that, in the event of conflict, the special conditions prevailed. The court held that the contract should be construed as a whole and every effort made to give effect to all its clauses. Also, the court should nevertheless preserve the general conditions so far as possible. On construing the entirety of the contract, though, the court concluded that no reasonable person possessed of the relevant information at the time of the contract would fail to find a conflict between the general and special conditions. As such, the court gave effect to the special conditions over the general.

## Special meanings

### [3.46]

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*Phelps v Spon-Smith* (10 May 2000, unreported), [43].

9

*Gan Insurance Co v Tai Ping Insurance Co* [2001] 2 All ER (Comm) 299, Mance LJ, [16].

10

*Mitsui Construction Co Ltd v A-G of Hong Kong* [1986] 33 BLR 1, Lord Bridge at 14; *Sinochem International v Mobil Sale and Supply* [2000] 1 All ER (Comm) 474, Mance LJ; *Gan Insurance Co v Tai Ping Insurance Co (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299, Mance LJ, [13].

11

*International Fina Services AG v Katrina Shipping Ltd, The Fina Samco* [1995] 2 Lloyd's Rep 344, Neill LJ at 350; *Wire TV Ltd v CableTel (UK) Ltd* [1998] CLC 244, Lightman J at 257.

12

*Sinochem v Mobil* [2000] 1 All ER (Comm) 474, Mance LJ, [28].

13

[2014] EWCA Civ 1103; see also *Hostgilt Ltd v Megahart Ltd* [1999] STC 141 and *Wynn Realisations Ltd v Vogue Holdings Inc* [1999] STC 524.

Words may come from a specialist vocabulary, rather than ordinary speech, requiring consideration of the specialist meaning<sup>1</sup>. Evidence may be required of the scientific or technical meaning of terms<sup>2</sup>. In some case, it may be clear from the contract that the words are not being used technically<sup>3</sup>. Words may also acquire a meaning through the custom of a particular place<sup>4</sup> or trade<sup>5</sup>. So, for example, a lease referring to 1,000 rabbits was found to mean 1,200 rabbits on the basis of a local custom<sup>6</sup>. More broadly, in a contract within the travel industry, the 'glossary of terms commonly used in the airline industry' could be regarded as part of the 'factual matrix' to be taken into account in the construction process<sup>7</sup>.

In *Fons HF (in liquidation) v Corporal Ltd*<sup>8</sup> the court was asked to interpret what the word 'debenture' used in the contract meant. The court approached the question of interpretation by looking at the various legal, regulatory and commercial contexts in which the word had been used (noting that there was no clear definition found in these contexts) but concluded that ultimately the interpretation should always be guided by the commercial sense. Lady Justice Gloster for example made it clear that for the contract in question, reliance on an over-technical reading was clearly not what a commercially reasonable approach to the matter of construction called for<sup>9</sup>.

## *Documents forming part of the same transaction*

### [3.47]

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1

*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, Lord Mustill.

2

*Shore v Wilson* (1842) 9 Cl & Fin 355; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663.

3

*Graham v Ewart* (1856) 1 H & N 550; *Musgrave v Forster* (1871) LR 6 QB 590 at 596; *Glasgow Corp v Farie* (1888) 13 App Cas 657 at 669; *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85; *Tester v Bisley* (1948) 64 TLR 184; *Michael Borys v Canadian Pacific Rly* [1953] AC 217 at 223; *Luigi Monia of Genoa v Cechofract Co Ltd* [1956] 2 QB 552.

4

*Studdy v Sanders* (1826) 5 B & C 628; *Smith v Wilson* (1832) 3 B & Ad 728; *Clayton v Gregson* (1836) 5 Ad & El 302; *Palgrave, Brown & Sons v SS Turid* [1922] 1 AC 397; *Aktieselskabet Dampskisselskabet Primula v Horsley* (1923) 40 TLR 11; *Hillas & Co v Rederiaktiebolaget Aeolus* (1926) 32 Com Cas 69; *Smith, Hogg & Co v Louis Bamberger & Sons* [1929] 1 KB 150.

5

*Gibbon v Young* (1818) 8 Taunt 254; *Hayton v Irwin* (1879) 5 CPD 130; *Re L Sutro & Co and Heilbut Symons & Co* [1917] 2 KB 348; *Westacott v Hahn* [1918] 1 KB 495; *Palgrave, Brown & Sons v SS Turid* [1922] AC 397; *Bulk Transport Group Shipping Co Ltd v Seacrystal Shipping Ltd* [1989] 1 Lloyd's Rep 1 at 6; *Care Shipping Corp v Itex Itagiana Export SA* [1993] QB 1.

6

*Smith v Wilson* (1832) 3 B & Ad 728.

7

*Association of British Travel Agents v British Airways plc* [2000] 2 All ER (Comm) 204, Clarke LJ, [29].

8

[2014] EWCA Civ 304.

9

At [50].



Documents forming part of the same transaction are to be construed together<sup>1</sup>. So, for example, a discrepancy in a lease was resolved by consideration of the counterpart<sup>2</sup>, and a prospectus containing terms for the issue of deposit notes, could be referred to when the deposit note issued omitted one of those terms<sup>3</sup>. An instrument which is expressed to be subject to an earlier instrument will take effect as if it included that earlier instrument<sup>4</sup>. It has also been indicated that where there is one document which sets out the contract terms, and another which is intended to provide an explanatory note for laymen, 'one should start with the assumption that the layman who read [the latter document] and did not venture into the [former contractual document] itself was being given an accurate account of the effect of the transaction' and the latter document may therefore be 'significant' in construing the contract<sup>5</sup>. In addition, when a software manufacturer contracted to supply its software and provide certain services to a business which would then sub-supply that software as part of a package to end users, the end user agreements, which were scheduled to the manufacturer's supply contract, were considered in construing that supply contract<sup>6</sup>.

Documents forming part of the same contractual transaction are usually subject to what is called the iterative approach to the construction of commercial contracts. The iterative approach to the interpretation of contracts requires possible rival interpretations to be tested, not only against other textual indications in the contract, but also the commercial consequences of each competing interpretation<sup>7</sup>. It is not appropriate to divorce a consideration of the commercial consequences from textual analysis and to treat it as a bolt-on or cross-check.

## *Saving the contract*

### [3.48]

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1

*Ford v Stuart* (1852) 15 Beav 493; *Burchell v Clark* (1876) 2 CPD 88; *Smith v Chadwick* (1882) 20 Ch D 27, Jessel MR at 62 and (1884) 9 App Cas 187; *Edwards v Marcus* [1894] 1 QB 587; *Whiteley v Delaney* [1914] AC 132; *Samuel v Jarrah Timber and Wood Paving Corp Ltd* [1904] AC 323; *Matthews v Smallwood* [1910] 1 Ch 777; *Jacobs v Batavia and General Plantations Trust Ltd* [1924] 2 Ch 329; *Amalgamated Investment & Property Co Ltd v Texas Commercial International Bank Ltd* [1981] 3 All ER 577, Eveleigh LJ; *Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-Rata Clo 2 BV and Others* [2014] EWCA Civ 984.

2

*Burchell v Clark* (1876) 2 CPD 88.

3

*Jacobs v Batavia and General Plantations Trust Ltd* [1924] 2 Ch 329.

4

Law Of Property Act 1925, s 58.

5

*Investors' Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 115.

6

*Harbinger v GEIS* [2000] 1 All ER (Comm) 166, Evans LJ, para 2.

7

*Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-Rata Clo 2 BV and Others* [2014] EWCA Civ 984; *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571 (see Lord Mance's speech at [12] endorsing Lord Neuberger's dissenting judgment in the Court of Appeal ([2008] EWCA Civ 1303)).

Traditionally the line has been taken that if it is possible to interpret a contract in more than one way and one way will produce a contract that is void or ineffective, then another interpretation will be adopted<sup>1</sup>. In *Bank of Credit and Commerce International SA (in liquidation) v Ali*, in indicating that the 'background' available for the purposes of construction could include 'the state of the law', Lord Hoffmann gave as an example 'cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective'<sup>2</sup>. However, (unless there is a policy issue to consider) if the relevance of any ineffectiveness is merely as part of the 'background', it can only impact upon the construction of the agreement to the extent that it was 'knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract'<sup>3</sup>, and the same type of considerations would seem to arise as in the discussion of the relevance of previous case law<sup>4</sup>. It would seem that it will depend upon such matters as the extent to which legal advisers were involved in the making of the contract and the extent to which, in any event, the area in which the parties are contracting is generally known to be one in which making an enforceable agreement is, in some way, 'regulated'.

It has been said to be a matter of construction that it is assumed, in the absence of clear words, that neither of the parties is to be entitled to benefit from their own breach, but that has also been seen as an implied term<sup>5</sup>.

## Mistakes

### [3.49]

Traditionally there has been limited scope for a court in construing a contract to correct mistakes. It has been seen as possible where 'it is clear from the document itself, without looking at extrinsic evidence, that such words were used only by virtue of a draftsman's blunder'<sup>1</sup> – where there is 'absurdity and inconsistency'<sup>2</sup>. There has been scope to deal with inconsistent and superfluous terms<sup>3</sup>. It has been

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*Solly v Forbes* (1820) 2 Brod & Bing 38 at 48; *Haigh v Brooks* (1839) 10 Ad & El 309; *Broom v Batchelor* (1856) 1 H & N 255; *Mills v Dunham* [1891] 1 Ch 576 at 590. See also *Kredietbank Antwerp v Midland Bank plc* [1998] Lloyd's Rep Bank 173.

2

[2001] UKHL 8, [2001] 1 All ER 961, [39].

3

*Zoan v Rouamba* [2000] 2 All ER 620, [36]. But see *White v White* [2001] UKHL 9, [2001] 2 All ER 43.

4

See above [3.43](#).

5

*New Zealand Shipping Co v Société des Ateliers et Chantiers de France* [1919] AC 1; *Cheall v Association of Professional, Executive and Computer Staff* [1983] 2 AC 180; *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587; *Gyllenhammar & Partners International Ltd v Saur Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403; *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002; *Richco International Ltd v Alfred C Toepfer GmbH* [1991] 1 Lloyd's Rep 136; *Little v Courage* [1995] CLC 164, Millett LJ at 168.

1

*North Circular Properties Ltd v Internal Systems Organisations Ltd* (26 October 1984, unreported); *Wilson v Wilson* (1854) 5 HL Cas 40, Lord St Leonards at 60.

2

possible to correct a reference to the wrong party, when it is clear that the other was intended<sup>4</sup>, or where it is clear that an error has been made in the name of a company<sup>5</sup>, or even supply a name omitted from one part of the document<sup>6</sup>. In some cases words which have been missed out have been supplied by the court<sup>7</sup> or those which do not make sense omitted<sup>8</sup> or corrected<sup>9</sup> to carry out what must clearly<sup>10</sup> have been the intention of the parties. If there has been a clear contradiction<sup>11</sup> between different parts of the contract, effect has been given to the part which will carry out the intention of the parties<sup>12</sup>, and similarly

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*Fitzgerald v Masters* (1956) 95 CLR 420; *Wilson v Wilson* (1854) 5 HL Cas 40.

3

*Gwyn v Neath Canal Co* (1868) LR 3 Exch 209 at 215:

'when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous what ever is repugnant to the intention discerned.'

See also *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 Lloyd's Rep 331 at 345; *Indian Oil Corpn v Vanol Inc* [1991] 2 Lloyd's Rep 634 at 636.

4

*Wilson v Wilson* (1854) 5 HL Cas 40.

5

*Nittan (UK) Ltd v Solent Steel Fabrications Ltd* [1981] 1 Lloyd's Rep 633.

6

*Lord Say and Seals Case* (1711) 10 Mod Rep 40.

7

*Re Daniel's Settlement Trusts* (1875) 1 Ch D 375; *Re Hargraves' Trusts* [1937] 2 All ER 545; *Coles v Hulme* (1828) 8 B & C 568; *Kirk v Unwin* (1851) 6 Exch 908; *Hanbury v Tyrell* (1856) 21 Beav 322; *Mourmand v Le Clair* [1903] 2 KB 216; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902, [1973] 1 WLR 1572; *Wolverhampton and Dudley Breweries plc v Trusthouse Forte Catering Ltd* (1984) 272 Estates Gazette 1072; *Christmas v Taylor Woodrow* [1977] 1 Lloyd's Rep 407 at 411; *Protank Shipping Inc v Total Transport Corpn, The Protank Orinoco* [1997] 2 Lloyd's Rep 42 at 46.

8

*Bache v Proctor* (1780) 1 Doug KB 382.

9

*Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305; *Fitzgerald v Masters* (1956) 95 CLR 420; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600.

10

*Coles v Hulme* (1828) 8 B & C 568], Lord Tenterden CJ; *Doe d Spencer v Godwin* (1815) 4 M & S 265; *East v Pantiles (Plant Hire) Ltd* (1982) 263 Estates Gazette 61; *North Circular Properties Ltd v Internal Systems Organisation Ltd* (26 October 1984, unreported).

11

*Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyd's Rep 342 at 350.

12

*Walker v Giles* (1848) 6 CB 662 at 702; *Love v Rowtor Steamship Co Ltd* [1916] 2 AC 527 at 535; *Sabah Flour and Feed Mills v Comfez Ltd* [1988] 2 Lloyd's Rep 18.

effect has been denied to terms which have been seen as repugnant to the intention in the contract as a whole<sup>13</sup>. When terms are incorporated by reference then the terms of the main, incorporating, document have normally been taken to show the intention of the parties in the case of conflicting terms<sup>14</sup>. A distinction has been made between repugnant or contradictory clauses and merely limiting or qualifying clauses<sup>15</sup>.

However, in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*<sup>16</sup> and *Investors' Compensation Scheme v West Bromwich Building Society*<sup>17</sup> a non-technical, more generally applicable, line was indicated in relation to 'mistakes'. In *Mannai* Lord Steyn emphasised the need for a 'commercially sensible construction'. He said:

'In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'

Lord Hoffmann further emphasised the need to consider the words used by the parties in context, even to the extent of being able to recognise what the parties intended despite their use of the 'wrong words'. He said<sup>18</sup>:

'It is of course true that the law is not concerned with the speakers' subjective intentions. But the notion that the law's concern is therefore with the "meaning of his words" conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the

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*Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum* [1959] AC 133; *Furnivall v Coombes* (1843) 5 Man & G 736; *Watling v Lewis* [1911] 1 Ch 414.

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*Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum* [1959] AC 133 at 178–179; *Modern Buildings Wales Ltd v Limmer and Trinidad Co Ltd* [1975] 2 All ER 549, [1975] 1 WLR 1281 at 129; *Sabah Flour and Feedmills v Comfez Ltd* [1988] 2 Lloyd's Rep 18 at 20.

15

*Forbes v Git* [1922] 1 AC 256 at 259; *Walton (Grain & Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep 223 at 227; *Pagnan SpA v Tradax Ocean Transport SA* [1987] 2 Lloyd's Rep 342 at 351.

16

[1997] 3 All ER 352. See also *Quoram A/S v Schramm* [2002] CLC 77, [78].

17

[1998] 1 All ER 98.

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[1998] 1 All ER 98 at 114. See also *Don King Productions v Warren* [1998] 2 All ER 608, Lightman J at 624:

'The essential task of construction is to deduce, if this is possible, from the two agreements, construed against their commercial background the commercial purpose which the businessmen and entities who were parties to them must as a matter of business common sense have intended to achieve by entering into them; and if such intent can fairly be deduced and if this is necessary to effectuate that intent, the court may require what may appear to be errors or inadequacies in the choice of language to yield to that intention and be understood as saying what (in the light of that purpose) that language must reasonably be understood to have been intended to mean.'

question of what would be understood as the meaning of a person who uses words. The meanings of words as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background which enables us, not only to choose the intended meaning when a word has more than one dictionary meaning, but also to understand a speaker's meaning, often without ambiguity, when he used the wrong words.'

This approach allowed the court to construe a notice to determine a lease which stated that it was to determine on 12 January 1995 as effective, even though the lease required any such notice to 'expire on the third anniversary of the term commencement date', which was the 13 January 1995<sup>19</sup>. Against its contextual setting, which included the requirements of the lease, the majority regarded the notice as unambiguously informing a reasonable recipient of determination of the lease on the date required – it would have been clear to the reasonable recipient that there was a minor error in the notice<sup>20</sup>.

Although *Mannai* was concerned with an error in a unilateral contractual notice, it is clear that the same approach is taken to the interpretation of contracts more generally and that is embodied in Lord Hoffmann's statement of principle in the *Investors Compensation Scheme* case<sup>21</sup>. However, emphasis should be placed on Lord Hoffmann's fifth principle that 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents', and determining the cases in which they have is not easy:

'It clearly requires a strong case to persuade the court that something must have gone wrong with the language .... It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another .... The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening. It is fortunately rare because most draftsmen of formal documents think about what they are saying and use language with care.'<sup>22</sup>

Nevertheless, things do go wrong with the language of a contract<sup>23</sup> and in *Chartbrook v Persimmon* Lord Hoffmann made the point that what is required is that 'it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to mean'<sup>24</sup>. Once that is established, there is no limit 'to the red ink or verbal rearrangement or correction which the court is allowed',<sup>25</sup> so that:<sup>26</sup>

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Overruling *Hankey v Clavering* [1942] 2 All ER 311.

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Contrast eg *Maradive and Oil Services (SAE) v CNA Insurance* [2002] CLC 972, [13].

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See para 3.41.

22

*Chartbrook v Persimmon* [2009] UKHL 38, [2009] 4 All ER 677, Lord Hoffmann at [15].

23

On occasion, a mistake may be 'particularly understandable in the case of a commercial contract made under pressure of time by business people' – *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyd's Rep 429 at [28].

24

[2009] UKHL 38, [2009] 4 All ER 677 at [25].

25

‘When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties... is no reason for not giving effect to what they appear to have meant.’

In *Chartbrook* not only did interpreting the term ‘in accordance with the ordinary rules of syntax’ make ‘no commercial sense’,<sup>27</sup> it also made the ‘structure and language of the various provisions of Sch 6 appear arbitrary and irrational’ when it was ‘possible for the concepts employed by the parties ... to be combined in a rational way’.<sup>28</sup> What may be in issue may be the need to perceive an overall scheme and not allow it to be derailed by a badly drafted point<sup>29</sup>.

The impact of *Chartbrook* and *Investors Compensation Scheme* on the law on rectification should however not be overstated. It might be noted that although principle 5<sup>30</sup> in *Investors Compensation Scheme* is similar to the law on rectification in how a mistake or deficient drafting is identified, the former does not permit the use of evidence of previous negotiations whilst the law on rectification clearly does. It is syllogistically problematic to allow this dissonance or inconsistency to remain and this point is not addressed in *Chartbrook*.

As would be expected, the approach to mistakes which was embodied in Lord Hoffmann's statement of principle in *Investors* has no role to play in relation to exemption clauses. In *William Hare Ltd v Shepherd Construction Ltd*<sup>31</sup> the court had to consider a ‘pay when paid clause’ in contracts between the main contractor and sub-contractors. The main contractors had failed to update the clause to take account of changes in the legislation which only allowed such clauses in limited circumstances of the employer's insolvency. It was argued that the clause should be construed so as to be effective despite the ‘mistake’. The court viewed the clause as functionally equivalent to an exemption clause and took the line that there was no scope to take the *Investors* approach to mistakes. Waller LJ said:<sup>32</sup>

‘The principle which the courts have always applied to clauses by which a party seeks to relieve itself from legal liability, i.e. that to do so they must use clear words, should, in my view, be the

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[2009] UKHL 38, [2009] 4 All ER 677 at [25].

<sup>26</sup>

[2009] UKHL 38, [2009] 4 All ER 677 at [21].

<sup>27</sup>

[2009] UKHL 38, [2009] 4 All ER 677 at [16].

<sup>28</sup>

[2009] UKHL 38, [2009] 4 All ER 677 at [20].

<sup>29</sup>

*Chartbrook v Persimmon* [2009] UKHL 38, [2009] 4 All ER 677, Lord Hoffmann at [15]; *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571. See also R Buxton ‘Construction and Rectification after *Chartbrook*’ (2010) CLJ 253.

<sup>30</sup>

See 3.41 above.

<sup>31</sup>

[2010] EWCA Civ 283, [2010] 22 EG 108, [2010] 12 EG 96 (CS).

<sup>32</sup>

[2010] EWCA Civ 283, [2010] All ER (D) 168 (Mar) at [18].

dominant principle. As Lord Bingham of Cornhill recently reiterated in *Dairy Containers Ltd v Tasman Orient Line CV* [2005] 1 WLR 215 “The general rule should be applied that, if a party otherwise liable is to exclude or limit his liability ... he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party”. It is not therefore in my view open to Shepherd to argue that there is a lack of clarity in a provision that they drafted so as to relieve themselves from liability, and that the court should use the principles identified by Lord Hoffmann as applicable in rare cases to rescue them.’

## *Contra proferentem*

### [3.50]

Traditionally the line has been taken that if a contract term is ambiguous the construction less favourable to the *proferens* is adopted. The rationale for the rule is said to be:

‘That a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests, so that if words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.’<sup>1</sup>

However, it has been recognised that the references to the ‘proferens’ are unclear, covering more than one situation – the person who drafted the clause, the person who sought its inclusion in the contract and the person who seeks to rely upon it. These will often coincide but need not necessarily do so and the justification for the rule may seem to have little connection with the particular fact situation eg ‘where the clauses under consideration [are] clauses contained in a common form document worked out by various interested parties in the construction industry and which would normally be in use between employers and contractors or contractors and sub-contractors from whichever side the initiative came’<sup>2</sup>. Obviously, the appositeness of the application of the rule in such contexts can be questioned<sup>3</sup>. In addition, the continued application of the rule had to be questioned more generally after the line taken in *Investors* that the way in which contracts are now interpreted has largely been assimilated to ‘the common sense principles by which any serious utterance would be interpreted in ordinary life’<sup>4</sup>. However, plainly the rule continues to be viewed as applicable post-*Investors*<sup>5</sup>, although there is emphasis upon it as a rule of last

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*Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, Lord Mustill 77. *First Realty plc v Norton Rose* [1999] 2 BCLC 428. But see also *Association of British Travel Agents v British Airways plc* [2000] 2 All ER (Comm) 204, Sedley LJ, [68]: ‘its origin and purpose is to limit the power of a dominant contractor who is able to deal on his own terms...’.

2

*E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported) Oliver LJ. See also *County and District Properties v Jenner* [1976] 2 Lloyd’s Rep 728, Swanwick J at 737.

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*E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Oliver LJ. See also *County and District Properties v Jenner* [1976] 2 Lloyd’s Rep 728, Swanwick J at 737. *Tersons Ltd v Stevenage Development Corp* [1963] 2 Lloyd’s Rep 333; *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2004] EWHC 803 (Comm), [2004] Lloyd’s Rep IR 815, [2004] All ER (D) 208 (Apr) at [82], affd [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590.

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[1998] 1 All ER 98 at 114. See para 3.40.

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Eg *Coutts & Co v Stock* [2000] 2 All ER 56, para 14; *National Westminster Bank v Utrecht-America* [2001] EWCA Civ 658, [2001] 3 All ER 733, paras 63–64; *First Realty plc v Norton Rose* (27 April 1999,

resort, only to be used when the 'business purpose' of the clause, or 'business common sense', or simply the relevant background, have failed to render a clause unambiguous<sup>6</sup>. The rule is often used in relation to exemption clauses and will be considered further in that context<sup>7</sup>.

However, it should also be noted here that in relation to contracts between consumers and sellers or suppliers, the Unfair Terms in Consumer Contracts Regulations 1999 now state:

'If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail....'<sup>8</sup>

This applies when a dispute between a particular seller, or supplier, and consumer is in question. It may be seen as simply a version of the common law *contra proferentem* rule, and the line taken by the CJEU in *European Commission v Spain*<sup>9</sup> would suggest that<sup>10</sup>.

## *Ejusdem generis* rule

### [3.51]

When a contract term contains a list<sup>1</sup> of specific words followed by<sup>2</sup> a general word, the parties may be taken to have intended the general word to be confined to cover only the same type of matter as that

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unreported); *Association of British Travel Agents v British Airways plc* [2000] 2 All ER (Comm) 204; *Sinochem v Mobil* [2000] 1 All ER (Comm) 474 at 483; *Zeus Tradition Marine Ltd v Bell* [2000] 2 All ER (Comm) 769 at 782–783; *Spring House v Mount Cook Land* [2001] EWCA Civ 1833, [2002] 2 All ER 822 at paras 49–52; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299; *Lexi Holdings plc v Stainforth* [2006] EWCA Civ 988 at [20], [2006] All ER (D) 225 (Jul); *Tektrol Ltd (Formerly Atto Power Controls Ltd) v International Insurance Co of Hanover Ltd* [2005] EWCA Civ 845, [2005] 2 Lloyd's Rep 701 at [8]; *Pratt v Aigaion Ins* [2008] EWCA Civ 1314, [2008] 2 CLC 756 at [26]; *William Hare Ltd v Shepherd Construction Ltd* [2010] EWCA Civ 283, [2010] All ER (D) 168 (Mar) at [18].

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*Sinochem v Mobil* [2000] 1 All ER (Comm) 474 at 483; *Spring House v Mount Cook Land* [2002] 2 All ER 822, [49]–[52]; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299; *Static Control Components (Europe) Ltd v Egan* [2004] EWCA Civ 392, [2004] 2 Lloyds Rep 429 at [37].

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See para 3.56.

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Reg 7(2). See para 3.107.

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Case C-70/03 *Commission v Spain* [2004] ECR I-7999, and see further para 3.107.

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It has been suggested that it may go somewhat further than the common law rule – indicating the most favourable of the possible interpretations which would favour the consumer even if it is not the most likely: K Lewison *The Interpretation of Contracts* (3rd edn, 2004) p 217.

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But see *Foscolo Mango & Co v Stag Line Ltd* [1931] 2 KB 48 – application in relation to one specific word and one general word.

2



covered by the specific words<sup>3</sup>. This cannot apply if the specific words do not generate any category, or *genus*<sup>4</sup>, to which the general words could be confined<sup>5</sup>. It may be clear that the parties did not intend<sup>6</sup> the general words to be confined by the specific list, as where the general words are followed by some such a phrase or word as 'whatsoever'<sup>7</sup>. In addition, any rule such as the *eiusdem generis* rule must now be viewed in the light of Lord Hoffmann's point in the *Investors' Compensation Scheme* case, that there has largely been an assimilation of the way in which contracts are interpreted to 'the common sense principles by which any serious utterance would be interpreted in ordinary life'<sup>8</sup>. However, whilst recognising that 'judges today are reluctant, and properly reluctant, to explain decisions on the use of language by reference to maxims expressed in Latin', *Scottish Power plc v Britoil (Exploration) Ltd* was viewed as illustrating that 'in appropriate circumstances' the rule remains sound<sup>9</sup>. It may be that in some cases the

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It does not apply where a general word is followed by specific words: *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175.

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*Cullen v Butler* (1816) 5 M & S 461; *Harrison v Blackburn* (1864) 17 CBNS 678; *Crompton v Jarratt* (1885) 30 Ch D 298; *Andersen v Andersen* [1895] 1 QB 749; *Lambourn v McLellan* [1903] 2 Ch 268; *Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385; *Thorman v Dowgate Steamship Co* [1910] 1 KB 410; *SS Magnhild v McIntyre Bros & Co* [1920] 3 KB 321; *PJ Vander Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep 240.

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What must be asked is 'whether the specified things which precede the general words can be placed under some common category ... the specified things must possess some common and dominant feature': *SS Magnhild v McIntyre Bros & Co* [1920] 3 KB 321, McCardie J.

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*Tillmanns & Co v SS Knutsford Ltd* [1908] 2 KB 385. But see *Chandris v Isbrandsen-Moller Co Inc* [1951] 1 KB 240, Devlin J:

'If there is something to show the literal meaning of words is too wide, then they will be given such other meaning as seems best to consort with the intention of the parties. In some cases it may be that they will indicate a genus; in others they will perform the simpler office of expanding the meaning of each enumerated item. If a genus cannot be found, doubtless that is one factor indicating that the parties did not intend to restrict the meaning of the words. But I do not take it to be universally true ...'

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*Chandris v Isbrandsen-Moller Co Inc* [1951] 1 KB 240; *Earl of Jersey v Neath Poor Law Union Guardians* (1889) 22 QBD 555.

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*Larson v Sylvester* [1908] AC 295; *The Apollo* [1978] 1 Lloyd's Rep 200 at 205; *The Aquacharm* [1980] 2 Lloyd's Rep 237 at 239; *Belcore Maritime Corp v Filli Moretti Cereali SpA, The Maestro Giorgis* [1983] 2 Lloyd's Rep 66 at 68; *The Manhattan Prince* [1985] 1 Lloyd's Rep 140 at 146; *The Roachbank* [1987] 2 Lloyd's Rep 498 at 507; *Andre & Cie SA v Orient Shipping (Rotterdam) BV, The Laconian Confidence* [1997] 1 Lloyd's Rep 139, Rix J at 150.

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[1998] 1 All ER 98 at 114. In *Argo Fund Ltd v Essar Steel Ltd* [2006] EWCA Civ 241, [2006] 2 All ER (Comm) 104 at [29] the Court of Appeal saw the approach of the judge at first instance as 'a form of *eiusdem generis* approach'. They took a different line, based on context, but the ultimate result was the same. See also *Fons HF (in liquidation) v Corporal Ltd* [2014] EWCA Civ 304 where although the word 'debenture' was used in a group of special terms, it did not necessarily follow that it should be given a narrow reading. The commercial sense of the contract should be given proper effect to.

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rule reflects the 'common sense' reaction<sup>10</sup>. In *Association of British Travel Agents v British Airways plc* the phrase 'and other charges' was viewed as 'naturally affected by the fact that it does not appear by itself but as part of the phrase "taxes and other charges"<sup>11</sup>. It thus follows that although as a construction aid the ejusdem generis rule is useful, it should not be used to deny the contract its commercial sense<sup>12</sup>.

## *Expressio Unius*

### [3.52]

Express reference to one thing in a contract may indicate that anything of the same type which is not expressly referred to, is not intended to be covered<sup>1</sup>. So, for example, a tenancy of agricultural land provided for certain payments to be made by the incoming tenants to the outgoing. It was held that that meant that there should be no payment for 'foldage' to the outgoing tenant, although it was a local custom, because of the other payments which had been expressly required<sup>2</sup>. However, it has been said of this canon of construction that<sup>3</sup>:

'It is often a valuable servant, but a dangerous master to follow ... The exclusion is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice.'

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[1997] 47 LS Gaz R 30, Staughton LJ.

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The rule has, however, been seen as based on the presumption against surplusage – 'the main rule of construction which justifies the application of the rule ... is that if general words have an unrestricted meaning the enumerated items are surplusage' (*Chandris v Isbrandsten-Moller Co Inc* [1951] 1 KB 240, Devlin J at 245. See also *Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 97) and the 'rule against surplusage' has been seen as 'of little value in the interpretation of commercial contracts' (*Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 97) – 'A charterparty is built up of clauses generally agreed in the trade and while they are added to or varied from time to time, as not infrequently they are, I doubt that the commercial draftsmen pay much attention to overlapping or that they are afraid of repetition' (*Royal Greek Government v Minister of Transport* (1949) 83 Ll L Rep 228, Devlin J at 235). 'There is, as it seems to me, a long history of charterparty clauses dealing with the liability of one party for the other for what would without the clause in question still be a breach of contract. To the lawyer this is surplusage; but to commercial men it is a way of making sure there has been no mistake or misunderstanding, and to emphasise their rights and liabilities' (*Total Transport Corp v Arcadia Petroleum Ltd* [1998] CLC 90, Staughton LJ at 98).

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[2000] 2 All ER (Comm) 204, Clarke LJ, [35].

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*Peel Land and Property (Ports No 3) Ltd v TS Sheerness Ltd* [2014] EWCA Civ 100.

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*Hare v Horton* (1833) 5 B & Ad 715; *Aspdin v Austin* (1844) 5 QB 671; *North Stafford Steel, Iron and Coal Co (Burselm) Ltd v Ward* (1868) LR 3 Exch 172; *Miller v Emcer Products Ltd* [1956] Ch 304; *The Tropwind* [1977] 1 Lloyd's Rep 397; *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89; *Amherst v James Walker Goldsmith & Silversmith Ltd* (1980) 254 Estates Gazette 123.

2

*Webb v Plummer* (1819) 2B & Ald 746.

3

*Colquhoun v Brookes* (1888) 21 QBD 52, Lopes LJ. See also *Dean v Wiesengrund* [1955] 2 QB 120, Jenkins LJ.

In addition, the point must again be made, that, in construction, the emphasis has largely moved to 'the common sense principles by which any serious utterance would be interpreted in ordinary life'<sup>4</sup>.

Exemption clauses can basically be viewed as clauses which exclude or limit, or appear to exclude or limit, liability for breach of contract or other liability arising by way of tort, bailment or statute. This document covers the: construction of exemption clauses; exemption clauses and third parties; Unfair Contract Terms Act 1977; and Misrepresentation Act 1967, s 3.

## E Exemption Clauses

### *Introduction*

#### [3.53]

Exemption clauses can basically be viewed as clauses which exclude or limit, or appear to exclude or limit, liability for breach of contract or other liability arising by way of tort, bailment or statute. This encompasses a wide variety of clauses<sup>1</sup> and those in the form of an indemnity will also often be treated as exemption clauses<sup>2</sup>. It has, in fact, been contended that there is no such distinct type of clause and the clause, whatever its form is part of the definition of the obligations undertaken by the parties<sup>3</sup>. However, although lacking in central definitions, the Unfair Contract Terms Act 1977, assumes that it is possible to identify clauses which 'exclude ... liability' and, in general, the assumption made by the courts is that exclusion clauses are a distinct type of clause<sup>4</sup> and that assumption does not seem out of line with the common perception of such clauses as something apart from the definition of the obligation. The identification of exemption clauses at a level other than that of form will be addressed below, in the context of the Unfair Contract Terms Act 1977<sup>5</sup>.

Three basic questions arise in relation to the effectiveness of exemption clauses:

- (i) whether the clause is part of the contract ie whether it was effectively incorporated<sup>6</sup>;

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*Investors' Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 114. See para [3.41](#).

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See Unfair Contract Terms Act 1977, s 13; see para [3.75](#).

2

See para [3.76](#).

3

See eg Coote *Exception Clauses* (1964) Chs 1 and 10.

4

For contrasting judicial approaches see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, Lord Wilberforce at 842–843, Lord Diplock at 851.

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See below para [3.75](#).

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In the Consumer Rights Bill 2014, it is less crucial that a particular exemption or limitation of liability clause had been incorporated in the contract. Clause 62 provides that the proscription against unfairness applies not only to terms but also notices. Moreover cl 61(6) states that 'it does not matter ... whether the

- (ii) whether it is worded so as to cover the breach which occurred (its construction);
- (iii) whether it is affected by legislation – principally, and most generally, the Unfair Contract Terms Act 1977<sup>7</sup>, s 3 Misrepresentation Act 1967<sup>8</sup> and, now, the Unfair Terms in Consumer Contracts Regulations 1999<sup>9</sup>.

Exemption clauses will often form part of a standard form contract and they are usually written terms and the incorporation of written terms, in general, has already been considered<sup>10</sup>. The construction of exemption clauses and also the effect of the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999 are considered below.

## Construction

### Approaches

#### [3.54]

It is in the area of exemption clauses that construction has, perhaps, been used most inventively 'to stab the idol' of freedom of contract 'in the back'<sup>1</sup>. However, since the advent of the Unfair Contract Terms Act 1977 'strained construction' has been deprecated. In *Photo Production Ltd v Securicor Transport Ltd*<sup>2</sup> Lord Diplock said<sup>3</sup>:

'the reports are full of cases in which what would appear to be very strained constructions have been placed upon exclusion clauses, mainly in what today would be called consumer contracts and contracts of adhesion ... any need for this kind of judicial distortion of the English language has been banished by Parliament's having made these kinds of contracts subject to the Unfair Contract Terms Act 1977.'

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notice is expressed to apply to a consumer, as long as it is reasonable to assume it is intended to be seen or heard by a consumer'.

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See para [3.67](#).

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See para [3.95](#).

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See para [3.97](#).

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See para [3.8](#).

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*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, CA, Lord Denning MR at 297.

2

[1980] AC 827.

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[1980] AC 827 at 851. See also *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 810; *Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 ConLR 46; *Fillite (Runcorn) Ltd v APV Pasilac* (22 April 1993, unreported); *Thomas Witter Ltd v TBP Industries Ltd* (1994) 12 Tr LR145, Jacobs J at 171.

In fact, construction may now save a clause which was initially seen as too wide to 'satisfy the requirement of reasonableness' in UCTA<sup>4</sup>.

In addition, in relation to the construction of exemption clauses, the impact remains somewhat imprecise of the movement in construction in general which was embodied in the principles set out by Lord Hoffmann in *Investors' Compensation Scheme v West Bromwich Building Society*<sup>5</sup>. As has been indicated, that approach assimilates the construction of contracts to 'the common sense principles by which any serious utterance would be interpreted in ordinary life'<sup>6</sup>. This will be considered further below at appropriate points, in relation to specific issues of the construction of exemption clauses. In general, there are some fundamentals – first, there is no reason to approach the exercise of construing an exemption or limitation of liability clause in any way differently to any other term in a contract. In *Tradigrain SA v Intertek Testing Services (ITS) Canada Ltd* Moore-Bick LJ stated:

'It is certainly true that English law has traditionally taken a restrictive approach to the construction of exemption clauses and clauses limiting liability for breaches of contract and other wrongful acts. However, in recent years it has been increasingly willing to recognise that parties to commercial contracts are entitled to apportion the risk of loss as they see fit and that provisions which limit or exclude liability must be construed in the same way as other terms ...'<sup>7</sup>

Second, the starting premise is the presumption that neither party intends to abandon any remedies for breach which are conferred to it by operation of law. Clear express words must be used in order to rebut this presumption<sup>8</sup>. As Lord Wilberforce noted, it surely could not be right to take it that the parties had

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For example, *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All ER (Comm) 586 – the relevant clause seen as unreasonable at first instance because it was viewed as leaving the injured party with no remedy for the breach of which it complained. However, in the Court of Appeal, although the clause referred to consequential loss etc the point was made that the clause did not cover the 'obvious and primary measure of [the] loss ... the diminution in value of the services' (at [30]). Further, although the clause in question excluded liability for certain categories of loss 'in any circumstances', and other clauses accepted liability in general for deliberate and negligent acts, the clause was not viewed as covering liability for 'fraud, malice or recklessness'. The line was taken that 'Liability for fraud or malice or recklessness which is a species of either, goes without saying: parties contract with one another in the expectation of honest dealing' (at [35]).

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*Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896, HL, Lord Hoffmann at 114; see para 3.41. See now Lord Hoffmann's comments on the developments in the construction of exemption clauses in *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [60]–[66]. However note also the comments of the Law Commission in contending for a limited scope for the Unfair Contract Terms Act 1977 in the context of the rights of third parties under what has become the Contracts (Rights of Third Parties) Act 1999. The Law Commission emphasised the use of the common law to control exemption clauses: Law Com no 242, para 13.10(iv).

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*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 114; see para 3.41.

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[2007] EWCA Civ 154 at [46]; Simon J recently endorsed this approach in *Bikam OOD Central Investment Group SA v Adria Cable Sarl* [2012] EWHC 621 (Comm) at [34]–[36]; see also *Fujitsu Services Limited v IBM United Kingdom Limited* [2014] EWHC 752 (TCC).

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*Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689, Lord Diplock at 717.

contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force<sup>9</sup>. To do so would be to reduce the contract to a mere declaration or statement of intent. In construing the exclusion clause against the party seeking to rely on it, the court would prefer the interpretation which would not reduce the contract to a mere declaration or statement of intent<sup>10</sup>.

There is some doubt as to whether there is a general rule that the exclusion clause should be construed in a manner which would prevent one party from benefiting from its wrongdoing (*Alghussein Establishment v Eton College*<sup>11</sup>). In *Fujitsu Services Limited v IBM United Kingdom Limited*<sup>12</sup> the court did not think there was, preferring to confine the inquiry largely to the accepted principles of construction.

A distinction has been drawn between clauses which exclude liability and those which merely limit it. Although, it is acknowledged that limitation clauses are still to be construed *contra proferentem*<sup>13</sup>, it has been said that they are not to be treated with 'the same hostility as clauses of exclusion'<sup>14</sup>, and that the rules for the construction of exclusion clauses should not be applied in 'their full rigour' to limitation clauses<sup>15</sup>. There have been attempts to justify this distinction<sup>16</sup>. However, it seems wholly unrealistic as 'a limitation clause may be so severe in its operation as to be virtually indistinguishable from that of an exclusion clause'<sup>17</sup> and the distinction was rejected by the High Court of Australia<sup>18</sup>. Even though made

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*Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 432; see also *AstraZeneca UK Limited v Albemarle International Corporation* [2011] 2 CLC 252.

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*AstraZeneca UK Limited v Albemarle International Corporation* [2011] 2 CLC 252, Flaux J at 313; doubt was expressed as to whether the statement of intent 'rule' is helpful in *Fujitsu Services Limited v IBM United Kingdom Limited* [2014] EWHC 752 (TCC) at [49]–[50]. The concern was that it could give the false impression that there is more to the construction process than a commercial reading.

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[1988] 1 WLR 587 where Lord Jauncey said at 594D: 'A party who seeks to obtain a benefit under a continuing contract on account of his breach is just as much taking advantage of his own wrong as is a party who relies on his own breach to avoid a contract and thereby escape his obligations.'

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[2014] EWHC 752 (TCC).

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*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, [1983] 1 WLR 964 at 966 and 971. *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] All ER (D) 383 (Apr), [22]. For the *Contra proferentem* rule see para 3.56.

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[1983] 1 All ER 101, [1983] 1 WLR 964, Lord Wilberforce at 966.

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Lord Fraser at 971. See also *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, Lord Bridge at 814. See also *EE Caledonia Ltd v Orbit Valve plc* [1994] 2 Lloyd's Rep 239 at 244; *Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd* [1995] CLC 1413; *University of Keele v Price Waterhouse* [2004] EWCA Civ 583, [2004] All ER (D) 264 (May); *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] All ER (D) 383 (Apr), [22]; *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hesa GMBH* [2008] EWHC 6 (TCC), 118 ConLR 104, [2008] BLR 155, [193].

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*Ailsa Craig* [1983] 1 WLR 964, Lord Wilberforce at 966. See also Lord Fraser at 970.

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by the House of Lords<sup>19</sup>, the distinction must now be open to question, in the light of the developments in relation to construction in general which were noted above and in *BHP Petroleum Ltd v British Steel*<sup>20</sup> Evans LJ commented on the limitation/exclusion distinction. He said:<sup>21</sup>

‘I think it is unfortunate if the present authorities cannot be reconciled on the basis that no categorization is necessary and of a general rule that the more extreme the consequences are, in terms of excluding or modifying the liability that would otherwise arise, then the more stringent the courts’ approach should be in requiring that the exclusion or limit should be clearly and unambiguously expressed.’

## The effects of legislation – contract drafting

### [3.55]

When contracts are drafted, account has to be taken of the Unfair Contract Terms Act 1977 (UCTA) and of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). There are some clauses which are automatically ineffective under the Act<sup>1</sup>. However, for the most part, clauses excluding or restricting liability, are rendered ineffective unless they satisfy the requirement of reasonableness. Since that is assessed against the time frame of when the contract was made<sup>2</sup>, the impact of the clause in relation to the particular breach is not considered, but merely the potential scope of the clause. That means that a clause may be ineffective because unreasonable, even though its application in the particular case would be reasonable<sup>3</sup>, and several narrow clauses are safer than a single wide clause. The single wide clause

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*Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, (1986) 68 ALR 385 at 391.

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*Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, (1986) 68 ALR 385. There is one basic distinction in principle between the two types of clause, but it is not sufficient to justify the width of the statements made. By definition, a limitation clause acknowledges the obligations, but if a clause appears to exclude all remedies then the question arises as to whether any obligations were intended. If it is concluded that they were, then the clause has to be construed to give effect to that intention. (See Notes on Effect of Exemption Clauses (1983) 99 LQR 163). If a limitation clause is used alongside an exclusion clause, it may be necessary to construe the exclusion clause ‘with rigour’ to give scope to the limitation clause – *euNetworks Fiber UK Ltd v Abovenet Communications UK Ltd* [2007] EWHC 3099 (Ch), [2007] All ER (D) 373 (Dec), Briggs J at [258].

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*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, [1983] 1 WLR 964; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

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[2000] 2 All ER (Comm) 133.

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Para 43. See also *Frans Maas (UK) v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2005] 2 All ER (Comm) 783. But see *Ocean Chemical Transport v Exnor Craggs Ltd* [2000] 1 All ER (Comm) 519, Evans LJ, [38].

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See eg UCTA 1977, ss 2(1), 6.

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UCTA 1977, s 11(5): see para [3.84](#).

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may fail in its entirety, whereas some of a series of clauses covering the same area might survive<sup>4</sup>. In general, the impact of UCTA 1977 must be borne in mind in drafting exemption clauses and, in many cases, that means the effect of the 'requirement of reasonableness'<sup>5</sup>.

The 1999 Regulations apply to terms which have not been individually negotiated in contracts between sellers or suppliers and consumers. Regulation 7(1) states that a 'seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language'. There is no clear penalty, as such, for failure so to state terms, but 'plain intelligible language' is emphasised in the Regulations<sup>6</sup>. There is what may be regarded as a version of the *contra proferentem* rule<sup>7</sup>, in regulation 7(2). In addition, whether a term is in 'plain intelligible language' affects whether a 'core term' is subject to the fairness test<sup>8</sup>, and may also impact upon whether a term is regarded as fair under the Regulations<sup>9</sup> (unfair terms do not bind the consumer<sup>10</sup>). In general, the fairness test should be borne in mind in the drafting of standard form contracts for use between a consumer and a seller or supplier, particularly the list of terms which 'may be regarded as unfair' in sch 2<sup>11</sup>.

## Strict construction, contra proferentem

### [3.56]

An exemption clause must clearly cover what has occurred if it is to be effective<sup>1</sup> and the burden of proving it does so, lies upon the party seeking to rely upon it<sup>2</sup>. They are said to be strictly construed

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*Stewart Gill Ltd v Horatio Myer Ltd* [1992] 2 All ER 257; *Thomas Witter Ltd v TBP Industries Ltd* (1994) 12 Tr LR 145, Jacobs J at 171.

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See para [3.84](#).

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See para [3.84](#).

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See para [3.106](#)

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See below para [3.56](#) and see para [3.107](#).

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See para [3.105](#).

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See paras [3.108–3.110](#) on the fairness test.

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Regulation 8.

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See para [3.112](#).

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*J Gordon Alison & Co Ltd v Wallsend Shipway and Engineering Co Ltd* (1927) 43 TLR 323.

2

*British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 2 All ER (Comm) 389 at 392, referring to *the Glendarroch* [1894] P 226 at 231. *Stent Foundations Ltd v M J Gleeson Group plc* [2001] BLR 134, [15].



(although the meaning of 'strict construction' has been questioned<sup>3</sup>) and the *contra proferentem* rule applies so that any ambiguity in the clause is resolved against the proferens. So, for example, where there was a clause in a contract for the sale of seed stating that the 'sellers give no warranty expressed or implied as to the growth, description or any other matters', the clause was held not to cover a breach of a term which was a condition<sup>4</sup>. A clause in a contract of insurance referring to 'load' was held not to apply to passengers<sup>5</sup>. Reference to the 'goods delivered' was held not to apply to a breach through short delivery<sup>6</sup>. A clause dealing with 'consequential loss or damage' did not cover loss arising in the natural course of events<sup>7</sup>.

However, it should be recognised that there is an ambiguity in the *contra proferentem* rule itself when the 'proferens' is referred to – it may be the person seeking to rely upon the clause or the person who introduced it into the contract<sup>8</sup>. In many cases, particularly where an exemption clause is in question, that may well be the same person and the argument for the application of the rule is greater where that is the case, particularly if the party who introduced the clause was also responsible for drafting it. The argument for the use of the rule is weakest when the contract is standard form, having been worked out by both sides of a particular trade and it is fortuitous as to which of the parties introduced it<sup>9</sup>. Particularly against the background of the *Investors'* approach to construction in general, it may be suggested that in some such cases it may be more appropriate simply to look for the most likely meaning intended by commercial people<sup>10</sup>. Post-UCTA, and in the movement away from 'strained construction', the *contra proferentem* rule

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le as opposed to the 'normal process' of ascertaining the parties' intention. It may be that it 'operates merely by way of intensification, so that the intention must be clear, unambiguous and incapable of misleading': *Mannai Investment v Eagle Star* [1997] 3 All ER 352 at 377.

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*Wallis, Son & Wells v Pratt & Haynes* [1911] AC 394; *Baldry v Marshall* [1925] 1 KB 260.

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*Houghton v Trafalgar Insurance Co* [1954] 1 QB 247.

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*Beck & Co v Szymanowski* [1924] AC 43.

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le consequential losses are those falling within the second limb of the remoteness test in *Hadley v Baxendale* ((1854) 9 Exch 341 per Alderson B at 355); *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55; *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd* (20 November 1991, unreported), Staughton LJ; *Millar's Machinery Co Ltd v David Way and Son* (1934) 40 Com Cas 204; *Saint Line Ltd v Richardsons Westgarth & Co Ltd* [1940] 2 KB 99; *British Sugar plc v Nei Power Ltd* (1997) 87 BLR 42; *Deepak Fertilisers v Davy McKee* [1999] 1 Lloyd's Rep 387; *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All ER (Comm) 750.

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*BHP Petroleum v British Steel* [2000] 2 All ER (Comm) 133, para 16; *Stent Foundations Ltd v MJ Gleeson Group plc* [2001] BLR 134, [15]. Or sometimes, more narrowly, as the person seeking to rely upon the clause or the person who drafted it: *Youell v Bland Welch* [1992] 2 Lloyd's Rep 127 at 134.

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*County and District Properties v Jenner* [1976] 2 Lloyd's Rep 728 at 737 and note the comments of Oliver LJ in *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported). *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2004] EWHC 803 (Comm), [2004] Lloyd's Rep IR 826 at [82], affd [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590. A Kramer 'Common Sense Principles of Contract Interpretation (and how we've been using them all along)' (2003) 23 Ox Jo LS 173, 195.

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has been described as an 'aid of last resort' and it has been said that it 'would be wrong to use it to create an ambiguity where none realistically exists, and then to resolve the question by reference to it'<sup>11</sup> and its nature as a rule of last resort must be emphasised all the more post-*Investors*<sup>12</sup>. In the light of these developments, caution is required in referring to older cases applying the rule, but it is still used<sup>13</sup> and the strict approach to exemption clauses continues to be restated.

'The general rule ... [is] that if a party, otherwise liable, is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; unclear words do not suffice; any ambiguity or lack of clarity must be resolved against that party'.<sup>14</sup>

In addition, it has recently been stated that the need for clear words is all the greater where the breach is one which cannot, or is unlikely to be covered by insurance as 'the normal function of an exemption clause is to allocate risk between parties, normally insurable risk, so that the parties as commercial men know on whom is the obligation to insure'<sup>15</sup>.

In the context of disputes between particular consumers and sellers, or suppliers, UTCCR 1999, reg 7(2) contains what may be regarded as a version of the common law *contra proferentem* rule, so that, 'if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail'<sup>16</sup>. This is considered further below<sup>17</sup>.

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Note the approach of Waller LJ in *Rhone Poulenc Rorer Ltd v Trans Global Ltd* (18 February 1998, unreported).

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*Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, 169; *Hinks v Fleet* [1986] 2 EGLR 243, 246, *Sinochem International Oil v Mobil Sales and Supply Corpn* [2000] 1 All ER (Comm) 474, 483.

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*Sinochem International Oil (London) Co Ltd v Mobil Sales and Supply Co* [2000] 1 All ER (Comm) 474 at 483. *McGeown v Direct Travel Insurance* [2003] EWCA Civ 1606, [2004] 1 All ER (Comm) 609 at [13].

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For example, *Whitecap Leisure Ltd v John H Rundle Ltd* [2008] EWCA Civ 429, [2008] All ER (D) 383 (Apr), [22].

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*Dairy Containers Ltd v Tasman Orient Line CV, The Tasman Discoverer* [2004] UKPC 22, [2004] 2 All ER (Comm) 667, [2005] 1 WLR 215, Lord Bingham at [12]. *William Hare V Shepherd Construction Ltd* [2010] EWCA Civ 283, [2010] All ER (D) 168 (Mar) at [18].

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*Internet Broadcasting Corpn Ltd (t/a NETTV) v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch), [2010] 1 All ER (Comm) 112 at [30]–[33], [2009] 2 Lloyd's Rep 295. In complex financial services contracts, a clear stipulation stating that the service provided is an execution-only transaction will excuse the provider from a duty to advise and the user must be careful not to treat any communications from the provider as departing from that position (*Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm)).

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As regards the Consumer Rights Bill 2014, cl 69(1) contains a similar provision. That clause reads: 'If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.'

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See para [3.107](#).

# Negligence

## [3.57]

Traditionally the courts have dealt with the issue of the construction of an exemption clause where the defendant's liability involves negligence by using a three stage test. This is commonly referred to as the *Canada Steamship* test because of the case from which its common formulation derives<sup>1</sup>. It is clear that, at this point, it survives the evolution of the general approach to construction which was identified in the *Investors Compensation Scheme* case<sup>2</sup>. In *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* Lord Bingham made the point that 'There can be no doubting the general authority of the [*Canada Steamship* test] which has been applied in many cases, and the approach indicated is sound'<sup>3</sup>, but its 'rigour' has been seen as reduced post-*Investors*<sup>4</sup> and developments in relation to the use of the test in the light of that evolution will be considered below. However, before considering the test, it should be emphasised that many exemption clauses covering liability for negligence will now be affected by UCTA 1977, s 2. In relation to the contracts to which the Act is relevant<sup>5</sup>, s 2 prevents the exclusion or limitation of liability for negligently caused death or personal injury and only allows a clause to limit or exclude liability for other negligently caused loss or damage in so far as the clause satisfies the requirement of reasonableness<sup>6</sup>. In addition, in relation to terms which have not been individually negotiated in contracts between sellers or supplier, the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)<sup>7</sup> should also be noted. The Regulations apply a test of fairness and although terms excluding or restricting liability for negligently caused death or personal injury are subject to that test, rather than being automatically ineffective, the Office of Fair Trading had said that 'it would be difficult to conceive of circumstances in which [such a clause] would not be unfair'<sup>8</sup>. In addition, the OFT (now replaced by the CMA) obviously viewed exemption clauses dealing with other negligently caused loss or damage as generally unfair in the consumer context<sup>9</sup>.

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*Canada Steamship Lines Ltd v R* [1952] AC 192.

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See para 3.41 ff.

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[2003] UKHL 6, [2003] 1 All ER (Comm) 349 at [11].

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*Biffa Waste Services Ltd v Maschinenfabrik Ernst Hesa GMBH* [2008] EWHC 6 (TCC), 118 ConLR 104, [2008] BLR 155, [180]–[183].

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See para 3.67 ff.

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In *Hirtenstein v Hill Dickinson* [2014] EWHC 2711 (Comm) it was clearly assumed that 'negligence' will extend to cover professional negligence. On the facts though the court held that for the purposes of s 2(2) it had not been properly proved that the operative clause satisfied the reasonableness test laid down in s 11.

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See para 3.97 ff.

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OFT Unfair Terms Bulletin No 3 at 1.2. See below para 3.113.

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The basic formulation of the three-stage test which the courts have adopted to deal with questions of whether a clause covers liability based on negligence can be found in the judgment of the Privy Council in *Canada Steamship Lines Ltd v R*<sup>10</sup>. Lord Morton stated<sup>11</sup>:

- (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called the “proferens”) from the consequences of the negligence of his own servants, effect must be given to that provision ...
- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens ...
- (3) If the words used are wide enough for the above purposes, the court must then consider whether the “head of damage may be based on some ground other than that of negligence” to quote again Lord Greene in the *Alderslade* case<sup>12</sup>. The “other ground” must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene’s words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence ...’

Although Lord Morton was referring to the negligence of the ‘servants of the proferens’, the approach also applies in relation to the party’s own negligence<sup>13</sup>. It is based on the idea that ‘it is inherently improbable that one party to the contract should intend to absolve the other party from the consequences of the latter’s own negligence’<sup>14</sup>. It has been suggested that a less strict approach should be taken to limitation clauses than exclusion clauses<sup>15</sup>, but that is open to criticism<sup>16</sup>. The scope of the test<sup>17</sup> extends beyond

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Eg OFT Bulletin 3 at pp 30, 54, Bulletin 4, at p 65. See below para [3.113](#).

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[1952] AC 192; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 at 312; *Alderslade v Hendon Laundry Ltd* [1945] KB 189 at 192; *Walters v Whessoe Ltd* (1968) 6 BLR 23; *Mediterranean Freight Services Ltd v BP Oil International Ltd, The Fiona* [1994] 2 Lloyd’s Rep 506. But see *Schenker & Co (Aust) Pty Ltd v Malpas Equipment and Services Ltd* [1990] VR 834 at 846.

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[1952] AC 192 at 208.

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[1945] KB 189, at 192.

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*Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] QB 400, [1973] 1 All ER 193, CA, Buckley LJ at 203.

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*Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] 1 All ER 193, Buckley LJ at 203; *E Scott Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Oliver LJ; *Industrie Chimiche Italia Centrale SpA v Nea Ninemia Shipping Co SA, The Emmanuel C* [1983] 1 All ER 686, Bingham J at 689; *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm) at [369].

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*Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 All ER 101, Lord Fraser at 105; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 814; *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd* (20 November 1991, unreported), Staughton LJ; *Jones v Northampton*

exemption clauses in the narrowest sense to indemnity clauses<sup>18</sup>. However, the line has always been taken that Lord Morton's three points are 'intended as guides to interpretation and not as rigid rules'<sup>19</sup>, and what is being sought is the parties' intention<sup>20</sup>. The rules have, for example, been seen as inapplicable where there is specific acceptance of liability in some cases 'only', and those listed cases involve some negligence. Such clauses may be seen as excluding liability in all other cases, including others involving negligence<sup>21</sup>. Further, post-*Investors*, there may be a greater willingness to find that the

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*Borough Council* (1990) Times, 21 May, Lexis; *EE Caldonia Ltd v Orbit Valve plc* [1994] 2 Lloyd's Rep 239 at 244; *Biffa Waste Services Ltd v Maschinenfabrik Ernst Hesa GMBH* [2008] EWHC 6 (TCC), [193].

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See para 3.54.

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In relation to anti-set off clauses see *Fastframe Franchises v Lohinski* (3 March 1993, unreported), Legatt LJ; *Skipskredittforeningen v Emperor Navigation* [1997] CLC 1151, Mance J at 1165; *Society of Lloyd's v Wilkinson (No 2)* [1997] CLC 1012; *Continental Illinois Bank v Papanicoliou, The Ferdora* [1986] 2 Lloyd's Rep 441 at 444; *FG Wilson v Holt* [2012] EWHC 2477 (Comm) and *Deutsche Bank (Suisse) SA v Khan* [2013] EWHC 482 (Comm). In relation to *Force Majeure* clauses see *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd's Rep 1, Bingham LJ at 7.

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*Gillespie Bros v Roy Bowles Transport Ltd* [1973] 1 All ER 193, Buckley LJ at 204; *Smith v South Wales Switchgear Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, HL; *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported); *United States v ARC Construction Ltd* (8 May 1991, unreported), Hobhouse J; *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm) at [369]; *Jose v MacSalvors Plant Hire Ltd* [2009] EWCA Civ 1329 at [18]. On 'transfer servant' clauses which are not treated as indemnities for the purposes of this rule, see *Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at 625–626; *Thompson v T Lohan Ltd* [1987] 2 All ER 631. It does not apply to a clause identified as defining the obligation, rather than excluding liability: *National Westminster Bank v Utrecht-America* [2001] EWCA Civ 658, [2001] 3 All ER 733, paras 49–52.

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*Evans v Glasgow District Council* 1979 SLT 270, Lord Cameron at 276; *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Slade LJ.

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*Smith v South Wales Swichgear* [1978] 1 All ER 18 at 22; *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Oliver LJ; *Morris v Breaveglen* (9 May 1997, unreported), Legatt LJ; *Arthur White Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, Lord Pearson at 599; *Mineralimportexport v Eastern Mediterranean Maritime Ltd, The Golden Leader* [1980] 2 Lloyd's Rep 573, Lloyd J at 574; *Onego Shipping and Chartering BV v JSC Arcadia Shipping, M/V 'Socol 3'* [2010] EWHC 777 (Comm), [2010] NLJR 654, [2010] All ER (D) 179 (Apr) at [52]. But note the comments of Sedley LJ, *Casson v Ostley* [2001] EWCA 1013, 85 Con LR 18.

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*E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Oliver LJ; *Westfal-Larsen and Co A/S v Colonial Sugar Refining Co Ltd* [1960] 2 Lloyd's Rep 206; *The Brabant* [1967] 1 QB 588. See also *Monarch Airlines Ltd v London Luton Airport* [1997] CLC 698, Clarke J at 705, but see *Cohen v Brantford* (8 December 1987, unreported). In relation to the applicability of the *Canada Steamship* rules where there is an allocation of the need to insure see *E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Slade LJ; *Morris v Breaveglen* (9 May 1997, unreported), Legatt LJ; *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All ER 473; Kerr LJ at 484; *Barking and Dagenham London Borough Council v Stamford Asphalt Co Ltd* (1997) 82 BLR 25.

*Canada Steamship* test is simply inapplicable on the basis that the parties' intention is clear<sup>22</sup> or the circumstances may be such that the 'inherent improbability', on which the test is based, is not seen to be present<sup>23</sup>.

In relation to the first part of the test, the point has been made that 'To satisfy [the first test] there must be a clear and unmistakable reference to negligence'<sup>24</sup>. The term negligence or some synonym for it should obviously suffice<sup>25</sup>, although it had even been suggested that nothing short of the use of the term 'negligence' itself will suffice<sup>26</sup>. Dismissing an earlier approach, the line was taken that 'Words such as "whatsoever" or "however arising" are merely words of emphasis and cannot be read as equivalent to an express reference' to negligence<sup>27</sup>. Of course, very explicit references to negligence are not unknown<sup>28</sup>, but are not frequently used. 'Omissions of express reference to negligence in contracts drafted by lawyers

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*HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349; *National Westminster Bank plc v Utrecht-America Finance Co* [2001] EWCA Civ 658, [2001] 3 All ER 733 at [47]; *Re-Source America International v Platt Site Services Ltd* [2004] EWCA Civ 665, 95 ConLR 1 at [55].

23

*HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349; *Shell UK v Total UK* [2009] EWHC 540 at [14].

24

*Smith v South Wales Switchgear Co Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165, Viscount Dilhorne.

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*Smith v South Wales Switchgear Co Ltd* [1978] 1 All ER 18, [1978] 1 WLR 165 at 168 and 172; *Onego Shipping and Chartering BV v JSC Arcadia Shipping, M/V 'Socol 3'* [2010] EWHC 777 (Comm) at [53], [2010] NLJR 654, [2010] All ER (D) 179 (Apr). 'Neglect or default' has been treated as synonymous with negligence: *Monarch Airlines Ltd v London Luton Airport* [1997] CLC 698, Clarke J at 706 (*Shaw v Great Western Rly* [1894] 1 QB 373).

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*Lamport & Holt Lines Ltd v Coubro & Scrutton (M&I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42 at 48.

27

*E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Oliver J; *Smith v South Wales Switchgear* [1978] 1 WLR 165 at 169 and 173; *Shell Chemicals Ltd v P & O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297 at 301. 'There is old authority that the use of language referring to the cause of the damage and not merely the kind of damage would cover liability based on negligence (*Manchester, Sheffield and Lincolnshire Rly v Brown* (1883) 8 App Cas 703; *Farr v Admiralty* [1953] 2 All ER 512; see also *Gillespie v Roy Bowles Transport* [1973] 1 All ER 193). However, it became no longer possible, in the light of *Smith v South Wales Switchgear*, to treat the undoubtedly wide words 'any damage whatsoever' or 'howsoever arising' as a periphrasis of 'damage arising from the negligence of the proferens' and as either satisfying or by-passing the test propounded by Lord Morton in *Canada Steamship – E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Lexis, Oliver LJ. But see *Hinks v Fleet* [1986] 2 EGLR 243, Lloyd LJ at 246; *Brown v Drake International Ltd* [2004] EWCA Civ 1629, [2004] All ER (D) 51 (Dec); *Onego Shipping & Chartering v JSC Arcadia Shipping (The Socol 3)* [2010] EWHC 777 (Comm).

28

Eg *Spriggs v Sotheby Parke Bernet & Co* [1986] 1 Lloyd's Rep 487; *Hancock Shipping Co Ltd v Deacon & Trysail (Private) Ltd* [1991] 2 Lloyd's Rep 550; *Warren v Truprint* [1986] BTLC 344, Lexis.

tend to be deliberate'. The 'draftsman on the underground ... would say "one does not want to frighten off one or other of the parties"'<sup>29</sup>.

When general words are used, which could, potentially, cover negligence but which do not expressly do so, stages 2 and 3 become relevant. A clause referring, for example, to loss or damage 'howsoever caused' has been seen as successfully falling within the second part of the test. It is not only a wide clause, it is also more explicit than one which simply refers to 'any loss' or 'any damage'. It directs attention not merely to the kinds of loss or damage but also to the cause of the loss or damage<sup>30</sup>. However, a wide but less specific clause may nevertheless be seen as capable of encompassing liability based on negligence within the second part of the test. The words 'any act or omission' have been seen as 'certainly wide enough to comprehend negligence'<sup>31</sup>.

The third stage of the test indicated above could be regarded as part of the second stage. In considering whether there could be liability without negligence, the question being asked is merely whether a general clause is ambiguous because of one particular factor: the number of ways in which liability may occur. Where there can be liability without negligence, the courts have tended to find that a generally worded exemption clause is intended to cover only the strict liability and not that based on negligence:

'[a common carrier's] liability in respect of articles entrusted to him is not necessarily based on negligence. Accordingly if a common carrier wishes to limit his liability for lost articles and does not make it quite clear that he is desiring to limit it in respect of his liability for negligence, then the clause will be construed as extending only to his liability on grounds other than negligence.'<sup>32</sup>

This example and the statement of the test by Lord Morton are in absolute terms as if the presence, or absence, of another, non-fanciful, basis of liability determines whether or not a clause is to be construed as covering negligence. However, there can be no such determinative rule as the intention of the parties is sought<sup>33</sup>. Even where there is no other, non-fanciful, liability for a clause to cover, on occasion, it may

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*EE Caledonia Ltd v Orbit Valve plc* [1994] 2 Lloyd's Rep 239 at 246.

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*Joseph Travers & Sons Ltd v Cooper* [1915] 1 KB 73 at 101 and 93.

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*Lamport & Holt Lines Ltd v Coubro Scrutton, The Raphael* [1982] 2 Lloyd's Rep 42, Stephenson LJ at 52.

32

*Alderslade v Hendon Laundry Ltd* [1945] KB 189, Lord Greene MR at 192; *Rutter v Palmer* [1922] 2 KB 87 at 94; *White v John Warrick & Co Ltd* [1953] 2 All ER 1021; *EE Caledonia Ltd v Orbit Valve plc* [1994] 2 Lloyd's Rep 239; *Shell Chemicals Ltd v P & O Roadtanks Ltd* [1995] 1 Lloyd's Rep 297 at 301; *Toomey v Eagle Star Insurance Co Ltd (No 2)* [1995] 2 Lloyd's Rep 88, Colman J at 92–93.

33

*Toomey v Eagle Star Insurance Co Ltd (No 2)* [1995] 2 Lloyd's Rep 88, Colman J at 93; *Seven Seas Transport Ltd v Pacifico Union Marine Insurance Corp, The Oceanic Amity* [1983] 1 All ER 672 at 684; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42; *EE Caledonia Ltd v Orbit Valve plc* [1995] 1 All ER 174, Steyn LJ at 181; *Alderslade v Hendon Laundry* [1945] KB 189, Mackinnon LJ at 195 (but see Lord Greene MR at 192); *Rutter v Palmer* [1922] 2 KB 87 at 92.

still be found not to encompass negligence<sup>34</sup> and, where there is other liability, on occasion a sufficiently worded clause may still be found to encompass negligence<sup>35</sup>.

However, it should be emphasised that not every alternative basis of liability will be relevant to the third part of the test. To be relevant to the question of construction, an alternative basis of liability must not be too 'fanciful or remote' so that it 'would not have been within the contemplation of the parties when the terms of the [contract] were agreed'<sup>36</sup>. In the *Canada Steamship* case the potential for non-negligent liability was not wide, but the Privy Council was 'not prepared to assume that the obligations imposed on the lessors by the Civil Code were not in the minds of the parties' and the clause was construed as referring to that liability and not as extending to negligence. In general the question of whether or not any alternative basis of liability is too 'fanciful or remote' will depend upon the facts of the particular case, but it should be borne in mind that:

'When two commercial concerns contract with one another, they do not ... concern themselves with ... legal subtleties ... We should look at the facts and realities of the situation as they did or must be deemed to have presented themselves to the contracting parties at the time the contract was made, and ask what potential liabilities the one to the other did the parties apply their minds, or must be deemed to have done so.'<sup>37</sup>

Some final consideration should be given to the *Canada Steamship* approach in the light of the principles set out in the *Investors Compensation Scheme* case<sup>38</sup>. The *Canada Steamship* case might simply have been viewed as part of the 'old intellectual baggage of legal interpretation' which is being dispensed with<sup>39</sup>. However, at this point, plainly it has survived *Investors*, although with some diminution in its

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*Hollier v Rambler Motors (AMC) Ltd* [1972] 1 All ER 399; *Dorset County Council v Southern Felt Roofing Co Ltd* (1989) 48 BLR 96, Lexis, Slade LJ.

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Eg *Mineralimportexport v Eastern Mediterranean Maritime Ltd, The Golden Leader* [1980] 2 Lloyd's Rep 573; *Joseph Travers & Son Ltd v Cooper* [1915] 1 KB 73; *Onego Shipping and Chartering BV v JSC Arcadia Shipping* [2010] EWHC 777 (Comm) at [55].

36

*Canada Steamship Lines Ltd v R* [1952] AC 192 at 210; *Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42; *Toomey v Eagle Star Insurance Co Ltd (No 2)* [1995] 2 Lloyd's Rep 88, Colman J at 92–93; *Onego Shipping and Chartering BV v JSC Arcadia Shipping* [2010] EWHC 777 (Comm) at [54].

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*Lamport & Holt Lines Ltd v Coubro & Scrutton (M & I) Ltd, The Raphael* [1982] 2 Lloyd's Rep 42, May LJ, at 50. See also Stephenson LJ at 51. See also *Industrie Chimiche Italie Centrale SpA v Nea Nimea Shipping Co SA, The Emmanuel C* [1983] 1 All ER 686 at 689; *Society of Lloyd's v Wilkinson* [1997] CLC 1012; *Hollier v Rambler Motors* [1972] 1 All ER 399 at 404; *Hair and Skin Trading Co Ltd v Norman Air Freight Carriers Ltd* [1974] 1 Lloyd's Rep 443 at 445; *AMF International Ltd v Magnet Bowling Ltd* [1968] 2 All ER 789, Mocatta J at 811; *Boomsman v Clark & Rose Ltd* 1983 SLT 67 at 70, Sh Ct. See also *HIH Casualty v New Hampshire* [2001] EWCA Civ 735, [2001] 2 All ER (Comm) 39, [126]–[141].

38

*Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 114. See above para 3.41.

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*Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, Lord Hoffmann at 114. See above para 3.41. And see the assumption made by Lord Hoffmann that there have been



impact. The basis for its survival may be that the approach in *Canada Steamship* has been seen as based on an assumption about the probability of one party intending to excuse the other's negligence and it has been seen 'when properly understood' as 'according with ... common sense'<sup>40</sup>. In any event, it is so well established that, at least in commercial cases, where the parties have been legally advised, it could be seen as part of the 'background knowledge which would reasonably have been available to the parties at the time of the contract', and so to be taken into account in the construction process on that basis<sup>41</sup>. It may be, however, that there will be a growing emphasis upon the fact that the *Canada Steamship* test does not need to be considered where the clause can be regarded as 'unambiguously' covering negligence.

## Inconsistent terms

### [3.58]

The exemption clause may appear to be inconsistent with one of the other terms of the contract and the question will arise as to whether the parties intended the exemption clause to deprive the apparent term of its contractual force or whether the exemption clause is intended to be subject to that other term. In *J Evans & Son (Portsmouth) v Andrea Merzario Ltd*<sup>1</sup>, from 1959 to 1967 Merzario had shipped machinery for Evans on the basis that it would always be shipped below deck to prevent rusting. In 1967 Merzario wished to change to using containers to ship goods and discussed that with Evans, who agreed to the change to containers on being given an assurance that containers with their goods in would continue to be shipped below deck. That agreement was not in writing. Subsequently, Merzario failed to ensure that a container with Evans' goods in it was shipped below deck and was lost overboard. Merzario sought to rely upon the standard conditions of the freight forwarding trade, clause 4 of which stated 'subject to express instructions in writing given by the customer, [Merzario] reserves to itself complete freedom in respect of means, route and procedure to be followed in the handling and transportation of goods'. On its face, clause 4 was inconsistent with any contention that there was an enforceable obligation on Merzario to ship the goods below deck. Nevertheless, reversing the decision of Kerr J, the Court of Appeal held that the express oral assurance that the machinery would be shipped below deck was an enforceable contractual obligation which prevailed over clause 4 (either on the basis that it was a collateral contract or because it was part of the main contract, which was partly oral and partly written). Roskill LJ said<sup>2</sup>:

'It is a question of construction. Interpreting the contract ... one has to treat the promise that no container would be shipped on deck as overriding any question of [an] exempting condition. Otherwise ... the promise would be illusory.'

There was a clear oral statement which both parties knew was essential to the contract and the standard terms had to be read subject to that. The same conclusion has been reached in other cases where there has been a clear oral promise, which was essential to the contract, but which was apparently contradicted in the standard terms<sup>3</sup>.

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developments in this area – *Bank of Credit and Commerce International SA (in liquidation) v Ali* [2001] UKHL 8, [2001] 1 All ER 961, [66].

<sup>40</sup>

*E Scott (Plant Hire) Ltd v British Waterways Board* (20 December 1982, unreported), Slade LJ.

<sup>41</sup>

See above para [3.43](#).

<sup>1</sup>

[1976] 2 All ER 930, [1976] 1 WLR 1078.

<sup>2</sup>

[1976] 2 All ER 930, [1976] 1 WLR 1078 at 1084

<sup>3</sup>

Where there existed a valid entire agreement clause in the contract, the outcome could have been very different. In *Mileform Ltd v Interserve Security Ltd*<sup>4</sup> the claimant argued that the written warehousing contract had been varied to give them exclusive rights by an oral contract which amounted to a collateral agreement. The court distinguished the case from *Andrea Merzario*, stating that in the present case there was a valid entire agreement clause preventing the admission of oral terms (even if it was proved that there was an oral agreement to the effect claimed by the claimant)<sup>5</sup>. This is an important limitation to the collateral contract device used in *Andrea Merzario*.

Inconsistencies may also arise between written terms. It may be clear that the particular term should take precedence over the general exemption clause<sup>6</sup>.

## Fundamental breach

### [3.59]

There has always been some confusion as to exactly what the phrase 'fundamental breach' means. It could be used to indicate that a breach had occurred which entitled the injured party to terminate the contract, or it could be used to indicate that a certain approach to construction is required<sup>1</sup>, and a similar point can be made in relation to the phrase 'fundamental term'. In *Photo Production* Lord Diplock stated<sup>2</sup> that the term 'fundamental breach' should now be confined to the situation where the breach is such as to allow the innocent party to terminate ie the term 'fundamental breach' is no longer required in relation to construction issues. In the context of construction, fundamental breach was a device used to limit the effectiveness of exemption clauses. At one point, it was even sought to create a rule of law to the effect that there were some breaches, or terms, which were so fundamental that no exemption clause could affect liability in relation to them<sup>3</sup>. However, this was dismissed by the House of Lords in *Suisse*

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*Harling v Eddy* [1951] 2 KB 739; *Couchman v Hill* [1947] KB 554; *Mendelssohn v Normand Ltd* [1970] 1 QB 177, Lord Denning MR at 184; *Firestone Tyre and Rubber Co Ltd v Vokins & Co Ltd* [1951] 1 Lloyd's Rep 32 at 39; *Nelson Pine Industries Ltd v Seatrans New Zealand Ltd, The Pembroke* [1995] 2 Lloyd's Rep 290. But see *Fillite Construction (Runcorn) Ltd v APV Pasilac* (22 April 1993, unreported).

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[2013] EWHC 3386 (QB).

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On entire agreement clauses, see 3.7 above.

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Eg *Thompson v Sayed* (21 March 1994, unreported), Henry LJ; *Lacey's Footwear v Bowler International* [1997] 2 Lloyd's Rep 369, Beldam LJ at 379. But see *Spriggs v Sotheby Parke Bernet & Co* [1986] 1 Lloyd's Rep 487, Neill LJ at 495.

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*Suisse Atlantique* [1967] 1 AC 361, Lord Wilberforce at 431.

2

[1967] 1 AC 361 at 849.

3

Eg *Alexander v Railway Executive* [1951] 2 KB 882; *Smeaton Hanscomb & Co Ltd v Sassoon I Setty Son & Co* [1953] 2 All ET 1471, [1953] 1 WLR 1468; *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, [1956] 1 WLR 936; *J Spurling Ltd v Bradshaw* [1956] 2 All ER 121, [1956] 1 WLR 461, Denning LJ at 465; *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447; *Wathes (Western) Ltd v Austin (Menswear) Ltd* [1976] 1 Lloyd's Rep 14; *Kenyon, Son & Craven Ltd v Baxter Hoare & Co Ltd* [1971] 2 All ER 708, [1971] 1 WLR 519.

*Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale*<sup>4</sup> and again<sup>5</sup>, and more clearly, in *Photo Productions Ltd v Securicor Ltd*<sup>6</sup>. Fundamental breach was essentially a device which the advent of the Unfair Contract Terms Act 1977 rendered redundant<sup>7</sup>. As an approach to construction it might now simply be said that the more fundamental the breach<sup>8</sup>, the less likely it is that an exemption clause was intended to cover it. So, it has been said, for example, the 'words needed to cover a deliberate, repudiatory breach need to be very "clear" in the sense of using "strong" language such as "under no circumstances"' and that there 'is a particular need to use "clear" in the sense of "strong" language where the exemption clause is intended to cover deliberate wrongdoing by a party in respect of a breach which cannot, or is unlikely to be covered by insurance'<sup>9</sup>.

However, a named rule is no longer required and what must be considered is how much of the 'respectable commercial origin' of the doctrine<sup>10</sup> survives, particularly in the light of the evolution which was recognised to have taken place in construction generally in the *Investors Compensation Scheme* case<sup>11</sup>.

## Within the performance of the contract

### [3.60]

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[1967] 1 AC 361. See also *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 and Unfair Contract Terms Act 1977, s 9.

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In relation to the attempt to continue to use fundamental breach after *Suisse Atlantique* see eg *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 QB 447.

6

[1980] AC 827. The approach taken in the recent case of *Motis Exports Ltd v Dampskibsselskabet* [2000] 1 All ER (Comm) 91 was seen as 'coming perilously close to, if not actually to be, the doctrine of fundamental breach': B Davenport [2000] LMCLQ 455, 456.

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*Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con LR 1.

8

That might encompass the importance of the term breached, the seriousness of the consequences of the breach, and / or its manner (eg whether deliberate): see *China Shipbuilding v Nippon Yusen Kabukisha Kaisha* [2000] CLC 566, 578–579.

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*Internet Broadcasting Corp'n Ltd (t/a NETTV) v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch), [2010] 1 All ER (Comm) 112 at [33], [2009] 2 Lloyd's Rep 295.

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Such as deviation from the contractual voyage and storing goods in a warehouse other than that agreed. *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801 at [10].

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See para 3.41 ff.

It may be contended that an exemption clause does not apply to what has occurred because it only applies to the performance of the contract, albeit defective performance. In *Chanter v Hopkins*<sup>1</sup> Lord Abinger said:

‘If a man offers to buy peas of another, and he sends him beans, he does not perform his contract. But that is not a warranty; there is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it.’

If there is a contract between two parties, X and Y, and X has contracted to deliver peas to Y he will not be able to rely upon any clause of the contract excluding his liability if he delivers beans instead. What X has done does not relate to the performance of the contract at all and an exemption clause dealing with that performance will not cover what has occurred. (Of course, care must be taken in ascertaining exactly what the contractual obligations were. The contract may have been one for the supply of peas or beans or, even, any green vegetable<sup>2</sup>.) However, this type of argument has been seen as going beyond delivery of entirely different goods, and as extending to the delivery of goods which are so defective that it is contended that their delivery does not amount to a performance of the contract<sup>3</sup>, but such an approach must now be regarded as of very restricted application<sup>4</sup>.

## The main purpose rule

### [3.61]

An exemption clause may have to be read so as to ensure that it does not defeat the main purpose of the contract. In *Glynn v Margetson & Co*<sup>1</sup> there was a contract for the shipment of oranges from Malaga to Liverpool. To collect another cargo the ship went a further 350 miles away from Liverpool before heading for that port. The delay meant that the oranges were damaged by the time they reached Liverpool. There was a clause in the contract of shipment that the ship ‘should have liberty to proceed to and stay at any port or ports in any station in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain or Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever’. The clause did not prevent the shipowners from being liable for the damage to the oranges. The clause provided a liberty to deviate but the approach taken was that it had to be read in the light of the main purpose of the contract, ascertained from reading it as a whole. The main purpose of getting a perishable cargo from A to B would be defeated if the liberty to deviate was not read as confined to ports along the route from A to B. In *Sze Hai Tong Bank Ltd v Rambler Cycle Club* this approach was also held to prevent reliance on a clause stating that that ‘the responsibility of the carrier ... shall be deemed ... to cease absolutely after the goods are discharged from the ship’ when the contract also provided that delivery should only have been made on production of the bill of lading and delivery was made without that document. The court viewed the situation as one which was to be equated with what would have occurred if the carriers had burnt the goods or thrown

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(1838) 4 M & W 399 at 404.

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See Devlin ‘The Treatment of Breach of Contract’ [1966] CLJ 192 at 212.

3

Eg *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866, [1956] 1 WLR 936 at 942 and 943; *Pinnock Bros v Lewis & Peat Ltd* [1923] 1 KB 690 but contrast *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441.

4

*George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 at 813.

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[1893] AC 351.

them into the sea. It would have defeated the main object of the contract if the carriers were entirely at liberty to deliver the goods to anyone, despite the requirement that delivery should occur on production of the bill of lading<sup>2</sup>. However, the question is the extent to which this type of approach survives *Investors*. It must obviously not be used to resurrect 'fundamental breach'<sup>3</sup> and in *Bank of Credit and Commerce International SA (in liquidation) v Ali* Lord Hoffmann saw the above type of cases as a matter of 'judicial creativity' rather than of 'giving effect to what on the ordinary principles of construction the parties agreed'<sup>4</sup>. Nevertheless, clauses which are potentially very wide in their application will sometimes need to be cut down to give effect to the intention of the parties<sup>5</sup>. In *Bank of Credit and Commerce International* itself even Lord Hoffmann thought that the 'full and final settlement clause' should be subject to some limitation on its literal extent (albeit to a lesser extent than did the majority) and in *Mitsubishi Corp v Eastwind Transport Ltd*<sup>6</sup> the approach taken in *Glyn v Margetson* was used to limit the effect of an exemption clause to meet the argument that the clause denied substance to the contract. The extension of the approach taken in *Sze Hai Tong Cycle Club* to delivery on production of a forged bill of lading in *Motis Exports Ltd v Dampskibsselskabet*<sup>7</sup> was criticised as 'coming perilously close to, if not actually to be, the doctrine or fundamental breach'<sup>8</sup>. Nevertheless, it was followed in *Trafigura Beheer BV v Mediterranean Shipping Co SA*<sup>9</sup>. In addition, in relation to a 'joint venture in internet broadcasting', a 'literal reading' of a clause which would have 'defeat[ed] the main object of the contract' was rejected where it would have allowed a deliberate and personal repudiation 'without any consequences as to lost profit even though lost profit [was] likely to be the only serious consequence' of repudiation<sup>10</sup>.

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*Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] AC 576; *MB Pyramid Sound NV v Briese Sciffahrt GmbH* [1995] 2 Lloyd's Rep 144. The same approach has now been extended to delivery on production of a forged bill of lading – *Motis Exports Ltd v Dampskibsselskabet AF 1912 Aktieselskab and Aktieselskabet Dampskibsselskabet Svendborg* [2000] 1 All ER (Comm) 91, [2000] 1 Lloyd's Rep 211, CA.

3

See n 2 above.

4

[2001] UKHL 8, [2001] 1 All ER 961 at [60].

5

A Kramer 'Common Sense Principles of Contract Interpretation (and how we've been using them all along)' (2003) 23 Ox Jo LS 173 at 188.

6

[2004] EWHC 2924 (Comm), [2005] 1 All ER (Comm) 328. See also *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2005] 1 All ER (Comm) 117, [2004] 1 WLR 3251. But see *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801 at [29].

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[2000] 1 All ER (Comm) 91.

8

B Davenport [2000] LMCLQ 455, 456.

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[2007] EWCA Civ 794, [2008] 1 All ER (Comm) 385, [2007] 2 Lloyd's Rep 622, [28]–[37].

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## Deviation

### [3.62]

Traditionally, a distinct approach has been taken in relation to deviation in carriage of goods by sea contracts and analogous bailment cases. Any unjustified deviation would provide the injured party with an election to end the contract and if that was done the terms ceased to bind, including any exemptions<sup>1</sup>, and similarly in relation to the liability for goods stored otherwise than in the agreed place<sup>2</sup>, or handed over to a subcontractor without authority<sup>3</sup>. It was, of course, necessary to determine the place of storage required by the contract<sup>4</sup>, or whether any liberty to deviate was given<sup>5</sup>. In *Photo Productions v Securicor* Lord Wilberforce indicated that despite the general demise of fundamental breach, it might be necessary to maintain these rules 'as a body of authority *sui generis*'<sup>6</sup>. Nevertheless, there are indications that this area should be assimilated to the general law, so that the effect of deviation would depend upon the construction of the contract<sup>7</sup>. However, it 'is a question of some controversy whether [the deviation cases] now exemplify ... a principle of English law'<sup>8</sup>.

### *Exemption clauses and third parties*

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*Internet Broadcasting Corp'n Ltd (t/a NETTV) v MAR LLC (t/a MARHedge)* [2009] EWHC 844 (Ch), [2010] 1 All ER (Comm) 112 at [38], [2009] 2 Lloyd's Rep 295.

1

*Joseph Thorley Ltd v Orchis Steamship Co Ltd* [1907] 1 KB 660; *James Morrison & Co Ltd v Shaw Savill & Albion Co Ltd* [1916] 2 KB 783; *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328; *Hain Steamship Co Ltd v Tate & Lyle Ltd* (1936) 41 Com Cas 350 at 354. But see *State Trading Corp'n of India v Golodetz Ltd* [1989] 2 Lloyd's Rep 277 at 289.

2

*Gibaud v Great Eastern Rly Co* [1921] 2 KB 426; *Woolf v Collis Removal Services* [1948] 1 KB 11; *United Fresh Meat Co Ltd v Charterhouse Cold Storage Ltd* [1974] 2 Lloyd's Rep 286.

3

*Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 WLR 940; *Davies v Collins* [1945] 1 All ER 247.

4

*Gibaud v Great Eastern Rly Co* [1921] 2 KB 426.

5

*Connolly Shaw Line Ltd v A/S Det Nordenfjelde D/S* (1934) 49 Lloyd's Rep 183; *Renton & Co v Palmyra Trading Corp'n of Panama* [1957] AC 149.

6

And see G Treitel *Some Landmarks of Twentieth Century Contract Law* (2002, OUP), Ch 3.

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*The Antares* [1986] 2 Lloyd's Rep 626 at 633; affd [1987] 1 Lloyd's Rep 424; *State Trading Corp'n of India v M Golodetz Ltd, The Sara D* [1989] 2 Lloyd's Rep 277 at 289; *Wibau Mascinenefabric Hartman v Mackinnon Mackenzie & Co, The Chanda* [1989] 2 Lloyd's Rep 494; *The Pembroke* [1995] 2 Lloyd's Rep 290. Mills [1983] LMCLQ 587 at 596.

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*Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd, The Kapitan Petko Voivoda* [2003] EWCA Civ 451, [2003] 1 All ER (Comm) 801 at [14].

### [3.63]

Traditionally, the rule of privity of contract has meant that basically only the parties to a contract can enforce a benefit in it or be burdened by it and there is a full discussion of privity of contract in ch 6. However, where contracts conferred benefits on third parties, this was much criticised<sup>1</sup>. It could thwart the intentions of the contracting parties and deny the reasonable expectation of the third parties. The common law developed various means of avoiding the privity rule and that has now been furthered by the Contracts (Rights of Third Parties) Act 1999. Here, brief consideration will be given to the situation in which a third party, C, can have the protection of an exemption clause in a contract between A and B (See further below ch 6). That issue is of particular importance when C is an employee, or subcontractor, of B and A is making a claim, in tort, against C, based on C's carrying out of a task which is part of the work dealt with by the contract between A and B. It has been seen as undesirable to allow the privity rule to be used effectively to undermine the contractual allocation of the risk and the concomitant insurance coverage. In *The Mahkutai*, for example, the point was made that:<sup>2</sup>

‘Recognition has been given to the undesirability, especially in the commercial context, of allowing plaintiffs to circumvent the contractual exemption clause by suing in particular the servant or agent of the contracting party who caused the relevant damage, thereby undermining the purpose of the exemption, and so redistributing the contractual allocation of risk, which is reflected in the freight rate and the parties' respective insurance arrangements’.

Brief consideration will be given here to the third party use of an exemption clause under the C(RTP)A 1999 and at common law.

## Contracts (Rights of Third Parties) Act 1999<sup>1</sup>

### [3.64]

The Contracts (Rights of Third Parties) Act 1999 came into force on 11 November 1999, basically implementing the Law Commission's report, *Privity of Contract: Contracts for the Benefit of Third Parties*<sup>1</sup>. It does not apply to contracts entered into before 11 May 2000 unless they were entered into after the Act came into force and expressly provide for the application of the Act<sup>2</sup>. Section 1 of the Contracts (Rights of Third Parties) Act 1999 sets out the basic test of third party enforceability. It states:

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Eg *Beswick v Beswick* [1968] AC 58 at 72; *Woodar Investment Developments Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277; *Swain v Law Society* [1983] 1 AC 598 at 611; *The Pioneer Container* [1994] 2 AC 324 at 335; *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 3 All ER 895, [1995] 1 WLR 68, Steyn LJ at 76.

2

[1996] AC 650 (at 651).

1

See further below, Ch 6. See generally C. Macmillan 'A Birthday Present for Lord Denning: the Contracts (Rights of Third Parties) Act 1999'. (2000) 63 MLR 721; N. Andrews 'Strangers to Justice No Longer: The Reversal of the Privity Rule Under the Contracts (Rights of Third Parties) Act 1999'. [2000] CLJ 353; A. Burrows 'The Contracts (Rights of Third Parties) Act 1999 and its implications for Commercial Contracts' [2000] LMCLQ 540.

1

Law Com No 242 (Cm 3329, July 1996).

2

C(RTP)A 1999, s 10.

- ‘1(1) Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if:
- (a) the contract expressly provides that he may, or
  - (b) subject to subsection (2), the term purports to confer a benefit on him.
- (2) Subsection 1(b) does not apply if on the proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.’

In other words, either (a) the contract must expressly provide that the third party may enforce the term or (b) the term must purport to confer a benefit on C and on the proper construction of the contract it does not appear that the parties did not intend the term to be enforceable by the third party<sup>3</sup>. In addition, to acquire rights, the third party must be ‘expressly identified in the contract’ to a stated extent (ie ‘by name, as a member of a class or as answering a particular description’), but ‘need not be in existence when the contract is entered into’<sup>4</sup>. The third party will not acquire rights to enforce a term ‘otherwise than subject to and in accordance with any other relevant terms of the contract’<sup>5</sup>. Where the original contract would confer rights on a third party, there are limitations on the abilities of the contracting parties to affect those rights by agreement, variation or rescission of the contract<sup>6</sup>. However, the point which must be emphasised here is that although the Act generally refers to the rights of a third party to enforce a term, s 1(6) makes it clear that it encompasses the situation in which a third party, C, seeks to avail him, or her, self of the ‘benefit’ of exclusions or limitations of liability in a contract between A and B. In fact, although it is open to question<sup>7</sup>, the tenor of the Law Commission Report, from which the Act derives, is that exemption clauses which expressly extend their protection to a third party will normally fall within s 1(1)(a), above, rather than s 1(1)(b) on the basis that ‘an exclusion clause, as a legal concept, has no meaning unless it is intended to effect legal rights’<sup>8</sup>. However, the need to appropriately identify the third party to be benefitted means that an exemption clause will not assist even an employee, whose employer has failed to expressly extend the exemption clause to them. In that and related situations, there may still be scope, for common law developments in the avoidance of the privity rule, for example, through the idea of ‘vicarious immunity’, which has been taken up by the Canadian courts<sup>9</sup>. The Act specifically states

3

Once a third party has established that the relevant term ‘purports to confer a benefit upon him’, he is ‘entitled to enforce the term directly against the defendant unless the defendant persuades the court that the parties did not intend the term to be enforceable by him’ – *Laemthong International Lines Co Ltd v Artis* [2005] EWCA Civ 519, [2005] 2 All ER (Comm) 167 at [22], citing *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 All ER (Comm) 481.

4

C(RTP)A 1999, s 1(3).

5

C(RTP)A 1999, s 1(4).

6

C(RTP)A 1999, s 2.

7

See para 6.64 below.

8

Law Com Rep 242, para 7.10.

9

See *London Drugs Ltd v Kuehne & Nagel International Ltd* (1992) 97 DLR (4th) 261 and its extension in *Fraser River Pile & Dredge Ltd v Can Drive Services Ltd* [2000] 1 LI Rep 199. See also *Trident General Insurance Co v McNeice Bros Pty Ltd* (1988) 165 CLR 107. There have been indications that the English



that it 'does not affect any right or remedy of a third party that exists or is available apart from this Act'<sup>10</sup> and the Law Commission envisaged that judicial development would continue. It was said:<sup>11</sup>

'We should emphasise that we do not wish our proposed legislation – which we believe to be a relatively conservative and moderate measure – to hamper the judicial development of third party rights. Should the House of Lords decide that in a particular sphere our reform does not go far enough and that, for example ... employees (even though not mentioned in the contract) should be able to rely on exclusion clauses that protect their employers under a doctrine of vicarious immunity, we would not wish our proposed legislation to be construed as hampering that development'.

Where the third party, C, does seek to rely on an exemption clause in the contract between A and B, the Unfair Contract terms Act 1977 may fall to be considered. Under s 1(6) a third party seeking to enforce a term of the contract (including an exemption clause) 'cannot do so if he could not have done so ... had he been a party to the contract'<sup>12</sup>.

## Avoiding the privity rule at common law

### [3.65]

Rejecting the impetus to the avoidance of the privity rule shown in *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd*<sup>1</sup>, the House of Lords in *Scruttons Ltd v Midland Silicones Ltd*<sup>2</sup> emphasised the established nature of the privity rule<sup>3</sup> and opposition to the use of 'artifice' to avoid it to 'save negligent people from the normal consequences of their fault'<sup>4</sup>. However, Lord Reid prepared the way for avoidance of the rule through the use of 'agency'. He indicated that, although not in the instant case, in other cases, it might be found that B had not only contracted on its own behalf, but as agent for C, to create a direct contractual relationship between A and C which included the exemption clause. He said<sup>5</sup>:

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courts might be willing to develop more generalised exceptions than those currently embodied in the common law (below) – eg *The Mahkutai* [1996] AC 650, 664, *KH Enterprise v Pioneer Container* [1994] 2 All ER 250, 255.

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C(RTP)A 1999, s 7(1).

11

Law Com no 242, para 5.10.

12

Contrast the extremely limited scope for the application of UCTA 1977 when a promisor is seeking to use a contractual exemption clause as a defence to a claim to a positive benefit under s 1 by a third party. Only s 2(1) is applicable – s 7(2). See para [6.66](#) below.

1

[1924] AC 522.

2

[1962] AC 446.

3

Eg Viscount Simonds at 467, Lord Reid at 473.

4

Viscount Simonds at 472, adopting, with approval the views of Fullager J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1955) 95 CLR 43.

5

‘I can see a possibility of the success of the argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for those provisions on his own behalf is also contracting as agent for the stevedore that those provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.’

Although, it has been questioned whether a contract brought about through B's agency is unilateral<sup>6</sup> or bilateral<sup>7</sup>, this paved the way for the extended use of Himalaya clauses<sup>8</sup> such as:

‘every such servant, agent and contractor shall have the benefit of all exceptions, limitations provisions, conditions and liberties herein benefitting the carrier as if such provision were expressly made for their benefit, and in entering into this contract, the carrier, to the extent of these provisions, does so not only on [his] behalf, but also as agent and trustee for such servants, agents and sub-contractors.’<sup>9</sup>

Such clauses were accepted by the Privy Council as effective to provide third parties with the protection of exemption clauses in *The Eurymedon (New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd)*<sup>10</sup> and *The New York Star (Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd)*<sup>11</sup>. Of course, as with any exemption clause, the effectiveness of such a clause to protect C from any particular liability will depend upon it being appropriately worded to provide such protection<sup>12</sup>. In addition, there are, of course, technical difficulties, such as those stemming from agency and the need for consideration, which may lie in the way of the effectiveness of a Himalaya clause to create a contractual relationship between A and C. The need for ‘agency’ to be found may not present too many difficulties where there is a pre-existing relationship between B and C<sup>13</sup> and where B had no authority to contract on

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[1962] AC 446 at 474.

6

*The Eurymedon* [1975] AC 154.

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*The Mahkutai* [1996] AC 650. The bilateral analysis is the more convincing.

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This type of clause had been used in *Adler v Dickson* [1955] 1 QB 158 where the ship was called *The Himalaya*.

9

*The Mahkutai* [1996] AC 650 at 662.

10

[1975] AC 154.

11

[1980] 3 All ER 257, [1981] 1 WLR 138. See also *The Mahkutai* [1996] AC 650.

12

Apparently appropriately worded clause may be overridden by greater liability undertaken in a direct contract between C and A, or even in a bailment on terms between C and A: *Lotus Cars Ltd v Southampton Cargo Handling plc* [2000] 2 All ER (Comm) 705. The clause may also be affected by legislation: eg *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2003] 2 All ER 785.

13

behalf of C that difficulty may often be obviated by ratification<sup>14</sup> but there are limitations on the extent to which ratification is effective – inter alia, the ‘principal’ must be ascertainable at the time that the contract is made<sup>15</sup>. The question of consideration moving from C is normally dealt with by regarding it as furnished by the performance of C’s obligations to B (the unloading of A’s goods, where C are stevedores)<sup>16</sup>. In addition, the avoidance of undue technicality in this area was indicated in *The New York Star*, at least where what is in question is whether stevedores, employed by carriers, can enjoy the benefits of exemptions in the bill of lading. It was said<sup>17</sup> that ‘their Lordships would not encourage a search for fine distinctions which would diminish the general applicability’ of the agency/Himalaya clause approach. More recently, in *The Mahkutai*<sup>18</sup> in approving the line taken in *The Eurymedon* and *The New York Star*, the Privy Council indicated that it might be extended further. There was seen to be ‘no doubt of the commercial need of some such principle as this, and not only in cases concerned with stevedores’ and it was questioned whether the development which had taken place in those cases is ‘yet complete’<sup>19</sup>. It was recognised that there were technical limitations on the use of agency and a Himalaya clause to avoid the effects of the privity rule, and it was said that<sup>20</sup>:

‘the time may well come when, in an appropriate case, it will fall to be considered whether the courts should take what may legitimately be perceived to be the final, and inevitable, step in this development, and recognise in these cases, a fully fledged exception to the doctrine of privity of

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In *The Eurymedon* [1975] AC 154 the carrier was a subsidiary of the stevedores and in *The New York Star* [1980] 3 All ER 257, [1981] 1 WLR 138 the stevedores were partly owned by the carriers.

14

*The Mahkutai* [1996] AC 650 at 664.

15

*Southern Water Authority v Carey* [1985] 2 All ER 1077.

16

*The Mahkutai* [1996] AC 650 at 664:

‘the problem of consideration in these cases is regarded as having been solved on the basis of a bilateral agreement between the stevedores and the cargo owners entered into through the agency of shipowners, may, though itself unsupported by consideration, be rendered enforceable by consideration subsequently furnished by the stevedores in the form of the performance of their duties as stevedores for the shipowners.’

*The Eurymedon* [1975] AC 154 at 167:

‘If the choice, and the antithesis, is between a gratuitous promise, and a promise for consideration ... there can be little doubt which, in commercial reality, this is ... This became a full contract when the appellant performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the appellant should have the benefit of the exemptions and limitations contained in the bill of lading.’

17

[1980] 3 All ER 257, [1981] 1 WLR 138 at 144.

18

[1996] AC 650.

19

[1996] AC 650 at 664.

20

[1996] AC 650 at 664.

contract, thus escaping from all the technicalities with which the courts are now faced in English law.’

*The Mahkutai* was concerned with a jurisdiction clause rather than an exemption clause and the court did not consider it appropriate to take the point any further in that case.

Numerous other devices have been employed at common law in an attempt to mitigate the privity rule in general<sup>21</sup>. There are some which should, in particular, be briefly noted in the context of exemption clauses. *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd*<sup>22</sup> could have been seen as indicating a general exception to the privity rule, based on vicarious immunity<sup>23</sup>. However, this was dismissed in *Scruttons Ltd v Midland Silicones Ltd*<sup>24</sup>, where the need to maintain the privity rule in such cases was reasserted. As has been indicated, however, a similar device has found favour elsewhere and could potentially be adopted here to add a more extensive exception than that provided by the 1999 Act<sup>25</sup>. Another basis of the decision in the *Elder, Dempster* case<sup>26</sup> may be seen as ‘bailment on terms’<sup>27</sup>. The argument is that where C is a bailee of A’s goods, C’s obligations as a bailee may be subject to the exemption clauses as the terms upon which C received the goods into its possession<sup>28</sup>. This argument was ‘given a restrictive treatment’<sup>29</sup> in the *Midland Silicones* case but has since been looked upon more favourably<sup>30</sup>. In addition, there has been some success in mitigating the effects of the privity rule in this

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21

See Chapter 6.

22

[1924] AC 522.

23

Viscount Cave at 534, Viscount Finlay at 548, Lord Carson at 565; Scrutton LJ in the Court of Appeal [1923] 1 KB 420 at 441–442. See also Scrutton LJ in *Mersey Shipping and Transport Co Ltd v Rea Ltd* (1925) 21LI L Rep 375.

24

[1962] AC 446.

25

See para 3.64 above.

26

[1924] AC 522, Lord Sumner at 564.

27

See the analysis of Fullager J in *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1955) 95 CLR 43 at 78. See also *The Pioneer Container* [1994] 2 AC 324 at 340; *The Mahkutai* [1996] AC 650 at 668.

28

*The Mahkutai* [1996] AC 650 at 668 – Such an argument was ineffective in *The Mahkutai* to import the jurisdiction clause into the relationship between A and C, on the basis of conflict with the express terms of the bill of lading, and in particular, the Himalaya clause, as it expressly imported some terms to the benefit of C and the express importation was construed as not including the jurisdiction clause.

29

*The Mahkutai* [1996] AC 650 at 660.

30

*The Pioneer Container* [1994] 2 AC 324 at 339–340; *The Mahkutai* [1996] AC 650.

area through the argument that the exclusion clause in a contract between A and B indirectly protects C from liability, in tort, for negligence, by negating, or limiting, the duty of care which C owes to A. The 'contractual background', particularly questions of the allocation of the need to insure, may serve to prevent the duty of care arising between a contracting party and a third party, in particular between the owner of a building and a sub-contractor carrying out work on it. In each case, the contract terms and the background more generally will need to be considered<sup>31</sup>. Further, it might be contended that indirect enforcement of the exemption could be achieved if B applied to stay A's action against C<sup>33</sup>.

## The Burden of the Clause

### [3.66]

A different problem arises where the exemption clause is contained in a contract between B and C and the question is whether C can rely upon it in an action taken by A. Again, prima facie, privity of contract would prevent any such reliance<sup>1</sup>. However, C may be able to rely upon the clause where what is in question is damage done to A's goods by C, and A can be regarded as having expressly or impliedly consented to B, the bailee of the goods, giving possession of the goods to C as a sub-bailee on the relevant terms<sup>2</sup>. It may also be possible to find that there is an implied contract between A and C. In the stevedore-consignee situation, such a contract was seen as arising on the basis of the consignee's acceptance of the bill of lading and request for delivery of the goods thereunder<sup>3</sup>.

## The Unfair Contract Terms Act 1977

### Scope of the Unfair Contract Terms Act 1977

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31

*Southern Water Authority v Carey* [1985] 2 All ER 1077; *Norwich City Council v Harvey* [1989] 1 All ER 1180; *Marc Rich & Co v Bishop Rock Marine, The Nicholas H* [1995] 3 All ER 307; *British Telecommunications plc v James Thomson & Sons (Engineers) Ltd* [1999] 2 All ER 241; *John F Hunt Demolition Ltd v ASME Engineering Ltd* [2007] EWHC 1507 (TCC), [2008] 1 All ER 180, [2008] 1 All ER (Comm) 473. It would seem easier to draw such a conclusion where the terms in question are well-known standard terms.

32

From C's perspective.

33

*Gore v Van der Lann* [1967] 2 QB 31; *Snelling v John G Snelling Ltd* [1973] QB 87.

1

*Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343; *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785 at 817.

2

*Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Singer (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 167–168; *The Captain Gregos (No 2)* [1990] 2 Lloyd's Rep 395 at 405; *The Pioneer Container* [1994] 2 AC 324; *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2003] 2 All ER 785, Lord Hobhouse, [132]–[138].

3

*The Eurymedon* [1975] AC 154 (see now Carriage of Goods by Sea Act 1992), by analogy with *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575. But see *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446. Acts done by a consignee who was then acting simply as the agent of the seller would not generate such an implication (*The Aliakmon* [1986] AC 785).

### [3.67]

The Act came into force on 1 February 1978, affecting contracts made after that date<sup>1</sup>. Its name, the 'Unfair Contract Terms Act 1977', can be regarded as misleading. It does not deal with 'unfair terms' as such and the Unfair Terms in Consumer Contracts Regulations 1999 are much more aptly named<sup>2</sup>. The 1977 Act is basically<sup>3</sup> concerned with terms or notices which 'exclude or restrict liability', but that should not be understood restrictively<sup>4</sup>, and it provides some scope for looking beyond the form of a term or notice in deciding upon its applicability<sup>5</sup>. There are provisions which deal with attempts to evade the application of UCTA 1977 in various ways<sup>6</sup>.

The Act affects terms or notices falling within its scope in one of two ways. In some cases they are rendered automatically ineffective. In others they are ineffective except in so far as it can be established<sup>7</sup> that they satisfy the requirement of reasonableness. The sections which state that a term or notice is to be affected in one of those ways can loosely be described as the active sections. Basically they cover:

- (i) cases involving negligence – s 2;
- (ii) contracts in which one party deals as consumer or on the other's written standard terms of business – s 3;
- (iii) contracts for the sale of goods or hire purchase or other contracts under which possession or ownership of goods passes – ss 6 and 7;
- (iv) contracts requiring someone who deals as consumer to indemnify another – s 4;
- (v) where there is a 'consumer guarantee' – s 5;
- (vi) where there is an attempt to evade the operation of the Act through a term in a second contract – s 10.

(It should also be noted that s 8 substituted a new s 3 into the Misrepresentation Act 1967 so that exemption clauses dealing with misrepresentation are subject to the requirement of reasonableness as set out in UCTA 1977, s 11). However, there are further restrictions on the basic situations in which UCTA 1977 may be relevant. It is generally only relevant to 'business liability'<sup>8</sup> and there are specific ousters, in whole or in part, of certain contracts or terms<sup>9</sup>.

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1

UCTA 1977, s 31(2).

2

See para [3.97](#).

3

UCTA 1977, s 4 specifically covers indemnities used against those who deal as consumers.

4

UCTA 1977, s 13(1) see para [3.75](#).

5

See, in particular, the final part of UCTA 1977, ss 13(1) and 3(2)(b).

6

UCTA 1977, s 10 – evasion by means of secondary contract. Sections 3(2)(b), 13 – evasion by means of the form of the term or notice. Section 27 – evasion by choice of law.

7

UCTA 1977, s 11(5) – ie the burden of proof lies on the person asserting that the clause is reasonable.

8

When the Consumer Rights Bill 2014 becomes law, UCTA 1977 will no longer apply to consumer transactions and the Unfair Terms in Consumer Contracts Regulations 1999 will be repealed<sup>10</sup>. This section should therefore be read with these developments in mind.

### [3.68]

**Business liability** With the exception of UCTA 1977, s 6<sup>1</sup>, s 1(3) states that ss 2–7 only apply to business 'liability', and the exception in s 6 is of limited effect<sup>2</sup>. 'Business liability' is liability for breach of obligations or duties arising<sup>3</sup>:

- (a) from things done or to be done by a person in the course of a business (whether his own business or another's); or
- (b) from the occupation of premises used for business purposes of the occupier<sup>4</sup>.

There is no definition of 'business'<sup>5</sup> but it is stated to include 'a profession and the activities of any government department or local or public authority'<sup>6</sup>.

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UCTA 1977, s 1(3).

9

UCTA 1977, Sch 1, ss 26, 27(1), 29.

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As at August 2014, the Consumer Rights Bill is at the Second Reading stage of the House of Lords and will enter the Committee Stage in October 2014 ([services.parliament.uk/bills/2014/consumerrights.html](http://services.parliament.uk/bills/2014/consumerrights.html)).

1

UCTA 1977, s 6(4).

2

It deals with attempts to exclude or restrict liability for certain statutorily implied terms, most of which are only implied where the relevant party contracts in the course of a business – see eg SGA 1979, s 14(2),(3).

3

UCTA 1977, s 1(3).

4

UCTA 1977, s 1(3) as amended by the Occupier's Liability Act 1984. There is an exclusion from the scope of (b) in relation to liability stemming from the dangerous state of premises. Such liability does not fall within the Act when it is to someone entering the premises for educational or recreational purposes, provided that granting that person access does not fall within the business purposes of the occupier.

5

In doubtful cases it would seem to be a matter of weighing the relevant factors present such as the presence or absence of the profit motive (*Corfield v Sevenways Garage* (1984) 148 JP 648; *Blakemore v Bellamy* (1982) 147 JP 89; *Abernethie v A M & J Kleiman Ltd* [1970] 1 QB 10, *R v Bow Street Magistrates' Court, ex p Joseph* (1986) 150 JP 650; but see *Building and Civil Engineering Holidays Schemes v Clark* (1960) 39 TC 12; *BBC v Johns* [1965] Ch 32; *Town Investments Ltd v Department of Environment* [1976] 3 All ER 479, [1976] 1 WLR 1126, Buckley LJ at 1149; *Customs and Excise Comrs v Fisher* [1981] 2 All ER 147, Gibson J at 157; *Ensign Tankers (Leasing) Ltd v Stokes* [1992] 1 AC 655, [1992] 2 All ER 275; *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1888) 22 QBD 279, Lord Coleridge CJ, at 293), the accoutrements of business such as premises or stationary (*Corfield v Sevenways Garage* (1984) 148 JP 648; *Southwark London Borough v Charlesworth* (1983) 147 JP 470; but see *Abernethie v A M & J Kleiman Ltd* [1970] 1 QB 10), the frequency of the type of transaction in question (*Pickford v Quirke* (1927) 13 TC 251; *Leach v Pogson* (1962) 40 TC 585, [1962]

### [3.69]

**'In the course of a business'** In most cases<sup>1</sup>, in order for UCTA 1977 to apply, s 1(3)(a) requires the relevant obligation or duty to have arisen 'from things done or to be done ... in the course of a business'. There is no definition of 'in the course of a business', in the Act but it also appears in s 12, in relation to the determination of whether someone 'deals as consumer', and, in that context, its meaning was considered by the Court of Appeal in *R & B Customs Brokers v United Dominion Trust Ltd*<sup>2</sup>. In that case, it was stated that for a transaction to be 'in the course of a business' it had to be 'integral' to the business, or if merely incidental to it, of a regularly occurring type. This will be considered further below<sup>3</sup>. Here the point should be made that it can be forcibly contended that this approach to 'in the course of a business' is too narrow for the purposes of s 12 and that is even more clearly the case in the context of s 1(3), where it determines the basic scope of the Act<sup>4</sup>. It can be contended that it would be more appropriate if transactions which were incidental to the business were encompassed as such, without any reference to the regularity of their occurrence<sup>5</sup>. That type of approach has been taken to the meaning of 'in the course of a business' in the Sale of Goods Act 1979, where the phrase has been seen merely to distinguish between 'a sale made in the course of a seller's business and a purely private sale of goods outside the confines of the business (if any) carried on by the seller'<sup>6</sup>.

### [3.70]

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TR 289, but see *American Leaf Blending Co v Director General of Inland Revenue* [1979] AC 676, Lord Diplock). On hobbies see *Rolls v Miller* (1884) 27 Ch D 71, Lindley LJ at 88; *Blakemore v Bellamy* (1982) 147 JP 89; *Corfield v Sevenways Garage Ltd* [1985] RTR 109, Mann LJ at 117; *Customs and Excise Comrs v Fisher* [1981] 2 All ER 147, Gibson J at 157. On the dealings of clubs see *Addiscombe Garden Estates v Crabbe* [1958] 1 QB 513; *Carlisle and Silloth Golf Club v Smith* [1913] 3 KB 75; *John v Matthews* [1970] 2 QB 443; *Building and Civil Engineering Holidays Management Scheme Ltd v Clark* (1960) 39 TC 12; *Cahalne v Croydon London Borough Council* (1985) 149 JP 561; *IRC v Stonehaven Recreation Ground Trustees* 1930 SC 206, 15 TC 419; *Carnoustie Golf Course Committee v IRC* 1929 SC 419, 14 TC 498. See also *Oxford Gene Technology Ltd v Affymetrix Inc* [2001] FSR 136, Aldous LJ, para 40, in relation to a company set up for Research and development and to commercialise the product or process: 'business' does 'not import any limitation as to the stage of research and development...'.  
6

UCTA 1977, s 14.

1

But see UCTA 1977, s 6(4).

2

[1988] 1 All ER 847.

3

See para 3.83.

4

Law Com No 69, para 9.

5

See further para 3.83 and see Kidner 'The Unfair Contract Terms Act 1977 – Who Deals as Consumer?' (1987) NILQ 46.

6

*Stevenson v Rogers* [1999] 1 All ER 613, 623.



**Excluded contracts or terms – Schedule 1**<sup>1</sup> Schedule 1 of UCTA 1977 ousts the operation of ss 2–4 and 7 in relation to certain contracts or parts of contracts. Paragraph 1 contains the most extensive ouster. It states that ss 2–4 do not extend to:

- (a) any contract of insurance (including a contract to pay an annuity on human life);
- (b) any contract so far as it relates to the creation or transfer of an interest in land, or to the termination of such an interest, whether by extinction, merger, surrender, forfeiture or the like;
- (c) any contract so far as it relates to the creation or transfer of a right or interest in any patent, trade mark, copyright, registered design, technical or commercial information, or other intellectual property, or relates to the termination of any such right or interest;
- (d) any contract so far as it relates –
  - (i) to the formation or dissolution of a company (which means any body corporate or unincorporated association and includes a partnership), or
  - (ii) to its constitution or the rights and obligations of its corporators or members;
- (e) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.<sup>2</sup>

A distinction has to be made between the wording of sub-para 1(a) and the rest of the paragraph<sup>3</sup>. Sub-paragraph 1(a) ousts from the scope of ss 2–4 ‘any contract of insurance’. This contrasts with the rest of the paragraph where the exclusion is only of any contract ‘so far as it relates to’ any of the specified matters. Sub-paragraphs (b)–(e) may oust from UCTA 1977 part of a contract which is not primarily concerned with the matters referred to in those sub-paras, because that part of the contract does ‘relate to’ a relevant matter<sup>4</sup> and, similarly, the Act may apply to part of a contract even though the contract is primarily concerned with one of those matters<sup>5</sup>.

There is limited restriction on the scope of UCTA 1977, ss 2–4 and 7 in para 2 of Sch 1. That paragraph is concerned with:

- (a) any contract of marine salvage or towage;

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1

The Law Commission consultation on the unification of UCTA and UTCCR envisages the existing exemptions from UCTA continuing for business to business contracts in any new legislation: see para 3.67, n 10 above.

2

There is some lack of uniformity in the approach to the meaning of ‘securities’ here. *Micklefield v SAC Technology Ltd* [1990] 1 WLR 1002; *Panagopoulos v Michaelos* (2 December 1994, unreported); *Philip Alexander Securities & Futures Ltd v Bemberger* [1996] CLC 1757. See also 385 HL Deb, col 521.

3

*Salvage Association v CAP Financial Services Ltd* [1995] FSR 654 at 663. *Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002.

4

*Micklefield v SAC Technology Ltd* [1991] 1 All ER 275, [1990] 1 WLR 1002.

5

A wide approach has been taken to ‘relates to’: *Electricity Supply Nominees Ltd v IAF Group plc* [1993] 3 All ER 372, [1993] 1 WLR 1059, *Star Rider Ltd v Innpreneur Pub Co* [1998] 16 EG 140, *Unchained Growth III plc v Granby Village (Manchester) Management Co Ltd* [2000] 1 WLR 739, [1999] All ER (D) 1077. But see *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654. See also 385 HL Deb, Col 518.

- (b) any charterparty of a ship<sup>6</sup> or hovercraft; and
- (c) any contract for the carriage of goods by ship or hovercraft.

The application of s 2(1) is not ousted in relation to these contracts in any case, and the rest of ss 2–4<sup>7</sup> and 7 also remain applicable in favour of a party dealing as consumer. Similarly under para 3, except in favour of a person dealing as consumer, there is an ouster of the application of ss 2(2), 3 and 4:

‘Where goods are carried by ship or hovercraft in pursuance of a contract which either –

- (a) specifies that as a means of carriage over part of the journey to be covered, or
- (b) makes no provision as to the means of carriage and does not exclude that means.’

In addition, except in favour of the employee<sup>8</sup>, UCTA 1977, s 2 does not extend to contracts of employment<sup>9</sup> and s 2(1) does not ‘affect the validity of any discharge and indemnity given by a person or in connection with an award to him of compensation for pneumoconiosis attributable to employment in the coal industry, in respect of any further claim arising from his contracting the disease<sup>10</sup>’.

### [3.71]

**International supply contracts** The restrictions imposed on some terms by UCTA 1977<sup>1</sup> do not apply to international supply contracts<sup>2</sup>. Such a contract is defined as requiring possession of the following characteristics<sup>3</sup>: firstly, either it is a contract of sale of goods or it is one under which possession or ownership of goods passes, and:

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6

*Browner International Ltd v Monarch Shipping Co Ltd, The European Enterprise* [1989] 2 Lloyd's Rep 185.

7

In any event, s 4 only applies in favour of a person dealing as consumer.

8

*Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293 at 301.

9

UCTA 1977, Sch 1, para 4.

10

UCTA 1977, Sch 1, para 5.

1

The control of exemption clauses dealing with misrepresentation does not occur under UCTA 1977 but the Misrepresentation Act 1967, as amended by the UCTA 1977. On that basis, it would seem that the restrictions of the 1967 Act would apply to international supply contracts.

2

UCTA 1977, s 26. In their consultation paper on unifying UCTA and UTCCR the Law Commission have invited views on whether the International business exemption should continue in the context of business to business contracts – Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*.

3

UCTA 1977, s 26(3).

‘it is made by parties whose place of business (or, if they have none, habitual residences) are in the territories of different states’<sup>4</sup>

and, secondly, that:<sup>5</sup>

- ‘(a) the goods in question are, at the time of conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to another; or
- (b) the acts constituting the offer and acceptance have been done in the territories of different States; or
- (c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.’

In relation to the first part of the requirements for the application of the section, the reference to a contract which is ‘made by the parties’ and then refers to the place of business of the parties ‘is referring to the principals to the contract and not to agents through whom the contract may have been made’<sup>6</sup>. The place of business of any such agents could be fortuitous or contrived. The court would take a business sense approach in ascertaining who the contracting parties are. In *Kingspan Environmental Ltd v Borealis A/S*<sup>7</sup> for example, although the defendant’s subsidiary was based in the UK, the court held that as the invoices were clearly issued by the head office in Denmark, the relevant defendant (here the claimant had sued the entire corporate group) had their place of business in Denmark. The contract between them and K (which was established in the UK) was therefore one for the international supply of goods. Hence, UCTA 1977 did not apply to the exemption clause in the contract.

In (c), in the second part of the requirements for the application of the section, the use of the word ‘to’ requires some international movement of goods<sup>8</sup>. In (a) there is no requirement that delivery to another state be an obligation under the contract. (a) covers the situation where ‘the goods in question will be transported across national boundaries, not necessarily in order to fulfil the terms of the contract, but in order to achieve its commercial object’<sup>9</sup>. So, ‘if a person who carries on business abroad, hires equipment from a supplier in this country in circumstances where both know that the intention is for it to be used abroad, the lease is one pursuant to which the goods will be carried from the territory of one state to the territory of another within the meaning of s 26(4)(a)’<sup>10</sup>.

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4

The Channel Islands and Isle of Man being treated as different states from the UK for these purposes.

5

UCTA 1977, s 26(4)

6

*Ocean Chemical Transport v Exnor Craggs* [2000] 1 All ER (Comm) 519, [45].

7

[2012] EWHC 1147 (Comm).

8

*Amiri Flight Authority v BAE Systems plc* [2004] 1 All ER (Comm) 385.

9

*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 2 All ER (Comm) 1050 at [28].

10

*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 2 All ER (Comm) 1050 at [28]. In *Air Transworld Limited v Bombardier Inc* [2012] EWHC 243 (Comm) the court found that the agreement had clearly anticipated that the aircraft would be flown out of Canada to the place of

### [3.72]

**Choice of law** Section 27 of UCTA 1977 deals with conflict of laws points. Subsection (1) ousts from the scope of UCTA 1977 contracts which are subject to the law of any part of the UK only by choice of the parties and which would, apart from that choice, be subject to some other law<sup>1</sup>. Subsection (2) relates to the reverse situation, dealing with attempted evasion of UCTA 1977 by choice of law. It states that the Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the UK where (either or both):

- ‘(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or
- (b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the UK, and the essential steps necessary for the making of the contract were taken there, whether by him or others on his behalf.’

### [3.73]

**Saving for other legislation** Section 29(1) prevents the Act from affecting any contractual provision which:

- ‘(a) is authorised or required by the express terms or necessary implication of an enactment; or
- (b) being made with a view to compliance with an international agreement to which the UK is a party, does not operate more restrictively than is contemplated by the agreement.’

The section also provides for certain terms to be taken to satisfy the requirement of reasonableness.<sup>1</sup>

## Terms subject to UCTA 1977

### [3.74]

**Terms excluding or restricting liability** For the most part<sup>1</sup>, the active sections of UCTA 1977 impact upon terms (and sometimes notices) which exclude or restrict liability. Section 13(1) can be viewed as extending the operation of those sections<sup>2</sup>. It states:

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residence of the buyer. Clauses which were considered to be relevant included those dealing with pre-inspection of the aircraft for flight, export taxes and formalities, certificate of airworthiness etc.

1

An example of this section in action is seen in *Deutsche Bank (Suisse) SA v Gulzar Ahmed Khan and Others* [2013] EWHC 482 (Comm) – there the contract was more closely connected to Switzerland and would ordinarily have been subject to Swiss law but for the English applicable law clause. As such, UCTA 1977 was held not to apply to the various terms alleged by one party to be unfair or unreasonable. See also *Air Transworld Limited v Bombardier Inc* [2012] EWHC 243 (Comm).

1

A term ‘incorporated or approved by, or incorporated pursuant to a decision or ruling of a competent authority acting in the exercise of any statutory jurisdiction or function and it is not a term in a contract to which the competent authority is itself a party’. ‘Competent authority’ means ‘any court, arbitrator or arbiter, government department or public authority’ (UCTA 1977, s 29(3)).

1

The exceptions being UCTA1977, ss 3(2)(b), 4 and 10. The Law Commission consultation paper envisages extending protection for businesses beyond exemption clauses where non-individually negotiated terms are in question (Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*). In the consumer context, such protection is already provided by the Unfair terms in Consumer Contracts Regulations 1999.

2

‘To the extent that this part of this Act prevents the exclusion or restriction of liability it also prevents –

- (a) making the liability or its enforcement subject to restrictive or onerous conditions
- (b) excluding or restricting any right or remedy in respect of the liability, or subjecting any person to any prejudice in consequence of his pursuing any such right or remedy
- (c) excluding or restricting any rules of evidence or procedure.’

This first part of UCTA 1977, s 13(1) does not present difficulties, it covers, for example, clauses placing a time limit on the notification of breach<sup>3</sup>, or the making of a claim<sup>4</sup>, or stating the location of the court, or jurisdiction, in which a claim is to be made<sup>5</sup> (s 13(1)(a)), clauses preventing set off<sup>6</sup> and other rights<sup>7</sup> (s 13(1)(b)), and clauses reversing a burden of proof<sup>8</sup> (s 13(1)(c)). However, there is an additional, and more problematic final part to s 13(1) which is considered below.

### [3.75]

**Excluding or restricting obligations – identifying exemption clauses** The final part of s 13(1) ensures that the scope of the Act extends to some terms or notices which take the form of part of the definition of the obligation. In so far as relevant s 13(1) states:

‘To the extent that this part of this Act prevents the exclusion or restriction of any liability ... sections 2 and 5 to 7 also prevent excluding or restricting any liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.’

The Act does not state which terms or notices which ‘exclude or restrict the relevant obligation or duty’ are to be treated in this way. The section seems to highlight the need for a ‘form and substance’ distinction to be made<sup>1</sup>, to identify terms or notices which in form relate to the definition of the obligation

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*Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257.

3

*Thomas Witter Ltd v TBP Industries Ltd* (1994) 12 Tr LR 145.

4

*Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con LR 1, Neill LJ; *Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited* [2013] EWHC 1191 (TCC).

5

*Snooks v Jai-King (GB) Ltd* [2006] EWHC 289 (QB), [2006] All ER (D) 325 (Feb) at [27].

6

*Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257; *Fastframe Franchises Ltd v Lohinski* (3 March 1993, unreported); *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, Pill LJ at 506. See also *Lease Management Services Ltd v Purnell* (1994) 13 Tr LR 337 at 344.

7

*Lease Management Services Ltd v Purnell* (1994) 13 Tr LR 337 at 344.

8

*Eg Fred Chappell Ltd v National Car Parks Ltd* (1987) Times, 22 May, Lexis.

1

*Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293, Stuart Smith LJ at 301; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at p 626; *Smith v Eric S Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL, Lord Griffiths at 530; *Cremdean Properties v Nash* [1977] EGD 63. But see *Stewart Gill Ltd v*

but are, in substance exclusions of liability, but does not, itself, provide any basis for the distinction to be drawn. The need for a 'form and substance' approach can be understood in the context of the argument that an exclusion clause is not a distinct type of clause at all, but simply part of the definition of the obligations. This argument can easily be understood when it is remembered that a clause which is in the form of an exclusion of liability could have been drafted instead as a clause in the form of part of the definition of the obligations<sup>2</sup>. For example, consideration can be given to the situation in which A has agreed to sell goods to B and deliver them by a certain date. A may wish to ensure that he will not be liable to B if industrial action causes late delivery. A could achieve that by a clause in more than one form. A could simply use a clause stating that liability for late delivery is excluded where it is caused by industrial action. Alternatively, A could specify that he, or she, is only obliged to deliver by the stated date if there is no industrial action. The same result can be achieved by two different forms of clause and, as has been indicated, it has been contended<sup>3</sup> that there is no distinction between exclusion clauses and clauses defining the obligations other than at the level of form. The basis of this is that both forms of clause mark out the boundaries within which a legal remedy is available. A clause in the form of an exclusion of liability does that by removing the legal remedies for breach of what would be, without the clause, an obligation. A clause in the form of part of the definition of the obligations simply states the obligations. The equation of exclusion clauses with those defining the obligation could have led to avoidance of the Act by the redrafting of exclusion clauses in the form of part of the definition of the obligation. A similar point can be made in relation to non-contractual notices.

However, it can be contended that it is possible to distinguish terms or notices which exclude liability from those which form part of the definition of the obligations at a level other than form and that such a distinction is assumed, and required, by last part of s 13(1)<sup>4</sup>. In the absence of some central definition of terms or notices excluding liability, there is nothing in the Act to indicate how this form and substance distinction is to be made. There has been some indication by the courts that what is required for the operation of the last part of s 13(1) is a 'but for' test. In *Smith v Eric S Bush (a firm)*<sup>5</sup> the approach was taken that as there was an obligation, and liability, 'but for' the disclaimer, the disclaimer was treated as a notice 'excluding or restricting liability' falling within the scope of s 2. The same approach was indicated in relation to contract terms in *Phillips Products v Hyland*<sup>6</sup>.

There has been little consideration of the 'but for' test<sup>7</sup>. However, the more basic criticism is simply that it is too wide, and that it does not make an appropriate 'form and substance' distinction. Such a test would,

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*Horatio Myer & Co Ltd* [1992] 2 All ER 257, Lord Donaldson at p 625; *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April, 1993, unreported), HH Judge Bowsher QC (Off Ref).

2

The reference here is to what are sometimes called the 'primary obligations' and not the 'secondary obligations' which come into play once a breach has occurred eg paying damages.

3

Coote *Exception Clauses* (1964) Chs 1 and 10.

4

Note also the approach taken to the scope of s 3(2)(b) in *Paragon Finance v Staunton* [2001] EWCA Civ 1466, [2001] 2 All ER (Comm) 1025 and the underlying assumption that even the broader parts of UCTA are restricted to what can be regarded as an exemption clause.

5

[1990] 1 AC 831, [1989] 2 All ER 514, HL, Lord Griffiths at 530.

6

[1987] 2 All ER 620 at 625.

7

for example, seem to render subject to the Act any express term contradicting a term which would, absent the clause, be implied into a contract falling within an appropriate section of the Act<sup>8</sup>. 'But for' the clause the implication would be made. In addition, the 'but for' test would seem to make it impossible for the parties to define an obligation to take due care by stating it widely and then qualifying it, without it being subject to s 2 of the Act. However, perhaps the width of the 'but for' test is most forcefully illustrated by reference to the terms implied by the Sale of Goods Act 1979. In relation to a sale to someone 'dealing as consumer', s 6(2) of the UCTA 1977 prevents the exclusion or restriction of the terms implied by ss 13–15 of the SGA 1979. If the sale is not to someone who deals as consumer then, under s 6(3), such a clause is effective only if it satisfies the requirement of reasonableness. The point to be made here is that the 'but for' test would seem to make subject to the 1977 Act any clause which was merely intended to show that the transaction was not one in which it was appropriate to imply the term in question. For example, a clause indicating that 'sale' goods were simply sold as seen and not 'by description' would be subject to the Act as a clause in the absence of which SGA 1979, s 13(1) would imply a term<sup>9</sup> that the goods should correspond with their description<sup>10</sup>. It seems inappropriate for it to be concluded that the Unfair Contract Terms Act 1977 should apply to all such clauses, particularly when it is borne in mind that if the sale is to a consumer the seller cannot even argue that his clause should survive the application of the Act because it is reasonable.

The 'but for' test is too wide and all embracing and is too mechanistic to make an appropriate 'form and substance' distinction for the purposes of s 13(1). It can be asked whether any such distinction exists outside of the Act which could be imported into it. Is there some distinction 'in nature' between exclusion clauses and those defining obligations which could provide a form and substance distinction for the purposes of the Act? When what is being sought is a distinction between terms or notices defining obligations and those excluding liability 'in nature' irrespective of their form, then what must be looked at is the creation, or origin, of the obligations and the relationship of the term, or notice, in question to that creation. In other words, the distinction which must be made is between the exclusion of an obligation purely by words and its circumstantial displacement<sup>11</sup>. If there is circumstantial displacement, the term or notice in question is 'in nature' part of the definition of the obligation. If the displacement is purely by words, then the term or notice – the words in question – is, in nature, an exclusion of liability. As has already been indicated, this requires consideration of the origin of the relevant obligation and this may explain why no simple test has been identified. Other than at the most general of levels, saying nothing more specific than has so far been stated here, it is not possible to identify a single test because of the

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But see *National Westminster Bank v Utrecht-America Finance Co* [2001] 3 All ER 733 for an approach taking account of the type of factors which it is contended here should be considered. For a criticism more in keeping with Coote's views see *First National Commercial Bank v Loxleys* [1997] PNLR 211.

8

Provided the liability existing in the absence of the clause is appropriate to bring the clause within the Act eg negligence liability falling within s 2. *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293. But see *L Gent and Sons (a firm) v Eastman Machine Co Ltd* [1986] BTLC 17, Lexis, Oliver LJ.

9

Unless it is asked whether the contents of the clause has gained any existence independent of the clause containing it, in the minds of the parties, so that such existence remains even though the clause itself is removed by the 'but for' test.

10

Contrast *Cavendish Woodhouse v Manley* (1984) 82 LGR 376 and *Hughes v Hall* [1981] RTR 430.

11

Yates, *Exclusion Clauses in Contracts* (2nd edn, Sweet & Maxwell, 1982) at p 78, sees 'The problem with this part of s 13(1)' as being that 'it ignores the distinction between the purely *verbal* delation of a primary duty ... and the *circumstantial* displacement of a primary duty...'. The point being made here is that such a distinction should be understood as inherent in the operation of the latter part of s 13(1) if sense is to be made of the provision.

different bases of creation of different obligations. There is a distinction between the basis of the creation of an express contractual obligation and that of a duty of care in tort. There is also a distinction between an express contractual obligation and a contractual obligation stemming from a term implied by statute. What needs to be considered in each case is the relationship of the particular term, or, in the tort context, the particular non-contractual notice, to the creation of the obligation. However, there is one further point which will be relevant in each case, no matter what the basis of the obligation, and that is that the situation must be viewed absent the artificialities which the law has placed upon it. The rules about incorporation of contract terms, for example, are far divorced from the realities of the situation, even when viewed through the eyes of the 'reasonable person'. These points can be further explained and illustrated in the context of the determination of the nature of a term when the obligation to which it relates is one stemming from the express terms of a contract.

Obligations stemming from express terms of the contract are generally seen as founded on the intention of the parties, objectively ascertained<sup>12</sup>. Basically, the nature of a clause should be determined by viewing its relationship to those intentions. To determine whether a clause is definitional or exclusionary, in nature, those intentions should be projected to the point at which the role of the clause becomes clear – the point of performance. In other words what should be considered is the parties reasonable expectations of performance. If the clause is then seen as producing a contractual performance which is less than that reasonably expected, it is identified as an exclusion clause. Of course, at the legal level, the terms as a whole are to be seen as generating 'expectations' of a performance which is protected by the remedy of damages ie at this level the reasonable expectations of performance equate with the performance actually required by the contract terms. At a factual level the parties reasonable expectations of the contractual performance may differ from those legally derived and protected expectations, because of the artificialities which may be involved in the contracting process, particularly when long, standard form documents are used. This artificiality may occur through both the manner of incorporation of a term into a contract and also through the style of drafting used. There can, for example, be 'cases in which the application of small print provisions would enable a party to perform a contract in a substantially different manner from that which could reasonably have been expected from a perusal of its primary terms'<sup>13</sup>. Such artificialities can occur in the drafting of terms and in almost every form of incorporation. They can lead to a situation in which 'the relatively unsophisticated or unwary party will not realise what or how little has been promised'<sup>14</sup>. When it is said that the assessment must be made at the factual level, what is required is a consideration of the impact of the terms on the parties' reasonable expectations, absent any such artificialities which may be present in their assessment at the legal level, as terms<sup>15</sup>. (Of course, it is nevertheless the reasonable expectations of the contractually required performance which are in question.) It is in the generation of that gap between the factually<sup>16</sup> and legally

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12

Eg *Heilbut, Symmons & Co v Buckleton* [1913] AC 30. But see eg P S Atiyah *Promises, Morals and the Law*.

13

*Liberty Life Insurance Co v Sheikh* (1985) Times, 25 June, Lexis, Kerr LJ.

14

Law Com Rep No 69 (1975) para 145.

15

Note the approach taken in *National Westminster Bank v Utrecht-America* [2001] EWCA Civ 658, [2001] 3 All ER 733, [49], to the question of whether a clause was duty defining or an exemption clause falling within the *Canada Steamship* rules of construction (on such rules, see para 3.57 above).

16

The parties' reasonable expectations as the factual level should be arrived at by taking into account all the relevant facts. It will mean taking into account many facts which are also relevant to the legal status of the clause in question as a term, but it should not require the drawing of the same conclusions. A clause



generated reasonable expectations of the contractual performance that the exclusion clause can be identified 'in nature'. The distinction is made between the exclusion of an obligation purely by words and its circumstantial displacement, when the words can be viewed as part of the parties' intention, as shown in their reasonable expectations.

In relation to obligations with different bases, the nature of a term or notice will not be determinable by the parties' reasonable expectations at the factual level but, in each case, what is required is the same type of examination of the relationship of the term or notice to the obligations, absent the artificialities. It can be contended that this type of approach leads to the distinction between form and substance required by the UCTA 1977 either under the last part of s 13(1) which is applicable to ss 2 and 5 to 7, or in the context of the treatment of contract terms under s 3(2)(b)(ii).

### [3.76]

**Indemnities** UCTA 1977, s 4 expressly subjects to the requirement of reasonableness contract terms which require someone 'dealing as consumer' to indemnify another in relation to liability for negligence or breach of contract. However, in some circumstances an indemnity clause<sup>1</sup> will be treated as a term excluding or restricting liability and thus falling within the more extensive provisions of the Act dealing with clauses which exclude or restrict liability. Currently, in applying the wider provisions of UCTA 1977 to indemnities a distinction has to be drawn between clauses acting reflexively and those acting as insurance clauses, ie a clause may operate when the liability is to the indemnifier (reflexive) or when it is to a third party (insurance). It has been held that s 2 can apply to a clause acting reflexively<sup>2</sup> but not to an insurance clause<sup>3</sup>, and the same reasoning would make similarly applicable other sections which cover terms which exclude or restrict liability<sup>4</sup>.

## Negligence – UCTA 1977, s 2

### [3.77]

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on the back of a ticket may be incorporated by reasonably sufficient notice if the front of the ticket says, 'for conditions see back', but the significance a clause acquires as a contract term may well not carry through to ensure its inclusion in the reasonable expectations of performance at the factual level. Trade practice and course of dealing may well be relevant to the assessment at the factual level, as they are in relation to the question of incorporation, but their relevance to the reasonable expectations at the factual level should be less artificial.

1

Or an analogous 'transferred servant clause' of the type considered in *Phillips Products Ltd v Hyland* [1987] 2 All ER 620 and *Thompson v Lohan* [1987] 2 All ER 631. Such clauses are not treated as indemnity clauses for the purposes of the rules of construction (*Arthur White Contractors Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508) but they may still fall within s 4 (*Thompson v Lohan* Dillon LJ at 639).

2

*Phillips Products Ltd v Hyland* [1987] 2 All ER 620. But see the assumption in *British Airports Authority v British Airways Board* (1981) Times, 8 May, Lexis, Parker J that the presence of s 4 in UCTA 1977 meant that indemnities did not fall within other sections.

3

*Thompson v Lohan* [1987] 2 All ER 631; *Jones v Northampton Borough Council* (1990) Times, 21 May, Lexis; *Hancock Shipping Co Ltd v Deacon & Trysail (Pte) Ltd, The Casper Trader* [1991] 2 Lloyd's Rep 550, Steyn J at 552; *United States v ARC Construction Ltd* (8 May 1991, unreported), Hobhouse J. But see *Re Cape plc* [2006] 3 All ER 1222 at [76].

4

In relation to s 3 see *United States v ARC Construction Ltd* (8 May 1991, unreported), Hobhouse J.

Section 2 relates to 'negligence', which is defined, in s 1(1)<sup>1</sup>, as the breach:

- (a) of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract;
- (b) of any common law duty to take reasonable care or exercise reasonable skill (but not any stricter duty);
- (c) of the common duty imposed by the Occupiers' Liability Act 1957 or the Occupiers Liability Act (Northern Ireland) 1957.'

This encompasses breaches of contractual obligations to exercise reasonable care and skill<sup>2</sup>, the common law duty of care arising under *Donoghue v Stevenson*<sup>3</sup> or *Hedley Byrne & Co v Heller and Partners*<sup>4</sup>, for example, and the common duty of care under Occupiers' Liability Act 1957, s 2(2). Section 2 of UCTA 1977 deals with the attempted exclusion or restriction of liability for negligence through 'any contract term or notice given to persons generally or to particular persons'. The reference to 'notices'<sup>5</sup> extends the coverage of the section to notices which are not contractual<sup>6</sup> and it is clear that vicarious liability is encompassed<sup>7</sup>. Under UCTA 1977, s 2(1), the relevant term or notice is rendered automatically ineffective if the negligence results in personal injury<sup>8</sup> or death. In relation to negligence resulting in other loss or damage, a term or notice excluding or restricting liability is ineffective except in so far as it satisfies the requirement of reasonableness<sup>9</sup>.

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1

*Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293.

2

The content of the contractual obligation will depend upon the terms of the particular contract but such obligations commonly arise where the contract is concerned with the provision of a service. See, for example, the term implied by Supply of Goods and Services Act 1982, s 13 where a service is supplied in the course of a business.

3

[1932] AC 562, eg *Phillips Products Ltd v Hyland* [1987] 2 All ER 620.

4

[1964] AC 465, eg *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145; *McCullough v Lane Fox & Partners Ltd* [1996] 1 EGLR 35.

5

Under UCTA 1977, s 14, a 'notice' includes 'an announcement, whether or not in writing, and any other communication or pretended communication'.

6

*Davies v Parry* [1988] 1 EGLR 147, McNeil J at 155; eg *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145; *McCullough v Lane Fox & Partners Ltd* [1996] 1 EGLR 35; *Stevenson v Nationwide Building Society* [1984] EGD 934.

7

Section 1(4). *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at 625.

8

Personal injury includes 'any disease and any impairment of physical or mental condition': s 14.

9

*Flamar Interocean Ltd v Denmac Ltd, The Flamar Pride and Flamar Progress* [1990] 1 Lloyd's Rep 434, Potter J; *Building Services (London) Ltd v Kerryredd Engineering Ltd* (12 April 1991, unreported), CA.

The scope of UCTA 1977, s 2 provides an example of the problem of determining the appropriate application of the Act when exclusions of liability can be indistinguishable, at least in form, from the definition of the obligation<sup>10</sup>. Here the problem may occur, for example, in relation to a claim for negligent misstatement where a disclaimer has been used. For the most part the courts have simply assumed that UCTA 1977 applies<sup>11</sup> or they have used the 'but for' test to arrive at that conclusion<sup>12</sup> or they may simply state that the terms defined the relationship so that no duty of care arose and s 2 had no application<sup>13</sup>.

Where a contract term or notice purports to exclude or restrict liability for negligence, UCTA 1977, s 2(3) states that 'a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk'. This prevents the evasion of the Act by a plea that a contract term or notice, excluding or restricting liability, by itself, established that *volenti* was present and thus that there was no liability<sup>14</sup>.

## Dealing as consumer or on the other's written standard terms of business – UCTA 1977, s 3

### [3.78]

UCTA 1977, s 3<sup>1</sup> covers contracts under which one party deals as consumer or on the other party's written standard terms of business. In those contracts, it subjects to the requirement of reasonableness<sup>2</sup>,

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<sup>10</sup>

See para 3.75.

<sup>11</sup>

Eg *McCullough v Lane Fox & Partners Ltd* [1996] 1 EGLR 35, Hobhouse LJ at 35; *First National Commercial Bank plc v Loxleys* [1997] PNLR 211; *Stevenson v Nationwide Building Society* [1984] EGD 934; *PartCo Group Ltd v Wragg and Scott* [2002] EWCA Civ 594, [2002] 2 Lloyd's Rep 343.

<sup>12</sup>

See para 3.75.

<sup>13</sup>

*JP Morgan Chase Bank v Springwell Navigation Corpn* [2008] EWHC 1186 (Comm), [2008] All ER (D) 167 (Jun), [602].

<sup>14</sup>

See also *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293, Stuart-Smith LJ at 298.

<sup>1</sup>

*W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146; *Liberty Life Insurance Co Ltd v Sheikh* (1985) Times, 25 June, Lexis; *Lease Management Services Ltd v Purnell Secretarial Services Ltd* (1994) 13 Tr LR 337; *United States v ARC Construction Ltd* (8 May 1991, unreported), Lexis; *St Alban's City and District Council v International Computers Ltd* [1996] 4 All ER 481, CA; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con LR 1; *Charlotte Thirty Ltd and Bison Ltd v Croker Ltd* (1990) 24 Con LR 46; *Chester Grosvenor Hotel Ltd v Alfred McAlpine Management Ltd* (1991) 56 BLR 115; *Stag Line v Tyne Shiprepair, The Zinnia* [1984] 2 Lloyd's Rep 211; *Zockoll Group v Mercury Communications Ltd* [1998] FSR 354; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498; *Peninsular and Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 136; *Paragon Finance plc v Stautnton* [2001] 2 All ER (Comm) 1025; *British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 2 All ER (Comm) 389; *Pegler v Wang* (2000) 70 ConLR 68. In the Law Commission consultation, the question of whether terms were 'individually negotiated' is preferred to that of whether they were standard, to set the basic scope of the fair and reasonable test in the business to business context – Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*.

terms by which the party who does not deal as consumer, or on whose written standard terms of business the contract is made, claims:

- (a) when in breach of contract, to exclude or restrict liability in respect of the breach (s 3(2)(a)), or
- (b) to be entitled to render a performance substantially different from what was reasonably expected (s 3(2)(b)(i)), or, in whole or in part, to render no performance at all (s 3(2)(b)(ii)).

The question of when someone deals as consumer is covered by s 12<sup>3</sup>. There is no definition of 'written standard terms of business', but it should require two questions to be considered:

- (i) does the relevant party have 'written standard terms of business' (which should be a matter of the pattern of dealing on the terms in question when the contract is of a type to which the terms are appropriate<sup>4</sup>); and
- (ii) was the particular contract made on those terms (which should depend upon the degree of variation<sup>5</sup> and also which terms were varied – some are inherently variable<sup>6</sup>)?

The burden of proving that the contract is on one party's written standard terms of business will lie on the party claiming that the statute applies<sup>7</sup>. There will usually be no difficulty with the requirement that the standard terms be written. The requirement that the 'written standard terms' have to be, in some sense, the terms of the relevant party does not prevent UCTA 1977, s 3 encompassing terms drawn up for general use by those in a particular trade<sup>8</sup>. The terms will, of course, have to have been 'adopted' by the relevant party<sup>9</sup>.

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2

UCTA 1977, s 11 – see para 3.84.

3

See para 3.83.

4

*Chester Grosvenor Hotel v Alfred McAlpine Management Ltd* (1991) 56 BLR 115. But see *McCrone v Boots Farm Sales Ltd* 1981 SLT 103, Lord Dunpark at 105; *British Fermentation Products v Compare Reavell* [1999] 2 All ER (Comm) 389 at 401 – 'usually used'. The statement of Potter J in *Flamar Interocean Ltd v The Flamar Pride* [1990] 1 Lloyd's Rep 434 at 438 is ambiguous.

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Law Com Rep No 69, para 156; *Watford Electronics v Sanderson* [2000] 2 All ER (Comm) 984 at [113]; *Hadley Design Associates v Westminster BC* [2003] EWHC 1617 (TCC) at [83]; *United States v ARC Construction Ltd* (8 May 1991, unreported); *Ferryways NV v Associated British Ports, The Humber Way* [2008] EWHC 225 (Comm), [2008] EWHC 225 (Comm), Teare J at [92] – 'although a large part of the final agreement was negotiated and was not part of the standard terms, the latter were untouced by the negotiation and remained a sufficiently significant and important part of the agreement to enable it fairly to be said that the parties dealt on the Defendant's standard terms and conditions'. In *Pegler v Wang* (1999) 70 ConLR 68 the somewhat extreme line was taken that 'so far as concerns the exclusion clauses, Pegler were dealing "on the other's written standard terms of business", and that is sufficient to cause the Act to apply to those terms.' For a somewhat different approach to that contended for here see *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654, Off Ref, at 672; *Fillite (Runcorn) Ltd v APV Pasilac* (22 April 1993, unreported).

6

*St Alban's City and District Council v International Computers Ltd* [1995] FSR 686, Scott Baker J at 706.

7

*British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 2 All ER (Comm) 389, 402.

8

One particular issue which has come to the fore in relation to whether one party deals on the other party's written standard terms of business is whether the contract between employee and employer can fall within that categorisation<sup>10</sup>. (Obviously its significance depends upon another contentious point: whether an employee 'deals as consumer' in making their contract of employment<sup>11</sup>). The line has been taken that the contract of employment of a bank employee is not made on the bank's written standard terms of business on the basis that the bank's business is banking and the terms of the employment contract are not standard terms of that business<sup>12</sup>. This obviously takes a narrow view of the scope of the 'standard terms of business' within s 3, nevertheless, the section has been seen as basically concerned with protecting the users or recipients of services and so inappropriate to the employment context<sup>13</sup>. However, the point has been made that to deny the application of s 3 to employment context is to encourage the type of distortion of interpretation in relation to employment contracts which led to the problems of the doctrine of 'fundamental breach' in contracts more generally before the introduction of UCTA<sup>14</sup>. Such a narrow interpretation need not be given to 'written standard terms of business'.

Section 3(2)(a) of UCTA 1977 covers the obvious situation of terms by which the proferens claims to exclude or restrict liability for breach of contract. It subjects such terms to the requirement of reasonableness. It may be seen as 'directed to an exemption clause of the classic type exonerating a party in default from the ordinary consequences of the default'<sup>15</sup>.

In contrast to the clear scope of UCTA 1977, s 3(2)(a), is s 3(2)(b). The latter subsection is not stated to cover exclusions or restrictions of liability but rather terms dealing with performance. Section 3(2)(b)(i) deals with the situation in which a term is being relied upon to provide a performance which is substantially different from that reasonably expected, with reasonable expectations being assessed as at the time when the contract was made<sup>16</sup>. Clearly, if the subsection is to have substance, although those

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Law Com No 69, para 151. *Cox Plant Hire (London) Ltd v Dialbola* (21 December 1983, unreported); *United States v ARC Construction Ltd* (8 May 1991, unreported); *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498. But see *St Alban's City and District Council v International Computers Ltd* [1995] FSR 686, Scott Baker J; *Schroeder Music Publishing v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, Lord Diplock at 1308.

9

*British Fermentation Products v Compare Reavell* [1999] 2 All ER (Comm) 389. 'Adoption' should be a matter of use and intention.

10

H Collins 'Legal Responses to the standard from contract of employment' (2007) 36(2) ILJ.

11

See below para 3.83, note 6.

12

*Commerzbank AG v Keen* [2006] EWCA Civ 1536, [2007] IRLR 132, [2006] 2 CLC 844. See also *Brigden v American Express Bank Ltd* [2000] IRLR 94, 631 IRLB 13 but see *Liberty Life Insurance v Sheikh* (17 June 1985, unreported), CA.

13

M Freedland *The Personal Employment Contract* (OUP, 2003).

14

H Collins 'Legal Responses to the standard from contract of employment' (2007) 36(2) ILJ.

15

*Timeload Ltd v British Telecommunications plc* [1995] EMLR 459, Sir Thomas Bingham MR.

16

expectations are of the contractual performance, they cannot be taken simply to reflect what is legally required<sup>17</sup>. There may be a divergence between the performance which is required and that reasonably expected because of complexity of drafting and the artificial way in which terms may be incorporated. Section 3(2)(b)(i) may encompass, for example, 'trap provisions' – 'cases in which the application of small print provisions would enable a party to perform a contract in a substantially different manner from that which could reasonably have been expected from perusal of its primary terms'<sup>18</sup> – or provisions conferring a discretion – it may be reasonable to expect the discretion to be exercised within narrow bounds<sup>19</sup>. However, the point should be made that if s 3(2)(b)(i) is to cover a term conferring a discretion on the proferens, the discretion must relate to the proferens performance and not that of the other party. It has been held not to apply to a term conferring a discretion on a lender as to the interest rate to be paid by the borrower<sup>20</sup>.

Section 3(2)(b)(ii) poses a problem. The point can be made that if a term entitles a party to say that something is not required by the contract then it is not part of the contractually required performance. Prima facie s 3(2)(b)(ii) appears to be circular and without content<sup>21</sup>. It has been said that UCTA 1977, s 3(2)(b)(ii) 'has no application where the contract term cannot operate alone but only in combination with

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*Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570, Webster J at 611.

17

Law Com Rep No 69, para 146; *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459; *Zockoll Group Ltd v Mercury Communications Ltd* [1999] EMLR 385; *Lahji v Post Office Ltd* (unreported, 19 December 2003); *SAM Business Systems v Hedley* [2003] 1 All ER (Comm) 465 at [62]; *Peninsular and Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 136, Potter LJ at 142. But see *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146; *Megaphone International Ltd v British Telecommunications plc* (28 February 1989, unreported); *Brigden v American Express Bank* [2000] IRLR 94; *Peninsula Business Services v Sweeney* [2004] IRLR 4.

18

*Liberty Life Insurance Co v Sheikh* (1985) Times, 25 June, Lexis, Kerr LJ. In *IG Index plc v Colley* [2013] EWHC 478 (QB) the court was not convinced that a manifest error clause (a stipulation in the spread-betting contract permitting the service provider to amend or void any bets placed by the client if there was an error that provider believed to be obvious or palpable) fell within s 3(2)(b). Stadlen J held that voiding a bet would not involve rendering no performance by the provider of its contractual obligation since once the bet was voided there would be no contractual obligation to perform. Therefore the clause did not come within the scope of s 3(2)(b). In any event the judge thought that the right to void the bets where there was a manifest error satisfied the requirement of reasonableness (at [844]–[845]).

19

*Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd* [1989] 2 Lloyd's Rep 570, Webster J at 612; *Timeload Ltd v British Telecommunications plc* [1995] EMLR 459; *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354; *Lahji v Post Office Ltd* (unreported, 19 December 2003). See also the example given by the Law Commission based on *Anglo Continental Holidays v Typaldos (London) Ltd* [1967] 2 Lloyd's Rep 61; Law Com Rep no 69.

20

*Paragon Finance plc v Staunton* [2001] EWCA Civ 1466, [2001] 2 All ER (Comm) 1025. Clearly setting the interest rate could literally be regarded as performance on the part of the proferens, but the court's approach embodies the underlying assumption that even the broader parts of UCTA are restricted to what can be regarded, in some sense, as an exemption clause. See also *Barclays Mercantile Business Finance Ltd v Marsh* [2002] EWCA Civ 948, [2002] All ER (D) 203 (Jun), Dyson LJ, para 21. For similar restrictions see *Rolls Royce Power Engineering v Ricardo Consulting Engineers* [2004] 2 All ER (Comm) 129 at [75]; *United States v ARC Construction Ltd* (8 May 1991, Unreported).

21

See *W Photoprint Ltd v Forward Trust Group Ltd* (1993) 12 Tr LR 146.

some other event<sup>22</sup>. However, it is suggested that content can be given to the section if a distinction is drawn between clauses which are part of the definition of the obligation in both form and substance and those which are only in the form of part of the definition of the obligation but which are, in substance, exclusion clauses<sup>23</sup>. Content can be found in s 3(2)(b)(ii) if the latter clauses are left out of the initial consideration of the performance required. They can then be seen as terms which are being used to claim that 'in respect of the whole or any part of his obligation' the relevant party is entitled to 'render no performance at all'.

## Indemnities – UCTA 1977, s 4

### [3.79]

Section 4 of UCTA 1977 subjects to the requirement of reasonableness<sup>1</sup>, a term by which a person who deals as consumer<sup>2</sup> is required to indemnify another in relation to liability for negligence or breach of contract. The indemnitee is not required to be the other party to the contract<sup>3</sup>. The liability may be direct or vicarious<sup>4</sup> and it may be to the indemnifier or to another<sup>5</sup>. An indemnity clause may just state that one person is to indemnify another, or it may achieve that effect in other words. It may, for example, state that one person is to be responsible for liability which is the immediate responsibility of another<sup>6</sup>. The categorisation of 'transferred servant' clauses is unclear<sup>7</sup>, but the better view would seem to be that such clauses should fall within the ambit of UCTA 1977, s 4. It has been suggested that a heavier burden is involved in establishing that an indemnity clause satisfies the requirement of reasonableness than in relation to other clauses<sup>8</sup>.

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22

*Liberty Life Insurance Co Ltd v Sheikh* (1985) Times, 25 June, Lexis.

23

See para 3.75 above.

1

See para 3.84.

2

See para 3.83.

3

UCTA 1977, s 4(1).

4

UCTA 1977, s 4(2)(a).

5

Section 4(2)(b).

6

Eg *United States v ARC Construction Ltd* (8 May 1991, unreported) Lexis.

7

*Arthur White (Contractors) Ltd v Tarmac Civil Engineering Ltd* [1967] 3 All ER 586, [1967] 1 WLR 1508; *Thompson v Lohan* [1987] 2 All ER 631.

8

*Jones v Northampton Borough Council* (1990) Times, 21 May, Lexis, Ralph Gibson LJ.

There is no provision in UCTA 1977 specifically dealing with indemnities other than those used against those who deal as consumers, but, as has been indicated, there is scope for some indemnity clauses to be regarded as clauses excluding or restricting liability and as falling within the more general provisions of the Act<sup>9</sup>.

## Guarantees of consumer goods – UCTA 1977, s 5

### [3.80]

Under UCTA 1977, s 5<sup>1</sup>, a manufacturer or distributor of goods cannot, by reference to any contract term or notice, contained in, or operating by reference to, a guarantee of the goods, exclude or restrict liability in negligence in relation to loss or damage arising from goods proving defective whilst in consumer use. The goods must be 'of a type ordinarily supplied for private use or consumption'<sup>2</sup>. The section does not apply to contracts under which possession or ownership of goods passes<sup>3</sup>. Goods are 'in consumer use' when a person 'is using them, or has them in his possession for use, otherwise than exclusively for the purposes of a business'<sup>4</sup>. A guarantee is anything in writing which contains, or purports to contain, 'some promise or assurance that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise'.

## Goods – UCTA 1977, ss 6 and 7

### [3.81]

Sections 6<sup>1</sup> and 7<sup>2</sup> of UCTA 1977 deal with terms excluding or restricting liability for breach of certain terms implied into contracts under which possession or ownership of goods passes. Section 6 covers contracts for the sale or hire purchase of goods and s 7 deals with other such contracts. It should be

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See para [3.76](#).

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Section 5 is regarded as redundant by the Law Commission and their consultation paper envisages its omission from any new legislation to unify UCTA and UTCCR: Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*.

2

See para [3.83](#).

3

UCTA 1977, s 5(3). But see UCTA 1977, ss 6 and 7 in relation to contracts under which possession or ownership of goods passes, or more generally, UCTA 1977, s 3.

4

UCTA 1977, s 5(2)(a).

1

*AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265 at 278; *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 ConLR 1. The Law Commission consultation envisages maintaining those situations in which terms are automatically ineffective in any replacement legislation. It is envisaged that, in the business to business context, individually negotiated terms will not be subject to the fair and reasonable test: Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*.

2

*Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 ConLR 46; *Stag Line v Tyne Shiprepair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211.



noted that, unlike the rest of the active sections<sup>3</sup>, s 6 is not currently restricted to 'business' liability but when the Consumer Rights Bill 2014 becomes law, the entirety of these provisions in UCTA 1977 will cease to apply to consumers. Under UCTA 1977, s 6(2), liability for the terms implied by Sale of Goods Act 1979, ss 13–15 and the corresponding terms implied into contracts of hire purchase by Supply of Goods (Implied Terms) Act 1973, ss 8–10, cannot be excluded or restricted when the acquirer of the goods 'deals as consumer'<sup>4</sup>. If the acquirer does not 'deal as consumer', then the exclusion or restriction is ineffective unless it satisfies the requirement of reasonableness<sup>5</sup>. The exclusion or restriction of the corresponding implied terms<sup>6</sup> in other contracts under which possession or ownership of goods passes are dealt with in the same way under s7<sup>7</sup>. There is a divergence of treatment under UCTA 1977, ss 6 and 7 of the exclusion or restriction of liability for breach of the implied terms as to title. Under s 6, such liability cannot be excluded or restricted<sup>8</sup>. Under s 7, the liability for breach of the term implied by Supply of Goods and Services Act 1982, s 2<sup>9</sup>, cannot be excluded or restricted<sup>10</sup>, but liability in respect of the terms implied in law in relation to (a) the right to transfer ownership of the goods, or give possession; or (b) the assurance of quiet possession can be excluded or restricted by a term satisfying the requirement of reasonableness<sup>11</sup>.

Both ss 6 and 7 are stated to apply to terms which exclude or restrict the relevant liability. The argument may be raised that a term does not exclude or restrict liability but rather prevents the implication from being made<sup>12</sup>. This raises issues of form and substance and the appropriate use of the last part of UCTA 1977, s 13(1)<sup>13</sup>.

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3

UCTA 1977, s 8 is also exempt but that is merely an amendment of s 3 of the Misrepresentation Act 1967, rather than a section operating under UCTA 1977 as such.

4

On deals as consumer see UCTA 1977, s 12.

5

UCTA 1977, s 6(3). On the requirement of reasonableness see s 11. Note the specific applicability of Sch 2 to contracts falling within ss 6 or 7: see para [3.88](#).

6

In relation to contracts for work and materials see Supply of Goods and Services Act 1982, ss 3–5, and in relation to contracts of hire see ss 8–10 of that Act. In other cases, the implication occurs at common law.

7

UCTA 1977, s 7(2) – where the acquirer deals as consumer. UCTA 1977, s 7(3) – where the acquirer does not deal as consumer.

8

UCTA 1977, s 6(1).

9

le in contracts for work and materials, barter or exchange.

10

UCTA 1977, s 7(3A).

11

UCTA 1977, s 7(4). On the requirement of reasonableness see s 11. Note the specific applicability of Sch 2 to contracts falling within ss 6 or 7: see para [3.88](#).

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## Second contracts – UCTA 1977, s 10

### [3.82]

Section 10 of the Unfair Contract Terms Act 1977 is an anti-avoidance provision, designed to prevent the use of a term in a second contract to achieve, in relation to a first contract, what the active sections would not allow to be achieved by a term in the first contract. Although obscurely drafted, it seems clear, that whether the term should be automatically ineffective, or only ineffective if it fails to satisfy the requirement of reasonableness, should depend upon what would have happened to it had it been a term excluding or restricting liability in the first contract. The section does not apply where the 'second contract' is an agreement compromising claims<sup>1</sup>. It has been suggested that UCTA 1977, s10 only applies where both contracts are not between the same parties<sup>2</sup>, but that is not required by the wording of the section and would seem to be undesirably restrictive of an anti-avoidance provision.

## 'Deals as consumer' – UCTA 1977, s 12

### [3.83]

The meaning of 'deals as consumer' is covered by UCTA 1977, s 12<sup>1</sup>. The basic definition is in s 12(1)<sup>2</sup>, which states:

'12(1) A party to a contract deals as consumer in relation to another party if –

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party does make the contract in the course of a business; and
- (c) in the case of a contract governed by the law of sale of goods or hire purchase, or by section 7 of this Act, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption<sup>3</sup>.

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Contrast the different assumptions made in *Cavendish Woodhouse Ltd v Manley* (1984) 82 LGR 376 and *Hughes v Hall* [1981] RTR 430. See also *Rogers v Parish (Scarborough) Ltd* [1987] 2 All ER 232.

13

See para 3.75.

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*Tudor Grange Holdings Ltd v Citibank* [1991] 4 All ER 1. *Re Cape plc* [2006] 3 All ER 122 at [81]–[90].

2

*Tudor Grange Holdings Ltd v Citibank* [1991] 4 All ER 1, Browne-Wilkinson V-C at 13.

1

These provisions referring to consumer transactions are likely to be replaced by the newly proposed Consumer Rights Act.

2

In *Rasbora v JCL Marine* [1977] 1 Lloyd's Rep 645 it was said (Lawson J at 651) that 'although the effect of the novation was to substitute a corporation for a private person as the buyer ... in my judgment this mere substitution did not alter the character of the original transaction to a non-consumer sale'. However, it would seem that the company which became the buyer would have been regarded as making a consumer purchase in any event.

3

This third requirement is now limited to those claiming to deal as consumers who are not 'individuals': s 12(1A) as added by the Sale and Supply of Goods to Consumers Regulations 2002: see below.

In s 12(2) there is some further limitation on those who deal as consumers where what is in question is a sale by competitive tender or auction. Originally, any buyer in such circumstances could not be regarded as 'dealing as consumer'. This has been amended by the Sale and Supply of Goods to Consumers Regulations 2002<sup>4</sup> so that in relation to an 'individual' that restriction only applies to the purchase of second hand goods, sold at a public auction at which individuals have the opportunity of attending the sale in person. In relation to someone who is not an individual the more general restriction remains in relation to the purchase of goods by auction or competitive tender. Those Regulations also impact upon goods contracts more generally. Section 12(1)(c) is dis-applied where the person claiming to deal as consumer is an 'individual'<sup>5</sup>. It is for the person claiming that a party does not deal as consumer<sup>6</sup> to show that he or she does not<sup>7</sup>.

Obviously, to determine whether someone is dealing as consumer, it is vitally important to determine when they will be contracting 'in the course of a business'<sup>8</sup>. In relation to UCTA 1977, s 12, that phrase was considered in *R & B Customs Brokers v United Dominion Trust Ltd*<sup>9</sup> and the Court of Appeal basically adopted the approach taken to the interpretation of the same phrase in the Trade Descriptions Act 1968. Dillon LJ said<sup>10</sup>:

'there are some transactions which are clearly integral parts of the business concerned, and these should be held to have been carried out in the course of those businesses; this would cover, apart from much else, the instance of a one-off adventure in the nature of trade where the transaction itself would constitute a trade or business. There are other transactions, however, such as the purchase of the car in the present case, which are at the highest only incidental to the carrying on of the relevant business; here a degree of regularity is required before it can be said that they are an integral part of the business carried on and so entered into in the course of that business.'

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SI 2002/3045 coming into force on 31 March, 2003, Regulation 14(3) substituting a new s 12(2).

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Regulation 14(2), adding s 12(1A) after s 12(1).

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It has been held that an employee can 'deal as consumer' – *Brigden v American Express Bank Ltd* [2000] IRLR 94 and see *Chapman v Aberdeen Construction Group plc* [1991] IRLR 505, Lord Caplan, Court of Session, Inner House, (but see *Degeld Options Ltd v Malook* (1 July 1990, unreported), Popplewell J). However, s 3 of UCTA has been seen as basically concerned with protecting the users or recipients of goods or services and not really appropriate to the employment context (see M Freedland, *The Personal Employment Contract* (OUP, 2003). Collins also finds it unconvincing to regard employees as 'dealing as consumers' but he does argue that s 3 should apply to standard form employment contracts on the basis that they are the employer's written standard terms of business (H Collins 'Legal Responses to the Standard Form Contract of Employment' (2007) 36(2) ILJ).

7

Section 12(3).

8

The phrase is also in s 1 and is there relevant to determining the scope of many of the active sections: see para 3.70.

9

[1988] 1 All ER 847.

10

[1988] 1 All ER 847 at 854. See also Neill LJ at 858–859.

This indicates that a contract will be made in the course of a business if it is either:

- (a) integral to the relevant party's business, in itself, or
- (b) merely incidental, in itself to that business, but regularly occurring.

For obvious reasons, cases decided under the Trade Descriptions Act 1968 should be helpful in understanding this. In the instant case, the buyer was found not to have contracted in the course of a business – it 'dealt as consumer'. It was in business as a freight forwarding agent. The purchase of a car was not integral to that business<sup>11</sup> and, as it was only the second or third such purchase, it was not a regularly occurring type of transaction. It should be noted that a company may deal as consumer, which contrasts with the definition of 'consumer' under the Unfair Terms in Consumer Contracts Regulations 1999<sup>12</sup>.

The approach taken to which transactions are integral to a business would seem to be very narrow<sup>13</sup>. It does not, for example, encompass the sale of a car by a taxi business<sup>14</sup>, or by a courier<sup>15</sup>. This would indicate that only transactions which are the basis of the business should be regarded as integral to it, eg the supply of taxi services by a taxi business and courier services by a courier. In relation to merely incidental transactions, what was stated to be required was that that type of transaction should be regularly occurring, but the tenor of the judgments would suggest not merely a requirement of regularity but also of some degree of frequency so that they can, in some way, be regarded as the 'normal practice' of the business<sup>16</sup>.

The approach taken to the meaning of 'in the course of a business' in *R&B Customs Brokers* is open to considerable criticism. In the particular case, it enlarged the availability of the greater protection provided for those who deal as consumers but inappropriately, leading to the comment as to the 'absurdity of a major trader claiming the protection afforded to a consumer whenever he stepped out of his habitual line of business'<sup>17</sup>. Further, as the phrase 'in the course of a business' appears twice in the definition in UCTA 1977, s 12 (also requiring the proferens to deal 'in the course of a business'), in other cases, it curtailed

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See also *Peter Symmons & Co v Cook* (1981) 131 NLJ 758, Lexis.

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There are now some distinctions drawn under s12 where the person claiming to deal as consumer is an 'individual' – s 12(1A) and s12(2) as added /amended by the Sale and Supply of Goods to Consumers Regulations 2002. On the 1999 Regulations and the definition there of consumer see para [3.100](#).

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*Devlin v Hall* [1990] RTR 320; *Davies v Sumner* [1984] 3 All ER 831. But see *Chester Grosvenor Hotel Co Ltd v Sir Alfred McAlpine Management Ltd* (1991) 56 BLR 115; *Ormsby v H & H Factors Ltd* (26 January 1990, unreported).

14

*Devlin v Hall* [1990] RTR 320. The sales by the car hire business in *Haverling London Borough v Stevenson* [1970] 3 All ER 609 were regularly occurring. There was a fleet of 24 cars and a car was sold when inter alia the business had had it for about two years.

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*Davies v Sumner* [1984] 3 All ER 831.

16

*Haverling London Borough v Stevenson* [1970] 3 All ER 609, Lord Parker CJ at 611.

17

*Prostar Management v Twaddle* 2003 SLT (Sh Ct) 11 at [12].

it<sup>18</sup>. Certainly, it is too narrow an approach to be used in relation to the same phrase in UCTA 1977, s 1<sup>19</sup>. In addition, it is an interpretation which seems to be inconsistent with the words themselves. What is required is that a transaction be 'in the course of a business' not that it be 'in the course of business'. 'The former suggests things done by and for a business, whilst the latter suggests acts limited to the kind of business in which a person is engaged'<sup>20</sup>. Transactions which are merely incidental to the relevant party's business could be construed as having been made in the course of a business without any need to establish a pattern of such transactions<sup>21</sup>.

Under UCTA 1977, s 12(1)(a) a person does not deal as consumer if either they (i) contract in the course of a business, or (ii) hold themselves out as doing so. The idea of 'holding out' as contracting in the course of a business may bring to mind someone claiming a trade discount or some such situation. However, the reference to such 'holding out' has to be understood in a way which is consistent with the interpretation of 'in the course of a business' in general and therefore, at present, in a manner consistent with the line taken in *R&B Customs Brokers*<sup>22</sup>. This provides a further indication of the inappropriateness of the current approach to the meaning of 'in the course of a business' in s 12.

In relation to contracts falling within UCTA 1977, ss 6 or 7, there has been an additional requirement if a party is to deal as consumer. Under s 12(1)(c), the goods had to be of a type ordinarily supplied for private use or consumption<sup>23</sup>. That further restriction is now limited to the situation in which the person claiming to 'deal as consumer' is not an individual<sup>24</sup>. The characterisation of goods as a type ordinarily supplied for private use or consumption could take account of factors such as<sup>25</sup> the size, quantity<sup>26</sup> and

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Eg if *R & B Customs Brokers* had been selling a car, it would seem that they would similarly not have dealt in the course of a business and any purchaser from them could not have dealt as consumer, no matter that the purchaser had no business involvement at all.

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See para [3.69](#).

20

Kidner 'The Unfair Contract Terms Act 1977 – Who Deals as Consumer?' (1987) NILQ 46 at 53.

21

See *St Alban's City and District Council v ICL* [1995] FSR 686. And see now *Stevenson v Rogers* [1999] 1 All ER 613 and the approach taken to the interpretation of 'in the course of a business' in the context of Sale of Goods Act 1979, s 14(2). But see *Peter Symmons & Co v Cook* (1981) 131 NLJ 758, Lexis.

22

*Felderol Finance plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747, [2004] All ER (D) 138 (May). But see Law Com Rep No 69, paras 149–150.

23

*Rasbora Ltd v JCL Marine* [1977] 1 Lloyd's Rep 645; *Ormsby v H & H Factors Ltd* (26 January 1990, unreported).

24

Section 12(1A) as added by the Sale and Supply of Goods to Consumers Regulations 2002.

25

Kidner (1987) 38 NILQ 46 at 54

26

A sufficient quantity might, in itself, indicate that a business is being pursued or a 'one off transaction in the nature of trade'.

quality<sup>27</sup> of the goods and, also, the purpose for which the goods are made or purchased, and these latter factors might relate, for example, to the predominant purpose or the usual purpose. Whatever the approach taken to categorising 'types' of goods, the question remains as to whether 'ordinarily' should be interpreted as 'usually' or 'commonly'. The latter would allow someone to deal as a consumer where the goods are of a type which are supplied for private use or consumption in a substantial minority of cases, rather than requiring that the supply for private use or consumption should provide the majority of occasions on which goods of the relevant type are supplied<sup>28</sup>.

## The requirement of reasonableness – UCTA 1977, s 11

### [3.84]

**Basic test** Under UCTA 1977 a clause is often rendered ineffective except in so far as it satisfies the requirement of reasonableness<sup>1</sup>, the basic test for which is set out in s 11(1) in relation to contract terms:

‘In relation to a contract term, the requirement of reasonableness ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.’

When what is in question is a non-contractual notice, s 11(3) deals with it, stating:

‘In relation to a notice, (not being a notice having contractual effect), the requirement of reasonableness under this Act is that it should be fair and reasonable to allow reliance on it having regard to all the circumstances obtaining when the liability arose or (but for the notice) would have arisen.’

There are clear differences between the two tests, particularly in the time frame of the assessment. When a contract term is in question, the time frame against which the assessment is made is that of the conclusion of the contract. The circumstances to be considered are those which were, or ought reasonably to have been, in the contemplation of both parties<sup>2</sup> at the time the contract was made. In particular, no account can be taken of the particular breach, only the potential for a breach of the relevant type, and a clause may be unreasonable because of its potential application, even though its use in relation to the particular breach would be reasonable<sup>3</sup>. (It is safer to draft a series of narrow clauses than

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<sup>27</sup>

E.g. carpets may be of domestic or commercial 'quality', *Kidner* (1987) 38 NILQ 46 at 55.

<sup>28</sup>

*Kidner* (1987) 38 NILQ 46 at 55.

<sup>1</sup>

The Law Commission's consultation envisages a 'fair and reasonable' test backed up by a list of factors and separate lists of terms for the consumer and the business to business context, which are to be treated as failing that test unless the contrary is shown – Law Commission Consultation Paper No 166, Scottish Law Commission Discussion Paper No 119 *Unfair Terms in Contracts*.

<sup>2</sup>

*Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 ConLR 1; *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep 434; *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Ltd* (1991) 56 BLR 115; *Jones v Northampton Borough Council* (1990) Times, 21 May, Lexis; *Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 169.

<sup>3</sup>

*Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257. In relation to the assessment of potential breaches see also *Skipskredittforeningen v Emperor Navigation Ltd* [1997] CLC 1151, Mance J at 1164;

one wide one – that way at least some may survive the test.) In contrast, in relation to non-contractual notices, the time frame of assessment is that of the time when the liability arose or (but for the notice) would have arisen. However, it has been said that ‘the fundamental standard to be met in order to satisfy the reasonableness test is broadly the same for both contractual and non-contractual notices, namely that it should be fair and reasonable in all the relevant circumstances’<sup>4</sup>. The basic approach required is a gathering and weighing of the relevant factors so that the court must ascertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down,<sup>5</sup> and that must be done in relation to each particular case, and cannot simply be determined because a standard form contract has been assessed previously<sup>6</sup>.

In *Lloyd v Browning*<sup>7</sup> it was stressed that when assessing the reasonableness of the exemption clause, the ultimate question is not whether the clause is *in general* a fair and reasonable clause. The ultimate question is whether or not it was a fair and reasonable clause as contained in the particular contract. This should not be interpreted as enjoining the court to ignore the general purpose behind clauses such as the one in question. Neither should one ignore the purpose behind deploying the clause in question as a special condition into the particular contract. Most boiler plate clauses are designed to achieve certainty, and as such should be read not only in the specific context of the parties’ relationship but also from a broader context.

There are non-exhaustive ‘guidelines’ in UCTA 1977, Sch 2<sup>8</sup> and in s 11(4) there are matters specified for consideration, when what is in question is a term or notice limiting liability to a ‘specified sum’<sup>9</sup>. Although,

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*Bacardi- Martini Beverages Ltd v Thomas Hardy Packaging Ltd* [2002] EWCA Civ 549, [2002] 2 All ER (Comm) 335, [26]. In *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361 the conclusion reached at first instance that the clause failed to satisfy the requirement of reasonableness was reversed in the light of narrower construction by the Court of Appeal. For example, although the clause in question excluded liability for certain categories of loss ‘in any circumstances’, and other clauses accepted liability in general for deliberate and negligent acts, the clause was not viewed by the Court of Appeal as covering liability for ‘fraud, malice or recklessness’. The line was taken that ‘Liability for fraud or malice or recklessness which is a species of either, goes without saying: parties contract with one another in the expectation of honest dealing’ (at [35]).

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*Salvage Association v CAP Financial Services Ltd* [1995] FSR 654, HH Judge Thyne Forbes (Off Ref).

5

*George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, [1983] 3 WLR 163, Lord Bridge at 171; *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 ConLR 109. See also *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April 1993, unreported).

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*Phillips Products Ltd v Hyland* [1987] 2 All ER 620 at 628; *First National Commercial Bank v Loxleys* [1997] PNLR 211; *Edmund Murray Ltd v BSP International Foundations Ltd* (1993) 33 Con LR 1; *Stevenson v Nationwide Building Society* [1984] EGD 934; *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd’s Rep 48 at 55; *British Fermentation products v Compair Reavell* [1999] 2 All ER (Comm) 389, 403.

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[2013] EWCA Civ 1637 at [33]–[34].

8

The guidelines are only made relevant by ‘statutory prescription’ to terms covered by UCTA 1977, ss 6 or 7 (see UCTA 1977, s 11(2)), but they are generally, factually relevant in other cases and will be considered as such: see para 3.88.

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See para 3.87.

the sections which apply the reasonableness test, state that a term (or notice) is ineffective 'except' (or, 'but only'), 'in so far as', it satisfies the requirement of reasonableness, terms or notices are simply effective or ineffective as a whole<sup>10</sup> unless a 'term' (or 'notice') contains several distinct units and the reasonable and unreasonable can be treated as distinct terms and severed<sup>11</sup>. Again, the point can be made as to the greater safety in drafting a number of separate terms so that all protection is not lost when part of the exemption sought is regarded as unreasonable<sup>12</sup>. From time to time there have been dicta<sup>13</sup> which might be taken to suggest that there should not be, because there is no need for, a close scrutiny of the reasonableness of exemption clauses in commercial contracts between businesses of equal bargaining power. However, it should not be ignored that the matter of bargaining strengths is merely one factor; other relevant factors must be given proper consideration in every case<sup>14</sup>.

### [3.85]

**Burden of proof and pleadings** Section 11(5) of UCTA 1977 places the burden of proof upon the person claiming that the contract term or notice satisfies the requirement of reasonableness and this may be of 'great significance'<sup>1</sup>. When a defence is based on an exemption clause to which UCTA 1977 and the requirement of reasonableness may be relevant, the 'assertion as to the term satisfying the requirement

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*George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257.

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*Watford Electronics v Sanderson* [2001] 1 All ER (Comm) 696 – first and second sentence of the clause treated as distinct terms. *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All ER (Comm) 586 – the elements of the clause in question which were viewed as separate sub-clauses (although only numbered as such by the court) were treated as distinct terms for the purposes of the application of the requirement of reasonableness. In particular, a limitation element was treated as independent of an exclusion element. *Troxel Products Ltd v Merrol Fire Protection Engineers Ltd* (20 November 1991, unreported), Nourse LJ.

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See, for example, the loss of whole clauses in *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2009] EWHC 1919 (TCC), [2009] All ER (D) 37 (Aug) even though only regarded as partly unreasonable.

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*Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827, 843; *Salvage Assn v CAP Financial Services Ltd* [1995] FSR 654; *Chester Grosvenor Hotel v Alfred McAlpine* (1991) 56 Build LR 115; *Fillite Runcorn v APV Pasilac* (22 April 1993, unreported); *Edmund Murray v BSP International* (1992) 33 ConLR 1; *Watford Electronics Ltd v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, para 55; *SAM Business Systems v Hedley* [2003] 1 All ER (Comm) 465; *Granville Oil v Davis Turner* [2003] 1 All ER (Comm) 819; *Frans Maas v Samsung Electronics* [2004] 2 Lloyd's Rep 251; *Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8, [26]; *JP Morgan Chase Bank v Springwell Navigation Corp*n [2008] EWHC 1186 (Comm), [2008] All ER (D) 167 (Jun), [603].

14

*The Trustees of Ampleforth Abbey Trust v Turner and Townsend* [2012] EWHC 2137 (TCC); also *Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited* [2013] EWHC 1191 (TCC).

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*Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at 628; *St Alban's City and District Council v ICL* [1995] FSR 686. See also *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725 (TCC), [2003] All ER (D) 212 (Apr) – failure to adduce evidence to show clause was reasonable was seen as making a finding of unreasonableness 'inevitable'.



of reasonableness may properly be regarded as a necessary particular of the defence' to be included in the pleadings<sup>2</sup>.

### [3.86]

**Appeals** The courts have given some consideration to the approach to be taken to an appeal from a decision on the requirement of reasonableness in Unfair Contract Terms Act 1977, s 11. In *George Mitchell Ltd v Finney Lock Seeds Ltd*<sup>1</sup> Lord Bridge, with whom the other members of the court agreed, said:

'There will sometimes be room for a legitimate difference of opinion as to what the answer should be, where it will be impossible to say that one view is demonstrably wrong and the other demonstrably right. It must follow ... that, when asked to review such a decision on appeal, the appellate court should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon some erroneous principle or was plainly and obviously wrong.'

Decisions on the requirement of reasonableness provide only limited guidance for the future<sup>2</sup>.

### [3.87]

**Limitation clauses** Section 11(4) makes two factors particularly relevant to, but not determinative of<sup>1</sup>, the question of the reasonableness of a clause which purports to limit liability to a specified sum. When someone purports to use such a clause regard is to be had to:

- (a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and
- (b) how far it was open to him to cover himself by insurance.

This should cover limitations stating a sum and also those stating a formula from which a sum can be ascertained<sup>2</sup>. Whether there is a basis for a particular sum will be considered<sup>3</sup> and the scope of a clause

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<sup>2</sup>

*Sheffield v Pickfords Ltd* (1997) 16 Tr LR 337. Ord 18 r 12(1) RSC. See also *Circuit Systems Ltd (in liquidation) and Baston v Zuken-Redac (UK) Ltd* (1995) 42 ConLR 120; *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265, Hobhouse LJ at 278.

<sup>1</sup>

*George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737, Lord Bridge at 743. See also *Ormsby v H & H Factors Ltd* (26 January 1990, unreported), Neill LJ; *Edmund Murray Ltd v BSP International Foundations Ltd* (1993) 33 Con LR 1; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at 629; *Warren v Truprint* [1986] BTLC 344, Lexis; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, Thorpe LJ at 508; *Overseas Medical Transport Services v Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, 276; *Watford Electronics v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, 707; *Britvic Soft Drinks v Messer UK Ltd* [2002] 2 All ER (Comm) 321, [19].

<sup>2</sup>

*Phillips Products Ltd v Hyland* [1987] 2 All ER 620; *British Fermentation Products v Compair Reavell* [1999] 2 All ER (Comm) 389, 403.

<sup>1</sup>

*Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep 164.

<sup>2</sup>

In *Shared Network Services Ltd v Nextira 1 UK Ltd* [2011] EWHC 3845 (Comm), for example, it was held that a limitation of liability which referred to an amount received under a contract by a party seeking to

may be relevant – if a clause seeks to cover several different types of breach with a single limit, the limit may not be appropriate for all of them<sup>4</sup>. In relation to standard terms, it may be easier to show a monetary limit is reasonable if it is regularly reviewed<sup>5</sup>. The cases show that the availability and cost of insurance is an important factor generally<sup>6</sup>, not only in relation to clauses limiting liability. A limitation clause may contain restrictions other than a simple monetary cap. It may restrict the availability of other remedies, and the extent and appropriateness of the remedies remaining will be reviewed, in determining the reasonableness of the clause<sup>7</sup>.

### [3.88]

**Guidelines – UCTA 1977, Sch 2** Schedule 2 contains guidelines for the application of the requirement of reasonableness. The factors in Sch 2 are:

- (a) the strength of the bargaining position of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- (b) whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;

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limit liability was quite common under various types of commercial contract, and there was nothing inherently unreasonable in that form of limitation.

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*St Alban's City and District Council v ICL* [1995] FSR 686; *Salvage Association v CAP Financial Services* [1995] FSR 654; *Salvage Assn v CAP Financial Services* [1995] FSR 654; *Moores v Yakely Associates* (1998) 62 Con LR 76; *Frans Maas v Samsung Electronics* [2004] 2 Lloyd's Rep 251. But see *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 at 55.

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*Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] CLC 1243, 1253. Distinguished in *Granville Oil v Davis Turner* [2003] EWCA Civ 570, [2003] 1 All ER (Comm) 819 where the same diversity of breaches was covered but the limitation was a time clause rather than a monetary restriction.

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*Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164. It will be difficult to argue that a monetary limit is reasonable if it is contained in an outdated version of the proferens terms which have been used by accident and a higher amount is contained in the current terms: *Salvage Association v CAP Financial Services* [1995] FSR 654, *St Albans City and District Council v International Computers Ltd* [1995] FSR 686.

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In *The Trustees of Ampleforth Abbey Trust v Turner and Townsend* [2012] EWHC 2137 (TCC) HHJ Keyser QC found that the liability cap of £111,000 odd (the amount paid under the contract) was unreasonable because the contract imposed on the defendant an obligation to take out professional indemnity insurance to a level of £10 million. See para [3.90](#).

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*Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 Con LR 109; *White Cross Equipment v Farrell* (1982) 2 Tr LR 21; *Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 Con LR 46; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, Pill LJ at 507; *WRM Group Ltd v Wood* [1998] CLC 189 at 196; *Skipskredittforeningen v Emperor Navigation* [1997] CLC 1151; *Granville Oil v Davis Turner* [2003] 1 All ER (Comm) 819; *British Fermentation Products v Compare Reavell* [1999] 2 All ER (Comm) 389; *SAM Business Systems v Hedley* [2003] 1 All ER (Comm) 465; *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2009] EWHC 1919 (TCC), [2009] All ER (D) 37 (Aug).

- (c) whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- (d) where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;
- (e) whether the goods were manufactured, processed or adapted to the special order of the customer.<sup>7</sup>

By s 11(2) the above guidelines are applicable when the contract is one covered by UCTA 1977, ss 6 or 7<sup>1</sup> but, even in that context, they are not exhaustive. Outside of ss6 and 7 the guidelines will not apply by 'legislative prescription', but the factors set out in the guidelines are still likely to be factually relevant to the reasonableness of an exemption clause<sup>2</sup>.

### [3.89]

**Guidelines – *Smith v Bush***<sup>1</sup> In *Smith v Bush* Lord Griffiths made some widely applicable points<sup>2</sup>. He said<sup>3</sup>:

'I believe that it is impossible to draw up an exhaustive list of factors that must be taken into account when a judge is faced with this very difficult decision. Nevertheless, the following matters should in my view always be considered.

- (1) Were the parties of equal bargaining power? ...
- (2) In the case of advice, would it have been reasonably practicable to obtain the advice from an alternative source taking into account considerations of costs and time? ....
- (3) How difficult is the task being undertaken for which the liability is being excluded? When a very difficult or dangerous undertaking is involved there may be a high risk of failure which

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*Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 ConLR 1.

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*Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep 164 at 169; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620 at 628; *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 ConLR 109; *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep 434, Potter J at 438–439; *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, Pill LJ at 505; *Overseas Medical Supplies Ltd v Orient Transport Services Ltd* [1999] 1 All ER (Comm) 981, [1999] CLC 1243, CA, at 1248; *British Fermentation Products v Compair Reavell* [1999] 2 All ER (Comm) 389, 402. But see *Jones v Northampton Borough Council* (1990) Times, 21 May, Lexis.

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[1990] 1 AC 831, [1989] 2 All ER 514, HL.

2

*St Alban's City and District Council v ICL* [1995] FSR 686 at 710; *Ormsby v H & H Factors Ltd* (26 January 1990, unreported); *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654; *Beaton v Nationwide Building Society* [1991] 2 EGLR 145 at 151; *Fillite (Runcorn) Ltd v APV Pasilac* (22 April 1993, unreported).

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[1989] 2 All ER 514 at 531.

would certainly be a pointer towards the reasonableness of excluding liability as a condition of doing the work ...

- (4) What are the practical consequences of the decision on the question of reasonableness? This must involve the sums of money potentially at stake and the ability of the parties to bear the loss involved, which, in its turn, raises the question of insurance ...<sup>7</sup>

There is some overlap here with the factors referred to in Sch 2. It should be noted that the case was concerned with liability for negligent misstatement and Lord Griffiths' second point is put in terms specific to the case. More generally, the question is simply that of the availability of an alternative source of whatever is being contracted for<sup>4</sup>.

### [3.90]

**Insurance** Insurance is a highly significant factor in considering the requirement of reasonableness. The availability of insurance to cover a potential liability is made specifically relevant to the reasonableness of a limitation clause by s 11(4). It is also a factor which the courts have indicated as being generally significant<sup>1</sup>. The reasonableness of the risk allocation in the exemption clause is assessed against the possibilities<sup>2</sup> open to either party to insure against it and the cost of doing so<sup>3</sup>. A limit on liability may be reasonable although it is less than the cover available to the party using the clause. The same cover may also deal with other contracts or other liabilities under the particular contract<sup>4</sup>.

### [3.91]

**Availability of alternatives** Another significant factor is the availability of alternatives. It is referred to in paras (a) and (b) of Sch 2 and it was also referred to by Lord Griffiths in *Smith v Bush*<sup>1</sup>. If there are other

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*Salvage Association v CAP Financial Services* [1995] FSR 654.

1

*Photo Production Ltd v Securicor Ltd* [1980] AC 827; *Smith v Bush* [1990] 1 AC 831, [1989] 2 All ER 514, HL; *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 Lloyd's Rep 48 at 55.

2

*Flamar Interocean Ltd v Denmac Ltd* [1990] 1 Lloyd's Rep 434; *Chester Grosvenor Hotel Co Ltd v Alfred McAlpine* (1991) 56 BLR 115; *Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2LI R 164, Steyn LJ at 169; *Jones v Northampton Borough Council* (1990) Times, 21 May, Lexis; *Monarch Airlines Ltd v London Luton Airport* [1998] 1 Lloyd's Rep 403. But see *United States v ARC Construction* (8 May 1991, unreported).

3

*Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 169; *Regus (UK) Ltd v Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All ER (Comm) 586, [41]–[43]; *The Trustees of Ampleforth Abbey Trust v Turner and Townsend* [2012] EWHC 2137 (TCC).

4

*Shepherd Homes Ltd v Encia Remediation Ltd (Green Piling Ltd, third party)* [2007] EWHC 70 (TCC), (2007) 110 ConLR 90, [2007] BLR 135, [96]. See also *Moores v Yakeley Associates Ltd* (1998) 62 ConLR 76 – a limit set at £250,000 was reasonable despite the existence of £500,000 cover for each claim. The limit reflected the proferens' total estimated cost of the project and a loss in excess of it was seen as requiring exceptional circumstances beyond the reasonable contemplation of the parties.

1

See para 3.89.

parties from whom the relevant goods or service could be obtained, then that may be significant<sup>2</sup> as an indicator of whether there is an imbalance in the bargaining positions<sup>3</sup>. Where the proferens seeks to rely on an exemption clause it may also be significant in relation to the issue of 'reasonableness' to ask whether the proferens had offered the other party an alternative higher priced contract involving less risk to that other party<sup>4</sup>. The reality of any alternative will be considered<sup>5</sup>.

### [3.92]

**Inequality of bargaining power** Inequality of bargaining power is referred to in para (a) of the Sch 2 guidelines. It was also referred to by Lord Griffiths in *Smith v Bush*<sup>1</sup>. It has been said that relative bargaining power is to be assessed on a broad basis<sup>2</sup>. One important question in considering the parties' relative bargaining power is whether there was an alternative source of supply of whatever was being contracted for<sup>3</sup> and whether the alternative source used the same terms<sup>4</sup>. Standard terms used throughout a trade will not indicate inequality of bargaining power if arrived at by representatives of those commonly involved on both sides of the transaction<sup>5</sup>. It is possible for the relative bargaining power of

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2

*Chester Grosvenor Hotel Ltd v Alfred McAlpine* (1991) 56 BLR 115; *Fillite (Runcorn) Ltd v APV Pasilac* (22 April 1993, unreported); *Keeton & Son v Carl Prior Ltd* [1986] BTLC 30, Lexis.

3

See para 3.92. In *Lloyd v Browning* [2013] EWCA Civ 1637 the court held that it was appropriate to ask whether the contract was on a 'take it or leave it' basis.

4

*Woodman v Phototrade Processing Ltd* (1981) 131 NLJ 935, Lexis. See also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164 at 170; *R W Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602.

5

*Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL (cost); *Warren v Truprint* [1986] BTLC 344, Lexis.

1

See also *Keeton & Sons Ltd v Carl Prior Ltd* [1986] BTLC 30, Lexis; *Singer (UK) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164; *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April 1993, unreported); *Phillips Products Ltd v Hyland* [1987] 2 All ER 620; *Fillite (Runcorn) Ltd v APV Pasilac Ltd* (22 April 1993, unreported); *St Alban's City and District Council v ICL* [1995] FSR 686; *Lloyd v Browning* [2013] EWCA Civ 1637. In *West v Finlay* [2014] EWCA Civ 316 the fact that a consumer was one of the contracting parties did not necessarily indicate that there was an unequal relationship.

2

*Stag Line Ltd v Tyne Shiprepair Group Ltd, The Zinnia* [1984] 2 Lloyd's Rep 211, Staughten J at 222.

3

*W Photoprint v Forward Trust Group Ltd* (1993) 12 Tr LR 146; *White Cross Equipment Ltd v Farell* (1982) 2 Tr LR 21; *Phillips Products Ltd v Hyland* [1987] 2 All ER 620, Slade LJ at 629; *George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737; *Schenkers Ltd v Overland Shoes* [1998] 1 Lloyd's Rep 498, 506.

4

*St Alban's City and District Council v ICL* [1995] FSR 686.

5

parties to change where there is a continuing relationship<sup>6</sup>. One contract, for example, may effectively result in one of the parties effectively becoming a monopoly supplier to the other because of the need for compatibility with what has already been supplied and that may impact upon the reasonableness of the exemption clause in later contracts<sup>7</sup>. Similarly, there may be an equalisation of bargaining power where a small business becomes, for the large business, a relied-upon contractor<sup>8</sup>.

### [3.93]

**Consequences** There were factors indicating the reasonableness of the disclaimer in *Smith v Bush*<sup>1</sup>, but they were outweighed by the potential consequences of holding the disclaimer effective<sup>2</sup> – the individual might have been left with a mortgage still to pay and an uninhabitable dwelling. Against that background it was regarded as preferable that such disclaimers should not be effective so that the costs of a negligent valuation would effectively be borne by house purchasers as a whole, through slightly increased valuation fees to cover valuers' increased insurance costs.

### [3.94]

**Other factors** Guideline (c) refers to the factor of knowledge, ie whether there was, or should have been<sup>1</sup>, knowledge of the existence, and sometimes extent<sup>2</sup>, of the exemption clause on the part of the party against whom the clause is being used<sup>3</sup>. The fact that a clause has the potential to cover negligence

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*R W Green v Cade Bros Farms* [1978] 1 Lloyd's Rep 602; see also *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep 164. See also *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 ConLR 109; *George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737 at 744; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498 at 507.

6

*Pegler v Wang* (2000) 70 ConLR 68.

7

*Fillite (Runcorn) Ltd v APV Pasilac* (22 April 1999, unreported).

8

*Rolls Royce v Ricardo* [2004] 2 All ER (Comm) 129 at [77].

1

[1990] 1 AC 831, [1989] 2 All ER 514, HL.

2

See also *Ormsby v H & H Factors Ltd* (26 January 1990, unreported); *St Alban's City and District Council v ICL* [1995] FSR 686 (decision on reasonableness followed by CA [1996] 4 All ER 481); *Watford Electronics v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, [54].

1

The fact that a clause has been incorporated should not, of itself, indicate that there should be taken to be knowledge: *AEG (UK) Ltd v Logic Resource Ltd* [1996] CLC 265; *Britvic Soft Drinks v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 All ER (Comm) 321, [21]. Although actual knowledge is obviously the strongest form of this factor, an objective assessment should also be relevant but should be more realistically made than sometimes occurs under the rules on incorporation.

2

*Charlotte Thirty and Bison Ltd v Croker Ltd* (1990) 24 ConLR 46; *Keeton Son & Co Ltd v Carl Prior Ltd* [1986] BTLC 30, Lexis; *McCullagh v Lane Fox & Partners* [1996] 1 EGLR 35, Hobhouse LJ at 46.

3

may be an indicator of unreasonableness<sup>4</sup>. Guideline (d) refers to the situation in which there is an exclusion or restriction of liability unless a condition is complied with. For example, it may be stated that any claim must be notified within a specified time<sup>5</sup>. A 'condition' which will operate capriciously is indicative of unreasonableness<sup>6</sup>. In *Mitchell v Finney Lock Seeds* it was seen as indicative of unreasonableness where there is a pattern of past settlement of claims by the proferens, with the proferens not adhering to the clause<sup>7</sup>, but that reasoning was questionable and should not now be seen as of general application<sup>8</sup>. In *Smith v Bush*<sup>9</sup> Lord Griffiths made the point that if a task is very difficult or dangerous it may be reasonable to exclude or restrict liability, and similarly where the proferens cannot assess the risk, for example, where the proferens is loading goods and has little knowledge of their value<sup>10</sup> or where goods are being supplied which may be used for a wide range of purposes and the specific purpose is unknown to the supplier.<sup>11</sup> After initially failing to do so<sup>12</sup>, the courts have now

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*R W Green Ltd v Cade Bros Farms* [1978] 1 Lloyd's Rep 602; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyds Rep 164; *Stevenson v Nationwide Building Society* [1984] EGD 934; *Peninsular and Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 136 at 143; *Oval (717) Ltd v Aegon v Ins Co* (1997) 54 Con LR 74; *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498, 507; *British Fermentation Products Ltd v Compair Reavell* [1999] 2 All ER (Comm) 389, 403; *Shepherd Homes Ltd v Encia Remediation Ltd (Green Piling Ltd, third party)* [2007] EWHC 70 (TCC), (2007) 110 ConLR 90, [2007] BLR 135, [95]. But see *Phillips Products Ltd v Hyland* [1987] 2 All ER 620 at 629; *Britvic Soft Drinks v Messer UK Ltd* [2002] EWCA Civ 548, [2002] 2 All ER (Comm) 321, [21].

4

*Mitchell v Finney Lock Seeds* [1983] 2 All ER 737 at 744; *Stag Line Ltd v Tyne Shiprepair Group, The Zinnia* [1984] 2 Lloyd's Rep 211 at 223; *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

5

*R W Green v Cade Bros. Farms* [1978] 1 Lloyd's Rep 602; *W Fishwick & Son (Meat Contractors) Ltd v Darrington & Co* (2 April 1994, unreported), McNeil J.

6

*Stag Line Ltd v Tyne Shiprepair Group, The Zinnia* [1984] 2 Lloyd's Rep 211 at 223.

7

*George Mitchell Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803; *Rees Hough Ltd v Redland Reinforced Plastics Ltd* (1983) 2 ConLR 109.

8

*Schenkers Ltd v Overland Shoes Ltd* [1998] 1 LI L Rep 498, Pill LJ at 508. But note the comments of the Law Commissions – *Unfair Terms in Contracts* Law Com Consultation No 166, Scot Law Com Discussion Paper No 119, para 5-109.

9

[1990] 1 AC 831, [1989] 2 All ER 514, HL.

10

*Singer (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 Lloyd's Rep 164, Steyn J; *Frans Maas v Samsung Electronics* [2004] 2 Lloyd's Rep 251. It may be important that the limit is clearly brought to the attention of the customer so that they can insure to the true value of the property in question – *Scheps v Fine Art Logistic Ltd* [2007] EWHC 541 (QB), [2007] All ER (D) 290 (Mar), [32].

11

*Sterling Hydraulics Ltd v Dichtomatik Ltd* [2006] EWHC 2004 (QB), [2007] 1 Lloyd's Rep 8, [29].

12

recognised the difficulties inherent in the process of writing software and the relevance of that to the reasonableness of an exemption clause<sup>13</sup>.

## *Misrepresentation Act 1967, s 3*<sup>1</sup>

### The section

#### [3.95]

At common law, it is said that a person cannot avoid or limit the consequences of their fraudulent misrepresentation by means of an exemption clause<sup>2</sup>, although they may be able to do so where the fraud is not theirs, but that of an employee<sup>3</sup>. In addition, the question of construction of an exemption clause dealing with liability for misrepresentation will need to be considered, just as would a clause dealing with liability for breach<sup>4</sup>. It may be found, for example, that a clause is appropriately worded to cover innocent but not negligent misrepresentation<sup>5</sup>. However, most significantly, exemption clauses dealing with misrepresentation may be affected by Misrepresentation Act 1967, s 3<sup>6</sup>, which states:

‘If a contract contains a term which would exclude or restrict –

- (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
- (b) any remedy available to another party to the contract by reason of such a misrepresentation.

That term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in s 11(1) of the Unfair Contract Terms Act 1977, and it is for those claiming that the term satisfies that requirement to show that it does.’

This is stated to cover clauses excluding or restricting liability for pre-contractual misrepresentation and, also, the exclusion or restriction of any remedy for such a misrepresentation. It deals with, for example, attempts to exclude the right to rescind, as well as the exclusion or restriction of damages for

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*Salvage Association v CAP Financial Services* [1995] FSR 654; *St Alban's City and District Council v ICL* [1995] FSR 686, 711 (decision on reasonableness followed by CA [1996] 4 All ER 481).

13

*Watford Electronics v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696; *SAM Business Systems v Hedley* [2002] EWHC 2733 (TCC), [2003] 1 All ER (Comm) 465.

1

See also para [4.69](#).

2

*S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351.

3

*John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 QB 495. *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349.

4

See para [3.54](#).

5

*Eg Toomey v Eagle Star Insurance Co Ltd (No 2)* [1995] 2 Lloyd's Rep 88. ‘This contract is neither cancellable or voidable by either party’ – construed as merely applying to innocent misrepresentations.

6

As amended by Unfair Contract Terms Act 1977, s 8.



misrepresentation. It is for the party seeking to rely upon the clause to establish that it satisfies the requirement of reasonableness, which is the same test as under the Unfair Contract Terms Act 1977<sup>7</sup>. The 'time frame' of assessment under UCTA 1977, s 11(1) is that of the conclusion of the contract, ie it is against the circumstances which were known to, or which should have been known to, the parties at the time of contracting that the 'reasonableness' of the clause is assessed<sup>8</sup>.

The current s 3 of the Misrepresentation Act 1967 was substituted by s 8 of UCTA 1977. The drafting of s 26, UCTA and the policy behind it have been held to be such that the exemption from UCTA of 'international supply contracts' also applies to exempt them from the application of s 3, Misrepresentation Act 1967<sup>9</sup>.

## Terms excluding or restricting liability or remedies

### [3.96]

Section 3, Misrepresentation Act 1967 is stated to apply to terms which exclude or restrict liability, or remedies, for misrepresentation. The section may apply, in some cases, where the clause in question is not in the form of an exclusion, or restriction, of liability or remedies. It has been seen as applicable to attempts to prevent there from being a legally recognised misrepresentation through, for example, clauses trying to turn statements of fact into mere statements of belief<sup>1</sup>. Questions may arise as to its application in relation to clauses stating that there is to be no reliance on a statement and in some cases s 3 has been seen as applicable<sup>2</sup>. It was suggested above<sup>3</sup> that the current trend in relation to the mechanical enforcement at common law of the non-reliance clauses which often accompany entire agreement clauses is the type of approach which invites a broad approach to the scope of s 3, and it has

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See para 3.84. In relation to the application of s 3 of the 1967 Act see eg *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495 (holding condition 17 of the National Conditions of Sale (19th edn) 'unreasonable'); *McCarthy v George* (15 January 1991, unreported) (holding condition 17 of the National Conditions of Sale 'unreasonable' in the amended 20th edition); *South Western General Properties v Mardon* (1983) 263 Estates Gazette 1090; *Cooper v Tamms* [1988] 1 EGLR 257; *Goff v Gauthier* (1991) 62 P & CR 388; *Garden Neptune Shipping Ltd v Occidental Worldwide Investment Corpn and Concord Petroleum Corpn* [1990] 1 Lloyd's Rep 330, Dillon LJ; *White Cross Equipment v Farrell* (1982) 2 Tr LR 21; *Thompson v Sayed* (21 March 1994, unreported); *WRM Group v Wood* [1998] CLC 189.

8

See para 3.84. Contrast the earlier version of s 3 which referred to reasonable reliance.

9

*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2009] EWCA Civ 290, [2009] 2 All ER (Comm) 1050.

1

*Cremdean Properties Ltd v Nash* (1977) 241 Estates Gazette 837, Lord Scarman.

2

*Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495; *Cremdean Properties Ltd v Nash* (1977) 241 Estates Gazette 837; *South Western General Properties v Marton* (1983) 263 Estates Gazette 1090; *Production Technology Consultants v Bartlett* [1988] 23 EG 121; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 948, 951; *Thompson v Sayed* (21 March 1994, unreported). But see *Watford Electronics Ltd v Sanderson* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696 and see the discussion in para 3.7 above.

3

See para 3.7.

been seen as applicable in such circumstances<sup>4</sup>. Section 3 has been seen as inapplicable where what is in question is a clause denying that an agent has authority to make representations<sup>5</sup>.

The EC Directive on Unfair Terms in Consumer Contracts was made under art 100A to facilitate the establishment of the internal market, however, the approach taken in the current Directive is not to enforce complete uniformity but rather to provide a minimum level of consumer protection, leaving member states free to provide more extensive protection through their own national laws, such as, currently the Unfair Contract Terms Act 1977. This document covers the: basic scope of the unfair terms in consumer contracts; enforcement of the terms of contracts; excluded terms; the meaning of 'consumer', 'seller or supplier'; contracts concluded between a seller or a supplier and a consumer; terms not individually negotiated; contract terms; 'core' exclusion; plain intelligible language of the terms of the contracts; construction of the contracts; unfair terms of the contract; 'grey' list and other unfair terms; and choice of law clauses.

## F Unfair Terms in Consumer Contracts<sup>1</sup>

### Unfair Terms in Consumer Contracts

#### *Basic scope*

##### [3.97]

The EC Directive on Unfair Terms in Consumer Contracts<sup>1</sup> was made under art 100A to facilitate the establishment of the internal market<sup>2</sup>. However, the approach taken in the current Directive is not to enforce complete uniformity but rather to provide a minimum level of consumer protection, leaving member states free to provide more extensive protection through their own national laws, such as, currently<sup>3</sup>, the Unfair Contract Terms Act 1977.<sup>4</sup> In the UK implementation was initially by the Unfair

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*Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686, [2009] 1 All ER (Comm) 16.

5

*Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511; *Collins v Howell-Jones* [1981] EGD 207; *Museprime Properties Ltd v Adhill* [1990] 2 EGLR 196 at 200.

1

See generally S Bright 'Winning the Battle Against Unfair Contract Terms' (2000) 20 LS 331, Beale 'Unfair Contracts in Britain and Europe' [1989] CLP 229, Beale 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Beatson and Friedmann (eds) *Good Faith and Fault in Contract Law*, Collins 'Good Faith in European Contract Law' (1994) 14 OJLS 229, Brandt and Ulmer 'The Community Directive on Unfair Terms in Consumer Contracts' (1991) CML Rev 647, Willett 'Directive on Unfair Terms in Consumer Contracts' [1994] Consum LJ 114.

1

Directive 93/13/EEC published in (1993) OJ L95/29.

2

For the evolution of the Directive see CCC 48/77, OJ 1980C 291/35, COM (84) 55, OJ 1990 C234/2, OJ C73/7.

3

The Law Commissions have recommended a single unified piece of unfair terms legislation (Law Com No 292, Scottish Law Commission No 199).

4

Terms in Consumer Contracts Regulations 1994<sup>5</sup> which came into force on 1 July 1995<sup>6</sup> They have now been replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), which came into force on 1 October 1999<sup>7</sup>. The 1999 Regulations adopted language which is even closer to that of the original Directive than the 1994 Regulations and they also made changes in relation to enforcement. In interpreting the Regulations, their origins as an EU measure must be borne in mind so that effect is given to the Directive<sup>8</sup>.

The Regulations apply a fairness test<sup>9</sup> to terms in contracts between 'consumers' and 'sellers or suppliers'<sup>10</sup>, which have not been 'individually negotiated'<sup>11</sup> and that is not restricted to written terms<sup>12</sup>. It has been said that it is limited to express terms<sup>13</sup>. An unfair term is one which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the

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This approach creates a degree of tension with the stated aim of preventing distortions of the market through different levels of consumer protection in different member states: Recital 2.

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SI 1994/3159.

6

The Directive required implementation by 31 December 1994. In relation to possible actions when a Directive has not been fully implemented see note 8.

7

SI 1999/2083.

8

*Lister v Forth Dry Dock* [1990] 1 AC 546; *Marleasing SA v La Comercial*: C-106/89 [1992] 1 CMLR 305; *Faccini Dori*: C-91/92 [1995] All ER (EC) 1. It may be necessary to consider versions of the Directive in other community languages and legal concepts will not necessarily be those of any one member state but should be given an EC interpretation: see *SrL CILFIT and Larificio di Gavardo SpA v Ministry of Health*: 283/81 [1982] ECR 3415 at 3430. If a Directive is not fully implemented a claimant may rely directly on it if the other party is the 'State', in a broad sense (*Marshall v Southampton Area Health Authority*: 52/84 [1986] QB 401; *Foster v British Gas* [1988] 2 CMLR 697; *Griffin v South West Water Services* [1995] IRLR 15). In addition, in limited circumstances there may be an action against the state for a failure to implement a Directive where that causes loss to someone for whose benefit the Directive was made (*Francovich v Italy*: C-6, 9/90 [1992] IRLR 84; *R v Secretary of State for Transport, ex p Factortame* [1991] 1 AC 603).

9

Regulation 5.

10

Regulation 4(1).

11

Regulation 5.

12

Recital 11 of the Directive.

13

*Baybut v Eccle Riggs Country Park Ltd* (2006) Times, 13 November, [2006] All ER (D) 161(Nov), [23]. Reg 4(2) (below para 3.99) would seem to take terms implied by statute or regulation outside of the scope of the Regulations and it seems unlikely that a term would be implied at common law which would be found to be unfair under the 1999 Regulations.

contract, to the detriment of the consumer<sup>14</sup>. Any unfair term does not bind the consumer<sup>15</sup>. Schedule 2 of the UTCCR 1999 contains an indicative and non-exhaustive list of terms which may be unfair<sup>16</sup> (the 'grey list'), and this list was significantly relied upon by the Office of Fair Trading<sup>17</sup>. The core exemption means that certain terms, defining the main subject matter of the contract and price terms, in relation to the issue of the appropriateness of the price, cannot be the subject matter of the fairness test, provided they are in 'plain intelligible language'<sup>18</sup>. In general, there is considerable emphasis upon terms being in plain intelligible language in the Regulations.<sup>19</sup>

As has been indicated, to an extent the Unfair Terms in Consumer Contracts Regulations can be regarded as complementary to the Unfair Contract Terms Act 1977, and vice versa, and some comparisons can usefully be made. Unlike the Unfair Contract Terms Act 1977, which is basically<sup>20</sup> restricted to terms which 'exclude or restrict liability', the application of the Regulations is not limited to a specific type of term, although they must be 'not individually negotiated'. The Regulations are restricted to contracts between 'consumers' and 'sellers or suppliers', whereas UCTA 1977 extends to some contracts between businesses. Both the Regulations and the Act can be used to strike down a term in a dispute between two particular parties. However, under the 1994 Regulations, the Director General of Fair Trading was also given powers to try to prevent the continued use of unfair terms in general use<sup>21</sup>. That has been maintained under the 1999 Regulations (for the Office of Fair Trading and latterly the Competition and Markets Authority) and extended to other 'qualifying bodies' set out in Schedule 1<sup>22</sup>,

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14

UTCCR 1999, reg 5(1).

15

UTCCR 1999, reg 8(1).

16

UTCCR 1999, reg 5(5).

17

See, generally, the OFT Bulletins on Unfair Contract Terms, but also see now the Unfair Contract Terms Guidance (OFT, February 2001). It is unlikely that the CMA, the successor to the OFT, would not do likewise.

18

UTCCR 1999, reg 6(2).

19

Regulation 7(1) states that 'A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language'. There is no penalty, as such, stated for a failure to use such language. However, it would seem that language which is not plain and intelligible will indicate that the term is fair. Also, as has been indicated, 'core terms' are only exempt from the fairness test provided they are in 'plain intelligible language': reg 6(2). Finally, in the context of a claim between a particular consumer and a particular seller or supplier (as opposed to the more general level of enforcement by the Director General of Fair Trading or a qualifying body: see below) there is also a rule of interpretation in the Regulations that 'if there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail' (reg 7(2)).

20

But see para [3.75](#).

21

UTCCR 1994, reg 8.

22

such as trading standards departments, and the Consumers' Association<sup>23</sup>. There will be many cases in which the possible application of both UCTA 1977 and the Regulations will need to be considered. This overlap obviously may cause confusion and, at the very least, adds to the complexity of the law in an area where simplicity and clarity might be thought to be particularly desirable as consumer rights are in question. The Law Commission and Scottish Law Commission have produced recommendations for a single unified piece of replacement legislation<sup>24</sup>. The EU has since issued the Consumer Rights Directive<sup>25</sup> which was intended to consolidate the various EU laws on consumer protection. The new directive thus replaces Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises. Most of the requirements of the Directive have already been implemented in the UK by the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013<sup>26</sup>.

The EU Directive on Unfair Terms in Consumer Contracts (93/13/EEC) however survives largely intact<sup>27</sup>, though the UK Regulations made under its auspices will be repealed and its relevant provisions incorporated in the new Consumer Rights Act. The new law is intended to apply where there is an agreement between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract<sup>28</sup>. Under the Bill, there is no need for the contract in question to be in writing. The new s 1(2) provides that the law 'applies whether the contract is written or oral or implied from the parties' conduct, or more than one of these combined'. This might be contrasted against the UTCCR which apply to express terms<sup>29</sup>.

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As amended by the Unfair Terms in Consumer Contracts (Amendment) Regulations 2001 (SI 2001/1186).

23

See para [3.98](#).

24

*Unfair Terms in Contracts* Law Com No 292, Scot Law Com No 199. The Consumer Rights Bill 2014 will go some way at addressing this.

25

Directive 2011/83/EU which came into force on 13 June 2014.

26

The rules in the Directive relating to payment surcharges have been adopted in the UK through the Consumer Rights (Payment Surcharges) Regulations 2012, which came into effect on 6 April 2013. These regulations prohibit traders from charging consumers excessive surcharges for the use of payment mechanisms (such as credit cards).

27

The main change is the introduction of a new provision, art 8a, which reads:

'1. Where a Member State adopts provisions in accordance with Article 8, it shall inform the Commission thereof, as well as of any subsequent changes, in particular where those provisions:

- extend the unfairness assessment to individually negotiated contractual terms or to the adequacy of the price or remuneration; or,
- contain lists of contractual terms which shall be considered as unfair.

2. The Commission shall ensure that the information referred to in paragraph 1 is easily accessible to consumers and traders, inter alia, on a dedicated website.'

28

Clause 1(1).

29

## Enforcement

### [3.98]

The Regulations may be used by the individual consumer who is in dispute with a particular seller or supplier to strike down a particular term of the particular contract between them. An unfair term is not binding on the consumer<sup>1</sup>. The contract as a whole will continue to bind the parties 'if it is capable of continuing in existence without the unfair term'<sup>2</sup>. Enforcement at this individual level has been strengthened by the judgment of the CJEU in the *Océano Grupo* case<sup>3</sup> that a national court has the power to find that a term is unfair and not binding on a consumer under the Unfair Terms legislation even though that issue has not been raised by the consumer ie the court may evaluate a term under the Unfair Terms legislation of its own motion and will normally be under a duty to do so<sup>4</sup>. This was regarded as necessary to fulfil art 6 of the Directive under which unfair terms do not bind the consumer (as consumers often do not know the law and may not regard it as viable to pay for advice) and in keeping with the Directive's requirement for enforcement at the more general level (see below) to prevent the continued use of unfair terms drawn up for general use. The point has been made, however, that 'there is an inherent limitation on the power of national courts to intervene of their own initiative, for a court cannot hold a term unfair if it does not so appear from the case presented to it'<sup>5</sup>.

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See note 13 above.

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UTCCR 1999, reg 8(1).

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UTCCR 1999, reg 8(2). In Case C-488/11 *Asbeek Brusse v Jahani BV* [2013] 3 CMLR 45 the CJEU held that the national courts are required to exclude the application of an unfair contractual term in order that it did not bind the consumer, without being authorised to revise the content of that term. It followed thus that art 6(1) did not allow a national court which had established that a penalty clause in a contract concluded between a seller or supplier and a consumer was unfair, to reduce the amount of the penalty imposed on the consumer instead of excluding the application of that clause in its entirety with regard to that consumer. As for the Consumer Rights Bill 2014, cl 67 carries a similar provision: 'Where a term of a consumer contract is not binding on the consumer as a result of this Part, the contract continues, so far as practicable, to have effect in every other respect.' The language of the test is relaxed a little – it has to be said that the change from 'capable' to 'practicable' provides better clarity.

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*Océano Grupo Editorial SA v Quintero* case C-240/98, [2000] ECR I-4941.

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*Mostaza Claro v Centro Movil Milenium SL*: C-168/05 [2006] ECR I-10421, [2007] 1 CMLR 22. In *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* Case C-40/08 [2010] 1 CMLR 865, in deciding whether a court should consider the fairness of an arbitration clause in proceedings to enforce an arbitral award when the consumer had not been present at the arbitration or applied for annulment of the arbitrator's decision, the Court of Justice recognised the need for finality and that the court should not re-open the award if the principles of 'effectiveness' and 'equivalence' were satisfied, ie if there had been effective procedures available to the consumer to challenge the award and 'the conditions imposed by domestic law under which the courts and tribunals may apply a rule of Community law of their own motion must be no less favourably treated than those governing the application by those bodies of their own motion of rules of domestic law of the same ranking' (at [49]). See also Case C-488/11 *Asbeek Brusse v Jahani BV* [2013] 3 CMLR 45.

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S Whittaker, 'Judicial Intervention and Consumer Contracts' (2001) 117 LQR 215.

In their action in a particular dispute the Regulations are not unlike the Unfair Contract Terms Act 1977. However, as has been indicated, the Regulations also provide for a more general level of enforcement. The Competition and Markets Authority (CMA) (formerly the Office of Fair Trading) and certain 'qualifying bodies' may consider complaints that terms 'drawn up for general use' are unfair and can seek injunctions against those using, or recommending the use of, such terms which they view as unfair, to prevent that use or recommendation from continuing<sup>6</sup>. The significance of this more general level of enforcement of the Regulations should not be doubted and has been recognised by the House of Lords in *Director General of Fair Trading v First National Bank*<sup>7</sup> where Lord Steyn took the view that the 'system or pre-emptive challenges is a more effective way of preventing the continued use of unfair terms ... than *ex casu* actions'<sup>8</sup>.

The Competition and Markets Authority (CMA) was set up in 2013 under the Enterprise and Regulatory Reform Act 2013 to replace the Office of Fair Trading as regards the latter's consumer affairs powers<sup>9</sup>. The CMA has been conferred all the necessary enforcement and policy-making powers of the OFT. Its powers and functions are to some extent in a transitional stage pending the passage of the Consumer Rights Act.

UTCCR 1999, reg 10 requires the regulator (the CMA) to consider any complaint made to it that a term drawn up for 'general use' is unfair<sup>10</sup> unless it appears to be 'frivolous or vexatious' or a 'qualifying body' has notified the regulator that it agrees to consider the complaint<sup>11</sup>. The regulator may bring proceedings for an injunction 'against any person appearing' to it 'to be using, or recommending the use of, an unfair term drawn up for general use in contracts concluded with consumers'<sup>12</sup>. In deciding whether or not to pursue an injunction in respect of a term which the regulator considers to be unfair, it may 'have regard to any undertakings ... as to the continued use of such a term in contracts concluded with consumers'<sup>13</sup>. The regulator is under a duty to give reasons for its decision to apply, or not to apply, for an injunction<sup>14</sup>. If an injunction is sought it need not be confined to the specific term but may also relate 'to any similar term,

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UTCCR 1999, regs 1015.

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[2001] UKHL 52, [2002] 1 All ER 97, Lord Steyn.

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Para 33. *Office of Fair Trading v Foxtons Ltd* [2009] EWCA Civ 288, [2009] 3 All ER 697, [2010] 1 All ER (Comm) 497, Waller V-P at [44], Moore-Bick LJ at [90]. See S Bright 'Winning the Battle Against Unfair Contract Terms' (2000) 20 LS 331.

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Part 3 of ERA 2013.

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UTCCR 1999, reg 10(1). Derived from art 7.

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UTCCR 1999, reg 10(1).

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UTCCR 1999, reg 12(1).

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UTCCR 1999, reg 10(3).

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UTCCR 1999, reg 10(2).

or a term having like effect, used or recommended for use by any person'<sup>15</sup>. As has been indicated, the Regulations allow for injunctions to be obtained not only against those who use the term in question but also those who recommend its use<sup>16</sup> and this might cover, for example, a trade association which recommends a set of standard terms for its members, including the term in question.

The issue has arisen as to whether, if a term is found to be unfair when an action is taken at the general level, this only relates to the future use of the term or can also impact on existing contracts. This was considered by the Court of Appeal in *Office of Fair Trading v Foxtons*<sup>17</sup>. The court considered the differences between individual action and the general action, recognising the variances in relation to the fairness test and the approach to construction so that it would be possible for an individual consumer to successfully contend a term was unfair even where it had been found fair at the general level (and vice versa). They nevertheless concluded that if a term was found to be unfair at the general level, an injunction could relate not only to future contracts but also to existing contracts. However, Arden LJ emphasised that whether an injunction could be granted in relation to existing contracts, and on what terms, depended upon the circumstances of the case. She saw the situation as one in which a balance had to be struck:

‘Provisionally, it seems to me that under general principles of Community law, the grant of the injunction will have to be proportionate, that is to say the interference with the rights of the supplier by the grant of the injunction will have to be justified by the need to protect the consumer interests. In addition, Community law requires that the remedy should be sufficiently effective.’<sup>18</sup>

In setting the terms of the injunction Her Ladyship thought therefore that the courts could “‘carve out” contracts fulfilling a particular description’ or ‘the court could give the supplier leave to seek the permission of the court to bring claims to enforce existing contracts in particular circumstances’<sup>19</sup>. Moore-Bick LJ favoured merely ‘prohibiting any attempt to rely on or enforce the term in question without permission of the court’ if there are ‘grounds for thinking that the term in question might be enforceable in some cases’. His Lordship sought to avoid ‘interference with existing rights’<sup>20</sup>.

It should however be noted that a court or tribunal cannot strike down a term as being unfair simply because the term in question was required to have been cleared as fair by the authorities but had not been. The court or tribunal must carry out its own assessment as to the term’s unfairness, as a matter of EU law<sup>21</sup>.

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UTCCR 1999, reg 12(4).

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UTCCR 1999, reg 12(1).

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[2009] EWCA Civ 288, [2009] 3 All ER 597.

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[2009] EWCA Civ 288, [2009] 3 All ER 597 at [73].

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[2009] EWCA Civ 288, [2009] 3 All ER 597 at [75].

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[2009] EWCA Civ 288, [2009] 3 All ER 597 at [96].

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*Kock v Schutzverband gegen unlauteren Wettbewerb (C-206/11)* [2013] 2 CMLR 21 – a case about the Unfair Commercial Practices Directive, but on this point it is submitted that there should be no difference between the two directives.



There is also enforcement at the general level under Part 8 of the Enterprise Act 2002. This allows certain 'enforcers' (such as the CMA<sup>22</sup>) to apply for enforcement orders in relation to certain consumer protection legislation (including the Unfair Terms in Consumer Contracts Regulations 1999) where the infringement 'harms the collective interests of consumers'<sup>23</sup>.

As for the Consumer Rights Bill 2014, the role of an 'unfair terms enforcer' rests primarily on the Competition and Markets Authority (CMA)<sup>24</sup>. The CMA also has the power to seek an injunction against an undertaking which it considers 'is using, or proposing or recommending the use of' an unfair term or notice<sup>25</sup>. It can do so with or without having first received a complaint<sup>26</sup>.

The Bill also places a legal responsibility on courts to consider the fairness of terms even though the issue is not raised<sup>27</sup>. This provision reflects the view of the CJEU in Case C-168/05 *Mostaza Claro* that 'the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair'<sup>28</sup>. The courts would be excused from assessing the fairness of terms if they do not have adequate information to do so<sup>29</sup>. In addition, the courts would only have to look at the term or terms in question, not the entire contract<sup>30</sup>.

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Note that with the closure of the OFT in April 2014, the Competition and Markets Authority (CMA) has assumed responsibility for consumer affairs.

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Enterprise Act 2002, s 212. *Office of Fair Trading v MB Designs* 2005 SLT 69 at [14].

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Consumer Rights Bill 2014, Sch 3, para 1. There are other unfair terms enforcers (set out in Sch 3, para 8(1)) – namely, the Department of Enterprise, Trade and Investment in Northern Ireland, a local weights and measures authority in Great Britain, the Financial Conduct Authority, the Office of Communications, the Information Commissioner, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, and the Consumers' Association – but if they take enforcement action, they must pre-notify the CMA. If they seek an injunction against an undertaking which uses or proposes to use an unfair term or notice, they must notify the CMA of (a) the outcome of the application; and (b) if an injunction or interdict is granted, the conditions on which, and the persons against whom, it is granted (Sch 3, para 5(5)).

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Sch 3, para 3(1).

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Sch 3, para 6.

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Clause 71.

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(2006) ECR I-10421 at [38].

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Clause 71(3) which in turn reflects the ruling by the CJEU in Case C-243/08 *Pannon* (2009) ECR I-4713 (at [35]).

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See Case C-137/08 *VB Penzugyi v Schneider* (9 November 2010).

## Excluded terms

### [3.99]

Regulation 4(2) states that the Regulations do not apply to:

‘contractual terms which reflect:

- (a) mandatory statutory or regulatory provisions (including such provisions under the law of any Member State or in Community legislation having effect in the United Kingdom without further enactment)<sup>1</sup>;
- (b) the provisions or principles of international conventions to which the Member States or the Community are party.’<sup>2</sup>

The line taken in the Directive is that the ‘statutory or regulatory provisions of Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms’ and it is therefore not regarded as necessary to subject such terms to the fairness test<sup>3</sup>. Here the CMA advises on such provisions to ensure the terms are fair<sup>4</sup>.

The scope of the exclusion from the Regulations is somewhat unclear<sup>5</sup>. The reference to ‘mandatory’ provisions could have been taken as merely excluding those terms which had to be included on the basis of legislation, whatever the parties’ wishes. However, the recitals to the Directive take the line that the exclusion includes ‘rules which, according to the law shall apply between contracting parties provided that no other arrangements have been established’<sup>6</sup>. This would also seem to provide for the exclusion of any terms which are included on the basis of statute or regulation unless the parties provide otherwise. One argument for narrowing this refers to the jurisprudence of the European Court on ‘mandatory provisions’

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The Law Commission are of the view that the reference to the mandatory or regulatory provisions of ‘any member state’ is an ‘incorrect incorporation of the Directive’ (emphasis added) and that terms which do not reflect relevant UK measures should be subject to UTCCR 1999: *Unfair Contract Terms Law Com Consultation Paper No 166*, para 3.36.

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It has been contended that ‘the Regulations refer to ‘the provisions *or principles* of such conventions. So that a term based on the principles of a relevant convention would not be governed by the Regulations even though the contract in which the term was contained was not governed by the convention eg where a term in a contract for domestic carriage of goods was based on the principles of a convention which in terms governed only international carriage’ (Treitel *The Law of Contract* (10th edn, Sweet & Maxwell, London 1999) p 253. The Law Commission views this interpretation as ‘doubtful’ (*Unfair Contract Terms Law Com Consultation Paper No 166*, para 3.38).

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Recital 13.

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For an extensive discussion see *Unfair Terms in Contracts Law Com Consultation No 166*, Scot Law Com Discussion Paper No 119 paras 3.36–3.40, 4.75.

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OFT Bulletin 1, 2.1.

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Recital 13.

in the context of the *Cassis de Dijon* decision<sup>7</sup>. This would require the justification of the relevant terms in the public interest if they were to be excluded and seems to be an inappropriate and uncertain exercise in the different contexts in which the Regulations fall to be considered<sup>8</sup>.

However, terms going beyond the 'mandatory statutory or regulatory provisions' (however interpreted) or the 'provisions or principles of international conventions' will fall within the scope of Regulations<sup>9</sup>, as will terms which accurately reflect the legislation in their content but which are incorporated into a different contractual context from that in which the legislation applies<sup>9</sup>.

The Regulations do not apply to a term merely embodying a common law rule<sup>10</sup>.

As regards the Consumer Rights Bill 2014, cl 73 provides that the part of the new Act dealing with unfair terms does not apply to a term of a contract, or to a notice, to the extent that it reflects—

- (a) mandatory statutory or regulatory provisions<sup>11</sup>, or
- (b) the provisions or principles of an international convention to which the United Kingdom or the EU is a party.

These provisions are very similar to reg 4(2) and are likely to be applied in a similar manner.

## 'Consumer'

### [3.100]

Regulation 3(1) states:

“‘consumer’ means any natural person who, in contracts covered by these Regulations, is acting for purposes which are outside his trade, business or profession.’

Although the definition limits 'consumers' to natural persons, there is an exception to that limitation in relation to arbitration clauses under s 90 of the Arbitration Act 1996. Under that section 'the Regulations apply where the consumer is a legal person as they apply where the consumer is a natural person'.

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For discussion of this argument see S Whittaker 'Unfair Terms, Public Services and the Construction of a European Conception of Contract' (2000) 116 LQR 95 at 117–118.

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See S Whittaker 'Unfair Terms, Public Services and the Construction of a European Conception of Contract' (2000) 116 LQR 95 at 118.

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*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June.

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*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June.

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This was assumed to be the case in *Direct Line Insurance plc v Fox* [2009] EWHC 386 (QB), [2009] 1 All ER (Comm) 1017 at [50], following *Direct Line Insurance plc v Khan* [2001] EWCA Civ 1794, [2001] All ER (D) 476 (Oct) at [36] where the rule was not embodied in an express term.

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Clause 73(2) states that 'mandatory statutory or regulatory provisions' would include rules which, according to law, apply between the parties on the basis that no other arrangements have been established.

(Obviously the 'legal person' in question must be acting for purposes outside its trade, business or profession in order to qualify as a consumer for the purposes of s 90)<sup>1</sup>. However, the basic restriction of the classification of 'consumer' under the Regulations to 'natural persons' contrasts with the approach which has been taken to the question of who 'deals as consumer' under s 12 UCTA 1977, which can encompass a company<sup>2</sup>. (Although, under the amendments to UCTA made by the Sale and Supply of Goods to Consumers Regulations 2002 some distinction is made between those situations in which the person claiming to be a consumer is an 'individual' and those where it is not, with the former being afforded more protection under some circumstances<sup>3</sup>.) However, the basic exclusion of companies from being 'consumers' under UTCCR 1999 indicates, in itself, a different, and less broad approach to the meaning of consumer than that taken to 'deals as consumer' under UCTA.

Under UCTA the courts have taken the line that someone may deal as consumer if the transaction is not integral to their business or regularly occurring. In the *Di Pinto* case<sup>4</sup>, in the context of the meaning of consumer in the doorstep selling Directive<sup>5</sup>, the Court of Justice stated that a distinction could not be drawn between the 'normal' acts of a business and those which are 'exceptional in nature'. The question was whether the acts were for the purpose of satisfying requirements 'other than the family and personal requirements of the trader'.<sup>6</sup> Similarly, in *Benincasa v Dentalkit Srl*<sup>7</sup> the European Court has seen consumer contracts under the Brussels' Convention (now replaced by EU Regulation 44/2001, the so-called Brussels I Regulation) as confined to those 'concluded for the purpose of satisfying an individual's own needs in terms of private consumption'.<sup>8</sup> and the latter approach was considered when the meaning of consumer under the Unfair Terms Directive and the Brussels convention fell to be addressed by Longmore J in *Standard Bank London Ltd v Apostoliakis*<sup>9</sup>. That case was concerned with foreign

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*Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831, [2008] Bus LR D49.

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*R & B Customs Brokers Co Ltd v United Dominion Trust Ltd* [1988] 1 All ER 847, [1988] 1 WLR 321.

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SI 2002/3045. See para 3.83.

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Case C-361/89 [1991] ECR I-1189.

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Council Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises.

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[1991] ECR I-1189 at [16]. See also the opinion of Advocate General Misco in *Cape Snc v Idealservice Srl* Case C-541/99, [2001] ECR I-9049, [2002] All ER (EC) 657 at [26]–[28].

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Case C-269/95 [1997] ECR I-3767.

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*Benincasa v Dentalkit SRL* Case C-269/95 [1997] ECR I-3767 at [15]. See also Case C-508/12 *Vapenik v Turner* [2013] CJEU which held that in the context of European enforcement orders, the definition of 'consumers' within Regulation 805/2004, art.6(1)(d) referred to a person who concluded a contract for a purpose which could be regarded as being outside his trade or profession with a person who was acting in the exercise of his trade or profession.

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exchange investment contracts made with the bank by a wealthy couple who were a civil engineer and a lawyer. Longmore J took the basic line that entering into foreign exchange contracts was 'not part of a person's trade as a civil engineer or a lawyer' and that 'the only question' was whether they 'were engaging in the trade of foreign exchange contracts as such' and he did not believe that they were. He took the view that 'they were disposing of income which they had available. They were using money in a way which they hoped would be profitable but merely to use money in a way one hopes would be profitable is not enough ... to be engaging in trade'. In addition, he took the view that the scale of the transactions – 28 contracts with a total exposure of \$7 million – did not make any difference. The fact that the definition of consumer looks to the purpose of the transaction seemed to him to 'militate against looking at a general consequence or scale of value'. In relation to the line taken in *Benincasa*, he thought that the description there of contracts 'concluded for the purpose of satisfying an individual's own needs in terms of private consumption' was met in the instant case – 'the contracts made ... were for the purpose of satisfying the needs of Mr and Mrs Apostoliakis, defined as an appropriate use of their income, and that the need was a need in terms of private consumption'. He made the point that 'consumption cannot be taken as literally consumed so as to be destroyed but rather consumed in the sense that a consumer consumes, viz he uses or enjoys the relevant product'. Undoubtedly a contract for the investment of disposable income must be regarded as being capable of being a contract made by a consumer, and the size of that investment will be relative to the financial situation of the individual consumer. There must, however, come a point at which a secondary means of making money becomes a secondary trade or business of the individual in question<sup>10</sup>. In *Office of Fair Trading v Foxtons Ltd*<sup>11</sup> it was indicated that the number of properties which a landlord had was relevant in determining whether he was a consumer when entering into a contract for the services of a letting agent<sup>12</sup>.

As has been indicated, the question raised under reg 3(1) may not merely be whether a transaction falls within a trade, business or profession, but also whether there is a trade, business or profession. That question arose in the case of a footballer who appointed a company to act on his behalf in relation to, for example, contractual negotiations with his employers and the commercial exploitation of his 'identity'. The footballer contended that he was the employee of a football club and did not have a trade or profession. The judge concluded he had the trade or profession of 'professional footballer'<sup>13</sup>. If a transaction is

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[2002] CLC 933. See also *Standard Bank London Ltd v Apostoliakis (No 2)* [2002] CLC 939.

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See the approach taken by the Greek court, refusing to classify the couple as consumers – [2003] I L Pr 29. In *Maple Leaf Macro Volatility Master Fund v Rouvray* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287 at [209], Andrew Smith J said that he 'would question the conclusion reached by Longmore J' in the *Apostoliakis* case. See also *Nationwide Building Society v Christie & Snell* [2013] EWHC 127 (Ch) where the court refused to treat a natural person, who had set up a business venture with other investors to make the investments in question, as a consumer.

<sup>11</sup>

[2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [28].

<sup>12</sup>

Other factors were also indicated – 'there are numerous individuals who find themselves in a position of requiring the services of an individual letting agent who cannot be classified as doing so for the purposes of a trade, business or profession .... They include individuals who decide to let out their only property whilst travelling temporarily abroad, as a result of relocation by their employer or for other reasons connected with their "lifestyle" choice, individuals who let out part of their property in order to fund their mortgage on the remainder, and individuals for whom their property investment represents part of their pension plan or long term saving ... Indeed it appears that significant numbers of landlords are acquiring one or two properties as a more secure way of providing future pensions and savings ...' – *Maple Leaf Macro Volatility Master Fund v Rouvray* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287, Mann J at [209] quoting from a witness statement of an OFT section head.

<sup>13</sup>

entered into by someone in order to pursue their business activities, it is not taken outside their 'business' because personal guarantees are provided and family property is used as security<sup>14</sup>. However, an issue may arise in relation to a transaction which is of a type in which the person concerned engages as a matter of their business, but which on the particular occasion is engaged in as a matter of private consumption, such as the car dealer who buys a car for private use. The line has been taken that 'purpose connotes intention. If a party acts in a way which furthers their intention, ie to further their trade, business or profession, their actions are excluded from the Regulations. If an action is for a different purpose but which has an incidental result which furthers its trade, business or profession it does not result in the contract being excluded from the protection of the Regulations'<sup>15</sup>. This may suffice where there is a clear 'personal' purpose behind the transaction and any business benefit is merely incidental, but questions may arise in relation to more mixed transactions (such as a car bought partly for business use and partly for personal use). In the context of the Brussels I Regulation (Regulation 44/2001) and its predecessor, the Brussels Convention, the CJEU in *Gruber v BayWa AG* has taken the line that a contract with mixed purposes will not be a consumer contract 'unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply'<sup>16</sup>. An objective assessment should be made of this 'unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business'<sup>17</sup>; for example, 'where an individual orders, without giving further information, items which could in fact be used for his business, or uses business stationery to do so, or has goods delivered to his business address, or mentions the possibility of recovering value added tax'<sup>18</sup>.

The position of an agent who would fulfil the definition of consumer, but who is contracting on behalf of a principal who would not, may fall to be considered. Plainly, where the agent has no personal involvement in the contract then the potential to classify the agent as a consumer should not be relevant and the contract should not fall within the scope of the Regulations. However, where the agent is not simply contracting as agent, but is also undertaking personal liability under the contract, then, in relation to that liability, the terms will fall to be considered under the Regulations<sup>19</sup>.

A note of general relevance is that the UTCCR and UCTA are to be complemented by the Consumer Protection from Unfair Trading Regulations 2008 (which implement EU Directive on Unfair Commercial Practices<sup>20</sup>) – the 2008 Regulations make a distinction between 'average consumer', 'average targeted

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*Prostar Management v Twaddle* [2003] SLT (Sh Ct) 11.

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*Maple Leaf Macro Volatility Master Fund v Rouvray* [2009] EWHC 257 (Comm), [2009] 2 All ER (Comm) 287 at [209].

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*Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831, [249].

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Case C-464/01 *Gruber v BayWa AG* [2006] QB 204, [2005] ECR I-439 at [54].

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Case C-464/01 *Gruber v BayWa AG* [2006] QB 204, [2005] ECR I-439 at [54].

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Case C-464/01 *Gruber v BayWa AG* [2006] QB 204, [2005] ECR I-439 at [52].

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*Domsalla (t/a Domsalla Building Services) v Dyason* [2007] EWHC 1174 (TCC), 112 ConLR 95, [2007] BLR 348.

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Directive 2005/29/EC.

consumer' and 'average vulnerable consumer' when providing for consumer protection against 'any act, omission and other conduct by businesses directly connected to the promotion, sale or supply of a product to or from consumers (whether before, during or after a commercial transaction, if any)' which is an unfair commercial practice. In the case of the Directive, the CJEU held in Case C-59/12 *BKK Mobil Oil Korperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*<sup>21</sup> that even a public law body can be treated as a consumer. The court ruled that a public body charged with a task of public interest, such as the management of a statutory health insurance fund, fell within the persons covered by Directive 2005/29 prohibiting unfair commercial practices. It stated that the members of such a body had to be regarded as consumers who could be deceived by misleading information circulated by that body, thus preventing them from making an informed choice as envisaged by art 6(1). How that decision will (if at all) influence the application and interpretation of the word 'consumer' in the UCCTR and UCTA remains to be seen.

As for the Consumer Rights Bill 2014, cl 2(3) defines a consumer as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. Although it does not refer to 'natural person', it is submitted that the term 'individual' must necessarily exclude legal persons, including small businesses, charities and social organisations. For clarity, it specifically refers to an individual who is acting outside his craft. It is also especially useful that the reference to 'wholly or mainly' is added – it is intended to make clear that the purposes behind the transaction must be wholly or mainly outside the individual's trade, business, craft or profession. However, it remains unclear whether the new definition has changed the scope of the restriction applied in *Gruber v BayWa AG*<sup>22</sup> where it was held by the CJEU that in cases of mixed transactions, the personal purpose has to be *negligible* before the contract would be considered to be a consumer contract.

## 'Seller or supplier'

### [3.101]

Regulation 3(1) states:

“‘seller or supplier’ means any natural or legal person who, in contracts covered by these Regulations, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.’

The reference to 'purposes relating to his business' would seem to indicate a broad approach to whether someone is a 'seller or supplier'. Certainly 'related to' does not seem to indicate that a strong connection with the business is required<sup>1</sup>, although plainly some relationship between the particular transaction and the business is required ie it is not merely a test of whether the seller or supplier is 'in business'. The reference to a business which is 'publicly owned' makes it clear that it is possible for a local authority to fall within the Regulations as a 'seller or supplier' but the question will be asked whether the functions it is carrying out in relation to the particular transaction are such that it does so in that case. In *London Borough of Newham v Khatun*<sup>2</sup>, before concluding that the transaction fell within the Regulations, the court basically considered whether the function being performed was one which was performed by a private sector business.

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<sup>21</sup>

[2014] 2 CMLR 1, [2014] CEC 516.

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Case C-464/01, [2006] QB 204, [2005] ECR I-439.

<sup>1</sup>

But see Harrison *Good Faith in Sales* (1997) at 19.13.

<sup>2</sup>

[2004] EWCA Civ 55, [2005] QB 37, [2004] 3 WLR 417.

Under the 1994 version of the Regulations the definitions of seller and supplier were somewhat different, limiting the definitions to the seller 'of goods' and to the supplier 'of goods or services'. The definitions in the Directive contain no such restrictions<sup>3</sup>. The restrictions in the 1994 Regulations had been imported from references in the recitals to the 'seller of goods or the supplier of services'<sup>4</sup>. Their importation in this way was questioned, particularly in relation to the apparent exclusion of contracts dealing with land<sup>5</sup>, and, as can be seen any such limitation has been dropped from the 1999 version of the implementing Regulations. In *London Borough of Newham v Khatun*<sup>6</sup> the Court of Appeal clearly viewed the Regulations as capable of applying to contracts dealing with land, even those transferring or creating an interest in land. Further in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* the CJEU assumed that the Directive applied to a contract for the purchase of a building which was to be constructed<sup>7</sup>.

As a comparison, the Consumer Rights Bill 2014 does not use the term 'seller'; instead it uses a more widely encompassing term – 'trader'. Clause 2(2) of the Bill defines a trader as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf'. Clause 2(7) stresses that a 'business' includes the activities of government departments and local and public authorities. Such bodies may therefore come within the definition of a trader. It would appear that not-for-profit organisations, such as charities, mutuals and co-operatives, may also come within the definition of a trader. For example, if a charity shop sells t-shirts or mugs, it would be acting within the meaning of trader<sup>8</sup>.

## *Contracts concluded between a seller or a supplier and a consumer*

### [3.102]

Consideration has been given above to the definitions of 'consumer' and 'seller or supplier', however some further comments need to be made in relation to the fact that the fairness test applies to relevant terms in 'contracts concluded between a seller or supplier and a consumer'. Firstly, in relation to the requirement for a 'contract' and secondly in relation to the necessity for it to be between 'a seller or supplier and a consumer'.

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Article 2(c).

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Recital 2, see also recitals 5, 6, 7 and the DTI Consultation Paper, *Implementation of the EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC)* (October 1993).

5

Bright and Bright 'Unfair Terms in Land Contracts' (1995) 111 LQR 655 at 667; Harrison *Good Faith in Sales* (1997) at 19.17.

6

[2001] EWCA Civ 1252, [2002] 2 WLR 1009, [70]. See also *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117.

7

[2004] CMLR 417.

8

Para 38, Explanatory Notes to the Bill ([www.publications.parliament.uk/pa/bills/lbill/2014-2015/0029/en/15029en.htm](http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0029/en/15029en.htm)).



As has been indicated, the UTCCR 1999 are concerned with contracts. The suggestion has been made that, as the implementation of a European measure, it may be that, for example, the English courts will not simply be able to apply the English law notion of contract in applying the Regulations. Rather some European concept of contract will need to be worked out through the European Court in order for the Directive to be properly implemented in the various Member States<sup>1</sup>. This might then allow for some agreements without consideration to be regarded as contracts for the purposes of the Regulations. Further, in the public law field, at the European level, for the purposes of the Directive, the provision of some public services might be seen as contractual when they are not otherwise so regarded by the laws of a particular Member State<sup>2</sup>.

The second point to be made here relates to contracts which will not be regarded as being between 'consumers and sellers or suppliers'. In the UTCCR 1994, Sch 1 contained a list of contracts excluded from the scope of the Regulations. These were:

- (a) any contract relating to employment
- (b) any contract relating to succession rights
- (c) any contract relating to rights under family law
- (d) any contract relating to the incorporation and organisation of companies.

There is no such list in the UTCCR 1999. However, it was originally derived from recital 10 to the Directive, where the exclusion of these contracts is seen as following from the Directive's coverage being of contracts between 'consumers and sellers or suppliers' and it could, therefore, still impact upon the UTCCR 1999.

In contrast, Part II of the Consumer Rights Bill 2014 on unfair terms purports to apply to contracts between a trader and a consumer<sup>3</sup>. It avoids any reference to seller or supplier. As to its exclusions, the Bill does not apply to contracts of employment or apprenticeship<sup>4</sup>. Contracts of employment are regulated by specific legislation. As such, the exclusion of such contracts from the Consumer Rights Bill avoids any potential overlap between different regimes.

One further issue which arises in relation to the UTCCR 1999 references to contracts between 'sellers or suppliers and consumers' lies in relation to contracts under which it is the consumer who appears to be the supplying party such as the sale of a car by a consumer to a business (eg a 'trade-in') or the situation in which an individual provides a guarantee to a business lender in order for a third party to be able to obtain a loan. In *Bayerische Hypothekbank v Dietsinger*: C-45/96<sup>5</sup> the European Court of Justice showed itself willing to find that the protection of Directive 85/577 (the 'Doorstep Selling' Directive) could extend to

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S Whittaker 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract' (2000) 116 LQR 95.

2

S Whittaker 'Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract' (2000) 116 LQR 95.

3

Clause 61(1).

4

Clause 61(2).

5

[1998] All ER (EC) 332. N Bamforth 'The Limits of European Union Consumer Contract Law' (1999) 24 Eur L Rev 410. And see European Commission 'Report on Directive 93/13/EEC on Unfair Terms in Consumer Contracts' Com (2000) 248 Final p 8, fn 19.

the latter situation where both the guarantor and the person receiving the loan were consumers. In *Barclays Bank plc v Kufner*<sup>6</sup> the line was taken that this approach should be followed in the context of UTCCR 1999, although it can be questioned whether it is appropriate to limit the application of the Regulations to the situation in which the loan is to a consumer. It can be contended that it should be sufficient if the guarantor is acting for purposes which are outside his trade, business or profession. To conclude otherwise is to place too much emphasis upon the secondary nature of the guarantee, which should be seen as falling within the Regulations in its own right. *Kufner* maintains too much of the idea that the supply must flow from the 'seller or supplier' to the consumer, which predominated in those earlier cases in which it was indicated that a guarantee provided by a consumer could not fall within the Regulations at all because the supply flowed from the consumer to the bank<sup>7</sup>. It should be emphasised that different language versions of the Directive do not have the same overtones as to direction of supply as is present in the reference in the English language version of the Regulations. The French version is, for example, the more neutral 'professionnel', simply referring to someone in business or carrying on a profession<sup>8</sup>.

## *Terms not individually negotiated*

### [3.103]

In appropriate contracts, and subject to certain exceptions<sup>1</sup>, the Regulations apply the fairness test to any terms which have 'not been individually negotiated'<sup>2</sup>. Regulation 5(4) places the burden of proving that a term was individually negotiated upon a seller or supplier. Some guidance as to which terms are not individually negotiated is provided by UTCCR 1999, reg 5(2) which states:

'a term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.'

This does not state the essential requirements for a term to be not individually negotiated. It merely states one set of circumstances in which a term will be so categorised. It raises the question of what the terms should have been drafted 'in advance of'. It would seem that the Regulation should be taken to refer to terms drafted 'in advance' of negotiations<sup>3</sup>. The reference to the 'substance of the term' makes it clear that cosmetic or trivial alterations will not suffice to lead to a term being regarded as 'individually negotiated'. Also, 'the fact that a consumer or his legal representative has had the opportunity of

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[2008] EWHC 2319 (Comm), [2009] 1 All ER (Comm) 1. See also *Royal Bank of Scotland plc v Chandra* [2010] EWHC 105 (Ch) at [102].

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*Manches LLP v Freer* [2006] EWHC 991 (QB), [2006] All ER (D) 428 (Nov); *Williamson v Governor of the Bank of Scotland* [2006] EWHC 1289 (Ch), [2006] BPIR 1085, following *The Governor and Co of the Bank of Scotland v Singh* (unreported, 2005) QBD Mercantile Ct, Kershaw HHJ.

8

S Bright 'Winning the Battle Against Unfair Contract Terms' (2000) 20 LS 331, 341.

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See reg 4(2) above para 3.99 (exception in relation to mandatory terms etc) and also reg 6(2) for the core term exception.

2

UTCCR 1999, reg 5(1).

3

Treitel *The Law of Contract* (10th edn, 1999) at p 247.

considering the terms of an agreement does not mean that any individual term has been individually negotiated<sup>4</sup>.

Commonly terms which are not 'individually negotiated' will be the seller's or supplier's 'standard terms' of business, but terms may be 'not individually negotiated' without being standard terms. Terms can, for example, fall within reg 5(2) without needing to be standard form terms. Where there is a 'pre-formulated standard contract', reg 5(3) makes it clear that the fact that a specific term has been negotiated does not prevent the rest of the contract terms from being regarded as non-individually negotiated. On a broader scale, this would seem merely to be dealing with one particular example of a type of argument ie that sufficient of the contract terms have been changed to mean that all of them should be regarded as individually negotiated. There must come a point at which that is so, but it should be remembered that the burden of proof is on the seller or supplier to show that the terms were individually negotiated.

The newly proposed Consumer Rights Act will apply to all terms in contracts between traders and consumers whether negotiated or not. It will also apply to notices to the extent that they relate to rights or obligations between traders and a consumer or purport to exclude or restrict a trader's liability to a consumer as long as it is reasonable to assume the notice is intended to be read by a customer (for example, a sign in a hotel room, or a notice on the back of a train ticket)<sup>5</sup>. A 'notice' includes an announcement, whether or not in writing, and any other communication or purported communication<sup>6</sup>.

## Terms

### [3.104]

It is clear that the scope of the UTCCR 1999 is restricted to contract 'terms'. Regulation 4(1) states that the Regulations apply 'in relation to unfair terms ...'<sup>1</sup>. This raises a difficulty in the context of clauses which are a standard part of a business's contracting procedure, but the procedure is defective, so that the clauses are not effectively incorporated. In that situation, prima facie, there is no 'term' for the Regulations to apply to<sup>2</sup>. Of course, non-contractual notices may impact upon liability in tort and they may then be subject to the control of the Unfair Contract Terms Act 1977<sup>3</sup> and when contractual liability is in question it might be thought to be irrelevant whether a clause is ineffective under the general law, because it has not been incorporated, or under the Regulations, because it is unfair. However, consumers frequently do not know their rights and do not litigate. Consumers may well be misled as to

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*UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [19].

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Clause 61(6) of the Consumer Rights Bill 2014.

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Clause 61(8).

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*Stephen West, Carol West v Ian Finlay & Associates* [2014] EWCA Civ 316; in the case of 'non-terms' but mere commercial practices considered to be unfair, the Unfair Trading Regulations 2008 (which implement EU Directive on Unfair Commercial Practices 2005/29/EC) may apply. In the Consumer Rights Bill 2014, not only terms will be subject to the unfair terms regime but also 'consumer notices' would be caught (cl 62(2)). Such a notice would include 'an announcement, whether or not in writing, and any other communication or purported communication' (cl 61(8)).

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But see *Munckenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr).

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UCTA 1977, s 2. See para [3.77](#).

their rights by clauses which would not have a legal impact upon their rights, leaving them in a situation in which they cannot enjoy their rights to the full. Of course, any term which falls within the scope of the powers of the CMA or 'qualifying body' can be removed from standard terms so that it is no longer used and cannot then mislead the consumer. This provides considerably greater protection for consumers than any individual's right to say that a term is not binding on them. The restriction on the scope of the powers of the CMA and 'qualifying bodies' might be limited by an appropriate emphasis on, and approach to, the fact that Regulation 12 allows for injunctions to be obtained against those 'recommending the use of an unfair term drawn up for general use'<sup>4</sup>. However, even if effective in itself, such an approach would only extend to some cases. An alternative, but more interventionist and contrived, approach could be taken to the interpretation of the Regulations. In the context of the powers of the CMA and 'qualifying bodies', where the real concern is not with one particular contract, but with the general use of a set of terms, and it should be the procedure for incorporation which should be considered, rather than the steps taken to incorporate a clause in one particular case, it could be contended that it should be sufficient if the procedure adopted was intended to lead to the incorporation of the clauses drawn up for general use<sup>5</sup> – even if it was inappropriate to do so<sup>6</sup>. This does however require a significant step to be taken in the interpretation of the Regulations<sup>7</sup>.

There is a further difficulty in this area in relation to the question of unfairness. Even if the more general powers under the Regulations can apply where the procedure adopted for incorporating clauses is ineffective, a problem arises as to whether a clause without legal effect can be unfair. *Prima facie* unfairness depends upon a significant imbalance in the rights and obligations of the parties and it can be questioned how a clause without legal impact can generate such an imbalance. This question is considered below with related issues<sup>8</sup>.

## *The 'core' exclusion*

### [3.105]

Regulation 6(2) provides the 'core'<sup>1</sup> exclusion from the fairness test. It states:

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It would have to be understood as not restricted by any inappropriate means recommended to incorporate the clauses and not to be restricted by any inappropriate means adopted to incorporate the clauses in question ie it would merely have to relate to their recommendation for use as terms – even if an inappropriate means is to be used to incorporate them.

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It would have to be understood that the relevant intention should not be required to extend to the means adopted to incorporate the clauses as terms (otherwise there would be no improvement). What should be considered is whether, despite the fact that the seller or supplier intends to use a procedure which will not incorporate the clauses, he, or she, does intend them to operate as terms.

6

E Macdonald 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations' (1999) 58 CLJ 413.

7

The Law Commissions make specific provision for the issue in the proposed unified regime – *Unfair Terms in Contracts* Law Com No 292, Scot Law Com No 199, paras 3.154-3.155.

8

See para 3.109. E Macdonald 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations' (1999) 58 CLJ 413.

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- ‘In so far as it is in plain intelligible language, the assessment of fairness of a term shall not relate -
- (a) to the definition of the main subject matter of the contract, or
  - (b) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange.’

This is derived from equally obscure provisions in the Directive. Article 4(2) states:

‘Assessment of the unfair nature of terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of price and remuneration on the one hand, as against the services or goods supplied in exchange, on the other in so far as those terms are in plain intelligible language.’

In addition, recital 19 states:

‘Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer.’

Regulation 6(2) provides some preservation of the basic principle that the courts will not inquire into adequacy of consideration and it has been said, of the core exclusion in the Directive, that it seems to be intended to exclude from the scope of the Directive ‘anything resulting from the contractual freedom of the parties’<sup>2</sup>. When what is in question is a standard form contract, what both parties are most likely to have been aware of are the price and a few other central terms and those are the areas where some ‘freedom of contract’ is preserved.<sup>3</sup> The need for transparency if freedom of contract is to operate effectively is recognised in the fact that ‘core’ exclusion only applies if the relevant terms are in ‘plain intelligible language’. In *Office of Fair Trading v Abbey National*<sup>4</sup> Lord Walker identified the core exclusion as part of a ‘compromise solution balancing the need for consumer protection against residual freedom of contract’<sup>5</sup>.

However, it has been clear from the publication of the Directive that there were considerable potential difficulties in determining the boundaries of the core exclusion. There was clear potential for the familiar problem to arise, for example, as to whether exclusion clauses should be regarded as part of the definition of the subject matter of the contract<sup>6</sup> and from the example of the operation of the core

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The terminology seems to have become very common despite the concerns of the Court of Appeal in *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481, [2001] 2 All ER (Comm) 1000, [25], and *Office of Fair Trading v Abbey National* [2009] UKSC 6 now also indicates a need to treat it with care. A similarly expressed provision is found in the Consumer Rights Bill 2014(cl 64).

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Howells and Wilhelmsson *EC Consumer Law* (Dartmouth, Aldershot, 1997) p 94.

3

*Unfair Contract Terms Guidance* OFT Feb 2001, para 19.3

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[2009] UKSC 6.

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[2009] UKSC 6 at [6] – having referred to the ‘particularly influential’ article of Brandner and Ulmer (1991) 28 CMLR 647.

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exclusion given in recital 19 (above) it was also clear that there was potential for the core exclusion to be construed as very extensive, with considerable impact upon the effectiveness of the Regulations<sup>7</sup>. Further, it has been questioned whether the exclusion is of terms or issues ie it has been questioned whether the exclusion relates to, for example, a price term or only to fairness challenges as to the 'adequacy of the price or remuneration' (ie whether it was an 'appropriate price'<sup>8</sup> or value for money)<sup>9</sup>. The drafting of the core exclusion in reg 3(2) of the 1994 version of the Regulations indicated the term approach, but that of reg 6(2) in the 1999 version indicates the issues approach. Some assistance in determining the scope of the core exclusion has now been provided by the House of Lords in *Director General of Fair Trading v First National Bank plc*<sup>10</sup> and by the Supreme Court in *Office of Fair Trading v Abbey National*<sup>11</sup>. Unfortunately, the two cases do not indicate a clear, uniform line. The point should be made that the *First National Bank* case was concerned with the UTCCR 1994, rather than the current version, and that would seem to have had some impact even though the point was made that the underlying Directive was the same in both cases<sup>12</sup>. In particular, it would seem to have had an impact in the approach to the terms/issues question. In *First National Bank* a 'term' approach was assumed. In the *Abbey National* case, with the drafting of reg 6(2) pointing to it, an issues approach was adopted and referred to as the 'excluded assessment' approach<sup>13</sup>. Nevertheless, the broadest comments on approach in the House of Lords, and, in particular, that a restrictive approach is required, do not seem to have been dependent upon the version of the Regulations under consideration.

The *First National Bank* case was concerned with one of the terms in First National's standard form contract for lending money to borrowers through regulated agreements under the Consumer Credit Act 1974. The particular term allowed for the continuance of the contractual rate of interest after judgment for

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See para 3.75.

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See Macdonald 'Mapping the Unfair Contract Terms Act 1977 and the Directive on Unfair Terms in Consumer Contracts' [1994] JBL 441.

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[2009] UKSC 6, Lord Walker at [4]. See also Lord Mance at [94] – "Adequacy" ... means appropriateness or reasonableness'.

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See eg S Bright 'Winning the Battle against Unfair Contract Terms' (2000) 20 LS 331, 343–344; S Whittaker 'Judicial Interventionism and Consumer Contracts' (2001) 117 LQR 215, 219; H Beale (ed) *Chitty on Contracts* (30th edn) para 15-051.

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[2001] UKHL 52, [2002] 1 AC 481, [2001] 2 All ER (Comm) 1000, [2001] 3 WLR 1297. E Macdonald 'Scope and Fairness of Unfair Terms in Consumer Contracts Regulations' (2002) MLR 763.

11

[2009] UKSC 6.

12

In *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 All ER 667 Lord Walker emphasised that the 'dominant text' was the Directive so that differences between the versions of the Regulations were not important (at [10]). However, Lord Mance made the point that the grammar of the 1999 Regulations suggested an 'excluded issues' approach, whilst that of the 1994 Regulations suggested an 'excluded terms' approach.

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In *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [2010] 1 All ER 667, Lord Mance made the point that the grammar of the 1999 Regulations suggested an 'excluded issues' approach, whilst that of the 1994 Regulations suggested an 'excluded terms' approach.

default. The significance of the term was that, without it First National would have ceased to have a right to interest on the amount outstanding once judgment had occurred. Without such a term, the contractual right to interest would have 'merged' with the judgment and, as judgment had to be sought in the county court, no interest could be awarded as what was in question was a regulated agreement<sup>14</sup>. The court had power to order payment by instalments of the sum for which judgment was given<sup>15</sup>, but that did not include future interest to cover the further time taken to repay the principal. It also had powers under section 136 of the Consumer Credit Act 1974, when making a 'time order' to allow repayment over a period of time, to amend any term of the agreement<sup>16</sup>. However, what caused the problem brought before the courts in this case was that the county court would give judgment for First National Bank on the consumer's default, and make an order allowing for repayment by instalments. The consumer would duly make those instalment payments and then be shocked to discover that a considerable sum was still owed because, under the relevant contractual term, the contractual rate of interest had continued to be payable after the judgment. That interest could not be covered by the payments ordered by the court and the court had not, when making the order, considered whether to provide any relief from it. The consumer had not understood the interaction of the term and the legislation. There were two basic arguments to be considered by the courts: firstly, that the term in question was within the core exclusion and not covered by the fairness test, and secondly, that it was, in any event, fair. The High Court<sup>17</sup>, the Court of Appeal<sup>18</sup>, and the House of Lords all found that the term was not within the core exclusion, but only the Court of Appeal regarded it as unfair. The aspect of the case dealing with the application of the fairness test will be returned to below. What is of interest here is the approach taken to the scope of the core exclusion.

In deciding that the term in question was not within the core exclusion Lord Bingham accepted the distinction between terms 'which express the substance of the bargain and "incidental" (if important) terms which surround them'<sup>19</sup>. Similarly, Lord Steyn thought that the term in question was not within the core exclusion and was a 'subsidiary' term. However, basically the line was taken that the particular term was not within the core exclusion because it dealt with the situation after default<sup>20</sup>. More broadly, the House of Lords recognised the need for a restrictive approach to the core exclusion if the purpose of the Regulations is not to be frustrated<sup>21</sup>. Lord Bingham took the line that the core exclusion should only cover

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County Courts (Interest on Judgment Debts) Order 1991 (SI 1991/1184).

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County Courts Act 1984, s 71.

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There is also a power under s 139 of the Consumer Credit Act 1974 to provide relief from extortionate credit bargains.

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[2000] 1 All ER 240, [2000] 1 WLR 98, Evans-Lombe J.

18

[2000] QB 672, [2000] 2 All ER 759, [2000] 2 All ER (Comm) 371, [2000] 2 WLR 1353.

19

[2001] UKHL 52, [2002] 1 AC 481, [2001] 2 All ER (Comm) 1000, [12].

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Lord Bingham, [12]; Lord Steyn, [34]; Lord Hope, [43].

21

Lord Bingham, [12]; Lord Steyn, [34].

terms 'falling squarely within it'<sup>22</sup>. In addition, Lord Steyn also recognised a more specific risk in relation to the approach to be taken to the core exclusion. He recognised that a restrictive approach is necessary to avoid 'the main purpose of the scheme [being] frustrated by endless formalistic arguments as to whether a provision is a definitional or exclusionary provision'<sup>23</sup> ie he was recognising the risk of the core exclusion generating excessive argument about the type of issue indicated above as potentially problematic – whether an exclusion clause should be regarded as part of the definition of the obligations.

After *First National Bank* it seemed that it could be said that the core exclusion does not encompass incidental or subsidiary terms, that a restrictive approach is to be taken to its scope generally and that there should be an avoidance of the type of argument which contends that an exclusion clause is part of the definition of the obligations, and it seemed that the way to achieve the broader aim of a restrictive approach to the core exclusion was through considering the significance of terms in the eyes of the parties. However, despite adopting an issues approach, the Supreme Court in *Office of Fair Trading v Abbey National*<sup>24</sup> has indicated a much less restrictive approach to the compass of the core exclusion<sup>25</sup>, simply taking the line that the payment in *First National Bank* was not a part of the price because it was a payment after default.

*Office of Fair Trading v Abbey National*<sup>26</sup> involved an action by the OFT against seven banks and one building society ('the Banks'). The terms in question were those which impose charges in relation to overdrafts which have not been agreed in advance or in relation to unsuccessful applications for such overdrafts (not the terms imposing interest payments on the overdrafts). Such overdrafts may be successfully, or unsuccessfully, 'requested', in a number of ways, but all such 'requests' result, or would result if acquiesced in by the bank, in the customer's account becoming overdrawn or going beyond an agreed overdraft limit. What were referred to as the customer's 'Relevant Instructions' to the bank to bring about that situation could take such forms as a cheque being presented, direct debits becoming payable, a withdrawal from an ATM, or even the debiting from an account of an amount to cover interest or fees payable to the bank. Such 'Relevant Instructions' themselves gave rise to 'Relevant Charges' and if the bank acquiesced and provided the unarranged overdraft there were then Relevant Charges in relation to that as well as interest. These Relevant Charges formed part of the charging structure adopted by the banks in relation to current accounts and that was described by Andrew Smith J at first instance:<sup>27</sup>

'The charging structure adopted by the Banks in relation to current accounts is commonly known as "free-if-in-credit banking". ... under this structure customers do not pay bank charges for the day-to-day operation of the account while it is in credit (although there are often charges for additional

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Lord Bingham, [12].

23

At [34].

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[2009] UKSC 6, [2010] 1 All ER 667.

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Lord Walker did state that he agreed with Lord Steyn's indication that the core exclusion should be construed 'restrictively' and with Lord Bingham's statement that it should be limited 'to terms falling squarely within it'. However, the general tenor of his judgment is of a broader approach to the core exclusion. See eg his view of the limited restriction placed on Reg 6(2)(a) by its reference to 'main' subject matter of the contract – [2009] UKSC 6, [2010] 1 All ER 667 at [40].

26

[2009] UKSC 6, [2010] 1 All ER 667.

27

[2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [53]



services such as, for some banks, stopping cheques written by the customer or supplying additional bank statements). The Banks do, however, have the benefit of customers' credit balances ... and also interest will be incurred and fees may be incurred if the customer's account goes into debit or in other circumstances. These fees include the Relevant Charges.'

The courts were asked to consider whether the Relevant Charges were covered by the core exclusion or could be subject to the fairness test. At first instance, and in the Court of Appeal<sup>28</sup>, it was found that they were not covered by the core exclusion. The Court of Appeal took the line that the Relevant Charges would not be viewed as part of 'the essential bargain' (particularly by consumers) and so would not be covered by the core exclusion. It is an approach which is in keeping with the idea that the area covered by the core exclusion can be left unpoliced (provided it is plain intelligible language) because it is the area where the consumer should be aware of (or is most likely to be aware of) the contents of the contract. However, it must now be viewed as an approach which has taken that idea too far. Lord Walker stated: 'Any monetary price or remuneration payable under the contract would naturally fall within the language of paragraph (b)' of reg 6(2)<sup>29</sup>. The court simply took the line that the Relevant Charges were undoubtedly the price, or part of the price, paid by the bank's customers for the services provided by the bank and that was not affected by the payments being contingent<sup>30</sup>. Of course, in keeping with an issues (or 'excluded assessment') approach, the judges did emphasise that that was not the end of the matter. They indicated that it was only a challenge to the price on the basis of 'adequacy' (ie value for money) that was excluded and not some other basis for a fairness challenge. However, even on the basis of an issues approach, the Supreme Court in *Abbey National* has indicated more scope for the core exclusion than did the general comments of the House of Lords in *First National Bank*. The scope of reg 6(2)(a) and 6(2)(b) must be considered further. Reg 6(2)(b), as the subject of much more specific discussion by the courts, will be considered first.

It should not be thought that any reference to payment means that a fairness challenge is precluded under reg 6(2)(b). In *Abbey National* itself, Lord Walker made the point that 'not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b)' and that 'Paras (d),(e),(f) and (l) of the "grey list" in Schedule 2 of the 1999 Regulations are an illustration of that'<sup>31</sup>. Lord Mance also made the point that 'There can be payments which do not constitute either price or remuneration' and further that 'payments which do constitute price or remuneration in this sense can be challenged as unfair on grounds which do not relate to their appropriateness in amount'<sup>32</sup>. The question of the scope of the reference to 'price or remuneration' will be considered first.

In *Abbey National* the Supreme Court accepted that, as a payment after default, the payment in the *First National Bank* case was not part of the 'price or remuneration'. Payments after default will not fall within the exclusion in reg 6(2)(b). However, as is well known from the rules on penalty clauses, a rule dealing with payment on breach can be avoided by careful drafting of a relevant term as, for example, one dealing with an alternative performance rather than a breach. In relation to the application of reg 6(2)(b), it was made clear that whether a term is a default term will not depend upon the form of the clause. The

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[2009] EWCA Civ 116, [2009] 1 All ER (Comm) 1097.

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[2009] UKSC 6, [2010] 1 All ER 667 at [41]. See also Lord Mance at [112].

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[2009] UKSC 6, [2010] 1 All ER 667, Lord Walker at [6], Lord Mance at [104].

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[2009] UKSC 6, [2010] 1 All ER 667 at [43].

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[2009] UKSC 6, [2010] 1 All ER 667 at [101]. He also made the point that 'Heads (d), (e), (f), and (l) in the grey list ... fall within one or both categories.

Supreme Court in *Abbey National* indicated its approval<sup>33</sup> of the line taken on this point in *Bairstow Eves London Central Ltd v Smith and Darlington (a firm) (Pt 20 defendants)*<sup>34</sup>. That case was concerned with estate agents' fees, which had, mistakenly, not been paid by the vendor's solicitors at the time of the sale. The contract provided for a 'standard commission rate' of 3 per cent and an 'early payment discounted rate' of 1.5 per cent. The standard rate became payable if the estate agents were not paid at the 'discounted rate' within ten days of the sale. The question arose as to the application of the 1999 Regulations to the term requiring 3 per cent commission. The estate agents argued it was covered by the core exclusion and not subject to the fairness test. Gross J concluded that it was not covered by the core exclusion. He thought it 'plain that both parties contemplated an agreed operative price of 1.5 per cent with a default provision of 3 per cent' (the market for estate agents was such that the estate agents recognised that they were unlikely to obtain business at 3 per cent and the negotiations had focused on 1.5 per cent). So, a default provision will not be covered by the core exclusion and whether a term is a default provision will not simply be determined by the form of the clause. Plainly, there is not to be (and it may never have been possible for there to be) an avoidance of the type of 'formalistic arguments' which Lord Steyn had wanted to avoid in relation to the core exclusion.<sup>35</sup> Equally plainly, even though reg 6(2)(b) is not to be confined to 'essential terms', consideration of the parties' perception of the role of a term is still required. The significance of this will be returned to below.

However, as has been indicated, the Supreme Court emphasised that the scope of the core exemption under reg 6(2)(b) is not simply restricted by the fact that it only refers to payments which are the 'price or remuneration'; it is also restricted by the fact that it only prevents challenges on the basis of 'adequacy' ie of the 'appropriateness' of the sum or, more simply, whether the contract is value for money. However, there are considerable difficulties in drawing the line between a fairness challenge on the basis of 'adequacy' and a fairness challenge relating to payment on other grounds. That can be illustrated by considering possible challenges to the Relevant Charges envisaged by Lord Phillips in *Abbey National*. The Relevant Charges came from 20 per cent of the banks' customers, but provided 30% of their revenue stream from current accounts<sup>36</sup>. Lord Phillips indicated the possibility of a challenge on the basis of the unfairness of the bank's 'method' of pricing or pricing structure. He said:<sup>37</sup>

'It may be open to question whether it is fair to subsidise some customers by charges on others who experience contingencies that they did not foresee when entering into their contracts'.

However, it is difficult to divorce the cross-subsidy argument from a challenge on the basis of 'adequacy'. It would seem to involve the contention that customers who incur Relevant Charges pay more than is appropriate for the services related to those charges and, as Lord Phillips said:<sup>38</sup>

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[2009] UKSC 6, [2010] 1 All ER 667 at [43].

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[2004] EWHC 263 (QB), [2004] 2 EGLR 25, [2004] 29 EG 118.

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*First National Bank* at [34].

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[2009] UKSC 6, [2010] 1 All ER 667 at [87].

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[2009] UKSC 6, [2010] 1 All ER 667 at [80].

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[2009] UKSC 6, [2010] 1 All ER 667 at [78]. Lord Phillips did seem to envisage the possibility of a challenge on the basis that the relevant charges were excessive in relation to the relevant services provided in exchange ie a challenge not based on the overall price/ services ratio. However, there seem to be major hurdles in the way of a challenge based on saying 'this part of the price' is excessive for 'this

‘an assessment of the fairness of charges will be precluded if the basis of the attack is that by reason of their inclusion in the pricing package, those who pay them are being charged an excessive amount in exchange for the overall package’.

The Supreme Court seems to have thought that it was drawing a clearer borderline around the core exclusion than the lower courts. However, it would seem that there are no simple lines to be drawn around the scope of reg 6(2)(b), and that can be further illustrated. As has been indicated, the Supreme Court recognised that the grey list illustrates that some terms related to payment fall outside of the core exclusion. Element (l) indicates that at least some price variation clauses are subject to the fairness test and may be unfair. Such clauses may fall outside the core exclusion on one of the two bases considered above. The first possibility is that the type of argument used in *Bairstow Eves* could be extended to say that terms providing a means of changing the initially agreed price are not price terms (leading to arguments as to whether the initially agreed price includes the variation, similar to the alternative performance / default term argument). However, difficult borderlines would need to be drawn. As has been indicated, the Supreme Court in *Abbey National* denied that the Relevant Charges were precluded from being ‘the price’ on the basis that they were dependent upon a contingency. The second possibility is that a limited view would be taken of when fairness is being challenged on the basis of ‘adequacy’ so that the fact of an inappropriate right to vary (eg one not hedged round with suitable limitations) can be raised without the underlying problem, of the potential for an excessive, varied price, precluding the challenge. Even with the borderline difficulty, it is suggested that the former approach is the appropriate one as an extension of the approach taken in *Bairstow Eves*.

Consideration must also be given to the scope of reg 6(2)(a), and it should be emphasised that the regulation itself limits its coverage by its reference to the ‘main’ subject matter of the contract. This was acknowledged in Lord Walker’s comment<sup>39</sup> that ‘delivery of goods or peripheral extras may be disregarded as ancillary for the purposes of para (a) of Regulation 6(2), but the charges for them, if payable under the same contract, are part of the price for the purposes of para (b)’. (Identifying the goods as the ‘main subject matter of the contract’.) It can be suggested, however, that he was placing too little emphasis upon the restriction of reg 6(2)(a) to the ‘main subject matter’ of the contract when he suggested<sup>40</sup> that in relation to ‘a week’s stay at a five-star hotel offering a wide variety of services’ there ‘is no principled basis on which the court could decide that some services are more essential to the contract than others and ... the main subject matter must be described in general terms – hotel services’. The ‘principled basis’ would be the view of the parties and again it can be suggested that the acceptance of *Bairstow Eves* shows the potential for such an approach.

In the *First National Bank* case, the House of Lords recognised the risk that the purpose of the Regulations would be frustrated if a restrictive approach was not taken to the core exclusion. In *Abbey National* the Supreme Court may be seen to be taking such a wide view of the scope of the core exclusion that it will lead to the effectiveness of the Regulations being much diminished. There is some indication in the Supreme Court that the emphasis in the Regulations is on policing consumer choice

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part of the service’. It could be argued not to be precluded by Reg 6(2) which could be seen to be restricted to the overall price/ services issue, but Lord Mance made the point (at [99]) – ‘any challenge to the fairness of a term must be to its fairness in the context of the relevant contract in which it appears. It is ‘beside the point’ if it is not. If, on a proper analysis, the customer’s potential liability for the relevant charges is the or part of the ‘price or remuneration’ in exchange for which the overall package of banking services is supplied, and it is challenged on the ground that it makes such price or remuneration disproportionate overall, then reg 6(2)(b) excludes the challenge. If there is no challenge to the overall proportionality of the overall price or remuneration of the package, then I fail to see how a challenge to the proportionality of the relevant charges in relation to the cost of providing particular services in isolation can be admissible or relevant.’

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[2009] UKSC 6, [2010] 1 All ER 667 at [46].

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[2009] UKSC 6, [2010] 1 All ER 667 at [40].

rather than consumer protection, but even that requires sufficient account to be taken of the realities of consumer contracting and what the consumer is likely to take account of. In recognising the appropriateness of the approach taken in *Bairstow Eves*, some function has been maintained for the perception of the parties of the role and significance of a term. This must be used to full effect if the effectiveness of the Regulations is not to be considerably curtailed by the core exclusion. It will need to be taken further than the Supreme Court may have envisaged, but it need not entail reintroducing the 'essential term' approach of the Court of Appeal or simply taking the perspective of the consumer<sup>41</sup>. (Sellers and suppliers are likely to be well aware of the consumer's usual reaction to standard terms.)

As far as the Consumer Rights Bill 2014 is concerned, cl 64(1) provides that 'a term of a consumer contract may not be assessed for fairness ... to the extent that—

- (a) it specifies the main subject matter of the contract, or
- (b) the assessment is of the appropriateness of the price payable under the contract by comparison with the goods, digital content or services supplied under it'.

Clause 64(1) however is further subject to a condition that the term in question (which is claimed to specify the main subject matter or the assessment is of the appropriateness of price) must be transparent and prominent<sup>42</sup>. Consequently, a price clause set out in very small print or in convoluted language would

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Something Lord Mance was particularly keen to avoid – see [113].

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Section 64(2); moreover, a term would be considered transparent if it is expressed in plain and intelligible language and (in the case of a written term) is legible (s 64(3)); and a term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term (s 64(4)). There is some concern as to the introduction of the new concept of an 'average consumer' ([www.publications.parliament.uk/pa/cm201314/cmpublic/consumer/memo/cr28.htm](http://www.publications.parliament.uk/pa/cm201314/cmpublic/consumer/memo/cr28.htm)). It was initially suggested by the Financial Services Consumer Panel to Parliament that the phrase 'taking into account social, cultural and linguistic factors' should be added to the definition in the Bill, to account for groups of consumers with different characteristics, and to allow for the ways in which individuals interact with information. The Panel's view was that that would also bring the definition in line with CJEU jurisprudence (see 3.106). The Government however rejected the suggestion, stating that the proposed test is not an objective exercise, and that all the circumstances relating to whether an individual consumer is vulnerable can be taken into account when assessing the fairness of the terms. The provision also does not take into account any need for different levels of prominence for terms which may impose different levels of burden on the consumer. The Government also dismissed that contention. The net result is that 'average consumer' is now defined in the Bill as 'a consumer who is reasonably well-informed, observant and circumspect' (cl 64(5)). It might be suggested that this 'average consumer' test may be setting the threshold too high, especially for the [vulnerable] consumer who has been specifically targeted by the trader. Looking to the Consumer Protection from Unfair Trading Regulations 2008, we find a more flexible standard. In those Regulations, although the 'average consumer' test maintains an objective standard, it adopts a variable test depending on the circumstances. There, reg 2 provides that:

'(4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.

(5) In determining the effect of a commercial practice on the average consumer—

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group,

a reference to the average consumer shall be read as referring to the average member of that group.'

not be exempt from the assessment of fairness. The proposed provision would also deal with the increasing phenomenon of price comparison websites where there is much pressure on traders to advertise low headline prices, whilst recouping their profits through other charges. The new law should provide better tools to combat unfair charges hidden in the website.

This new section replaces reg 6(2) of the UTCCR. It may be recalled that in *Office of Fair Trading v Abbey National plc*<sup>43</sup> the Supreme Court concluded that the concepts of main subject matter and price are to be narrowly construed as ‘the two sides of the *quid pro quo* inherent in any consumer contract’, that is, the goods or service that the trader agrees to provide, and the price that the consumer agrees to pay. Lord Walker explained that the fact that other types of price terms appeared on the grey list reinforced this narrow construction of the exemption:

‘This House’s decision in *First National Bank* shows that not every term that is in some way linked to monetary consideration falls within Regulation 6(2)(b). Paras (d), (e), (f) and (l) of the “grey list” in Schedule 2 to the 1999 Regulations are an illustration of that.’<sup>44</sup>

On that basis, it would follow that if a term relates to aspects of the price other than the amount, such as time for payment, payment structure, withdrawal rights or forms of payment, that term may be assessed for fairness but the amount itself cannot be assessed as long as the term passes the transparency and prominence tests.

## *Plain intelligible language*

### [3.106]

‘Plain intelligible language’ is an important concept in the Regulations. ‘Core terms’ can be subject to the fairness test only if they are not in ‘plain intelligible language’ and reg 7(1) ‘requires’ that written terms be drafted in ‘plain intelligible language’. There is, in addition, a rule of construction in reg 7(2) in relation to the situation in which there is ‘doubt about the meaning of a written term’. The rule of construction is dealt with below. Here consideration will first be given to what amounts to ‘plain intelligible language’ before the impact of Regulation 7(1) is addressed.

The first question is as to what is ‘plain intelligible language’? One question is to whom should it be plain and intelligible? What is needed is the setting of a standard and this requires an objective approach, and the OFT (the former ego of the CMA) had referred to the view of ‘the ordinary consumer’<sup>1</sup>. In *Office of Fair Trading v Abbey National* Andrew Smith J took the line that there was ‘no real dispute between the parties that the question whether terms are in plain intelligible language is to be considered from the point of view of the typical or average consumer’ and he equated this with a concept used elsewhere by the Court of Justice ‘in applying and interpreting European Consumer law’ the ‘concept of the average consumer ... who is reasonably well informed and reasonably observant and circumspect’ and he thought that it provided ‘an appropriate yardstick guide to whether a term is in plain intelligible language’<sup>2</sup>. He also

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For consistency between the two pieces of legislation, it is submitted that a similar test should be adopted.

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[2009] UKSC 6, Lord Walker at [39].

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At [43].

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OFT Bulletin No 3, at 19. Although that obviously begs the question of the linguistic abilities of the ‘ordinary consumer’, the ‘typical consumer’, or ‘the average consumer’, whichever is invoked (see further below). On the problem of ‘plain English’ see M Clarke ‘Freedom of Information in Commercial Disputes’ in *Freedom of Expression and Freedom of Information* Beatson & Cripps eds, 377–379.

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clarified the level of understanding further, viewing it not only as a matter of whether 'the typical consumer can understand the actual wording used in contractual documentation but also its effect',<sup>3</sup> and he said:<sup>4</sup>

'The question of plain intelligible language is, as it seems to me, directed to whether the contractual terms put forward by the seller or supplier are sufficiently clear to enable the typical consumer to have a proper understanding of them for sensible and practical purposes'.

However, his views as to the terms in question being, for the most part, in 'plain intelligible language' would indicate that the understanding of the 'effect' of a clause 'for sensible and practical purposes' is not a very demanding standard in relation to complex provisions. The 'plain' and 'intelligible' terms would not have enabled a consumer to discern whether a particular transaction would trigger a 'charge' as, for example, they would not know the order in which payments in and payments out would occur.

Some less abstract points can be made. The fact that a court could give meaning to 'vague' words does not mean that they are plain and intelligible:

'Without some form of definition ["associated" and "connected"] are vague words. That is not to say that a court could not give meaning or apply them if it had to. The point is not that they are void for legal uncertainty. The point is that they are too vague to be classed as plain and intelligible'.<sup>5</sup>

Albeit, in the language of the 'ordinary consumer', the OFT had previously indicated some specific points which are of value when considering the identification of 'plain intelligible language'. The OFT stressed that it should normally be the ordinary consumer without legal advice – 'consumers would rarely consider there was any necessity for them to seek legal advice before entering into most types of contract'<sup>6</sup>. It is therefore usually 'not sufficient for terms to be clear and precise for legal purposes', normally they must be 'intelligible to ordinary members of the public'<sup>7</sup>. (The OFT however suggested an exception in relation to 'contracts normally entered only on legal advice'<sup>8</sup>). More concretely, some specific factors can be identified if terms are to be in 'plain intelligible language'. It may be inappropriate, in particular, to use a contract drafted to be used with other commercial parties when contracting with a consumer. In a contract

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[2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [89]. Referring to *Lidl Belgium GmbH & Co KG v Etablissementen Franz Colruyt NV*: C-356/04 [2006] ECR I-8501, [2007] 1 CMLR 9, Andrew Smith J's application of the test of plain intelligible language in the *Abbey National* case would seem to place the abilities of the 'typical or average' consumer to comprehend bank's standard terms at a rather high level.

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*OFT v Abbey National* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [103]. Quoted by Mann J in *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [59].

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*OFT v Abbey National* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [119]. Quoted by Mann J in *Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [59].

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*Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [62].

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Bulletin 2, 2.12.

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 85.

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 85.

with a consumer there should be an avoidance of technical legal terminology such as ‘consequential loss’, ‘time is of the essence’<sup>9</sup>, and ‘force majeure’<sup>10</sup>, but if it is unavoidable it should be explained<sup>11</sup>. The OFT did not restrict its objections to obviously obscure jargon. ‘Relatively straightforward technicalities such as references to “indemnity”... can have onerous implications of which consumers are likely to be unaware’<sup>12</sup>. ‘Ordinary words should be used as far as possible, and in their normal sense’<sup>13</sup>. The OFT had also considered ‘wide exclusion clauses, qualified by reference to statute liable to be unfair, by reason of lack of clarity (if not for other reasons too). ... if not for other reasons too’. ‘Such As far as the OFT was concerned, “such a term may not be unclear or uncertain in law, but if consumers cannot understand the statutory references, they may be prevented or deterred from pursuing legitimate claims.’<sup>14</sup> In addition, ‘plain intelligible language’ may not merely be a matter of the words used. The OFT saw ‘intelligibility’ also as a matter of how contracts are ‘presented and used’. There is seen to be an issue of ‘legibility’ – of print size and colour and quality of paper<sup>15</sup>. Further, there is also the style of the document – long sentences and frequent cross-referencing do not assist ready intelligibility<sup>16</sup>, ‘significant points can be highlighted and unavoidable technicalities explained’<sup>17</sup>. It has also been suggested that long documents may be improved if ‘accompanied by summaries of their main points’<sup>18</sup>, but care will have to be taken with any such summaries if they are not to mislead<sup>19</sup> and, more generally a term may be found to be not in plain intelligible language because of the impact of accompanying non-contractual materials. In *OFT v Abbey National* an error in a ‘boxed warning’ meant that an accompanying term was not in plain intelligible

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OFT Bulletin No 3 at 19.

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OFT Bulletin No 2, 2.14.

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OFT Bulletin No 3 at 19.

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 86.

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 86. For examples of alternatives to ‘common legal jargon’ see Annex A, Group 19(b).

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 86.

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*Unfair Contract Terms Guidance* (2008) (OFT311) p 86.

16

OFT Bulletin No 2, 2.19.

17

*Unfair Contract Terms Guidance* (2008) (OFT311) p 87.

18

OFT Bulletin 4 at p 22.

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A misleading summary might be argued to constitute a misrepresentation of the full contract terms – compare *Curtis v Chemical Cleaning Co* [1951] 1 KB 805: see para [3.10](#).

language even if the 'boxed warning' was not itself a term<sup>20</sup>. In some cases, particularly with longer and more complex sets of terms, there may be some scope for difficulties with the language of the terms to be ameliorated by opportunities given to the consumer to digest and understand them. Information packs, dispatched to consumers before the contract is made may be of assistance to the seller or supplier when the fairness of a term is questioned as may the provision of a 'cooling-off period' after the contract is made, providing the consumer with an opportunity to withdraw, without penalty, after time for digestion and consideration of the terms<sup>21</sup>. Although a cooling off period would seem not to affect the question of whether a term is plain and intelligible, it may, nevertheless, impact upon its fairness. Finally, the question can also be raised as to whether it will always be sufficient if the only language in which the contract is expressed is English. A supplier may know, or be in a situation where he, or she, should be aware that English is not the first language of the relevant group of consumers. Certainly, in such a case, it would seem that there would be an impact upon the fairness test and, in particular, the element of good faith.

The question which must now be addressed is as to the effect of reg 7(1) and the 'requirement' that written terms be in 'plain intelligible language'. The UTCCR 1999 and the Directive must be considered. Recital 20 of the Directive states:

'Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer shall prevail.'

Much of that recital is reflected in art 5 which states:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail ...'

And the implementation is in reg 7, which in its turn states:

- '(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain intelligible language.
- (2) If there is doubt about the meaning of a written term, the interpretation which is most favourable to the consumer shall prevail ...'

It should be noted that neither art 5, nor reg 7, embody the reference which is to be found in recital 20, to the need for the consumer to be provided with an 'opportunity to examine all the terms', and the significance given to that recital 20 reference by the regulator will be returned to below. What must first be dealt with is the mandatory tone in which art 5 refers to the need for 'plain intelligible language', but without specifying any penalty for a failure to draft contracts in compliance with such a 'requirement'. (It could be seen as simply linked with the effect of the rule of construction also dealt with in art 5 with its inherent 'penalty' for ambiguity<sup>22</sup>.) The mandatory tones of art 5 and, even more so, reg 7 (with its separation of the 'requirement' from the rule of construction), favour the contention that there is a requirement that written terms be drafted in plain intelligible language. However, the absence of any penalty, as such, within the Regulations<sup>23</sup>, simply for failing to draft in plain intelligible language, would seem to mean that there is no separate requirement and lack of clarity in the language of contract terms

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<sup>20</sup>

[2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [146]–[147].

<sup>21</sup>

OFT Bulletin 3 at 13.2. *Unfair Contract Terms Guidance* (2008) (OFT311) p 86.

<sup>22</sup>

On the rule of construction in UTCCR 1999 see para [3.107](#) below.

<sup>23</sup>

*OFT v Abbey National* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625 at [86].



is merely relevant to the application of the fairness test and, in particular, that element of it which focuses on whether the supplier was acting in good faith<sup>24</sup>. Further, if the lack of plain intelligible language itself directly impacted upon the enforcement of a term, there would have been no need for the line taken in relation to the construction rules by the CJEU in *European Commission v Spain*<sup>25</sup> which is considered below. It should be noted, however, that it has been contended that the Consumer Injunctions Directive<sup>26</sup> could be seen as providing a penalty as it requires injunctive relief to be available, in certain circumstances, where there is 'any act contrary' to a listed Directive, including the Unfair Terms in Consumer Contracts Directive<sup>27</sup>.

The final point to be made here is in relation to the reference in recital 20 to the consumer being given an opportunity to examine the terms. The OFT (now the CMA) had stated that this reference meant has seen that as indicating that under the Directive and the Regulations 'consumers have a right to know and understand the terms of their contracts'<sup>28</sup> ie that 'plain intelligible language' is only half of the issue, the other being an appropriate opportunity for the consumer to become acquainted with the terms. The lone appearance of the reference to the consumer's opportunity to examine the terms in recital 20, without further reference to it in art 5, weakens this contention. However, it makes considerable sense for a 'core terms' exemption based on the preservation of freedom of contract, to be restricted not only by the intelligibility of the language of the terms but also their accessibility, and it is plain that the accessibility of the terms should be relevant to the fairness test, particularly its good faith aspect. The Law Commission's proposals for unified unfair terms legislation would explicitly make 'transparency' (including accessibility) relevant to both the core exemption and the fairness test, rather than merely that the language be plain and intelligible.<sup>29</sup>

As regards the Consumer Rights Bill 2014, it is provided that 'a trader must ensure that a written term of a consumer contract, or a consumer notice in writing, is transparent'<sup>30</sup>. That section goes on to provide that a consumer notice is considered to be transparent if it is expressed in plain and intelligible language and it is legible<sup>31</sup>. It should be remembered the prominence test discussed above<sup>32</sup> does not apply here. The trader is only under a legal duty to ensure transparency of terms, not prominence. The trader is only

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OFT *Guidance on Unfair Terms in Tenancy Agreements*, p 4.

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[2004] ECR I-7999, see para [3.107](#) below.

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Directive 98/27 now replaced by the codifying Consumer Injunctions Directive 2009/22/EC.

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See H Beale (ed) *Chitty on Contracts* (30th edn) para 15-133.

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OFT Bulletin 2, at 2.2.

29

*Unfair Terms in Contracts* Law Com no 292, Scot Law Com no 199.

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Clause 68(1).

31

Clause 68(2).

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Para [3.105](#).

subject to the requirement of prominence if he seeks to exempt his terms relating to subject matter and appropriateness of price from the assessment of unfairness<sup>33</sup>.

## Construction

### [3.107]

In the context of disputes between a particular consumer and a particular seller, or supplier, UTCCR 1999, reg 7(2) states a rule of construction, that doubt about the meaning of a written term will lead to the interpretation most favourable to the consumer prevailing<sup>1</sup>. The common law is well used to construction on the basis of the *contra proferentem* rule that any ambiguity in a clause will be construed against the person putting it forward<sup>2</sup> and *European Commission v Spain* would indicate the same type of approach when an individual dispute is in question under the Regulations<sup>3</sup>. It has, however, been seen as also extending to the situation where the contract contains two contradictory clauses, allowing the one favourable to the consumer to prevail<sup>4</sup>. In the context of the reference to 'plain intelligible language' in relation to the core exclusion, it has been said:<sup>5</sup>

'Any lawyer worth his salt can usually contrive possible alternative meanings of contractual words and the fact this can be done does not of itself make any given language insufficiently plain and intelligible. For that to result the alternative wording, or uncertain effect, must be one of substance or significance, and not merely of legal contrivance<sup>7</sup>.

This warning would also seem apt in the context of reg 7(2).

Regulation 7(2) only applies if after applying the rules on construction of contracts there is in fact an ambiguity in the language<sup>6</sup>. It was held in *Stephen West, Carol West v Ian Finlay & Associates* that the lower court had erred in applying reg 7(2) because the language of the contract was clear – there was

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Clause 64.

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As for the Consumer Rights Bill 2014, cl 69(1) provides that 'If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail.'

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See para [3.50](#).

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[2004] ECR I-7999. See also *Office of Fair Trading v Abbey National plc* [2008] EWHC 875 (Comm), [2008] 2 All ER (Comm) 625, [2008] NLJR 633 at [323].

4

*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June, at [33].

5

*Office of Fair Trading v Foxtons Ltd* [2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [73].

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*du Plessis v Fontgary Leisure Parks Ltd* [2012] EWCA Civ 409 at [40].

therefore no ambiguity in the contract which would trigger the application of doubt about the meaning of the contract required in reg 7(2)<sup>7</sup>.

It would thus appear that there is no material difference between the principle of construction in reg 7(2) and the *contra proferentem* rule. Andrew Smith J's dictum that they were 'to much the same effect' in *The Financial Services Authority v Asset LI Inc*<sup>8</sup> was endorsed in *AJ Building and Plastering Limited v Samantha Turner*<sup>9</sup>. It has been suggested that reg 7(2) might go beyond the common law rule, on the basis that the former but not the latter would require a court, faced with a case of ambiguity, to favour one less likely interpretation over two more likely interpretations<sup>10</sup>. That proposition was however rejected by Judge Keyser QC in *AJ Building and Plastering Limited v Samantha Turner*<sup>11</sup>, who said:

'If the normal principles of construction yield a clear preference, even of two competing interpretations over one, the remaining ambiguity applies only to the preferred interpretations; all others have been rejected before invoking any rule or principle of last resort; and they are still rejected, even if they remain possible interpretations in the sense that there is room for other courts or judges to favour them – a common enough state of affairs in appellate courts. Neither at common law nor, in my view, under regulation 7(2) is the court that invokes what I may call the tie-breaker required or permitted to apply it in favour of an interpretation that has already been rejected by means of the application of the normal canons of construction.'

Hence in the construction exercise, regard must continue to be had to the factual matrix.

It is probably also trite to state that the term must have been properly incorporated into the contract before a court or tribunal would resort to reg7(2)<sup>12</sup>.

When a term drawn up for general use is being considered in the context of the powers of the regulator (CMA), or the qualifying bodies, reg 7(2) makes it clear that the rule of construction, there set out, does not apply. The approach to be taken was stated by the CJEU in *European Commission v Spain*.<sup>13</sup>

'[In] actions for cessation which involve persons or organisations representative of the collective interests of consumers ... in order to obtain, by way of prevention, the most favourable result for consumers as a whole, it is not necessary, where there is doubt to interpret the term in a manner favourable to them. Accordingly an objective interpretation makes it possible to prohibit more

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[2014] EWCA Civ 316; see also *AJ Building and Plastering Limited v Samantha Turner* [2013] EWHC 484 (QB).

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[2013] EWHC 178 (Ch).

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[2013] EWHC 484 (QB).

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*Lewison on the Interpretation of Contracts* (5th edn, 2011), at para 7.0.

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At [53].

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We see a reminder of this point in *In re Applications by Jamie Lee McLean* [2014] NIQB 33.

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[2004] ECR I-7999 at [16].

frequently the use of an unintelligible or ambiguous term, which results in wider consumer protection.’

‘Objective’ interpretation, rather than a *contra proferentem* approach, is to be taken.

## Unfair terms

### [3.108]

The unfairness test is dealt with by UTCCR 1999, regs 5(1) and 6(1), with an indicative and non-exhaustive list of terms that may be unfair in Sch 2 (the ‘grey’ list). Regulation 6(2) sets out the circumstances to be taken into account in the application of the test. It states:

‘Without prejudice to regulation 12, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all other terms of the contract or of another contract on which it is dependent.’

In relation to the assessment of terms in particular contracts between particular sellers or suppliers and consumers, the ‘time frame’ of the assessment is that of the conclusion of the contract, as with the requirement of reasonableness in the Unfair Contract Terms Act 1977<sup>1</sup>. All the other terms of the contract, including any on which the core exemption impacts<sup>2</sup>, and all the circumstances attending the conclusion of the contract are relevant, as are the terms of other, ‘dependent’, contracts<sup>3</sup>. If a second contract is not ‘dependent’ it may still be relevant as part of the surrounding circumstances. Any circumstances occurring after the conclusion of the contract, such as breaches, cannot be relevant, as such, but the potential for them may be relevant if it was foreseeable at the time the contract was made. It is plain that much of this would fit awkwardly in the context of the more general assessment of terms under the powers of the regulators. That is now acknowledged, to an extent, in the regulations in the reference to regulation 6(1) being ‘without prejudice to regulation 12’, which deals with those powers<sup>4</sup>, but they do not indicate how the more general assessment differs. Obviously, however, a more abstract assessment must be in question and, having recognized the omission from the Directive and the Regulations, the House of Lords has taken the line that the ‘Directive and the Regulations must be made to work sensibly and effectively and this can be done by taking into account the effect of contemplated or typical relationships between contracting parties’<sup>5</sup>. It is clear that the particular performance or breach of a contract is irrelevant to the assessment at the level of both the particular contract (because of the ‘timeframe’ of the assessment) and also at the level of the more general assessment. Equally clearly, however, the potential use of a term is significant and, for example, the argument that an entire agreement clause was fair as it was ‘neutral’,

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UCTA 1977, s 11(1); see para [3.84](#).

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Recital 19.

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Compare UCTA 1977, s 10: see para [3.82](#).

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It was not previously so acknowledged in UTCCR 1994, but the problem was recognised by the House of Lords in *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 All ER 97, Lord Steyn, [33].

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*Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 All ER 97, Lord Steyn, [33].

merely providing certainty for both parties, did not succeed as it was 'obvious that the main practical effect was to prevent the customer relying on representations by [the supplier's] salesman'<sup>6</sup>, Further the OFT had formerly taken the line that:<sup>7</sup>

'The test of unfairness takes note of how a term *could* be used. If a term is so widely drafted that it could be used in such a way as to cause consumer detriment, then it is open to challenge. The OFT cannot regard such a term as fair solely on the basis of protestations that it is not in practice used unfairly.'

Similarly, under the Unfair Contract Terms Act 1977, an exemption clause may operate reasonably in relation to the breach which has occurred, but fail to satisfy the requirement of reasonableness because of its potential coverage<sup>8</sup> In the context of the Regulations, the OFT made the point that if it is claimed that a term is not, in practice, used unfairly, it may be drafted too widely, and if rewritten, to reflect actual practice, might then be fair<sup>9</sup>. It has been noted that:<sup>10</sup>

'Unfair terms normally give business a benefit which is excessive rather than wholly unwarranted, and often the firm's underlying interest is a vital one. Suppliers can avoid losing all the protection offered by, for instance, a 'boiler plate' exclusion clause, by agreeing to narrow it and accept liability (as fairness requires) for negligence.'

The test of unfairness itself is set out in reg 5(1) which states:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

There are basically two elements here which need to be considered<sup>11</sup>:

- (i) significant imbalance in the parties' rights and obligations to the detriment of the consumer; and
- (ii) the requirement of good faith.

It has been suggested that the term does not contain two separate elements, but that if a term creates a significant imbalance in the parties' rights and obligations, that must be contrary to good faith<sup>12</sup>. However,

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*Office of Fair Trading v MB Designs* 2005 SLT 691 at [43].

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Bulletin 3, at p 7. See also Bulletin 1, at 2.6. But see Bulletin 2 at 2.11 – 'Whenever a consumer contract is brought to our notice by a complainant who believes that it contains a standard term that is unfair we examine the contract as a whole and look at all the circumstances in which it is likely to be used ...' See also OFT *Unfair Contract Terms Guidance* (2008) (OFT 311) at pp 9–10.

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*Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 2 All ER 257. See para [3.84](#).

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OFT Bulletin 3, at 7.

10

OFT Bulletin 5, at 15. See also OFT *Unfair Contract Terms Guidance* (2008) (OFT 311) at pp 9–10.

11

'There are three independent requirements. But the element of detriment to the consumer does not add much. But it serves to make clear that the Directive is aimed at significant imbalance against the consumer, rather than the seller or supplier' – *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 All ER 97, Lord Steyn, [36].

whilst sufficient significant imbalance might be enough to indicate a lack of good faith in some cases<sup>13</sup>, UTCCR 1994, Sch 2, contained a separate list of factors relevant to the assessment of good faith, thus making plain its separate existence from 'significant imbalance'. That list was not repeated in UTCCR 1999 but as it was originally derived from the recitals to the Directive, it can still be influential in relation to the interpretation of those regulations as the implementation of a EC measure. In addition, in considering the application of what was, admittedly, UTCCR 1994, in *Director General of Fair Trading v First National Bank*<sup>14</sup> the House of Lords plainly treated the fairness test as containing the two distinct elements identified above. In *West and Another v Finlay*<sup>15</sup> we are reminded that it is necessary to consider significant imbalance and good faith separately as well as together in making the ultimate overall assessment. Lord Justice Vos commented: 'it could be argued that it carries qualitative as well as quantitative connotations. If it were to do so, it could be that the question whether a term creating an imbalance creates a "significant" imbalance might turn in part on the exercise of good faith. For the purposes of this case, we do not think it is necessary to decide this question and, having heard no argument on the point, we prefer to express no concluded view.'<sup>16</sup>. The matter thus remains unresolved although the Court of Appeal in *West v Finlay* approached the matter first by making some tentative conclusions about significant imbalance before examining the issue of good faith and then finally drawing together the two sets of conclusions in pronouncing that the clause was not unfair.

Under the Unfair Contract Terms Act 1977, it is for the person seeking to rely upon the exemption clause subject to the requirement of reasonableness to establish that the term is reasonable<sup>17</sup>. There is no stated rule in the Regulations or the Directive as to the burden of proof in relation to the fairness test. However, in the light of the court's ability to declare a term unfair of its own initiative, this does not lead to the simple conclusion that the burden must be on the consumer. The European Commission takes the view that:<sup>18</sup>

'... there is no problem concerning the burden of proof, because the unfair nature of a clause is not a matter of fact to be substantiated by the parties concerned, but a matter of law which the court must independently decide upon according to the rules of law ... Unfairness is therefore very much a matter of law, but potentially may depend upon elements of fact which the court may not know

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Eg Brownsword, Howells & Wilhelmson 'Between Market and Welfare: Some Reflections on Article 3 of the EC Directive on Unfair Terms in Consumer Contracts' in C Willett (ed) *Aspects of Unfairness in Contracts* (1996), 28; M Tenreiro 'The Community Directive on Unfair Terms and National Legal Systems' (1995) 3 *European Review of private Law* 273 at 279.

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See para 3.110.

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[2001] UKHL 52, [2002] 1 All ER 97.

15

[2014] EWCA Civ 316.

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At para 47.

17

UCTA 1977, s 11(5).

18

'The Unfair Terms Directive: 5 Years on' (July 1999) *The Implementation of Directive 93/13 into the National Legal Systems*, Final Report to Workshop 3 – 'The Definition of Unfairness' pp 141–142 ([europa.eu.int](http://europa.eu.int)).

and this becomes [a matter of the] burden of proof for one or other side which may want the clause to be declared unfair or not unfair as the case may be’.

It has been suggested that an attempt should be made to produce uniformity in the approach to the fairness test across the EU through referring suitable cases to the European Court under art 234 (formerly art 177) procedure<sup>19</sup> and there was criticism of the courts involved in *Direct General of Fair Trading v First National Bank*<sup>20</sup> for failing to make such a reference<sup>21</sup>. However, in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter*<sup>22</sup> the CJEU declined to express a view on the fairness of a particular term. That was for the national court to decide. The CJEU is to ‘interpret general criteria used by the community legislature in order to define the concept of unfair terms’<sup>23</sup>.

The OFT had previously provided guidance as to its views on whether particular terms, or types of term, are unfair<sup>24</sup> and these should be considered. In relation to the OFT’s ‘Guidance on Unfair Terms in Tenancy Agreements’<sup>25</sup> the line was taken ‘Although the Court is in no sense bound by the guidance provided by the Office of Fair Trading ... the guidance does give landlords helpful commonsense indications of what is likely to be considered fair and should be carefully taken into account’<sup>26</sup>. For the time being, the CMA is likely to follow this approach<sup>27</sup>.

There are some terms in relation to which the fairness test is not applied because they are automatically deemed unfair under the Regulations. This covers arbitration clauses in relation to claims under a specified sum<sup>28</sup> and also clauses putting the burden of proof on the consumer in relation to whether a

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Eg S Wetherill *EC Consumer Law and Policy* (1997) p 82; Howells & Wilhelmsson *EC Consumer Law* (1997) pp 103–104.

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[2001] UKHL 52, [2002] 1 All ER 97.

21

M Dean ‘Defining Fair Terms in Consumer Contracts – Crystal Ball Gazing?’ (2002) 65 MLR 773.

22

C-237/02 [2004] ECR I-3403, [2004] 2 CMLR 291, CJEU.

23

[2004] 2 CMLR 291 at [22].

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Eg OFT *Unfair Contract Terms Guidance* (2008) (OFT311).

25

OFT 356.

26

*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June, at [54]

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See para 4.3, CMA publication *Towards the CMA: CMA Guidance* (October 2013) available at [www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority).

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Sections 89, 90, Arbitration Act 1996.

distance supplier or intermediary has complied with obligations under the distance marketing of consumer financial services Directive<sup>29</sup>.

The CJEU has also confirmed that it is no defence for the supplier to argue that the clause in question did little more than to reproduce verbatim national legal stipulations applicable to a different category of contracts (*RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*<sup>30</sup>). In that case, it was held therefore that the national court should assess in each individual case whether such a term allowing a supplier of gas unilaterally to alter the price satisfied the requirements of good faith, balance and transparency.

As far as the Consumer Rights Bill 2014 is concerned, the provisions on unfairness closely mirror those in the UTCCR. Clause 62 provides that a consumer is not bound by an unfair term or notice<sup>31</sup>. A term or notice is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer<sup>32</sup>. A significant imbalance is created if the term in question limits the consumer's rights or disproportionately increases his obligations as compared to the trader's rights and obligations. This clause also sets out factors that a court should take into account when determining whether a term is fair, notably that it should consider the specific circumstances existing when the term was agreed, other terms in the contract and the nature of the subject matter of the contract<sup>33</sup>. This assessment is known as the 'fairness test'. Clause 63 then provides a list of terms that may be used to assist a court when considering the application of the fairness test<sup>34</sup>.

### [3.109]

**Significant imbalance** The point has been made that significant imbalance could be understood in a number of ways<sup>1</sup>. Firstly, as requiring a weighing of all the rights and obligations under the contract, or secondly, it could be seen as requiring a search for related balancing terms within the contract or even, thirdly, as requiring consideration beyond a single contract so that there would be an imbalance if, for example, 'the supplier reduces the price slightly ... but at the risk of placing a very large potential loss on the small number of consumers for whom the risk will materialise'<sup>2</sup>. The relevance of the third approach

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Directive 2002/65; Financial Services (Distance Marketing) Regulations 2004 (2004/2095), reg 24.

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C-92/11, [2013] 3 CMLR 10.

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The consumer can however rely on the unfair term if he so chooses (cl 62(3)).

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Clauses 62(4), (6).

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See paras 292–293, Explanatory Note to the Bill ([www.publications.parliament.uk/pa/bills/lbill/2014-2015/0029/en/15029en.htm](http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0029/en/15029en.htm)), which gives this illustration: 'For example, a contract to subscribe to a magazine could contain a term allowing the publisher to cancel the subscription at short notice. In deciding whether this is fair or not, the court could consider issues such as whether the subscriber can also cancel at short notice or obtain a refund if the publisher cancels the contract.'

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For more on this see para 3.112 below.

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Beale 'Unfair Contracts in Britain and Europe' (1989) CLP 197 at 204–205.

2



may be as a particular way of identifying that the balance issue in question is essentially one related to a particular type of risk in the relation to the particular consumer (low risk of very serious consequences),<sup>3</sup> and certainly at first instance in *OFT v Abbey National* Andrew Smith J made the point<sup>4</sup> that ‘the Directive and the 1999 Regulations are concerned with the fairness of the individual contract between the individual seller or supplier and a particular consumer and are not directly concerned with whether the seller or supplier treats fairly consumers as a body’.<sup>5</sup> The second of the above possible approaches is suggested by the ‘grey list’. Paragraph 1(d) of the grey list<sup>6</sup>, provides, for example<sup>7</sup>, for terms having the ‘object or effect of’:

‘permitting the seller or supplier to retain sums paid by the consumer where the latter decided not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract.’

The approach of the OFT<sup>8</sup> would suggest a combination of the second and first possible approaches. In OFT Bulletin 4 it was said<sup>9</sup>:

‘... we need to establish first that there is no balancing proviso – which we interpret as one which: first is as potentially detrimental to the supplier as the term in question is to the consumer; and secondly is obviously linked to it, so that the two, on a common sense view tend to cancel each other out ... We also look of course at the rest of the contract for any qualifying provisos that

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Beale ‘The Directive on Unfair Terms in Consumer Contracts’ in Beatson and Freidmann (eds) *Good Faith and Fault in Contract Law* (1995) p 243.

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Eg in relation to attempts to exclude or restrict liability for negligently caused personal injury, or in ‘situations’ such as that considered under the Unfair Contract Terms Act 1977 in *Smith v Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL.

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[2008] EWHC 875, [2008] 2 All ER (Comm) 625 at [415].

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However, Recital 16 indicates scope for a broader approach, at least to the question of good faith, in some contexts – ‘whereas the assessment according to the general criteria chosen, of the unfair character of terms, in particular in sale or supply activities of a public nature providing collective services which take account of solidarity among users, must be supplemented by means of making an overall evaluation of the different interests involved: whereas this constitutes the requirement of good faith ...’.

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In the Annex to the Directive and Sch2 of the Regulations in identical terms.

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See also para 1(c), (f), (g), (j), (k), (l), (o).

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For the time being, the CMA has stated it would continue to adopt the OFT’s Guidances, but where necessary revisions and changes would be gradually introduced. See para 4.3, *Toward the CMA: CMA Guidance* (CMA Official Publication, 2013) at [www.gov.uk/government/organisations/competition-and-markets-authority](http://www.gov.uk/government/organisations/competition-and-markets-authority)

9

At 22–23.

would tend to remove the possibility of detriment in the term under consideration, rather than balancing it.’

However, Lord Bingham in *Director General of Fair Trading v First National Bank* indicated the first, ‘overall’ approach. He briefly described significant imbalance, stating<sup>10</sup>:

‘The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by imposing on the consumer of a disadvantageous burden or risk or duty ... This involves looking at the contract as a whole’.

The overall approach was adopted by the Court of Appeal in *UK Housing Alliance v Francis*,<sup>11</sup> where what was in question was a sale and leaseback of the consumer's home. At the time of completion of the sale £87,500 was paid to the consumer. There was to be a ‘final payment’ of £37,500 if the consumer remained as a tenant for ten years, but that was not to be paid (or to be paid in a reduced proportion after six years) if the tenancy was terminated earlier. The consumer defaulted on the rent and the tenancy was terminated. The consumer claimed that the term precluding the final payment was an unfair term. The Court of Appeal found that there was no significant imbalance. The consumer was protected by the need for a court order to oust him from possession of the house. Also, as there was potential for the movement in the market to make the contract a good or a bad deal for either of the parties, ‘the retention of what [was] less than a third of the price [did] not cause any imbalance let alone a significant one’<sup>12</sup>.

The CJEU's preferred approach is similar – the particular term in question should be evaluated against the background and context of all the other terms of the contract. It stated:

‘Pursuant to Article 4(1) of the same directive, that assessment must have regard to the nature of the services for which the contract was concluded as well as to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent. Consequently ... the national court must, in order to determine whether the contractual term on which the claim brought before it is based may be unfair, take account of all of the other terms of the contract.’<sup>13</sup>

That is not to say that it is never useful, in appropriate cases, to focus on the particular term in question. In *Munckenbeck & Marshall v Harold*<sup>14</sup> the term was regarded as creating a significant imbalance because there was no mirror-image, balancing right for the consumer. Similarly, an apparently neutral term, such as an entire agreement clause may be seen as significantly imbalanced where its ‘main practical effect’ will be significantly detrimental to the consumer<sup>15</sup>. It may be seen as equivalent to a term

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<sup>10</sup>

[2001] UKHL 52, [2002] 1 AC 481, [2002] 1 All ER 97 at [17].

<sup>11</sup>

*UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [27].

<sup>12</sup>

*UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [27].

<sup>13</sup>

*Banif Plus Bank Zrt v Csipai* (C-472/11), [2013] 2 CMLR 42 at [40]–[41].

<sup>14</sup>

[2005] EWCA 356.

<sup>15</sup>

*OFT V MB Designs* 2005 SLT 691.

which is imbalanced on its face and for which there is no balancing term. Indeed, it would be difficult to take an 'overall' approach to the question of significant imbalance in relation to an entire agreement clause.

That said it is important not to be easily swayed by a finding of imbalance – most clauses at issue will show an imbalance at face value. What matters is whether that imbalance is significant. In *West v Finlay*<sup>16</sup>, the court found that although the net contribution clause (NCC)<sup>17</sup> plainly caused an imbalance, that imbalance should not be viewed in isolation, and in the bigger context the imbalance was not significant for the following main reasons:

‘(a) the prevalence of the usage of the NCC in standard RIBA forms, (b) the fact that the clause would be regarded as not unusual in a commercial contract, and (c) the fact that it was the Wests who in this case would be taking the final decision on the future choice of main contractor, very likely being alive (bearing in mind Mr West's banking background) to the fact that that contractor's financial stability was a matter of importance’.

It was clear that commercially speaking the clause was unexceptional and standard and this made a difference to the court's decision on as to whether there was significant imbalance. The reference to the Wests' strength in the bargain is consistent with the tenor of recital 16 of the original Directive on Unfair Terms in Consumer Contracts. However that recital is largely concerned with the matter of good faith, not significant imbalance. That demonstrates how difficult (and artificial) it is to treat 'significant imbalance' and 'good faith' separately.

Similarly, in *First National Bank* itself, what was in issue was the term requiring continuance of the contractual rate of interest after default. In looking at the question of significant imbalance, basically the court emphasised that the interest was simply continuing to be charged, as from the start of the contract, and there was no change in the circumstances which made the term one generating a significant imbalance. The House of Lords viewed the situation as unexceptionable as interest payments are the price of a loan, and merely continuing them after judgment for default was seen as simply ensuring that the price for the borrowing continued to be paid as long as the borrowing continued. Lord Bingham said:<sup>18</sup>

‘The essential bargain is that the bank will make funds available to the borrower which the borrower will repay, over a period, with interest. Neither party could suppose that the bank would willingly forgo any part of its principal or interest. If the bank thought that outcome at all likely, it would not lend... There is nothing unbalanced or detrimental to the consumer in that obligation; the absence of such a term would unbalance the contract to the detriment of the lender.’

Where a term deals with something continuing after the happening of a particular event, it may be asked whether there has been a change in the balance of the rights and obligations. Similarly, where the same charge is made in different circumstances it may be asked whether the balance of the rights and

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[2014] EWCA Civ 316.

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The net contribution clause, in the agreement for architectural and building services, stipulated: ‘We confirm that we maintain professional indemnity insurance cover of £1,000,000.00 in respect of any one event. This will be the maximum limit of our liability to you arising out of this Agreement. Any such liability will expire after six years from conclusion of our appointment or (if earlier) practical completion of the construction of the Project. Our liability for loss or damage will be limited to the amount that it is reasonable for us to pay in relation to the contractual responsibilities of other consultants, contractors and specialists appointed by you.’

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At [20]. See also Lord Millett at [55], Lord Hope at [46].

obligations is different in the different circumstances. In *Office of Fair Trading v Foxtons Ltd*<sup>19</sup> the case was concerned with a contract between property owners and letting agents. The contract provided for an 11 per cent commission for the agents when the property was initially let to a tenant, and also for an 11 per cent commission on each renewal of it. The question arose as to the fairness of the renewal commission<sup>20</sup>. The court decided that there was a significant imbalance (and a lack of good faith so that the term was unfair). When the property was first let to a tenant the letting agents would have to undertake significant work which would not have to be undertaken on a renewal. The judge took the line that:<sup>21</sup>

‘The commission amounts in question are significant, and operate adversely to the client the more time goes on. Commensurate services are not provided as time goes on.’

Again, as in the *First National Bank* case, the term in question related to payment upon the happening of a specified event. In both cases, the overall balance in the contractual rights could be considered relative to those at the commencement of the contract, rather than having to weigh them in absolute terms, ie the relative benefits/burdens were unchanged in *First National Bank*, and had tipped against the consumer in *Foxtons*.

When what is in issue is a term allowing a supplier to vary a term, or terms, the question will be, in a sense, one of a relative weighing. However, the potential for the balance of the contract rights and obligations to move against the consumer will be clear. What will be focused on will be any restrictions on the supplier's right and what the consumer can do in response. In *Peabody Trust (Governors of the) v Reeve*<sup>22</sup> the court had to consider a unilateral right to vary the terms of tenancy agreements made between a ‘social landlord’ and its tenants. The right was extensive, giving the landlord ‘almost carte blanche in the field of variations, apart from the areas of rent and statutory protection’, and it was said that:<sup>23</sup>

‘There is no doubt that a unilateral right of variation in favour of a landlord causes a “significant imbalance” in the parties’ rights and obligations to the detriment of the tenant. The landlord can impose material changes but the tenant cannot. The tenant's only right is to walk away from the tenancy by giving notice to quit under the procedure set out in section 103 of the Housing Act 1985. However, in the case of relatively low cost housing operated by a registered social landlord, this is unrealistic. The tenant will typically have a strong necessity, will be of relatively limited means, may well lack experience and familiarity with contractual terms and will have a very weak bargaining position.’

One further point addressed by the House of Lords in the *First National Bank* case should be considered. The term could, in a sense, be seen as a departure from what would otherwise be the ‘default position’ – it departed from what would otherwise be the situation created by statute ie no interest would be payable after judgment – and the Court of Appeal in *First National Bank* had indicated that such departure in the

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[2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul).

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The case was decided before the Supreme Court gave judgment on the scope of the core exclusion in *OFT v Abbey National* [2009] UKSC 6, [2010] 1 All ER 667.

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[2009] EWHC 1681 (Ch), [2009] All ER (D) 110 (Jul) at [90].

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[2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June.

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[2008] EWHC 1432, (2008) Times, 9 June at [45].

instant case showed a significant imbalance<sup>24</sup>. However, that was clearly not the view taken by the House of Lords. Lord Bingham, having considered the development of the statutory background, concluded that he did not think that 'the term could be stigmatised as unfair on the ground that it violates or undermines a statutory regime enacted for the protection of consumers'<sup>25</sup>. Similarly, Lord Steyn did not think that that the argument could prevail 'in circumstances where the legislature has neither expressly nor by necessary implication barred a stipulation that interest may continue to accrue after judgment'<sup>26</sup>. The OFT has said that 'its starting point in assessing the fairness of a term is ... normally to ask what would be the position if it did not appear in the contract'<sup>27</sup>, but plainly the approach cannot be taken that departure from the default position is automatically unfair. The basis of the particular default position, and the impact of the departure from it, must be considered<sup>28</sup>.

The final point to be considered here in relation to 'significant imbalance' concerns its application when the basic difficulty with the term in question is that it is misleading – a term which might appear to the consumer to have an effect other than it actually has. An example is provided by the OFT<sup>29</sup>.

'The OFT normally objects to clauses which reflect the general contractual position concerning damages for breach of contract but in a misleading way. Contracts sometimes give the impression that, if they are cancelled by the consumer, the company can recover all the profit it would have made. In law the supplier actually has a duty to mitigate ...'

Plainly the OFT takes the view that such misleading terms should be unfair and controlled by the Regulations, and prima facie there should be no difficulty in finding a lack of good faith in such circumstances (see below), but how can it be said that such a term 'causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer'. The concern is not with the actual effect it will have upon the parties' rights and obligations but with the effect which the consumer will wrongly think it will have. If such terms are to be caught by the fairness test then an appropriate approach will need to be taken to the interpretation of the Directive and the Regulations and the solution is suggested by the problem. The terms distort the rights and obligations which the consumer believes he, or she, has. A significant imbalance can be found if it is judged at that level, referring, for example, to the 'effectively usable' rights and obligations of the parties<sup>30</sup>. (The same problem (and

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[2000] QB 672, [35].

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[2001] UKHL 52, [2002] 1 All ER 97, [22].

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At [38].

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OFT *Unfair Contract Terms Guidance* (Feb 2001) p 2.

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E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations' (2002) 65 MLR 763, 771; *Picardi v Cuniberti* [2003] BLR 487.

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OFT Bulletin 3, at 12.

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The Advocate General stated in *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11), [2013] 3 CMLR 5: 'A significant imbalance should be considered to be unjustified in particular where the consumer's rights and obligations are curtailed to such an extent that the party stipulating the contractual conditions could not assume, in accordance with the requirement of good faith, that the consumer would have agreed to such a provision in individual contract negotiations.'

solution) also arises in relation to the situation in which a supplier adopts an ineffective system for incorporating his, or her, standard terms into contracts with consumers and the OFT, or other qualifying body, wishes to police them at the general level to prevent consumers being misled as to their rights. The prior issue of how Regulations dealing with contract *terms* can apply in such a case was considered above<sup>31</sup>). However, the treatment of an informational defect in *First National Bank* will be returned to below in considering good faith<sup>32</sup>.

The CJEU has held that in order to ascertain whether there is significant imbalance, it is also relevant to assess what rights and obligations are available to the parties under national law in the absence of an agreement by the parties (*Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*<sup>33</sup>) {29}. Such a comparative analysis would enable the national court to evaluate whether and to what extent the contract placed the consumer in a legal situation less favourable than that provided for by the national law in force.

### [3.110]

**The requirement of good faith** For a term to be unfair the 'significant imbalance' it generates must be 'contrary to the requirement of good faith'. The reference to good faith was not one which was familiar to lawyers in England, and Wales, although it must now be becoming more so, with its important role in the Unfair Terms Regulations since 1994. It has long been more familiar in civil law systems, but there are considerable differences in its treatment within those systems<sup>1</sup>. However, in relation to good faith under the Regulations, significant guidance has now been provided by the House of Lords in *Direct General of Fair Trading v First National Bank*<sup>2</sup>.

The facts of the *First National Bank* case were outlined above<sup>3</sup>. Here note should be made of the comments on 'good faith'<sup>4</sup>. Lord Bingham said:<sup>5</sup>

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(at para AG75). E Macdonald 'The Emperor's Old Clauses: Unincorporated Clauses, Misleading Terms and the Unfair Terms in Consumer Contracts Regulations' (1999) 58 CLJ 413. The same type of problem may arise in relation to some terms which are not drawn to the consumer's attention. 'This could apply, for example, in a clause requiring notification of any defects within a reasonable time. If the consumer is not aware of such a term it will work to cause significant imbalance to the detriment of the consumer even though the substance of the term is not unfair' (S Bright 'Winning the Battle Against Unfair Terms' (2000) 20 LS 331, 348). Again significant imbalance can be found in the 'effectively usable' rights and obligations of the parties.

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Para [3.104](#).

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Para [3.110](#).

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Case C-415/11, [2013] 3 CMLR 5.

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See eg R Zimmerman and S Whittaker *Good Faith in European Contract Law* (Cambridge University Press, 2008)

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[2001] UKHL 52, [2002] 1 All ER 97.

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See para [3.105](#).

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‘The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps. Appropriate prominence should be given to terms which might operate disadvantageously to the customer. Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the regulations.’

Similarly, Lord Steyn saw good faith as importing ‘the notion of open and fair dealing’<sup>6</sup>. Obviously this relies on the setting of standards and, more broadly, Lord Bingham also recognised that good faith ‘looks to good standards of commercial morality and practice’<sup>7</sup> and, again similarly, Lord Steyn saw the ‘purpose of the provision of good faith and fair dealing’ as being ‘to enforce community standards of fairness and reasonableness’. On this view then, good faith broadly embodies certain ‘standards’ of dealing in relation to the two aspects of good faith – open dealing and fair dealing – which in turn seem to contain the ideas of (broadly) the sufficiency of notice of terms (including the clarity of their drafting)<sup>8</sup> and of advantage not being taken of a superior position by the seller or supplier<sup>9</sup>. Whether or not it is possible to achieve European ‘community’ standards has been questioned<sup>10</sup> and, in any event, the approach taken by the CJEU in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter*<sup>11</sup> to the scope of its decision making on fairness, would deny the need to search for European, rather than national, standards. It can be further noted that whilst Lord Bingham referred to the ‘advantage taking’ being deliberate or unconscious, Lord Steyn simply referred to good faith as an ‘objective criterion’<sup>12</sup> and it is suggested that given the need to apply the fairness test to terms at the general level, and not merely in the context of a specific contract (a point which will be returned to below), the objective approach should

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E Macdonald ‘Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations’ (2002) 65 MLR 763.

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At [17].

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At [36].

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At [17].

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*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June at [51] – ‘Setting out two entirely contradictory clauses and then claiming to rely on one of them, in particular when it is the more obscure clause, must in any event be contrary to any concept of “fair and open dealing”’. See also *Standard Bank London Ltd v Apostolakis* Steel J, [2001] Lloyd’s Rep Bank 240, [51].

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See also Lord Millett at [57].

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Joerges (1995) 3 Eur Rev of Private Law 175, 183–184. See also the discussion in G Teubner ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ (1998) 61 MLR 11.

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C-237/02, [2004] ECR I-3403, [2004] 2 CMLR 291.

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At [36].

suffice to show a lack of good faith. In *Peabody Trust (Governors of the) v Reeve* the judge took the line that he did not 'suggest for a moment that the Claimant' landlord had 'deliberately tried to take advantage of the tenant but it certainly' seemed to him 'that if their interpretation of clause 5 was correct they would "unconsciously" be "taking advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position" as ... set out by Lord Bingham'<sup>13</sup>. Further, the discussion in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* of the *Oceano Grupo* case<sup>14</sup> indicates an objective approach and it also suggests that a significant imbalance can be such as to be sufficient, in itself, to show the supplier's lack of good faith<sup>15</sup>. However, it should be questioned whether the idea of 'advantage taking' provides a sufficiently high standard. Lord Bingham's reference to schedule 2 is a reference to a list of matters to which, in particular, regard was to be had in assessing good faith under the 1994 Regulations. The list does not feature in the 1999 Regulations, but derives from the recital 16 in the original Directive on Unfair Terms in Consumer Contracts and remains therefore of relevance to the interpretation of the Regulations as the implementation of a European measure<sup>16</sup>. Recital 16 states:

'Whereas in making an assessment of good faith, particular regard shall be had to the strength of bargaining position of the parties, whether the consumer had an inducement to agree to the term and whether the goods or services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has to take into account.'

It can be contended that there is an emphasis here on a factor which admittedly was not specifically referred to in the schedule 2 list in the 1994 regulations – the factor of the seller or supplier taking account of the legitimate interests of the consumer. It is contended that the recitals show that good faith is intended to go further than restraining advantage taking and actually requires sufficient account to be taken of the legitimate interests of the consumer<sup>17</sup>. The other factors could be seen as merely indicative of whether or not that has occurred and certainly Lord Bingham seemed to be treating the factors referred to in schedule 2, and analogous factors, as indicative of whether the narrower criteria of 'advantage taking' by the seller or supplier has been satisfied<sup>18</sup>.

In considering good faith it has been seen as appropriate to ask whether the term was 'imposed on the consumer in circumstances which justify a conclusion that the supplier has fallen short of the standards of

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*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June at [52].

14

[2000] ECR I-4941.

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See also *OFT V MB Designs* 2005 SLT 691, *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC) at [12]–[15], [2005] All ER (D) 227 (Apr), But see *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul) at [44].

16

See eg Lord Steyn at [31], Lord Rodger at [63], Lord Bingham at [17]; *UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [22].

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See also the OFT *Guidance on Unfair Terms in Tenancy Agreements* p 3.

18

See also Lord Millett at [57]. E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations' (2002) 65 MLR 763.



fair dealing<sup>19</sup>. Where a standard form JCT building contract was introduced by the consumer's agent, rather than the supplier, there was seen to be no possibility of a finding of a lack of good faith where the consumer had 'insisted on the terms'<sup>20</sup>. Further, the same line was taken where the consumer's agent introduced the term and the supplier knew that the consumer was professionally advised<sup>21</sup>. More broadly, the advice and other legal protection available to the consumer may be relevant to the issue of good faith when the terms are introduced by the supplier. In *UK Housing Alliance v Francis*<sup>22</sup> the transaction was a sale and leaseback of the consumer's home, and the term complained of was one precluding (or reducing) the 'final payment' to be made to the consumer after ten years tenancy if the tenancy was terminated before then. There was no lack of good faith as the transaction 'necessitated' that the consumer instructed a solicitor, and when the landlord wanted to terminate the tenancy agreement early, the consumer 'would have the protection of the court if and when a possession order was sought by the landlord'<sup>23</sup>.

It has been suggested that the element of 'good faith' in the Directive and the Regulations embodies both a substantive and a procedural element and can overlap with the 'significant imbalance' element of the fairness test<sup>24</sup> and this does result from the approach taken by the House of Lords in *First National Bank*. It embodies a procedural element in its reference to 'open dealing' and, in addition, the idea of the seller or supplier not taking advantage of the consumer (or, more positively, taking account of the consumer's interests) provides the basis for the substance of the terms to be considered and for there to be an overlap with the test of 'significant imbalance'. As has been indicated, the discussion in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* of the *Oceano Grupo* case suggests that a significant imbalance can be such as to be sufficient, in itself, to show the supplier's lack of good faith<sup>25</sup>. This would allow, for example, for a clause excluding or restricting liability for negligently caused personal injury to be found to be unfair no matter how clearly it was drawn to the consumer's attention, and in the *Peabody Trust* case the judge commented that even had the variation clause been 'clearly and

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*Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul) at [45].

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*Lovell Projects v Legg & Carver* [2003] BLR 452.

21

*Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul). See also *Heifer International Inc v Christiansen* [2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831, [2008] Bus LR D49.

22

*UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb).

23

*UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [29].

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Eg H Beale 'The Directive on Unfair Terms in Consumer Contracts' in Beatson & Friedmann eds *Good Faith and Fault in Contract Law* (1995) 244, S Bright 'Winning the Battle Against Unfair Contract Terms' (2000) 20 LS 331.

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[2000] ECR I-4941. See also *OFT v MB Designs* 2005 SLT 691; *Munkenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr) at [12]–[15]. But see *Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul) at [44]; *UK Housing Alliance v Francis* [2010] EWCA Civ 117, [2010] All ER (D) 283 (Feb) at [21]; and *West v Finlay* [2014] EWCA Civ 316.

unambiguously set out', it was such a 'sweeping and one sided provision' he doubted whether it 'could be held to be fair'<sup>26</sup>.

A further point to be made is in relation to the fact that the fairness test has to operate in two different situations – in relation to a particular contract and at the more general level. It has been noted that the House of Lords in *First National Bank* recognised that that was significant, and that the application of the Regulations had to be adapted to the more general level<sup>27</sup>. Lord Steyn took the view that, at the more general level, the 'directive and the regulations must be made to work sensibly and effectively' and that could be done by 'taking into account the effects of contemplated or typical relationships between the contracting parties'. However, what should be noted here is that he took the further view that 'the primary focus' at the more general level 'is on issues of substantive unfairness'<sup>28</sup>. It has already been indicated, that the substance of the contract may well have an influential role even on the 'good faith' element of the fairness test through consideration (at least) of whether advantage has been taken of the consumer. However, even at the more general level, the procedural aspect should not be neglected. Clearly there is no difficulty in considering whether the standard terms are in 'plain intelligible language' even at the more general level and, in addition, the sellers or suppliers practice in introducing the standard terms can be considered. The OFT previously had made the point that in relation to good faith it regards it as significant to look at 'the trader's marketing practices, documents and administrative procedures' and whether they 'enable the consumers to know exactly what they are doing and pull back from commitments at any point before the whole picture is clear'<sup>29</sup>.

The final point to be made here is in relation to informational defects. Prima facie, when the problem faced by a consumer is an informational one, although there may be difficulties in finding a significant imbalance<sup>30</sup>, there would seem to be no difficulty with the good faith element of the test (provided always that the informational problem is sufficiently significant). However, some obstacles to that prima facie conclusion may be seen to have been created by the approach taken by the House of Lords in *First National Bank*. The basic problem in that case was informational. Consumers were shocked to discover that they still owed considerable sums after they had complied with a court ordered repayment schedule which had been devised on the basis of what they could afford. The House of Lords made the point that the term continuing the obligation to pay the contractual interest rate after default was 'clearly and unambiguously expressed'<sup>31</sup>. However, the difficulty did not lie in the term as an intelligible piece of English. The difficulty lay in the impact of its interaction with the legislation, and the consumers' lack of awareness of that. That was addressed by the House of Lords to the extent that they considered that the problem lay in the legislation and not the term, and was not something for which the lenders were seen as

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*Peabody Trust (Governors of the) v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June at [53].

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See [3.108](#).

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At [33]. See also Brownsword, Howells & Wilhelmson in Willett (ed) *Aspects of Unfairness in Contracts* (1996) pp 36–37.

29

OFT Bulletin 4, at 23.

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See para [3.109](#).

31

[2001] UKHL 52, [2002] 1 All ER 97, Lord Bingham at [20], Lord Millett at [55].

responsible, and was not, therefore, viewed as unfair<sup>32</sup>. The approach raises concerns as to the efficacy of UTCCR 1999 to address 'informational defects' which are not simply matters of the accessibility of the term in question or of its intelligibility as a piece of English<sup>33</sup>. It is suggested that, on this point, the case should be seen as confined to its very specific facts, or emphasis placed upon the fact that the House of Lords viewed the informational problem as not the fault of the supplier. There certainly should be no difficulty in finding unfairness in relation to the type of situation considered above<sup>34</sup> where terms mislead consumers as to their rights.

### [3.111]

**Fairness – factors** The preceding paragraphs break down the test of unfairness into the two elements of significant imbalance and a lack of good faith. The further point can be made that in *First National Bank* Lord Millett indicated a more overall approach in identifying factors which, for the most part, would be relevant to both those elements. He said:<sup>1</sup>

'There can be no one single test of [fairness]. It is obviously useful to assess the impact of an impugned term on the parties' rights and obligations by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arm's length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion.'

So, whilst the consumer's likely surprise at the term, most obviously goes to the good faith element of the fairness test (in particular 'open dealing'), it could also be indicative of imbalance and the departure of a term from the consumer's reasonable expectations was seen in that light in *Office of Fair Trading v Foxtons Ltd*<sup>2</sup>. More plainly, the fact that a similar term would be accepted by a commercial party of equal bargaining power may be indicative of both the 'balanced' nature of the term and of the fact that it has not been included to take advantage of the consumer<sup>3</sup>. However, the point should be made that the question of what the reaction of a commercial party would be must be approached with caution. Different factors may operate in the different contexts.

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Lord Steyn at [38], Lord Bingham at [24], Lord Hope at [47], Lord Millett at [61].

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E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations' (2002) 65 MLR 763. The problem of finding a 'significant imbalance' when the problem is basically informational is considered above in relation to misleading terms: see para [3.109](#).

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See para [3.109](#).

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[2001] UKHL 52, [2002] 1 All ER 97, [54].

2

[2009] EWHC 1681 (Ch), [2009] 29 EG 98 (CS), [2009] All ER (D) 110 (Jul) at [91].

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E Macdonald 'Scope and Fairness of the Unfair Terms in Consumer Contracts Regulations' (2002) 65 MLR 97.

## The 'grey' list and other unfair terms

### [3.112]

As has been indicated, Schedule 2 contains a list of terms which may be regarded as unfair<sup>1</sup> and is set out below. The OFT once said that:<sup>2</sup>

‘It is the most authoritative guide to what fairness entails. It is not a “black list” but the exact shade of grey is debatable. Our view is that if a term appears in the list it is under substantial suspicion, but that correspondence with an item in the list cannot of itself determine the issue of unfairness.’

This not only indicates the importance of the list as a guide to which terms will be unfair, but also emphasises that ultimately it is the fairness test in reg 5(1) – set out above – which must determine the issue. The list is not exhaustive and the OFT had made the point that ‘exclusion from the [grey list] cannot be seen as forming any sort of “white list”. Any standard term will be seen as being unfair whether or not it appears in ... the list, if it fails the test in<sup>3</sup> reg 5(1) and the OFT duly identified other types of term (not falling within the list) which it regards as ‘questionable in the light of the general test of fairness<sup>4</sup> – eg ‘indemnification clauses’, ‘unfair enforcement clauses’<sup>5</sup> and ‘signed statements’<sup>6</sup>. The terms in the ‘grey’ list are not identified by their form but by their ‘object or effect’. In one sense that makes the compass of the list less certain, but it has the benefit of helping to avoid difficult questions as to the classification of clauses. A term may be ‘under suspicion’ even if it does not look like a term on the list, ‘if it is calculated to affect consumers in the same way as anything on the list’<sup>7</sup>. In other words, this formulation of the grey list terms helps to avoid the type of questions which arise in relation to identifying exemption clauses and the appropriate coverage of the Unfair Contract Terms Act 1977. (Such difficulties are avoided more generally because the application of the fairness test is not restricted to a certain type of clause – such as one excluding or restricting liability – but the extent of that avoidance does depend upon the approach

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Reg 5(5).

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OFT Bulletin 4, p 22.

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OFT Bulletin 5, p 10.

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OFT Bulletin 3, p 18. For a broader consideration of ‘other’ unfair terms see OFT *Unfair Contract Terms Guidance* (Feb 2001) pp 41–51.

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le terms giving the seller or supplier unduly wide powers to enforce its rights. For example, a clause which is intended to permit a seller or supplier to enter the consumer’s property to repossess goods it has supplied: OFT Bulletin 3, p 18.

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le statements which the consumer is required to sign to the effect that they have read the contract – OFT Bulletin 3, pp 18–19. ‘Consumer declarations’ more broadly are also criticised in OFT *Unfair Contract Terms Guidance* (Feb 2001) pp 47–48 – ‘Consumers are sometimes sold goods on printed terms which include a declaration that they have inspected their purchase and found it to be free from faults. If they then subsequently discover defects, they are at risk of being told that they have ‘signed away their right’ to make any claim. ... Wording of this kind gives rise to the same objections as exclusion clauses’.

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OFT Bulletin 5, p 10.

taken to identifying terms falling within the 'core exclusion'<sup>8</sup>.) The grey list itself should now be considered. Paragraph 1 of Schedule 2 sets out the basic terms, according to their 'object or effect' but some qualification is placed upon it in certain areas by paragraph 2. Schedule 2 states:

- '1. Terms which have the object or effect of –
  - (a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
  - (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;
  - (c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realisation depends on his own will alone;
  - (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
  - (e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;
  - (f) authorising the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
  - (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
  - (h) automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;
  - (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
  - (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;
  - (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
  - (l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
  - (m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

- (n) limiting the seller's or supplier's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;
- (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;
- (p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter's agreement;
- (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

2. Scope of subparagraphs (g), (j) and (l)

- (a) Subparagraph (g) is without hindrance to terms by which a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately.
- (b) Subparagraph (j) is without hindrance to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately.

Subparagraph (j) is also without hindrance to terms under which a seller or supplier reserves the right to alter unilaterally the conditions of a contract of indeterminate duration, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to dissolve the contract.

- (c) Subparagraphs (g), (j) and (l) do not apply to:

- transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control;

- contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;

- (d) Subparagraph (l) is without hindrance to price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.'

As regards the Consumer Rights Bill 2014, cl 63 introduces Sch 2, which provides a list of indicative and non-exhaustive terms which may be regarded as unfair (the 'grey list'). The list is intended to assist the courts in deciding whether a particular term is unfair<sup>9</sup>. The fact that a particular term is not on the list, though, does not imply that it is not unfair. This clause and the Schedule are taken almost verbatim from art 3(3) and the Annex in the Unfair Terms in Consumer Contracts Directive.

Terms on the 'grey list' are subject to the assessment of fairness even if they would otherwise qualify for an exemption under cl 64 (which provides for an exemption ordinarily for terms referring to the subject

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See Case C-472/10 *Nemzeti* (judgment of 26 April 2012), [26].

matter of the contract or the price). Terms on the 'grey list' are also so subject even if they satisfy the transparency and prominence tests as defined in cl 64(3)(4)<sup>10</sup>.

That is consistent with EU case law. In Case C-478/99 *Commission v Sweden*, the CJEU stated:

'It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair ... In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive ... Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures.'<sup>11</sup>

Part 1 of Sch 2 is as included in the UTCCR (and in the Directive) but the terminology has been made consistent with the language used elsewhere in the Bill. Three additional items have been added to the list as recommended by the Law Commission in their report of March 2013<sup>12</sup>:

- (a) Paragraph 5 which adds to the 'grey list' terms of a contract which have the object or effect of requiring that a consumer pay a disproportionate amount if they decide not to continue the contract. In this paragraph the phrase 'decides not to conclude or perform' includes the situation where a consumer cancels a contract and is charged a so-called 'termination fee'.
- (b) Paragraph 12 which adds to the 'grey list' terms which have the object or effect of allowing the trader to determine the subject matter of the contract after the contract has been agreed with the consumer. In certain circumstances<sup>13</sup>, this would not apply to contracts which last indefinitely.
- (c) Paragraph 14 which adds to the 'grey list' terms which have the object or effect of allowing the trader to set (for the first time) the price under a contract (or the method for calculating the price), after that contract has been agreed with the consumer. The paragraph specifically provides that, in certain circumstances<sup>14</sup>, it does not apply to contracts which last indefinitely, contracts for the sale of securities and foreign currency (etc), and price index clauses. This is essentially only for the avoidance of doubt, because in most of these situations the price of the contract, or the method for calculating it, will be determined before the contract is agreed, so para 14 would not be relevant.

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An example given in the Explanatory Notes to the Bill is: '... if a contract to subscribe to a magazine included a term which provided that the publisher, but not the subscriber, could cancel the delivery at short notice, that term may be regarded as unfair, as it is covered by paragraph 7 of the Schedule (which gives a term which authorises "the trader to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer" as an example of a term which may be unfair). This does not mean that the term is automatically unfair, but the court must take this into account when assessing the term under the fairness test in clause 62.' (see para 298).

<sup>11</sup>

(2002) ECR I-4147at [20]–[22].

<sup>12</sup>

[lawcommission.justice.gov.uk/docs/unfair\\_terms\\_in\\_consumer\\_contracts\\_advice.pdf](http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf)

<sup>13</sup>

These circumstances are defined in para 23.

<sup>14</sup>

These circumstances are defined in paras 23, 24 and 25.

It might also be observed that cl 63 is the chosen instrument to implement art 15 of the Distance Marketing Directive (Directive 2002/65/EC concerning the distance marketing of consumer financial services)<sup>15</sup>. That Directive lays down common minimum standards for the information that must be given to a consumer prior to a distance contract for financial services being concluded. There are also provisions for rights of withdrawal ('cancellation rights') in many circumstances, and provisions to protect consumers in relation to misuse of payment cards in connection with distance contracts for financial services, unsolicited supplies of financial services and unsolicited communications about such services. Article 15 provides that any contractual term or condition that puts the burden of proof on the consumer (rather than the trader) to show non-compliance with the Directive is an unfair term.

### [3.113]

**Exemption and related Clauses** There is considerable overlap between UTCCR 1999 and UCTA 1977. This is most obvious in relation elements (a), (b), and (q) of the grey list. Even in relation to those clauses which are automatically ineffective under UCTA 1977, the Regulations may still be of significance because of their operation at the more general level, ensuring the removal of such clauses and preventing them from misleading consumers. Section 2(1) of the Unfair Contract Terms Act 1977 renders automatically ineffective terms excluding or restricting liability for negligently caused death or personal injury. Nevertheless, the OFT had still encountered clauses purporting to have that effect<sup>1</sup>. Such clauses are only 'grey listed' in the Regulations but the OFT said that 'it would be difficult to conceive of circumstances in which [such a clause] would not be unfair'<sup>2</sup>. In addition, the OFT obviously saw exemption clauses dealing with other negligently caused loss or damage as generally unfair in the consumer context and some clauses have been redrafted to make it clear that they do not extend to liability for negligence<sup>3</sup>. In general it can be suggested that the factors which have proved important in determining 'reasonableness' under UCTA 1977 may prove helpful in identifying unfairness in exemption clauses under the Regulations<sup>4</sup>. However in making any such analogies care must be taken in moving from the business to business contracts which have often been the context for consideration of the 'requirement of reasonableness' under the 1977 Act to the consumer contracts which fall to be addressed under the Regulations. The OFT took the view that:<sup>5</sup>

'Rights and duties under a contract cannot be considered evenly balanced unless both parties are equally bound by their obligations under the contract and the general law. Suspicion of unfairness falls on any term that undermines the value of such obligations by preventing or hindering the consumer from seeking redress from a supplier who has not complied with them.'

If a particular exemption or limitation is sought, it may be wise to restrict its scope to what is seen as essential. So, for example, the OFT indicated that terms which exclude all liability for consequential loss

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As generally implemented in the UK by the Financial Services (Distance Marketing) Regulations 2004 (SI 2004/2095).

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Eg OFT Bulletin 3 at 1.2.

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OFT Bulletin 3 at 1.2. See eg Bulletin 1, cases 2, 7, 23.

3

Eg OFT Bulletin 3 at pp 30, 54, Bulletin 4 at p 65.

4

See para 3.84 ff.

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OFT *Unfair Contract Terms Guidance* (2008) (OFT311) p 13.



may be unfair<sup>6</sup>. Firstly, because they may mislead the consumer, who may understand a reference to consequential loss more broadly than it is likely to be construed – as extending to all loss consequent on the breach. Secondly, because they are not usually restricted to the loss which is actually unforeseeable. The OFT indicated that it would not usually object to clauses which are restricted to losses which are actually unforeseeable, rather than also encompassing losses which are merely usually unforeseeable<sup>7</sup> eg clauses which do not encompass any unusual loss the potential for which has been drawn to the attention of the seller or supplier.

Element (b) includes terms which have the ‘object or effect of ... inappropriately excluding or limiting the rights of the consumer vis-à-vis the ... supplier... in the event of total or partial non-performance or inadequate performance by the ... supplier of any contractual obligations, including the option of offsetting a debt owed to the ... supplier against any claim which the consumer may have against him’. This was one indicator that a ‘withholding notice clause’ in a JCT Minor Works contract was unfair in *Domsalla (t/a Domsalla Building Services) v Dyason*<sup>8</sup>. The reinstatement of the consumer's house was being paid for by his insurance company following its destruction by fire. The consumer was the contractor's ‘employer’, but he had contracted as the insurer's agent and although he could be personally liable to the contractor, the consumer had no control in relation to the operation of the building contract. In particular, the contract required a withholding notice to be issued in relation to any amount to be withheld from the amount due under a certificate of payment and the consumer could not issue, or have issued, such a notice even where he had concerns about defects or delay. Such matters were in the control of the insurance company. Against that background, the impact of the requirement of a withholding notice was seen as ‘substantially’ affecting the consumer's rights if he did become personally liable and he had had no opportunity to read or consider the clauses in making the contract. In contrast, the contractors would not be adversely affected if the withholding notice clause was not held to be binding (they could still rely on rights to suspend work and proceed against the insurers directly)<sup>9</sup>.

Element (q) of the grey list would cover arbitration and adjudication clauses. Arbitration clauses in consumer contracts dealing with claims for a modest amount (as specified from time to time) are deemed unfair for the purposes of the Regulations<sup>10</sup>. Above that amount such clauses would be subject to the test of fairness under the Regulations<sup>11</sup>. However, in the context of contracts dealing with building work in relation to which questions about such terms tend to arise, the standard terms containing the term may have been introduced by an agent of the consumer. Where such standard terms are introduced by the agent of a professionally advised consumer, that should prevent any lack of good faith on the part of the supplier<sup>12</sup>. This contrasts with the situation where the terms were introduced by the supplier and even

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OFT Bulletin 3.

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OFT Bulletin 3 at p 9; eg OFT Bulletin 5 at p 28 (Eastern Natural Gas Ltd).

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[2007] EWHC 1174 (TCC), 112 ConLR 95, [2007] BLR 348.

9

[2007] EWHC 1174 (TCC), 112 ConLR 95, [2007] BLR 348, [95].

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Arbitration Act 1996.

11

*Zealander v Laing Homes* (2000) 2 TCLR 724.

12

*Bryen & Langley Ltd v Boston* [2005] EWCA Civ 973, [2005] All ER (D) 507 (Jul), Rimer J at [45]; *Lovell Projects Ltd v Legg and Carver* [2003] 1 BLR 452 at [29]; *Westminster Building Co Ltd v Beckingham*

though a box was signed, drawing attention to the terms, 'the impact of the arbitration clause would not have been apparent to a layperson' and the 'requirement of fair and open dealing means that for consumer transactions the arbitration clause and its effect need to be more fully, clearly and prominently set out'<sup>13</sup>. An adjudication clause, incorporated from the JCT minor works contract, has been seen as a neutral term, not generating a significant imbalance because it 'applies equally' to both parties<sup>14</sup> and element (q) of the grey list was seen as of no 'relevance' to it on the basis that it did not hinder the consumer's right to take legal action or exercise any other remedy but only bound the parties until the dispute is resolved by legal action, arbitration or agreement'<sup>15</sup>. However, factors may be present that mean that such clauses cannot be taken at face value as neutral terms, but are terms excluding or hindering the consumer's right to take action. In particular, the consumer's financial position may impact. In relation to an adjudication clause from RIBA standard terms, the line was taken that 'a procedure which the consumer is obliged to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action.... Costs in an adjudication can be significant'<sup>16</sup>. In relation to a claim for £5,230 the point was made in relation to an arbitration clause, which was found to be unfair, that there was an 'element of imbalance to the detriment of the consumer where the claims are small and the fees payable to the arbitrator are comparatively significant' (in the case, over £2,000)<sup>17</sup>. When an arbitration would have only covered part of the consumer's claim, in finding unfairness, it was noted that the consumer's 'means are limited, though they have insurance to cover their costs to a certain limit. So they will suffer, at least, an inconvenience if they have to conduct two sets of proceedings, and possibly injustice through lack of resources'<sup>18</sup>.

Element (q) could also cover jurisdiction clauses and the European Court of Justice has seen a jurisdiction clause conferring jurisdiction on the place of the seller's business as unfair as beneficial to the seller at the expense of the consumer ie giving the seller easy access to the court and potentially

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[2004] EWHC 138 (TCC), 94 ConLR 107[2004] BLR 163. But a 'withholding clause' was found to be unfair in *Domsalla (t/a Domsalla Building Services) v Dyason* [2007] EWHC 1174 (TCC), 112 ConLR 95, [2007] BLR 348 even though the terms had been introduced by agents of the consumer's insurance company. The consumer had had no input in relation to the clause, or even an opportunity to become acquainted with it. The consumer's lack of control should be emphasised.

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*Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC), [2009] 2 All ER (Comm) 259 at [56].

14

*Lovell Projects Ltd v Legg and Carver* [2003] 1 BLR 452 at [29]. See also *Westminster Building Co Ltd v Beckingham* [2004] 1 BLR 265 at [31].

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*Lovell Projects Ltd v Legg and Carver* [2003] 1 BLR 452 at [29]. See also *Westminster Building Co Ltd v Beckingham* [2004] 1 BLR 265 at [31].

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*Picardi v Cuniberti* [2002] EWHC 2923, 94 ConLR 81 at [131]. No right to adjudication arose under s 106 of the Housing Grants Construction and Regeneration Act 1996 and the judge also emphasised that 'the fact that the consumer was deliberately excluded by parliament from the statutory regime' reinforced his view as to the terms unfairness under the Unfair Terms in Consumer Contracts Regulations 1999.

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*Mylcrist Builders Ltd v Buck* [2008] EWHC 2172 (TCC), [2009] 2 All ER (Comm) 259 at [55]. The point was also made, in relation to element (q) of the grey list, that 'The existence if an arbitration clause together with the requirement for a mandatory stay under s 9 of the 1996 Act means that an arbitration clause does exlude or hinder a consumer's right to take legal action'.

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*Zealander v Zealander v Laing Homes Ltd* (2000) 2 TCLR 724

imposing a burden in that respect on consumers (ie when the consumer is from another jurisdiction)<sup>19</sup>. It would seem that an arbitration clause referring disputes to arbitrators outside of the consumer's jurisdiction would generally meet with the same response. Although in *Heifer International Inc v Christiansen*<sup>20</sup> the court did not view a clause referring disputes to an arbitration board in Copenhagen as unfair, it should be recognised that the consumer's resources were in this case obviously not those of the 'ordinary consumer'. Further, it should be emphasised that the consumer's lawyers had chosen the standard terms and the fairness of the clause was also indicated as much of the work would be done in Denmark, it was the consumer's choice to employ skilled Danish labour, and although the Danish Arbitration Board was likely to conduct proceedings in Danish, the consumer could afford translators. In contrast, in the context of a commercial contract, where the claimant was of limited means and experience, the point was made that it would assist the court to decide if a clause requiring arbitration in Utah was onerous, within the 'red hand rule'<sup>21</sup>, if there was evidence as to whether it would 'in practice mean that [the claimant] has no real prospect of pursuing the claim'<sup>22</sup>.

### [3.114]

**Forfeiture/penalty and analogous clauses** Element (d) of the grey list deals with the forfeiture of a consumer's deposit on the consumer's withdrawal where there is no corresponding right for the consumer. Element (e) relates to clauses requiring the consumer to pay a 'disproportionately high sum in compensation' and overlaps with the common law rule providing relief in relation to penalty clauses. That rule is, however, very form based and easily avoided by appropriate drafting<sup>1</sup>. A clause in a contract covered by the Regulations, serving the same function as a penalty clause, as indeed a clause requiring a deposit may do, should not, however, escape the fairness test on the basis of its form. Even if it is not seen as falling within the grey list, it should still be subject to the fairness test in general, provided that an appropriate approach is taken to the 'core exemption' and the Supreme Court's approval, in *OFT v Abbey National*<sup>2</sup> of the line taken in *Bairstow Eves London Central Ltd v Smith and Darlington's (a firm) (Pt 20 defendants)*<sup>3</sup> indicates such an approach will be taken. The key element relating to the fairness of such clauses would seem to be the disproportion of the 'compensation' which, at some point, passes from the consumer to the seller or supplier in relation to the seller or supplier's loss. The question of any balancing

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*Océano Grupo v Quintero* Case C-240/98. See also *Standard Bank London Ltd v Apostoliakis* [2001] Lloyd's Rep Bank 240, Steel J. But see N Bamforth 'The Limits of European Contract Law' (1999) 24 Eur L Rev 40.

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[2007] EWHC 3015 (TCC), [2008] 2 All ER (Comm) 831, [2008] Bus LR D49.

21

See above para [3.16](#).

22

*Kaye v Nuskin UK* [2009] UKHC 3509 (Ch) at [39].

1

See para [8.108](#) ff.

2

[2009] UKSC 6, [2010] 1 All ER 667 at [43].

3

[2004] EWHC 263 (QB), [2004] 2 EGLR 25, [2004] 29 EG 118. See above, para [3.105](#).

right for the consumer on the default of the seller or supplier may also be relevant and in its absence, an unusual term was held to be unfair even though it was a genuine pre-estimate of loss:<sup>4</sup>

Embodying both the problem of an apparent lack of connection to the actual loss of the supplier and a lack of any balancing right for the consumer, the following clause was revised, at the behest of the OFT, to take account of both factors. As originally drafted it said:<sup>5</sup>

‘No order which has been accepted by [the company] may be cancelled by the Customer except with the agreement in writing of [the company] (who have a discretion whether or not to except such cancellation) and on terms that the Customer shall indemnify [the company] in full against all losses and costs incurred by [the company] as a result of cancellation. A minimum cancellation charge of 25% of the contract price will be payable by the customer in the event that [the company] accepts such cancellation.’

The revised clause removed the minimum payment, restricting the company's claim to its losses and costs, and also provided a balancing right for the consumer on cancellation by the company. The revised clause stated:

‘You cannot cancel an order unless we agree in writing. You must pay any losses and costs we suffer because of the cancellation. If we cancel the contract, we must pay you any losses or costs you suffer because of the cancellation.’

### [3.115]

**Terms dealing with contract duration** There will normally be nothing unfair in a term dealing with the duration of a contract, however, elements (f), (g) and (h) of the grey list all relate to terms in this area which ‘may be unfair’. Element (f) relates, inter alia, to a term allowing the seller or supplier to dissolve the contract at their discretion, without a similar right for the consumer. Depending upon any restrictions on the point at which that could occur, such a contract term could render the entire contract void for want of consideration. When the fairness of any such term is in question, however, the OFT had taken the view that:<sup>1</sup>

‘Fairness and balance require that consumers and suppliers should be on an equal footing as regards rights to end or withdraw from the contract. The supplier's rights should not be excessive, nor should the consumer's be over restricted. This does not however, mean a merely formal equivalence in rights to cancel, but rather that both parties should enjoy rights of equal extent and value...’

In addition the OFT made the point that:<sup>2</sup>

‘Cancellation of a contract by a supplier can leave the consumer facing inconvenience at least, if not costs or other problems. When that is so, a unilateral right for the supplier to cancel without liability to do more than return prepayments is likely to be considered unfair.’

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*Munckenbeck & Marshall v Harold* [2005] EWHC 356 (TCC), [2005] All ER (D) 227 (Apr).

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OFT Bulletin 3 at p 35 (Maples Stores).

1

OFT Unfair Contract Terms Guidance (2008) (OFT 311), p 43.

2

OFT Unfair Contract Terms Guidance (2008) (OFT 311), p 43.

If a seller or supplier feels that there are certain circumstances in which a right to cancel is necessary, the right should be set out within the limits of that necessity. So, for example, a roadside breakdown service originally used a clause which stated:<sup>3</sup>

‘We may cancel membership at any time by sending seven days’ notice by recorded delivery to your last known address and in such event you will receive a pro rata refund if your subscription, unless the service has been used.’

The OFT viewed that as ‘potentially unfair ... since it allowed [the business] to cancel contracts on a discretionary basis and thus to get out of a bad bargain’<sup>4</sup>. The clause was redrafted to allow the business to cancel in limited circumstances.

‘If excessive use of the service has occurred through failure to seek permanent repair following any temporary repair effected by an agent or due to lack of routine vehicle maintenance, we may cancel membership by sending seven days’ notice by recorded delivery to your last known address.’

Similarly, as element (g) indicates, if a seller or supplier is to be given a right to cancel a contract of indeterminate duration without reasonable notice, such a right should be restricted to the situations in which it is felt to be necessary and can be justified. The scope of element (g) is restricted by para 2 of the grey list (above).

Element (h) deals with automatic renewal of contracts of fixed duration and with an unreasonably early deadline for the consumer to indicate the intention to discontinue. Similarly, contracts which are not of fixed duration may have provisions for termination which are viewed as unfair because of an excessive notice period<sup>5</sup>.

### [3.116]

**Terms binding consumers to ‘hidden terms’** It has been suggested that element (i) of the grey list could be very extensive in its impact where the written terms contain a clause binding the consumer to the contract. In such circumstances, if there has been insufficient opportunity for the consumer to become acquainted with the terms, the whole contract would not bind the consumer<sup>1</sup>, but that would not be the case if the terms were incorporated even without the clause in question. More narrowly, this element of the grey list would cover terms such as those attempting to incorporate other terms by reference when, prior to contracting, there was ‘no real opportunity’ for the consumer to ‘become acquainted’ with the other terms<sup>2</sup>. The OFT had placed some emphasis on ‘real opportunity’. The point has been made that ‘small print, even where the font size, pitch and printing contrast are good, can discourage or prevent consumers from reading their contracts’<sup>3</sup>. More broadly the OFT had stressed:<sup>4</sup>

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OFT Bulletin 3 (Britannia Rescue Services).

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OFT Bulletin 3, p 26.

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Eg OFT Bulletin 5 (Global Internet Ltd), OFT Bulletin 4 (Motorola Ltd).

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See *Chitty on Contracts* (30th edn) para 15-102.

2

Eg OFT Bulletin 1 (Stena Line Ltd) case 2, (Goodalls Caravans Ltd) Case 3; OFT Bulletin 2 (Form Motor Co) at p 56; Bulletin 3 (Country Holidays Ltd) at p 70.

3

OFT Bulletin 4 at p 10.

‘We interpret “real” opportunity as something more than the theoretical right to refer to a book held by the operator. While it is not practicable to put much information legibly on the back of a normal sized ticket, it is by no means impossible to take reasonable steps – for example displaying posters in ticket offices – to alert consumers to, and summarize, significant provisions which they might not otherwise realise applied to them, and ignorance of which would cause them detriment.’

Whilst summaries of terms may have their own problems in terms of a capacity to mislead, it is clear that what is intended is a reduction in the artificiality which can occur in incorporation. The OFT did also indicate that in its view a finding of unfairness might be avoided by a cooling off period, providing the consumers with an opportunity to review the terms after the contract has been made and permitting them a period within which they can withdraw without penalty<sup>5</sup>.

### [3.117]

**Seller / Supplier's Discretion as to elements of the performance** Elements (j), (k), and (l) of the grey list deal with various situations in which the seller or supplier is given rights to vary the terms of the contract, the characteristics of the product or service to be provided and the price respectively. There are limitations placed upon the scope of those elements by para 2 of schedule 2. Element (m) deals with the related situation in which the seller or supplier is given the right to determine if goods or services are in conformity with the contract or the interpretation of any term of the contract. The OFT made the point that:<sup>1</sup>

‘a right for one party to alter the terms of the contract after it has been agreed, regardless of the consent of the other party is under strong suspicion of unfairness. A contract can be considered balanced only if both parties are bound by their obligations as agreed.’

If the seller or supplier does think it necessary to maintain control over some element of the contract in one of these ways, it would seem that there is less likely to be unfairness if the seller's or supplier's rights are restricted to what is viewed as essential<sup>2</sup> – as was indicated above in relation to the terms covered by elements (f) and (g). It may also help to show fairness if the consumer's consent to any change is maintained through the right to withdraw without prejudice. In the contract of a supplier and installer of kitchens a clause was seen as ‘of questionable fairness’ in the light of para 1(k)<sup>3</sup>. The unrevised clause stated:

‘If, for any reason, the Company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. The Company will normally replace it with an item of equivalent or superior standard and value.’

The clause was revised to state:

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OFT Bulletin 4 at p 10.

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OFT bulletin 1 (Stena Line), OFT Bulletin 2 (David Lloyd Leisure).

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OFT Unfair Contract Terms Guidance (2008) (OFT311) p 52.

2

Eg OFT Bulletin 5 at p 91.

3

OFT Bulletin 1 (Moben Kitchens) case 1 at p 25. See also OFT Bulletin 1 (Stena Line Ltd) case 2, (Falkirk Sunbed Solarium & Ladies Health Club) case 6; Bulletin 2, at p57; Bulletin at p 72.

‘If, for any reason beyond the company's reasonable control, the company is unable to supply a particular item of furniture or a particular appliance, the Company will notify the Customer. With the agreement of the Customer the Company will replace it with an item of superior standard and value.’

The revised clause was seen as an ‘improvement’ as it specified that the substitution must be for reasons ‘beyond the company's reasonable control’ and required the consumer's consent to the change. The restrictions on a supplier's rights to make a change will have to be sufficiently limited and specific. The OFT took the view that ‘a term which merely says that variations will be “reasonable” or will only be made “reasonably” is unlikely to be any fairer than one which contains no such qualification, unless there can be little doubt in the consumer's mind as to what sort of variation, broadly speaking, such wording allows and in what circumstances’<sup>4</sup>.

Some indication of the correctness of the OFT's basic approach to clauses conferring a wide discretion and of the limitations on cancellation or termination as a balancing factor was provided in *Peabody Trust (Governors of the) v Reeve*<sup>5</sup> in the context of a landlord and tenant contract. The clause was one giving a ‘social landlord’ ‘almost carte blanche in the field of variations apart from the areas of rent and statutory protection’<sup>6</sup>. The judge took the line that:<sup>7</sup>

- ‘54. Although the Court is in no sense bound by the guidance provided by the Office of Fair Trading (OFT 356 “Guidance on unfair terms in tenancy agreements”), ... that guidance does give landlords helpful commonsense indications of what is likely to be considered to be fair and should be carefully taken into account when drafting a variation clause in a tenancy agreement.
55. For example, the OFT must be right in saying (at para 3.89) that a term is likely to be objectionable if it “gives the landlord a broad discretion that could be used to impose new restrictions, penalties or burdens unexpectedly on the tenant.” By contrast, a term allowing for variations is less likely to be thought unfair if “its effect is narrowed, so that it can be used to vary terms to reflect changes in the law, for example, rather than be used to change the balance of advantage under the contract?” (at para 3.92).’

The landlord unsuccessfully argued that its status as a ‘social landlord’ should mean that the term was not unfair as it was contended that it could ‘be trusted only to impose reasonable and proper variations’<sup>8</sup> (although it was viewed as a relevant factor). Further, it did not help the landlord to argue that if tenants did not like new terms, they could terminate the lease and go elsewhere. The point was made that ‘in the case of relatively low cost housing operated by a registered social landlord, this is unrealistic. The tenant will typically have a strong necessity, will be of relatively limited means, may well lack experience and familiarity with contractual terms and will have a very weak bargaining position.’<sup>9</sup>

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OFT Unfair Contract Terms Guidance (2008) (OFT311) p 53.

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[2008] EWHC 1432 (Ch), [2008] 43 EG 196, (2008) Times, 9 June.

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[2008] EWHC 1432 (Ch), (2008) Times, 9 June at [56].

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[2008] EWHC 1432 (Ch), (2008) Times, 9 June at [54]–[55].

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[2008] EWHC 1432 (Ch), (2008) Times, 9 June at [56].

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### [3.118]

**Entire Agreement Clauses** Element (n) of the grey list covers some 'entire agreement clauses' and others may well also be unfair under UTCCR 1999. (In its first Bulletin on the Regulations the OFT identified entire agreement clauses as amongst the unfair terms it had most commonly encountered<sup>1</sup>). Such terms are attempts to ensure that there are no terms outside of those contained in the written standard form and also that there is no liability for pre-contractual statements as misrepresentations. They can take many forms such as:<sup>2</sup>

'You agree that this Agreement is the complete and exclusive statement between us which supersedes all understandings or prior agreements oral or written, and all representation or other commitments between us relating to the subject matter of the Agreement.'

In the past, the OFT had plainly taken the view that such clauses were generally unfair. It was commented that:<sup>3</sup>

'Consumers commonly and naturally rely on what is said to them when they are entering a contract. If they can be induced to part with money by claims and promises, and the seller can then simply disclaim responsibility by using an entire agreement clause, the scope for bad faith is clear. Even if such a term is not deliberately abused, it weakens the seller's incentive to take care in what he says, and to ensure that his employees and agents do so.'

In *OFT v MB Designs*<sup>4</sup> the court was not persuaded that it should view an entire agreement clause as a 'neutral' term which merely created certainty for both parties. The view was taken that it was 'likely' that in the 'vast majority of cases' the 'main practical effect of terms of this nature will be to prevent the customer from relying on representations'<sup>5</sup>. The term was seen as unfair.

However, the OFT did not see any objection to terms which provide a warning for consumers 'that the law favours written terms' provided that 'it does not undermine the court's power to consider other statements where necessary' and the OFT gave the example that 'a contract may include a statement that it is a binding document, and that consumers should read it carefully and ensure that it contains everything they want and nothing they are not prepared to agree to'<sup>6</sup>. Of course, the OFT emphasised that any such statement must be clearly worded and sufficiently drawn to the consumer's attention, 'for instance, by appropriate highlighting'<sup>7</sup>.

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[2008] EWHC 1432 (Ch), (2008) Times, 9 June at [45] and see [57].

1

OFT Bulletin 1 at 19.

2

OFT Bulletin 1, 2.4.

3

OFT *Unfair Contract Terms Guidance* (2008) (OFT311) at p 61.

4

(2005) SLT 691.

5

(2005) SLT 691 at [43].

6

OFT *Unfair Contract Terms Guidance* (2008) (OFT311) at p 62.

7

OFT *Unfair Contract Terms Guidance* (2008) (OFT311) at p 62.



## *Choice of law clauses*

### **[3.119]**

Regulation 9 of the UTCCR 1999 includes a provision intended to prevent evasion of the Regulations by a choice of law clause. It applies the Regulations 'notwithstanding any contract term which applies or purports to apply the law of a non-Member State, if the contract has a close connection with the territory of the Member States'.

As far as the Consumer Rights Bill 2014 is concerned, it is permissible for the contractual parties to agree that the contract is to be governed by the law of a particular country (cl 74). This is useful where the trader is based in a country other than the UK. However, the effect of cl 74 is that the consumer would not be deprived of the provision of the Act on unfair terms where the contract has a close connection with the UK, even if the contract states that the law of a non-EEA State applies. As far as the choice of law points to an EEA country, the presumption is that the law on unfair terms in consumer contracts would be the same and there is no need to subject the contract to the Consumer Rights Act. It should of course also be borne in mind that the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) would govern which law applies to a consumer contract. Thus, where there is a choice of law, that choice must satisfy the requirements of the Rome I Regulation. Where there is no choice, then the provisions in the Rome I Regulation would apply to assist the English court to ascertain the applicable law of that consumer contract.