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*.

16

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.

Fielding and Platt Ltd v *Najjar*, 1969 – An action by an innocent party (**200**)

Cowan v *Milbourn*, 1867 – Where the claimant intended unlawful performance (**201**)

Berg v *Sadler and Moore*, 1937 – Unlawful performance: no recovery of money or property (**202**)

Public policy and the judiciary – void contracts

These contracts do not involve any type of moral weakness but are against public policy because they are inexpedient rather than unprincipled. The contracts concerned are contracts to oust the jurisdiction of the courts, contracts prejudicial to the status of marriage and contracts in restraint of trade. These are dealt with individually below.

Contracts to oust the jurisdiction of the courts

A contract which has the effect of taking away the right of one or both of the parties to bring an action before a court of law is void, though it may be possible to *sever* the offensive part of the contract and enforce the rest. This rule does not make void honourable pledge clauses because in such cases the parties do not intend to be bound by the contract at all. If the contract is to be binding, however, then the parties cannot exclude it from the jurisdiction of the courts. Furthermore, arbitration clauses are not affected. Many commercial contracts contain an arbitration clause, the object being to provide a cheaper or more convenient remedy than a court action. An arbitration clause in a contract is not void if the effect of it is that the parties are to go to arbitration *first* before going to court. An arbitration clause which denies the parties access to the courts completely is, of course, invalid.

Goodinson v *Goodinson*, 1954 – Severing an unlawful promise (**203**)

Contracts prejudicial to the status of marriage

A contract in absolute restraint of marriage, i.e. one in which a person promises not to marry at all, is void. Partial restraints, if reasonable, are said to be valid, e.g. a contract not to marry a person of a certain religious faith, or not to marry for a short period of time. However, there are no recent cases and it may be that even a partial restraint would be regarded as void today. Marriage brokage contracts, i.e. contracts to introduce men and women with a view to their subsequent marriage, are also void on the ground that third parties should not be free to reap financial profit by bringing about matrimonial unions.

As regards separation agreements, these are invalid if made for the future, as where a husband promises that he will make provision for his wife if she should ever live apart from him, unless the agreement is made as part of a reconciliation arrangement. In this case the agreement is valid, although it may make provision for a renewed future separation. If the parties are not living in amity or are actually separated, then a separation agreement is valid. Once it is apparent that the parties cannot live together in amity, it is desirable that a separation which has become inevitable should be concluded upon reasonable terms.

The special case of the pre-nuptial agreement has already been considered.

Contracts in restraint of trade

Originally all contracts in restraint of trade were regarded as void but in the seventeenth century the courts began to allow certain of them to operate if reasonable, apparently because of the reluctance of masters to train apprentices unless they were able to restrain those apprentices in some way on the completion of the apprenticeship.

Because of the obvious importance of this area of the law, together with restrictive practices generally, the remainder of this chapter will be devoted to this subject.

Contracts in restraint of trade – generally

Such contracts are *prima facie* void and will only be binding if reasonable. Thus the contract must be reasonable between the parties which means that it must be no wider than is necessary to protect the interest involved in terms of the area and time of its operation. It must also be reasonable as regards the public interest. Finally, the issue of reasonableness is a matter of law for the judge on the evidence presented to him which would include, for example, such matters as trade practices and customs.

Even where the employee receives a special payment to accept the covenant, it must still be reasonable and justified by the employer. (See *Turner* v *Commonwealth & British Minerals Ltd* (1999) *The Independent*, 29 November.)

Wyatt v *Kreglinger and Fernau*, 1933 – Restraint of trade and the public interest (**204**)

Voluntary contractual restraints of trade on employees generally

Here the contract is entered into voluntarily by the parties and as regards employees it should be noted that there are only two things an employer can protect:

(a) Trade secrets. A restraint against competition is justifiable if its object is to prevent the exploitation of trade secrets learned by the employee in the course of his employment. In this connection it should be noted that the area of the restraint must not be excessive. Furthermore, a restraint under this heading may be invalid because its duration is excessive.

(b) Business connection. Sometimes an employer may use a covenant against solicitation of persons with whom the employer does business. The problem of area is less important in this type of covenant, though its duration must be reasonable. The burden on the employer increases as the duration of the restraint is extended, though in rare situations a restraint for life may be valid.

Forster & Sons Ltd v *Suggett*, 1918 – A restraint in regard to trade secrets (**205**)

Home Counties Dairies v *Skilton*, 1970 – A restraint preventing customer solicitation (**206**)

Fitch v *Dewes*, 1921 – A client restraint for life (**207**)

Restraint in the City of London

The problems involved in holding on to key staff in City of London financial institutions has been a matter of much publicity in recent times.

An important Court of Appeal decision gives some protection against poaching. It held that a provision in a company manager's service contract prohibiting him during employment, and for one year after leaving, from offering a partnership or employment to any person who had at any time during the manager's employment also been employed by the company as a director or senior employee of the company, was a reasonable restraint and enforceable. A clause which prohibited the poaching of any employee, regardless of status, was struck down as too wide. (See *Dawnay Day & Co Ltd* v *D'Alphen* [1997] IRLR 442.)

The managers concerned were acting as inter-dealer brokers with Dawnay Day, an investment bank. The managers had also entered into a joint venture with Dawnay Day but non-solicitation of staff clauses in the shareholder's agreement were held to be in unreasonable restraint of trade because they were too wide, since they applied to all staff from top to bottom of the company.

The importance of the case lies in the fact that there were conflicting decisions in previous case law as to whether an employer had a legitimate interest in maintaining a stable, trained workforce.

This case takes the line that there is a legitimate interest which can be protected. It is of great importance to the City since, if there was no legitimate interest in retaining the senior workforce, a competitor could take senior staff into his own organisation, in effect taking over the former employer's business without actually paying for it. It is important to note that the case does not cover the situation where an employee leaves because a job is advertised in the other organisation, for which he applies. The basis of the case is *solicitation* of employees.

Contractual restraints on employees through the period of notice

In recent times the court has had to consider the validity of contracts of service with restrictively long periods of notice which have sometimes been given to able and ambitious executives. Typically such contracts provide that if the employee leaves he must give notice of, say, one year and during that time the employer can suspend him from work but agrees to give him full pay and other benefits. The contract will normally also provide that the employer may exclude the employee from the workplace so that he cannot after serving his notice obtain any further information which might be of benefit to the new employer nor can he work for the new employer during the period of notice without being in breach of contract. He can either do nothing or pursue his hobbies. This is why the period of notice has been called 'garden leave'.

A specific provision in the contract is essential if the employee is to be excluded from work. *William Hill Organisation* v *Tucker* [1998] IRLR 313 decides that otherwise the employee has the right to work.

A 'garden leave' contract typically does not contain a restraint clause but the employee can be restrained from competing, during what is usually a long period of notice, because he is still employed during the notice period and so owes *a duty of fidelity to his employer at common law* not to compete. The 'garden leave' contract is an alternative to a restraint clause and allows the court to adopt a more flexible approach in that the employer may be granted an

injunction to prevent competition during the period of notice if, *on the facts*, it is reasonable to do so, as where the competition is serious. This happened in *GFI Group Inc* v *Eaglestone* (1994) 490 IRLB 2 where the High Court held that an injunction could be granted to prohibit a highly-paid foreign exchange options broker from working for a rival firm during his notice period of 20 weeks, so that for that period of time he could not assist a competing organisation to deal with the business connections of his employer. If the competition is not so serious, a claim for damages can be brought, as the Court of Appeal decided in *Provident Financial Group plc* v *Whitegates Estate Agency* [1989] IRLR 84.

If, however, a restraint clause is put into a severance package when the employee leaves, the clause must satisfy the general test of reasonableness. The duty of fidelity at common law does not exist since the former employee is no longer employed. Thus, if the clause is too wide, the court cannot give any protection even if, *on the facts*, the competition is severe, as the Court of Appeal decided in *JA Mont (UK) Ltd* v *Mills* [1993] IRLR 172. For example:

(a) A surveyor with a firm of estate agents is on 'garden leave' and takes a job with a major competing estate agency in the same town. The court may well grant an injunction on the grounds of the surveyor's breach of the duty of fidelity at common law. However, if the court feels that injunctive relief is unreasonable, a claim for damages could be allowed. If the surveyor went to work for a firm of estate agents in the next town, the court might decide on the facts that no relief of any kind should be given.

(b) If the surveyor had left his job and as part of a severance package he was restrained from working for a firm of estate agents anywhere in the UK for five years, the restraint would obviously be too wide and wholly void. That being so the court could not give the employer any relief, even if the surveyor went to work for a rival firm of estate agents next door to his former employer!

Payments in lieu of notice (PILON) – effect on employee restraints

An employer who is in breach of contract may not be able to enforce agreements in restraint of trade. Thus an employer who, without cause, dismisses an employee without notice is in breach of contract and the court would be unlikely to uphold any post-employment restraints on the employee. The authority for this is *Atkins* v *General Billposting* [1909] AC 118. Where the contract contains a PILON clause and the employer makes such a payment then he or she is not in breach of contract and post-employment restraints can be enforced if reasonable. There was doubt as to the position where although the contract did not contain a PILON clause the employer nevertheless dismissed without notice but made a payment in lieu. The possibility was that the employer was in breach of contract and that the payment was a non-contractual payment of damages. In these circumstances did post-employment restraints become unenforceable?

In *Mackenzie* v *CRS Computers Ltd* [2002] Emp LR 1048 the Employment Appeal Tribunal ruled that a payment in lieu, not provided for by the contract, was not a repudiation of the contract provided the employer paid the ex-employee a sum representing his salary and loss of any relevant benefits. Therefore, *Atkins* did not apply and other clauses, including presumably restraint clauses, would apply if reasonable. In this case the clause that survived related to the fact that the ex-employee should pay settlement charges on the lease of a company car provided to him if he left, as here, during the first year of employment. There is another important aspect of *MacKenzie* because where there is a PILON clause, the payment is contractual and tax is payable on it. A payment without a PILON clause is, on the face of it, in the nature of damages and may be entitled to tax relief, up to £30,000, on compensation for loss

of employment. The *MacKenzie* ruling allows the employee to have that benefit and the employer to retain rights under the contract. However, the Inland Revenue may challenge non-PILON payments particularly if, in the organisation, a payment in lieu of notice is always made even though there is no PILON clause.

Non-contractual restraints on employees: confidential information

The position is different where the employee has no restraint of trade clause in his contract and is not on 'garden leave'. Thus, in *Faccenda Chicken Ltd* v *Fowler* [1986] 1 All ER 617, Mr Fowler was sales manager for Faccenda Chicken Ltd for seven years and set up a van sales operation whereby refrigerated vans travelled around certain districts offering fresh chicken to retailers and caterers. He left the company and set up his own business selling chickens from refrigerated vans in the same area. Eight of the company's employees went to work for him. Each of the salesmen in the company knew the names and addresses of the customers, the route and timing of deliveries, and the different prices quoted to different customers.

The company unsuccessfully brought an action for damages in the High Court, alleging wrongful use of confidential sales information and was also unsuccessful in a counterclaim for damages for breach of contract by abuse of confidential information in Mr Fowler's action against the company for outstanding commission.

It is generally the case that rather more protection in terms of preventing an employee from approaching customers can be obtained by an express term which is reasonable in terms of its duration. In the absence of an express term, it is clear from this decision of the Court of Appeal that confidential information of an employer's business obtained by an employee in the course of his service may be used by that employee when he leaves the job unless, as the Court of Appeal decided, it can be classed as a trade secret or is of such a confidential nature that it merits the same protection as a trade secret. For example, there would have been no need for a term in the contract of service in *Forster* v *Suggett* (1918). The court could have prevented use of the secret process for a period without this. It should, however, be noted that in *Faccenda* the Court of Appeal did say that if the employees had written down lists of customers, routes, etc., as distinct from having the necessary information in their memories, and presumably being unable to erase it, short of amnesia, they might have been restrained for a period from using the lists. This follows the case of *Robb* v *Green* [1895] 2 QB 315 where the manager of a firm dealing in live game and eggs copied down the names of customers before leaving and then solicited these for the purposes of his own business after leaving the employment of the firm. He was restrained from soliciting the customers. In this connection, the High Court granted an injunction in regard to a one-year non-solicitation of customers clause in the contract of a manager in a company of insurance brokers who was dealing with small business clients. He had not set out to learn the client information to use it in competition with his employer but the High Court held that as regards confidentiality *Faccenda Chicken* did not *rigidly* draw a distinction between deliberate and innocent learning. Confidential information was confidential regardless of how it came into the employee's memory (see *SBJ Stevenson Ltd* v *Mandy*, High Court, 30 July 1999).

In the *Mandy* case there was a restraint in the contract of employment. It is hard to see how any such contractual restraint could work if memory matters were excluded. The situation may be different where there is no contract but the claimant is proceeding under the implied duty of confidentiality. Here mere innocent learning may not always be enough to create an enforceable restraint.

In addition, the courts prefer a written contractual restraint in confidentiality matters. Many of the cases are based on complex technical facts and a written contract can assist the court in deciding what is the confidential technical information that is in issue.

In this connection, the Court of Appeal ruled in *Pocton Industries Ltd* v *Michael Ikem Horton* [2000] Lawtel CCH New Law 200059503 that although an electro-plating apparatus was capable of protection under an implied duty of non-disclosure there was no contractual provision regarding which part of the employee's knowledge was to be regarded as confidential and the plating process was only part of a number of pieces of information the employee could not help but acquire from his duties. The claim to restrain use of the knowledge acquired failed.

Whistle-blowing

When discussing an employee's duty of confidentiality, mention should be made of the provisions of the Public Interest Disclosure Act 1998 which inserted some new sections into the Employment Rights Act 1996. The Act protects workers from being dismissed or penalised for disclosing information about the organisation in which they work that they reasonably believe exposes financial malpractice, miscarriages of justice, dangers to health and safety, and dangers to the environment. Disclosure may be made to an employer, but where the disclosure relates to the employer or there is danger of victimisation, it may be made e.g. to a regulator such as the Financial Services Authority for City frauds. Whistle-blowers who are dismissed or otherwise victimised may complain to an employment tribunal and make appeals to higher courts.

In this connection the Court of Appeal ruled in *Woodward* v *Abbey National plc* [2006] IRLR 677 that the protection under s 47B of the Employment Rights Act 1996 against whistleblowers being subjected to detriment because of making a protected disclosure is not restricted to the duration of the contract of employment but extends also to a detriment imposed by an ex-employer on an ex-employee after leaving employment. In this case the detriment was that Abbey would not provide a reference for Mrs Woodward after she had left employment with Abbey having made protected disclosures relating to Abbey's alleged failure to comply with certain legal obligations.

Is it a trade secret?

The Court of Appeal has held that an ex-employee who made negative remarks about the financial situation and management of the company from which he had resigned as managing director did not owe an implied duty of confidentiality with regard to the information disclosed about the ex-employer.

The information, it said, did not come within the category of a 'trade secret' (see *Brooks* v *Olyslager OMS (UK) Ltd* [1998] 601 IRLB 6).

When Mr Brooks resigned from the company, it was under a compromise agreement giving him three months' salary in three monthly instalments. Immediately following his resignation, he telephoned an investment banker who had an interest in the company. During the conversation, he intimated that the company's management was autocratic, the company was insolvent and would only last a month, its budgets were over-optimistic and that it would be taken over by its holding company.

When it heard about these remarks, the company refused to pay the salary instalments and claimed that Mr Brooks was in breach of an implied duty of confidentiality. He claimed damages in the lower court and was awarded them.

The issue in the Court of Appeal related mainly to the duty of confidentiality. The court did not agree that there was such a duty in this case and in respect of the information

disclosed. There was no evidence that knowledge of the company's financial affairs was not already in the public domain. Also, Olyslager had not sought to show that what Mr Brooks had said was untrue or malicious, nor that his statements had caused any financial loss. The company's case was based on its desire to prevent Mr Brooks from disclosing the reasons why he had resigned and from making statements that were in any way detrimental to its interest.

There was no such broad right in law. Accordingly, Mr Brooks was entitled to his damages for breach of the compromise agreement and the company was not entitled to an injunction to prevent further disclosures of the kind put forward in this case. They were not trade secrets.

Employee restraints arising from agreements between manufacturers and traders

The courts are concerned to prevent an employer from obtaining by indirect means restraint protection which he could not have obtained in an express contract with the employee.

Kores Manufacturing Co Ltd v *Kolok Manufacturing Co Ltd*, 1958 – Employee restraints between employers (**208**)

Restraints imposed on the vendor of a business

In allowing restraints to protect the goodwill of the business sold, e.g. that customers will continue to buy from it, the law is only responding to commercial necessity. Unless the vendor (seller) was legally able to undertake not to compete with the purchaser, no one would buy the business. However, such a restraint will be void unless it is required to protect the business sold and not to stifle competition.

It should be noted, however, that the protection of the business sold may in rare situations involve a world-wide restraint.

British Reinforced Concrete Co v *Schelff*, 1921 – Restraints against mere competition not allowed (**209**)

Nordenfelt v *Maxim Nordenfelt Guns and Ammunition Co*, 1894 – An exceptional world-wide restraint (**210**)

Restrictions on shareholder-employees

The courts will generally allow wider restraints in the case of vendors of businesses than in the case of employees. However, what is the position where the employee is also a shareholder and therefore also a proprietor of the business?

Systems Reliability Holdings plc v *Smith*, 1990 – Where the employee is also a shareholder in the employing company (**211**)

Restrictions accepted by distributors of merchandise

In order to increase the efficiency of distribution, a manufacturer or wholesaler may refuse to make merchandise available for distribution to the public unless the distributor accepts certain conditions restricting his liberty of trading. This is the main purpose of the solus agreement used by petrol companies. Such agreements are void unless reasonable.

There is an important distinction here between a garage proprietor who borrows money on mortgage of his own property from a petrol company and a garage proprietor who agrees to sell only that company's products for a period of time. The rule relating to unreasonable restraints of trade applies to the mortgage. However, if the petrol company is the owner of the land and garage premises and grants a lease to a tenant who will run the garage then the rule relating to unreasonable restraints of trade does not apply to an agreement in the lease to take the petrol company's products.

Esso Petroleum Co Ltd v *Harper's Garage (Stourport) Ltd*, 1967 – Restraint in a mortgage (**212**)

Cleveland Petroleum Co Ltd v *Dartstone Ltd*, 1969 – A restraint in a lease (**213**)

Involuntary restraints of trade

We have so far considered, subject to an exception in the case of confidential information, restrictions against trading contained in contracts. However, the doctrine is not confined to these voluntary restraints. It extends to involuntary restraints imposed by trade associations or professional bodies upon their members. Such restraints are void unless reasonable.

Pharmaceutical Society of Great Britain v *Dickson*, 1968 – Restraints imposed by a professional body (**214**)

Consequences where the contract is contrary to public policy: severance

Where a contract is rendered void by the judiciary, it is enforceable only in so far as it contravenes public policy. Thus lawful promises may be severed and enforced. A contract of service which contains a void restraint is not wholly invalid and the court will sever and enforce those aspects of it which do not offend against public policy. Thus an employee who has entered into a contract of service which contains a restraint which is too wide can recover his wages or salary.

The court will not add to a contract or in any way redraft it but will merely strike out the offending words. What is left must make sense without further additions, otherwise the court will not sever the void part in order to enforce what is good. For example, A agrees 'not to set up a competing business within ten miles' in a covenant when he sells his business. If we suppose that five miles would be reasonable, the court will not in fact substitute 'five' and then enforce the covenant because this would mean making a contract for the parties.

It is important also to note that the court will not delete the invalid part of a restraint clause if it is the major part of the restraints imposed.

Thus in *Attwood* v *Lamont* [1920] 3 KB 571 the heads of each department in a business of a general outfitter were required to sign a contract agreeing, amongst other things, after leaving the business not to be engaged in 'the trade or business of a tailor, dressmaker, general draper, milliner, hatter, haberdasher, gentlemen's, ladies' or children's outfitters, at any place within a radius of ten miles of the employers' place of business at Regent House, Kidderminster . . .'. Lamont, who was employed as cutter and head of the tailoring department, left and began to compete, doing business with some of his former employer's customers. The employer then tried to enforce the above restraint which was drawn too wide in terms of the various departments covered, since Lamont had never been concerned with departments other than the tailoring department. The court refused to sever the tailoring covenant from the rest because that would have meant severing almost the whole of the restraint in order to leave the restraint regarding tailoring.

A contrast is provided by *Goldsoll* v *Goldman* [1915] 1 Ch 292. In that case the defendant sold imitation jewellery and when he sold his business he agreed 'not for two years to deal in real or imitation jewellery in any part of the United Kingdom'. The court was prepared to sever the words 'real or' in order to make the restraint valid and restrict the defendant from competing in imitation jewellery. Only two words needed to be deleted and this was a very small part of the restraint as a whole.

No severance of widely drawn clause

It is not appropriate said the Court of Appeal in *Wincanton Ltd* v *Cranny* [2000] IRLR 716 for a court to sever an unenforceable restraint so that it becomes enforceable if it is clear that it has been drawn intentionally wide. The clause involved stated that the employee should not for a period of 12 months following the termination of his employment be 'directly or indirectly engaged, concerned or interested in any capacity . . . in any business of whatever kind in the UK which is wholly or partly in competition with any business carried on by the company . . .'. The Court of Appeal would not contemplate a possible severance.

Public policy: the contribution of Parliament

Some contracts are prohibited by statute in terms that they are illegal, the words 'unlawful' being used in the statute concerned. In this context 'statute' includes the orders, rules and regulations that Ministers of the Crown and other persons are authorised by Parliament to issue.

The statutory prohibitions with which we are concerned may be express or implied.

Implied statutory prohibition

In these cases the statute itself does not say expressly that contracts contravening its provisions are necessarily illegal. The statute may affect the formation of a particular contract as where a trader does business without taking out a licence. In some cases the statute may affect the manner of performance of the contract as where a trader is required to deliver to a purchaser a written statement such as an invoice containing, for example, details of the chemical composition of the goods.

In either case whether failure to comply with a statutory provision renders the contract illegal is a matter of construction of the statute and is for the judge to decide.

If, in the opinion of the judge, the Act was designed to protect the public then the contract will be illegal. Thus in *Cope* v *Rowlands* (1836) 2 M&W 149 an unlicensed broker in the City of London was held not to be entitled to sue for his fees because the purpose of the licensing requirements was to protect the public against possibly shady dealers. Furthermore, in *Anderson Ltd* v *Daniel* [1924] 1 KB 138 a seller of artificial fertilisers was held unable to recover the price of goods which he had delivered because he had failed to state in an invoice the chemical composition of the fertilisers which was required by Act of Parliament.

On the other hand, if in the opinion of the judge the purpose of the legislation was mainly to raise revenue or to help in the administration of trade, contracts will not be affected. Thus in *Smith* v *Mawhood* (1845) 14 M&W 452 it was held that a tobacconist could recover the price of tobacco sold by him even though he did not have a licence to sell it and had not painted his name on his place of business. The purpose of the statute involved was not to affect the contract of sale but to impose a fine on offenders for the purpose of revenue. In addition, in *Archbolds* (*Freightage*) *Ltd* v *Spanglett Ltd* [1961] 1 QB 374 a contract by an unlicensed carrier to carry goods by road was held valid because the legislation involved was only designed to help in the administration of road transport.

Express statutory prohibition

Sometimes an Act of Parliament may expressly prohibit certain types of agreement. For example, the Competition Act 1998 in s 2(2)(a) prohibits agreements, decisions or practices that directly or indirectly fix purchase or selling prices, and this would include resale price maintenance agreements. *As regards the remedies* available to an organisation affected by an anti-competitive practice, it may complain to the Office of Fair Trading or if the infringement has a European Union dimension it may complain to the EU Commission in Brussels. Interim relief may be asked for in urgent cases. However, the final outcome will be an infringement decision and a large fine on the offending organisation. *This will not produce damages for the organisation if it has lost profits because of the offending organisation's activities*.

Organisations wishing to pursue claims against the offender may go through the ordinary courts of law. Actions for damages and injunctions are clearly available to those who have suffered loss as a result of infringements of the 1998 Act (see *Courage* v *Crehan* [2002] QB 507: a ruling of the ECJ).

Organisations suffering loss may wait for the OFT to investigate and make a finding of infringement. When the appeals process has been exhausted the organisation may rely on the infringement decision and this will be beneficial because there will be no need to produce evidence that there has been an infringement to the court again. Obviously, matters of causation and quantification of damages may arise but the claim will be made easier. These are called *'piggyback' claims* and have been introduced by the Enterprise Act 2002 inserting a new s 58A into the Competition Act 1998.

Finally, if there is difficulty in pleading before the ordinary courts because of their unfamiliarity with competition issues the Enterprise Act 2002 has expanded the jurisdiction of the Competition Appeals Tribunal (a specialist tribunal) so that *it can hear actions for damages following domestic competition infringement decisions by the OFT and the EU Commission regarding infringements of EU law*. These will be 'piggyback' claims.