(iv) There is something of a problem with the meaning of the word 'recklessly' since it envisages a state of mind short of actual knowledge. It seems that the maker of the statement must be *almost sure* that it is false, but is nevertheless reckless and goes on to make it anyway.

Misrepresentation: the contribution of the tort of negligence

142 *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] 2 All ER 575

The appellants were advertising agents and the respondents were merchant bankers. The appellants had a client called Easipower Ltd who was a customer of the respondents. The appellants had contracted to place orders for advertising Easipower's products on television and in newspapers, and since this involved giving Easipower credit, they asked the respondents, who were Easipower's bankers, for a reference as to the creditworthiness of Easipower. The respondents said that Easipower Ltd was respectably constituted and considered good, although they said in regard to the credit: 'These are bigger figures than we have seen' and also that the reference was 'given in confidence and without responsibility on our part'. Relying on this reply, the appellants placed orders for advertising time and space for Easipower Ltd, and the appellants assumed personal responsibility for payment to the television and newspaper companies concerned. Easipower Ltd went into liquidation and the appellants lost over £17,000 on the advertising contracts. The appellants sued the respondents for the amount of the loss, alleging that the respondents had not informed themselves sufficiently about Easipower Ltd before writing the statement, and were therefore liable in negligence.

Held – in the present case the respondents' disclaimer was adequate to exclude the assumption by them of the legal duty of care, but, in the absence of the disclaimer, the circumstances would have given rise to a duty of care in spite of the absence of a contract or fiduciary relationship.

Comment (i) The House of Lords stated that the duty of care arose where there was 'a special relationship' requiring care.

The boundaries of the *Hedley* case are still not entirely clear but the requirement of a 'special relationship' between the maker of the statement and the recipient is an attempt to mark some boundaries. Can one complain, for example, if casual advice given on a train journey by a solicitor turns out to be erroneous? An extract from the judgment of Lord Devlin in the *Hedley* case is helpful. He said:

> . . . Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some direct form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good . . .

Thus, the solicitor's advice should not be actionable because there was no consideration to found contract liability and equally no 'special relationship' to found the tort claim. Of course, the absence of consideration and a contract prevents s 2(1) of the Misrepresentation Act 1967 from applying. However, the requirement of a 'special relationship' as a substitute for consideration brings the *Hedley* tort of negligence much closer to contract than the general law of negligence – a casual statement is not actionable, but there is obviously a claim by persons knocked over by a casual bad driver, who is, of course, the worst kind! (For further developments in professional liability see Chapter 21.)

(ii) The ease with which the duty to take care placed upon the bank was excluded in this case by the disclaimer was disappointing. However, such a disclaimer of negligence liability would, these days, have to satisfy the test of 'reasonableness' under the Unfair Contract Terms Act 1977 (see Chapter 15). It would seem that such a disclaimer would fall short of the reasonable expectations of those in business who naturally and reasonably expect that a bank will have taken proper care before giving a reference of this kind.

(iii) In this connection it was held in *Smith* v *Eric S Bush* [1987] 3 All ER 179 that it was unreasonable to allow a surveyor to rely on a general disclaimer of negligence where he had been asked by a building society to carry out a reasonably careful visual inspection of the property for valuation purposes (paid for by the would-be purchaser) when the valuer knew that the purchaser would be likely to rely on his report and not get another one. The house was purchased but, because of defects, turned out to be unfit for habitation. The surveyors when sued could not escape liability for damages on the basis of disclaimer.

The case suggests that in so far as such disclaimers are still used by professional persons they may not be effective, at least as regards ordinary consumers of professional services.

(iv) However, much would seem to depend on the sophistication of the person misled. In *McCullagh* v *Lane Fox*

and Partners, *The Times*, 22 December 1995 the Court of Appeal heard a claim against an estate agent for negligently misrepresenting the size of a plot of land to a purchaser. The purchaser's claims failed because the agents had included a disclaimer in the sales particulars which negated the element of proximity and assumption of responsibility required if negligence was to be established. In addition, it was not unfair under s 11 of the Unfair Contract Terms Act 1977 to allow the agents to rely on the disclaimer. The distinction between this case and *Bush* would appear to be the cost of the property (some £800,000) compared with the property in *Bush* (some £17,000) and the normally worldly wise nature of people who buy such expensive properties. Lord Justice Hobhouse said: 'Here the transaction involved a sophisticated member of the public who had had ample opportunity to regulate his conduct having regard to the disclaimer and who would have been assumed by all concerned to have had the benefit of legal advice before exchanging contracts.' The judge went on to say that since disclaimers are usually inserted by estate agents into their contracts it would have been unfair not to allow the defendants to rely on theirs.

Misrepresentation: loss of the right to rescind

143 *Long* v *Lloyd* [1958] 2 All ER 402

The claimant and the defendant were haulage contractors. The claimant was induced to buy the defendant's lorry by the defendant's misrepresentation as to condition and performance. The defendant advertised a lorry for sale at £850, the advertisement describing the vehicle as being in 'exceptional condition'. The claimant telephoned the defendant the same evening when the defendant agreed that his advertisement was a little ambiguous and said that the lorry was 'in first-class condition'. The claimant saw the lorry at the defendant's premises at Hampton Court on a Saturday. During a trial run on the following Monday the claimant found that the speedometer was not working, a spring was missing from the accelerator pedal, and it was difficult to engage top gear. The defendant said there was nothing wrong with the vehicle except what the claimant had found. He also said at this stage that the lorry would do 11 miles to the gallon.

The claimant purchased the lorry for £750, paying £375 down and agreeing to pay the balance at a later date. He then drove the lorry from Hampton Court to his place of business at Sevenoaks. On the following Wednesday, the claimant drove from Sevenoaks to Rochester to pick up a load, and during that journey the dynamo ceased to function, an oil seal was leaking badly, there was a crack in one of the road wheels, and he used eight gallons of petrol on a journey of 40 miles. That evening the claimant told the defendant of the defects, and the defendant offered to pay half the cost of a reconstructed dynamo, but denied any knowledge of the other defects. The claimant accepted the offer and the dynamo was fitted straightaway. On Thursday the lorry was driven by the claimant's brother to Middlesbrough, and it broke down on the Friday night. The claimant, on learning of this, asked the defendant for his money back, but the defendant would not give it to him. The lorry was subsequently examined and an expert said that it was not roadworthy. The claimant sued for rescission.

Held – at first instance, by Glyn-Jones, J – the defendant's statements about the lorry were innocent and not fraudulent because the evidence showed that the lorry had been laid up for a month and it might have deteriorated without the defendant's precise knowledge. The Court of Appeal affirmed this finding of fact and made the following additional points.

(*a*) The journey to Rochester was not affirmation because the claimant was merely testing the vehicle in a working capacity.

(*b*) However, the acceptance by the claimant of the defendant's offer to pay half the cost of the reconstructed dynamo, and the subsequent journey to Middlesbrough, did amount to affirmation, and rescission could not be granted to the claimant.

Comment (i) Damages could now be obtained for negligent misrepresentation under the Misrepresentation Act 1967, s 2(1), for how could the seller say he had reasonable grounds for believing that the lorry was in exceptional condition or first-class condition?

(ii) It seems remarkable that Glyn-Jones, J did not find fraud. However, fraud must be proved according to the criminal standard, i.e. beyond a reasonable doubt, and not according to the civil standard which is on balance of probabilities. Fraud is, therefore, difficult to prove and in this case there was presumably a reasonable doubt in the mind of the judge on the issue of fraud.

(iii) The Court of Appeal would not accept that the statement that the lorry was in first-class condition was a term of the contract (see Chapter 14) but decided that it was only a misrepresentation.

144 *Clarke* v *Dickson* (1858) 27 LJQB 223

In 1853 the claimant was induced by the misrepresentation of the three defendants, Dickson, Williams and Gibbs, to invest money in what was in effect a partnership to work lead mines in Wales. In 1857 the partnership was in financial difficulty and with the

claimant's assent it was converted into a limited company and the partnership capital was converted into shares. Shortly afterwards the company commenced winding-up proceedings and the claimant, on discovery of the falsity of the representations, asked for rescission of the contract.

Held – rescission could not be granted because capital in a partnership is not the same as shares in a company. The firm was no longer in existence, having been replaced by the company, and it was not possible to restore the parties to their original positions.

Comment (i) It should be noted that in addition to the problem of restoration, third-party rights, i.e. creditors, had accrued on the winding-up of the company and this is a further bar to rescission.

(ii) However, the court still retains its power to rescind 'on terms' where the problem is only one of deterioration of the subject matter. In *Erlanger* v *New Sombrero Phosphate Co* (1878) 3 App Cas 1218 rescission was granted of a contract to purchase a phosphate mine even though some phosphate had been extracted from it since sale. The House of Lords granted rescission on terms that the purchaser must account to the seller for profits made from the sale of the phosphate extracted since purchase.

Contracts of utmost good faith: insurance: effect of contractual clauses

145 *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413

Dawsons Ltd insured its motor lorry against loss by fire with Bonnin and others, and signed a proposal form which contained the following as Condition 4: 'Material misstatement or concealment of any circumstances by the insured material to assessing the premium herein, or in connection with any claim shall render the policy void.' The policy also contained a clause saying that the 'proposal shall be the basis of the contract and shall be held as incorporated therein'. Actually the proposal form was filled up by an insurance agent, and although he stated the proposer's address correctly as 46 Cadogan Street, Glasgow, he also stated that the vehicle would usually be garaged there, although there was no garage accommodation at the Cadogan Street address and the lorry was garaged elsewhere. Dawsons' secretary, who signed the proposal, overlooked this slip made by the agent. The lorry was destroyed by fire and Dawsons claimed under the policy.

Held – on appeal, by the House of Lords – the statement was not material within the meaning of Condition 4. However, the basis clause was an independent provision, and since the statement, though not material, was untrue, the policy was void for breach of condition. Viscount Cave said: 'The meaning and effect of the basis clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy, and if that be the contract of the parties, the question of materiality has not to be considered.'

Comment (i) The Unfair Contract Terms Act 1977 does not apply to contracts of insurance. This resulted from a deal between the insurance companies and the government under which the insurance companies agreed to abide by voluntary statements of practice. These have no legal effect but some moral force. If the insurance company follows these statements of practice, then certainly in consumer, i.e. non-business, insurance the worst effect of the basis clause (which is what they are called) should be eliminated.

(ii) However, even if we get rid of the basis clause problem, the rules of disclosure of material matters by the person seeking insurance remains a difficulty. It is based upon s 18(2) of the Marine Insurance Act 1906. This should not have been used as a basis for *all* insurances. Those seeking marine insurance are well aware of the risks they seek to insure. Those seeking, for example, domestic fire insurance are not. The Law Commission Report entitled *Non-Disclosure and Breach of Warranty* places a heavy burden on insurance companies to phrase their questions so as to elicit the kind and amount of information they want and not to leave it, as at present, to the person seeking insurance to make uninformed guesses as to what might be material to the insurers. The common law has already taken steps in this direction in *Hair* v *Prudential Assurance* [1983] 2 Lloyd's Rep 667, the court deciding in that case that if a person seeking insurance answered honestly all the questions put to him by the proposal for insurance, he should not be required to disclose any other matters. The questions should reveal all material issues.

(iii) The courts continue to try to assist the insured in terms of the utmost good faith rule, which has for so long been the insurer's best friend. In *Pan Atlantic Insurance Co Ltd* v *Pine Top Insurance Co Ltd* [1994] 3 All ER 581 the House of Lords decided that whereas in the past a mere innocent non-disclosure had enabled insurers to avoid the contract, it was now necessary to show that the insurer had actually been induced by the non-disclosure to enter into a policy on its terms.

Their Lordships did decide, however, that there was a presumption that an insurer would have been influenced by a non-disclosure of a material fact. This means that the person insured will have the burden of proving that the insurer was not influenced by the non-disclosure. This rather weakens the decision so far as the insured is concerned.

(iv) Further progress by the courts in defending the rights of the consumer against the harsher application of the

utmost good faith rule is to be seen in *Economides* v *Commercial Union Insurance Co plc* [1997] 3 All ER 636 where the Court of Appeal ruled, at least so far as the private consumer buying insurance cover is concerned, that the insured's duty to the insurance company is primarily one of honesty and he need only disclose those material facts which are known to him. Mr E's flat was burgled and £31,000 worth of valuables stolen, mainly those belonging to his parents. His contents insurance had been valued by Mr E, with his father's consent, at £16,000 and the maximum cover for valuables was £5,333. The defendants repudiated liability on the grounds of misrepresentation as to value and failure to disclose material facts. Mr E was, of course, under-insured and could only cover part of his loss, but the defendants did not want to pay at all. The Court of Appeal ruled in favour of Mr E for recovery of the reduced sum.

Fiduciary relationships: the duty to disclose

146 ***Gordon* v *Gordon*** (1819) 3 Swan 400

Two brothers made an agreement for division of the family estates. The elder supposed he was born before the marriage of his parents and was, therefore, illegitimate. The younger knew that their parents had been married before the birth of the elder brother and the elder brother was, therefore, legitimate and his father's heir. He did not communicate this information to his elder brother. Nineteen years afterwards the elder brother discovered that he was legitimate and the agreement was set aside following this action brought by him. He would have had no case if at the time of the agreement both brothers had been in honest error as to the date of their parents' marriage.

Duress: effect upon contracts

147 ***Welch* v *Cheesman*** (1973) 229 EG 99

Mrs Welch lived with the defendant, C, for many years in a house which she owned. C was a man given to violence, and after he threatened her Mrs Welch sold the house to him for £300. C died and his widow claimed the house which was worth about £3,000. Mrs Welch brought this action to set aside the sale of the house to C on the grounds of duress and she succeeded.

Undue influence: situations in which presumed: special relationships

148 ***Lancashire Loans Ltd* v *Black*** [1934] 1 KB 380

A daughter married at 18 and went to live with her husband. Her mother was an extravagant woman and was in debt to a firm of moneylenders. When the daughter became of age, her mother persuaded her to raise £2,000 on a property in which the daughter had an interest, and this was used to pay off the mother's debts. Twelve months later the mother and daughter signed a joint and several promissory note of £775 at 85 per cent interest in favour of the moneylenders, and the daughter created a further charge on her property in order that the mother might borrow more money. The daughter did not understand the nature of the transaction, and the only advice she received was from a solicitor acting for the mother and the moneylenders. The moneylenders brought this action against the mother and daughter on the note.

Held – the daughter's defence that she was under the undue influence of her mother succeeded, in spite of the fact that she was of full age and married with her own home.

149 ***Allcard* v *Skinner*** (1887) 36 Ch D 145

In 1868 the claimant joined a Protestant institution called the sisterhood of St Mary at the Cross, promising to devote her property to the service of the poor. The defendant, Miss Skinner, was the Lady Superior of the Sisterhood. In 1871 the claimant ceased to be a novice and became a sister in the order, taking her vows of poverty, chastity and obedience. By this time she had left her home and was residing with the sisterhood. The claimant remained a sister until 1878 and, in compliance with the vow of poverty, she had by then given property to the value of £7,000 to the defendant. The claimant left the order in 1879 and became a Roman Catholic. Of the property she had transferred, £1,671 remained in 1885 and the claimant sought to recover this sum, claiming that it had been transferred in circumstances of undue influence.

Held – that the gifts had been made under pressure of an unusually persuasive nature, particularly since the claimant was prevented from seeking outside advice under a rule of the sisterhood which said, 'Let no sister seek the advice of any extern without the superior's leave.' However, the claimant's suit was barred by her delay because, although the influence was removed in 1879, she did not bring her action until 1885.

Presumption of undue influence: other categories

150 ***Hodgson* v *Marks*** [1970] 3 All ER 513

Mrs Hodgson, who was a widow of 83, owned a freehold house in which she lived. In 1959 she took in a Mr Evans as a lodger. She soon came to trust

Evans and allowed him to manage her financial affairs. In June 1960, she transferred the house to Evans, her sole reason for so doing being to prevent her nephew from turning Evans out of the house. It was orally agreed between Mrs Hodgson and Evans that the house was to remain hers, although held in the name of Evans. Evans later made arrangements to sell the house without the knowledge or consent of Mrs Hodgson. The house was bought by Mr Marks and Mrs Hodgson now asked for a declaration that he was bound to transfer the property back to her. The following questions arose:

(*a*) whether Evans held the house in trust for Mrs Hodgson. It was *held* – by Ungoed-Thomas, J – that he did. The absence of written evidence of trust as required by s 53 of the Law of Property Act 1925 was not a bar to Mrs Hodgson's claim. The section does not apply to implied trusts of this kind;

(*b*) whether Evans had exercised undue influence. It was *held* that he had and that a presumption of undue influence was raised. Although the parties were not in the established categories, Evans had a relationship of trust and confidence with Mrs Hodgson of a kind which raised a presumption of undue influence.

However, Mrs Hodgson lost the case because Mr Marks was protected by s 70 of the Land Registration Act 1925, which gives rights to a purchaser of property for value in respect of interests in that property of which the purchaser is not aware. In this case Mr Marks bought the house from Mr Evans, the house being in the name of Evans and he had no reason to suppose that Mrs Hodgson had any interest in it.

Comment (i) Mrs Hodgson's appeal to the Court of Appeal in 1971 succeeded and she got her house back, the court holding that in spite of s 70, a purchaser must pay heed to the possibility of rights in all *occupiers*. Mrs Hodgson was obviously in occupation with Mr Evans and inquiries should have been made by the purchaser as to her rights in the property.

(ii) The application of the presumption in a relationship which was not one of the established ones is also illustrated by *Goldsworthy* v *Brickell* [1987] 1 All ER 853, where a contract to grant a tenancy of a farm advantageous to the defendant in that, for example, it did not allow the landlord, G, to make any rent increases, was set aside. The defendant, B, who had become the tenant, was a neighbour of G. G was 85 and had come to rely implicitly on the advice of B. Undue influence was presumed although neighbours are not within the established categories where undue influence is generally presumed.

Unconscionable bargains: protection against improper pressure and inequality of bargaining power

151 *Lloyds Bank* v *Bundy* [1974] 3 All ER 757

The defendant and his son's company both banked with the claimants, the defendant having been a customer for many years. The company's affairs deteriorated over a period of years and at the son's suggestion the bank's assistant manager visited the defendant and said that the bank could not continue to support an overdraft for the company unless the defendant entered into a guarantee of the account. The defendant received no independent advice, nor did the bank's assistant manager suggest that he should do so. The defendant charged his house as security for the overdraft and shortly afterwards the company went into receivership. The bank obtained possession of the house from the defendant in the county court, where the assistant branch manager in evidence said that he thought that the defendant had relied upon him implicitly to advise him about the charge.

The defendant appealed to the Court of Appeal in an attempt to set aside the guarantee and the security and it was *held* – allowing the defendant's appeal – that in the particular circumstances a special relationship existed between the defendant and the bank's assistant manager, as agent for the bank, and the bank was in breach of its duty of fiduciary care in procuring the charge which would be set aside for undue influence. The defendant, without any benefit to himself, had signed away his sole remaining asset without taking independent advice.

Comment (i) While the majority of the Court of Appeal (Cairns, LJ and Sir Eric Sachs) were content to decide that appeal on the conventional ground that a fiduciary relationship existed between the bank and its customer, which is to suggest that a new fiduciary relationship has come into being, Lord Denning took the opportunity to break new ground by deciding that in addition to avoiding the contract on the grounds of fiduciary relationship, Mr Bundy could also have done so on the basis of 'inequality of bargaining power'. Although inequality of bargaining power obviously includes undue influence, Lord Denning made it clear that the principle does not depend on the will of one party being dominated or overcome by the other. This is clear from that part of the judgment where he says: 'One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.' This approach is, of course, at variance with the traditional view of undue influence which was that it was based on dominance resulting in an inferior party being unable to

exercise independent judgment or on a relationship of trust and confidence.

(ii) It should be noted that cases such as this which introduce into the law a requirement that a contract must be fair may eventually develop to the point where adequacy of consideration is required in contract. This is not the case at the present time.

(iii) In *National Westminster Bank plc* v *Morgan* [1983] 3 All ER 85 the Court of Appeal set aside a charge over a wife's share in the matrimonial home after she executed it without legal advice, in order to secure a loan from the bank to clear a building society mortgage, and after the bank manager had assured her that the charge would not be used to secure her husband's business advances, whereas it did in fact extend to such advances. However, the bank had no intention of using the charge other than to secure the advance to clear the building society mortgage, nor did it.

The above decision, which moved in the direction of saying that banks would have to ensure that all their customers had independent legal advice before taking out a bank mortgage was reversed by the House of Lords in *National Westminster Bank plc* v *Morgan* [1985] 1 All ER 821. Undue influence, the House of Lords said, was the use by one person of a power over another person to take a certain course of action generally to his or her disadvantage. A bank manager need not advise independent legal advice in a situation such as this. The manager in this case had stuck to explaining the legal effect of the charge which, though erroneous as to the terms of the charge, correctly represented his intention and that of the bank. The security represented no disadvantage to Mrs Morgan. It was exactly what she wanted, to clear the building society loan on her home. The House of Lords also rejected the view that a court would grant relief where there was merely an inequality of bargaining power. Their Lordships rejected that view which was expressed by Lord Denning in *Bundy.* The courts will not, said the House of Lords, protect persons against what they regard as a mistake merely because of inequality of bargaining power. This is a much harder line.

(iv) In *Bundy*, therefore, the Court of Appeal *held* that the bank in not advising the person giving the security to get independent advice exercised undue influence and for this reason set the security aside. In *Morgan* the House of Lords *held* that no presumption of undue influence existed. In *Cornish* v *Midland Bank* [1985] 3 All ER 513 the Court of Appeal decided that the proper way to deal with these cases was not through undue influence but by using the law of negligence, though only where the bank had actually given wrong advice.

In *Cornish* the claimant had signed a second mortgage on a farmhouse jointly owned with her husband in order to secure £2,000 which her husband had borrowed from the bank. She did so because the bank clerk involved said that the mortgage was like a building society mortgage. It was not because unlike a building society mortgage it covered all future borrowing by the husband. The bank later tried to enforce the security. Eventually the Court of Appeal *held* that the bank was liable in negligence for the wrong advice of its clerk who made a negligent misstatement causing damage, i.e. that £2,000 was the borrowing limit when it was not. The mortgage was not set aside for undue influence so that the bank was entitled to the proceeds of the sale of the farmhouse but had to pay the claimant £11,231 damages plus interest for negligence. Thus, although it would be good practice for a bank to advise independent advice, it is not necessary for it to do so. The security will be good and there is no presumption of undue influence. However, if an employee of the bank *actually* gives negligent advice or fails to explain the consequences of the charge and/or fails to advise the taking of independent advice (see *Midland Bank plc* v *Perry*, *The Times*, 28 May 1987), the bank will be able to enforce the security but will be liable in damages under the ruling in *Hedley Byrne* v *Heller & Partners* (1963).

(v) This may in some cases make the security of little use to the bank because it will have to set off the damages it is required to pay against the money it receives from the sale of the security. Much depends, of course, on the amount of damages awarded. Nevertheless, cases such as *Morgan, Cornish* and *Perry* do seek to remove these security situations from the realm of undue influence, and it seems that the courts which decided them were moving away from the old rules previously provided by equity for married women who provided security for their husbands' debts. A security is a business transaction and those giving securities must look after themselves as others in business must. However, the older rules seem to have survived and were stated in definitive form by the House of Lords in *Barclays Bank plc* v *O'Brien* [1993] 4 All ER 417. Their Lordships decided that a married woman (or cohabitee) must be treated as a special protected class of guarantor when guaranteeing her husband's (or cohabitee's) debts because of the emotional involvement of which the bank is on constructive notice. Unless the transaction is fully explained and understood by the protected guarantor, it will be void.

(vi) What then is new about *O'Brien*? First and most importantly is the fact that the bank was fixed with *constructive notice* of the possibility that the wife may not have fully understood the transaction, either because she had been misled by the husband or cohabitee, or had not been fully informed. It was not necessary for the branch manager to have *actual knowledge* of this.

What this means, in effect, is that when taking a security on a property which is jointly owned, as in the *O'Brien* case, by persons with an emotional involvement, the person taking the security must *assume* that there may be deceit or undue influence upon the wife or cohabitee, though the security will be good if the bank

official ensures that the wife or cohabitee fully understands the transaction and its risks, either by means of its own explanations or as a result of the receipt of independent advice. If following explanation or advice the wife or cohabitee signs a document to the effect that the transaction and its risks are understood, the court is likely to accept this as good evidence of the wife or cohabitee's liability.

This 'counselling' aspect is also new. At a time when counselling is regarded as a cure for all kinds of ills, it is perhaps not surprising that the House of Lords should have put this forward as an answer to the problems of lenders. Finally, there is a recognition by the court that any variety of relationships comprised in the term 'cohabitees' can give rise to the constructive notice of emotional involvement.

(vii) It is worth noting that in a similar case entitled *CIBC Mortgages plc* v *Pitt* [1994] 4 All ER 433, handed down on the same day as *O'Brien* by the House of Lords, the decision was that a wife who had been pressurised into giving security over the jointly-owned family home was bound by it. The distinction was made in *Pitt* that the loan was made *jointly* to the husband and wife, and not to the husband alone, so that the wife derived some benefit from it. In such cases, said the House of Lords, the rule of constructive notice does not arise and in the absence of actual knowledge of pressure, which was not present in *Pitt*, the bank has not the same need to follow the 'counselling' approach.

(viii) More recently the Court of Appeal gave guidance including the extent of the *O'Brien* advice to be given by solicitors (see *Royal Bank of Scotland plc* v *Etridge (No 2)* [1998] 4 All ER 705). The court made the assumption that the claimant is the wife (or cohabitee) and the person using the influence is the husband (or cohabitee), although similar principles would apply to a situation where the wife or cohabitee used the undue influence. The guidance appears below:

- the client must be told that she is not under any obligation to enter into the transaction;
- the solicitor must be satisfied that the client is not subject to any improper influence and then consider whether the transaction is one which she ought to be allowed to make, even if she was not subject to influence. If it is not, she should be advised not to enter into it;
- if the lender is asking for an 'all monies' guarantee or charge, the solicitor should make clear to the client that she is being asked to undertake liability for any existing indebtedness, new debts and future debts and not merely the amount contemplated in the current arrangements and that the client may be unable to control the amount of future indebtedness;
- if a wife is being asked to give an unlimited guarantee, she should be told of the option of giving a limited guarantee or charge and the solicitor should offer to negotiate for her. It is not acceptable practice to assume that the arrangements are not negotiable.

(ix) The amount of litigation involving occupiers who try to avoid eviction by relying on *O'Brien* shows no sign of abating, despite the clear statement of principles both in *O'Brien* and *Etridge*. There is little point in proliferating authorities. The rules to be applied lie mainly in the two cases mentioned above. It is, however, worth mentioning that the mere presence of the family solicitor during the transaction of loan is not enough. The lender must be satisfied that proper advice has been given. This cannot be assumed from the mere presence of a lawyer (see *Lloyds TSB Bank plc* v *Holdgate* [2002] EWCA Civ 1543).

CONTRACTUAL TERMS

Representations and terms distinguished

152 ***Bannerman* v *White*** (1861) 10 CB (NS) 844

The defendant was intending to buy hops from the claimant and he asked the claimant whether sulphur had been used in the cultivation of the hops, adding that if it had he would not even bother to ask the price, by which he meant he would not make the contract. The claimant said that no sulphur had been used, though in fact it had. It was *held* that the claimant's assurance that sulphur had not been used was a term of the contract and the defendant was justified in raising the matter as a successful defence to an action for the price.

153 ***Oscar Chess Ltd* v *Williams*** [1957] 1 All ER 325

In May 1955, Williams bought a car from the claimants on hire-purchase terms. The claimants took Williams' Morris car in part exchange. Williams described the car as a 1948 model and produced the registration book, which showed that the car was first registered in April 1948, and that there had been several owners since that time. Williams was allowed £290 on the Morris. Eight months later the claimants discovered that the Morris car was a 1939 model there being no change in appearance in the model between 1939 and 1948. The allowance for a 1939 model was £175 and the claimants sued for £115 damages for breach of warranty that the car was a 1948 model. Evidence showed that some fraudulent person had altered the registration book but he could not be traced, and that Williams honestly believed that the car was a 1948 model.

Held – the contract might have been set aside in equity for misrepresentation but the delay of eight

months defeated this remedy. This mistake was a mistake of quality which did not avoid the contract at common law and in order to obtain damages the claimants must prove a breach of warranty. The court was unable to find that Williams was in a position to give such a warranty, and suggested that the claimants should have taken the engine and chassis number and written to the manufacturers, so using their superior knowledge to protect themselves in the matter. The claimants were not entitled to any redress. Morris, LJ dissented, holding that the statement that the car was a 1948 model was a fundamental condition.

Comment (i) No doubt Mr Williams would have been liable for innocent and not negligent misrepresentation under the Misrepresentation Act 1967 for he had reasonable grounds to believe that the car was a 1948 Morris. He was merely repeating an earlier deception made when he bought the vehicle.

(ii) Since the remedy of rescission had been lost by reason of delay, the court would not even now grant that remedy or damages at the court's discretion, which the court can do even if the remedy of rescission is not available. The reluctance of the court to say that statements by non-dealers are contractual terms for breach of which damages can be recovered leads to an unfair result as in this case. After all, Mr Williams obtained £115 more for his Morris than it was worth.

(iii) The case is not without its difficulties because it seems to be based on the fault of the agents of Oscar Chess in not discovering the date of the vehicle. In most cases the courts do not concern themselves with fault when dealing with the terms of a contract. If, as in *Oscar Chess*, A warrants to B that goods have certain characteristics, it is no defence if they have not that the giver of the warranty honestly and reasonably believed that they had. (Compare the law relating to misrepresentation.) Nor is B normally expected to check up on the statement. What this case shows is that it is much harder for a private individual to give a warranty to a dealer, and that the dealer may be regarded as at fault in terms of the contract he made because he should have known better!

(iv) A contrast to *Oscar Chess* is provided by *Dick Bentley Productions Ltd* v *Harold Smith (Motors) Ltd* [1965] 2 All ER 65 where a dealer sold a Bentley to a customer, the instruments showing that it had done only 30,000 miles since a replacement engine was fitted when, in fact, it had done 100,000 miles since that time. The seller was held liable for breach of condition, whereas in *Oscar Chess* the seller – who was not a dealer – was not.

Conditions and warranties distinguished

154 ***Poussard* v *Spiers and Pond*** (1876) 1 QBD 410

Madame Poussard had entered into an agreement to play a part in an opera, the first performance to take place on 28 November 1874. On 23 November Madame Poussard was taken ill and was unable to appear until 4 December. The defendants had hired a substitute, and discovered that the only way in which they could secure a substitute to take Madame Poussard's place was to offer that person the complete engagement. This they had done, and they refused the services of Madame Poussard when she presented herself on 4 December. The claimant now sued for breach of contract.

Held – the failure of Madame Poussard to perform the contract as from the first night was a breach of condition, and the defendants were within their rights in regarding the contract as discharged.

Comment This case merely illustrates the availability of repudiation for serious breach of contract. Madame Poussard was not liable to pay damages for breach because unlike the defendants in *Gill & Duffus SA* she could not help the breach, the contract being also frustrated (see Chapter 17).

155 ***Bettini* v *Gye*** (1876) 1 QBD 183

The claimant was an opera singer. The defendant was the director of the Royal Italian Opera in London. The claimant had agreed to sing in Great Britain in theatres, halls and drawing rooms for a period of time commencing on 30 March 1875, and to be in London for rehearsals six days before the engagement began. The claimant was taken ill and arrived on 28 March 1875, but the defendant would not accept the claimant's services, treating the contract as discharged.

Held – the rehearsal clause was subsidiary to the main purpose of the contract, and its breach constituted a breach of warranty only. The defendant had no right to treat the contract as discharged and must compensate the claimant, but he had a counterclaim for any damage he had suffered by the claimant's late arrival.

Comment This case is also concerned with the availability of repudiation and the court decided that the breach was not sufficiently serious. The court suggested that if Gye wanted redress he should cross-claim for damages against Bettini. If and when he did, and there is no report suggesting that he did, the matter of Bettini's illness excusing his breach would have had to be raised. Presumably, it would have been a defence even though in this case the contract was not discharged by frustration.

Intermediate or innominate terms

156 *Cehave NV* v *Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1975] 3 All ER 739

The defendants sold citrus pulp pellets to the claimants. A term of the contract was 'shipment to be made in good condition'. The goods were not delivered all at once but in consignments, and when a particular consignment arrived at Rotterdam, the market price of the goods had fallen and it was found that 1,260 tons of the goods out of a total consignment of 3,293 tons was damaged. The claimants rejected the whole cargo on the ground that the shipment was not made in good condition. The claimants then sought the recovery of the price, which amounted to £100,000. In the event, a middle man bought the goods at the price of £33,720 and resold them to the claimants at the same price. The claimants then used the pellets for making cattle food as was the original intention. The total result of the transaction, if it had been left that way, was that the claimants had received goods which they had bought for £100,000 for the reduced price of £33,720. The Court of Appeal decided in favour of the sellers. The court *held* that the contractual term 'shipment to be made in good condition' was not a contractual condition but was an intermediate or innominate term. As Lord Denning, MR said: 'If a small portion of the whole cargo was not in good condition and arrived a little unsound, it should be met by a price allowance. The buyers should not have the right to reject the whole cargo unless it was serious or substantial.'

Lord Denning also rejected the view that the goods were not of merchantable (now satisfactory) quality simply because they were not perfect in every way. He said that the definition now contained in s 14(2) of the Sale of Goods Act 1979 (as amended) was to be preferred because it was more flexible than some of the eariler judicial decisions on previous legislation. In fact, the definition delegates to the court the task of deciding what is satisfactory quality in the circumstances of each particular case.

Comment (i) This intermediate or innominate term approach was endorsed by the House of Lords in *Reardon Smith Line* v *Hansen-Tangen* [1976] 3 All ER 570.

(ii) The breach did not seem to have affected the use of the goods and looks like a business ploy to get them more cheaply. The views of Lord Denning in this case are now contained in s 15A of the Sale of Goods Act 1979 (inserted by the Sale and Supply of Goods Act 1994) under which the right to reject the goods for slight breaches is retained in consumer contracts, but in non-consumer contracts such as this, a buyer will, where the breach is slight, have to take delivery and sue for any loss.

Contractual terms: terms implied by custom

157 *Hutton* v *Warren* (1836) 150 ER 517

The claimant was the tenant of a farm and the defendant the landlord. At Michaelmas 1833, the defendant gave the claimant notice to quit on the Lady Day following. The defendant insisted that the claimant cultivate the land during the period of notice, which he did. The claimant now asked for a fair allowance for seeds and labour, of which he had had no benefit, having left the farm before harvest. It was proved that by custom a tenant was bound to farm for the whole of his tenancy and on quitting was entitled to a fair allowance for seeds and labour.

Held – the claimant succeeded.

> We are of opinion that this custom was, by implication, imported into the lease. It has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages. (*Per* Parke B)

Comment (i) Michaelmas Day is 29 September and is a quarter day for payment of rent as well as a Christian feast. Lady Day is 25 March. It is also a quarter day for the payment of rent and is so called because it is a Christian feast.

(ii) The case also provides an example of an exception to the parol evidence rule which has already been considered. Outside evidence was admitted, though there was a written agreement as Parke B explains.

(iii) A comparison is provided by the ruling in *Lancaster* v *Bird, The Times*, 9 March 1999 where it was held that although there was some evidence of a custom in the building trade that prices were quoted exclusive of VAT, this customary term could not be applied to a contract between a small builder and a part-time farmer for work and materials in connection with the erection of a farm shed. The builder's price had been quoted exclusive of VAT but, of course, the account rendered added 17½ per cent to that figure to cover VAT, the builder being registered for VAT. This increased the bill by a percentage which the farmer could not recover since he was not registered for VAT, his turnover being presumably below the then VAT threshold.

The non-VAT price was payable by the farmer with the builder accounting for VAT on the reduced price. A bad deal for him!

Judicial implied terms

158 *The Moorcock* (1889) 14 PD 64

The appellants in this case were in possession of a wharf and a jetty extending into the River Thames, and the respondent was the owner of the steamship *Moorcock*. In November 1887, the appellants and the respondents agreed that the ship should be discharged and loaded at the wharf and for that purpose should be moored alongside the jetty. Both parties realised that when the tide was out the ship would rest on the river bed. In the event the *Moorcock* sustained damage when she ceased to be waterborne owing to the centre of the vessel settling on a ridge of hard ground beneath the mud. There was no evidence that the appellants had given any warranty that the place was safe for the ship to lie in, but it was *held* – by the Court of Appeal – that there was an implied warranty by the appellants to this effect, for breach of which they were liable in damages. *Per* Bowen, LJ:

> Now, an implied warranty, or as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

Comment (i) This statement of the law is to the effect that the court cannot imply a term because it is reasonable to do so but only when it is commercially necessary to do so. Lord Denning, particularly, in *Liverpool City Council* v *Irwin* [1977] put forward the view that the court could imply a term whenever it was reasonable to do so, even if it was not necessary to do so to make the contract work in a commercial sense. This view is still not entirely accepted by the judiciary in general.

(ii) Although the court most often implies covenants or terms which are positive, i.e. the party concerned *has to do something, negative* covenants can be implied. Thus, in *Fraser* v *Thames Television Ltd* [1983] 2 All ER 101 the members of a group called Rock Bottom brought an action alleging that Thames had broken an agreement with them about a TV series, an implied term of which was that Thames would not use the idea for the series, which was based on the history of the group and its subsequent struggles, unless the members of the group were employed as actresses in the series. Hirst, J implied this negative term on the ground that it was necessary to give business efficacy to the agreement between the parties.

Statutory implied terms: seller's right to sell

159 *Rowland* v *Divall* [1923] 2 KB 500

In April 1922, the defendant bought an 'Albert' motor car from a man who had stolen it from the true owner. One month later the claimant, a dealer, purchased the car from the defendant for £334, repainted it, and sold it for £400 to Colonel Railsdon. In September 1922, the police seized the car from Colonel Railsdon and the claimant repaid him the £400. The claimant now sued the defendant for £334 on the ground that there had been a total failure of consideration since the claimant had not obtained a title to the car.

Held – the defendant was in breach of s 12 of the Sale of Goods Act, which implies conditions and warranties into a sale of goods relating to the seller's right to sell, and there had been a total failure of consideration in spite of the fact that the car had been used by the claimant and his purchaser. The claimant contracted for the property in the car and not the mere right to possess it. Since he had not obtained the property, he was entitled to recover the sum of £334 and no deductions should be made for the period of use.

Comment (i) Although the court purported to deal with this case as a breach of s 12(1) of the Act, it would appear that in fact it operated on common-law principles and gave complete restitution of the purchase price because

of total failure of consideration arising out of the seller's lack of title. The condition under s 12(1) had by reason of the claimant's use of the car and the passage of time become a warranty when the action was brought, and if the court had been awarding damages for breach of warranty it would have had to reduce the sum of £334 by a sum representing the value to the claimant of the use of the vehicle which he had had.

(ii) The drawback to making an allowance to the seller for use is that he gets an allowance for a car which is not his and the owner might sue the buyer in damages for conversion so that he would have to pay an allowance and damages to the true owner in conversion. In other words, pay for use twice.

(iii) It is also relevant to say that the court felt an allowance for use should not be made because the claimant had paid the price for the car to become its *owner*, and not merely to have *use* of it. So why should he be subject to an allowance for use when that is not what he wanted or bargained for? As Bankes, LJ said: 'He did not get what he paid for – namely a car to which he would have title.'

160 ***Niblett Ltd* v *Confectioners' Materials Co Ltd*** [1921] 3 KB 387

The defendants agreed to sell to the claimants 3,000 cases of condensed milk to be shipped from New York to London. Of these, 1,000 cases bore labels with the word 'Nissly' on them. This came to the notice of the Nestlé Company and it suggested that this was an infringement of its registered trade mark. The claimants admitted this and gave an undertaking not to sell the milk under the title of 'Nissly'. They tried to dispose of the goods in various ways but eventually discovered that the only way to deal with the goods was to take off the labels and sell the milk without mark or label, thus incurring loss.

Held – by the Court of Appeal – the sellers were in breach of the implied condition set out in s 12(1) of the Sale of Goods Act. A person who can sell goods only by infringing a trade mark has no right to sell, even though he may be the owner of the goods. Atkin, LJ also found the sellers to be in breach of the warranty under s 12(2) because the buyer had not enjoyed quiet possession of the goods.

Sale by description: Sale of Goods Act 1979, s 13 applied

161 ***Beale* v *Taylor*** [1967] 3 All ER 253

The defendant advertised a car for sale as being a 1961 Triumph Herald 1200 and he believed this description to be correct. The claimant answered the advertisement and later visited the defendant to inspect the car. During his inspection he noticed, on the rear of the car, a metal disc with the figure 1200 on it. The claimant purchased the car, paying the agreed price. However, he later discovered that the car was made up of the rear of a 1961 Triumph Herald 1200 welded to the front of an earlier Triumph Herald 948. The welding was unsatisfactory and the car was unroadworthy.

Held – by the Court of Appeal – the claimant's case for damages for breach of the condition implied in the contract by s 13 of the Sale of Goods Act succeeded. The claimant had relied on the advertisement and on the metal disc on the rear and the sale was one by description, even though the claimant had seen and inspected the vehicle.

Comment It is, however, necessary for the buyer to show that it was the intention of the parties that the description should be relied upon by the buyer. In *Harlingdon Ltd* v *Hull Fine Art Ltd* [1990] 1 All ER 737 Hull was a firm of art dealers controlled by Mr Christopher Hull. It was asked to sell two oil paintings described as being by Münter, a German artist of the Impressionist School. Mr Hull had no knowledge of the German Impressionist School. He contacted Harlingdon: art dealers specialising in that field. Mr Hull told Harlingdon that the paintings were by Münter. Harlingdon sent an expert to examine the paintings and at this stage Mr Hull made it clear that he was not an expert in the field. Following the inspection, Harlingdon bought one of the paintings which turned out to be a forgery. Harlingdon sued for breach of s 13. It was held by the Court of Appeal that the claim failed. Harlingdon had not relied on the description of the painting, but had bought it after a proper and expert examination. The 'description' had not, therefore, become an essential term or condition of the contract.

It should be noted that this matter was not raised in *Leaf* v *International Galleries* (1950) (see Chapter 12) because Mr Leaf did not claim a breach of s 13. Presumably, if he had done so, he would have been required to show that it was the intention of the parties that he should rely on the description that the painting was by John Constable. This will normally be fairly easy to prove where the purchaser is an inexpert consumer. However, it was held in *Cavendish-Woodhouse* v *Manley* (1984) 82 LGR 376 that a seller could show that the sale was not by description by using such phrases as 'Sold as seen' or 'Bought as seen'. Such phrases do not, however, avoid the conditions of fitness and satisfactory quality because the phrases are not regarded as general exclusion clauses.