(ii) However, in *Re Selectmove* (1994) the Court of Appeal followed *Foakes* by deciding that a promise to allow payment by instalments was invalid because it was not supported by consideration and even though the promise to accept instalments had in no way been extorted.

Accord and satisfaction: payment by cheque is not substituted performance: promissory estoppel may, in appropriate circumstances, extinguish as distinct from suspend contractual rights

93 *D & C Builders Ltd* v *Rees* [1965] 3 All ER 837

D & C Builders, a small company, did work for Rees for which he owed £482 13s 1d. There was at first no dispute as to the work done but Rees did not pay. In August and October 1964, the claimants wrote for the money and received no reply. On 13 November 1964, the wife of Rees (who was then ill) telephoned the claimants, complained about the work, and said, 'My husband will offer you £300 in settlement. That is all you will get. It is to be in satisfaction.' D & C Builders, being in desperate straits and faced with bankruptcy without the money, offered to take the £300 and allow a year to Rees to find the balance. Mrs Rees replied: 'No, we will never have enough money to pay the balance. £300 is better than nothing.' The claimants then said: 'We have no choice but to accept.' Mrs Rees gave the claimants a cheque and insisted on a receipt 'in completion of the account'. The claimants, being worried about their financial position, took legal advice and later brought an action for the balance. The defence was bad workmanship and that there was a binding settlement. The question of settlement was tried as a preliminary issue and the judge, following *Goddard* v *O'Brien* [1880] 9 QBD 33, decided that a cheque for a smaller amount was a good discharge of the debt, this being the generally accepted view of the law since that date. On appeal it was *held* (by the Master of the Rolls, Lord Denning) that *Goddard* v *O'Brien* was wrongly decided. A smaller sum in cash could be no settlement of a larger sum and 'no sensible distinction could be drawn between the payment of a lesser sum by cash and the payment of it by cheque'.

In the course of his judgment Lord Denning said of *High Trees*:

> It is worth noting that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.
>
> This principle has been applied to cases where a creditor agrees to accept a lesser sum in discharge of a greater. So much so that we can now say that, when a creditor and a debtor enter on a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so. . . . But he is not bound unless there has been truly an accord between them.

In the present case there was no true accord. The debtor's wife had held the creditors to ransom, and there was no reason in law or equity why the claimants should not enforce the full amount of debt.

Comment (i) The case also illustrates the requirements of equality of bargaining power and the absence of economic duress in the negotiation (or as here, the re-negotiation) of a contract. (See also *Lloyds Bank* v *Bundy* (1974), Chapter 13.)

(ii) It was held in *Stour Valley Builders (a Firm)* v *Stuart*, *The Times*, 22 February 1993 that the fact that a cheque for a lesser sum, said to be given in full satisfaction but without consideration, was cashed by the recipient did not prevent him from suing for the balance, even though the cashing of the cheque might indicate agreement to take a lesser sum. The decision serves to confirm that, at common law, an *agreement*, express or implied, to change existing obligations is ineffective unless it is a *contract*.

(iii) The same rule was applied in *Inland Revenue Commissioners* v *Fry* [2001] STC 1715 where a cheque in payment of only half the tax bill was sent to the Revenue 'in full and final settlement'. The Revenue was able to sue for the balance even though the cheque had been cashed.

Accord and satisfaction: compromises between creditors

94 *Good* v *Cheesman* (1831) 2 B & Ad 328

The defendant had accepted two bills of exchange of which the claimant was the drawer. After the bills became due and before this action was brought, the claimant suggested that the defendant meet his creditors with a view perhaps to an agreement. The meeting was duly held and the defendant entered into an agreement with his creditors whereby the defendant was to pay one-third of his income to a trustee to be named by the creditors, and that this was to be the method by which the defendant's debts were to be paid. It was not clear from the evidence whether the claimant attended the meeting, though he certainly did not sign the agreement. There was, however, evidence that the agreement had been in his possession for some time and it was duly stamped before the trial. No trustee was in fact appointed, though the defendant was willing to go on with the agreement.

Held – the agreement bound the claimant and the action on the bills could not be sustained. The consideration, though not supplied to the claimant direct, existed in the forbearance of the other creditors. Each was bound in consequence of the agreement of the rest.

Comment (i) The better view is that the basis of this decision is to be found not in the law of contract but in tort, in the sense that once an agreement of this kind has been made it would be a *fraud* on the other creditors for one of their number to sue the debtor separately.

This also applies to joint debtors. A payment from one debtor of part of the sum owing with the agreement of the creditor and 'in full and final settlement' of the debt operates to release other joint debtors, such as partners, from liability and although such joint debtors are jointly and severally liable, a compromise with one in regard to the total sum owing prevents a claim against other joint debtors under the Civil Liability (Contribution) Act 1978 (see *Morris* v *Wentworth-Stanley*, *The Times*, 2 October 1998). Both the joint and several aspects of liability are released.

(ii) The *Good* v *Cheesman* arrangements would more usually be made today under the Insolvency Act 1986. Section 260 of that Act states that such an arrangement binds every creditor if it is approved by a meeting of creditors at which three-quarters in value vote in favour of the arrangement. Therefore, s 260 really provides an exception to the rule of accord and satisfaction.

Accord and satisfaction: payments by third parties

95 *Welby* v *Drake* (1825) 1 C & P 557

The claimant sued the defendant for the sum of £9 on a debt which had originally been for £18. The defendant's father had paid the claimant £9 and the claimant had agreed to take that sum in full discharge of the debt.

Held – the payment of £9 by the defendant's father operated to discharge the debt of £18.

Comment (i) Here again, the basis of the decision is that it would be a fraud on the third party to sue the original debtor. 'If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the [claimant's] now recovering against the son; because by suing the son, he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.' (*Per* Lord Tenterden, CJ)

(ii) Also, of course, the creditor breaks his contract with the third party.

(iii) Where there is a payment by a third party, the acceptance of, say, a cheque by the creditor will be regarded as an acceptance of the payment in discharge of the debtor's liability. This is not the case where the creditor accepts a smaller payment by cheque from the debtor as distinct from a third party. (See *Stour Valley Builders (a firm)* (1993).)

Promissory estoppel: variation of contractual rights without consideration: the approach of equity: suspension of rights

96 *Central London Property Trust Ltd* v *High Trees House Ltd* [1947] KB 130

In 1937 the claimant company granted to the defendants a lease of 99 years of a new block of flats at a rent of £2,500 per annum. The lease was by deed. During the period of the war the flats were by no means fully let owing to the absence of people from the London area. The defendant company, which was a subsidiary of the claimant company, realised that it could not meet the rent out of the profits then being made on the flats, and in 1940 the parties entered into an agreement which reduced the rent to £1,250 per annum, this agreement being put into writing but not by deed. The defendants continued to pay the reduced rent from 1941 to the beginning of 1945, by which time the flats were fully let, and they continued to pay the reduced rent thereafter. In September 1945, the receiver of the claimant company investigated the matter and asked for arrears of £7,916, suggesting that the liability created by the lease still existed, and that the agreement of 1940 was not supported by any consideration. The receiver then brought this action to establish the legal position. He claimed £625, being the difference in rent for the two quarters ending 29 September and 25 December 1945.

Held – (*a*) a simple contract can in equity vary a deed (i.e. the lease), though it had not done so here because the simple contract was not supported by consideration; (*b*) as the agreement for the reduction of rent had been acted upon by the defendants, the claimant was estopped in equity from claiming the full rent from 1941 until early 1945 when the flats were fully let. After that time it was entitled to do so because the second agreement was only operative during the continuance of the conditions which gave rise to it. To this extent the limited claim of the receiver succeeded. If the receiver had sued for the balance of rent from 1941, he would have failed.

97 *Tool Metal Manufacturing Co Ltd* v *Tungsten Electric Co Ltd* [1955] 2 All ER 657

The appellants were the registered proprietors of British letters patent. In April 1938, they made a contract with the respondents whereby they gave the latter a licence to manufacture 'hard metal alloys' in accordance with the inventions which were the subject of patent. By the contract the respondents agreed to pay

'compensation' to the appellants if in any one month they sold more than a stated quantity of metal alloys.

Compensation was duly paid by the respondents until the outbreak of war in 1939 but thereafter none was paid. It was found as a fact that in 1942 the appellants agreed to suspend the enforcement of compensation payments pending the making of a new contract. In 1944 negotiations for such new contracts were begun but broke down. In 1945 the respondents sued the appellants for breach of contract and the appellants counterclaimed for payment of compensation as from 1 June 1945. As regards the arguments on the counterclaim, it was eventually *held* by the Court of Appeal that the agreement of 1942 operated in equity to prevent the appellants demanding compensation until they had given reasonable notice to the respondents of their intention to resume their strict legal rights and that such notice had not been given.

In September 1950, the appellants themselves issued a writ (now claim form) against the respondents claiming compensation as from 1 January 1947. The respondents pleaded the equity raised by the agreement of 1942 and argued that reasonable notice of its termination had not been given. When this action reached the House of Lords it was *held* – affirming *Hughes* v *Metropolitan Railway Co* and the *High Trees* case – that the agreement of 1942 operated in equity to suspend the appellants' legal rights to compensation until reasonable notice to resume them had been given. However, the counterclaim in the first action in 1945 amounted to such notice and since the appellants were not now claiming any compensation as due to them before 1 January 1947, the appellants succeeded in this second action and were awarded £84,000 under the compensation claim.

Promissory estoppel: the meaning of reliance upon the promise

98 *W J Alan & Co* v *El Nasr Export and Import Co* [1972] 2 All ER 127

A contract for the sale of coffee provided for the price expressed in Kenyan shillings to be paid by irrevocable letter of credit. The buyers procured a confirmed letter expressed in sterling and the sellers obtained part payment thereunder. While shipment was in progress sterling was devalued and the sellers claimed such additional sum as would bring the price up to the sterling equivalent of Kenyan shillings at the current rate. Orr, J *held* that the buyers were liable to pay the additional sum as the currency of account was Kenyan shillings. On appeal by the buyers it was *held* – allowing the appeal – that the sellers by accepting payment in sterling had irrevocably waived their right to be paid in Kenyan currency or had accepted a variation of the sale contract, and that a party who has waived his rights cannot afterwards insist on them if the other party has acted on that belief differently from the way in which he would otherwise have acted; and the other party need not show that he has acted to his detriment. In the course of his judgment Lord Denning, MR said:

> If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so. . . . There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them. . . . I know that it has been suggested in some quarters that there must be a detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement by Viscount Simonds in the *Tool Metal* case that the other must have been led 'to alter his position' which was adopted by Lord Hodson in *Emmanuel Ayodeji Ajayi* v *RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556. But that only means that he must have been led to act differently from what he otherwise would have done. And, if you study the cases in which the doctrine has been applied, you will see that all that is required is that one should have 'acted on the belief induced by the other party'. That is how Lord Cohen put it in the *Tool Metal* case and it is how I would put it myself.

Comment Since, as in *High Trees*, a tenant who only pays one-half of the rent cannot be said to be 'acting to his detriment', 'detriment' cannot be a requirement of equitable estoppel. It is a requirement of estoppel at common law.

Promissory estoppel: does not operate to create new contractual rights but merely to suspend existing ones

99 *Combe* v *Combe* [1951] 2 KB 215

The parties were married in 1915 and separated in 1939. In February 1943, the wife obtained a decree *nisi* of divorce, and a few days later the husband

entered into an agreement under which he was to pay his wife £100 per annum, free of income tax. The decree was made absolute in August 1943. The husband did not make the agreed payments and the wife did not apply to the court for maintenance but chose to rely on the alleged contract. She brought this action for arrears under that contract. Evidence showed that her income was between £700 and £800 per annum and the defendant's was £650 per annum. Byrne, J, at first instance, *held* that, although the wife had not supplied consideration, the agreement was nevertheless enforceable, following the decision in the *High Trees* case, as a promise made to be acted upon and in fact acted upon.

Held – (*a*) the *High Trees* decision was not intended to create new actions where none existed before, and it had not abolished the requirement of consideration in the formation of simple contracts. In such cases consideration was a cardinal necessity; (*b*) in the words of Birkett, LJ, the doctrine was 'a shield not a sword', i.e. a defence to an action, not a cause of action; (*c*) the doctrine applied to the modification of existing agreements by subsequent promises and had no relevance to the formation of a contract; (*d*) it was not possible to find consideration in the fact that the wife forbore to claim maintenance from the court, since no such contractual undertaking by her could have been binding even if she had given it. Therefore, this action by the wife must fail because the agreement was not supported by consideration.

Promissory estoppel: other applications

100 *Durham Fancy Goods Ltd* v *Michael Jackson (Fancy Goods) Ltd* [1968] 2 All ER 987

On 18 September 1967, the claimants drew a bill of exchange on the first defendants in the following form, 'M. Jackson (Fancy Goods) Co'. The bill was signed by Mr Jackson who was the director and company secretary. The bill was dishonoured and the claimants brought an action against Mr Jackson contending that by signing the form of acceptance he had committed a criminal offence under s 108 of the Companies Act 1948 and had made himself personally liable on the bill because he should either have returned the bill with a request that it be re-addressed to Michael Jackson (Fancy Goods) Ltd, or he should have accepted it 'M. Jackson (Fancy Goods) Ltd p.p. Michael Jackson (Fancy Goods) Ltd, Michael Jackson'. It was *held* – by Donaldson, J – that the misdescription was in breach of s 108 of the Companies Act 1948, and that Mr Jackson was personally liable, under the section, to pay the bill. However, since the error was really that of the claimants, they were estopped from enforcing Mr Jackson's personal liability. The principle of equity upon which the promissory estoppel cases were based was applicable and barred the claimants' claim. That principle was formulated by Lord Cairns in *Hughes* v *Metropolitan Railway Co* (1877) 2 App Cas 439 at p 448, and although in his enunciation Lord Cairns assumed a pre-existing contractual relationship between the parties, that was not essential provided that there was a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties. Such a relationship was created by s 108.

Comment (i) A holder other than the claimants might have been able to bring an action against Mr Jackson under s 108 since such a holder would not have been affected by the equity in that he would not have drawn the bill in an incorrect name. The provisions are now in the Companies Act 1985, s 349.

(*Note*: s 108 provided: '(1) every company . . . (*c*) shall have its name mentioned in legible characters . . . in all bills of exchange . . . purporting to be signed by or on behalf of the company . . . (4) If an officer of the company or any person on his behalf . . . (*b*) signs . . . on behalf of the company any bill of exchange . . . wherein its name is not mentioned in manner aforesaid . . . he shall be liable to a fine not exceeding £50, and shall further be personally liable to the holder of the bill of exchange . . . for the amount thereof unless it is duly paid by the company.')

(ii) A further application of the doctrine occurred in *Crabb* v *Arun District Council* [1975] 3 All ER 865 where Arun represented to Mr Crabb that he had a right of way across Arun's land which gave access to the public highway. It was *held* – by the Court of Appeal – that Arun could not go back on that promise after Mr Crabb had sold some of his land and had left himself without access to the public highway except by the right of way across Arun's land. He was granted an injunction to enforce the right. When promissory estoppel is used in this situation, a claimant can raise it and indeed base his action upon it. Thus, the expression of Birkett, LJ in *Combe* v *Combe* (1951) that the doctrine is 'a shield not a sword' is not always applicable where estoppel is used in situations other than the variation of contractual rights.

Contractual intention: domestic agreements between husband and wife are in general terms unenforceable

101 *Balfour* v *Balfour* [1919] 2 KB 571

The defendant was a civil servant stationed in Ceylon. In November 1915, he came to England on leave with his wife, the claimant in the present action. In August

1916, the defendant returned alone to Ceylon because his wife's doctor had advised her that her health would not stand up to a further period of service abroad. Later the husband wrote to his wife suggesting that they remain apart, and in 1918 the claimant obtained a decree *nisi*. In this case the claimant alleged that before her husband sailed for Ceylon he had agreed, in consultation with her, that he would give her £30 per month as maintenance, and she now sued because of his failure to abide by the said agreement. The Court of Appeal *held* that there was no enforceable contract because in this sort of situation it must be assumed that the parties did not intend to create legal relations. The provision for a flat payment of £30 per month for an indefinite period with no attempt to take into account changes in the circumstances of the parties did not suggest a binding agreement. Duke, LJ seems to have based his decision on the fact that the wife had not supplied any consideration.

Contractual intention: agreements between husband and wife designed to regulate the terms of their separation are usually regarded as binding contracts

102 ***Merritt* v *Merritt*** [1970] 2 All ER 760

After a husband had formed an attachment for another woman and had left his wife, a meeting was held between the parties on 25 May 1966, in the husband's car. The husband agreed to pay the wife £40 per month maintenance and also wrote out and signed a document stating that in consideration of the wife paying all charges in connection with the matrimonial home until the mortgage repayments had been completed, he would agree to transfer the property to her sole ownership. The wife took the document away with her and had herself paid off the mortgage. The husband did not subsequently transfer the property to his wife and she claimed a declaration that she was the sole beneficial owner and asked for an order that her husband should transfer the property to her forthwith. The husband's defence was that the agreement was a family arrangement not intended to create legal relations.

Held – by the Court of Appeal:

(*a*) the agreement, having been made when the parties were not living together in amity, was enforceable (*Balfour* v *Balfour* (1919) distinguished);

(*b*) the contention that there was no consideration to support the husband's promise could not be sustained. The payment of the balance of the mortgage was a detriment to the wife and the husband had received the benefit of being relieved of liability to the building society.

Accordingly, the wife was entitled to the relief she claimed.

Contractual intention: family agreements other than those between husband and wife

103 ***Simpkins* v *Pays*** [1955] 3 All ER 10

The defendant and the defendant's granddaughter made an agreement with the claimant, who was a paying boarder, that they should submit in the defendant's name a weekly coupon, containing a forecast by each of them, to a Sunday newspaper fashion competition. On one occasion a forecast by the granddaughter was correct and the defendant received a prize of £750. The claimant sued for her share of that sum. The defence was that there was no intention to create legal relations but that the transaction was a friendly arrangement binding in honour only.

Held – there was an intention to create legal relations. Far from being a friendly domestic arrangement, the evidence showed that it was a joint enterprise and that the parties expected to share any prize that was won.

Comment A family agreement which went the other way was *Julian* v *Furby* (1982) 132 NLJ 64. J was an experienced plasterer who helped F, his son-in-law, and his wife (J's favourite daughter) to buy, alter and furnish a house for them. They later quarrelled and J sued for £4,440. This included materials supplied and F was prepared to pay for these but not for J's labour which, it was understood, would be free. It was held by the Court of Appeal that there was never an intention to create a legal relationship between the parties in regard to the labour which J and F jointly provided in refurbishing the house.

Contractual intention: family agreements: effect of vagueness

104 ***Jones* v *Padavatton*** [1969] 2 All ER 616

In 1962 the claimant, Mrs Jones, who lived in Trinidad, made an offer to the defendant Mrs Padavatton, her daughter, to provide maintenance for her at the rate of £42 a month if she would leave her job in Washington in the United States and go to England and read for the Bar. Mrs Padavatton was at that time divorced from her husband having the custody of the child of that marriage. The agreement was an informal one and there was uncertainty as to

its exact terms. Nevertheless, the daughter came to England in November 1962, bringing the child with her, and began to read for the Bar, her fees and maintenance being paid for by Mrs Jones. In 1964 it appeared that the daughter was experiencing some discomfort in England occupying one room in Acton for which she had to pay £6 17s 6d per week. At this stage Mrs Jones offered to buy a large house in London to be occupied partly by the daughter and partly by tenants, the income from rents to go to the daughter in lieu of maintenance. Again, there was no written agreement but the house was purchased for £6,000 and conveyed to Mrs Jones. The daughter moved into the house in January 1965, and tenants arrived, it still being uncertain what precisely was to happen to the surplus rent income (if any) and what rooms the daughter was to occupy. No money from the rents was received by Mrs Jones and no accounts were submitted to her. In 1967 Mrs Jones claimed possession of the house from her daughter, who had by that time married again, and the daughter counterclaimed for £1,655 18s 9d said to have been paid in connection with running the house. At the hearing the daughter still had, as the examinations were then structured, one subject to pass in Part I of the Bar examinations and the whole of Part II remained to be taken.

Held – by the Court of Appeal:

(*a*) the arrangements were throughout family agreements depending upon the good faith of the parties in keeping the promises made and not intended to be rigid binding agreements. Furthermore, the arrangements were far too vague and uncertain to be enforceable as contracts (*Per* Danckwerts and Fenton Atkinson, LJJ);

(*b*) although the agreement to maintain while reading for the Bar might have been regarded as creating a legal obligation in the mother to pay (the terms being sufficiently stated and duration for a reasonable time being implied), the daughter could not claim anything in respect of that agreement which must be regarded as having terminated in 1967, five years being a reasonable time in which to complete studies for the Bar. The arrangements in relation to the home were very vague and must be regarded as made without contractual intent. (*Per* Salmon, LJ)

The mother was, therefore, entitled to possession of the house and had no liability under the maintenance agreement. The counterclaim by the daughter was left to be settled by the parties.

Comment In this case there was an inference of contractual intent in the mother's promise because it caused Mrs Padavatton to leave one job to study for another, but the vagueness of the arrangement negatived that intent as in *Gould* v *Gould* [1969] 3 All ER 728.

Contractual intent: generally but not always assumed in business agreements unless excluded by the parties

105 *Kleinwort Benson Ltd* v *Malaysia Mining Corporation, Berhad* [1989] 1 All ER 785

In this case the High Court had decided that a letter of comfort (as they are called) stating that it was the policy of Malaysia Mining to ensure that its subsidiary MMC Metals Ltd was 'at all times in a position to meet its liabilities' in regard to a loan made by Kleinwort to MMC had contractual effect. This meant that Kleinwort was entitled to recover from Malaysia the amount owed to it by the insolvent MMC which went into liquidation after the tin market collapsed in 1985. Malaysia appealed to the Court of Appeal which reversed the High Court ruling. The problem has always been to decide whether a letter of comfort of the usual kind contains a legal obligation or only a moral one. In the High Court Mr Justice Hirst decided that there was a legal obligation: the Court of Appeal decided that it was only a moral one. The letter, said the Court of Appeal, stated the policy of Malaysia. It gave no contractual warranty as to the company's future conduct. In these circumstances there was no need to apply the presumption of an intention to create legal relations just because the transaction was in the course of business as laid down in *Edwards* v *Skyways* (1964).

Comment The wording of the letter of comfort must be looked at and if it appears to create a moral obligation only, then it has no contractual force. It is of course no bad thing for those in business to honour moral obligations but as Lord Justice Ralph Gibson said, moral responsibilities are not a matter for the courts.

106 *Jones* v *Vernon's Pools Ltd* [1938] 2 All ER 626

The claimant said that he had sent to the defendants a football coupon on which the penny points pool was all correct. The defendants denied having received it and relied on a clause printed on every coupon. The said clause provided that the transaction should not 'give rise to any legal relationship . . . or be legally enforceable . . . but . . . binding in honour only'. The court *held* that this clause was a bar to any action in a court of law.

Comment This case was followed by the Court of Appeal in *Appleson* v *Littlewood Ltd* [1939] 1 All ER 464, where the contract contained a similar clause.

107 ***Rose and Frank Co* v *Crompton (J R) & Brothers Ltd*** [1925] AC 445

In 1913 the claimant, an American company, entered into an agreement with the defendant, an English company, whereby the claimant was appointed sole agent for the sale in the USA of paper tissues supplied by the defendant. The contract was for a period of three years with an option to extend that time. The agreement was extended to March 1920, but in 1919 the defendant terminated it without notice. The defendant had received a number of orders for tissues before the termination of the contract, and it refused to execute them. The claimant sued for breach of contract and for non-delivery of the goods actually ordered. The agreement of 1913 contained an 'Honourable Pledge Clause' drafted as follows: 'This arrangement is not entered into nor is this memorandum written as a formal or legal agreement and shall not be subject to legal jurisdiction in the courts of the United States of America or England . . .'. It was *held* by the House of Lords that the 1913 agreement was not binding on the parties, but that in so far as the agreement had been acted upon by the defendant's acceptance of orders, the said orders were binding contracts of sale. Nevertheless, the agreement was not binding for the future.

Comment Those in business have only rarely to address themselves to the concept of intention to create legal relations, and this is why the law, as dispensed in the courts, has created a presumption that business agreements are to be regarded as binding in the absence of something such as an 'honourable pledge clause', as in this case. It is also worth noting that even these clauses are comparatively rare in the business world.

MAKING THE CONTRACT III

Formalities: contracts which must be evidenced in writing: guarantee and indemnity: s 4, Statute of Frauds 1677 and its effect

108 ***Mountstephen* v *Lakeman*** (1871) LR 7 QB 196

The defendant was chairman of the Brixham Local Board of Health. The claimant, who was a builder and contractor, was employed in 1866 by the Board to construct certain main sewage works in the town. On 19 March 1866, notice was given by the Board to owners of certain homes to connect their house drains with the main sewer within 21 days. Before the expiration of the 21 days Robert Adams, the surveyor of the Board, suggested to the claimant that he make the connections. The claimant said he was willing to do the work if the Board would see him paid. On 5 April 1866, i.e. before the expiration of the 21 days, the claimant commenced work on the connections. However, before work commenced, it appeared that the claimant had had an interview with the defendant at which the following conversation took place:

Defendant: 'What objection have you to making the connections?'
Claimant: 'I have none, if you or the Board will order the work or become responsible for the payment.'
Defendant: 'Go on Mountstephen and do the work and I will see you paid.'

The claimant completed the connections in April and May 1866, and sent an account to the Board on 5 December 1866. The Board disclaimed responsibility on the ground that it had never entered into any agreement with the claimant nor authorised any officer of the Board to agree with him for the performance of the work in question. It was *held* – that Lakeman had undertaken a personal liability to pay the claimant and had not given a guarantee of the liability of a third party, i.e. the Board. In consequence, Lakeman had given an indemnity which did not need to be in writing under s 4 of the Statute of Frauds 1677. The claimant was, therefore, entitled to enforce the oral undertaking given by the defendant.

Comment (i) Section 4 of the Statute of Frauds 1677 provides that: 'No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt default or miscarriage of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.' It was held in *Birkmyr* v *Darnell* (1704) 1 Salk 27 that the words 'debt default or miscarriage of another person' meant that the section applied only where there was some person other than the surety who was primarily liable.

(ii) It should be noted that the absence of writing makes a contract of guarantee unenforceable and not void. This is because s 4 of the 1677 Act states in effect that 'No action shall be brought . . .' unless the guarantee is in writing. So if a person is *defending* an action and not *bringing* one and the existence of a guarantee would provide a defence, the guarantee can be proved orally and the judge will not require a written memorandum of it.

In *Deutsche Bank AG* v *Ibrahim and Others*, *Financial Times*, 15 January 1992, Mr Ibrahim's two daughters were the tenants of two leases. The leases were deposited with the bank to secure Mr Ibrahim's overdraft. The daughters

later regretted having done this and tried to get the leases back from the bank. If this were done the bank would lose a good security since it would not be able to sell the leases to a third party in order to repay Mr Ibrahim's overdraft. The bank brought this action to establish that it had a right to the leases. The daughters counterclaimed against the bank for the return of the leases. They were thus, in effect, *bringing an action* against the bank, which *the bank was defending* by trying to establish its right to the leases. Part of the counterclaim was that by depositing the leases the daughters were guaranteeing their father's overdraft and yet there was no memorandum in writing signed by the daughters. The court accepted that they had given a guarantee but allowed the bank to prove the contract, i.e. overdraft for leases, *orally* because the bank was *defending* its right to retain the leases as security under the guarantee. The bank succeeded and was allowed to retain the leases.

(iii) The Act of 1677 continues to be of relevance in modern commercial cases, and *Actionstrength Ltd* v *International Glass Engineering* [2002] 1 WLR 566 shows it can still make an important commercial agreement unenforceable. The defendants were contracted to build a glass factory. The defendants sub-contracted Actionstrength to provide the workforce. The defendants were late making payments to Actionstrength and so Actionstrength threatened to remove the workforce from the site. The owners of the factory agreed orally with Actionstrength to pay them amounts due from the defendants if the defendants did not do so, if they would keep the workforce on site. This they did but later the defendants failed to pay Actionstrength and this claim was brought against the owners of the factory who were the second defendants for payment of the guarantee. The claim failed, the Court of Appeal ruling that the oral contract was a guarantee not an indemnity and there being no evidence in writing the claim failed.

Minors: necessaries: the general test

109 *Nash* v *Inman* [1908] 2 KB 1

The claimant was a Savile Row tailor and the defendant was a minor undergraduate at Trinity College, Cambridge. The claimant sent his agent to Cambridge because he had heard that the defendant was spending money freely, and might be the sort of person who would be interested in high-class clothing. As a result of the agent's visit, the claimant supplied the defendant with various articles of clothing to the value of £145 0s 3d during the period October 1902 to June 1903. The clothes included 11 fancy waistcoats. The claimant now sued the minor for the price of the clothes. Evidence showed that the defendant's father was in a good position, being an architect with a town house and a country house, and it could be said that the clothes supplied were suitable to the defendant's position in life. However, his father proved that the defendant was amply supplied with such clothes when the claimant delivered the clothing now in question.

Held – the claimant's claim failed because he had not established that the goods supplied were necessaries.

Minors: beneficial contracts

110 *Roberts* v *Gray* [1913] 1 KB 520

The defendant wished to become a professional billiards player and entered into an agreement with the claimant, a leading professional, to go on a joint tour. The claimant went to some trouble in order to organise the tour, but a dispute arose between the parties and the defendant refused to go. The claimant now sued for damages of £6,000.

Held – the contract was for the minor's benefit, being in effect for his instruction as a billiards player. Therefore, the claimant could sustain an action for damages for breach of contract, and damages of £1,500 were awarded.

Comment (i) In *Chaplin* v *Leslie Frewin (Publishers)* [1965] 3 All ER 764 the claimant, the minor son of a famous father, made a contract with the defendants under which they were to publish a book written for him, telling his life story and entitled *I Couldn't Smoke the Grass on my Father's Lawn*. The claimant sought to avoid the contract on the ground that the book gave an inaccurate picture of his approach to life.

Held – amongst other things – the contract was binding if it was for the minor's benefit. The time to determine that question was when the contract was made and at that time it was for the minor's benefit and could not be avoided.

(ii) Although this was not a contract of service, it could be regarded as analogous to one, and was for the claimant's benefit because although he had a ghost writer the publishing contract could have helped him to make a start as an author. So the court still thought it necessary to use the contract of service analogy and not merely say that the contract was beneficial because it made Mr Chaplin money.

(iii) In *Denmark Productions* v *Boscobel Productions* (1967) 111 Sol J 715 Widgery, J held that a contract by which a minor appoints managers and agents to look after his business affairs is, in modern conditions, necessary if he is to earn his living and rise to fame, and if it is for his benefit it will be upheld by analogy with a contract of service.

(iv) The case of *De Francesco* v *Barnum* (1890) 45 Ch D 430 shows that so far as beneficial contracts are concerned the subject matter of the contract is not decisive. Two minors bound themselves in contract to the claimant

for seven years to be taught stage dancing. The minors agreed that they would not accept any engagements without his consent. They later accepted an engagement with Barnum, and the claimant sued Barnum for interfering with the contractual relationship between himself and the minors, to enforce the apprenticeship deed against the minors and to obtain damages for its breach. The contract was, of course, for the minors' benefit and was *prima facie* binding on them. However, when the court considered the deed in greater detail, it emerged that there were certain onerous terms in it. For example, the minors bound themselves not to marry during the apprenticeship; the payment was hardly generous, the claimant agreeing to pay them 9d per night and 6d for matinee appearances for the first three years, and 1s per night and 6d for matinee performances during the remainder of the apprenticeship. The claimant did not undertake to maintain them whilst they were unemployed and did not undertake to find them engagements. The minors could also be engaged in performances abroad at a fee of 5s per week. Further the claimant could terminate the contract if he felt that the minors were not suitable for the career of dancer. It appeared from the contract that the minors were at the absolute disposal of the claimant.

Held – the deed was an unreasonable one and was, therefore, unenforceable against the minors. Barnum could not, therefore, be held liable, since the tort of interference with a contractual relationship presupposes the existence of an enforceable contract.

Minors: trading contracts are not binding on a minor unless exceptionally they are analogous to a contract of service

111 *Mercantile Union Guarantee Corporation* v *Ball* [1937] 2 KB 498

The purchase on hire-purchase terms of a motor lorry by a minor carrying on a business as a haulage contractor was *held* not to be a contract for necessaries, but a trading contract by which the minor could not be bound.

Comment It would be possible for the owner to recover the lorry without the assistance of s 3 of the Minors' Contracts Act 1987 because a hire-purchase contract is a contract of bailment not a sale. Thus, ownership does not pass when the goods are delivered.

Minors: contracts binding unless repudiated: consequences of defective contracts

112 *Steinberg* v *Scala (Leeds) Ltd* [1923] 2 Ch 452

The claimant, Miss Steinberg, purchased shares in the defendant company and paid certain sums of money on application, on allotment and on one call. Being unable to meet future calls, she repudiated the contract whilst still a minor and claimed:

(*a*) rectification of the Register of Members to remove her name therefrom, thus relieving her from liability on future calls; and
(*b*) the recovery of the money already paid.

The company agreed to rectify the register but was not prepared to return the money paid.

Held – the claim under (*b*) above failed because there had not been total failure of consideration. The shares had some value and gave some rights, even though the claimant had not received any dividends and the shares had always stood at a discount on the market.

Comment In *Davies* v *Beynon-Harris* (1931) 47 TLR 424 a minor was allowed to avoid a lease of a flat without liability for future rent or damages but was not allowed to recover rent paid. However, in *Goode* v *Harrison* (1821) 5 B & Ald 147 a partner who was a minor took no steps to avoid the partnership contract while a minor or afterwards. He was held liable for the debts of the firm incurred after he came of age.

113 *Pearce* v *Brain* [1929] 2 KB 310

Pearce, a minor, exchanged his motor cycle for a motor car belonging to Brain. The minor had little use out of the car, and had in fact driven it only 70 miles in all when it broke down because of serious defects in the back axle. Pearce now sued to recover his motor cycle, claiming that the consideration had wholly failed.

Held – (*a*) a contract for the exchange of goods, whilst not a sale of goods, is a contract for the supply of goods, and that if the goods are not necessaries, the contract was void if with a minor (now not binding unless ratified); (*b*) the car was not a necessary good, so the contract was void; (*c*) even so, the minor could only recover money paid under a void contract if the consideration had wholly failed. The court considered that the minor had received a benefit under the contract, albeit small, and that he could not recover the motor cycle.

Comment In *Corpe* v *Overton* (1833) 10 Bing 252 a minor agreed to enter into a partnership and deposited £100 with the defendant as security for performance of the contract. The minor rescinded the contract before the partnership came into existence.

Held – he could recover the £100 because he had received no benefit having never been a partner. There had been total failure of consideration.

Contracting with persons of unsound mind and drunkards

114 *Imperial Loan Co* v *Stone* [1892] QB 599

This was an action on a promissory note. The defendant pleaded that at the time of making the note he was insane and that the claimant knew he was. The jury found that he was, in fact, insane but could not agree on the question of whether the claimant knew it. The judge entered judgment for the defendant.

Held – he was wrong. The defendant in order to succeed must convince the court on both issues.

Comment (i) In *Hart* v *O'Connor* [1985] 2 All ER 880 the Privy Council refused to set aside an agreement to sell farmland in New Zealand because although the seller was of unsound mind, his affliction was not apparent. The price paid was not unreasonable. If it had been, the Privy Council said that the contract could have been set aside for equitable fraud as an unconscionable bargain.

(ii) This case is retained to show the changes effected by the Mental Capacity Act 2005. The question of whether the other party knew of the mental incapacity does not arise. There is a presumption of capacity unless and until the person claiming not to have capacity (or his or her representatives) can show otherwise. The knowledge requirement still applies in cases of drunkenness (see below).

115 *Matthews* v *Baxter* [1873] LR 8 Exch 132

Matthews agreed to buy houses from Baxter. He was so drunk as not to know what he was doing. Afterwards, when sober, he ratified and confirmed the contract. It was *held* that both parties were bound by it.

Comment A contract with a drunken person must in effect always be voidable by him because presumably the fact that he is drunk will be known to the other party. This is not so in regard to unsoundness of mind which might not be known to the other party.

Registered companies: the *ultra vires* rule: position at common law

116 *Ashbury Railway Carriage & Iron Co* v *Riche* (1875) LR 7 HL 653

The company was formed for the purposes (stated in the memorandum of association) of making and selling railway wagons and other railway plant and carrying on the business of mechanical engineers and general contractors. The company bought a concession for the construction of a railway system in Belgium from Antwerp to Tournai and entered into an agreement whereby Messrs Riche were to construct the railway line. Messrs Riche commenced the work and the company paid over certain sums of money in connection with the contract. The Ashbury company later ran into difficulties, and the shareholders wished the directors to take over the contract in a personal capacity and indemnify the shareholders. The directors thereupon repudiated the contract on behalf of the company and Messrs Riche sued for breach of contract.

Held – the directors were able to repudiate because the contract to construct a railway system was *ultra vires* and void. On a proper construction of the objects, the company had power to supply materials for the construction of railways but had no power to engage in the actual construction of them. Further, the subsequent assent of all the shareholders could not, in those days, make the contract binding, for, at common law, a principal cannot ratify the *ultra vires* contracts of his agent.

REALITY OF CONSENT I

Mistake: documents mistakenly signed: relevance of signer's negligence

117 *Saunders* v *Anglia Building Society* [1970] 3 All ER 961

Mrs Gallie, a widow aged 78 years, signed a document which Lee, her nephew's friend, told her was a deed of gift of her house to her nephew. She did not read the document but believed what Lee had told her. In fact, the document was an assignment of her leasehold interest in the house to Lee, and Lee later mortgaged that interest to a building society. In an action by Mrs Gallie against Lee and the building society, it was *held* at first instance – (*a*) that the assignment was void and did not confer a title on Lee; (*b*) that although Mrs Gallie had been negligent, she was not estopped from denying the validity of the deed against the building society for she owed it no duty. The Court of Appeal, in allowing an appeal by the building society, *held* that the plea of *non est factum* was not available to Mrs Gallie. The transaction intended and carried out was the same, i.e. an assignment.

The appeal to the House of Lords was brought by Saunders, the executrix of Mrs Gallie's estate. The House of Lords affirmed the decision of the Court of Appeal but took the opportunity to restate the law relating to the avoidance of documents on the ground of mistake as follows.

(*a*) The plea of *non est factum* will rarely be available to a person of full capacity who signs a document apparently having legal effect without troubling to read it, i.e. negligently.

(*b*) A mistake as to the identity of the person in whose favour the document is executed will not normally support a plea of *non est factum* though it may do if

the court regards the mistake as fundamental (Lord Reid and Lord Hodson). Neither judge felt that the personality error made by Mrs Gallie was sufficient to support the plea.

(*c*) The distinction taken in *Howatson* v *Webb* [1908] 1 Ch 1 that the mistake must be as to the class or character of the document and not merely as to its contents was regarded as illogical. Under the *Howatson* test, if X signed a guarantee for £1,000 believing it to be an insurance policy he escaped all liability on the guarantee, but if he signed a guarantee for £10,000 believing it to be a guarantee for £100 he was fully liable for £10,000. Under *Saunders* the document which was in fact signed must be 'fundamentally different', 'radically different', or 'totally different'. The test is more flexible than the character/contents one and yet still restricts the operation of the plea of *non est factum*.

Comment (i) The charge of negligence might be avoided where a person was told he was witnessing a confidential document and had no reason to doubt that he was. Many such documents are witnessed each day and the witnesses would never dream of asking to read them nor would they think themselves negligent because they had not done so. Surely the *Saunders* decision is not intended to turn witnesses into snoopers. Thus the decision in the old case of *Lewis* v *Clay* (1898) 77 LT 653 would probably be the same under modern law. In that case Clay was asked by Lord William Neville to witness a confidential document and signed in holes in blotting paper placed over the document by Neville. In fact, he was signing two promissory notes and two letters authorising Lewis to pay the amount of the notes to Lord William Neville. The court *held* that the signature of Clay in the circumstances had no more effect than if it had been written for an autograph collector or in an album and he was not bound by the bills of exchange.

In fact, the survival of the plea of *non est factum* in cases such as *Lewis* is recognised in certain of the judgments in the House of Lords in *Saunders* (see Lord Pearson at p 979 where, because of the cunning deception of a friend and the supposedly confidential nature of the documents in *Lewis*, he would have allowed the plea in *Lewis*'s case to succeed, as indeed it did).

(ii) As between the immediate parties to what is always in effect a fraud, there is, of course, no difficulty in avoiding the contract or transaction mistakenly entered into. The rules set out above are relevant only where the contract or transaction mistakenly entered into has affected a third party, as where he has taken a bill of exchange bona fide and for value on which the defendant's signature was obtained under circumstances of mistake (*Foster* v *Mackinnon* (1869) LR 4 CP 704) or has lent money on an interest in land obtained by a fraudulent assignment under circumstances of mistake (*Saunders* v *Anglia Building Society* (1970) – see above). The principles set out in *Saunders*' case apply also to those who sign blank forms as well as to those who sign completed documents without reading them (*United Dominions Trust Ltd* v *Western* [1975] 3 All ER 1017).

Unilateral mistake: ingredients: A is mistaken and B the other party to the contract knows or ought to know he is

118 *Higgins (W) Ltd* v *Northampton Corporation* [1927] 1 Ch 128

The claimant entered into a contract with the corporation for the erection of dwelling houses. The claimant made an arithmetical error in arriving at his price, having deducted a certain rather small sum twice over. The corporation sealed the contract, assuming that the price arrived at by the claimant was correct.

Held – the contract was binding on the parties. Rectification of such a contract was not possible because the power of the court to rectify agreements made under mistake is confined to common not unilateral mistake. Here, rectification would only have been granted if fraud or misrepresentation had been present.

Comment (i) Since this case was decided the courts have moved away from the idea that rectification of a contract for unilateral mistake is permissible only if there is some form of sharp practice (*Thomas Bates & Sons Ltd* v *Wyndham's (Lingerie) Ltd* (1981) – see Chapter 12, Rectification). Even so, rectification would not have been granted in this case because Northampton Corporation was not aware of the claimant's error, which is still a requirement for rectification.

(ii) The rule of unilateral mistake does not seem to apply to mistakes as to the value of the contract. If you go into a junk shop and recognise a genuine Georgian silver teapot marked at £10, your contract of purchase, if made, would be good in law, although it would be obvious that the seller had made a mistake and that the buyer was aware of it. This is the rule of *caveat venditor* (let the seller beware) and applies provided the seller intends to offer the goods at his marked price.

119 *Cundy* v *Lindsay* (1878) 3 App Cas 459

The respondents were linen manufacturers in Belfast. A fraudulent person named Blenkarn wrote to the respondents from 37 Wood Street, Cheapside, ordering a quantity of handkerchiefs but signed his letter in such a way that it appeared to come from Messrs Blenkiron, a well-known and solvent house doing business at 123 Wood Street. The respondents knew of the existence of Blenkiron but did not know the address. Accordingly, the handkerchiefs were sent to 37 Wood Street. Blenkarn then sold them to the