the court felt that it was reasonable for the agent to exclude his liability, as it might be if the property was very old and there had been no survey.

However, the matter of reasonableness is a matter for the court in each case and will depend upon the circumstances. Thus an estate agent may be allowed to enforce a disclaimer in the case of a high value property where the client is a more sophisticated person whereas in the case of a property of less value and a less sophisticated client the court may take the view that enforcement of a disclaimer by the agent is unreasonable. (Contrast *McCullagh* v *Lane Fox* with *Smith* v *Eric S Bush*: Chapter 21.)

It is also worth noting that the Property Misdescriptions Act 1991 makes it a criminal offence to make a false or misleading statement about property matters in the course of an estate agency or property development business.

Section 3 also applies to non-business liability. A private seller cannot exclude his liability for misrepresentation unless he can show that the exclusion clause concerned satisfied the test of reasonableness.

Walker v *Boyle*, 1982 – When liability for misrepresentation cannot be excluded (**186**)

Reasonableness

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The burden of proof

The burden of proving that the clause is reasonable lies upon the party claiming that it is – usually B, the person in business (s 11(5)).

Meaning of reasonableness

Although the matter is basically one for the judge, the following guidelines appear in the 1977 Act.

(a) The matter of reasonableness must be decided on the circumstances as they were when the contract was made (s 11(1)).

(b) Where a clause limits the amount payable regard must be had to the resources of the person who included the clause and the extent to which it was possible for him to cover himself by insurance (s 11(4)). The object of this rule is to encourage companies to insure against liability in the sense that failure to do so will go against them if any exclusion clause which they have is before the court. However, in some cases it may be right to allow limitation of liability, e.g. in the case of professional persons such as accountants where monetary loss may be caused to a horrendous amount following negligence and be beyond their power to insure against.

(c) Where the contract is for the supply of goods, i.e. under a contract of sale, hire-purchase, hiring, or work and materials, the criteria of reasonableness are laid down by s 11(2) of and Sch 2 to the 1977 Act. They are:

(i) strength of the bargaining position of the parties. Thus if one party is in a strong position and the other in a weaker in terms of bargaining power, the stronger party may not be allowed to retain an exclusion clause in the contract;

(ii) availability of other supplies. Again, if a seller is in a monopolistic position so that it is not possible for the buyer to find the goods readily elsewhere, the court may decide that an exclusion clause in the contract of a monopolistic seller shall not apply;

(iii) inducements to agree to the clause. If the goods have been offered for sale at £10 without an exemption clause but at £8 with the inclusion of the clause, the court may see fit to allow the clause to apply at the lower price because there has been a concession by the seller in terms of the price;

(iv) buyer's knowledge of the extent of the clause. If the clause had been pointed out to the buyer and he is fully aware that it reduces the liability of the seller, this will be relevant in deciding whether the seller should be allowed to rely on the clause. If a buyer is reasonably fully informed and aware of the seller's intentions as regards exclusion of liability, the buyer may have to accept the clause;

(v) customs of trade and previous dealings. If, for example, exclusion clauses are usual in the trade or have been used by the parties in previous dealings, the court may decide that an exclusion clause should apply. It should be noted that previous dealings do not seem relevant in consumer transactions, unless quite regular, but they are in this area where one is considering a non-consumer situation;

(vi) whether the goods have been made, processed or adapted to the order of the buyer. Obviously if the seller has been required by the buyer to produce goods in a certain way, then it may well be fair and reasonable for the seller to exclude his liability in respect of faults arising out of, for example, the buyer's design which he insisted was used. It would probably be reasonable to exclude the implied term under the Sale of Goods Act 1979 that the goods were fit for the purpose (see further Chapter 14).

Although the above criteria are, strictly speaking, confined to exclusion of statutory implied terms in, for example, the Sale of Goods Act 1979, they are being applied in other situations. For example, Judge Clarke in the *Woodman* case (see below) felt it was right to use them where what was at issue was a negligent service. The Supply of Goods and Services Act 1982 has not changed the law regarding the exclusion of liability of a supplier of services. Services are not specifically mentioned in the 1977 Act but they fall within the ambit of ss 2 and 3 which deal with negligence and breach of contract respectively.

Mitchell (George) (Chesterhall) Ltd v *Finney Lock Seeds Ltd*, 1983 – Reasonableness: the tests to be applied (**187**)

Reasonableness – other case law

The following is a selection of other case law on the 1977 Act to illustrate its application.

Section 2(2) came up for consideration in two county court cases which were brought under the Act. In *Woodman* v *Photo Trade Processing Ltd*, heard in the Exeter County Court in May 1981, Mr Woodman took to the Exeter branch of Dixons Photographic for processing a film which carried pictures of a friend's wedding. The film was of special value because Mr Woodman had been the only photographer at the wedding, and he had said he would give the pictures as a wedding present. Unfortunately, the film was lost and when Dixons were sued they relied on an exclusion clause which, it appeared, was standard practice throughout the trade and had been communicated. The clause read as follows: 'All photographic materials are accepted on the basis that their value does not exceed the loss of the material itself. Responsibility is limited to the replacement of film. No liability will be accepted consequently or otherwise, however caused.' His Honour Judge Clarke found in the county court that the customer had no real alternative but to entrust his film to a firm that

would use such an exclusion clause and that, furthermore, Dixons could have foreseen that the film might be irreplaceable and although they could argue that the exclusion clause enabled them to operate a cheap mass-production technique, it could not be regarded as reasonable that all persons, regardless of the value of their film, should be required to take their chance of the system losing them. The judge therefore granted compensation of £75 to Mr Woodman and held that the exclusion clause was unreasonable.

In *Waldron-Kelly* v *British Railways Board*, which was heard in the Stockport County Court in 1981, the claimant delivered a suitcase to Stockport railway station so that it could be taken to Haverfordwest station. The contract of carriage was subject to the British Railways Board general conditions 'at owner's risk' for a price of £6. A clause exempted the Board from any loss, except that if a case disappeared then the Board's liability was to be assessed by reference to the weight of the goods, which in this case was £27 and not to their value, which in this case was £320. The suitcase was lost whilst it was in the control of British Rail. In the county court Judge Brown held that the claimant succeeded in his contention that the exclusion clause was unreasonable and therefore of no effect. The judge held that in the case of non-delivery of goods the burden of proof to show what had happened to the goods was on the bailee. British Rail had failed to show that the loss was not its fault, and in any case the fault and loss were not covered by the exclusion clause because it did not satisfy the test of reasonableness.

Further, in *Stag Line Ltd* v *Tyne Ship Repair Group Ltd* [1984] 2 Lloyd's Rep 211 Staughton, J, in finding that exclusion clauses inserted into the contract by the defendants were not fair and reasonable, said:

> The courts would be slow to find clauses in commercial contracts made between parties of equal bargaining power to be unfair or unreasonable, but a provision in a contract, which deprived a ship owner of any remedy for breach of contract or contractual negligence unless the vessel were returned to the repairer's yard for the defect to be remedied would be unfair and unreasonable because it would be capricious; the effectiveness of the remedy would depend upon where the ship was when the casualty occurred and whether it would be practical or economic to return the vessel to the defendants' yard.

Also in *Rees-Hough Ltd* v *Redland Reinforced Plastics Ltd* [1984] Construction Industry Law Letters 84, His Honour Judge Newey QC decided that it was not fair and reasonable for the defendants to rely on an exclusion clause in their standard terms and conditions of sale. They had sold pipes to the claimants which were not fit for the purpose for which the defendants knew they were required, nor were they of merchantable (now satisfactory) quality under the Sale of Goods Act 1979 (see further Chapter 14) and the clause excluded liability for this. Clearly, then, it is difficult to apply exclusion clauses which try to prevent liability for supplying defective goods.

Where there is no contract, as in the *Hedley Byrne* situation where a bank used a 'without responsibility' disclaimer, s 2(2) of the Act applies the 'reasonable' test to the disclaimer (see further Chapter 21).

Provisions against evasion of liability

General

If an attempt is made to exclude or restrict liability in contract X by a clause in a secondary contract Y, then the clause in Y is ineffective (s 10). For example, C buys a television set from

B. There is an associated maintenance contract. The sale of a television would be within s 6 of the 1977 Act and so there could be no exclusion of B's implied obligations. Any attempt to exclude or restrict these obligations in the maintenance contract would also fail. If the transaction was a non-consumer one the 'reasonable' test would have to be applied.

Nor can the Act be excluded by a clause which states that the contract is to be governed by the law of another country which does not outlaw exclusion clauses, at least if it is part of an evasion scheme, or if the contract is with a United Kingdom consumer and the main steps in the making of the contract took place in the UK (s 27).

The Act does not apply to insurance contracts, nor to contracts for the transfer of an interest in land (s 1(2) and Sch 1, para 1(a) and (b)). House purchase is therefore excluded though inducement liability cannot be excluded unless reasonable (see above). Nor does it apply to certain contracts involving the supply of goods on an international basis because these are covered by conventions. Furthermore, it should be noted that a written arbitration agreement will not be treated as excluding or restricting liability for the purposes of the 1977 Act and such an agreement is valid (s 13(2)).

Office of Fair Trading and the Enterprise Act 2002

The Office of Fair Trading is empowered to deal with infringements (i.e. conduct) that harms the collective interests of consumers (ss 211 and 213, EA 2002). In addition to its enforcement powers, s 7 of the EA 2002 gives the OFT the function of making proposals to any Minister of the Crown on amongst other things proposed changes in the law. It was under a similar provision in earlier legislation that the Consumer Transactions (Restrictions on Statements) Order 1976 (SI 1976/1813) as amended by SI 1978/127 was passed to make it a criminal offence to sell or supply goods and purport that the implied terms in sale of goods and hire-purchase legislation can be excluded in a consumer sale since this might suggest to the customer that he has no rights so that he will not bother to try to enforce them.

Unfair contract terms regulations

The Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) now implement the EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC).

Terms covered (reg 3)

The Regulations apply to any term in a contract between a seller or supplier who is acting for purposes relating to his business and a consumer, i.e. a natural person (not a company) who is acting for purposes outside of business where the term has not been individually negotiated. Although the Regulations apply to oral contracts, it is businesses which use pre-printed contract terms, the substance of which cannot be influenced by the consumer, which are most affected by the Regulations.

No assessment is made of the fairness of terms which identify the goods or services to be supplied or the price or remuneration involved, provided such terms are in plain intelligible language. The fact that some terms of a contract have been negotiated will not prevent the contract being unfair if on an overall assessment it is found to be a pre-formulated standard contract. The seller or supplier must prove that a term in dispute was individually negotiated.

Under Sch 1 certain contracts and their terms are excluded from the scope of the Regulations, e.g. employment contracts and contracts relating to the incorporation and

organisation of companies and partnerships. In addition, a contract that complies with other relevant UK legislation, e.g. the Package Travel Regulations will not be further tested under the Unfair Terms Regulations. Sales by auction are not excluded.

Unfair terms (reg 4)

An unfair term is any term which, contrary to the requirement of good faith, causes a significant imbalance in the rights and obligations of the parties under the contract, to the detriment of the consumer. The concept of good faith is thus introduced more widely into English law, having really only applied before to the disclosure requirement in a contract of insurance, which is a contract of utmost good faith.

Schedule 2 sets out matters which go to deciding whether the contract meets the requirement of good faith. These are:

- the strength of the bargaining positions of the parties;
- whether the consumer had an inducement to agree to the term, e.g. where the goods were cheaper if the term was included, it might survive;
- whether the goods or services were sold or supplied to the special order of the consumer, e.g. where goods were made to a consumer's design or adapted to the consumer's requirements, it might be fair to include a term relating to the possible unfitness of the goods for the intended purpose;
- the extent to which the seller or supplier has dealt fairly and equitably with the consumer.

Schedule 3 gives an indicative and non-exhaustive list of terms which may be regarded as unfair. This does not mean that they are automatically unfair. There are 17 examples including clauses:

- excluding or limiting the liability of a seller or supplier in the event of the death or personal injury of or to a consumer resulting from an act or omission of that seller or supplier;
- requiring any consumer who fails to meet his obligations to pay a disproportionately high sum in compensation. This could include, e.g., a non-refundable deposit;
- enabling the seller or supplier to alter the contract unilaterally;
- limiting the consumer's rights in the event of total or partial non-performance by the seller or supplier;

and so on.

It is worth noting here the somewhat unfortunate overlap between the 1999 Regulations and the Unfair Contract Terms Act 1977. The first example in the above list which is 'unfair' under the Regulations is actually totally barred by the 1977 Act in s 2(1). The other examples given in Sch 3 would probably be regarded as inapplicable because they do not satisfy the 'reasonableness' test of the 1977 Act. The government did not feel able to align the 'reasonableness' test and the 'fairness' test but did announce in the Final Consultation Document in September 1994 that the Regulations would not limit the 1977 Act, so we can take it that our first example is totally outlawed so that there is no need to apply the 'fairness' test.

There are differences between the two pieces of legislation. The Act applies to exclusion clauses in consumer contracts but can extend to business contracts, negotiated contracts and exclusion notices. The Regulations apply only to consumer contracts where the terms were not individually negotiated and in that sense are narrower but, since they are not limited to exclusion clauses, their effect may be much wider. Regulation 4 also states that an assessment of the unfair nature of a term should take into account: (a) the nature of the goods or services for which the contract was concluded; (b) the circumstances attending the conclusion of the contract; and (c) the other terms of the contract or of another contract on which it is dependent.

Consequences of inclusion of unfair terms (reg 5)

An unfair term is not binding on the consumer but the contract will continue to bind the parties if it is viable without the unfair term.

Construction of written contracts (reg 6)

Standard form contracts offered to consumers must be expressed in plain intelligible language. If there is any doubt about the meaning of a term the interpretation most favourable to the consumer shall prevail. This rule of construction applies only if the term under review is regarded as unfair. It does not apply to other terms not so regarded.

Enforcement by the Office of Fair Trading (OFT)

The Regulations and the Enterprise Act 2002 impose on the OFT a duty to consider complaints that contracts which have been drawn up for general use are unfair unless the complaint appears to be vexatious or frivolous. The OFT may apply to the court for an enforcement order against persons who appear to be recommending or using unfair terms in contracts with consumers. The OFT may also arrange for the dissemination of information and advice concerning the operation of the Regulations.

The Director-General of Fair Trading (see now Office of Fair Trading) achieved a substantial victory for borrowers in the Court of Appeal where the court gave the first authoritative guidance on the regulations (see *Director-General of Fair Trading* v *First National Bank plc* (2000) *The Times*, 14 March where the court ruled in favour of the Office of Fair Trading which had taken exception to a provision in a lending contract, apparently common to most banks in the UK, under which the lender was entitled to contractual interest on outstanding capital even after obtaining a judgment against the defaulting debtor until payment, which goes against the 'no interest' protection normally applied by court orders in this type of case, i.e. no interest accrues on the debt after judgment. An injunction (now an enforcement order) to stop the practice was granted against the bank.

Wider enforcement

The Regulations and Enterprise Act 2002 allow specified bodies referred to as 'qualifying bodies' or enforcers to consider complaints and apply for enforcement orders to restrain the use of unfair terms. The qualifying bodies include for example the various industry regulators and the Consumers' Association.

Terms affected

Examples are provided by an *Office of Fair Trading Case Report Bulletin*, as follows:

- *a mobile phone company* that required the consumer to pay for call charges even after giving the supplier notification of the loss/theft of the phone – *changed* so that call charges only payable up to the time of notification;
- *airline recruitment and training company* that gave itself the right to alter course venues, dates and times – *changed* to allow a full refund if changes not suitable;
- *a package holiday business* that allowed retention of prepayments on a sliding scale to 100 per cent loss of deposit on cancellation two weeks before departure – *changed* so that scale taper lengthened with full loss of deposit only in final week;
- *a property letting company* that had a financial penalty of £5 per day when payment was in arrears – *this was withdrawn altogether*.

Reform

The Law Commission has published proposals for a reform of the law relating to unfair contract terms. The intention is to replace the current legislation with new legislation extending the protection of the law to businesses particularly small and medium-sized enterprises including companies.

Trading electronically

Organisations selling online need to take into account the provisions of the law relating to unfair terms in the same way as other traders. The relevant legislation as described in this chapter applies.

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ILLEGALITY, PUBLIC POLICY AND COMPETITION LAW

In this chapter we are concerned to describe the effect of illegality and public policy on the freedom of contract. The more commercial aspects of restraint of trade and restrictive practices are treated in greater depth as is competition law.

Introduction

Freedom of contract must always be subject to overriding considerations of public policy.

Public policy has been ascertained as follows:

(a) At common law by the judiciary. At one time the judiciary had wide powers of discretion in the matter of creating new categories of public policy but this view is now unacceptable. In *Fender* v *Mildmay* [1937] 3 All ER 402 the House of Lords declared against the extension of the heads of public policy, at least by the judiciary. However, up to then the judiciary had created a number of categories of public policy. These fell into two areas as follows:

(i) *Illegal contracts*. These involve some degree of moral wrong and contracts to commit crimes or to defraud the Revenue fall into this category.

(ii) *Void contracts*. In these cases there is not in any strict sense blameworthy conduct; the contracts are rendered void because if enforced by the courts they could produce unsatisfactory results on society. Examples are contracts in restraint of trade, e.g. an agreement under which an employee covenants with his employer that on the termination of his contract he will not work for a rival firm or start a competing business, and contracts prejudicial to marriage, e.g. a contract under which a person promises not to marry at all.

(b) By Parliament. Parliament expresses its view as to what is public policy by Acts of Parliament and rules and orders made by Ministers under Acts of Parliament.

The two main areas requiring consideration here are:

(i) *Wagering contracts*, which will be dealt with later; and

(ii) *The prevention of restrictive practices*. Here the Competition Act 1998 applies and prohibits, e.g., resale price agreements between suppliers of goods and retailers who agree not to sell below the minimum resale price agreed by the suppliers. This is covered by Prohibition 1 of the 1998 Act and any agreement that infringes the Chapter 1 prohibition is void and unenforceable.

The European Court of Justice confirmed in *Courage* v *Crehan* [2002] QB 507 that EU law required national courts to award relief, including damages, to any person suffering as a result of infringements of EU competition law. Under s 60(6)(b) of the Competition Act 1998 courts are required to follow this ruling when deciding what remedies to award in regard to infringements of UK competition law. Therefore, damages and injunctions should now be available to those who have suffered as a result of infringements of the UK Competition Act 1998. The provisions of the Competition Act 1998 and the Enterprise Act 2002, including third-party rights, are considered in more depth later in this chapter.

Crehan in the Lords

As a result of the ECJ ruling the UK Court of Appeal later awarded Bernie Crehan damages of £131,336, having decided that a lease agreement between a brewer and a publican Mr Crehan which tied him to buying beer at more expensive prices than other local pubs contravened Art 81. The Court of Appeal followed as a precedent a European case involving Whitbread which had a beer-tie with its tenant.

The brewer appealed to the House of Lords against the ruling of the Court of Appeal (see *Inntrepeneur Pub Company* v *Crehan* [2006] 4 All ER 465). The House of Lords ruled that beer-ties *did not infringe Art 81* and that Mr Crehan was not entitled to any damages. The Lords' judgment shows that an English court is entitled to consider all evidence before it and does not have to follow an ECJ decision which presented similar facts but in which Mr Crehan was not involved. However, the House of Lords did state, perhaps rather helpfully, that a party to an agreement that *does infringe Art 81* has a right to sue for damages.

Public policy – the contribution of the judiciary: illegal contracts

Illegal contracts

These contracts involve some form of moral weakness which society in general seeks to control. They are as follows:

(a) Contracts to commit crimes or civil wrongs. Thus a contract between an agent and his client whereby the agent was to receive a double commission would be illegal because it has as its object the commission of a fraud on the principal, since if the agent takes a double commission there is a conflict of interest.

(b) Contracts involving sexual immorality. Agreements for future illicit cohabitation are void, because the promise of payment might encourage immoral conduct in a person who otherwise would not have participated. However, a contract under which a person promises to pay another money in return for past illicit cohabitation is not illegal because it does not necessarily encourage future immorality between the parties. Such a contract will, however, be unenforceable unless made by deed because it is for past consideration. Furthermore, contracts which are on the face of it legal may be affected if *knowingly* made to further an immoral purpose. Immorality seems to refer only to extra-marital sexual intercourse.

It may be asked whether legally enforceable rights of maintenance may be created by a contract between cohabitants, i.e. persons who live together as husband and wife though unmarried. Certainly, a contract could be made, but its enforceability is doubtful. It was the view of the House of Lords in *Fender* v *St John Mildmay* [1937] 3 All ER 402 that the courts

could not enforce an immoral promise between a man and a woman such as the payment of money or some other consideration in return for an immoral association. However, much depends upon the view a court would now take of this. The older cases, such as *Fender*, tended to regard the payment of money as a reward for and to induce the sexual aspect of the relationship. It may be that the courts would enforce a maintenance agreement which was entered into as part of a stable relationship between cohabitants, and which could not be seen as mere payment for a sexual relationship.

Nevertheless, in *H* v *H The Times*, 22 April 1983, the court refused to enforce maintenance support provisions in what was in effect a wife-swapping contract intended by the four parties to be permanent. Thus the matter of enforceable maintenance by contract must remain doubtful in terms that it may be contrary to public policy. In addition, the court may not enforce it on the basis that the parties did not intend to create legal relations, a concept which may affect contracts between members of a family or friends. This is unlikely to be a problem where the contract is in writing or by deed and especially so if the agreement is made following legal advice.

(c) Pre-nuptial agreements. In *M* v *M* (2002) 152 New Law Journal 696 the High Court held that a pre-nuptial agreement signed in Canada provided useful information as to the parties' intentions but went on to award a much higher sum to the wife. The judge could also have awarded less if the circumstances had required it. English law is at odds with many other jurisdictions in Europe and the English-speaking world in terms of the enforceability of these agreements. Individuals of high net worth coming to live in the UK should be advised that our courts are not impressed with such agreements and may regard the financial provisions as on the low side particularly if there are children or the marriage has lasted for some years. As we have noted, the judiciary is not obliged to enforce such agreements because they are contrary to public policy. The view is that they provide encouragement to violate the marriage tie that might be injurious to the public generally (*Fender* v *St John Mildmay* (1937) above). The judgment of Mr Justice Thorpe in *F* v *F* [1995] 2 FLR 45 is also relevant. He described pre-nuptial agreements as having 'a very limited significance in this jurisdiction'. A government Green Paper in 1998 supported such agreements but legislation has not been forthcoming.

(d) Contracts prejudicial to good foreign relations. This category includes contracts to carry out acts which are illegal by the law of a foreign and friendly country, since to enforce such contracts would encourage disputes.

(e) Contracts prejudicial to the administration of justice. Thus, a contract tending to defeat the bankruptcy laws is illegal at common law.

(f) Contracts tending to corruption in public life. A contract to procure a title or honour is illegal under this head.

(g) Contracts to defraud the Revenue. This applies to frauds in connection with national taxes or local business rates.

Dann v *Curzon*, 1911 – A contract to commit a crime (**188**)
Pearce v *Brooks*, 1866 – The prostitute's carriage (**189**)
Regazzoni v *KC Sethia*, 1958 – A contract to avoid apartheid sanctions (**190**)
John v *Mendoza*, 1939 – An attempt to avoid a bankruptcy (**191**)
Parkinson v *College of Ambulance*, 1925 – Buying a title (**192**)
Napier v *National Business Agency Ltd*, 1951 – A tax fiddle that failed (**193**)

Consequences

The consequences of illegality in the above cases depend upon whether the contract was unlawful on the face of it, i.e. there was no way in which lawful performance could be achieved, or whether the contract was lawful on the face of it, i.e. it could have been performed in a lawful manner.

(a) Contract unlawful on face of it. This includes all the categories mentioned above except some contracts involving sexual immorality. The consequences where the contract is unlawful on the face of it are as follows:

(i) The contract is void and there is no action by either party for debt (see *Dann* v *Curzon*, 1911), damages, specific performance or injunction.
(ii) Money paid or property transferred to the other party under the contract is irrecoverable (see *Parkinson* v *College of Ambulance* (1925)) unless:
   (1) The claimant is relying on rights other than those which are contained in the contract. Thus, if A leases property to B for five years and A knows that B intends to use the property as a brothel, A cannot recover rent or require any covenant to be performed without pleading the illegal lease. However, at the end of the term A can bring an action for the return of his property as *owner* and not as a landlord under an illegal lease. In addition, if the action is to redress a wrong which, although in a sense connected with the contract, can really be considered independent of it, the law will allow the action.
   (2) The claimant is not *in pari delicto* (of equal wrong). Where the contract is unlawful on the face of it, equal guilt is presumed but this presumption may be rebutted if the claimant can show that the defendant was guilty of fraud, oppression or undue influence.
   (3) The claimant repents provided that the repentance is genuine and performance is *partial* and not *substantial*.

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Bowmakers Ltd v *Barnet Instruments Ltd*, 1944 – Where the claimant sues as owner (**194**)

Edler v *Auerbach*, 1950 – An action independent of the illegal contract (**195**)

Hughes v *Liverpool Victoria Legal Friendly Society*, 1916 – A contract induced by fraud (**196**)

Bigos v *Bousted*, 1951 – Where repentance is not genuine (**197**)

Taylor v *Bowers*, 1876 – A partial performance (**198**)

Kearley v *Thomson*, 1890 – A substantial performance: no redress (**199**)

(b) Contract lawful on face of it. The result here is as follows:

(i) Where both parties intended the illegal purpose. There is no action by either party for debt, damages, specific performance or injunction (see *Pearce* v *Brooks* (1866)) or to recover money paid or property transferred under the contract.
(ii) Where one party was without knowledge of the illegal purpose. The innocent party's rights are unaffected and he may sue for debt, damages, specific performance or injunction, or to recover money paid or property transferred.
(iii) The party who would have performed the contract in an unlawful manner has no action on it nor can he recover property delivered to the other party under the contract.