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LAW OF CONTRACT

Paul Richards

Fourteenth Edition

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Paul Richards

Formerly Head of the School of Law, University of Huddersfield

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For my partner Maggie, my sons Phillip and William
and my brother Anthony

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Court of Appeal **220 Parliamentary Copyright:** *Luxor (Eastbourne) Ltd* v *Cooper* **221 ICLR:** The Moorcock (1889) 14 PD 64 **221 Crown Copyright:** *Reigate* v *Union Manufacturing Co (Ramsbottom) Ltd* [1918] **221 Crown Copyright:** *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) **222 Crown Copyright:** *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UKPC **222 Crown Copyright:** *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UKPC **222 ICLR:** *Investors Compensation Scheme* v *West Bromwich* [1998] 1 WLR 896 **222 Parliamentary Copyright:** *Liverpool City Council* v *Irwin* **223 Crown Copyright:** *Mediterranean Salvage & Towage Ltd* v *Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531 **223 ICLR:** *ATTORNEY GENERAL OF BELIZE AND OTHERS* v *BELIZE TELECOM LTD AND ANOTHER*: PC 18 MAR 2009 **225 Crown Copyright:** *Attorney General of Belize* v *Belize Telecom Ltd* [2009] UKPC **226 Crown Copyright:** *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* [1995] EMLR 472 **226 Crown Copyright:** *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* [1995] EMLR 472 **226 Crown Copyright:** *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* [1995] EMLR 472 **226 Crown Copyright:** *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 **226 Crown Copyright:** *Philips Electronique Grand Public SA* v *British Sky Broadcasting Ltd* [1995] EMLR 472 **227 Crown Copyright:** *Marks and Spencer plc* v *BNP Baribas Securities Services Trust Co (Jersey) Ltd* **227 Crown Copyright:** *Trump International Golf Club Scotland Ltd* v *The Scottish Ministers* [2015] UKSC 74 **227 Crown Copyright:** *Dunnett Investments Ltd* v *The Secretary of State for Communities* **228 Crown Copyright:** *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72 **229 Parliamentary Copyright:** *Liverpool City Council* v *Irwin* [1976] 2 ALL ER 39 **230 Crown Copyright:** *Crossley* v *Faithful & Gould Holdings Ltd* [2004] 4 All ER 447 **232 Crown Copyright:** Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills **238 Crown Copyright:** Bradgate, 'Consumer rights in digital products: A research report prepared for the UK De-partment for Business, Innovation and Skills', Institute for Commercial Law Studies, Sheffield and BIS (2010) **245 ICLR:** *Harlingdon & Leinster Enterprises Ltd* v *Christopher Hull Fine Art Ltd* [1992] 1 QB 564 **246 Crown Copyright:** Sale of Goods Act 1979 **247 Crown Copyright:** *Shine* v *General Guarantee Corporation* [1988] 1 All ER 911 **252 Crown Copyright:** The Unfair Terms in Consumer Contracts Regulations 1999 **252 Crown Copyright:** Consumer Rights Act 2015 **253 ICLR:** I*nterfoto Picture Library Ltd* v *Stiletto Visual Programmes Ltd* [1989] QB 433 **253 Crown Copyright:** *Spurling* v *Bradshaw* [1956] 2 All ER 121 **253 ICLR:** *Walford* v *Miles* [1992] 2 AC 128 **254 ICLR:** *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 **254 Parliamentary Copyright:** *HIH Casualty* v *Chase Manhattan Bank* [2003] **254 Parliamentary Copyright:** *HIH Casualty* v *Chase Manhattan Bank* [2003] **256 Crown Copyright:** *Yam Seng Pte Ltd* v *International Trade Corp Ltd* [2013] **256 Crown Copyright:** *TSG Building Services Plc* v *South Anglia Housing Ltd* [2013] EWHC 1151 **257 Crown Copyright:** *TSG Building Services Plc* v *South Anglia Housing Ltd* [2013] EWHC 1151 **257 Crown Copyright:** *Mid Essex Hospital Service NHS Trust* v *Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 **257 Parliamentary Copyright:** *Manifest Shipping Co Ltd* v *Uni-Polaris Shipping Co Ltd* [2001] UKHL **258 Crown Copyright:** *Street* v *Derbyshire Unemployed Workers' Centre* **258 Crown Copyright:** *MSC Mediterranean Shipping Company SA* v *Cottonex Anstalt* [2016] EWCA Civ 789 Moore-Bick LJ observed at para 45: **259 Crown Copyright:** *MSC Mediterranean Shipping Company SA* v *Cottonex Anstalt* [2016] EWCA Civ 789 Moore-Bick LJ observed at para

45: **259 Crown Copyright:** MSC Mediterranean Shipping Company SA v Cottonex Anstalt [2016] EWCA Civ 789 Moore-Bick LJ observed at para 45: **260 Crown Copyright:** Sale of Goods Act 1979 **261 Crown Copyright:** *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 1 ALL ER 474 **262 Crown Copyright:** *Urban I (Blonk Street) Ltd* v *Ayres* [2013] **262 Crown Copyright:** *Maredelanto Compania Naviers SA* v *Bergbau-Handel GmbH (The Mihalis Angelos)* [1970] 3 ALL ER 125 **263 Crown Copyright:** *Maredelanto Compania Naviers SA* v *Bergbau-Handel GmbH (The Mihalis Angelos)* [1970] 3 ALL ER 125 **263 Parliamentary Copyright:** *Bunge Corporation* v *Tradax Export SA* [1981] 2 All ER **264 ICLR:** *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. **264 ICLR:** *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. **264 ICLR:** *Federal Commerce & Navigation Co Ltd* v *Molena Alpha Inc. (The Nanfri)* [1979] AC 757, at pp. 778–9 **265 Crown Copyright:** *Hong Kong Fir Shipping Co. Ltd*. v *Kawasaki Kisen Kaisha Ltd*. [1962] 2 **265 Crown Copyright:** *Ampurius Nu Homes Holdings Ltd* v *Telford Homes (Creekside) Ltd* **265 Crown Copyright:** *Rice* v *Great Yarmouth* [2001] **268 Crown Copyright:** *Proctor & Gamble Co* v *Svenska Cellulosa Aktiebolaget SCA* [2012] EWCA Civ 1413, **268 Crown Copyright:** *Napier Park European Credit Opportunities Fund Ltd* v *Harbourmaster Pre-rata CLO 2 BV* [2014] EWCA Civ 984 **273 Crown Copyright:** *Attorney General of Belize* v *Belize Telecom Ltd* **279 Parliamentary Copyright:** *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] **279 Parliamentary Copyright:** *Photo Productions Ltd* v *Securicor Transport Ltd* [1980] **280 ICLR:** *Hollier* v *Rambler Motors (AMC) Ltd* [1972] QB 71. **280 Parliamentary Copyright:** *Ailsa Craig Fishing Co Ltd* v *Malvern Fishing Co Ltd* [1983]1 All ER 101 **281 Crown Copyright:** *Nobahar-Cookson* v *Hut Group Ltd* [2016] EWCA Civ 128, **281 ICLR:** *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 **282 ICLR:** *Vaswani* v *Italian Motor Cars Ltd* [1996] 1 WLR 270 (PC) **284 Crown Copyright:** *Nobahar-Cookson* v *The Hut Group Ltd* [2016] EWCA Civ 128. **285 ICLR:** *Karsales (Harrow) Ltd* v *Wallis* [1956] 1 WLR 936 **286 Parliamentary Copyright:** *Suisse Atlantique Société d'Armement Maritime SA* v *NV Rotterdamsche Kolen Centrale* [1966] **286 Crown Copyright:** *UGS FINANCE LTD* v *NATIONAL MORTGAGE BANK OF GREECE*: CA 1964 **287 ICLR:** *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 **288 Crown Copyright:** *White* v *John Warwick & Co Ltd* [1953] **289 Crown Copyright:** *White* v *John Warwick & Co Ltd* [1953] **289 Crown Copyright:** *Alderslade* v *Hendon Laundry Ltd* 1945 **289 Crown Copyright:** *Alderslade* v *Hendon Laundry Ltd* 1945 **289 ICLR:** *White* v *Blackmore* [1972] 2 QB 651 **289 Crown Copyright:** *Alderslade* v *Hendon Laundry Ltd* 1945 **292 Crown Copyright:** *Adler* v *Dickson* [1954] 3 ALL ER 397 **294 Crown Copyright:** Sale of Goods Act 1979 **295 Crown Copyright:** Unfair Contract Terms Act 1977 **297 Crown Copyright:** Unfair Contract Terms Act 1977 **296 Crown Copyright:** Unfair Contract Terms Act 1977 **296 Crown Copyright:** Unfair Contract Terms Act 1977 **296 Crown Copyright:** Unfair Contract Terms Act 1977 **298 Crown Copyright:** Law Commission Report, Unfair Terms in Contracts, (Law Com No 292) para 4.57 **299 Crown Copyright:** Law Commission Report, Unfair Terms in Contracts, (Law Com No 292) para 4.57 **299 Crown Copyright:** Unfair Contract Terms Act 1977 **300 Crown Copyright:** *Stewart Gill Ltd* v *Horatio Myer and Co. Ltd* [1992] **300 ICLR:** *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 **301 Crown Copyright:** *Levison* v *Patent Steam Carpet Cleaning Co. Ltd* [1977] **302 ICLR:** *Flamar Interocean Ltd* v *Denmac Ltd* (The Flamar Pride) [1990] **306 ICLR:** *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 **306 Crown Copyright:** *Watford Electronics Ltd* v *Sanderson CFL Ltd* [2001] EWCA Civ 317, **307 Crown Copyright:**

Watford Electronics Ltd v *Sanderson CFL Ltd* [2001] EWCA Civ 317, **307 Crown Copyright:** *Granville Oil & Chemicals Ltd* v *Davis Turner & Co Ltd* **308 ICLR:** *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds* [1983] 2 AC 803 **308 Crown Copyright:** *Regus (UK) Ltd* v *Epcot Solutions Ltd* [2008] EWCA CIV 361 **309 Crown Copyright:** *Regus (UK) Ltd* v *Epcot Solutions Ltd* [2008] EWCA CIV 361 **310 Crown Copyright:** *SCHENKERS LIMITED* v *OVERLAND SHOES LIMITED AND SCHENKERS INTERNATIONAL DEUTSCHLAND GMBH* v *OVERLAND SHOES LIMITED*: CA 12 FEB 1998 **310 ICLR:** *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds* [1983] 2 AC 803 **312 Parliamentary Copyright:** *Fishing Co. Ltd* v *Malvern Fishing Co. Ltd* [1983] 1 All ER 101 **312 Crown Copyright:** Unfair Contract Terms Act 1977 **313 Crown Copyright:** Unfair Contract Terms Act 1977 **313 Crown Copyright:** Unfair Contract Terms Act 1977 **315 Crown Copyright:** *Stewart Gill Ltd* v *Horatio Myer and Co. Ltd* [1992] 2 All ER 257 **319 Crown Copyright:** Consumer Rights Act 2015 **329 Crown Copyright:** The Unfair Terms in Consumer Contracts Regulations 1999 **320 Oxford University Press:** Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts Hugh Beale in Good Faith and Fault in Contract Law **320 Crown Copyright:** The Unfair Terms in Consumer Contracts Regulations 1994 **318 Crown Copyright:** Consumer Rights Act 2015 **321 Parliamentary Copyright:** *Judgments - Director General of Fair Trading* v *First National Bank* **322 ICLR:** *Judgments - Director General of Fair Trading* v *First National Bank* **322 ICLR:** *Judgments - Director General of Fair Trading* v *First National Bank* **323 Parliamentary Copyright:** *Judgments - Director General of Fair Trading* v *First National Bank* **323 ICLR:** *Director General of Fair Trading* v *First National Bank* [2001] 3 WLR 1297 (HL) **323 ICLR:** *Director General of Fair Trading* v *First National Bank* [2001] 3 WLR 1297 (HL) **324 ICLR:** *Director General of Fair Trading* v *First National Bank* [2001] 3 WLR 1297 (HL) **326 European Union:** *Mohamed Aziz* v *Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) (Case C-415/11)* [2013] 3 CMLR 89 **328 Crown Copyright:** *Domsalla (t/a Domsalla Building Services)* v *Dyason* [2007] ALL ER 255 **329 Crown Copyright:** *Parkingeye Ltd* v *Beavis* [2015] UKSC 67 **330 Crown Copyright:** *Parkingeye Ltd* v *Beavis* [2015] UKSC 67 **331 ICLR:** *Bankers Insurance Co Ltd* v *South* [2003] EWHC 380 QB **331 Crown Copyright:** Unfair Terms in Consumer Contracts Regulations 1999 **332 Parliamentary Copyright:** *Director General of Fair Trading* v *First National Bank* [2001] UKHL 52 (25th October, 2001) **332 Parliamentary Copyright:** *Director General of Fair Trading* v *First National Bank* [2001] UKHL 52 (25th October, 2001) **333 Parliamentary Copyright:** *Director General of Fair Trading* v *First National Bank* [2001] UKHL 52 (25th October, 2001) **333 Crown Copyright:** *The Office of Fair Trading (Respondents)* v *Abbey National plc & Others (Appellants)* 2009 **334 Crown Copyright:** *The Office of Fair Trading (Respondents)* v *Abbey National plc & Others (Appellants)* 2009 **335 Crown Copyright:** *The Office of Fair Trading (Respondents)* v *Abbey National plc & Others (Appellants)* 2009 **338 Crown Copyright:** Unfair Terms in Consumer Contracts: a new approach? Issues Paper **338 ICLR:** *Director General of Fair Trading* v *First National Bank plc* [2001] UKHL 52, [2002] 1 AC 481 **350 Parliamentary Copyright:** *Lovell and Christmas Ltd* v *Wall* (1911) 104 LT 85 **351 ICLR:** *Prenn* v *Simmonds* [1971] 1 WLR 1381. **352 ICLR:** *REARDON SMITH LINE LTD.* v *HANSEN-TANGEN*; *HANSEN-TANGEN* v *SANKO STEAMSHIP CO. LTD. (THE "DIANA PROSPERITY")* **352 ICLR:** *Prenn* v *Simmonds* [1971] 1 WLR 1381. **353 Crown Copyright:** *Prenn* v *Simmonds and Reardon Smith Line Ltd* v *Yngvar Hansen-Tangen* **354 ICLR:** *Bank of Credit and Commerce International SA* v *Ali* [2001] UKHL **354 Crown Copyright:** *Prenn* v *Simmonds and Reardon Smith Line Ltd* v *Yngvar*

Hansen-Tangen **354 ICLR:** *George Mitchell (Chesterhall) Ltd* v *Finney Lock Seeds Ltd* [1983] QB 284 **355 ICLR:** *Photo Production Ltd* v *Securicor Transport Ltd* [1980] AC 827 **356 Crown Copyright:** *Marks and Spencer plc* v *BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC **356 Parliamentary Copyright:** *Judgments - Investors Compensation Scheme* v *West Bromwich Building Society* **356 Parliamentary Copyright:** *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL **356 Crown Copyright:** *Pink Floyd Music Ltd* v *EMI Records Ltd* [2010] EWCA Civ 1429 **357 Crown Copyright:** *Proctor & Gamble Co* v *Svenska Cellulosa Aktiebolaget SCA* [2012] **357 Parliamentary Copyright:** *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* **357 Parliamentary Copyright:** *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* **357 Crown Copyright:** *Rank Enterprises* v *Gerard* [2000] 1 All ER (Comm) 449 **357 Parliamentary Copyright:** *Bank of Credit and Commerce International SA (in liquidation)* v *Ali* [2001] UKHL **358 Parliamentary Copyright:** *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL **358 ICLR:** *Prenn* v *Simmonds* [1971] 1 WLR 1381 **358 ICLR:** *Prenn* v *Simmonds* [1971] 1 WLR 1381 **359 ICLR:** *Prenn* v *Simmonds* [1971] 1 WLR 1381 **360 Parliamentary Copyright:** *Chartbrook Limited (Respondents)* v *Persimmon Homes Limited and others (Appellants) and another (Respondent)* **361 Parliamentary Copyright:** *Chartbrook Limited (Respondents)* v *Persimmon Homes Limited and others (Appellants) and another (Respondent)* **361 Crown Copyright:** *Oceanbulk Shipping and Trading SA* v *TMT Asia Ltd* [2010] UKSC 44 **361 ICLR:** *Mannai Investment Co Ltd* v *Eagle Star Assurance* [1997] UKHL 19; [1997] AC 749; [1997] 3 All ER 352; [1997] 2 WLR 945 (21st May, 1997) **362 ICLR:** in *Antaios Compania Naviera SA* v *Salen Rederierna AB* [1985] AC **362 Parliamentary Copyright:** *Chartbrook Limited (Respondents)* v *Persimmon Homes Limited and others (Appellants) and another (Respondent)* **362 Parliamentary Copyright:** *Chartbrook Limited (Respondents)* v *Persimmon Homes Limited and others (Appellants) and another (Respondent)* **363 Crown Copyright:** *East* v *Pantiles (Plant Hire) Ltd* (1981) **363 Crown Copyright:** *East* v *Pantiles (Plant Hire) Ltd* (1981) **363 Crown Copyright:** *East* v *Pantiles (Plant Hire) Ltd* (1981) **363 Crown Copyright:** *Pink Floyd Music Ltd* v *EMI Records Ltd* [2010] **364 Crown Copyright:** *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50. **364 Crown Copyright:** *Rainy Sky SA* v *Kookmin Bank* [2011] UKSC 50. **365 Crown Copyright:** *Arnold (Respondent)* v *Britton and others (Appellants)* **367 Crown Copyright:** Court of Appeal **367 Crown Copyright:** *Arnold* v *Britton* [2015] UKSC 36 **368 Crown Copyright:** *Arnold* v *Britton* [2015] UKSC 36 **369 Crown Copyright:** *Arnold (Respondent)* v *Britton and others (Appellants)* **370 Parliamentary Copyright:** *American Airlines* v *Hope* [1974] **371 Parliamentary Copyright:** *Agip SpA* v *Navigazione Alta Italia SpA* **371 Crown Copyright:** *Swainland Builders Ltd* v *Freehold Properties Ltd* [2002] 2 EGLR 71 **371 Crown Copyright:** *EARL* v *HECTOR WHALING, LTD.* **372 Crown Copyright:** *Frederick E Rose (London) Ltd* v *William H Pim Junior & Co Ltd* **373 Crown Copyright:** *Thomas Bates & Sons Ltd* v *Wyndham's (Lingerie) Ltd* [1981] **373 Crown Copyright:** *Thomas Bates & Sons Ltd* v *Wyndham's (Lingerie) Ltd* [1981] **375 ICLR:** *Republic of India* v *India Steamship Co.* [1998] **375 Crown Copyright:** *ING Bank NV* v *Ros Roca SA* [2011] **375 Parliamentary Copyright:** *Chartbrook Limited (Respondents)* v *Persimmon Homes Limited and others (Appellants) and another (Respondent)* **386 Parliamentary Copyright:** *Kleinwort Benson Ltd* v *Lincoln City Council* **387 Crown Copyright:** *Smith* v *Land and House Property Corp* (1884) 28 Ch D 7 **389 ICLR:** *Edgington* v *Fitzmaurice* (1885) 29 ChD 459 **391 ICLR:** With v O'Flanagan [1936] Ch 575 Court of Appeal **393 Crown Copyright:** Insurance Act 2015 **393 Crown Copyright:** Insurance Act 2015 **395 Crown Copyright:** Insurance Act 2015 **397 ICLR:** *Downs* v *Chappell* [1997] 1 WLR 426 **397 Crown Copyright:** *Versloot Dredging BV and Another* v *HDI Gerling*

Industrie Versicherung AG [2016] UKSC 45(29). **398 Crown Copyright:** *Dadourian Group International Inc.* v *Simms* [2009] EWCA Civ 169 **398 ICLR:** *Standard Chartered Bank Ltd* v *Pakistan National Shipping Corporation Ltd (Nos 2 and 4)* [2003] 1 AC **398 Crown Copyright:** *Spice Girls Ltd* v *Aprilia World Service BV* [2002] EWCA Civ 15 **399 ICLR:** *Peek* v *Gurney* (1873) LR 6 HL 377 **399 ICLR:** *Caparo Industries plc* v *Dickman* [1990] 2 AC 605 **400 Parliamentary Copyright:** *Caparo Industries plc* v *Dickman* [1990] UKHL 2 **401 Crown Copyright:** *Redgrave* v *Hurd* (1881) 20 Ch D 1 **401 Crown Copyright:** *Redgrave* v *Hurd* (1881) 20 Ch D 1 **402 Crown Copyright:** *Hayward* v *Zurich Insurance Co plc* [2016] UKSC 48 **403 ICLR:** *SMITH* v *KAY*: HL 1859 **403 Crown Copyright:** in *Downs* v *Chappell* [1996] 3 All ER 344 **403 ICLR:** *BP Exploration Operating Co Ltd* v *Chevron Shipping Co* [2003] 1 AC 197 **405 Crown Copyright:** *Cramaso LLP* v *Ogilvie-Grant* [2014] UKSC **406 Crown Copyright:** *Cramaso LLP* v *Ogilvie-Grant* [2014] UKSC **407 ICLR:** *Derry* v *Peek* (1889) 14 App Cas 337 **407 Crown Copyright:** *AIC Ltd* v *ITS Testing Services (UK) Ltd (The Kriti Palm)* [2007] 1 All ER **407 ICLR:** *Derry* v *Peek* (1889) 14 App Cas 337 **408 ICLR:** *R* v *Ghosh* [1982] QB **408 Crown Copyright:** *Barlow Clowes International Ltd (In Liquidation)* v *Eurotrust International Ltd* [2005] UKPC **409 ICLR:** *Angus* v *Clifford* [1891] 2 Ch 449 **409 Crown Copyright:** *Armstrong* v *Strain* [1951] 1 TLR 856 **409 Crown Copyright:** *AIC Ltd* v *ITS Testing Services (UK) Ltd* **410 ICLR:** *Smith New Court* v *Scrimgeour Vickers (Asset Management) Ltd* [1994] 1 W.L.R. 1271 **410 ICLR:** re H (Minors) [1996] AC 563 **410 Crown Copyright:** *Ticket2final OU* v *Wigan Athletic AFC Ltd* [2015] EWHC 61b (Ch) **410 Crown Copyright:** Marine Insurance Act 1906 **411 Crown Copyright:** *Britton* v *Royal Insurance Co* (1866) 4 F & F 905 **411 ICLR:** *Manifest Shipping Co. Ltd.* v *Uni-Polaris Shipping Co. Ltd. (The 'Star Sea')* [2001] 2 WLR 170 **411 Crown Copyright:** *Galloway* v *Guardian Royal Exchange (UK) Ltd.* [1999] **412 Crown Copyright:** *Versloot Dredging BV* v *HI Gerling Industrie Versicherung AG* [2016] UKSC 45 **412 Crown Copyright:** *Versloot Dredging BV* v *HI Gerling Industrie Versicherung AG* [2016] UKSC 45 **413 Crown Copyright:** *Versloot Dredging BV* v *HI Gerling Industrie Versicherung AG* [2016] UKSC 45 **414 ICLR:** *Donoghue* v *Stevenson* [1932] AC 562 **414 ICLR:** *Donoghue* v *Stevenson* [1932] AC 562 **415 ICLR:** *Candler* v *Crane, Christmas and Co* [1951] 2 KB 164 **416 Parliamentary Copyright:** *Smith* v *Eric S Bush (A Firm) and Harris* v *Wyre Forest District Council* [1990] **417 Crown Copyright:** *Steel* v *NRAM Ltd* [2018] UKSC **417 Parliamentary Copyright:** *Caparo Industries plc* v *Dickman* **417 Crown Copyright:** *Steel* v *NRAM Ltd* [2018] UKSC **417 Parliamentary Copyright:** *Caparo Industries plc* v *Dickman* **417 Sir Gerard Brennan:** *Shire Council* v *Heyman* (1985) 60 ALR 1 **418 Crown Copyright:** *Esso Petroleum Co. Ltd* v *Mardon* **418 Parliamentary Copyright:** HEDLEY BYRNE & CO. LTD.APPELLANTS AND HELLER & PARTNERS LTD. RESPONDENTS **420 Crown Copyright:** Misrepresentation Act 1967, s 2(1) **430 Crown Copyright:** *Salt* v *Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA **430 Crown Copyright:** *Salt* v *Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA **430 Crown Copyright:** Salt v Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle) [2015] EWCA **431 Crown Copyright:** Misrepresentation Act 1967, s 2(1) **431 ICLR:** *WILLIAM SINDALL PLC Respondent* v *CAMBRIDGESHIRE COUNTY COUNCIL Appellant* **431 Crown Copyright:** WILLIAM SINDALL PLC Respondent v CAMBRIDGESHIRE COUNTY COUNCIL Appellant **431 Crown Copyright:** WILLIAM SINDALL PLC Respondent v CAMBRIDGESHIRE COUNTY COUNCIL Appellant **432 Crown Copyright:** *WILLIAM SINDALL PLC Respondent* v *CAMBRIDGESHIRE COUNTY COUNCIL Appellant* **432 Crown Copyright:** *WILLIAM SINDALL PLC Respondent* v *CAMBRIDGESHIRE COUNTY*

COUNCIL Appellant **433 Crown Copyright:** *Salt* v *Stratstone Specialist Ltd (t/a Stratstone Cadillac Newcastle)* [2015] EWCA Civ 745 **435 ICLR:** Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158 **437 Crown Copyright:** *Cherrilow Ltd* v *Richard Butler-Creagh,* **440 Nicholls VC:** Nicholls VC **441 The Court of Appeal of New Zealand:** *Rowe* v *Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550 **441 ICLR:** *Redgrave* v *Hurd* (1881) 20 ChD 1 **442 Crown Copyright:** *Taberna Europe CDO II Plc* v *Selskabet (Formerly Roskilde Bank A/S) (In Bankruptcy)* [2015] EWHC 871 **443 Crown Copyright:** *Inntrepreneur Pub Co.* v *East Crown Ltd* [2000] **444 Crown Copyright:** *Peekay Intermark Ltd* v *ANZ Banking Group Ltd* [2006] **444 Crown Copyright:** *Springwell Navigation Corporation* v *JP Morgan Chase Bank* [2010] EWCA Civ 1221 **444 Crown Copyright:** *Housing Partnership Limited* v *Mears Limited* [2013] EWCA Civ 639 **445 Crown Copyright:** *EA Grimstead & Son Ltd* v *McGarrigan* **445 ICLR:** *Lowe* v *Lombank Ltd* [1960] 1 WLR **446 Crown Copyright:** *Lowe* v *Lombank* [1960] 1 W.L.R. 196 (09 February 1960) **446 Crown Copyright:** *Raiffeisen Zentralbank Osterreich AG* v *Royal Bank of Scotland plc* [2010] EWHC 1392 **447 Crown Copyright:** Unfair Contract Terms Act 1977 **448 Crown Copyright:** *William Sindall Plc* v *Cambridgeshire County Council,* **448 Crown Copyright:** *William Sindall Plc* v *Cambridgeshire County Council,* **449 Crown Copyright:** *Cremdean Properties Ltd* v *Nash* [1977] EG 63 **449 Crown Copyright:** *Cremdean Properties Ltd* v *Nash* [1977] EG 63 **449 Crown Copyright:** *Cremdean Properties Ltd* v *Nash* [1977] EG 63 **450 Crown Copyright:** *IFE Fund SA* v *Goldman Sachs International* [2006] EWHC 2887 **450 Crown Copyright:** *IFE Fund SA* v *Goldman Sachs International* [2006] EWHC 2887 **450 Crown Copyright:** *Raiffeisen Zentralbank Osterreich AG* v *Royal Bank of Scotland plc* [2010] EWHC 1392 **452 Crown Copyright:** *Agapitos* v *Agnew (The 'Aegeon')* [2002] EWCA Civ 247 **452 Crown Copyright:** *Agapitos* v *Agnew (The 'Aegeon')* [2002] EWCA Civ 247 **453 ICLR:** in *Manifest Shipping Co Ltd* v *Uni-Polaris Insurance Co Ltd (The 'Star Sea')* [2003] 1 AC 469 at para 62 **466 ICLR:** *William Sindall plc* v *Cambridgeshire County Council* [1994] 1 WLR 1016 **468 LexisNexis:** *Associated Japanese Bank (International) Ltd* v *Credit Du Nord* [1988] 3 All ER 902 Steyn J **468 Crown Copyright:** *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd* [2002] EWCA **468 Crown Copyright:** *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407 **469 Crown Copyright:** *Dana Gas PJSC (a company incorporated under the laws of the United Arab Emirates)* v *Dana Gas Sukuk Limited and Others* [2017] EWHC 2928 (Comm) Leggatt J. stated at paras 61-64 **470 ICLR:** *COUTURIER* v *HASTIE* (1856) HL CAS 673 **471 Crown Copyright:** *Taylor* v *Caldwell* (1863) 3 B & S 826 **471 Crown Copyright:** *Griffith* v *Brymer* (1903) 19 TLR 434 **471 Parliamentary Copyright:** *Bell v Lever Bros* [1932] AC **471 Parliamentary Copyright:** *Bell* v *Lever Bros* [1932] AC **473 Crown Copyright:** *Graves* v *Graves* [2007] EWCA Civ 660 **475 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **475 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **475 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **475 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **476 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **476 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **476 Parliamentary Copyright:** Bell v Lever Brothers Ltd [1931] UKHL **476 Parliamentary Copyright:** Bell v Lever Brothers Ltd [1931] UKHL **477 Parliamentary Copyright:** Bell v Lever Brothers Ltd [1931] UKHL **477 Crown Copyright:** *ASSOCIATED JAPANESE BANK (INTERNATIONAL) LTD* v *CREDIT DU NORD SA*: 1988 **477 Crown Copyright:** ASSOCIATED JAPANESE BANK (INTERNATIONAL) LTD V CREDIT DU NORD SA: 1988 **477 Crown Copyright:** ASSOCIATED JAPANESE BANK (INTERNATIONAL) LTD V CREDIT DU NORD SA: 1988

477 Crown Copyright: ASSOCIATED JAPANESE BANK (INTERNATIONAL) LTD V CREDIT DU NORD SA: 1988 **478 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **479 ICLR:** Great Peace Shipping v Tsavliris International [2003] QB 679 Court of Appeal **479 ICLR:** Great Peace Shipping v Tsavliris International [2003] QB 679 Court of Appeal **479 Commonwealth of Australia:** *McRae* v *Commonwealth Disposals Commission* **480 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **480 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **481 Crown Copyright:** *Dana Gas PJSC (a company incorporated under the laws of the United Arab Emirates)* v *Dana Gas Sukuk Limited and Others* [2017] EWHC 2928 (Comm) Leggatt J. stated at paras 61-64 **482 Parliamentary Copyright:** *Bell v Lever Brothers Ltd* [1931] UKHL **482 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **482 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **482 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **483 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **484 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **484 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **485 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **487 Crown Copyright:** Sale of Goods Act 1979 **487 ICLR:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **488 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **488 ICLR:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **488 Parliamentary Copyright:** *Bell* v *Lever Bros* **489 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **489 Crown Copyright:** *Leaf* v *International Galleries - 1950* **489 Crown Copyright:** *Leaf* v *International Galleries - 1950* **490 Crown Copyright:** *Leaf* v *International Galleries - 1950* **490 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **490 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **491 Court of Exchequer (Ireland):** *RAFFLES* v *WICHELHAUS* (1864) 2 H & C 906 **491 ICLR:** *Smith* v *Hughes* (1871) LR 6 QB 597 **492 ICLR:** *Scriven Bros & Co.* v *Hindley & Co.* [1913] 3 KB 564 **492 ICLR:** *Smith* v *Hughes* (1871) LR 6 QB 597 **493 Crown Copyright:** *Statoil A.S.A.* v *Louis Dreyfus Energy Services L.P.* [2008] EWHC 2257 (Comm) by Atkins J. at para 87 **498 Parliamentary Copyright:** *HECTOR* v *LYONS*: 1988 **498 Parliamentary Copyright:** *HECTOR* v *LYONS*: 1988 **500 ICLR:** *CUNDY* v *LINDSAY* (1878) 3 APP CAS 459 **501 ICLR:** *PHILLIPS* v *BROOKS LTD* [1919] 2 KB 243 **501 ICLR:** *PHILLIPS* v *BROOKS LTD* [1919] 2 KB 243 **503 Crown Copyright:** *Cundy* v *Lindsay* 1878 **477 Crown Copyright:** *Leaf* v *International Galleries - 1950* **507 ICLR:** *Solle* v *Butcher* [1950] 1 KB 671 **507 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **507 ICLR:** *Solle* v *Butcher* [1950] 1 KB 671 **510 ICLR:** *Cooper* v *Phibbs* **510 ICLR:** *HUDDERSFIELD BANKING CO. LTD* v *HENRY LISTER & SON LTD* [1895] 2 CH 273 **510 ICLR:** *Solle* v *Butcher* [1950] 1 KB 671 **512 ICLR:** *William Sindall plc* v *Cambridgeshire County Council* [1994] 1 WLR 1016 **512 ICLR:** *Cooper* v *Phibbs* **513 ICLR:** *Great Peace Shipping* v *Tsavliris International* [2003] QB 679 Court of Appeal **513 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **513 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **514 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **514 Parliamentary Copyright:** *Bell* v *Lever Brothers Ltd* [1931] UKHL **514 Court of Appeal for Ontario:** *Miller Paving Limited* v *B. Gottardo Construction Ltd.*, 2007 ONCA 422 (CanLII) **515 Crown Copyright:** *Swainland Builders Ltd* v *Freehold Properties Ltd* [2002] 2 EGLR 71 **518 ICLR:** *Frederick E Rose (London) Ltd* v *William H Pim Jnr & Co Ltd* [1953] 2 QB **518 Crown Copyright:** *Etablissements George et Paul Levy* v *Adderley Navigation Co.*

Panama SA (The Olym-pic Pride) [1980] 2 Lloyd's Rep 67 Mustill J stated at p 72 **519 ICLR:** Thomas Bates Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505 **529 Crown Copyright:** *Occidental Worldwide Investment Corporation* v *Skibs A/S Avanti, The Sibeon and The Sibotre* [1976] 1 Lloyd's Rep 293 **529 Crown Copyright:** *Occidental Worldwide Investment Corporation* v *Skibs A/S Avanti, The Sibeon and The Sibotre* [1976] 1 Lloyd's Rep 293 **530 ICLR:** *Barton* v *Armstrong* [1976] AC 104, Lord Wilberforce and Lord Simon of Glaisdale said at 121 **530 ICLR:** *Dimskal Shipping Co SA* v *ITWF* [1992] AC 152 **530 Crown Copyright:** *D S N D Subsea Ltd (formerly D S N D Oceantech Ltd)* v *Petroleum Geo Services ASA* [2000] **531 ICLR:** *PAO ON AND OTHERS* v *LAU YIU AND ANOTHER PRIVY COUNCIL* [1980] AC 614, [1979] 3 All ER 65 **533 ICLR:** Universe Tankships Inc. of Monrovia v International Transport Workers' Federation (The Universe Sentinel) [1983] 1 AC 366 **533 ICLR:** *Universe Tankships Inc. of Monrovia* v *International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366 **534 ICLR:** *Universe Tankships Inc. of Monrovia* v *International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366 **534 ICLR:** *Thorne* v *Motor Trade Association* [1937] AC 797 at 806 **534 Crown Copyright:** *Ltd* v *Gallaher Ltd* [1994] 4 All ER 714 **536 Crown Copyright:** *D S N D Subsea Ltd (formerly D S N D Oceantech Ltd)* v *Petroleum Geo Services ASA* [2000] BLR 530 **537 Thomson Reuters:** Chitty on contracts: volume 1,Sweet & Maxwell, 2016. **538 Crown Copyright:** *Huyton SA* v *Peter Cremer GmbH & C0* [1999] **538 Crown Copyright:** *Kolmar Group AG* v *Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 **539 Crown Copyright:** *Kolmar Group AG* v *Traxpo Enterprises Pvt Ltd* [2010] EWHC 113 **530 ICLR:** *Dimskal Shipping Co SA* v *International Transport Workers Federation (The Evia Luck)* [1992] 2 AC 152 **540 Crown Copyright:** *Huyton SA* v *Peter Cremer GmbH & C0* [1999] **540 Crown Copyright:** *Lupofresh Limited* v *Sapporo Breweries Limited (A company incorporated under the laws of Japan)* [2013] EWCA Civ 948 **541 Crown Copyright:** *Allcard* v *Skinner* (1887) 36 ChD 145 **543 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **545 Crown Copyright:** *Bank of Credit and Commerce International SA* v *Aboody,*2013 **545 Crown Copyright:** *Dunbar Bank plc* v *Nadeem and Another* [1998] 3 All ER 876 **547 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **547 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **548 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **551 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **551 Crown Copyright:** *CIBC* v *Pitt,*1993 **553 ICLR:** *Allcard* v *Skinner* (1887) 36 ChD 145 **553 ICLR:** *Goldsworthy* v *Brickell* [1987] Ch 378 **553 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **553 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **553 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **554 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **554 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **555 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **555 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **557 Crown Copyright:** *Barclays Bank plc* v *O'Brien* [1993] 4 All ER 417 **558 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **559 LexisNexis:** *Avon Finance Co. Ltd* v *Bridges* [1985] 2 All ER 281 **561 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **561 Crown Copyright:** *Royal Bank of Scotland* v *Etridge (No. 2)* [2001] **565 ICLR:** *Newbiggin* v *Adam* (1886) 34 ChD 582 **567 ICLR:** *LLOYDS BANK LTD* v*BUNDY,*1974 **567 Crown Copyright:** *National Westminster Bank Ltd* v *Morgan* **568 Crown Copyright:** Unfair Terms in Consumer Contracts Regulations 1999 reg 5(1) **568 Crown Copyright:** Unfair Terms in Consumer Contracts Regulations 1999 reg 5(1) **572 Crown Copyright:** Unfair Terms in Consumer Contracts

Regulations 1999 reg 5(1) **576 Bloomsbury Publishing:** A. P. Herbert,Uncommon Law (1989)© Methuen **576 Crown Copyright:** *Holman* v *Johnson* (1775) 1 Cowp 341 **576 ICLR:** *Vita Food Products Inc* v *Unus Shipping Co.* [1939] AC 277 **577 Crown Copyright:** *Patel* v *Mirza* [2016] UKSC 42 **578 Crown Copyright:** Law Commission's Report on the Illegality Defence (Law Com. No. 320, 2010) **579 Cope v Rowlands:** *Cope* v *Rowlands* **580 Crown Copyright:** *St John Shipping Corporation* v *Joseph Rank Ltd* [1956] 3 All ER 683 **582 ICLR:** *St John Shipping Corporation* v *Joseph Rank Ltd* [1956] 3 All ER 683 **582 ICLR:** *St John Shipping Corporation* v *Joseph Rank Ltd* [1956] 3 All ER 683 **582 Crown Copyright:** Law Commission's Report on the Illegality Defence (Law Com. No.189, 2009) **583 Crown Copyright:** *Richardson* v *Mellish* (1824) 2 Bing 229 **583 ICLR:** *Enderby Town FC Ltd* v *The Football Association Ltd* [1971] Ch 591 **586 ICLR:** *Trendtex Trading Corporation* v *Crédit Suisse* [1982] AC 679 **586 Crown Copyright:** Criminal Law Act 1967,s14(2) **586 Crown Copyright:** Re Trepca Mines Ltd (Application of Radomir Nicola Pachitch (Pasic)) [1962] 3 All ER 351 **588 Crown Copyright:** Arbitration Act 1996(s 69(2) and 69(3)) **591 Crown Copyright:** *Holman* v *Johnson* (1775) 1 Cowp 341 **592 ICLR:** *St John Shipping Corpn* v *Joseph Rank Ltd* [1957] 1 QB 267 **593 Crown Copyright:** *Patel* v *Mirza* [2016] UKSC 42. (at para 3) **594 ICLR:** *Tinsley* v *Milligan* [1993] 3 WLR 126 **594 ICLR:** *Tinsley* v *Milligan* [1993] 3 WLR 126 **595 Crown Copyright:** *Tinsley* v *Milligan* [1994] **595 Crown Copyright:** *Tinsley* v *Milligan* [1994] **603 Crown Copyright:** *Gray* v *Thames Trains Ltd*,2009 **604 Crown Copyright:** *Stone & Rolls Ltd v Moore Stephen*,2009 **605 Crown Copyright:** *Bilta (UK) Ltd* v *Nazir (No 2)* [2015] UKSC 23 **605 Crown Copyright:** *Bilta (UK) Ltd* v *Nazir (No 2)* [2015] UKSC 23 **606 ICLR:** *Vita Food Products Inc* v *Unus Shipping Co.* [1939] AC 277 **606 Crown Copyright:** *Parkingeye Ltd* v *Somerfield Stores Ltd*, 2012 **607 Crown Copyright:** *Parkingeye Ltd* v *Somerfield Stores Ltd*, 2012 **607 Crown Copyright:** *Les Laboratoires Servier* v *Apotex Inc* [2012] EWCA Civ 593 **608 Supreme Court of Canada:** *Hall* v *Hebert* [1993] 2 SCR 159 **608 Crown Copyright:** *Les Laboratoires Servier* v *Apotex Inc* [2012] EWCA Civ 593 **609 Crown Copyright:** *Les Laboratoires Servier* v *Apotex Inc* [2012] EWCA Civ 593 **610 Crown Copyright:** Lord Toulson **610 ICLR:** *Attorney General* v *Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 286 **610 Crown Copyright:** *Hounga* v *Allen*,[2012] EWCA Civ 609 **611 Crown Copyright:** *Patel* v *Mirza* [2016] UKSC 42 **612 Crown Copyright:** *Patel* v *Mirza* [2016] UKSC 42 **612 Crown Copyright:** *Patel* v *Mirza* [2016] UKSC 42 **612 Crown Copyright:** *Patel* v *Mirza*,[2014] EWCA Civ 1047 **614 Oxford University Press:** Cheshire, Fifoot and Furmston's Law of Contract,OUP Oxford, 30-Aug-2012 **614 ICLR:** *Nordenfelt* v *Maxim Nordenfelt Guns and Ammunition Co.* [1894] AC 535 **615 ICLR:** *Esso Petroleum Co. Ltd* v *Harper's Garage (Stourport) Ltd* [1968] AC 269 **618 LexisNexis:** *Home Counties Dairies Ltd* v *Skilton* [1970] 1 All ER 1227 **618 Crown Copyright:** *Egon Zehnder Ltd* v *Tillman* [2017] EWCA Civ 1054 **618 Crown Copyright:** *Egon Zehnder Ltd* v *Tillman* [2017] EWCA Civ 1054 **619 ICLR:** *Littlewoods Organisation Ltd* v *Harris* [1977] 1 WLR 1472 **621 Crown Copyright:** *ChipsAway International Ltd* v *Errol Kerr* [2009] EWCA Civ 320 **628 ICLR:** *Schroeder Music Publishing Co. Ltd* v *Macaulay* [1974] 1 WLR 1308 **629 Crown Copyright:** *Panayiotou* v *Sony Music Entertainment Ltd* **630 ICLR:** *Schroeder Music Publishing Co. Ltd* v *Macaulay* [1974] 1 WLR 1308 **642 ICLR:** *Arcos Ltd* v *E A Ronaasen & Son* [1933] AC 470 **643 Crown Copyright:** Sale of Goods Act 1979, s 30(1) **643 Crown Copyright:** Sale of Goods Act 1979, s 30(2) **643 Crown Copyright:** Sale and Supply of Goods Act 1994 , s 4(2) **644 Crown Copyright:** *Cutter* v *Powell* (1756) 6 TERM R 320 **644 Crown Copyright:** *Hoenig* v *Isaacs* [1952] 2 All ER 176 **646 Crown Copyright:** Sale of Goods Act 1979, s29(5) **647 Crown Copyright:** Law of Property Act 1925,s 41

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Preface

In this edition I have rewritten some areas of the subject matter. In particular on reviewing the 13th edition I considered that Chapter 7 on terms of the contract had become too long and unwieldy with the addition of contractual interpretation and for this reason I have decided to separate this material out into a standalone chapter, which has now become a new Chapter 9. I hope readers find this a more coherent examination of this important area. In the previous edition, incorporation of terms was dealt with as part of Chapter 8 on exemption clauses; however, I considered that this area should not be confined to exemption clauses and should really apply to terms generally. I have therefore decided to move this area into Chapter 7 so that readers have an understanding of this area earlier on in their examination of terms. Other chapters have also been substantively rewritten, particularly the chapters on capacity, intention to create legal relations, exemption clauses, mistake (where more emphasis has been placed on the issue of allocation of risk, together with a new section on the conceptual basis of common mistake), some areas of duress and undue influence, and common law remedy of damages.

Numerous new cases, far too many to set out here, have been included in the new edition but pre-eminent among these are a number of Supreme Court decisions: ***Ivey*** v ***Genting Casinos UK Ltd (t/a Crockfords Club)*** [2017] UKSC 76, dealing with the burden of proof for dishonesty in fraudulent misrepresentation; ***Steel*** v ***NRAM Ltd*** [2018] UKSC 13, dealing with the assumption of responsibility in negligent misrepresentation at common law, in which Lord Wilson considered the correct approach was to reassert the principles in ***Caparo*** that for negligent misrepresentation at common law a representee needs to establish that it was reasonable for him to have relied on the representation and that the representor should reasonably have foreseen that he would do so; ***Patel*** v ***Mirza*** [2016] UKSC 42, where the Supreme Court changed the common law approach to the illegality defence from a strict rule-based approach to a series of flexible tests driven by policy considerations; ***Morris-Garner*** v ***One Step (Support) Ltd*** [2018] UKSC 20, which provided the Supreme Court with the first opportunity to review the whole principle of ***Wrotham Park*** and ***Blake*** damages, where Lord Reed concluded that ***Wrotham Park*** damages should now be regarded as being of 'little more than historical interest', renouncing the expression '***Wrotham Park*** damages' and replacing it with the expression 'negotiating damages', being damages of a compensatory nature available for breach of contract; ***Fulton Shipping Inc. of Panama*** v ***Globalia Business Travel (formerly Travelplan SAU) of Spain, The New Flamenco*** [2017] UKSC 43, which provided that where the process of mitigation provides a benefit to a claimant, that benefit must be brought into account in assessing the claimant's loss; ***Lowick Rose LLP*** v ***Swynson Ltd*** [2017] UKSC 32, where Lord Sumption approved of the broader ground of Lord Griffiths in ***Linden Gardens Trust Ltd*** v ***Lenesta Sludge Disposals Ltd***; and ***Wood*** v ***Sureterm Direct Ltd*** (aka ***Wood*** v ***Capita Insurance Services Ltd***) [2017] UKSC 24, where a more contextual approach is taken with regards to contractual interpretation, so that the term must be read against the matrix of facts forming the background of the contract and the words must be given their 'natural and ordinary meaning'. In this case Lord Hodge considered that the decisions in the ***Rainy Sky*** and ***Arnold*** cases were saying the same thing, and that interpretation is a unitary exercise so that 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.

At the time of writing, the Law Commission published a consultation document 'Electronic Execution of Documents' (Consultation Paper No. 237). While electronic signatures have had legal recognition for some time now by virtue of the Electronic Communications Act 2000 s. 7 (which implements certain provisions of the EU Electronic Signatures Directive (1999/93/EC)) and the Electronic Identification and Trust Services for Electronic Transaction Regulations 2016/696 which replaced the Electronic Signatures Regulations 2002/318, the use of electronic signatures has never been fully utilised. The role of the Law Commission in this consultation project is to try to identify areas which create difficulties for the development of electronic signatures and provide a strategy by way of legislation or otherwise to eliminate such difficulties. The developments that arise out of the Law Commission investigation will no doubt feature in later editions, however for the moment I have included a summary of some of the issues facing the Law Commission in this area.

The law of contract has, as many lawyers and law students have no doubt lamented, been subject to the influence of European Directives and Regulations for some 40-odd years now. As Lord Denning famously observed in ***Bulmer* v *Bollinger*** regarding the incoming tide of EU law, 'it flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute'. At the time of the last edition, the Brexit referendum had just taken place and in the two years since then there has been little clarification as to how quickly, or slowly, the influence of the European Union on the law of contract will begin to ebb. The signs are that rules and regulations that are already in place will continue since the intention of the government is that all such rules and regulations will be subsumed into English law until such time as Parliament decides to exercise its discretion to bring about change. This is more a question of expedience given the volume of European legislation that the UK already operates under. As we turn away from the European Union, my opinion is that our law of contract will continue to be robust and indeed be the choice of law in the vast majority of commercial transactions around the world. In any event, it can be seen already that the Supreme Court is increasingly taking on board decisions in the Canadian, Australian, New Zealand and Singaporean courts where the jurisdictions have a great deal more affinity with our own common law system. But in that there is also a warning in that the English courts will have to exercise caution since, whilst the common law allows for inherent flexibility to develop independently of legislation, as Lord Sumption stated in ***Patel* v *Mirza*** the common law 'is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and principles which … is developed organically, building on what was there before'. Effectively therefore there are 'pragmatic limits to what law can achieve without becoming arbitrary, incoherent and unpredictable'. It is important therefore that for English law of contract to maintain its dominant position in international commercial transactions there has to be synergy across the common law jurisdictions, whether it be Singapore, Australia, New Zealand, Canada, etc. The result is that Supreme Courts in common law jurisdictions have to be cognisant as to how their decisions will be received in other common law jurisdictions and pay particular attention to ensure certainty, predictability and consistency. In a globalised commercial world it is these facets that attract commercial entities and business people across the world to select common law systems and common law jurisdictions based on the English law of contract.

As in previous years, I have continued to refrain from making widespread use of unreported cases in order to maintain the original ethos of the book, in that it should so far

as possible stand alone, and that if a student needs to look further, they should be able to obtain the information they want from a readily available source. Of course, the objectives behind the writing of this book remain the same – that of presenting the law in a readable and accessible form by setting out the general principles of the subject with reference to the leading and most recent cases. I have attempted to avoid including new cases just because they are new. The courts hear many decisions and I have attempted to be conservative in choosing cases that have a real impact on the law wherever possible, as I see little point in cluttering up the text with minor decisions since these will only distract the student, create confusion and get in the way of developing a proper understanding of the law. The fact remains, however, that some of the judgments that are coming out of the courts, particularly the Supreme Court, are now of a very complex nature and reducing these to an easily understandable set of principles is now a challenging exercise in its own right. I hope I have done justice to these decisions for the reader.

In this edition therefore I have attempted to make this increasingly complex subject a little more accessible. In doing this I have included more diagrams to help the reader and I have rewritten the summaries at the end of each chapter to provide a rather more detailed account of the law than simply a skeleton of the previous text in that chapter. I have also been cognisant of the fact that often the text can become extremely 'dense' to a reader to the extent that it can be quite easy to lose track of the principles that arise out of various conflicting decisions. To help with this I have attempted to distil the principle from the text in order to aid the reader's understanding of the law in a short summary at appropriate points within the text.

Problem areas and other contentious aspects are also considered but as a means of leading the student into more specific reading. For this reason, there is a further reading section at the end of each chapter providing a selection of authoritative texts and articles in a variety of legal journals. Hopefully, these will also save students time when having to research particular topics. I have also attempted to continue to present the text in a user-friendly and structured form.

While this book can be used as a standalone text, it is written not with this intention but to encourage students to undertake further reading so that they have a full understanding of the wider issues that surround this increasingly complex subject. The book has been written with the intention of providing a halfway house between a student's lecture notes, more substantive works and articles in legal journals and to encourage this learning process. In order to prompt students into becoming more autonomous in their reading and learning, there are also a number of 'Debates' contained within the text with the intention of engaging readers with thought-provoking exercises.

All too often, new students coming into higher education for the first time have not developed the learning skills to manage their own learning. Many academics have their own views on why this is the case but whatever those reasons, it is vital that the student of this subject spends time in the lawyers' laboratory, the library, reading around their subjects. It is also for this reason that the additional reading section is included.

Not that many years ago, the law of contract was regarded as one of the easier undergraduate law courses. I do not believe this to be true any longer (if, indeed, it ever was) and certainly some areas which in my days as a student were relatively straightforward are no longer the case, and the whole subject is now becoming quite a challenging one. The reception and comments received with respect to the last edition were extremely encouraging although, as ever, I welcome any suggestions that may improve it. In time-honoured tradition, all errors and omissions are entirely my responsibility.

It is a tradition and always a pleasure in the preface of a book to thank those who have given their help and assistance in the writing and production of it. I would like to give my thanks to Cheryl Cheasley, Melanie Carter and all the staff at Pearson for their continued support of this book and the Foundation Studies in Law Series in general. Their efforts, ideas and enthusiasm have contributed immensely to the success of both. The quality of the production of the book and the series is a tribute to their dedicated hard work. I thank them also for their patience when I overrun my date for submission of the manuscript.

There are many others who have given me support and help in terms of advising me about content or design and I thank them all for their input, particularly the students who have been so supportive of this textbook. In particular, I have to thank Gerald Swaby at the University of Huddersfield for his emails and telephone calls informing of new decisions and our discussions about those judgments.

As in previous years I thank my sons Phillip and William for their love, support and companionship as they move on in life through difficult and what can be hard and challenging times. At the time of the last edition I thought that I had got rid of them but this seems to be a generation that keeps returning to the family ‘nest’! I can now report that they have both left the ‘nest’ but, as every parent knows, this is always regarded with mixed feelings. The truth of course is that I love them both dearly and the home is never quite the same when they are not there and, at the end of the day, it is their happiness that is of paramount importance to me.

I also thank my partner, Maggie, for her love, support, patience and for quite simply being there despite my long absences when I have been working on various manuscripts. I also thank my brother Anthony Richards MBE for his unswerving support.

Paul Richards
September 2018

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Part 1
The formation of a contract

1 The evolution and definition of the modern contract

2 The fact of agreement

3 Consideration

4 Intention to create legal relations

5 Capacity

6 Formalities

Chapter 1
The evolution and definition of the modern contract

Objectives

After reading this chapter you should be able to:

1 Understand how the law of contract evolved historically.

2 Understand how the law of contract has evolved in modern times and explain the nature of contracts of adhesion.

3 Define a contract.

4 Recognise when a contract arises in legal terms.

1.1 Evolution

1.1.1 The early development

Objective 1

The law of contract in England has a long history which dates back to the thirteenth and fourteenth centuries. Its early development was connected closely with the growth and expansion of the jurisdiction of the common law courts over the myriad courts that evolved before and after the Norman Conquest. Some local courts in the Middle Ages exercised a limited jurisdiction based on custom that was very similar to that of the law of contract. This jurisdiction was termed the 'law merchant' and was often administered at local fairs, markets and ports. It was, however, the common law courts that evolved a more generalised jurisdiction.

The evolution of contract began initially with forms of action based on covenant and debt, roughly equivalent to what we know today as contracts under seal and simple contracts. Under 'covenant' some agreements were regarded as so important that they were formalised in writing. In addition to this, and no doubt because of widespread illiteracy, the parties were required to acknowledge the written document by sealing it. Initially, the action was based on the need to enforce a specific promise to do something, such as ploughing a field, but it evolved into an action for damages for a sum of money, awarded by a jury for breach of the 'covenant' or agreement.

The informal contract evolved in a very different way since the action based on covenant could not be used in a parol (oral) contract. Here the action began on the basis of debt and detinue, whereby specific sums of money lent or otherwise owed (debt) or chattels sold or lent (detinue) could be recovered. These forms of action revolved around a fiction that the claimant was recovering their own money or property. The main deficiencies with these actions were that they could not be used to enforce a positive obligation, the only remedy being the recovery of the debt in all property. Further, the trial procedures were based on compurgation or wager of law, whereby a defendant could evade liability by producing a number of oath-swearers (usually 12) to swear their innocence in respect to the money or property alleged to be held by them. An action could be lost merely by the incorrect enunciation of the oath by one of the oath-swearers. Other rules made these actions inappropriate and often unjust, and it was at this time that the jurisdiction of the Court of Chancery began to intervene to correct the inadequacies of the common law and evolve their own particular remedies applicable to agreements.

While the actions of debt and detinue were the earliest recognition of the enforcement of agreements, the modern law of contract in relation to informal agreements does not originate from these actions. As already stated, at this time there were a large number of different courts all vying to expand their own jurisdictions. The common law courts developed a jurisdiction over wrongs in which the king had a special interest. These were known as pleas of the Crown and involved actions relating to breaches of the king's peace. Such actions were founded on actions in **trespass** (i.e. actions in tort) which were particularly useful, in that the form of the writ was flexible and allowed the writ to be developed and used in many different situations. It is for this reason that Maitland called trespass 'the mother of all torts'. These types of writ were called 'actions on the case' and were tried by a jury which itself awarded damages as a remedy. Eventually the bringing of these actions ceased to be the sole prerogative of the Crown and could be used to remedy purely civil wrongs. Those torts that did not evolve in this way went on to form the basis of the criminal law. Among the torts that evolved at this time was an action in which the claimant alleged that the defendant had

entered an informal agreement with them and then by a defective performance caused the claimant some damage. One particular anomaly in this early trespass on the case, known as 'assumpsit', was that it lay only for a **misfeasance**, that is performing one's obligations badly, rather than a **nonfeasance**, that is not performing one's obligations at all, though this restriction was removed after ***Thoroughgood's case*** (1584) 2 Co Rep 9a. The lifting of this anomaly was significant in the development of a law of contract since it meant that any breach of promise could be actionable, even though the agreement was merely informal.

The only remaining blot on the development of assumpsit was the relation of this action to debt. Again the significant factor was the competition for jurisdiction between the courts. With assumpsit, the Court of the King's Bench was prepared to allow the action to be used instead of the action on debt. The Court of Common Pleas regarded this use of assumpsit as improper, with the result that it would not allow a claimant to recover a specific sum of money by way of an action in assumpsit. It required such a claim to be brought in debt with all its incumbent defects. The dispute between the two courts was resolved in ***Slade's case*** (1602) 4 Co Rep 92a when the views of the Court of the King's Bench were upheld. The result of the case was to produce a single form of action for the enforcement of informal agreements and potentially produce an action that held no bounds in the enforcement of promises.

The open-ended scope of assumpsit needed to be controlled. The controlling element as to what types of promise fell within the general scope of assumpsit emerged also in the sixteenth and early seventeenth centuries when the doctrine of **consideration** evolved. How this doctrine arose in English law is unclear, but what is clear is that by the seventeenth century a principle had emerged that it was necessary not only to show a promise, but also some motivating reason for the existence of the promise. Put another way, a promise may be regarded as a statement of will but for that statement to have legal effect, it had to be supported by a motive for the exercise of that will or consideration. The establishment of the need to show consideration produced a broad form on which the modern law is now based and one which was not to be subject to radical reformulation until the nineteenth century.

1.1.2 The nineteenth century

The nineteenth century is regarded as the golden age of contract since it was at this time that the law of contract evolved into the structure that we have today. Perhaps just as important was the fact that the significance of contract changed within the legal psyche of lawyers since it emerged as a subject in its own right.

The emergence of the law of contract at this time has often been put down to the Industrial Revolution, though this development owes more to coincidence than to a substantive causative link. As Smith and Atiyah (2006) point out in *Atiyah's Introduction to the Law of Contract,* the emergence of the law of contract is really the result of the adoption of the theories of natural law, which propounded the idea of an inalienable right of people to own and deal with property, and that the state via the law should interfere as little as possible with the affairs of individuals. The effect of these two approaches was to elevate the law of contract to a higher plane and produce the notion of the sanctity of the contract, the function of the law being to uphold the contract and only to become involved when things went wrong, not concerning itself with the fairness or social justice of the situation.

This latter comment is of course too simplistic and creates an imbalance when the reality of the situation is assessed since the Court of Chancery did attempt to protect individuals who found themselves bound by an onerous contract. Nevertheless, the protection offered by

the Court of Chancery was limited and probably even reduced during this period, which was a time of great corruption within the court, as is graphically illustrated by Charles Dickens in *Bleak House*.

The result of the above changes produced, by the early part of the nineteenth century, a new concept of individualism, whereby the person in the street was regarded as self-sufficient and imbued with a new notion of self-reliance, in being able to control their own destiny. Given this development one then had to consider at what point the courts should become involved to settle any dispute that might arise from a contract, though central to this question was whether a contract had been entered into in the first place.

The answer here lies in the perhaps obvious statement that a contract materialises where there is an agreement between the parties. Again the statement is far too simplistic, since the stereotypical response where any breach of the contract is alleged is: 'I did not agree to that'. The problem is one of measuring the existence of the agreement. Further, in many situations, a party may not have expressly 'agreed' to anything. Thus, the act of buying a ticket and getting on a train shows no agreement on the face of things, the same being true of any standard form of contract, in that one has no option but to sign and accept; there is no question of 'agreement' here.

It is at this point that the notion of freedom of contract shows its frailty since the law imposes an objective test to find for the existence or not of an agreement, the court representing the so-called reasonable person. At the end of the day, then, the idea of individualism fails and the courts have to find for the existence of a contract based on the intention of the parties. That intention is found by reference to a legal rule rather than the intention of the individuals themselves, despite the fact that some judges at this time considered that ***consensus ad idem*** (total agreement) was an essential feature of the existence of an enforceable contract.

A further misconception of the notion of freedom of contract is the idea that it provides the parties with freedom of choice as to the terms on which the agreement is entered into. Such an idea holds good where there is equality of bargaining power but is plainly false where this is not the case. Indeed, it is the fact of the powerful imposing terms on the weak that led to the notions of collectivisation, the growth of the trade union movement, the intervention of government and the weakening of the notion of freedom of contract, with its laissez-faire basis, as the underlying principle on which the modern law of contract is based.

The classical theory of contract, as we have seen, played an important part in the early economic and social development of the country, when modern economic theory and power were still in their infancy and true freedom of choice existed. Once large, powerful industrial units developed, as in the railways, for instance, where there was no competition or freedom of choice, then the chinks in the armour of the classical theory began to open up, allowing interventionism and a new dawn of state paternalism to develop.

1.1.3 The modern era

Objective 2

The nineteenth century saw great social, economic and political change in Britain which heralded a swing away from the classic theory of freedom of contract. Britain became firmly established as an industrial leader and this brought with it large industrial concerns, mass production with a wide selection of goods readily available and the dawn of a new consumerism. While previously an individual was free to negotiate an agreement, now they were faced with **standard-form contracts**, large companies carrying great financial power and products which required a scientific knowledge beyond that of the person in the street. Political and

social changes were also occurring, taking the form of a widening of the franchise and a movement towards a more socialist society, the result of which was a change from, as Smith and Atiyah put it, 'a corrective form of justice to one which was distributive'.

The modern era then became one of protectionism and a subsequent decline in the freedom of contract caused by the fettering of negotiating discretion. This decline was only partial and in many aspects of business freedom still persisted, particularly in the manufacturing industry. The new protectionism evolved in three ways, all of which often interacted with each other.

Social protectionism

The Industrial Revolution, culminating in the 1880s, the 'golden age' of Britain's economic and industrial transformation, produced a society dependent on earning a living since the population now became centred on major areas of industrial activity. The movement from the country to the towns presented massive social and infrastructure problems. The worker was treated by his employer as a commodity that without careful financial control could be a considerable liability. The effect of this was to produce slum dwellings, jerry-built with little or no sanitation, and working conditions that had the appearance of the devil's cauldron, with unsafe working practices and widespread pollution. These conditions could be seen to be the result of the need to further the profit motive, to produce housing and a workforce that allowed for the greatest maximisation of profit, this objective in turn being achieved by the negotiation of the contract between the manufacturer and the distributors of their goods. Freedom of contract in the classical theory could be seen as being at the centre of the exploitation of the most vulnerable members of society. It was to curtail these excesses that Parliament and the law were called in, and this they did, imposing planning controls, prohibiting certain types of contract and imposing terms into contracts.

So far we have seen how protectionism began but this process also continued right through the twentieth century and into the twenty-first. Thus there has developed a whole network of institutions designed to act as a safety net for the individual, to protect them from the extremes of commercial and industrial life, such as a system of national insurance, a national health service, statutory recognition of trade unions, a compensation scheme for those made redundant and a whole battery of legislation to protect tenants from the excesses of their landlords. There has also been a recognition of the dangers of the concentration of economic power with the development of restrictions on the growth of monopoly power.

Consumer protection

As already stated, the Industrial Revolution brought with it mass production, a great deal more freedom of choice and the development of goods of a complexity never before available. Britain had also become a consumer society, one where an individual generally had to work to earn a living to buy not only essentials such as food and clothing, but also those items which had hitherto been luxuries and beyond the aspirations of the ordinary person to acquire and which were available because of mass production techniques.

With this development the common law and Parliament imposed conditions on the parties to contracts, particularly sellers of goods, to comply with certain basic standards. Such legislation generally protected the individual against the vagaries of the commercial enterprise, though more limited protection was also imposed on contracts made between commercial enterprises. In contracts between private individuals the idea of freedom of contract encapsulated in the maxim ***caveat emptor*** (let the buyer beware) still persisted – as it does today.

Consumer protection legislation not only imposed civil liability, which left it to the individual to enforce the terms imposed by way of statute in an action for breach of contract, but also imposed criminal liability in some areas. Thus, the Trade Descriptions Act 1968 made it a criminal offence falsely to describe goods offered for sale.

Contracts of adhesion

Contracts of adhesion, generally known today as standard-form contracts, have now become part and parcel of the commercial life of the country. They derive from the time of the development of the passenger-carrying train when, for the first time, large numbers of contracts were entered into on any one day and it would clearly have been nonsensical to have to negotiate every single contract. The railway companies thus produced a standard contract which applied to everyone, the terms of which were not open to negotiation.

It might be thought, therefore, that such contracts are of recent origin, but they are not, and their history goes back to the very beginnings of mercantile enterprise. Initially, they could be found in trade usage, and eventually they were transformed into documents such as charter parties, insurance policies and bills of lading. Their purpose here was to save time and expense since clearly in complex matters such as those indicated, it would be commercially wasteful to have to sit down and negotiate each contract separately. A further purpose was to indicate where particular risks lay in carrying out the contract, so enabling a party to insure or guard against the risk becoming a loss. In contracts for export sales, for example, a strict **free on board contract** (or f.o.b.) requires the seller to place the goods, at their own expense, on a ship nominated by the buyer. The price quoted on such a contract does not include the price of the freight or insurance, both of which must be provided for by the buyer.

Such contracts are quite legitimate when entered into between people of business at arm's length. Indeed, this might also be the case where a contract negotiated with a private individual can assume that the individual themselves would normally insure against a particular risk – for example, the cancellation of a holiday. Such contracts become illegitimate where the standard-form contract seeks to impose harsh and onerous terms on an individual who has no option but to accept them. Very often the weaker party will be unable either to renegotiate the contract or, very often, to go elsewhere since such contracts may be common to all operators within a particular industrial activity. A further criticism of such contracts is that they are often drafted in such a way as to be virtually incomprehensible to the ordinary person and often impose wide-ranging exemption clauses which preclude the stronger party from being liable for breach of the contract in almost any circumstances.

In the twentieth century such contracts became all-pervasive, and while the courts attempted to curtail the operation of such contracts – and in particular the effect of the exemption clause – by means of various rules regarding the construction of such clauses, a more radical step was required. This reform developed in a piecemeal fashion in various statutes until the passing of the Unfair Contract Terms Act in 1977.

1.1.4 The present day

Sir George Jessel in ***Printing and Numerical Registering Co.*** v ***Sampson*** (1875) LR 19 Eq 462 stated:

> if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their

> contracts, when entered freely and voluntarily, shall be held sacred and shall be enforced by the Courts of Justice.

Such a view is clearly not one which sums up the evolution of the law of contract in the last quarter of the nineteenth century or in the twentieth century. The notion of freedom of contract lives on, but the reality is that it persists only in very limited areas of commercial life. The courts and Parliament have made substantial inroads into limiting the powers of those who exercise economic dominance.

In the 1980s, however, the notion of freedom of contract was given a new lease of life in the form of so-called Thatcherism, the idea that the controls that had evolved over the past 100 years had now become so restrictive and so protectionist that they had dulled the cutting edge of competitiveness which Britain required to succeed in the modern commercial world. The result of this dramatic policy change has been to privatise the once publicly-owned utilities which had become dilatory, safe in the knowledge that they were state-owned and protected monopolies which governments had to support no matter how inefficient. On a more individualistic level the government argued that the population was now better educated and more sophisticated, and that individuals were more able to look after their own interests.

The result of this change of policy has been to reduce the levels of protection offered and to allow the individual to have greater freedom of choice, thereby inducing a new competitive order to the economy. Thus the previously state-owned industries now had to become more efficient in order to make profits and to keep their customers. Failure to do so meant not only loss of business but also the asking of questions at the annual general meeting of the newly privatised company in question, since now their privatised customers, or at least some of them, were shareholders to whom the board was answerable.

Such changes occurred not only in relation to the old state-owned utilities, but also in relation to some of the benefits previously enjoyed and protected by the state. Thus individuals now became free to choose how to organise their pensions rather than being dependent on the state. Further, in the private sector, tenants had their rights to security of tenure reduced since it was recognised that the wide-ranging protection previously afforded had the effect of reducing investment in the rented housing market with a consequent reduction in the stock of rented accommodation throughout the country.

This new era of freedom of contract is not a complete one; some level of protection will always be required to protect those less able to look after themselves. It is of course not desirable to revert to the slums and deprivations that existed prior to the protectionist era and therefore some level of protection will be maintained. What that level should be is a matter of political debate, though it seems unlikely that, whatever the political colour of future governments, there will be a reversion to the protectionism prevalent prior to the 1980s. All political parties recognise that the competition prevalent in the notion of freedom of contract is essential to a sound national economy.

1.2 Definition

Objective 3

Treitel in *The Law of Contract* defines a contract as:

> an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.

Beatson in *Anson's Law of Contract*, takes his definition a little further than this, defining it as:

> A legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.

1.2.1 Objectivity

Objective 4

The notion of agreement is central to both definitions and the question has to arise as to the point at which an agreement actually materialises. The problem of measuring the existence of the agreement has already been looked at in our discussions on the concept of freedom of contract. Nevertheless, it is worth restating the fact that the law requires more than some subjective indication of agreement between the parties. There is a clear need for some degree of evidence of the fact of agreement, otherwise there would be great uncertainty when one attempts to reconcile the theoretical basis of the law of contract with the actual intentions of the parties. An individual could escape their obligations merely by stating that they had no intention of being bound by any agreement. The courts thus require some outward objective evidence of the existence of an agreement. Any subjective element is subordinate to the objective one and is, to a large degree, of no consequence except where it corresponds with the intentions of the parties as ascertained by objective means. The point was emphasised by Lord Denning in ***Storer* v *Manchester City Council*** [1974] 1 WLR 1403 when he stated:

> In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying, 'I did not intend to contract', if by his word he has done so.

In the case of ***The Leonidas D*** [1985] 1 WLR 925, Goff LJ, in analysing the discussions on the objective test that took place in ***The Hannah Blumenthal*** [1983] 1 AC 854, preferred the assertion of Lord Brightman in defining the objective test, stating:

> In his speech Lord Brightman was, as we understand it, asserting that if one party (*O*) so acts that his conduct, objectively considered, constitutes an offer, and the other party (*A*), believing that the conduct of *O* represents his actual intention, accepts *O*'s offer, then a contract will come into existence, and on those facts it will make no difference if *O* did not in fact intend to make an offer, or if he misunderstood *A*'s acceptance, so that *O*'s state of mind is, in such circumstances, irrelevant.

The concept of objectivity in this context has, however, to be given some balance, since it is clearly not desirable for the law to impose an agreement where none existed simply because some hypothetical reasonable person says that there is such an agreement!

In the case of ***The Golden Bear*** [1987] 1 Lloyd's Rep 330 at 341, it was stated that the objective test would not apply, for instance, where *X* knows that *Y*'s actual state of mind was not in accordance with the objective appearance created by *Y*'s conduct. Moreover, the objective test will not apply when the result would be to cause hardship to the other party where, for instance, the apparent acceptance of one party is based on a mistake which has been induced by the negligent acts of the other.

For the most part this apparent conflict between finding for an agreement in objective or subjective terms will not materialise since in the vast majority of contracts there will be

consensus ad idem between the parties, i.e. subjective agreement *and* an agreement as seen objectively. In such circumstances there is unlikely to be a dispute as to the existence of an agreement per se. The principle, however, remains that the test for a contract is based objectively on a reasonable person test but in asking this question one has to look at the circumstances surrounding the parties. This approach is replicated in other parts of the law of contract. Thus, in relation to the means by which the courts imply terms as a matter of fact, Lord Hoffmann stated in ***Attorney General of Belize*** v ***Belize Telecom Ltd*** [2009] 1 WLR 1988:

> in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.

Similarly, the interaction between an objective test in a subjective context can be seen in ***Rainy Sky SA and others*** v ***Kookmin Bank*** [2011] 1 WLR 2900 where Lord Clarke stated:

> the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.

A similar approach is taken with regard to the finding for the existence of a contract and, while this is usually expressed in terms of offer and acceptance, the courts in appropriate cases can look at the whole of the transaction and determine for the existence or non-existence of a contract by assessing what the reasonable person would take to be the reality of the situation.

Principle

The test for the finding of a contract is based objectively on a reasonable person test but in asking this question one has to look at the circumstances surrounding the parties. This test is based on a unitary exercise where the court considers the language used and from this ascertains what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties at the time of the contract, would have understood the parties to have meant in the contract.

1.2.2 The notion of a bargain and legal relations

So far we have been discussing the need to establish an agreement before a contract becomes established, and certainly evidence must be submitted to prove this fact. English law of contract requires that there be not only an agreement but also the presence of a bargain since otherwise any promise could give rise to a binding obligation. Thus for the purposes of English law, a promise is not binding unless it is either made under seal or supported by 'consideration'.

➤ See Chapter 3 for the doctrine of consideration.

While the doctrine of consideration will be examined in more depth later, one has to consider it briefly here as an essential element in finding for the mere existence of a contract. This requirement can be seen in Beatson's definition, where he indicates that there must be

a degree of quid pro quo to establish the contract, or – to put it simply – the parties are each required to 'buy' the promise of the other party, as, for example, 'I promise to give you £500 if you promise to give me your car.'

In simple contracts, therefore, one must establish the existence of a bargain, and a bare promise, such as 'I promise to give you £500', is not enforceable, being simply a bare promise or *nudum pactum*. The only way such a promise is binding is if it is made in writing under seal as in a deed. However, here we are in the territory of speciality contracts and for the most part this book is about simple contracts.

A further factor in determining what sort of agreements are binding is the requirement of an intention to create a legal relationship. Even if evidence of an agreement is proved, together with consideration, not every such bargain will give rise to a legally enforceable contract.

Example

If *X* says to a neighbour, 'If you give me a lift to work, I will cut your lawns' and the neighbour agrees to this, there is *prima facie* no binding contract despite the clear existence of a bargain. The reason for this is that such a social arrangement is not one which a reasonable person would consider as giving rise to legally enforceable obligations. The law thus draws a line between agreements of a commercial nature and those of a social or domestic nature.

Debate

The international sphere of contract law

English law of contract does not exist in an isolated 'bubble', and indeed in the vast majority of business transactions around the world, English law of contract is law of choice and this is not just in relation to Commonwealth countries. The reason for this phenomenon is that it is stable, predictable and certain and is undoubtedly flexible, in that it is responsive to the needs and changing nature of commercial life. For many years, the decisions of the English courts stood aloof from decisions in former Commonwealth countries but this is clearly no longer the case and indeed has not been for some time. The way the English courts have referred to decisions of other jurisdictions has meant that English law has continued to evolve and maintain its relevance internationally. This relevance has been maintained despite other codes being available to parties such as United Nations Convention on Contracts for the International Sale of Goods (the 'Vienna Convention'), the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. It is an interesting fact that as of October 2018, while the Vienna Convention has been ratified by 89 states, the United Kingdom, recognised as a leading jurisdiction for the choice of law in international commercial contracts, is not a signatory. Apparently the grounds on which the United Kingdom has resiled from becoming a signatory is that, according to the UN, 'the government not viewing its ratification as a legislative priority, a lack of interest from business in supporting ratification, opposition from a number of large and influential organisations, a lack of public service resources, and a danger that London would lose its edge in international arbitration and litigation'.

Of course the greatest international influence on English law of contract is the European Union. This influence has been maintained since the UK acceded to the European Community Treaty by way of the European Communities Act 1972. It is well to remember the well-known retort of Lord Denning to this influence in the case of ***H. P. Bulmer Ltd. and Another* v *J. Bollinger S.A.*** [1974] Ch. 401 when he stated:

> The first and fundamental point is that the Treaty concerns only those matters which have a European element, that is to say, matters which affect people or property in the nine countries of the common market besides ourselves. The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.

Of course things have moved on a great deal since Lord Denning first uttered these words and English law has now been subject to a huge influence in this field by way of a myriad of Directives and Regulations, much of it concerned with consumer protection. Much of this is to be welcomed, however, there is no getting away from the fact that English law is conceptually very different from many of the codes and legislative regimes that exist within the 27 member states of the EU. In some areas, concepts have been introduced that do not sit well within the UK, for instance, the notion of good faith as originally framed within the Consumer Rights Directive (CRD) 2011/83/EU and which, via the Unfair Contract Terms in Consumer Contract Regulations 1994 and 1999, is now embodied within the Consumer Rights Act 2015. This concept and its place in English law were considered at length by Leggatt J in ***Yam Seng Pte Ltd* v *International Trade Corp Ltd.*** In that case, he accepted that the existence of a contractual duty of good faith and fair dealing had been recognised in the United States and Australia and was cautiously gaining ground in Canada, though not in New Zealand. Leggatt J did not consider, however, that a duty of good faith had reached the point in English law that such a duty could be implied as a matter of law into contracts, though it does arise in some specific areas, such as insurance and the law of trusts.

The question arises then as to whether European law could eventually completely reform how English law operates. There is undoubtedly a powerful view that the law of contract should be subject to a harmonisation process across the European Union so that the principles will end up in a codified form. In one respect this would be useful, in that it would operate across all national boundaries and thereby facilitate commercial and business transactions. The wider question is whether this is necessary since parties negotiate a choice of law clauses within their contracts in any event and, as we have seen already, on a worldwide standing, English law of contract is by far the law of choice in commercial transactions. Such a move within the European Union should therefore be resisted and in any event it seems likely that with the Brexit referendum and the UK's withdrawal from the European Union, this threat to English law of contract will diminish. For the vast majority of international commercial agreements Brexit is unlikely to make any difference to the substantive law or indeed as to whether parties continue to choose English law as the governing law in their contracts. In the business field, as opposed to consumer law or areas such as financial regulation, EU law has had very little discernible effect on English law and it is likely that leaving the EU will also have little effect. Brexit is however likely to have an effect on the recognition and enforcement of jurisdiction agreements and judgments within the EU. At the moment the UK is already a party to the Hague Convention on Choice of Court Agreements by which exclusive jurisdiction clauses are required to

be recognised and enforced by virtue of its membership of the EU. Similarly the UK is also a party to the Lugano Convention 2007 under which jurisdiction agreements and judgments are required to be recognised and enforced within the EU, again by virtue of its current membership of the EU. In its position statement the UK government has already made it clear that it will sign up to these Conventions on leaving the EU and so there should be no change in the UK status in these Conventions except that its membership will be based on its individual membership.

No doubt Brexit will bring challenges but it will also bring opportunities not least that there will be a growing interaction and cooperation with countries outside of the EU, particularly with other common law countries.

Questions

1 Do you think that there should be a European law of contract?
2 Should English law of contract remain aloof from such an initiative?
3 What continued influences do you think the European Union will have on the English law of contract post Brexit? Will it be reduced to simply being part of the wider notion of private international law?

SUMMARY

This chapter deals with the evolution of the law of contract and its definition.

Evolution

- Early development from the thirteenth and fourteenth centuries encompassing the 'law merchant' and the early forms of action based on covenant, debt and assumpsit.
- Nineteenth-century 'golden age' of contract, the development of the notion of freedom of contract and the conflict with the objective test imposed to find for the existence of a contract.
- 'Classical theory' of contract and the development of interventionism as the notion of freedom of contract began to break down in the face of large-scale commercialism.
- Modern era – protectionism and the decline in the freedom of contract caused by the fettering of negotiating discretion. The new protectionism evolved in three ways: social protectionism, consumer protection, contracts of adhesion/standard-form contracts.
- Present day – rebirth of freedom of contract by the stripping away of state protectionism and the drive for a new competitive order.

Definition

Treitel:

An agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.

Beatson:

A legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.

- The notion of agreement is central to both Treitel's and Beatson's definitions. The problem of measuring the existence of the agreement – the law requires more than some subjective indication of agreement between the parties.
- Need for some degree of evidence of the fact of agreement and the court's requirement for some outward objective evidence of the existence of an agreement.
- Subjective element is subordinate to the objective one and is, to a large degree, of no consequence except where it corresponds with the intentions of the parties as ascertained by objective means.

Further reading

Atiyah, *The Rise and Fall of the Freedom of Contract* (Oxford University Press, 1979)

Howarth, 'The Meaning of Objectivity in Contract' (1984) 100 *Law Quarterly Review* 265

McKendrick, 'English Contract Law: A Rich Past, an Uncertain Future?' in Freeman and Lewis (eds) *Current Legal Problems 1997, Volume 50* (Oxford University Press, 1997)

Smith and Atiyah, *Atiyah's Introuduction to the Law of Contract,* 6th edn (Oxford University Press, 2006)

Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 *Law Quarterly Review* 433

Peel, *Treitel on the Law of Contract,* 14th edn (Sweet and Maxwell, 2015)

Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 *Law Quarterly Review* 274

Chapter 2
The fact of agreement

Objectives

After reading this chapter you should be able to:

1. Define an offer and compare it with other types of transactions, particularly invitations to treat.
2. Define an acceptance of an offer.
3. Understand the difference between an acceptance and a counter-offer.
4. Recognise the various means by which acceptances are communicated.
5. Explain when offers are terminated.
6. Appreciate the need for certainty in the formation of a contract.

2.1 Introduction

It has already been stated that there must be an intention to enter into a binding agreement, and that this intention is usually established by some outward objective indication of the existence of an agreement, rather than a subjective assessment of the actual intentions of the parties. On a practical level, however, the question arises as to what evidence of objective intention the law requires in deciding whether or not an agreement has been entered into.

Two very different approaches have been used to assess the presence of an agreement. The first is a liberal laissez-faire approach under which virtually anything at all could potentially be used in assessing the presence of an agreement. Such an approach almost invariably results in a subjective assessment of the parties' actions taking place and has the disadvantage of rendering the law uncertain and unpredictable. This approach found favour with Lord Denning who, in ***Butler Machine Tool Co. Ltd*** v ***Ex-Cell-O Corporation (England) Ltd*** [1979] 1 All ER 965, stated:

> In many cases our traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date… The better way is to look at all the documents passing between the parties and glean from them or from the conduct of the parties, whether they have reached agreement on all material points.

Similarly, in ***Gibson*** v ***Manchester City Council*** [1979] 1 All ER 972, he also stated that one ought to:

> look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material.

In both these cases Lord Denning's approach was rejected in favour of the second, more traditional, approach which is to find the objective intention of the parties to enter into an agreement by reducing the agreement in terms of offers, counter-offers, acceptances, revocations and rejections. This method of finding whether an agreement has come into existence or not provides a more predictable, certain and objective means of assessment, though one that is artificial. One should always bear in mind that this process of breaking an agreement down into smaller, more manageable units is simply an evidential device and in difficult cases where this process of analysis is not possible, the courts may well adopt Lord Denning's approach. Lord Diplock in the ***Gibson*** case certainly considered it was a legitimate method of analysing a set of circumstances 'which do not fit easily into the normal analysis of offer and acceptance'. This legitimacy of Lord Denning's approach has since been affirmed in the following case.

G Percy Trentham Ltd v *Archital Luxfer* [1993] 1 Lloyd's Rep 25

The facts of the case were that the plaintiffs (Trentham) were engaged by Municipal Mutual Insurance as main contractors to design and build industrial units in two phases. Trentham employed Archital to design, supply and install the doors and window frames for the development. This work was eventually completed and, indeed, paid for by Trentham. The subcontracts were thus fully executed. Subsequently claims were made against Trentham by Municipal Mutual under the main contract for alleged delays and defects in carrying out the work. In order to obtain an indemnity against the damages that it had to pay out, Trentham

began proceedings against several subcontractors, including Archital, alleging defects in the window works in both of the phases. In their defence Archital denied that any binding contracts had come into existence between themselves and Trentham. It was common ground in the dispute that no integrated written subcontracts had come into existence; instead there had been a series of exchanges of letters and telephone conversations but no corresponding offer and acceptance. The picture presented, then, was of two parties jockeying for position in a scenario very similar to a 'battle of the forms' type of situation (see later in the chapter) where the parties both attempt to impose their own terms and conditions on a contract by the use of offers and counter-offers. The case is unusual, in that the issue is not one concerning whose standard terms and conditions predominate, but whether any contract at all has come into existence out of the exchange of correspondence. At first instance the judge held that a contract had been formed when the defendant carried out the work, basing his decision on ***Brogden*** v ***Metropolitan Railway Co.*** (1877) 2 App Cas 666 (see below). In other words, the plaintiff had made an offer which the defendants had accepted by conduct in carrying out the work. Archital appealed from this decision.

In the Court of Appeal, the only judgment was given by Steyn LJ, the two other members concurring. Steyn LJ agreed with the judge at first instance that there was a contract in existence. In arriving at this decision Steyn LJ considered that there were four matters which were of importance to the case. First, English law generally adopts an objective test to the issue of contract formation. As we have already seen, the law generally ignores a subjective assessment of the 'expectations and unexpressed mental reservations of the parties'. He stated that the governing criterion was 'the reasonable expectations of honest men', which he translated in the present case as the 'reasonable expectations of sensible businessmen'. Second, while in the vast majority of cases the presence of offer and acceptance will be the means of deciding the matter of contract formation, 'it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance', citing ***Brogden*** v ***Metropolitan Railway Co.***; ***New Zealand Shipping Co. Ltd*** v ***A M Satterthwaite & Co. Ltd*** [1974] 1 Lloyd's Rep 534 at 539; [1975] AC 154 at 167; ***Gibson*** v ***Manchester City Council,*** as supporting this proposition. Third, he stated that the fact that the contract in the case was executed (i.e. performance of the contract was completed) rather than executory was important since the fact that the transaction has been performed by both parties will make it very difficult for an argument to be sustained that there was no intention to create legal relations or that the contract is void for uncertainty. Indeed, on the specific matter of uncertainty Steyn LJ considered that the fact that the contract was executed 'makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential'. Fourth, Steyn LJ stated that 'if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance' as indicated in ***Trollope and Colls Ltd*** v ***Atomic Power Constructions Ltd*** [1962] 3 All ER 1035.

On the basis of these points, Steyn LJ concurred with the decision at first instance that there was sufficient evidence to conclude that there was a binding contract; the parties had clearly intended to create a legal relationship between each other. In arriving at this position Steyn LJ stated that 'one must not lose sight of the commercial nature of the transaction', that is one party carrying out work for which he expected to be paid, and this is what had occurred. There was no suggestion that there was a continuing stipulation that a contract would only be created if a written agreement was concluded. Thus Steyn LJ adopted an approach that was very similar to Lord Denning's in that he looked at the overall effect of what had been said and done by the parties, although he did not refer to Lord Denning's approach. He stated:

> The contemporary exchanges, and the carrying out of what was agreed in those exchanges, support the view that there was a course of dealing which on Trentham's side created a right

> to performance of the work by Archital, and on Archital's side it created a right to be paid on an agreed basis. . . The Judge (at first instance) analysed the matter in terms of offer and acceptance. I agree with his conclusion. But I am, in any event, satisfied that in this fully executed transaction a contract came into existence during performance even if it cannot be precisely analysed in terms of offer and acceptance.

Does this decision suggest an abandonment of offer and acceptance as central pillars in the formation of contracts? The answer to the question is clearly in the negative, since Steyn himself states that 'the coincidence of offer and acceptance will, in the vast majority of cases, represent the mechanism of contract formation'. What the decision does is to broaden the opportunity to find for a contract by examining the 'commercial reality' of the situation coupled with evidence of the parties' intentions and to this extent a level of uncertainty may have been created as to when a contract has actually been formed.

Despite the decision of Steyn, it should be borne in mind that the judge at first instance was able to find for a contract on the basis of offer and acceptance, that is by adopting the classical approach. More often than not, therefore, the courts will continue to go to great lengths to analyse the facts in terms of the classical approach.

As Lord Wilberforce stated in ***New Zealand Shipping Co. Ltd*** **v** ***A M Satterthwaite and Co. Ltd*** [1975] AC 154:

> English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

While one must always bear in mind Lord Denning's approach, the classical analysis is far more important and has to be considered in a great deal more depth. The basic proposition of the classical analysis may be summed up as:

$$\text{offer} + \text{acceptance} = \text{agreement}$$

It will be noted here that offer + acceptance produces an agreement, not necessarily a 'contract' as there are other elements required to form a legally binding contract not least consideration (Chapter 3), an intention to create legal relations (Chapter 4) and capacity (Chapter 5).

2.2 Offer

2.1.1 The nature of an offer

Objective 1

An offer is an expression of a willingness to contract on certain terms made with the intention that a binding agreement will exist once the offer is accepted.

The task of a claimant seeking to enforce a contract is to prove the existence of an offer. An offer may be made either orally or in writing, or implied by the conduct of the person making the offer, namely, the offeror. Furthermore, the offer may be made to a specific person or group of persons or to the world at large. In the now famous case of ***Carlill*** **v** ***Carbolic Smoke Ball Co.***, it was argued that it was not possible to make an offer to the world at large.

Carlill v *Carbolic Smoke Ball Co.* [1893] 1 QB 256

In this case, the plaintiff bought a medical preparation called 'The Carbolic Smoke Ball' on the basis that the defendants advertised that they would pay £100 to any person who contracted influenza after using the smoke ball in the prescribed manner and for a specified period. The advert stated:

> £100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball.

Further, the defendants stated that 'to show their sincerity' they had deposited £1000 with the Alliance Bank. The plaintiff bought one of the smoke balls and used it in the manner prescribed and promptly caught influenza! She sued for the £100. The defendants contended that there was no agreement between them and used considerable ingenuity in promoting this contention. One of the defences used was that it was not possible to make an offer to the whole world since this would enable the whole world to accept the offer, which was clearly beyond the realms of commercial reality. The Court of Appeal had no difficulty in rejecting this defence. Bowen LJ stated the position very clearly as follows:

> It was also said that the contract is made with the whole world – that is, with everybody and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition?. . . Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.

The defendants also contended that the plaintiff had not accepted their offer and therefore there was no *consensus ad idem* and thus no agreement. This defence, which was rejected, exposes the fact that offers may arise in two forms, either bilateral or unilateral. A bilateral offer arises where one party promises to do something in return for a promise made by the offeree. Both parties are agreeing to do something in return for some reciprocal promise from the other. The vast majority of offers are of this type.

Example

Albert promises to sell his car to Sharon in return for a payment of £10,000 from Sharon.

A unilateral offer occurs where one party, the offeror, promises to pay for the act of another, that is, a conditional promise. The acceptance of the offer takes place when the offeree performs the act in question. The offer here is said to be unilateral because only one party is making a promise. The facts of the ***Carlill*** case provide an obvious example of such an offer.

A modern example of the principle can be seen in the case of ***O'Brien*** v ***MGN Ltd*** [2001] EWCA Civ 1279. The facts of the case were that the claimant purchased a Sunday newspaper that contained a 'scratchcard' game that related to a competition being held during the following week in the *Daily Mirror*. The claimant's card revealed two 'windows' displaying £50,000 in each. The next week the claimant bought a copy of the *Daily Mirror* and in

Figure 2.1 The Carbolic Smoke Ball manufacturers promised £100 reward to anyone who caught influenza while using the smoke ball according to the directions

THE ILLUSTRATED LONDON NEWS

CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

COUGHS · CATARRH · HOARSENESS · THROAT DEAFNESS · INFLUENZA · CROUP

COLD IN THE HEAD · ASTHMA · LOSS OF VOICE · SNORING · HAY FEVER · WHOOPING COUGH

COLD ON THE CHEST · BRONCHITIS · SORE THROAT · SORE EYES · HEADACHE · NEURALGIA

As all the Diseases mentioned above proceed from one cause, they can be Cured by this Remedy

£100 REWARD

WILL BE PAID BY THE

CARBOLIC SMOKE BALL CO.

INFLUENZA,

CARBOLIC SMOKE BALL

£1000 IS DEPOSITED

INFLUENZA

CARBOLIC SMOKE BALLS

CARBOLIC SMOKE BALL.

THE CARBOLIC SMOKE BALL,

TESTIMONIALS.

AS PRESCRIBED BY

SIR MORELL MACKENZIE, M.D.,

H.I.M. THE GERMAN EMPRESS.

TESTIMONIALS.

One CARBOLIC SMOKE BALL will last a family several months, making it the cheapest remedy in the world at the price—10s., post free.

The CARBOLIC SMOKE BALL can be refilled, when empty, at a cost of 5s., post free. Address:

CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.

➤ For more analysis of the *O'Brien v MGN Ltd* case refer to Chapter 8

accordance with the 'rules' rang the 'hotline' and was told that the prize for that day was £50,000, and the claimant then believed he had won that amount. The court considered that the advertisement in the *Daily Mirror* constituted an offer which was accepted when those with a winning scratchcard rang up to claim their prize.

Two further features of offers to be noted are that the terms of an offer must be clear and that the offer is made with the intention that it should be binding. In connection with the latter requirement, a further defence propounded in the ***Carlill*** case was that the advertisement was a 'mere puff' and not intended to form the basis of a binding agreement. Such 'puffs' are very much part of commercial life today, particularly in the advertising industry. Clearly statements that allude to certain soap powders 'washing whiter than white' or certain types of beers working untold miracles are not intended to be taken seriously but to 'puff up' the propensities of the product to induce the all-suffering public to buy. In the ***Carlill*** case the allegation that the offer was a 'mere puff' was rejected on the basis that the advertisement also stated that the defendants had deposited £1000 with the Alliance Bank 'to show their sincerity'. As Lindley LJ stated at 261–62:

> We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "1000l. is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter – that is, the sincerity of his promise to pay this 100l. in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

It was clear in this case that this fact indicated that they intended the promise to form the basis of a legal relationship.

So far everything presented is fairly straightforward, but unfortunately the situation is not so simple. There are many types of statement which, on the face of things, appear to be offers but in fact do not so comprise.

2.2.2 Offers compared with other types of transaction

Offers distinguished from invitations to treat

It has been seen that, according to one definition, an offer is an expression of a willingness to be bound by the terms of the offer should the offer be accepted. Clearly the implication here is that the statement of offer is the final statement of an individual who wishes to be bound by those terms; it is a person's final declaration of their readiness to be bound. It follows that if an individual is not willing to implement the terms of their promise but is merely seeking to initiate negotiations, then this cannot amount to an offer, such statements are termed 'invitations to treat'.

The distinction between an offer and an invitation to treat is not an easy one to make since it very often revolves around that elusive concept of intention. It may be that a statement amounts to an invitation to treat even though the statement is said to make an 'offer' and vice versa. The easiest way of making the distinction is by analysing how the law deals with the problem within certain stereotypical transactions, bearing in mind that the courts will look at the surrounding circumstances and the intention of the parties and will not necessarily have regard to the actual wording of the statement.

1. Advertisements and other notices

It has already been seen that the advertisement in the ***Carlill*** case amounted to an offer, though it was a unilateral one. In the words of Bowen LJ:

> It is not like cases in which you offer to negotiate or you issue advertisements that you have got a stock of books to sell, or houses to let, in which case there is no offer to be bound by any contract. Such advertisements are offers to negotiate – offers to receive offers – offers to chaffer.

The decision in the ***Carlill*** and ***O'Brien*** cases that the advertisement was an offer is peculiar to a situation where the statement is a conditional promise, a unilateral offer. A similar situation would result if an individual placed an advertisement offering a reward to the finder of a lost wallet. In such a case there is clearly a conditional promise and the advertisement would amount to an offer.

Most advertisements however do not fall into this category and hence they are held not to be offers but statements inviting further negotiations or invitations to treat. An example of such a situation can be seen in the case of ***Partridge* v *Crittenden*** [1968] 2 All ER 421, where the appellants placed an advertisement in a periodical for bird fanciers stating, 'Bramblefinch cocks and hens 25s'. They were charged under the Protection of Birds Act 1954, s. 6(1), in that they were unlawfully 'offering for sale' a certain live bird, a brambling, contrary to the provisions of the Act. At first instance the appellants were convicted but on appeal the conviction was quashed by the Divisional Court. Here the advert is an invitation to treat, NOT an offer, and therefore they could not be convicted of 'offering for sale' the bird.

This decision affirms the much earlier decision of ***Harris* v *Nickerson*** (1873) LR 8 QB 286, where an auctioneer advertised that certain goods would be sold at a certain location on a certain date. The plaintiff went to the sale but all the lots he was interested in had been withdrawn. He sued the auctioneer for his loss of time and expenses. It was held that the claim must fail as the advertisement of the auction was merely a declaration of intent to hold a sale and did not amount to an offer capable of being accepted and thus forming the basis of a binding contract, that is, that the advertisement merely amounted to an invitation to treat and not an offer that was capable of being accepted by the plaintiff..

The same conclusion was also reached in the case of a price list circulated by a wine merchant (***Grainger and Son* v *Gough*** [1896] AC 325), though a notice declaring that deckchairs were for hire was held in ***Chapelton* v *Barry UDC*** [1940] 1 KB 532 as amounting to an offer. The moral of the story is clear that in this type of case, while one can draw on certain generalisations, as in advertisements, one must treat each case on its own merits, assessing the intentions of the parties.

2. Displays of goods for sale

By far the most common example of the occurrence of invitations to treat is in the case of goods displayed either in shop windows or within a shop itself. The issue that arises here is that if the display of the goods in question amounts to an offer, then a customer may enter the shop and purport to accept that offer, thus creating a binding obligation on the shopkeeper to sell the goods at the stated price. If, however, the display of goods only amounts to an invitation to treat, then it is the customer who makes the offer to the shopkeeper, who is free to accept or reject that offer as they wish. Almost invariably it is the latter approach that is adopted by the courts, though the reasoning behind the general rule is somewhat obscure and lost in the mists of time – some think the rule is a throwback to the time of the marketplace when bargaining and haggling were commonplace, a notion that is not particularly appropriate today. The rule could nevertheless produce some startling effects.

Example

A shopkeeper places a notice in his window:

Special Offer
Computers For Sale
Were £1000
NOW £500

The shopkeeper could refuse to sell the goods to a customer even if they walked into the shop and placed £500 on the counter. The shopkeeper is not making an offer but an invitation to members of the public to come into the shop and make an offer since the shopkeeper is only making an ‘invitation to treat’. The words ‘Special Offer’ import no specific legal meaning here and do not necessarily mean an offer at law. Such a conclusion may be somewhat unfair, however, if those words had induced a person to wait outside the shop all night, only to be told the next morning that their offer to buy had been rejected. Nevertheless, even if the goods subject to the ‘Special Offer’ were regarded as an offer at law, an offeror in any event is free to withdraw that offer at any time up to acceptance.

The general rule as regards goods displayed in shop windows is well illustrated in the case of ***Fisher*** v ***Bell*** [1961] 1 QB 394, where a price-marked flick-knife was displayed for sale in a shop window. The seller was prosecuted under the now repealed Restriction of Offensive Weapons Act 1961, which made it an offence to offer to sell such items, and was acquitted. Lord Parker stated:

> It is clear according to the ordinary law of contract that the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.

A more problematical situation occurred in the following case.

Pharmaceutical Society of Great Britain v *Boots Cash Chemists (Southern) Ltd* [1952] 2 All ER 456; [1953] 1 All ER 482

The status of goods on the shelves of a self-service shop was called into question. The facts of the case were that the defendants were being prosecuted under the Pharmacy and Poisons Act 1933, s. 17, in that they had allowed the sale of a listed poison to be effected without the supervision of a registered pharmacist. The arrangement in the shop was that a customer on entering was given a basket and he was then free to walk around the shop selecting items from the shelves. When he had selected such items as he required, they were taken to the cash desk, where the customer was required to pay for them. Near to the cash desk was a registered pharmacist who was authorised to prevent a customer removing any drug from the shop. The Pharmaceutical Society alleged that the goods on the shelves were offers to sell, which the customer accepted by placing the goods in the basket and that, thus, the sale took place at that point and not at the cash desk under the supervision of the registered pharmacist. In such a situation, it was alleged, Boots were clearly in breach of the provision and had committed a criminal offence. The court, however, decided that the goods on the shelves were only invitations to treat and that it was the customer who made an offer to buy when he presented the goods for payment at the cash desk. At this point the person at the cash desk or the registered pharmacist could accept or reject that offer. The effect of this reasoning was that the sale did take place under the supervision of the registered pharmacist and no criminal offence had been committed.

Another reason for the decision in the Boots case is that if the goods on the shelves constituted offers then arguably the customer in picking the goods off the shelf is accepting that offer and that there is then a contract. The customer is unable to change their mind and put the goods back either on the shelf or when they present the goods at the checkout.

Some authorities, particularly American ones, dispute such a conclusion as regards the status of goods on display in a self-service shop. In ***Lasky* v *Economy Grocery Stores,*** 65 NE 305 (1946), it was stated that the goods displayed constituted offers but that the acceptance took place not on the placing of the goods in the basket, but on the customer presenting them at the cash desk for payment. Alternatively, in ***Sheeskin* v *Giant Food Inc.***, 318 A 2d 894 (1974), it was stated that acceptance took place before the goods were presented at the cash desk, though the customer could cancel his acceptance before payment if he wished. Contradiction also exists in English law though, since in ***R* v *Morris*** [1984] AC 320 it was held that the taking of goods from a shelf and changing the price tags amounted to an 'appropriation' within the Theft Act 1968.

3. Auction sales

The status of the call for bids by an auctioneer was considered in the case of ***Payne* v *Cave*** (1789) 3 Term Rep 148. In this case, it was decided that a call for bids by the auctioneer amounts to an invitation to treat, the bids themselves amounting to offers which the auctioneer is free to accept or reject as they wish. This situation is given implied authority in the Sale of Goods Act 1979, s. 57(2), which provides that a sale in an auction is completed by the fall of the hammer and each party is allowed to withdraw their offer up to this time.

Auction sales however can take two forms, in that goods may be sold with or without a reserve price. Where the goods are put up for sale with a reserve price, that is bids for the goods must reach this minimum price, it has been held (in ***McManus* v *Fortescue*** [1907] 2 KB 1) that no contract results if the auctioneer purports to accept a bid that is lower than the reserve price.

Where the auction is held without reserve no contract of sale materialises between **the owner** of the property and the highest bidder if the auctioneer either refuses or otherwise fails to accept the highest bid. In ***Warlow* v *Harrison*** (1859) 1 E& E 309 it was stated, *obiter dicta,* that in such a case there is a unilateral offer contained in a promise that there will be no reserve between the auctioneer and the bidders. The auctioneer in calling for bids is promising to accept the highest bid and not to apply a reserve and that this unilateral offer is accepted by the highest bidder. Thus if the auctioneer refuses to sell to the highest bidder, **the auctioneer** may be sued for breach of contract. It should be noted that in the unilateral offer there is also a promise not to allow the seller of the goods to bid in order to artificially inflate the price.

This position was affirmed in ***Barry* v *Heathcote Ball & Co. (Commercial Auctions) Ltd*** [2000] 1 WLR 1962. In this case, the defendant was auctioning two new machines on behalf of the Customs and Excise. The machines were valued at £14,251 each. The defendant was instructed to auction these machines without reserve. At the auction the claimant, who had been told that the sale was without reserve, bid £200 for each machine. When the defendant could not get a higher bid he withdrew the machines from the sale and sold them for £750 a few days later by way of a magazine advertisement. The claimant argued that on the highest bidder rule, the auctioneer was legally bound to accept his bid, since in an auction held without reserve the auctioneer was making a unilateral offer to accept the highest bid.

The Court of Appeal, affirming ***Warlow* v *Harrison*,** confirmed there was no contract between the vendors, the Customs and Excise, and the claimant bidder. There was, however, a contract between the auctioneer and the claimant bidder. The measure of damages where a seller refused goods to the buyer was the difference between the contract price and the market price as set out in the Sale of Goods Act 1979, s. 51(3). The Court of Appeal held that despite the fact that there was no contract between the vendor and the claimant, the same measure of damages would apply. Since the judge considered that the machines were valued at £14,000 each, he awarded damages of £27,600.

Principle: Auctions held 'without reserve'

In an auction held 'without reserve' there is an invitation to treat by the auctioneer offering the goods for sale and the bidders make offers which the auctioneer accepts with the fall of their hammer. This is a bilateral contract that determines which bidder is to be the owner of the goods.

In such auctions there is also a unilateral offer in that there is a promise not to apply a reserve by the auctioneer, and to sell the goods to the highest bidder.

4. Tenders

Tenders are a common commercial device used when a company or organisation is seeking to purchase an item or a service. The company will invite tenders (or quotations) from parties interested in supplying the goods or services, the idea being that the company can secure the cheapest (usually) price for the goods or service. Such invitations may be sent out to specific companies or suppliers but equally they may be advertised in a newspaper or trade journal. Such invitations are not offers but invitations to treat, the reason being that very often the company calling for tenders may have other criteria, other than the price, to consider before awarding the contract. It is the supplier therefore that is making the offer, which the company can accept or reject as the case may be. It was also held in ***Spencer* v *Harding*** (1870) LR 5 CP 561 that a statement that goods are to be sold by tender is not normally an offer, and that thus no obligation is created to sell to the person making the highest tender.

In some circumstances, however, an invitation to tender may be held to be an offer.

***Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25**

In this case, the Council owned and managed an airport, raising money by granting a concession to an operator to run pleasure flights from the airport. Shortly before the concession was about to expire in 1983 the Council invited tenders for the right to run the concession, invitations being sent to the plaintiffs and six other interested parties. The terms of submission of bids were that they were to be submitted in an envelope provided by themsleves, which was to bear no mark which could identify the sender. Furthermore, the tender had to be submitted no later than 12 noon on 17 March 1983. The plaintiffs' tender was put in the Town Hall letter box at 11 am

on 17 March. However, although the box should have been cleared at noon, this did not occur. The plaintiffs' tender was subsequently marked down as being submitted late and was therefore not considered. The plaintiffs sued the Council for breach of contract on the basis that it had warranted that had a tender been submitted by the deadline it would be considered and that the Council had acted in breach of that warranty. It was held, on appeal, that in certain circumstances an invitation to tender could give rise to binding obligations. This was such an instance since tenders had been sought from a number of parties, all of them known to the Council, which had also imposed strict rules of compliance on them. It was thus implied that a person submitting a tender in compliance with those rules had the right to have their tender opened and considered along with the others.

Tenders may take two possible forms. They may be specific tenders or standing-offer tenders. The former comprises a tender for a definite quantity of goods to be delivered or sold at a specified time. Here the person requiring or selling the goods makes an invitation to tender, the person wishing to deliver or buy them making the offer, which will be converted into a trading contract when accepted by the first party.

The second type of tender arises when a person invites tenders for the supply of goods or services which *may* be required within a specified time at some future date. An example of such a tender may be where a company invites tenders for the supply of stationery as and when, or if and when, required. Here acceptance of the tender (i.e. the offer) does not create a binding contract. The supplier whose bid is successful is in fact making a standing offer which is accepted every time an order is placed for stationery. At this point the supplier is obliged to meet the order or be in breach of contract, though the supplier is free to revoke the standing offer at any time prior to an order being placed, though they are bound to fulfil orders already received.

The problem of standing offers was considered in the case of the ***Great Northern Railway Co.*** **v** ***Witham*** (1873) LR 9 CP 16 where the plaintiffs invited tenders for the supply of goods, including iron, for a period of 12 months. The defendant submitted a tender to supply the goods over the period at a fixed price in such quantities as may be ordered from time to time. The tender was accepted, but before the expiry of 12 months the defendant refused to supply any more goods and was sued for breach of contract. It was held that just as the plaintiffs were not bound to order goods, the defendant was only bound to supply goods actually ordered and that he could revoke his standing offer at any time provided that revocation was communicated to the other party.

The revocation thus only operated to free him from future obligations, not those which had actually accrued by virtue of the placing of an order. The case thus affirmed the earlier decision of ***Offord*** **v** ***Davies*** (1862) 12 CBNS 748.

In recent years, a new development has occurred in the area of tenders, namely, the referential bid. A referential bid occurs in a competitive tender situation where one party attempts to win the order by reference to a bid submitted by another party.

Example

X offers to pay £100,000 for a coffee house franchise or £10,000 more than any other offer. The latter part of this bid is a referential bid.

The status of referential bids was considered in the following case.

Harvela Investments Ltd v *Royal Trust Co. of Canada (CI) Ltd* [1986] AC 207

An invitation was made to two persons to submit 'offers' for the purchase of a quantity of shares. The first defendants, who were disposing of the shares, also agreed to accept the highest offer received provided it met with other stipulated conditions. The plaintiffs bid $2,175,000 while the second defendant bid $2,100,000 or '$10,000 in excess of any other offer which you may receive which is expressed as a fixed monetary amount whichever is higher'. The first defendants accepted the second defendant's offer. The House of Lords held that the referential bid was ineffective and that the fixed bid of the plaintiffs should have been accepted. The reasoning for this decision was that the House of Lords considered that the idea behind a competitive tender was that the bids were to be confidential and that no bidder would know the amount bid by the other person. The effect of a referential bid would be to defeat the notion of a confidential competitive tender and undermine the competitive tendering process.

5. Ticket cases

One problem that has recurred time and time again concerns the giving of a ticket during the course of entering into the contract. The problem revolves around whether the ticket is a contractual document, thereby rendering the parties subject to the terms and conditions printed or referred to on the ticket, or not. Two factors can influence the role of tickets in contracts: first, whether it was intended that the ticket should amount to a contractual document; and, second, the mode and timing of the issue of the ticket.

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

In this case, the Court of Appeal considered that a sign by some deckchairs for hire constituted an offer, which the plaintiff accepted when he took two of the chairs. The tickets amounted to no more than mere receipts with the result that the terms and conditions on them formed no part of the contract since they were handed out after the contract was concluded.

With regard to timetables and passenger tickets, however, the law is not at all certain. Tickets have been held to be contractual documents on the basis that the proffering of the ticket by a bus conductor or ticket office clerk is an offer which is accepted by the taking of the ticket, as suggested in ***Cockerton* v *Naviera Aznar SA*** [1960] 2 Lloyd's Rep 450. Another view is that a timetable amounts to an offer which is accepted by a passenger either by applying for a ticket or by boarding the bus. The latter problem was discussed in the case of ***Wilkie* v *London Passenger Transport Board*** [1947] 1 All ER 258. In the ***Wilkie*** case, Lord Greene considered that on a bus a contract is made when the intending passenger 'puts himself either on the platform or inside the bus'. The implication here is that the company makes an offer of carriage by running the bus which the passenger accepts by boarding. The fact that a contract arises here despite the fact that no fare has been paid, or ticket issued, renders the statement open to doubt. A better solution would surely be that the company

makes an invitation to treat by virtue of its advertisement or sign on the front, the passenger making an offer when they get on the bus, which is accepted by the conductor's taking the fare and issuing the ticket. The question then arises as to whether the ticket issued is a contractual document or a mere receipt, but no doubt this is one for the court to answer in the circumstances of a particular case and something which we will look at when considering exemption clauses (Chapter 8).

The question of the status of tickets also arose in the following case.

Thornton v *Shoe Lane Parking Ltd* [1971] 1 All ER 686

This case concerned the issue of a ticket by an automatic issuing machine in a car park. It will be discussed more fully when exemption clauses are analysed later (Chapter 8), but in relation to offer and acceptance, the case also has a contribution to make. Broadly speaking, the facts are that the plaintiff went to park his car in the defendant's car park. At the entrance there was a sign which set out the charges and which stated: 'all cars parked at customer's risk'. As customers drove in, a light changed from red to green and a ticket was ejected from the machine. Lord Denning discussed the transaction as follows:

> The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it; but it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money in the machine; the contract was concluded at that time. It can be translated into offer and acceptance in this way. The offer is made when the proprietor of the machine holds out as being ready to receive the money. The acceptance takes place when the customer puts money in the slot. The terms of the offer are contained in the notice placed on or near the machine, stating what is offered for the money. He (the customer) is not bound by the terms printed on the ticket because the ticket comes too late. The contract had already been made.

The decision in the case is certainly a better solution to the status of tickets than Lord Greene's statement in the ***Wilkie*** case which would appear to be wrong.

6. E-commerce

Today buying goods on the Internet is now a very common phenomenon but what is the status of a supplier's website – does it represent an invitation to treat or an offer? Many of the electronic or virtual shopping sites are set out to resemble real stores, so that the potential purchaser browses through the products for sale in much the same way as he or she would do in a shop or supermarket. As the purchaser finds a product they want to buy, they place the item into a virtual shopping basket. When the purchaser has completed their 'shopping trip', the purchaser then submits details of the selected products, their identity (if they have shopped there before, otherwise they will have to register) and their credit/debit card details to the seller. The transaction is thus analogous to the situation seen in ***Pharmaceutical Society of Great Britain*** v ***Boots Cash Chemists (Southern) Ltd***. The goods on the website will constitute an invitation to treat, as in ***Fisher*** v ***Bell***, the offer arising when the buyer submits their details to the seller.

The analysis above is of course dependent on the contents of the website. In appropriate cases it may be possible to argue that the site in fact constitutes an offer, possibly even a unilateral offer of the type seen in ***Carlill*** v ***Carbolic Smoke Ball Co.***, where the purchaser

accepts the offer simply by pressing a button. Clearly website developers have to exercise great care in designing their websites to avoid such a situation from arising.

The sort of difficulties that can arise here can be seen in the case involving Argos Stores, where the company inadvertently offered television sets worth £300 for £3. Many customers purported to accept this offer but of course Argos would have argued that the website constituted an invitation to treat and that the purchasers were making an offer to buy. In such a situation, Argos was in a position to reject the offers made in response to the wrongly priced invitation to treat. No doubt this is a correct analysis but Argos might have found themselves in substantial difficulties if their website could have been considered to be a unilateral offer and the response by the purchasers clicking a button on the site to be an acceptance. Such a transaction would clearly not be in the interests of Argos in these particular circumstances. Of course, this would have required the customers to argue that the website constituted an offer. In the Argos scenario some customers had actually had their orders accepted and confirmed by Argos before the mistake was discovered. Presumably, therefore, they were entitled to insist on receiving a television set for £3. Sadly this is not the case since in ***Hartog* v *Colin and Shields*** [1939] 3 All ER 566 it was held that no contract arises where one party makes an offer to another and he is aware that the other party is acting under a fundamental mistake as to the terms of the offer.

➤ For more on unilateral mistakes as to the terms of an offer refer to Chapter 11

In spite of the fact that there have been a number of European Directives regulating various aspects of the law relating to electronic contracting, none purport to define the status of a website as either an invitation to treat or an offer. Thus reg. 12 of the Electronic Commerce (EC Directive) Regulations 2002 states that an 'order may be but need not be a contractual offer', presumably implying that websites would normally constitute invitations to treat.

Principle

As a general principle websites selling goods would probably amount to an invitation to treat with the customer/buyer making the offer. Whether this is the case however depends on the particular website and how this is constructed.

Offers distinguished from requests for information

Very often, particularly in commercial transactions, substantial negotiations may take place before the terms of the contract are agreed by the parties concerned and the contract itself is entered into. During the period of negotiation one of the parties may simply require further information before they can place themselves in the position of being able to enter the contract. Such a situation is very common where negotiations for the sale of land take place since there may be many questions of detail to be investigated before a formal contract can be entered into.

A similar case is that of ***Clifton* v *Palumbo*** [1944] 2 All ER 497, where the defendant was negotiating the purchase of a large estate owned by the plaintiff who wrote, 'I am prepared to offer you… my… estate for £600,000… I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of Completion.' It was held that, in the circumstances, this letter did not amount to an offer to sell but a mere preliminary statement as to price to enable negotiations to proceed.

***Harvey* v *Facey* [1893] AC 552**

The appellants sent a telegram to the respondent which read, 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'; the respondent replied, 'Lowest price for Bumper Hall Pen, £900.' The appellants then telegraphed, 'We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title deeds in order that we may get early possession.' The appellants received no reply and thereupon brought an action for specific performance. It was held that the action must fail since the respondent's reply was not an offer to sell but simply a statement as to the minimum price required should he decide to sell; his reply was a mere response to a request for information. The appellants' final telegram amounted to the offer to buy, which was not accepted by the respondent.

So far the distinction between offers and requests for information is fairly straightforward, though one wonders if some of the earlier decisions can be considered correct. Would the decision in ***Harvey* v *Facey*,** for instance, be the same today?

Example

If A walks up to B and says, 'How much do you want for your car?' and B replies, '£3500', is this not a contract? Surely the situation is likely to be that if B does not wish to sell he will reply, '£3500, but it is not for sale' or simply, 'The car is not for sale.'

The surrounding circumstances of the case will be important in this type of situation but on the face of things there would appear to be a binding contract today. The courts in any event are not consistent or predictable in this type of case.

***Bigg* v *Boyd Gibbons Ltd* [1971] 2 All ER 183**

In this case, negotiations were taking place for the sale of some freehold property belonging to the plaintiffs. The plaintiffs wrote to the defendants, stating: 'As you are aware that I paid £25,000 for this property, your offer of £20,000 would appear to be at least a little optimistic. For a quick sale I would accept £26,000.' The defendants replied: 'I accept your offer' and asked the plaintiffs to contact the defendants' solicitors. In their final letter the plaintiffs said: 'I am putting the matter in the hands of my solicitors. . . my wife and I are both pleased you are purchasing the property.' The plaintiffs alleged that this exchange of correspondence constituted an agreement for the sale of the property and sought specific performance. The Court of Appeal stated that an agreement on price did not necessarily mean an agreement for sale and purchase, nor did the use of the word 'offer' always amount to an offer in law; however, on the facts it was clear from the correspondence that the plaintiffs' first letter constituted an offer, the acceptance of which by the defendants constituted a binding contract. In this case the parties had gone so far down the road of negotiations that a binding agreement had resulted.

Quite clearly the background circumstances play an important part in determining the nature of a statement as to whether it is indeed an offer or simply a request for further

information. The question is whether the offeror's words or conduct are such as to induce a reasonable person to believe that they intend to be bound, even though they have no such intention. In ***Crest Nicholson (Londinium) Ltd*** v ***Akaria Investments Ltd*** [2010] EWCA Civ 1331, Sir John Chadwick stated that the correct approach for determining whether there was an offer in a proposal that was capable of being accepted was to ask 'whether a person in the position of B (the offeree) (having the knowledge of the relevant circumstances which B had), acting reasonably, would understand that A (the offeror) was making a proposal to which he intended to be bound in the event of an unequivocal acceptance'.

2.2.3 Communication of offers

Clearly an offer cannot take effect until it has been received by the offeree, since they cannot accept something of which they are not aware. The offer must be communicated and received by the offeree to be effective. The principle can be seen in the case of ***Taylor*** v ***Laird*** (1856) 1 H& N 266; 25 LJ Ex 329, where the plaintiff, the captain of a ship, was employed to command a steamer 'for an exploring and trading voyage up the river Niger… at a rate of £50 per month'. The plaintiff took this ship as far as Dagbo, but refused to go further and resigned his command. He later helped to work the ship home and he claimed his wages for this work. It was held that the owners of the vessel were entitled to refuse payment as the plaintiff's offer to help to bring the ship back to its home port was not communicated to them. In other words, they were given no opportunity to either accept or reject his offer.

The timing of the communication of the offer can be of importance when determining the time within which it can be accepted by the offeree. From the above case it is clear that acceptance can only take place when the offer has been received. It follows also that if the offer specifies some date by which the offer must be accepted and that date has passed when the offer is received, then the offeree is not able to accept the offer as the offer has lapsed. Similarly, it may be that there has been a very long delay in the transmission of the offer to the offeree, and in these circumstances it may well be the case, depending on the subject matter of the offer, that the offer has in fact lapsed, rendering it incapable of acceptance.

One problem that arises in the latter context is what happens where the delay in the transmission of the offer is the fault of the offeror themselves. In ***Adams*** v ***Lindsell*** (1818) 1 B& Ald 681, the defendants offered to sell wool to the plaintiffs. Their letter of offer was wrongly addressed so that it reached the plaintiffs two days later than the defendants could, in normal circumstances, have expected it to arrive. The plaintiffs, on receiving the letter, immediately accepted the offer and it was held that they were entitled to do so, creating a binding contract, despite the fact that the defendants had considered that the offer had lapsed by the delay and sold the wool to a third party. It would seem from the case that the significant factor was the negligence of the defendants in addressing the letter and that if the delay had been caused by some other factor, then it is possible that the decision could have been the reverse.

Principle

An offer cannot take effect until it has been received by the offeree, since they cannot accept something of which they are not aware. Thus acceptance of the offer is only possible once the offer has been received. It follows that if the offer specifies some date by which the offer must be accepted and that date has passed when the offer is received, then the offeree is not able to accept the offer as the offer has lapsed.