1 Introductory Matters

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1.1 Preliminary Points

1.01 This book is concerned with loan transactions governed by English law under which finance is arranged for provision to those who require it, whether they be located in the United Kingdom or abroad. It will examine the legal issues that arise concerning such transactions, which it will do from the perspective of English law. This book does not purport to consider the multifarious local law matters which may be relevant to such a

financing transaction where it involves foreign elements. The focus is solely on the laws applied by courts in England and Wales and arbitral tribunals applying English law.

1.02 There are a number of ways in which finance may be raised, ranging from finance provided under loan facilities of various different types, to capital markets (p. 2) issues of bonds and notes and structured finance in the form of a securitisation. Derivatives transactions may also be a relevant part of the way in which a financial package is structured. Finance may also be raised by a receivables or debt purchase transaction or through an equipment finance facility, in the latter case, by leasing, hire-purchase, and conditional sale. Sometimes a supplier (which may, in fact, be a financier) may be prepared to extend credit by giving time to pay, or a purchaser may be prepared to make an advance payment. In addition, finance may be raised by other methods such as through the issuance of share capital. Project finance utilises one or more methods of raising finance for the development of large-scale asset-based projects. A number of these various methods of raising finance in the London markets are addressed in this book's parent work *McKnight, Paterson, & Zakrzewski on the Law of International Finance*. But this book focuses on the most fundamental and most common of these financing methods: loan facilities. It examines the law surrounding loan transactions involving just one lender and one borrower (bilateral loans) and complex multilateral loan transactions involving groups of lenders (syndicated loans) and issues connected with transfers of participations in such loans.

1.03 There are number of important matters that may affect the structure, costs, and risk allocation of an English law-governed loan financing transaction and yet are beyond the scope of this book. The reader is referred to the parent work for their detailed analysis, however, these matters are flagged here at the outset to highlight their importance.

1.04 First, the transaction may be affected by regulatory matters which concern the bank or banks that provide the finance. This can have a significant impact on the structure and costs of the transaction. It is therefore relevant, in that connection, to consider banking regulation.[1]

1.05 Because of the cross-border nature of international finance and the associated issues that may arise under the laws of different jurisdictions, the subject of conflict of laws will be important in any consideration of such transactions. The conflict of laws position must be analysed as a preliminary matter, as the application of the relevant conflicts rules will indicate the domestic system or systems of law which should be applied in determining the structure and effect of a transaction, and, indeed, if it is possible for the transaction and its various constituent elements to be recognised and enforced in each relevant jurisdiction. This will concern the transactional and proprietary issues that may arise, the resolution of disputes and enforcement of judgments or awards, sovereign immunity, and the effect of the insolvency of a party which is a participant in the transaction. A word of caution must be sounded at this point. Whilst there has been some limited (p. 3) standardisation as between different jurisdictions of their conflicts rules (for instance, under EU law or by international treaties and conventions), the general position is that each jurisdiction has its own conflicts rules and so there can be no guarantee that the conflicts analysis under the rules of one jurisdiction will be the same as that which is applied in a different jurisdiction. A practical consequence of this is that it may be necessary to obtain legal advice in each jurisdiction that has a connection with a transaction, or with those who are involved in it or may be affected by it, so as to determine how the transaction will be viewed, and whether it will be acknowledged and enforced, in that jurisdiction. Due to their importance, the subject of conflict of laws, and the subjects that are associated with it, require careful analysis and management in any transaction involving a foreign element.[2]

1.06 A perennial problem that must be faced by those who provide credit is the possibility of suffering a default in repayment of the indebtedness that has been incurred in utilising the credit. If it has not become apparent beforehand, the problem will do so when the entity that has obtained the credit becomes insolvent. To guard against this problem, or at least to mitigate against its effect, credit protection may be sought in various different ways. Once again, a conflict of laws analysis will be important in considering the methods of protection that may be available and, of course, the commercial adequacy of what is available will also have to be assessed. The possible methods to achieve credit protection will include taking security over assets of the debtor, use of the techniques of set-off or netting of claims, holding proprietary claims against assets that are used by the debtor or generated by its business or by obtaining the commitment of a third party to be answerable for the debtor's default by way of a suretyship obligation, which may itself be protected by taking security over the surety's assets, or using one of the other techniques that have just been mentioned. Equipment finance is a subject that is related to the techniques for holding proprietary protection in assets. These various matters are covered in detail in the parent work and will not be repeated here.

1.07 This book is laid out in the following way. This chapter deals with general matters of contract law that are important to understanding English law-governed loan transactions. Chapter 2 concerns loan facilities. Chapter 3 deals with legal issues arising in respect of syndicated lending. Chapter 4 deals with loan transfers.

1.08 It is now relevant to turn to a consideration of various general issues of a legal nature that might concern a lending transaction (particularly as to contractual matters), which will occupy the remainder of this introductory chapter.

(p. 4) 1.2 Contractual Issues

1.09 From a legal perspective, the law of contract lies at the heart of all loan transactions. What follows explores contractual issues that may arise under English law and which are of particular relevance to finance transactions. Similar issues are likely to arise under any other system of law that may be connected with a transaction, although the analysis and outcome may be different. It is not possible to provide a treatise on the whole of the law of contract,[3] so the discussion will cover some of the particular contractual issues that may arise in the context of the provision of finance, in particular where the applicable principles may differ from those in continental legal systems.

1.2.1 Some contractual prerequisites

1.10 Generally speaking, English law does not prescribe any formal requirements that must be fulfilled in entering into contracts,[4] although it should always be remembered that a contract must be supported by consideration[5] (a simple contract) or be made by way of a deed.[6] Accordingly, a contract may be reduced to writing, be oral, be evidenced by conduct, or be a mixture of those things. In a limited number of instances, however, the law (principally statutory law) does prescribe certain formal requirements.[7]

(p. 5) **1.11** By way of example, a guarantee must be in writing or evidenced by a note or memorandum which is in writing and the guarantee or the note or memorandum must be signed by or on behalf of the guarantor.[8] A contract for the disposition of an interest in land must be in writing, signed by both parties.[9] A disposition of an equitable interest in an asset must be in writing and signed by the disponor or his agent.[10] A conveyance of land or an interest in land must be by way of deed if it is to convey or create a legal estate in the land.[11] A power of attorney must be in the form of a deed.[12] A dealing with a patent (including the grant of a security interest) must be in writing.[13] An absolute (or legal) assignment of a chose in action must be in writing under the hand of (signed by) the assignor and written notice must be given to the debtor.[14] The principal statutory enforcement remedies for security only apply if the security was made by deed.[15] A further

requirement arises in relation to contracts which the law requires to be in writing or evidenced in writing. An amendment or variation of such a contract which requires a written form must also be in writing, otherwise it will be ineffective.[16] It is important to note that a loan agreement does not come within any of the aforementioned categories requiring some kind of formality. Accordingly it may be entered into in writing, orally, or by conduct.

1.12 Amendments to simple contracts such as loan agreements have also traditionally been treated by English courts as requiring no particular form. This used to be the case even if the terms of the contract provided to the contrary such as by stipulating that to be effective amendments have to be in writing and signed by both parties.[17] However, recently the Supreme Court adopted a different position in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*.[18] It held that English law should give effect to a contractual provision requiring specified formalities to be observed for a variation.

(p. 6) **1.13** It has become increasingly common for agreements, both simple contracts and deeds, to be executed by the exchange of scanned documents by email. Certain principles have been laid down by case law[19] and have given rise to recommended practices in respect of such virtual signings conducted by email. In the *Mercury case* the judge held that attaching a separately executed signature page to a deed document or using a signature page from a previous draft on a subsequent draft of the deed would not generate a validly executed deed. This led The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees to prepare guidance on the execution through electronic signings of documents governed by English law.[20] In short, the recommended guidance provided that, in the case of deeds, the scanned signature page should be returned with the full final version of the deed being executed (which itself could be in electronic form), whereas simple contracts, such as loan agreements, could be executed through the authorised attachment of pre-executed signature pages to subsequent drafts. However, best practice, to avoid uncertainty and future disputes, is to require signature pages to be emailed with the final form of the document that they relate to.

1.2.2 Corporate entities and other legal persons

1.14 Where a legal person, that is, an entity other than a natural person, wishes to enter into a transaction, it must possess the constitutional power to do so under the law that governs it, and those who purport to make decisions for it and act on its behalf must be duly authorised to do so. There may be formal processes that must be undertaken internally before it can enter into the transaction. These matters raise conflict of laws questions that are outside the scope of this book.[21] As a matter of English law, a person who deals with an English company (strictly speaking, a company incorporated under one of the Companies Acts) enjoys various protections against the consequences if it transpires that the company lacked the constitutional capacity to enter into the transaction or if it was not properly sanctioned by the directors.[22]

1.2.3 Intention to contract and certainty of agreement

1.15 There must be an intention on the part of both parties to enter into a legally binding contractual relationship, and there must be certainty as to the essential terms of their agreement, before there can be a valid agreement between them.

(p. 7) **1.16** Thus, a document which makes it clear that a party does not intend to undertake a binding obligation or which simply sets out a non-binding statement of intention will not give rise to a contract which is enforceable against that party, as has been evident in various cases concerning so called ‘comfort letters’ issued in lieu of giving a guarantee.[23] In similar vein, there have been cases where there has been no evidence that an alleged guarantor ever agreed to give a guarantee or any other type of commitment.[24] A document that has the appearance of being a contract but which is expressed to be ‘subject

to contract' will mean that there is no binding agreement until such later stage as the parties then agree that the contract is binding, or unless they subsequently conduct themselves so as to indicate that they have entered into an agreement on the terms of the earlier document.[25] On the other hand, the mere fact that it is envisaged that an earlier document or understanding will be superseded or replaced by a later and more formal document does not, of itself, mean that the earlier arrangement might not constitute a binding agreement.[26] As to the enforceability of a preliminary arrangement, it will depend upon whether the parties had the necessary intention to contract at the earlier stage and if there was sufficient certainty as to the essentials of what they had agreed.[27] The question of intention will be judged objectively, by reference to whether a reasonable man, versed in the business of the nature involved, would have understood the exchanges between the parties as sufficient to indicate an intention on the part of both parties to enter into a binding contract.[28]

1.17 Another of the prerequisites to a valid contract is the requirement as to the certainty of its essential terms.[29] 'There can be no contract without some terms, express or implied. If the express terms that are pleaded are significant, but are too uncertain and vague to be legally enforceable, there can be no concluded and binding agreement.'[30] Thus, a supposed agreement between the parties that they (p. 8) will negotiate so as to conclude a contract, even if expressed to be an agreement to negotiate in good faith, is unenforceable and will fail for uncertainty[31] because it will amount to nothing more than an unenforceable agreement to agree. On the other hand, a 'lock out' agreement, by which a person agrees not to enter into negotiations concerning a specified subject matter with third parties for a defined period, may be enforceable.[32] Certainty can be achieved where the contract refers to an external and independent criterion for fixing a matter (as, for instance, is often done in loan facilities where the interest rate is fixed by reference to a Libor rate) or by reference to an objective criterion, such as a standard of reasonableness,[33] provided the court can determine what that criterion should be.[34] Certainty can also be achieved by the use of a master agreement, by which the parties agree that future dealings between them should be subject to the terms as contained in the master agreement. Such a mechanism will only be effective, however, if it can be certain when the parties deal that they meant to do so by reference to the master agreement and not independently of it.

1.18 The courts generally work on the basis of seeking to uphold bargains rather than finding them to be of no effect, particularly where one or both of the parties have acted on the agreement, and so the courts will sometimes be prepared to uphold an agreement which omits certain matters or leaves them to be agreed at a later time by finding ways to fill in the gaps,[35] such as by reference to established customs of trade or usage,[36] or previous dealings between the parties, or by the implication of a term, such as not to act irrationally. In the words of Lord Goff, speaking extra-judicially:

> We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.[37]

(p. 9) 1.2.3.1 Implication of terms

1.19 Traditionally, a term may have been implied if it was not contrary to the express terms of the contract[38] and was considered to be so obvious that it 'goes without saying',[39] the parties would have thought it unnecessary to state it if asked by an 'officious bystander',[40] or if the term should be implied so as to give business efficacy to the contract.[41] In *BP Refinery (Westernport Pty) Ltd* Lord Simon said that the following conditions needed to be met before a term could be implied: it had to be reasonable and equitable; it had to be necessary to give business efficacy to the contract, so that no term would be implied if the contract was effective without it; it had to be so obvious that 'it

[went] without saying'; it had to be capable of clear expression; and it had not to contradict any express term of the contract.[42] The courts have been more willing to imply a term in cases where, typically, the express terms were brief, such as relating to the use of care and skill in a services contract, but have not been so ready to imply terms to deal with a matter that was not expressly covered in a complex written contract where it may not be clear what the parties might have intended.[43] Additionally, the courts have been reluctant to imply terms in financing contracts (such as syndicated loans or bonds) that are intended to be traded to third parties, through assignment or novation. In *Law Debenture Trust Corp Plc v Ukraine* Blair J observed that '[t]he reason that the room for the implication of terms is limited in the case of such financial instruments is that transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts. Otherwise, the scope of transferability would be severely limited, and the market thereby compromised.'[44]

1.20 There has been some uncertainty as to the test on the basis of which terms are to be implied in fact. Lord Hoffman in the Privy Council in the *Attorney General of Belize* case suggested (obiter) that there was only one question to be posed and answered: what the instrument, read as a whole against the relevant background, would reasonably be understood to mean.[45] However, Lord Hoffman's seemingly (p. 10) simple formulation was not without controversy,[46] and in *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* there was a retrenchment. The Supreme Court drew a clear distinction between implying terms into a contract and interpreting a contract, and emphasised that terms should only be implied into a contract if it is really necessary to do so.[47] Lord Neuberger noted that implied terms do not depend upon the parties' intention, but rather on whether it is necessary for business efficacy for the contract in question that the term be implied. The test is not absolute necessity but whether, absent the suggested implied term, the contract would lack commercial or practical coherence.[48] It is not sufficient that it would be fair or reasonable to imply the term.[49]

1.21 A distinction is traditionally drawn[50] between terms implied in fact, on the basis described above 'in the light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made',[51] and terms implied in law which are usually implied by the courts on the basis of the relationship between the parties for the protection of one of the parties.[52]

1.22 In the context of loan agreements, generally it has not been necessary for courts to imply terms in law. Disputes in this context usually concern the question whether a term should be implied in fact into a particular contract which contains a gap.

1.2.3.2 Filling gaps—summary of principles

1.23 Whilst it was not meant to be a definitive guide, the general position as to finding certainty and filling gaps was succinctly summarised by Rix LJ in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD*[53] as follows:

(p. 11)

> In my judgment the following principles … can be deduced from [the] authorities, but this is intended to be in no way an exhaustive list. (i) Each case must be decided on its own facts and on the construction of its own agreement. Subject to that, (ii) where no contract exists, the use of an expression such as 'to be agreed' in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that you 'cannot agree to agree'. (iii) Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty. (iv) However, particularly in

commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the courts are willing to imply terms, where that is possible, to enable the contract to be carried out. (v) Where a contract has once come into existence, even the expression 'to be agreed' in relation to future executory obligations is not necessarily fatal to its continued existence. (vi) Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest. (vii) This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long-term relationship, or has had to make an investment premised on that agreement. (viii) For these purposes, an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the courts to act on. But even in the absence of express language, the courts are prepared to imply an obligation in terms of what is reasonable. (ix) Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in S. 8(2) of the Sale of Goods Act 1979 (and, in the case of services, in S. 15(1) of the Supply of Goods and Services Act 1982). (x) The presence of an arbitration clause may assist the courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute.

1.24 In the later case of *BJ Aviation* Chadwick LJ referred to five propositions:

> First, each case must be decided on its own facts and on the construction of the words used in the particular agreement. Decisions on other words, in other agreements, construed against the background of other facts, are not determinative and may not be of any real assistance.
>
> Secondly, if on the true construction of the words which they have used in the circumstances in which they have used them, the parties must be taken to have intended to leave some essential matter, such as price or rent, to be agreed between them in the future—on the basis that either will remain free to agree or disagree about that matter—there is no bargain which the courts can enforce.
>
> Thirdly, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them—see *Walford v Miles* [1992] A.C. 128, at page 138G.
>
> Fourthly, where the court is satisfied that the parties intended that their bargain should be enforceable, it will strive to give effect to that intention by construing the (p. 12) words which they have used in a way which does not leave the matter to be agreed in the future incapable of being determined in the absence of future agreement. In order to achieve that result the court may feel able to imply a term in the original bargain that the price or rent, or other matter to be agreed, shall be a 'fair' price, or a 'market' price, or a 'reasonable' price; or by quantifying whatever matter it is that has to be agreed by some equivalent epithet. In a contract for sale of goods such a term may be implied by section 8 of the Sale of Goods Act 1979. But the court cannot imply a term which is inconsistent with what the parties have actually agreed. So if, on the true construction of the words which they have used, the court is driven to the conclusion that they must be taken to have intended that the matter should be left to their future agreement on the basis that either is to remain free to agree or disagree about that matter as his own perceived interest

> dictates there is no place for an implied term that, in the absence of agreement, the matter shall be determined by some objective criteria of fairness or reasonableness.
>
> Fifthly, if the court concludes that the true intention of the parties was that the matter to be agreed in the future is capable of being determined, in the absence of future agreement, by some objective criteria of fairness or reasonableness, then the bargain does not fail because the parties have provided no machinery for such determination, or because the machinery which they have provided breaks down. In those circumstances the court will provide its own machinery for determining what needs to be determined—where appropriate by ordering an inquiry (see *Sudbrook Trading Estate Ltd v. Eggleton* [1983] A.C. 444).[54]

1.25 Both cases were referred to in the Court of Appeal in *MRI Trading AG v Erdenet Mining Corporation LLC*,[55] and together they provide a useful guide to the approach of the courts in this area.

1.26 One area where the issue as to certainty arises is in relation to contracts where a party is given a discretion which affects its own rights and obligations or the rights and obligations of the other party. This is particularly relevant to loan documentation and is discussed further later in this chapter.

1.2.4 Good faith and fairness

1.27 There is no general doctrine in English law which imposes an obligation on a party to act in good faith when negotiating and entering into a contract, such as by disclosing facts that might be relevant to another party in deciding if it wishes to contract or by not breaking off negotiations without a good reason.[56]

1.28 Nonetheless, an underlying principle of good faith is addressed by English law albeit in a more piecemeal manner than through the imposition of a general duty.[57] (p. 13) A misrepresentation (as opposed to mere silence)[58] that is made by a party in the course of such negotiations may be actionable or render the contract voidable,[59] a unilateral mistake by one party may make a contract void where the other was aware of it,[60] and there are particular situations where there is an obligation of good faith as, for instance, the obligation of good faith and disclosure that is inherent in entering into an insurance contract and the equitable obligations that arise out of a fiduciary relationship and under the law as to the exertion of undue influence where the necessary relationship of influence exists. However, in the context of loan agreements, it has been held on a number of occasions that a bank contracting with another party owes no duty to explain the nature or effect of the transaction.[61]

1.29 Nor is there any general concept of striking down contracts or contract terms that are unfair as, for instance, because of an inequality of bargaining power,[62] although there has been some very limited statutory amelioration of this by the Consumer Rights Act 2015 and, after the Consumer Rights Act only for regulation of business-to-business contracts, the Unfair Contract Terms Act 1977. In addition, the courts have imposed obligations of fair dealing in the context of a fiduciary relationship or where the situation involved a relationship of undue influence.[63] The courts have also imposed notice requirements in relation to particularly onerous terms that appear in a party's pre-printed terms and conditions of business, which are beyond what the other party (which is adversely affected by them) might reasonably expect.[64]

(p. 14) **1.30** Similarly, there is no general duty of good faith or reasonableness that is owed by a party in exercising its rights under a contract,[65] as the party is entitled to consider its own interests but, again, this is qualified by restrictions that are placed by the law in relation to the enforcement of penalties, the duties of a fiduciary towards its beneficiaries and the obligation of good faith and clean hands that is imposed on a party seeking equitable relief. In addition, an obligation to act in good faith may arise under an express

term of a contract[66] and it may also be implied where it is in accordance with the presumed intention of the parties.[67] However, both interpretation of an express duty of good faith and implication of a duty of good faith are heavily dependent on the context.

1.31 In *Greenclose Ltd v National Westminster Bank PLC* Andrews J said:

> So far as the 'Good Faith' condition is concerned, there is no general doctrine of good faith in English contract law and such term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms' length.[68]

1.2.5 The parties to a contract: mistake

1.32 Something similar to the requirement for certainty raises its head in relation to the identification of the parties to a contract. The consequence of a mistake by one party as to the identity of the other, particularly if that other is a rogue who has misled the mistaken party, was finally settled by the House of Lords in *Shogun Finance Ltd v Hudson*.[69] The majority[70] followed the previous case law, which had (p. 15) tended to distinguish between oral contracts concluded face to face and contracts entered into in writing. In the former situation, the courts took the view that, prima facie, the parties meant to deal with the person physically before them.[71] In the second situation, however, the courts were prepared to take the view that the only contract that could have existed would have been between the named parties so that the fictitious identity of one of the parties would render it void from the outset[72] and no legal relationship will arise between the parties. The majority of the House of Lords declined to adopt the more general approach favoured by the minority,[73] that the contract should be considered as being only voidable and so valid and enforceable until such time as it was avoided.

1.2.6 Mistake as to the subject matter of a contract

1.33 In passing, it is also worth mentioning that a common mistake by the parties as to the existence or essential character of the subject matter of a supposed contract, where the contract does not expressly make provision for the consequences of the mistake, will mean that the contract does not exist and is void.[74] If only one of the parties made a mistake as to the subject matter of the contract, the contract may be void if the other party was aware of the mistake when the contract was made.[75] Whereas previously the courts only granted relief in cases involving a mistake of fact, the courts will now grant relief as well in cases involving a mistake of law.[76]

1.2.7 Privity of contract

1.34 A similar issue to that concerning the identity of the contracting parties concerns the effect of a contract which purports to extend the benefit of the contract (such as a right to receive a payment, the benefit of warranties or covenants, or the benefit of an exclusion clause) to third parties, including unrelated parties and the (p. 16) servants or agents of a contracting party. There was previously a real difficulty at general law in achieving this as the doctrine of privity of contract would intervene to prevent the third party, which was not a party to the contract, from relying upon the provision or being able to enforce it.[77] If a contracting party sought to recover damages for the benefit of the third party, because the other party had failed to perform in favour of the third party, the contracting party would be met by the defence that it had suffered no loss, so it could not recover anything further than nominal damages.

1.35 There were, however, certain circumstances in which the contract might be enforced for the benefit of a third party as, for instance, where an agent or trustee had contracted for the benefit of the third party (particularly in the case of enforcing an exclusion clause for the benefit of a third party),[78] where a party could obtain an order for specific performance of the contract on the basis that damages would be an inadequate remedy because only

nominal damages were recoverable,[79] where a party assigned its rights under the contract to the third party,[80] where the benefit of the contract was novated in favour of the third party, or where the case fell within the circumstances of agency mentioned in the next paragraph. A contract may also contain a promise by a party not to sue the servants or agents of the other party and the latter should be able to prevent the promisor from breaching the contract by suing the servants or agents.[81]

1.36 It should be noted that at common law, two parties to a contract cannot impose the burden of a contract upon a third party that is a stranger to the contract, although an agent can bind its principal because the contract is really between the principal and the other contracting party.

(p. 17) **1.37** The courts have also fashioned a particular exception to the operation of the doctrine of privity of contract (and the associated concept that a claimant should only recover for its own loss) in cases that involved a contract to do work or perform services relating to property that was later transferred to a third party. The courts have recognised principles allowing the previous owner of property to recover substantial damages against a contractor that it had employed to do work relating to the property even though it had sold the property and had suffered no loss.[82]

1.38 In similar vein, in *Technotrade Ltd v Larkstore Ltd*[83] the Court of Appeal allowed an assignee of the benefit of a contract for the performance of services relating to an asset to recover substantial damages for breach of the contract by the other contracting party. The breach had occurred prior to the date of the assignment, but the assignor had disposed of the asset to the assignee prior to the loss becoming apparent and consequent damage being suffered. It did not matter that the assignor had itself suffered no loss in that it had disposed of the asset to the assignee for full value and without any responsibility for the loss to the asset that later became apparent. The court distinguished the position in this case from the general rule that an assignment is subject to equities and that the assignee cannot recover for a claim or loss that would not have been recoverable under the contract by the assignor.[84] This was done on the basis that it was the cause of action (as opposed to the manifestation and suffering of the loss arising from the breach) that was assigned, and that had accrued prior to the date of the assignment. As a matter of law, the cause of action was complete when the breach occurred, even though the consequences of the breach were not manifested, and the consequential loss was not suffered, until a later time. To have found otherwise would have permitted a legal ‘black hole’ to arise into which the claim would have disappeared, with the result that the defendant would have escaped liability for its breach of the contract.

1.39 The position at general law regarding privity of contract was substantially modified by the Contracts (Rights of Third Parties) Act 1999,[85] although the Act does not detract from any right that a third party may have at general law.[86] Accordingly, if the third party cannot avail itself of the Act, it might still be able to fall back on one of the limited exceptions that applied at general law to the doctrine of privity of contract.[87] The Act provides that a third party which is intended to benefit (p. 18) from a provision of a contract[88] will be able to enforce the contract in its own right, unless on a proper construction of the contract it is apparent that the third party was precluded by the contract from doing so.[89] The Act makes it clear that the third party has the right to enforce an exclusion or limitation clause that was intended for its benefit[90] but that right is itself subject to any restriction on the operation of such a clause that might arise by virtue of other legislation, such as the Unfair Contract Terms Act 1977.[91] However, if a third party wishes under the Act to enforce a positive obligation in its favour in the contract, its right to do so will be subject to any limitations on that right which are imposed by the contract,

such as a limitation or exclusion of liability for breach of the contract that is contained in the contract for the benefit of the promisor.[92]

1.2.8 The interpretation of a contract

1.40 It is surprising how frequently what was thought to be a well-crafted contractual document turns out to be ambiguous and not to be as clear as previously imagined. Different interpretations can be put on the same words by those with opposing interests, particularly when something has gone wrong and it is necessary to determine which party should bear the responsibility or suffer the resulting loss. Agreements that have not been carefully prepared are even more susceptible to ambiguity. It is appropriate, therefore, to consider the approach that the courts take to the construction or interpretation of the express provisions of a contract.

(p. 19) **1.41** The modern principles by which the courts undertake the process of construction of contractual documents were summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[93] as follows:

> (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.
>
> (2) The background was famously described by Lord Wilberforce [94] 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 have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (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 would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (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 the 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 Investment Co. Ltd v Eagle Star Life Assurance Co. Ltd* [95]).
>
> (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. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios*, [96] 'if 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'.

1.42 In his opinion in the later case of *Bank of Credit and Commerce International SA v Ali*,[97] Lord Hoffmann explained that the starting point of the analysis should (p. 20) always be the wording that has been used as interpreted in accordance with conventional usage and that it should not be too readily accepted that people will make linguistic mistakes, particularly in formal documents. Subject to that point, the relevant background that could be considered was that which a reasonable man would consider to be relevant, rather than material which such a person would not consider to be relevant. The relevant background might include not just the factual background but also the parties' understanding of the law or the facts, even if that understanding was mistakenly held.[98] The courts have stressed that in a multiparty transaction, it would be wrong to take account of background facts which were not known or knowable to all of the parties.[99] It has been held that where parties contracted on the basis of Loan Market Association (LMA) recommended form documentation, the templates and user guides published by the LMA could be used as an aid to interpretation as a background fact.[100]

1.43 The importance of giving a commercially sensible interpretation to the construction of contracts, rather than taking a strict and literalistic approach, was emphasised by Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[101] and in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd*.[102] In making this point, his Lordship was echoing what had been said by Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios*,[103] and in *HHY Luxembourg SARL* the Court of Appeal was prepared to adopt a highly commercial approach in construing an intercreditor agreement which arguably differed markedly from any interpretation of the precise language used.[104] In *Rainy Sky* the Supreme Court provided further guidance on the role of 'business common sense' in the interpretation of contracts. In carrying out the exercise of construction, the court had to have regard to all relevant surrounding circumstances. If there were two possible constructions, the court was entitled to prefer the approach which accorded with business common sense, and reject the other.[105] In appealing to business common sense, the courts have considered whether a term's interpretation accords with its commercial objective or purpose,[106] although this should be the purpose of all the parties in agreeing the term, not just one of them.[107]

(p. 21) **1.44** In *Arnold v Britton* the Supreme Court did not apply the principle of commercial common sense because the clause in question was unambiguous.[108] Following this decision, it had seemed to some practitioners and commentators that the Supreme Court had backed away from the seemingly contextual approach to interpretation adopted in the *Rainy Sky* case, which focused on the factual matrix and commercial purpose, to a more literal or textual approach, at least in cases where the wording of the clause in question lacked ambiguity. However, in *Wood v Capita Insurance Services Ltd*,[109] the Supreme Court held that the *Arnold* case did not involve a recalibration of the approach in the *Rainy Sky* case. Lord Hodge stated:

> The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. … Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can

> give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. …
>
> This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines (p. 22) which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.
>
> On the approach to contractual interpretation, the *Rainy Sky* and *Arnold* cases were saying the same thing.[110]

1.45 In short, as Lord Bingham had noted a couple of decades earlier, contractual construction is an exercise which is ‘neither uncompromisingly literal nor unswervingly purposive’.[111] It is a combination of both, with the relative weight to be given to the ordinary meaning of the text and to the context (including purpose) varying in accordance with the language used and the surrounding circumstances.

1.46 The third point in Lord Hoffmann’s summary reflects what was said by Lord Wilberforce in *Prenn v Simmonds*[112] and is sometimes referred to as the ‘exclusionary principle’. It also partly reflects the so-called parol evidence rule,[113] by which extrinsic evidence was inadmissible to add to or subtract from the contents or meaning of a written agreement or instrument. In *Chartbrook* in the House of Lords the court indicated, obiter dicta, that there was no clearly established case for revisiting the rule in *Prenn*.[114] The principle is subject to a number of exceptions and qualifications, such as where the written document was not intended to contain the whole agreement,[115] where another document is incorporated by reference into the agreement or where there is a collateral contract,[116] where there is a claim for misrepresentation, where evidence is admitted as to the validity of the agreement[117] or that it is a sham,[118] where a term may be implied in the agreement,

and where there is a claim for rectification of the document because it does not represent the true agreement between the parties.

1.47 It has also been held that evidence of the prior negotiations between the parties will be admitted to prove the meaning of an unusual expression that was used in the contract and which was commonly understood between the parties in their negotiations to have a particular meaning,[119] that evidence of prior negotiations may be admitted to establish the intended contents of an obvious omission on the face (p. 23) of the document,[120] and that evidence from prior negotiations can be admitted to prove that background facts were known by the parties.[121] Evidence of prior negotiations may be admitted to prove the subject matter of the contract.[122] Evidence of a prior agreement between the parties can also be admitted.[123] However, the general rule continues to be that evidence of prior negotiations, such as prior drafts of the loan documentation, is inadmissible for the purposes of construing the execution copies.

1.48 For similar reasons, but subject to much the same exceptions, evidence of the conduct of the parties after the making of a contract is not admissible in construing the contract.[124] Nonetheless, such conduct may be admissible to prove that the contract had been varied by subsequent agreement[125] or to raise an estoppel.[126] It may also now be relevant to take into account the subsequent conduct of the parties in determining the true nature or character of a transaction, so as to ascertain if the transaction (and its mechanics) as provided for in the contract was carried into effect, or if, in reality, it was something else because the transaction represented by the agreement was not operated in the manner provided for in the contract. Lord Millett, in giving the advice of the Privy Council in *Agnew v Commissioner of Inland Revenue*,[127] made that point in relation to determining whether a charge over book debts should be characterised as a fixed or floating charge. His approach was approved by the House of Lords in *National Westminster Bank plc v Spectrum Plus Ltd*.[128]

1.49 To reinforce the effect of the exclusionary principle and the parol evidence rule and to prevent reference to other agreements (including collateral contracts and earlier agreements) and other matters, a contract may contain an ‘entire agreement’ clause along the following lines:

(p. 24)

> This Agreement constitutes the entire contract between the parties and supersedes all prior or collateral representations, agreements, negotiations or understandings, whether oral or in writing.

1.50 Depending upon the wording that is used, such a clause should be effective to exclude consideration of a collateral contract and an earlier agreement, as well as an attempt to include terms that were not expressly set out in the contract.[129] However, if such a clause does not refer to pre-contractual representations then it cannot exclude consideration of them.[130] It has also been held that wording along the lines quoted above would not prevent the court from considering the pre-contractual negotiations between the parties to ascertain the meaning of an uncommon expression that was used in the contract and which the parties had agreed between them in those negotiations.[131]

1.2.9 Contractual discretions

1.51 A lender or financier is often given a measure of discretion in a facility as to what may be required of the borrower and the extent of the rights and obligations of the borrower under the facility. Such a discretion may go to matters such as setting interest rates, determining if conditions precedent have been fulfilled before the facility will be available for drawing, the extent of performance or observance of restrictions by the borrower that is required under the covenants and undertaking provisions of the facility, and the basis on

which the lender will give consents when requested by the borrower. Sometimes the discretion has the appearance of being unlimited, in the sense of it being entirely within the will of the lender.[132] The question that arises is whether any limitation should be implied in such a case as to the factors that the lender should take into account and the grounds upon (p. 25) which it would be entitled to make a determination or take other action within its discretion.

1.52 Whilst it may appear to be in the lender's interest that there should be no such limitation, there is a risk that a limitless discretion which goes to a fundamental matter under the contract may mean that there has been a failure to agree on an essential element of the contract and, in consequence, the contract may be unenforceable and fail for uncertainty for the reasons previously discussed. For example, an entirely unfettered discretion that is vested in the lender as to charging and setting the interest rate in a term loan facility might have the result that there was lack of certainty and agreement concerning a matter going to the heart of the contract, namely, as to the price payable by the borrower for the use of the money borrowed under the facility.[133] In a different vein, some limitation may be thought desirable where the lender appears to be given in a facility agreement a completely unfettered discretion in determining whether the borrower had fulfilled the conditions precedent for it to draw down under the facility (particularly if some of the conditions were within the lender's own control) or where no parameters are prescribed expressly as to the grounds upon which the lender may determine that a material adverse change has arisen that would entitle it to determine that an event of default has occurred.[134]

1.53 There have been a number of Court of Appeal decisions and a recent Supreme Court decision[135] that have concerned this issue in relation to a variety of different contracts. These decisions have addressed the issue by seeing if a term could be implied into the contract as to the extent of, and the manner in which, the (p. 26) discretion should be exercised and, if so, what the term should be. In summary, the following propositions may be drawn from the cases.

1.54 First, it is a matter of interpretation of the contract and, to the extent permitted by ordinary contractual rules, the implication of a term to determine if there is a fetter placed on the scope of the discretion and how it should be exercised. This should be done in the context of the contract as a whole. Unless the parties have otherwise provided, the contract should be interpreted in accordance with current law and not by the law as it was understood at the time of contracting.[136] If the relevant provision in the contract is plain and the contract works perfectly well without the necessity for such an implied term, then the contract should be applied on its own, without implying anything further.[137] However, a court will usually be prepared to imply terms along the lines next mentioned, unless there is an express provision which clearly ousts the minimum implied restrictions on contractual discretions.[138]

1.55 Secondly, where a term is to be implied, it should be the minimum that is necessary to meet the tests for its implication. It would appear that, if a term is to be implied, the minimum that might be implied would include an obligation to act in good faith, on the basis of the facts or the available material, with perhaps some obligation to review the adequacy of that material and seek further information if the material was obviously deficient.[139] In addition, it might be implied that the discretion should not be exercised capriciously, arbitrarily, or for a collateral purpose which was outside the legitimate scope of the contract.[140] For a time it was uncertain whether such an implied obligation would also encompass an (p. 27) obligation to refrain from acting in a way in which no other person in a similar position, acting reasonably, would act (known as the *Wednesbury* unreasonableness test[141]) as there were conflicting judicial pronouncements on this point.[142] But the Supreme Court in *Braganza v BP Shipping Ltd* set out to clarify the law by adopting a two-stage approach. First, the court looked at the decision-making process to

see whether the right matters had been taken into account in reaching the decision (and also that irrelevant matters had not been taken into account).[143] Secondly, the court considered the result arrived at to see whether the outcome is so outrageous that no reasonable decision-maker could have reached it.[144] The second stage, somewhat controversially, transposes the *Wednesbury* unreasonableness public law concept into the law of contract.

1.56 Thirdly, except in the unusual case where the court would imply an obligation to act in an entirely objective and reasonable fashion, the discretion may still be exercised in the commercial interests of the person exercising the discretion and, where appropriate (eg in setting an interest rate), by taking into account matters more generally relating to its business and its customers than just the particular circumstances of the other party to the contract, even if that meant that the other party had to pay more under the contract than the remaining customers of the person exercising the discretion.[145]

1.57 It is not every situation, however, in which a lender's discretion will be fettered by an implied term. As is clear from the first of the propositions stated earlier, a term will be implied only if it is necessary to do so. If the contract works perfectly well without implying a term then the contract will be left in its original state. One particular area where it is submitted that a lender's discretion would be left unfettered is in relation to the determination by a lender of whether it wishes to make demand for repayment and enforce its security. For a commercial facility that is expressed to be repayable on demand, assuming that such a stipulation has not (p. 28) been waived or abrogated by the lender, the authorities have consistently allowed the lender to decide if and when it wishes to make demand, without having to ascribe any reason for doing so.[146] However, the Court of Appeal has also made it clear that the lender must be acting within its right to make a demand under the terms of the facility; that is, that the facility is expressed to be repayable on demand[147] or the demand is made in accordance with a provision which permits the demand to be made following the occurrence of an event of default.[148] Subject to that particular point, the view that a lender's discretion in deciding if it wishes to make demand is unlimited is reinforced by the freedom of a creditor at general law[149] to decide entirely within its discretion whether and how it will enforce its security or a guarantee it holds, as exemplified by the decision of the Privy Council in *China & South Sea Bank Ltd v Tan*.[150] Similarly, a party's right to terminate a contact is unfettered by any implied term.[151]

1.58 Finally, it is necessary to consider the position where the parties have expressly imposed fetters on the exercise of a contractual discretion; for example, where an express restriction has been inserted that the relevant power must be exercised in a commercially reasonable manner or that the lender must act reasonably (or not unreasonably). There is an important distinction to be drawn here between the parties agreeing that the outcome must be reasonable and only agreeing that the decision-making process must be conducted reasonably. In *Lehman Bros Special Financing Inc v National Power Corp*[152] an express requirement to 'act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result' was held to impose an objective standard of reasonableness, and not only rationality.[153] The earlier case of *Fondazione Enasarco v Lehman Brothers Finance SA*[154] had held that the words 'reasonably determines in good (p. 29) faith' imposed a standard of rationality, not objective reasonableness. Similarly, in *Barclays Bank PLC v Unicredit Bank AG*[155] where a matter had 'to be determined by [the Bank] in a commercially reasonable manner', the Bank was only required to act rationally (the outcome did not have to be commercially reasonable) and could have primary regard to its own commercial interests. In each case, the effect of an express fetter on a contractual

discretion will be a matter of construction of the words used in the context of the relevant contract.

1.59 *Crowther v Arbuthnot Latham & Co Ltd*[156] concerned an express obligation 'not to withhold consent unreasonably'. There the court held that the test was one of objective reasonableness, not merely of rationality (*Wednesbury* reasonableness) nor one of just subjectively balancing commercial interests in a commercially reasonable manner.[157] A bank was found to have acted objectively unreasonably in withholding its consent to the sale of property used as security for the borrower's indebtedness because it attempted to enhance its rights rather than protect them. An objective standard of reasonableness requires the court to identify what is a reasonable outcome (with the court supplanting the decision-maker), whereas rationality requires the court to assess whether the process followed by the decision-maker adhered to a minimum standard of rationality (with the decision remaining that of the decision-maker).[158] Nonetheless, it must be remembered that both rationality and wholly objective reasonableness allow for a result that falls within a range.[159] Even when applying the reasonableness standard there is not necessarily a single correct answer.

1.2.10 Best endeavours and reasonable endeavours

1.60 One of the key strengths of English law as a risk allocation tool is the doctrine of strict liability. This doctrine provides that where a contractual promise has been made, the promisor will be bound to perform and will only be released from the obligation in very limited circumstances.[160] However, strict liability places the promisor in a difficult situation if circumstances change or if a third party's (p. 30) agreement is required. Consequently the expressions 'best endeavours' and 'reasonable endeavours' are frequently used in contracts to soften obligations that would otherwise attract strict liability. These expressions are used to qualify what would otherwise be an absolute and unqualified contractual obligation that a party would have under the contract, so that the relevant party undertakes to use its best endeavours, or its reasonable endeavours,[161] to achieve a stated object, rather than undertaking an unqualified obligation to do so.[162] Given their frequent use, it is surprising that there has been only a modest amount of case law on the meaning of the two expressions and there is little precision as to their construction. It is apparent, however, that there is a distinction between an obligation to use best endeavours and an obligation to use reasonable endeavours and that the latter is less stringent than the former.[163]

1.61 In *Jet2.com* all three judges in the Court of Appeal focused on the need to identify whether the object of the best endeavours clause was sufficiently certain, and sufficient objective criteria had been supplied to determine whether it was met, in order for the clause to be enforceable.[164] It has been said that best endeavours does not mean second-best endeavours and, broadly speaking, that no stone should be left unturned in seeking to achieve the desired result: *Sheffield District Ry Co v Great Central Ry Co*.[165] Somewhat less stridently, the Court of Appeal said in *IBM United Kingdom Ltd v Rockware Glass Ltd*[166] that an obligation placed upon a party to use its best endeavours meant that the party should take all of the possible steps that a prudent and determined person would take, if he were acting in his own interests and wished to obtain or achieve the stated objective. (p. 31) This would include incurring reasonable expenditure. In *Terrell v Mabie Todd & Co*[167] it was said that the obligor could have regard to the likely commercial success of the steps to be taken as well as its own financial and commercial position. By way of further qualification, in another case it was held that an obligation on a company and its merchant bank advisers to use their best endeavours to obtain the approval of the company's shareholders to a transaction did not extend to recommending the transaction if there had been an intervening event which would make the transaction disadvantageous to the company and its shareholders, as to have given the recommendation in such circumstances would have amounted to giving bad advice to the shareholders and contrary to the obligors'

duties to the shareholders.[168] Such an obligation cannot require the promisor to perform unlawful acts, including breaches of contracts with third parties by which the promisor is bound.

1.62 As with a best endeavours obligation, an obligation to use reasonable endeavours must also stipulate an object which is sufficiently certain, and sufficient objective criteria to determine whether it is met.[169] An obligation to use reasonable endeavours does not require a party to sacrifice its commercial interests,[170] and the obligation must come to an end at the point when the party has exhausted the avenues available to it, although account had to be taken of events as they occurred, including extraordinary events. In deciding upon the available avenues, the obligor was entitled to consider the likelihood of success in achieving the desired result. However, if the contract actually specifies that certain steps must be taken as part of the endeavours then they must be taken, even if that would involve the party in sacrificing its commercial interests.[171] Subject to such a specific requirement as to the steps to be taken, it would appear that the party is entitled to have regard to its own financial interests in deciding upon what is required of it.[172]

1.63 It has been said that, as a matter of language and business common sense, an obligation to use reasonable endeavours should only require a party to take one reasonable course of action, whereas an obligation to use best endeavours should require the party to take all reasonable courses that he can take.[173] Thus, an (p. 32) obligation to take 'all reasonable endeavours' probably equates to an obligation to use best endeavours.[174]

1.64 In *Astor Management AG v Atalaya Mining Plc*[175] the High Court recently considered an obligation to use all reasonable endeavours to obtain a senior debt facility by a specified date. It is worth noting that the specified date was construed as a target by which the object was to be achieved, and not as the date on which the endeavours obligation expired. If that is the intention, clear wording to that effect will be needed in the relevant clause.

1.3 Illegality

1.65 Illegality is a subject that might raise its head when considering the validity and enforceability of a finance transaction. This is particularly true in the current geopolitical climate where increasing regulation of markets, international sanctions, and trade wars seem to feature on the agenda of the world's major powers. The law as to the effect of illegality on a transaction is not terribly clear and what follows is an attempt to summarise a rather difficult area.[176] Illegality in this sense means unlawfulness under statute or at common law, the latter including contracts to commit a crime or a tort and contracts which offend against morals or public policy. Illegality may affect a transaction where the entry into or the performance of the transaction is unlawful in itself, where the intended purpose or use of the subject matter of the transaction is unlawful, or where some related transaction is unlawful so that it taints the principal transaction. The illegality is likely to be raised as an objection to reliance on the transaction or as a defence against a claim for non-performance of one or more putative obligations under it.

1.66 The discussion that follows will commence by examining the effect of illegality under statute and then turn to unlawfulness at common law. It will go on to examine the situations where title in property may pass notwithstanding an illegal contract and the right of a party to an illegal contract to bring a restitutionary claim to recover benefits it has conferred on the other party under the contract, (p. 33) before concluding with the approach that the courts should take in considering pleadings or evidence which concern illegality.

1.3.1 Statutory illegality

1.67 As a preliminary matter, a distinction should be drawn between the effect of an illegality that existed under statute at the time the contract was made and supervening illegality under legislation that came into force after that time. In the latter situation, it is likely that the contract will be frustrated[177] unless the illegality affects the contract in some minor way that is irrelevant to the main purpose or fulfilment of the contract[178] or if it arises in consequence of an earlier default of the relevant party.[179] It would appear that the effect of a supervening illegality is not a matter for which the parties can expressly provide in the contract so as to preclude the contract from being frustrated,[180] unlike the position in most other situations that would otherwise give rise to a frustration of a contract.

1.68 Where the unlawfulness is proscribed from the outset by statute then the legislation may itself provide for the consequences of the unlawfulness as, for instance, is the case in relation to transactions that are made in breach of the general prohibition contained in section 19 of the Financial Services and Markets Act 2000[181] and the fact that contracts and promises that were made in breach of section 18 of the Gaming Act 1845 or section 1 of the Gaming Act 1892 were void.[182] In such cases, the statute may provide that the transaction remains valid or that it is rendered unenforceable by both parties or only by the party that is in breach of the statutory requirement. The statute may also provide for restitutionary remedies that would be available to the parties. In other cases, the effect of the legislation will be less clear and will depend upon whether the transaction is rendered unenforceable by an implication to be drawn from the legislation and, if so, whether both parties are affected or only the party which is in breach of the statutory requirement. It follows that not every breach of a statutory requirement that relates to the entry into the transaction or its performance will lead to a transaction being unenforceable.[183]

(p. 34) **1.69** Various considerations have been put forward in determining the intended effect of a statute on transactions, although none of them provides a conclusive test that can be applied in all situations and there is more than an element of contradiction between them. The following things have been said. The intended effect should be gauged by asking, first, if the statute intended any prohibition of transactions at all and, if so, whether the particular transaction under consideration belonged to the class of transactions that the statute was intended to prohibit.[184] The matter should be tested against the mischief at which the statute is aimed, the language it uses, the scope and purpose of the statute, the consequences to the parties (particularly to an innocent party) should the transaction be found to be unenforceable, and any other relevant considerations.[185] A statute is unlikely to affect a transaction whose purpose is lawful and which could therefore be performed and carried out lawfully but where one of the parties chooses (without the encouragement of the other party) to perform in a manner which involves a breach of a statute dealing with some peripheral or incidental matter.[186] It is now clear that only acts which are criminal or ‘quasi criminal’ may make it unlawful to enter into or perform a transaction. A quasi-criminal act is one that engages the public interest in the same way as a crime.[187] As a result, breach of a statutory rule which carries only a civil or regulatory sanction may render a transaction unlawful, but only if the statutory rule is enacted to protect the public interest.[188]

1.70 If the transaction is affected by statutory illegality, the next question is to ascertain if the illegality affects both parties, even if one of them is entirely innocent, or only the party which is in breach of the statute. Where the latter applies, the transaction will remain enforceable by the innocent party which is not in breach and was unaware of the other party’s unlawful conduct.[189] Once again, the matter may be addressed specifically by the statute but in other cases it will be necessary to determine the issue by the implication that should be drawn from the statute. In some cases, the courts have held that the illegality should only affect the party that was in breach of the statute,[190] particularly if the innocent party was a member of (p. 35) a class which the statute was intended to protect, so that the transaction should remain enforceable by the innocent party.[191] However, that approach is not universal and there are other cases where the affected transaction has been held to be

unenforceable by both parties to it, even though one of them was innocent, ignorant of the unlawfulness of the other's conduct, and might have fallen within the class of those whom the statute was intended to protect.[192]

1.71 The point was discussed by Kerr LJ in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd*,[193] in which his Lordship said that a contract of insurance entered into by an unauthorised insurer in breach of the Insurance Companies Act 1974 would be void and so unenforceable by both parties, even though the statutory obligation to be authorised was placed upon the insurer and was intended to protect the public, including the insured, against the activities of unauthorised insurers. This was because the statute prohibited the entry into and carrying out of contracts of insurance, rather than just entering into such contracts, although it is submitted that the distinction is not easy to follow.[194] All will not be entirely lost in such a situation, however, as the innocent party should be able to recover moneys that it has paid in purported pursuance of the contract (such as premiums under an insurance policy) under a restitutionary remedy based upon a mistake of fact by the innocent party (that the other party was duly authorised)[195] or of law[196] or that the innocent party was not the person primarily responsible for the mistake.[197]

(p. 36) 1.3.2 Unlawfulness at common law

1.72 It is now convenient to consider the position at common law as to the effect of unlawfulness on a transaction.[198] This covers transactions which involve (in their formation, their performance, or in the use to which their subject matter will be put) the commission of a crime or, as discussed earlier, a quasi-criminal act which engages the public interest in the same way as a crime.[199] A related matter that will also be discussed concerns the enforceability of transactions that, taken in isolation, could be valid and enforceable but which are linked to or tainted by some other unlawful transaction.

1.73 With respect to the intended purpose or manner of performance of the immediate transaction between the parties, traditionally if both parties from the outset were fully aware and complicit in the facts giving rise to the illegality,[200] albeit ignorant of the legal consequences, the transaction would be unenforceable by either of them against the other.[201] However, where one party in entering into the transaction relied upon a representation or undertaking by the other that the transaction was lawful or that the other would obtain the necessary permissions so that the transaction could be carried out lawfully, the first of those parties might have a claim which it could assert against the other in deceit, or for fraudulent misrepresentation,[202] or for a breach of a collateral contract, or in negligent misrepresentation.[203] Where one of the parties (the 'innocent party') was unaware of the facts which made the transaction unlawful, or if the innocent party was unaware of the other party's intention to perform it in an unlawful manner, in a situation where the transaction could otherwise have been entered into and performed lawfully, the innocent party would be entitled to enforce the transaction (p. 37) with respect to rights that had accrued in its favour up to the time the unlawfulness was discovered,[204] but the party which intended to enter into the transaction for a purpose which was unlawful or which intended from the outset to perform it in a manner which was unlawful would be unable to enforce the transaction.[205] It might also be the case that a party which enters into a transaction whose purpose is lawful and with an intention to perform lawfully, but which breaches the law in performing the transaction, might still be entitled to enforce it, at least where the unlawful performance was merely incidental to the main purpose and intent of the transaction.[206]

1.74 The question then arose as to the extent or degree to which a party's awareness of the other party's intended unlawful behaviour (in entering into the transaction, in its manner of performance, in the intended use of the subject matter of the transaction, or in its connection with a related transaction that is tainted by illegality) would be taken to amount to a sufficient knowledge of that unlawfulness, so as to prevent the first of those parties from being able to rely upon and enforce the transaction. Where, on the facts, the essence of the transaction was to engage in an unlawful activity or there is an obvious shared intention to engage in such an activity,[207] the parties would be equally complicit and neither would be able to enforce the transaction. In one early case it was held that mere knowledge on its own would amount to a sufficient participation in the other party's unlawful activities so as to deny the right to enforce the contract,[208] but in another case (which was decided a few months later) the court came to the opposite conclusion.[209] The approach that developed over time had been to see the issue as a matter of the degree of a party's involvement or 'participation' in the unlawfulness, rather than judging it in absolute terms.[210] The question was whether the parties had a common design or a shared intention so that they each participated in the unlawfulness. However, it has not always been easy to draw the line, and the effect of the relevant unlawfulness has depended upon the facts of the particular case.

1.75 If a party actively participated and assisted in the other party's scheme, that would mean that it cannot enforce the transaction.[211] Similarly, if a party to what might be a lawful transaction knows of, or deliberately shuts its eyes to, the (p. 38) unlawful purpose for which the other party had entered into the transaction or of the unlawful purpose for which that party intends to use the subject matter of the transaction, the first party would be unable to enforce the transaction.[212] On the other hand, if a party to what could be a lawful transaction innocently assisted the other party in pursuing some unlawful purpose but without realising the unlawful intention of the other party, the first party should be entitled to enforce the transaction.[213] A further difficult question arose as to whether the extent to which a party to a claim needed to rely on an illegal act was relevant in establishing whether the other party had a defence based on illegality. In *Hounga v Allen* the court suggested that the illegality defence rested on public policy and depended on the particular context.[214] But other decisions seemed to prefer a rule-based approach, with a strict test of whether or not the party to the claim needed to rely on the illegal act.[215]

1.76 These cases led to an increasingly clear division between members of the judiciary as to the correct approach in this area.[216] Whilst some judges favoured the application of rigid rules, others preferred a more flexible approach which took account of what Andrew Burrows has called 'a range of factors'.[217] In *Chandrakant Patel v Salman Mirza*, a majority decision of a nine-strong Supreme Court resolved the issue in favour of a public policy approach.[218] Lord Toulson (with whom Lady Hale and Lords Kerr, Hodge, and Wilson agreed) concluded that:

> [The effect of illegality] is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question, I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, (p. 39) b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.[219]

1.77 Thus the majority endorsed the range of factors approach.[220] The minority, Lord Sumption (with whom Lord Clarke and Lord Mance agreed), considered that the range of factors test was 'far too vague and potentially far too wide to serve as the basis on which a person may be denied his legal rights'.[221]

1.78 A transaction which may appear to be valid in itself may, nonetheless, be unenforceable if it is tainted by an illegality or impropriety that affects a connected transaction.[222] Before the illegality or impropriety will affect the transaction, there must be a relevance in the connection between it and the other transaction that is sufficiently substantial to taint it,[223] rather than a more distant connection which is merely collateral or peripheral to the transaction and the claim that is made to enforce it.[224]

1.3.3 Passing of title under an unlawful transaction

1.79 Notwithstanding the unlawfulness of a transaction which affects a party to it, title[225] in an asset may pass under the transaction and be recognised in favour of such a party where the tainted obligation to effect the conveyance has been fulfilled so that it is no longer executory and in need of assistance by the court.[226] This will not be the case, however, if the illegality arises under a statute and the statute (either expressly or by implication) prevents the passing of title under the impugned transaction.[227] It has held that the grant of a limited interest in property under an unlawful transaction that affects the grantor will not prevent the (p. 40) recovery of the property by the grantor upon the determination of that interest.[228] It has also been held in the case of statutory illegality that the grantor of a limited interest in property (for instance, a grant by way of security or by way of a tenancy) may recover the full ownership of the property if it was in a class of persons that the statute was intended to protect.[229]

1.3.4 Restitutionary claims

1.80 A party to a transaction that is unenforceable because of illegality may also have a restitutionary claim to recover benefits it has conferred on the other party in pursuance of the transaction, such as for money it has paid. The claim may be based upon a mistake of fact[230] or of law[231] giving rise to the illegality or, more generally, that the claimant was misled by the other party in entering into the transaction,[232] was compelled by the duress of the other party in entering into it[233] or was not the person primarily responsible for the mistake.[234] However, if the claimant was the instigator of the illegality or was otherwise at fault then it will not be permitted to recover the benefits it has conferred under the transaction, at least in relation to restitutionary claims based on a total failure of consideration.[235] The court may award simple interest on the amount of a restitutionary award.[236]

1.3.5 Pleadings and evidence concerning illegality

1.81 The approach that the courts should take in considering pleadings or evidence which concern illegality was addressed in *North Western Salt Co Ltd v Electrolytic Alkali Co*,[237] *Edler v Auerbach*,[238] and *Snell v Unity Finance Co Ltd*.[239] They were (p. 41) summarised as a set of propositions by Lord Mance in giving the advice of the Privy Council in *Morrell v Workers Savings & Loan Bank*[240] as follows:

> First, where a contract is ex facie illegal, the court will not enforce it, whether the illegality is pleaded or not; secondly, where the contract is not ex facie illegal, evidence of surrounding circumstances tending to show that it has an illegal object should not be admitted unless the circumstances are pleaded; thirdly, where unpleaded facts, which taken by themselves show an illegal object, have been revealed in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the surrounding circumstances are before it; but,

fourthly, where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not.

1.4 Frustration of Contract and *Force Majeure* Clauses

1.82 English law does not recognise the civil law concept of *force majeure*, by which a party's obligations may be adjusted or terminated as a matter of law (and without the need to make express provision in the contract) in consequence of an adverse change in circumstances which makes it uneconomic or more difficult or onerous to perform the contract. The precise parameters of the doctrine of *force majeure* will depend upon the laws of the particular civil law jurisdiction which governs the contract.

1.83 By contrast, the English law doctrine of frustration of contract is much stricter in its application and narrower in the circumstances in which it will operate. Under it, the whole contract is automatically terminated and each of the parties to it is discharged from having to make further performance. A contract will be frustrated if the relevant event is external (ie outside the control of one of the parties) and it is so fundamental as to affect the very basis of the contract, provided that the contract did not provide for one of the parties to bear the consequences thereof and the possibility of the relevant event was not foreseen by the parties. Unless those requirements are met, the contract will continue under English law despite the fact that its performance might have become more burdensome to one or other of the contracting parties.[241] If the contract is frustrated then a restitutionary remedy (p. 42) may lie to enable a party to recover moneys paid before it was frustrated, and to obtain compensation for benefits conferred under the contract, pursuant to the Law Reform (Frustrated Contracts) Act 1943.[242]

1.84 Nonetheless, English law does permit the parties in their contract to provide for the consequences of events which the contract stipulates will have the effect of modifying or discharging their responsibilities. Such clauses are often referred to, if somewhat confusingly, as '*force majeure* clauses'. They may comprehend matters that might fall within the civil law concept of *force majeure* or the more fundamental matters required before the common law doctrine of frustration could be invoked. Typically, such a clause will provide a list of possible events and then define the consequences thereof, which may include some or all of a temporary suspension of a party's obligations, an adjustment in the contract price, an extension of time to perform, restitution of moneys paid and compensation for work or services already performed, or a complete discharge from the obligation to make further performance of the contract. The list of events may include matters such as labour strikes and similar industrial action, external blockades and embargoes, war, terrorist attacks, civil commotion, and acts of God.[243] Another typical event is political risk and other governmental intervention which prevents or impedes performance.

1.85 Such provisions are often to be found in project, construction, development, and supply contracts, which contracts themselves will sometimes provide the basis for a financing. In such a case, it is essential for the financier to understand the circumstances in which the clause may operate in the underlying commercial contract and its consequences, both in relation to that contract and the financing arrangements.

1.86 In *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD*[244] Aikens J made a number of observations concerning the operation of such a clause, (p. 43) as follows. In general and unless they provide otherwise, *force majeure* clauses are concerned to excuse performance of contracts where the relevant events are outside the control of the party claiming to be excused and their effect could not have been avoided or mitigated by reasonable steps taken by that party.[245] The evidential burden was upon the party relying upon the clause to establish that the facts fell within the terms of the clause.

The alleged *force majeure* event had to be the effective cause of the failure to perform, rather than the real cause for such failure arising for some other reason.

1.87 Although *force majeure* clauses do not appear under that label in loan agreements, it is arguable that they do appear in another guise. MAC or 'material adverse change' clauses, in so far as they suspend or release parties from obligations, may be considered to be a sub-species of *force majeure* clauses and consequently should be interpreted and applied in an analogous way.[246]

1.5 Enforcement and Recovery upon Breach of Contract

1.88 This matter concerns the remedies that are available to a party to a contract (the 'innocent party') where the other party (the 'defendant') has breached the contract, always assuming that the contract is (and remains) valid and enforceable.[247] Needless to say, it is a complex area of law upon which there is a vast amount of case law. All that can be provided here is a summary. In particular cases, questions of waiver, estoppel, and acquiescence may arise as a defence to an innocent party's claim, which are beyond the scope of this book. The reader is referred to the standard texts on contract law for a fuller analysis. The discussion that follows will deal with breaches of contract in general, before examining the separate position concerning liquidated claims in debt.

1.5.1 The general position

1.89 Breaches of contract, and their consequences, come in all shapes and sizes and this is recognised by English law. Some breaches are of such significance that they obviously go to the heart or root of the contract. Other breaches are comparatively minor. In between, there are breaches which initially may be regarded as minor but which, by continuance or repetition, build up to such a stage that they (p. 44) become significant as indicating an unwillingness on the part of the defendant to perform the contract. In addition, some terms of the contract (called 'conditions', as opposed to the other terms of the contract, which are called 'warranties') may be considered as being of such significance that a breach of such a term will automatically be considered as going to the heart of the contract.[248] On the other hand, a term of the contract may initially appear to be of neutral significance but a breach of it may, in fact, be of considerable significance. The parties may expressly provide that a particular term should be regarded as a condition as, for instance, by declaring that the term is of the essence of the contract,[249] but it may be necessary to show that the parties really meant to ascribe such a status to the term, especially where it would lead to an unreasonable result.[250] Otherwise, the status of the term must be determined by the language that the parties have used in the contract and the surrounding circumstances.[251]

1.90 The consequence of these distinctions goes to the remedial rights that will be available to an innocent party upon the occurrence of a breach of contract. A breach of contract by the defendant which goes to the heart of the contract, or which shows that the defendant no longer wishes to be bound by the contract, is called a repudiatory breach. The innocent party may treat such a breach as entitling it to terminate the contract and sue for damages for general loss of its bargain. In addition, if it becomes apparent to the innocent party before the time for performance by the defendant of an essential obligation that the defendant will be unable or unwilling to perform the obligation, the innocent party may anticipate the breach (thus called an 'anticipatory breach'), terminate the contract, and sue for damages.[252] A termination of the contract for (or in anticipation of) a repudiatory breach is only prospective; it does not effect a rescission of the contract *ab initio*.[253] The consequences of termination in such circumstances are discussed elsewhere in this book.[254]

(p. 45) **1.91** As an alternative to terminating the contract in consequence of a repudiatory breach, the innocent party may elect to continue with the contract by holding the defendant to it.[255] However, where a repudiatory breach has occurred (or is anticipated), the innocent party may find its hands tied if it is apparent that the defendant is no longer able or otherwise completely unwilling to perform the contract and may have no option but to accept the repudiation and terminate the contract. In this case, where the breach is an anticipatory breach, the innocent party's duty to mitigate will arise from the date on which it opts to terminate. Where there has been an actual breach the duty to mitigate arises immediately, and so the innocent party must not unreasonably delay in terminating the contract and seeking to mitigate its loss once it realises that the contract is lost, as, otherwise, it will suffer a reduction in its claim for damages arising from the breach and termination of the contract.[256] If it is reasonable for the innocent party to try and persuade the defendant to resile from its unwillingness to perform, the innocent party is entitled to defer terminating the contract and taking action to mitigate whilst so attempting to continue with the contract, until such time as it should realise that the contract is lost.[257]

1.92 In cases of a breach which do not amount to a repudiatory breach of the contract, the innocent party will have a claim for damages for the loss that arises specifically from the breach, but it may not terminate the contract in consequence of the breach, nor will it have a claim in damages for loss of the benefit of the whole contract, as it would have been able to advance in a case where the contract had been terminated following a repudiatory breach. There is, however, a qualification to that statement. The contract may expressly provide the innocent party with a right to terminate the contract upon the occurrence of a non-repudiatory breach by the defendant. If such a breach occurs, the innocent party may terminate the contract in pursuance of its express right to do so but it will not have a claim in damages for general loss of bargain, although it will be able to claim damages that relate specifically to the breach that occurred.[258]

1.93 Generally speaking, a breach of the contract by the defendant does not entitle the innocent party to withhold its own performance, unless the contract has been terminated in consequence of the breach.[259] However, the innocent party may be (p. 46) relieved of its own obligation to perform by the express terms of the contract or by the fact that the defendant has impeded it from performing, such as where the innocent party's performance was dependent upon the prior performance by the defendant.[260]

1.94 Subject to the rules of remoteness, as referred to below, the general principle[261] governing the assessment of the quantum of damages in a claim for breach of contract is that the damages should compensate the innocent party, as the victim of the breach, for the loss it has suffered,[262] but it is up to the innocent party to prove its loss[263] and it has a duty to take reasonable steps to mitigate its loss (for instance, by finding an alternate source of performance).[264] In assessing damages, the innocent party is entitled to be placed, so far as money can do it, in the position it would have been in had the contract been performed.[265] Whilst these basic principles appear comparatively straightforward, they are subject to a number of controversies in their application and interaction in practice,[266] for example, as to the date at which damage is assessed and the consideration given to events arising after breach but before assessment of damage. No more detailed review is attempted here, and the reader is once again referred to the standard contract texts.

1.95 The recoverable loss for which damages are sought must also fall within the rules as to remoteness, classically, that the loss which is claimed must be of a type that could naturally be expected to arise or was foreseeable within the knowledge of the parties at the time of contracting.[267] The House of Lords' decision in *The (p. 47) Achilleas* appears to add a further condition: that even if the loss is forseeable it will only be recoverable if it is within the scope of an implied assumption of responsibility by the defendant in the contract.[268] This approach has now been endorsed in more than one Court of Appeal

decision,[269] although its real effect may be limited to specialist markets such as shipping and banking. This matter is explored more fully in the chapter on loan facilities.[270]

1.96 Under the rules that used to apply relating to privity of contract (as described earlier in this chapter), only a party to the contract (or its agent, trustee, or assignee) may enforce the contract, so that in general a third party could not enforce the contract for its own benefit. If the contracting party sought to enforce the contract for the benefit of a third party, the contracting party (unless it was the agent or trustee of the other person) was likely to be met by a defence that it had suffered no loss and so was only entitled to receive nominal damages. The Contracts (Rights of Third Parties) Act 1999 has overcome many of the problems associated with the privity rule, but the operation of the Act may be excluded or restricted and, in such cases, the rule will continue to be relevant.

1.5.2 Enforcement remedies

1.97 An innocent party may not be happy to be confined to a claim for damages. It may want the contract to be performed by the defendant and so it may wish to obtain a mandatory order from the court to compel the defendant to perform its bargain.[271] Such orders are not readily available. Exceptionally, however, the court may make an equitable order requiring performance of the contract, by way of an order for specific performance or the grant of a mandatory injunction, but such a remedy is discretionary, the applicant for equitable relief must come to the court with clean hands (ie its own conduct in relation to the contract and its relationship with the defendant must be of a high standard),[272] the court will not (save in exceptional circumstances) order performance of a contract for the performance of personal services,[273] and there must be something exceptional or unique in (p. 48) the subject matter of the contract to warrant the intervention of the court in this manner, so that damages would not be an adequate remedy. Subject again to the exercise of its discretion, a court may be prepared to grant a prohibitory injunction to restrain a threatened breach or the continuance of a breach of a negative stipulation in a contract.[274]

1.5.3 Liquidated claims

1.98 The situation that has been described so far concerns contracts where the innocent party's claim for damages is an unliquidated claim where the loss has to be assessed by the court. The position is different where the innocent party as claimant sues for non-payment by the defendant of a monetary sum, a liquidated sum, that has fallen due for payment under the contract, as for instance for the repayment of a debt (including where the obligation for repayment has been accelerated in pursuance of a contractual right[275]), for the price of goods or services that have been sold or supplied,[276] or for recovery under some classes of indemnity.[277] In such a case, the claimant sues for that sum and does not have to prove its loss, is not subject to any rule as to remoteness,[278] nor (in the case of recovery of a debt) has it any obligation to mitigate its loss. However, if the claimant also sues for other damage or loss that it has suffered (for instance, for interest on the unpaid sum[279]) then it will have to meet the usual rules before it can recover that loss. Care must also be taken to distinguish between a genuine liquidated damages clause and a clause which amounts to a penalty. Whilst the former is enforceable, the latter is not and will be struck down.[280]

1.5.4 Part payment

1.99 In accordance with the rule in *Pinnel*'s case,[281] part payment of a debt that has accrued due for payment will not amount to a discharge of the debtor and a promise by the debtor to pay part of the debt provides no consideration for the release of the debt; nor does either thing provide consideration for the creditor to give up (p. 49) its other remedies for non-payment or later payment, such as foregoing interest on a judgment debt. All the

debtor has done is to perform or promise to perform part of an existing obligation, and that can provide no consideration in itself that can bind the creditor.[282]

1.100 However, the debtor may be able to raise promissory estoppel (discussed at para 1.102) as a defence, if it acted in reliance on the creditor's assurance that the debt had been discharged. Furthermore, there are various ways in which an agreement to compromise the debt can be made binding on the creditor. The agreement may be made by deed or the debtor may provide fresh consideration, such as by agreeing to pay early,[283] by agreeing to pay in a different currency to the currency in which the debt was originally payable, by agreeing to make payment together with the delivery of some other asset or benefit,[284] or by agreeing to forbear in the enforcement of a cross-claim. It has also been held that part payment of a debt by a third party, if accepted by the creditor, will release the debtor, and that this does not depend upon an agreement to which the debtor is a party.[285] In that regard, it is easy to see that the third party may enter into an agreement which it could enforce against the creditor, by preventing the creditor from suing the debtor, but, prior to the Contracts (Rights of Third Parties) Act 1999, it is difficult to understand how the debtor might have benefited directly from such an agreement.

1.101 In similar vein, a debtor can enter into an enforceable agreement with its creditors, by which they all agree with the debtor to accept a compromise of their respective claims.[286] This has been extended by the provisions of the Insolvency Act 1986 concerning voluntary arrangements. In addition, under section 62 of the Bills of Exchange Act 1882, an unconditional renunciation in writing by the holder of a bill, at or after maturity of the bill, of the liability of the acceptor under the bill will amount to a discharge of the acceptor[287] and (if specified) other parties to the bill, and an earlier written renunciation by the then holder of the bill will bind the holder but not a subsequent holder in due course who took without notice.

1.5.5 Promissory estoppel

1.102 There is also the difficult concept of promissory estoppel, whose parameters are not certain. In *Hughes v Metropolitan Ry Co*[288] it was held that it would be inequitable to allow a contracting party to enforce its strict contractual rights when (p. 50) by its conduct it could be taken clearly and unequivocally to have agreed (albeit voluntarily) not to do so, where the other party had acted in reliance on that promise and altered its position. Generally speaking, it has been taken that the effect of this is that the rights are suspended and can be revived upon giving reasonable notice,[289] although there have been cases where, because of the passage of time, the occurrence of subsequent events, or the debtor incurring other liabilities in reliance on the promise, it has been held that it would also be impossible or inequitable to require any further performance of the original obligation.[290] It is respectfully submitted, however, that, contrary to the view expressed by Denning J in *Central London Property Trust Ltd v High Trees House Ltd*,[291] the application of the principle does not generally mean that the creditor will be taken to have given up its rights altogether and cannot sue for payment of an accrued debt after giving reasonable notice.(p. 51)

Footnotes:

1 See Sarah Paterson and Rafal Zakrzewski (eds), *McKnight, Paterson, & Zakrzewski on the Law of International Finance* (2nd edn, OUP 2017) ch 2.

2 ibid chs 4 to 6.

3 For a detailed analysis see eg Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015).

4 *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24 [7].

5 Consideration is simply 'something of value', either a detriment to the recipient of a contractual promise or a benefit to the promisor. The most common form of consideration is a mutual promise (eg to pay a price for goods or services which are to be provided). However, almost anything of value, subject to a few exclusions based on judicial precedent, will suffice to constitute consideration if it confers a practical benefit: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553.

6 As to the requirements for making a deed, see s 1 of the Law of Property (Miscellaneous Provisions) Act 1989 and *HSBC Trust Co (UK) Ltd v Quinn* [2007] EWHC 1543 (Ch). As to execution of a deed, see that section, ss 44 and 46 of the Companies Act 2006 (replacing ss 36 to 36AA of the Companies Act 1985), and ss 74, 74A, and 76 of the Law of Property Act 1925. As to execution of deeds by companies incorporated outside the UK see Overseas Companies (Execution of Documents and Registration of Charges) Regs 2009, SI 2009/1917. Where a deed does not satisfy the statutory requirements, it might still take effect as a simple contract: *Zurich Insurance plc v Nightscene Ltd* [2017] EW Misc 27 (CC), *Banque Cantonale de Genève v Sanomi* [2016] EWHC 3353 (Comm) [46]; see also *Bank of Scotland v Waugh* [2014] EWHC 2117 [60]–[61]; but contrast *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 (Admin) [40].

7 The view taken by the Law Commission in its paper *Electronic Commerce: Formal Requirements in Commercial Contracts* (2001) was that the requirements for writing and signatures that are required by statutory provisions in relation to commercial contracts can be satisfied by electronic means and that there was no need for English law to take any legislative steps by way of further implementation of the EC Directive on electronic commerce (EC 2000/31 OJ L178/1 17/7/2000) or the EC Directive on electronic signatures (EC 1999/93 OJ L13/12 19/1/2000). See also the Electronic Communications Act 2000 and the Signatures Regs 2002, SI 2002/318. The EC Directive on electronic signatures was repealed by reg (EU) 910/2014 of the European Parliament and Council of 23 July 2014 on electronic identification (eID) and trust services for electronic transactions in the Internal Market which applies from 1 July 2016 and provides for the mutual recognition of electronic signatures and identities across the EU.

8 S 4 of the Statute of Frauds 1677. In *N Mehta v J Pereira Fernandes S.A.* [2006] EWHC 813 (Ch), it was held that an email can be a sufficient 'memorandum or note' of the guarantee for purposes of this section.

9 S 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

10 S 53(1)(c) of the Law of Property Act 1925, but this is subject to reg 4(1)(2) of the Financial Collateral Arrangements (No 2) Regs 2003, SI 2003/3226.

11 S 52 of the Law of Property Act 1925.

12 S 1(1) of the Powers of Attorney Act 1971.

13 S 30(6)(a) of the Patents Act 1977.

14 S 136 of the Law of Property Act 1925, but this is subject to reg 4(1)(3) of the Financial Collateral Arrangements (No 2) Regs 2003, SI 2003/3226.

15 S 101 of the Law of Property Act 1925.

16 *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38.

17 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396.

18 [2018] UKSC 24.

19 In particular *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 (the '*Mercury case*').

20 See http://www.citysolicitors.org.uk/attachments/article/121/20100226-Advice-prepared-on-guidance-on-execution-of-documents-at-a-virtual-signing-or-closing.pdf.

21 See Sarah Paterson and Rafal Zakrzewski (ed), *McKnight, Paterson, & Zakrzewski on the Law of International Finance* (2nd edn, OUP 2017) ch 4 for a discussion of these matters.

22 Ss 39 and 40 of the Companies Act 2006 (ss 35 and 35A of the Companies Act 1985).

23 See eg *Kleinwort Benson v Malaysia Mining* [1989] 1 All ER 785 (CA).

24 For instance, *Carlton Communications plc v The Football League* [2002] EWHC 1650 (Comm) and *Manches LLP v Freer* [2006] EWHC 991 (QB).

25 *Rugby Group Ltd v Proforce Recruit Ltd* [2005] EWHC 70 (QB). The case was subject to an appeal, but not on this point: [2006] EWCA Civ 69. See also *Taylor v Burton* [2015] EWCA Civ 142 [35] and *Global Asset Capital Inc v Aabar Block Sarl* [2017] EWCA Civ 37. In *RTS Flexible Systems v Molkerei Alois Müller GmbH* [2010] UKSC 14 an unsigned draft which contained a clause stipulating that it 'shall not become effective until each party has executed a counterpart and exchanged it with the other' was waived by conduct which gave rise to a contract on the terms contained in the draft.

26 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, 619; *Bear Stearns Bank plc v Forum Global Equity plc* [2007] EWHC 1576 (Comm); *Immingham Storage Co Ltd v Clear plc* [2011] EWCA Civ 89; *Air Studios (Lyndhurst) Ltd v Lombard North Central plc* [2012] EWHC 3162 (QB); *Bieber v Teathers Ltd (in Liquidation)* [2014] EWHC 4205 (Ch).

27 *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, 619.

28 *Bear Stearns Bank plc v Forum Global Equity plc* [2007] EWHC 1576 (Comm) [171]. Thus an agreement made at an informal meeting in a pub did not give rise to a binding contract: *Blue v Ashley* [2017] EWHC 1928 (Comm).

29 *May and Butcher Ltd v R* [1934] 2 KB 17; *Wells v Devani* [2016] EWCA Civ 1106.

30 Per Mummery LJ in *Cayzer v Beddow* [2007] EWCA Civ 644 [57].

31 *Walford v Miles* [1992] AC 128; *Barbudev v Eurocom Cable Management Bulgaria Eood* [2011] EWHC 1560 (Comm). But see also *Emirates Trading Agency LLC v Prime Mineral Exports Limited* [2014] EWHC 2104 in which an obligation to undertake 'friendly discussion' prior to arbitration was an enforceable condition precedent.

32 *Walford v Miles* [1992] AC 128 and *Pitt v PHH Asset Management Ltd* [1993] 1 WLR 327.

33 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503.

34 *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.

35 *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503; *Foley v Classique Coaches Ltd* [1934] 2 KB 1; *Scammell v Ouston* [1941] AC 251; *British Bank of Foreign Trade v Novimex Ltd* [1949] 1 KB 623; *F&G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444; *G Percy Trentham Ltd v Archital*

Luxfer Ltd [1993] 1 Lloyd's Rep 25; *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep 76.

36 However, incorporation of terms by usage and custom can only take place if the usage or custom is notorious, certain, and reasonable, not just if there is a mere trade practice: *Bear Stearns Bank plc v Forum Global Equity plc* [2007] EWHC 1576 (Comm).

37 *Commercial Contracts and the Commercial Court* [1984] LMCLQ 382, 391, quoted with approval by Lord Steyn in *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2004] 1 AC 715 [57].

38 *Duke of Westminster v Guild* [1985] QB 688, 700. In *Irish Bank Resolution Corp Ltd (In Special Liquidation) v Camden Market Holdings Corp* [2017] EWCA Civ 7 it was held that the implied term must not be substantially inconsistent with the express terms, not only linguistically inconsistent.

39 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 [137].

40 Per MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 (affd [1940] AC 701).

41 *The Moorcock* (1889) LR 14 PD 64.

42 *BP Refinery (Westernport) Pty Ltd v The President etc of the Shire of Hastings* (1978) 52 ALJR 20, 26.

43 See Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 [105]–[106]; and *Torre Asset Funding v RBS* [2013] EWHC 2670 (Ch).

44 [2017] EWHC 655 (Comm) [355], this point was upheld on appeal [2018] EWCA Civ 2026 [209]–[215].

45 *Belize Bank Ltd v Attorney General of Belize* [2009] UKPC 10 [19].

46 See eg Richard Hooley, 'Implied Terms After Belize Telecom' (2014) 73(2) Cambridge Law Journal 315 and *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531.

47 [2015] UKSC 72.

48 '[T]he fact that without the term the contract might potentially work to the disadvantage of one party in certain circumstances, in that it does not make a profit it might have made other times, does not necessarily render the contract as a whole incoherent': *J Toomey Motors Ltd v Chevrolet UK Ltd* [2017] EWHC 276 (Comm) [91]–[92]. As *Arnold v Britton* [2015] UKSC 36 demonstrates, business necessity can pose a high threshold.

49 *Rosenblatt (A Firm) v Man Oil Group SA* [2016] EWHC 1382 (QB) [59].

50 *Geys v Société Générale, London Branch* [2012] UKSC 63 [55].

51 *Marks & Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 [14].

52 In addition, in other situations, statutory law may fill a gap by also providing for implied terms. In addition to the examples given by Rix LJ in the passage from the *Mamidoil-Jetoil* case that follows (see text to n 53), the following (which is not an exhaustive list) further statutory implied terms might be mentioned: ss 12–15 of the Sale of Goods Act 1979 (implied terms as to title, description, quality and fitness, and samples), together with several other provisions of that Act and provisions of the Supply of Goods (Implied Terms) Act 1973 and of the Supply of Goods and Services Act 1982 (including s 13 as to a duty of

care and skill in a contract for the supply of services) and the implied covenants for title contained in the Law of Property (Miscellaneous Provisions) Act 1994.

53 [2001] EWCA Civ 406, [2001] 2 Lloyd's Rep 76 [69].

54 *BJ Aviation Ltd v Pool Aviation Ltd* [2002] 2 P&CR 25.

55 [2013] EWCA Civ 156.

56 *Walford v Miles* [1992] AC 128. See also the review conducted by Morgan J in *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) [91]–[97]. See also *Rosalina Investments Ltd v New Balance Athletic Shoes (UK) Ltd* [2018] EWHC 1014 (QB).

57 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA) 439; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 [45].

58 *Hamilton v Allied Domecq plc* [2007] UKHL 33.

59 Depending on the facts, in the tort of deceit as a fraudulent misrepresentation, in negligence for a negligent misrepresentation, or under s 2 of the Misrepresentation Act 1967. It may also be possible to bring a claim based upon a collateral contract and, if the recipient acts expeditiously (but subject to s 2(2) of the Misrepresentation Act 1967), it may be able to rescind the contract. For a detailed consideration of rescission for misrepresentation see Chapter 4 of Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP, 2014).

60 See eg *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, which also discusses the concept of a common mistake that will make a contract void at common law. In *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm) Aikens J, relying on the Court of Appeal decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, rejected the existence of any equitable jurisdiction that would render a contract voidable for unilateral mistake rather than void.

61 *Bankers Trust International plc v PT Dharmala Sakti Sejahtera (No. 2)* [1996] CLC 518; *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2018] EWCA Civ 355.

62 *Pao On v Lau Yiu Long* [1980] AC 614; *National Westminster Bank plc v Morgan* [1985] AC 686.

63 For a detailed consideration of vitiation of contracts due to undue influence and breach of fiduciary duties see Chapters 6 and 8 of Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski, *The Law of Rescission* (2nd edn, OUP 2014).

64 See the review on this subject by the Court of Appeal in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433. But it must be borne in mind that the *Interfoto* principle focuses on incorporation of contractual terms by notice and has no, or extremely limited, application when the contractual documentation is signed: *Woodeson v Credit Suisse (UK) Ltd* [2018] EWCA Civ 1103 [46].

65 *Allen v Flood* [1898] AC 1. This may be contrasted with the obligation of good faith and fair dealing which arises under New York law in relation to the performance of a contract and the exercise of disputes and remedial action: see § 1-203 of the New York Uniform Commercial Code and, in relation to the exercise of a right to accelerate a payment obligation, § 1-208 of that Code. For a general commentary, see Robert S. Summers, 'Good Faith in Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) Virginia Law Review 195.

66 Unusually a loan agreement contained such an obligation in *Horn v Commercial Acceptances Ltd* [2011] EWHC 1757. It provided that 'each party shall act in absolute faith towards the other'. The concept of 'good faith' in such clauses was relatively widely construed in *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1130 (Ch) and *CPC Group Ltd v Qatari Diar Real Estate Investment Co.* [2010] EWHC 1535 (Ch) [246]. However, in the interest of certainty, later cases have taken a more conservative and restrictive approach to express undertakings to act in good faith: *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 and *Sainsbury's Supermarkets Ltd v Bristol Rovers* (1883) Ltd [2016] EWCA Civ 160.

67 *Yam Seng Pte Ltd v International Trade Corporation* [2013] EWHC 111 (QB) and *Al Nehayan v Kent* [2018] EWHC 333 (Comm). See also *Myers v Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch) and *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396. But other authorities suggest that duties of good faith would only be implied very rarely, if at all: *Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 [105], *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), *Carewatch Care Services Ltd v Focus Caring Services Ltd* [2014] EWHC 2313 (Ch), and *Ilkerler Otomotiv v Perkins Engines Co. Ltd* [2017] EWCA Civ 183.

68 [2014] EWHC 1156 (Ch) [150].

69 [2003] UKHL 62, [2004] 1 AC 919.

70 Lords Hobhouse, Phillips, and Walker.

71 See eg *Phillips v Brooks* [1919] 2 KB 243 and *Lewis v Avery* [1972] 1 QB 198, although a different conclusion was reached in *Ingram v Little* [1961] 1 QB 31.

72 See eg *Cundy v Lindsay* (1878) 3 App Cas 459 and *Hector v Lyons* (1988) 58 P&CR 156. In *King's Norton Metal Co Ltd v Edridge, Merrett & Co Ltd* (1897) 14 TLR 98, a different result was reached but that was because the relevant contracting party was using an alias and its identity was not a material concern to the other party.

73 Lords Nicholls and Millett.

74 *Bell v Lever Bros Ltd* [1932] AC 161. See also *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 and *Kyle Bay Ltd v Underwriters* [2007] EWCA Civ 57. The Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679 said that there was no jurisdiction in equity to grant rescission of a contract on the ground that the contract was voidable for common mistake where the common law would not have regarded the contract as void, thereby overruling its previous decision in *Solle v Butcher* [1950] 1 KB 671, as having been given in error.

75 *Smith v Hughes* (1871) LR 6 QB 597.

76 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

77 See eg *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, *Cosgrove v Horsfall* (1945) 62 TLR 140, and *Genys v Matthews* [1966] 1 WLR 758.

78 See *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154 and *Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd (The New York Star)* [1981] 1 WLR 138. Clauses under which a party to a contract acts as an agent in obtaining protection for a third party, when used in a contract for the carriage of goods by sea, are often referred to as 'Himalaya clauses' after the name of the vessel that was involved in *Adler v Dickson* [1955] 1 QB 158.

79 *Beswick v Beswick* [1968] AC 58. However, see the further discussion of this issue at para 2.54.

80 But an assignment is subject to equities, including that the assignee should not recover from the debtor or obligor to any greater extent than the rights that were vested in the assignor and could have been recovered by it: *Dawson v Great Northern & City Ry Co* [1905] 1 KB 260 (but see also *Technotrade Ltd v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926). Hence, the purported assignment of all of the rights of a lender under a facility agreement will include the right to receive payment of principal and interest but not necessarily the benefit of clauses that are purely personal to the circumstances of the assignor, such as under an increased costs clause if it relates only to the personal position of the assignor. Having transferred its commitment, it will not be exposed to the risks against which such a clause is intended to protect. However, where the increased costs clause is construed so as to extend to permitted assigns, then it would also cover the transferee.

81 *Snelling v John G Snelling Ltd* [1973] QB 87.

82 *St Martins Property Corp Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85; *Alfred McAlpine Construction Ltd v Panatown* [2001] 1 AC 518. See also *Pegasus Management Holdings SCA v Ernst & Young* [2012] EWHC 738 (Ch).

83 [2006] EWCA Civ 1079, [2006] 1 WLR 2926.

84 *Dawson v Great Northern & City Railway Co* [1905] 1 KB 260.

85 Which applies, generally speaking, to contracts made after 11 May 2000 (s 10(2) of the Act), but see also s 10(3) of the Act.

86 S 7(1).

87 In addition, in *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38 it was held that a third party could avail itself of the Act even though at general law the contract might have been enforceable for its benefit under a trust in its favour of the contractual benefit.

88 Ie, it is expressly named as being entitled to enforce the provision, it is a member of an identified class of intended beneficiaries, or if it answers a particular description, even if it was not in existence at the time of the contract: s 1(3). See the discussion on this point in *Avraamides v Colwill* [2006] EWCA Civ 1533, [2007] BLR 76. See also *Prudential Assurance Co Ltd v Ayres* [2007] EWHC 775 (Ch), in which it was held that a third party will be treated as entitled to benefit from a contractual term even if the intention that it should do so was not the predominant purpose of the term or that the term was also intended to benefit a contracting party or another person. Although the actual decision in the *Prudential Assurance* case was overturned on appeal ([2008] EWCA Civ 52, [2008] 1 All ER 1266), the appeal was not concerned with this issue.

89 S 1(2). In *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38 it was held that the third party will be entitled to enforce the term for its own benefit unless the right to do so was contrary to the intention of the parties in the contract. Thus, if the contract is neutral on the point, s 1(2) will not operate against the third party. In *Laemthong International Lines Co Ltd v Abdullah Mohammed Fahem & Co* [2005] EWCA Civ, [2005] 1 Lloyd's Rep 688 the Court of Appeal quoted with approval from the opinion of the Law Commission, *Privity of Contract* (Report No 242 of 31/7/1996) para 7.18, that the proper construction of a term for the purposes of s 1(2) of the Act would include taking account of the surrounding circumstances in making the contract, such as industry practice relating to that type of contract.

90 S 1(6).

91 S 3(6).

92 Ss 3(1)–3(5). It would also appear that the provisions of the Unfair Contract Terms Act 1977 (except for s 2(1)) would not affect the rights of the promisor under s 3(1)–(5).

93 [1998] 1 WLR 896, 912–13. His Lordship made it clear that he had drawn his summary from the approach previously enunciated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381 and in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989.

94 In *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989.

95 [1997] AC 749.

96 [1985] AC 191, 201.

97 [2001] UKHL 8, [2002] 1 AC 251 [39].

98 See also *Spencer v Secretary of State for Defence* [2012] EWHC 120 in which knowledge of clear and well-known legal principles may be attributed to the parties.

99 *Re Sigma Finance Corporation* [2009] UKSC 2 [37].

100 *GSO Credit v Barclays Bank plc* [2016] EWHC 146 (Comm) [62], [65], and [78].

101 [1997] AC 749, 771.

102 [2004] UKHL 54, [2004] 1 WLR 3251 [18]–[19].

103 [1985] AC 191, 201.

104 *HHY Luxembourg SARL v Barclays Bank* [2010] EWCA Civ 1248.

105 *Rainy Sky SA and ors v Kookmin Bank* [2011] UKSC 50.

106 *Procter & Gamble v Svenska Cellulosa Aktiebolaget* [2012] EWCA Civ 1413.

107 *Strategic Value Master Fund Ltd v Ideal Standard International Acquisition* [2011] EWHC 171.

108 *Arnold v Britton* [2015] UKSC 36 (Lord Carnwath dissenting).

109 [2017] UKSC 24.

110 ibid [10]–[14].

111 *Arbuthnott v Fagan* [1995] CLC 1396, 1400.

112 [1971] 1 WLR 1381, 1383–85.

113 *Goss v Lord Nugent* (1833) 5 B&Ad 58.

114 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 [40]–[41].

115 *Allen v Pink* (1838) 4 M&W 140.

116 *Mann v Nunn* (1874) 30 LT 526.

117 *Clever v Kirkman* (1876) 33 LT 672.

118 *AG Securities v Vaughan* [1990] 1 AC 469.

119 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69.

120 *Caterpillar Financial Services Ltd v Goldcrest Plant and Groundworks Ltd* [2007] EWCA Civ 272. As to the ability of the court to interpolate missing words into a written contract, see Lord Bingham in *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 AC 715 [23].

121 *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44.

122 *Macdonald v Longbottom* (1859) 1 E&E 977.

123 Rix LJ in *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161 [81]–[84], although his Lordship doubted the value of such evidence. The Court of Appeal did find an earlier agreement useful in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, as the earlier agreement provided for the form of the later agreement, which erroneously omitted a significant matter which the court was able to correct as a matter of construction of the later document.

124 *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, 603 (Viscount Dilhorne) and 606 (Lord Wilberforce); *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 325.

125 *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38.

126 *James Miller & Partners v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583.

127 [2001] UKPC 28, [2001] 2 AC 710 [48].

128 [2005] UKHL 41, [2005] 2 AC 680. See, in particular, Lord Walker at [140].

129 *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611. See also *Matchbet Ltd v Openbet Retail Ltd* [2013] EWHC 3067 (Ch) [130]–[132] where such a clause was said to act as a contractual estoppel. However, an entire agreement clause does not prevent the implication of terms: *JN Hipwell & Son v Szurek* [2018] EWCA Civ 674.

130 *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All ER 573, 595–96; *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133 and *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm) [531]; but contrast *NF Football Investments Ltd v NFCC Group Holdings Ltd* [2018] EWHC 1346 (Ch). In any event, as the *Thomas Witter* case explained, an attempt to exclude or restrict reference to (and thus liability for) a misrepresentation will be subject to s 3 of the Misrepresentation Act 1967. This should be distinguished from the effect of a 'non-reliance' clause, by which a party confirms that it did not rely upon any representation in deciding to enter into the contract: contrast the approach in *Thomas Witter Ltd v TBP Industries Ltd*, at 596–97 with that taken in *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696 [38]–[41]. The approach taken on this latter point in the *Thomas Witter* case may now also be seen as being inconsistent with that taken by the Court of Appeal in *IFE Fund SA v Goldman Sachs International* [2007] EWCA Civ 811. See the further discussion at section 3.5.5.

131 *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69.

132 The position where the discretion is qualified, for example, where the decision-maker is to act reasonably, is discussed at para 1.58 below.

133 The same conclusion would not arise under an overdraft facility as, from a legal perspective, it is considered to be a contract from day to day, with each party being able to terminate at any time. Thus, the lender theoretically is treated as proposing an interest rate each day, which the borrower accepts by maintaining its borrowing or rejects by repaying the outstanding amount. In a term loan, however, the legal mechanics are different as the contract is intended to endure for the term of the facility and thus the borrower is meant to be bound as to the payment of interest for the term. For further discussion of the exercise of contractual discretion in the context of conditions precedent see section 2.9.2.

134 In *Watson v Watchfinder.co.uk Ltd* [2017] EWHC 1275 (Comm) a discretion to veto a contractual right (a share option) was held not to be unfettered because if it were it would render the underlying contract meaningless, as the contractual right would be entirely within the gift of the party having the veto.

135 *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299; *Paragon Finance plc v Nash & Staunton* [2001] EWCA Civ 1466, [2002] 1 WLR 685; *Paragon Finance plc v Pender* [2005] EWCA Civ 760, [2005] 1 WLR 3412; *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151; *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116; *McKay v Centurion Credit Resources LLC* [2012] EWCA Civ 1941; *Westlb AG v Nomura Bank International plc* [2012] EWCA Civ 495; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200; *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302; *Braganza v BP Shipping Ltd* [2015] UKSC 17; *LBI EHF v Raiffeisen Bank International AG* [2018] EWCA Civ 719.

136 In general, the effect of a court decision on the common law is retrospective and not just prospective: see *National Westminster Bank v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680. However, a change to the parties' understanding of the law that is brought about by a later court decision might render the contract void and give rise to a restitutionary claim based upon a mistake of law: see *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 and, for the effects of common mistake, see section 1.2.6.

137 *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151; *Marks & Spencer plc v BNP Paribas Security Services Trust Company (Jersey) Ltd* [2015] UKSC 72.

138 See Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 [66] and [106]. However, both in the *Socimer* case and in *Westlb AG v Nomura Bank International plc* [2012] EWCA Civ 495 a qualifier allowing a valuation to be made in a party's 'sole and absolute discretion' did not exclude the implied restrictions. See also *Mid Essex Hospital v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 [83].

139 Contrast the approach of Arden LJ in *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151 [42] and [43] with that of Pill LJ in that case, at [71] and of Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299 [76].

140 *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151. An example provided by *Paragon Finance plc v Nash & Staunton* [2001] EWCA Civ 1466, [2002] 1 WLR 685 would be where a lender had a discretion in setting the interest rate payable by a borrower and set an unduly high rate beyond what the lender knew the borrower could afford simply to force the borrower to repay because the borrower was a nuisance and the lender wished to be rid of the borrower. It should be noted that in *Sterling Credit Ltd v Rahman* [2002] EWHC 3008 (Ch) it was held that a lender would not be obliged to exercise its discretion and reduce the rate it charged the borrower.

141 After the test formulated by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233–34, that should be applied in administrative law.

142 *Paragon Finance plc v Nash & Staunton* [2001] EWCA Civ 1466, [2002] 1 WLR 685 [38]; cf *Lymington Marina Ltd v Macnamara* [2007] EWCA Civ 151 [37].

143 However, in *Lehman Brothers International (Europe)(in administration) v Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm) Blair J expressed the view that the

Braganza case did not require the kind of analysis of the decision-making process that was required in the context of public law.

144 *Braganza v BP Shipping Ltd* [2015] UKSC 17. The two-stage test was applied in *Watson and Others v Watchfinder.co.uk* [2017] EWHC 1275 (Comm) and *BHL v Leumi ABL Limited* [2017] EWHC 1871 (QB).

145 *Paragon Finance plc v Nash & Staunton* [2001] EWCA Civ 1466, [2002] 1 WLR 685 and *Paragon Finance plc v Pender* [2005] EWCA Civ 760, [2005] 1 WLR 3412. In the first of those cases, Dyson LJ said that a lender was free to raise the interest rate payable by a borrower because of financial difficulties suffered by the lender or to set a rate which provided a subsidy to compensate for what it received from other customers. In *Barclays Bank plc v Unicredit Bank AG* [2014] EWCA Civ 302 the decision-maker was entitled to prefer its own commercial interests even where it had agreed to exercise its discretion in a 'commercially reasonable manner'.

146 See *Bank of Baroda v Panessar* [1987] Ch 335. The Court of Appeal has indicated that it might on some future occasion be prepared to consider if the borrower should be allowed time to find the funds to make repayment following the making of a demand upon it: see *Lloyds Bank plc v Lampert* [1999] 1 All ER (Comm) 161, but there is no sign that this will happen. In *Nicholson v HSBC Bank plc* [2001] EWCA Civ 748, Rix J reiterated that 'on demand' means 'on demand', and *Panessar* was followed in *Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm).

147 See *Cryne v Barclays Bank plc* [1978] BCLC 548.

148 See *The Angelic Star* [1988] 1 Lloyd's Rep 122. If, within the particular terms of the wording of an event of default, the lender is given an apparently unfettered discretion to make a determination, as for instance in determining (without any express limitation) if an adverse change has occurred, then there may be scope for the implication of a term as to the manner in which the lender may make its determination.

149 To which there are statutory exceptions, such as under the Consumer Credit Act 2006 and under provisions regulating possession proceedings concerning residential land.

150 [1990] AC 536. Cf *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] EWCA Civ 355, where a lender's power to call for annual valuations of security was found, contrary to the first instance decision, to be subject to an implied term.

151 *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) and *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm) [64].

152 [2018] EWHC 487 (Comm).

153 *Fondazione Enasarco v Lehman Brothers Finance SA* [2015] EWHC 1307 (Ch).

154 [2015] EWHC (Ch).

155 [2014] EWCA Civ 302.

156 [2018] EWHC 504 (Comm).

157 In *No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] EWCA Civ 250 it was held that where a such decision to refuse consent was based on multiple reasons, the fact that one of the reasons was unreasonable would not normally render the whole decision unreasonable, if the other reasons for refusal were reasonable:

158 *Hayes v Willoughby*[2013] UKSC 17 [14]; *Socimer International bank Ltd v Standard Bank London Ltd (No 2)* [2008] EWCA Civ 116 [66].

159 *Lehman Brothers Special Financing v National Power Corporation* [2018] EWHC 487.

160 *Paradine v Jane* (1646) 82 ER 897 which provided that 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract'. As the foregoing quotation illustrates, English contract law places the onus on the contracting parties to provide for supervening events in their contracts, for example by negotiating *force majeure* clauses.

161 It is important to note that an endeavours obligation is likely to be construed according to the resources and powers of the promisor: Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell, 2015) 13-064. Additionally it is usually construed by having regard to the circumstances pertaining at the time for performance: *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417. Accordingly, the strength—and hence benefit of such an obligation to the promisee—may vary according to whether it is given by a resource-rich or resource-poor promisor and may fluctuate in line with the promisor's financial position. But contrast *Ampurius NU Home Holdings Ltd v Telford Homes (Creekside) Ltd* [2012] EWHC 1820 (Ch).

162 An agreement to use best endeavours to achieve a stated result, which is an enforceable obligation, has been contrasted with an unenforceable agreement to negotiate: see Lord Ackner in *Walford v Miles* [1992] AC 128, 138.

163 See Rougier J in *UBH (Mechanical Services) v Standard Life Assurance Co* (unreported, *The Times* 13 November 1986), Kim Lewison QC, sitting as a deputy High Court judge, in *Jolley v Carmel Ltd* [2000] 2 EGLR 154, and Julian Flaux QC, sitting as a Deputy High Court judge, in *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm).

164 *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 (Lewison J dissenting from the result, but not the analysis). In the case of undertakings to use endeavours to enter into an agreement with a third party, there appears to be no problem with the certainty of object because it is easy to determine whether an agreement with a third party had been made: *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm) [67].

165 (1911) 27 TLR 451.

166 [1980] FSR 335.

167 (1952) 69 RPC 234, affirmed by the Court of Appeal (1953) 70 RPC 97.

168 *Rackham v Peek Foods Ltd* [1990] BCLC 895.

169 *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm).

170 *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535.

171 Lewison J in *Yewbelle v London Green Developments* [2006] EWHC 3166 (Ch) [122]–[123], which was approved on appeal by the Court of Appeal ([2007] EWCA Civ 475), although a different conclusion was reached on the application of the principle to the facts. See also *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm).

172 *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* [1997] CLC 329.

173 *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm).

174 See also Mustill J in *Overseas Buyers v Granadex SA* [1980] 2 Lloyd's Rep 608, 613, Buckley LJ in *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335, 343, and *UBH (Mechanical Services) Ltd v Standard Life Assurance Co*, n 163.

175 [2017] EWHC 425 (Comm).

176 For a more detailed review, see Law Commission, *The Illegality Defence* (Law Com No 320). The Law Commission found the rules in the area to be complex and confused but concluded that, other than for a limited reform to trusts law, it was not possible to lay down strict rules about when the illegality defence should apply. In so far as the law of contract is concerned, the Law Commission left it to the courts to 'consider the policy rationales that underlie the defence and apply them to the facts of the case' (at p vi).

177 *Wynn v Shropshire Union Railways and Canal Co* (1850) 5 Exch 420.

178 As eg in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221.

179 *Ocean Tramp Tankers Corp v V/O Sovfracht, The Eugenia* [1964] 2 QB 226.

180 *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260.

181 See ss 26–29 of the Act.

182 Those two sections were repealed by s 334 of the Gambling Act 2005, as to contracts entered into after the date of the repeal (1 September 2007). Prior to that repeal, s 412 of the Financial Services and Markets Act 2000 provided that certain contracts (ie contracts relating to investments that met prescribed criteria) were not avoided or rendered unenforceable by those sections.

183 As eg in *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267; *Archbolds (Freightage) Ltd v Spanglett Ltd* [1961] 1 QB 374; *Yango Pastoral Co Pty Ltd v First Chicago Ltd* (1978) 139 CLR 410; and *Hughes v Asset Managers plc* [1995] 3 All ER 669.

184 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, 287–288 (Devlin J).

185 *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216, 273 (Kerr LJ).

186 *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267; *Archbolds (Freightage) Ltd v Spanglett Ltd* [1961] 1 QB 374.

187 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55.

188 *Safeway Stores Ltd v Twigger* [2010] EWHC 11 (Comm), subsequently reversed on appeal but not on these grounds.

189 Even in cases where a party had knowledge of the other party's unlawful activity, it may still be able to argue that it was unaffected by mere knowledge which did not amount to 'participation' in the unlawfulness, along the same lines as are discussed later in connection with participation in an unlawfulness that affects contracts at common law.

190 See eg the explanations provided in the Court of Appeal in *Marles v Philip Trant & Sons Ltd* [1954] 1 QB 29, 32 (Singleton LJ) and 36 (Denning LJ) as to its earlier decision in *Anderson Ltd v Daniel* [1924] 1 KB 138.

191 As eg in *Hughes v Asset Managers plc* [1995] 3 All ER 669. See also *Mistry Amar Singh v Kulubya* [1964] AC 142, in which the plaintiff was held by the Privy Council, relying upon *Browning v Morris* (1778) 2 Cowp 790 and *Kearley v Thomson* (1890) 24 QBD 742, to be a member of the class for whose benefit the statute had been introduced, so that his claim should not be defeated by the statute. In *Kasumu v Baba-Egbe* [1956] AC 539, a lender under an unlawful money lending transaction was precluded from enforcing its security but the borrower was held by the Privy Council to be entitled to plead the illegality of the transaction and recover his security without being obliged to repay the moneys that had

been borrowed, as the borrower was a member of a class that the statute was intended to protect.

192 *Re Mahmoud and Ispahani* [1921] 2 KB 716 and *Chai Sau Yin v Liew Kwee Sam* [1962] AC 304.

193 [1988] QB 216, 267–77.

194 The judgment on this point was obiter, as it was held that the insurer was authorised. However, the statement of principle enunciated by Kerr LJ was followed in *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430, *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* [1992] 1 Lloyd's Rep 439, and *DR Insurance Co v Seguros America Banamex* [1993] 1 Lloyd's Rep 120. The statutory provision (subsequently contained in s 2 of the Insurance Companies Act 1982) was replaced by s 132 of the Financial Services Act 1986, which gave the insured the right to enforce the policy against an unauthorised insurer. The Insurance Companies Act 1982 and the Financial Services Act 1986 were, in turn, repealed by art 3 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649. The matter is now governed by ss 26–28 of the Financial Services and Markets Act 2000.

195 *Oom v Bruce* (1810) 12 East 225.

196 In reliance upon the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

197 *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430.

198 To some extent, the analysis on this issue will overlap with that set out earlier concerning the effect of statutory illegality, as a contract which involves a breach of a statute could be seen as a contract to commit a crime and as being against public policy. There may also be an overlap, on the facts of a particular case, between this area and those concerning the tort of conspiracy to commit a crime or to injure a third party (see *Belmont Finance Corp v Williams Furniture Ltd (No 2)* [1980] 1 All ER 383), claims for dishonest assistance in a breach of trust (see *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265; *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476; and *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 Lloyd's Rep 115), and claims for knowing receipt of trust property (see *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265; *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; and *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep 511).

199 *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55.

200 For instance, because the very purpose of the contract binds them into carrying out an unlawful activity.

201 *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340; *Ashmore Benson Pease & Co Ltd v Dawson Ltd* [1973] 1 WLR 828.

202 *Shelley v Paddock* [1980] QB 348; *Saunders v Edwards* [1987] 1 WLR 1116. Such a claim was refused in *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1 because of the claimant's own turpitude.

203 *Strongman (1945) Ltd v Sincock* [1955] 2 QB 525.

204 *Clay v Yates* (1856) 1 H&N 73.

205 *Archbolds (Freightage) Ltd v Spanglett Ltd* [1961] 1 QB 374.

206 *Wetherell v Jones* (1832) 3 B&Ad 221; *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267; *Coral Leisure Group Ltd v Barnett* [1981] ICR 503.

207 As there was in *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340 and *Ashmore Benson Pease & Co Ltd v Dawson Ltd* [1973] 1 WLR 828.

208 *Langton v Hughes* (1813) 1 M&S 593.

209 *Hodgson v Temple* (1813) 5 Taunt 181.

210 See the review of this subject by Toulson LJ in *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456 [70]–[83].

211 *Biggs v Lawrence* (1789) 3 TR 454 and *Weymell v Reed* (1794) 5 TR 599, which were cases where goods were sold in a form made ready for smuggling by the other party.

212 *Pearce v Brooks* (1866) LR 1 Exch 213 (the case concerned the sale of an 'ornamental' brougham to a known prostitute, who plied her trade in it. The seller was denied its claim for the price of the goods.) By contrast, in *Appleton v Campbell* (1826) 2 C&P 347 a contract to let a room to a prostitute who practised her occupation elsewhere was held to be valid. Similarly, in *Lloyd v Johnson* (1798) 1 B&P 340 a washerwoman who washed the clothes of a prostitute at normal rates was entitled to recover payment. Lord Denning MR suggested in *JM Allan (Merchandising) Ltd v Cloke* [1963] 2 QB 340, 348, that tradesmen who supplied ordinary goods at normal commercial rates to such a person would not usually be taken to be assisting them in an unlawful or immoral purpose. On the other hand, if the price was inflated, that would be evidence of participation in the unlawful or immoral purpose. His Lordship also distinguished *Waugh v Morris* (1873) LR 8 QB 202 on the grounds that in *Waugh v Morris* there was no common design nor any participation in an unlawful activity.

213 *Fielding & Platt Ltd v Najjar* [1969] 1 WLR 357; *Anglo Petroleum Ltd v TFB (Mortgages) Ltd* [2007] EWCA Civ 456.

214 *Hounga v Allen* [2014] WLR 2889.

215 *Tinsley v Milligan* [1994] AC 340 and Lord Sumption's obiter remarks in *Les Laboratoires Servier v Apotex* [2014] 3 WLR 1257.

216 See also *Jetivia SA v Bilta (UK) Limited (in liquidation)* [2015] UKSC 23 [15].

217 Andrew Burrows, *A Restatement of the English Law of Contract* (OUP 2016) 229.

218 *Chandrakant Patel v Salman Mirza* [2016] UKSC 42.

219 At [110].

220 At [113].

221 At [265].

222 *Fisher v Bridges* (1854) 3 El & Bl 643 (a separate deed of covenant was held to be unenforceable as it constituted an undertaking by a purchaser to pay part of the purchase price of land that remained outstanding under an earlier illegal contract of sale). See also *Spector v Ageda* [1973] Ch 30 (the borrower's obligation to repay a loan was held to be unenforceable as the loan had been advanced to provide the funds to pay off an earlier unlawful loan that had been made to the borrower by a third party) and *Mansouri v Singh* [1986] 1 WLR 1393 (which discussed the enforceability of a cheque or other negotiable instrument given in pursuance of a transaction which is made unenforceable by the Bretton Woods Agreement).

223 *Tinsley v Milligan* [1994] 1 AC 340 and *Standard Chartered Bank v Pakistan National Shipping Corp* [2000] 1 Lloyd's Rep 218.

224 *Sweetman v Nathan* [2003] EWCA Civ 115, [2004] PNLR 89; *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821; *Donegal International Ltd v Republic of Zambia* [2007] EWHC 197 (Comm).

225 Including equitable title: *Tinsley v Milligan* [1994] 1 AC 340.

226 *Singh v Ali* [1960] AC 167; *Belvoir Finance Co Ltd v Stapleton* [1971] 1 QB 210.

227 In *Mistry Amar Singh v Kulubya* [1964] AC 142 the Privy Council held that a leasehold interest in land could not have been created in contravention of the relevant statute.

228 *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65; *Mistry Amar Singh v Kulubya* [1964] AC 142, although note the overruling of the reliance test in *Chandrakant Patel v Salman Mirza* [2016] UKSC 42.

229 *Kasumu v Baba-Egbe* [1956] AC 539; *Mistry Amar Singh v Kulubya* [1964] AC 142.

230 *Oom v Bruce* (1810) 12 East 225.

231 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

232 *Hughes v Liverpool Victoria Friendly Society* [1916] 2 KB 482.

233 *Smith v Cuff* (1817) 6 M&S 160; *Davies v London and Provincial Marine Insurance Co* (1878) 8 ChD 469.

234 *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192; *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430.

235 *Parkinson v College of Ambulance Ltd and Harrison* [1925] 2 KB 1; *Berg v Sadler and Moore* [1937] 2 KB 158. Contrast the position in those cases with *Mohamed v Alaga & Co* [2000] 1 WLR 1815, in which the Court of Appeal allowed a *quantum meruit* claim for services provided under an unlawful contract because the claimant was less blameworthy than the defendants, who were in a much better position to realise the unlawfulness of the transaction and who had, nonetheless, knowingly entered into the contract in disregard of the unlawfulness.

236 *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39.

237 [1914] AC 461.

238 [1950] 1 KB 359.

239 [1964] 2 QB 203.

240 [2007] UKPC 3 [35].

241 The foregoing statement as to frustration is a summary of a large body of case law, including *Wynn v Shropshire Union Railways and Canal Co* (1850) 5 Exch 420 (supervening illegality, see also section 1.3); *Taylor v Caldwell* (1863) 3 B&S 826 (destruction of the subject matter of the contract); *Krell v Henry* [1903] 2 KB 740 (change in the fundamental basis of the contract); *Bank Line Ltd v Arthur Capel & Co* [1919] AC 433 (government requisition of the subject matter of the contract); *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497 (the self-executing effect of frustration); *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (the requisite nature of a fundamental change in the basis of the contract, as opposed to a contract where performance has been delayed or become more onerous); *Peter Cassidy Steel Co Ltd v Osuustukkukauppa* [1957] 1 Lloyd's Rep 25 (a party could not plead frustration where it had assumed responsibility under the contract for the risk of the occurrence of the relevant events, in that case for obtaining an export licence); *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 (contract made more onerous and performance delayed but contract not frustrated); *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (similar in its analysis to the *Davis Contractors* case); *J*

Lauritzen AS v Wijsmuller BV, The Super Servant Two [1990] 1 Lloyd's Rep 1 (a party could not plead frustration where it was 'self-induced' or the party could have prevented the event from occurring).

242 The Act was reviewed by Goff J in *BP Exploration Co (Libya) Ltd v Hunt* [1979] 1 WLR 783 (upheld at [1983] 2 AC 352). Recovery was possible at common law if there had been a total failure of consideration but not if there had only been a partial failure: *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

243 The original author of this chapter always said that he felt that if one believes in a benevolent God (whichever version of the deity that might be) then He receives a rather bad press in this regard. Surely, it would be more correct to refer to 'acts of the Devil'. In polytheistic systems, the expression might be 'acts of the gods'.

244 [2002] EWHC 2210 (Comm), [2003] 1 Lloyd's Rep 1 (upheld on appeal at [2003] EWCA Civ 1031, [2003] 2 Lloyd's Rep 635).

245 See *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323.

246 This argument is further developed in Rafal Zakrzewski, 'When is a Material Adverse Change Clause a Force Majeure Clause?' (2012) 9 Journal of International Banking and Financial Law 547. For detailed discussion of MAC clauses see para 2.195ff.

247 The ambiguous legal concept of a 'remedy' is examined in detail in the editor's doctoral thesis published as Rafal Zakrzewski, *Remedies Reclassified* (OUP 2005). That book also considers English law remedies such as awards of agreed sums, awards of damages, injunctions and specific performance, and the methods for their enforcement.

248 Terms requiring something to be done by a particular date are usually not considered to be conditions, that is, time is not usually 'of the essence'. However, it can be made of the essence where the innocent party gives notice requiring the relevant obligation to be performed within a reasonable time: *Multi Veste 226 BV v NI Summer Row Unitholder BV* [2011] EWHC 2026 (Ch). Cf *Dalkia Utilities Services plc v Celtech International Ltd* [2006] 1 Lloyd's Rep 599.

249 *Lombard North Central plc v Butterworth* [1987] QB 527. But a mere right that is expressly given to an innocent party in a contract to terminate the contract for a breach does not mean that the provision that has been breached should always be treated as a condition of the contract or that the breach is so serious as otherwise to amount to a repudiatory breach of the contract: see *Financings Ltd v Baldock* [1963] QB 104 and *Capital Finance Co Ltd v Donati* (1977) 121 SJ 270.

250 See Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, 251–52.

251 *BNP Paribas v Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm).

252 This may be a dangerous strategy because if an incorrect assessment of the situation was made and the other party was, in fact, ready and willing to perform, then the party which wrongly purported to terminate will, by doing so, have committed a repudiatory breach of the contract and the tables will be turned upon it.

253 For the effect of a termination in these circumstances, see Lord Diplock in *Moschi v Lep Air Services Ltd* [1973] AC 331, 350.

254 See section 2.8.2.

255 *Société Générale v Geys* [2012] UKSC 63.

256 See Lord Wilberforce in *Johnson v Agnew* [1980] AC 367, 400, such question of reasonableness being relevant in assessing the time at which the buyer's duty to mitigate had arisen, as explained by Oliver J in *Radford v De Froberville* [1977] 1 WLR 1262, 1285. See also *Bear Stearns Bank plc v Forum Global Equity plc* [2007] EWHC 1576.

257 *Bear Stearns Bank plc v Forum Global Equity plc* [2007] EWHC 1576.

258 *Financings Ltd v Baldock* [1963] QB 104 and *Capital Finance Co Ltd v Donati* (1977) 121 SJ 270.

259 See Lord Ackner in *Fercometal SARL v Mediterranean Shipping Co SA, The Simona* [1989] AC 788, 805. See also *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 (QB).

260 *Bulk Oil (Zug) AG v Sun International Ltd* [1984] 1 Lloyd's Rep 531.

261 The House of Lords indicated in *Attorney General v Blake* [2001] 1 AC 268 that, in exceptional circumstances where normal remedies were inadequate to compensate for a breach of contract, the court may be prepared to order the defendant to account for the profits it had received or to which it was entitled. The difficulties that ensue from this are demonstrated by the subsequent decisions of the Court of Appeal in *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830 and *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286. In the first of those two cases, the Court of Appeal did not grant an account of profits but it did order the payment of a reasonable sum to compensate for an unauthorised breach of contract, even though no actual loss could be demonstrated. In the second case, the court refused (on a procedural issue concerning the case) to grant a remedy on those lines but acknowledged that an award could be made where it was not possible to demonstrate identifiable financial loss.

262 See Parke B in *Robinson v Harman* (1848) 1 Exch 850, at 855 and the review conducted by Lord Scott in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12 [29]–[36].

263 See Lord Nicholls in *Sempra Metals Ltd v HM Commissioners of Inland Revenue* [2007] UKHL 34 [95]–[96].

264 The difficult question of when financial benefits brought about by mitigation must be taken into account was recently considered in *Globalia Business Travel SAU v Fulton Shipping Inc of Panama (the New Flamenco)* [2017] UKSC 43.

265 See Lord Atkinson in *Wertheim v Chicoutimi Pulp Co* [1911] AC 301, 307.

266 See eg Andrew Dyson and Adam Kramer, 'There is No Breach Date Rule: Mitigation, Difference in Value and Date of Assessment' (2014) 130 Law Quarterly Review 259, cf Michael G. Bridge, 'Markets and Damages in Sale of Goods Cases' (2016) 132 Law Quarterly Review 404.

267 *Hadley v Baxendale* (1854) 9 Exch 341. The orthodox view has been that loss falling within the second limb of the rule in *Hadley v Baxendale* was 'consequential loss' for the purposes of interpreting that phrase in contractual provisions: *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2000] EWCA Civ 74. However, the courts are starting to move away from that view: *Star Polaris LLC v HHIC-PHIL Inc* [2016] EWHC 2941.

268 *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48.

269 *Supershield Ltd v Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7; *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184.

270 See the discussion at para 2.69.

271 Subject to the rules as to laches, there may be a benefit in seeking equitable relief by way of an order for specific performance, as the limitation period that applies to an ordinary claim at common law may not apply to such an equitable claim: *P&O Nedlloyd BV v Arab Metals Co, The UB Tiger* [2006] EWCA Civ 1717, [2007] 2 All ER (Comm) 401.

272 *Fiona Trust Holding Corporation and ors v Privalov and ors* [2008] EWHC 1748 (Comm).

273 *Johnson v Shrewsbury and Birmingham Ry Co* (1853) 3 De GM&G 358, *The Scraptrade* [1983] 2 AC 694, at 700–01, *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 WLR 3686.

274 *Lumley v Wagner* (1852) 1 De GM&G 604; *Doherty v Allman* (1878) 3 App Cas 709; *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 WLR 3686. See also the discussion of Briggs J on this point and on the point concerning the enforcement of contracts for personal services in *Akai Holdings Ltd v RSM Robson Rhodes LLP* [2007] EWHC 1641 (Ch).

275 See section 2.18.

276 This should, however, be distinguished from contracts, such as hire-purchase and lease contracts, where the claim relates to loss of the bargain to receive future contractual payments, as the claim in those situations will be an unliquidated claim for damages for the loss of the bargain.

277 Rafal Zakrzewski, 'The Nature of a Claim on an Indemnity' (2006) 22 *Journal of Contract Law* 54; cf *Agarwal v ABN AMRO Bank NV* [2017] BPIR 816.

278 *Jervis v Harris* [1996] Ch 195.

279 See *Sempra Metals Ltd v HM Commissioners of Inland Revenue* [2007] UKHL 34. Departed from in part in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39.

280 See the discussion at section 2.12.

281 (1602) 5 Co Rep 117a.

282 *Foakes v Beer* (1884) 9 App Cas 605; *D&C Builders Ltd v Rees* [1966] 2 QB 617.

283 *Pinnel*'s case (1602) 5 Co Rep 117a.

284 ibid.

285 *Welby v Drake* (1825) 1 C&P 557; *Cook v Lister* (1863) 13 CB (NS) 543.

286 *Good v Cheesman* (1831) 2 B&Ad 328; *Boyd v Hind* (1857) 1 H&N 938.

287 As against the acceptor, the renunciation can also be achieved by delivering the bill to the acceptor.

288 (1877) 2 App Cas 439. See also *Birmingham and District Land Co v London and North Western Ry Co* (1888) 40 ChD 268 and *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326.

289 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761.

290 See the third point mentioned by Lord Hodson in *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326, 1330 and eg *Ogilvy v Hope-Davies* [1976] 1 All ER 683 and *Maharaj v Chand* [1986] AC 898.

291 [1947] KB 130, 134.