Boilerplate Clauses, International Commercial Contracts and the Applicable Law

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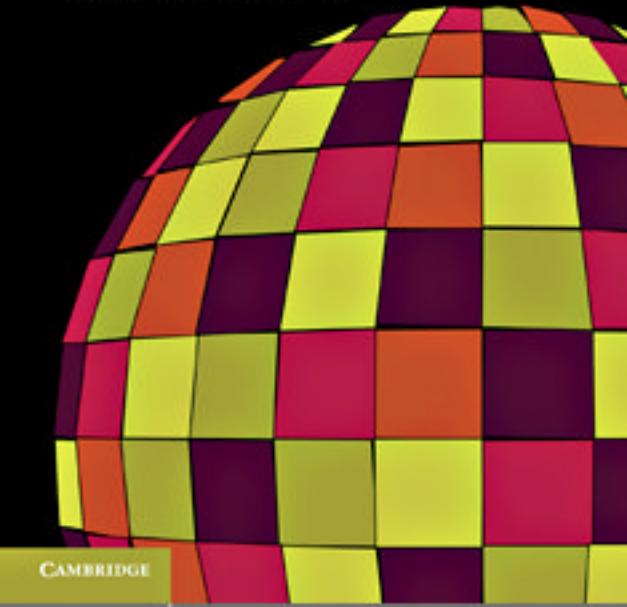

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that the difference between the approach of English law and that of other legal systems is one of degree. Differences in degree can matter, of course. Writing extra-judicially, Lord Steyn has observed that 'there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties',[31] but in English law there is *a* difference and it might be thought to be exemplified by the approach taken to the clauses about to be considered.

In approaching the analysis of particular clauses, I have adopted the illuminating technique employed by Giuditta Cordero-Moss in the last of the workshops around which this book is based of asking two very specific questions: (i) what is the legal background for the development of the clause in question, or, to put it another way, what would happen as a matter of English law if the clause was not there?; (ii) will such a clause be applied without restriction in situations where the result may be unexpected or unfair? I have eliminated from any specific consideration two types of clause – the severability provision and the 'material adverse change' provision. This is in part because of the confines of space, but is in part also a reflection of the fact that there is little, if any, direct judicial consideration of such clauses.

2 The clauses

2.1 Entire agreement[32]

As a matter of English law, it is necessary to draw a distinction between entire agreement clauses in two senses: the narrow and the wide. The sample clause which has been put forward for consideration states as follows:

> The Contract contains the entire contract and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of the Contract.

The sample clause is an example of an entire agreement clause in the narrow sense. It is this narrow sense which will be considered first, but some consideration will also be given to the wider sense, if only to confirm the approach of the English courts to such clauses generally.

[31] (1997) 113 LQR 433 at 439. This is a theme about which his Lordship has also written judicially: *First Energy (UK) Ltd* v. *Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194 at 196.

[32] G. McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford University Press, 2007), Chapter 24.

If one starts by asking what would happen if this clause was not included in a contract governed by English law, the answer is, arguably, nothing very different because of the parol evidence rule. This states that evidence cannot be admitted (or, even if admitted, cannot be used) to add to, vary or contradict a written instrument.[33] Thus, where a contract has been reduced to writing, neither party can rely on extrinsic evidence of terms alleged to have been agreed, i.e., on evidence not contained in the document itself.

One difficulty with the rule is that when a contract is reduced to writing, there is only a presumption that the writing was intended to include all the terms of the contract and this presumption is rebuttable, such that the parties may adduce evidence to show that the written document was not intended to set out all the terms on which the parties had actually agreed. It has been argued that this turns the parol evidence rule (as applied to contracts) into 'no more than a circular statement'.[34] The circularity argument goes thus: if the rule applies only where the written document is intended to contain *all* the terms of the contract, evidence of other terms would be useless even if admitted (since they would not form part of the contract), while the rule never prevents a party from relying on evidence of terms which *were* intended to be part of the contract. There is much force in this view.[35]

The primary purpose of the parol evidence rule is to promote certainty, but this may be at the expense of justice if it results in the rejection of evidence of other terms that were actually agreed and relied upon by one party. By contrast, the reception of such evidence may cause injustice to the other party, if he or she reasonably believed that the document drawn up by the parties formed an exclusive record of the contract. Where the evidence is rejected because the party relying on it cannot overcome the presumption which seems to arise from the fact that the document *looks* like a complete contract, the greater injustice would appear to lie in the exclusion of the evidence, for the presumption

[33] *Jacobs* v. *Batavia & General Plantations Trust Ltd* [1924] 1 Ch 287 at 295; *Rabin* v. *Gerson Berger Association Ltd* [1986] 1 WLR 526 at 531, 537; *The Nile Rhapsody* [1992] 2 Lloyd's Rep. 349 at 407, affirmed [1994] 1 Lloyd's Rep. 382; *Orion Insurance Co* v. *Sphere Drake Insurance Plc* [1992] 1 Lloyd's Rep. 239 at 273.

[34] Law Commission Report on *The Parol Evidence Rule* (Law Com. No. 154), para. 2.7; G. Marston, 'The Parol Evidence Rule: The Law Commission Speaks' [1986] CLJ 192; cf. Beldam LJ in *Youell* v. *Bland Welch & Co Ltd* [1992] 2 Lloyd's Rep. 127 at 140 – 'the rule, if rule it be'.

[35] For an argument that it is, nonetheless, more than mere circularity, see *Treitel*, para. 6–013.

seems to be based on the nature and form of the document, rather than on any actual belief of the party relying on it, that it formed an exclusive record of the contract.

It is in this context that one may consider the role and effect of an entire agreement clause of the type set out above. It is essentially intended to operate as an express incorporation of the parol evidence rule[36] and in that sense it is a clause which aims at detaching the contract from the need to have English law as the governing law.[37] If anything, it aims at even greater certainty than the parol evidence rule, since one does not need to ask whether the document *looks* like it was intended as an exclusive record of the contract; one has the express agreement of the parties to that effect. Because it amounts to an express incorporation of the parol evidence rule, its interpretation and enforcement is subject to the same dilemma referred to in relation to the rule itself. For example, the Law Commission has said: 'it may have a strong persuasive effect but if it were proved that, notwithstanding the clause, the parties actually intended some additional term to be of contractual effect, the court would give effect to that term.'[38] There are surprisingly few reported cases on the interpretation and effect of entire agreement clauses, but one of those few decisions supports this view. In *Cheverny Consulting Ltd* v. *Whitehead Mann Ltd*,[39] the court was required to consider claims for payment under a consultancy agreement which contained the following clause:

> This Agreement constitutes the entire agreement between the parties to it with respect to its subject matter and shall have effect to the exclusion of any other memorandum agreement or understanding of any kind between the parties preceding the date of this Agreement and touching and concerning its subject matter.

Crucially, the court had made a finding of fact that the main agreement had been accompanied by an unsigned side-letter which was, the entire agreement clause apart, intended to take effect contemporaneously with

[36] Though it has also been said that it operates 'to denude what would otherwise constitute a collateral warranty of legal effect': *Inntrepreneur Pub Co Ltd* v. *East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at 614; *Ravennavi SpA* v. *New Century Shipbuilding Co Ltd* [2006] EWHC 733 (Comm), [2006] 2 Lloyd's Rep. 280, [2007] EWCA Civ 58, [2007] 2 Lloyd's Rep. 24.

[37] It is suggested that the practice of including such clauses probably originated in the US: H. Beale, *Chitty on Contracts,* 30th edn (Sweet & Maxwell, 2008), 12–104, No. 435. See Uniform Commercial Code, para. 2–202.

[38] Law Com. 154, 1986, Cmnd. 9700, para. 2.15.

[39] [2005] EWHC 2431.

the main agreement.[40] In those circumstances, it was held that the entire agreement clause failed to exclude the side-letter for two reasons, though the judge placed greater emphasis on the second: first, 'This Agreement' was not further defined. As the judge held, if the side-letter had been stapled to the back of the main agreement, 'This Agreement' would have included the side-letter and the judge saw no reason to reach a different conclusion when it was supplied *along with* the main agreement; secondly, the clause only excluded 'any other memorandum agreement . . . *preceding* the date of the Agreement'. The judge found that the main agreement and the side-letter were 'devised for execution on the same occasion'.[41]

It should be noted that the decision in *Cheverny* is one which is reached solely on the basis of interpretation and is therefore a good example of the general observation made above that the courts can, via the orthodoxy of interpretation, avoid unreasonable results. It is noticeable that since this decision, the 'standard form' of an entire agreement clause does seem to have been altered to try and meet the objections raised by the judge, i.e., by giving a more explicit definition to 'This Agreement' or 'This Contract'[42] and dropping any reference to 'preceding' or 'prior' statements or representations. Would such a clause, leaving no room for an interpretative 'escape', be enforced if the court made the same finding of fact as in the *Cheverny* case that the parties had agreed to an additional term at variance with the recorded contract?[43] It seems

[40] The effect of the side-letter was to amend the 'trigger' for payment of additional consideration in the form of shares. In the Court of Appeal ([2006] EWCA Civ 1303), it was found that the trial judge had been wrong to rely on the evidence of one of the witnesses so as to conclude that there was an agreement on the side-letter, leaving aside the effect of the entire agreement clause. The matter was therefore remitted to the court for a further hearing, where the same result, that the entire agreement clause did not rule out the enforceability of the side-letter which was found to be binding on a proper consideration of the evidence, was reached: [2007] EWHC 3130 (Ch).

[41] The same might be said of the sample clause used – what does 'This Contract' mean? And does the clause only rule out 'prior' representation, etc?

[42] E.g., 'This Agreement, including the Schedules hereto, and the other Project documents referred to herein . . .'.

[43] In effect, this question was considered in the second trial in the *Cheverny* case, when Rattee J asked what the result would be if the entire agreement clause had deprived the side-letter of any contractual effect. He found that the parties had dealt with each other in a manner consistent with the side-letter, which gave rise to an estoppel by convention (see *Amalgamated Investment & Property Co Ltd (In Liquidation)* v. *Texas Commerce International Bank Ltd* (1982) QB 84) such that the defendant was estopped from denying that it was bound by the terms of the side-letter.

never to have been argued that an entire agreement clause might be caught by the provisions of the Unfair Contract Terms Act 1977. Potentially, it could be caught by the provision in Section 3(2)(b) under which one party 'cannot by reference to any contract term ... claim to be entitled (i) to render a contractual performance substantially different from that which was reasonably expected of him, or (ii) in respect of the whole or any part of his contractual obligation, to render no performance at all'.[44] It may be that it has been generally accepted that entire agreement clauses seek only to define the obligations of the parties and are not the sort of 'bogus' exclusion clauses at which this provision is clearly aimed, but *ex hypothesi,* we are concerned at this stage with the situation where one party has undertaken an obligation via the additional term but seeks to avoid performance of that obligation by reference to the entire agreement clause. In this regard, it may be noted that the Office of Fair Trading has regarded entire agreement clauses as potentially unfair under the Unfair Terms in Consumer Contracts Regulations 1999.[45]

Support for the view that the English courts may not allow an appropriately drafted entire agreement clause to be relied upon if the outcome would be unfair or unjust, and that the source of control may lie in the reasonableness test imposed by the Unfair Contract Terms Act 1977, may be derived from the approach they have taken to such clauses in their wider sense. The sample clause, as drafted, only has the effect of excluding additional claims for breach of contract; it does not exclude claims for misrepresentation, i.e., claims to rescind the contract and/or claim damages on the basis that one party was induced to enter it as a result of a precontractual misrepresentation of the other.[46] To achieve this result, additional wording is usually added, of which the following is an example:

> The parties agree that these terms and conditions (together with any other terms and conditions expressly incorporated in the Contract) represent the entire agreement between the parties relating to the sale and purchase of the Equipment and that *no statement or representations*

[44] Section 3 as a whole only applies where one party 'deals as consumer' or on the other party's 'written standard terms of business'.

[45] OFT Bulletin 1 at 16 (though this draws no distinction between entire agreement clauses in the narrow sense and 'non-reliance clauses' which seek to avoid liability in misrepresentation, as discussed in the following text).

[46] *Thomas Witter Ltd* v. *T.B.P. Industries Ltd* [1996] 2 All ER 573; *Deepak Fertlizers and Petrochemicals Corp* v. *ICI* [1999] 1 Lloyd's Rep. 387 at 395.

> *made by either party have been relied upon by the other in agreeing to enter into the Contract.*[47]

The particular feature of this wording is that it does not simply 'exclude' or 'limit' liability for misrepresentation. Rather, it seeks to operate on the basis that no such liability arises in the first place. This is because an essential ingredient of liability is that the claimant must have relied on the false representation of the defendant. By agreeing to the clause, the claimant acknowledges that it has not so relied. A variant on the 'non-reliance' clause is the 'no representation' clause, under which the parties acknowledge that no representations have even been made save those which are then set out in the contract itself.

Entire agreement clauses in this wider sense have become commonplace such that they are now 'standard form' or 'boilerplate'. They take this form in an attempt to avoid the controls set out in Section 3 of the Misrepresentation Act 1967, which states as follows:

> If a contract contains a term which would exclude or restrict –
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does.

By drafting the extended entire agreement clause on the basis of 'non-reliance' or 'no representation', the opportunity is created to argue that such clauses do not purport to 'exclude' or 'restrict' liability and are therefore not subject to the test of reasonableness.[48]

[47] Taken from *Watford Electronics Ltd* v. *Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] BLR 218.

[48] Of course, in commercial transactions, it is highly likely that such a clause would be found to be reasonable in any event, but the aim of the extended entire agreement clause is to avoid the uncertainty created by the very application of the test. This is particularly valuable in the context of Section 3 of the Misrepresentation 1967 since, although it was inserted in its current form by Section 8 of the Unfair Contract Terms Act 1977, it is much broader in its scope. The key controls in the 1977 Act do not apply to certain types of contract (see Sched. 1, para. 1) and, as noted above (note 44), the controls in Section 3 in particular only apply if one party deals as consumer or on the other's written standard terms of business.

The current approach of the English courts is to regard such clauses as giving rise to a contractual estoppel.[49] It has also been suggested that, as such, they cannot be subject to the test of reasonableness under Section 3 of the 1967 Act.[50] That, however, has been seen as an approach which would elevate form over substance. The point has been best expressed by Toulson J as follows:[51]

> The question is one of substance and not form. If a seller of a car said to a buyer 'I have serviced the car since it was new, it has had only one owner and the clock reading is accurate,' those statements would be representations, and they would still have that character even if the seller added the words 'but those statements are not representations on which you can rely.' *Cremdean Properties Ltd v Nash* [1977] EGLR 80, which Mr Nash cited, is authority for the principle that a party cannot by a carefully chosen form of wording circumvent the statutory controls on exclusion of liability for a representation which has on proper analysis been made.
>
> If, however, the seller of the car said 'The clock reading is 20,000 miles, but I have no knowledge whether the reading is true or false,' the position would be different, because the qualifying words could not fairly be regarded as an attempt to exclude liability for a false representation arising from the first half of the sentence.

[49] 'I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear, or why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel of the kind recognised in *Colchester Borough Council* v. *Smith*': *Peekay Intermark Ltd* v. *ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep. 511 at [56]. See also *Bottin* v. *Venson* [2006] EWHC 3112 (Ch); *Donegal International* v. *Republic of Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep. 397; *JP Morgan Chase Bank* v. *Springwell Navigation Corporation* [2010] EWCA Civ 1221; *Foodco UK Ltd* v. *Henry Boot Developments Ltd* [2010] EWHC 358 (Ch); *Titan Wheels Ltd* v. *RBS* [2010] EWHC 211 (Comm); and *Raiffeisen Zentralbank Osterreich AG* v. *RBS* [2010] EWHC 1392. Alternatively, such a clause may give rise to an estoppel by representation: *Grimstead* v. *McGarrigan* [1999] All ER (D) 1163; *Watford Electronics Ltd* v. *Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] BLR 218 at [39]–[40]; *Quest 4 Finance Ltd* v. *Maxfield* [2007] EWHC 2313 (QB), (2007) 2 CLC 706. The submission in *FoodCo UK LLP* v. *Henry Boot Developments Ltd* that contractual estoppel is limited to 'no representation' clauses and estoppel by representation is limited to 'non-reliance' clauses was dismissed out of hand.

[50] See *Watford Electronics Ltd* v. *Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] BLR 218 at [41], where Chadwick LJ described such a contention as 'bizarre'.

[51] *IFE Fund SA* v. *Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyd's Rep. 264 at [69] (the Court of Appeal – [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep. 449 – did not deal expressly with this particular issue). See also *Raiffeisen*, above note 49 at [314]–[315].

Thus, if a seller has clearly, as a matter of fact, made a representation and intended it to be relied upon, his or her attempt to rely upon a clause which says that he or she has not made the representation, or it has not been relied upon, will be treated as an attempt to exclude or restrict a liability which would otherwise have accrued.[52] If, however, there is doubt as to whether a representation was made or was intended to be relied upon, a clause of the type in question will be seen as having legitimately determined the scope of the obligations of the seller and will not be subject to the test of reasonableness.[53] This now seems to represent the approach of the English courts.[54] There is a parallel here with the approach which, it is suggested above, may be taken with respect to entire agreement clauses in the narrow sense.[55] In both senses, the clause may be drafted in such a way as to ensure that there can be no claim in the first place (in a narrow sense, for breach of contract; in a wider sense, for misrepresentation). But if relied upon when, but for the clause in question, the court is of the view that a claim would have arisen, reliance on the clause may be struck down as unreasonable using the tests available in Section 3 of the Unfair Contract Terms Act 1977, and Section 3 of the Misrepresentation Act 1977, respectively. The limit of this test so far as Section 3 of the 1977 Act is concerned is that it only applies where one party deals as a consumer, or on the other party's written standard terms of business. Of course, if such a clause is included in, and relied upon, in the context of a commercial contract, there will be a strong argument to be made that it should be regarded as reasonable. The aim in this part has not been to determine precisely *when* such clauses should be regarded as unenforceable because they are unreasonable, but merely to establish that there is scope for such an argument as a matter of English law.

[52] See *Trident Turboprop (Dublin) Ltd* v. *First Flight Couriers Ltd* [2009] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep. 581 and the 'but for' test employed by Aikens J (at [48]). On appeal ([2009] EWCA Civ 290, (2009) 3 WLR 861), there was no further consideration of the scope of Section 3 in this sense.

[53] In the *Goldman Sachs* case itself, the 'no representation' clause relied upon was held to fall into the latter category and was not therefore subject to the reasonableness test in Section 3. Cf. *JP Morgan Chase Bank* v. *Springwell Navigation Corporation* [2010] EWCA 1221.

[54] In addition to the cases already cited, see *Thomas Witter* v. *TBP Industries* [1996] 2 All ER 573; *Government of Zanzibar v. British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333; *Peart Stevenson Associates Ltd* v. *Holland* [2007] EWHC 1868 (QB), [2007] 2 CLC 706; contrast *Wm. Sindall Plc* v. *Cambridgeshire C.C.* [1994] 1 WLR 1016 at 1034E.

[55] See text to note 45.

2.2 *No waiver*

A no waiver clause may take various forms. The sample clause used for the purposes of this book states as follows:

> Failure by a party to exercise a right or remedy that it has under this contract does not constitute a waiver thereof.

One hesitates to ask the question of what would happen if the clause was not there. An assessment of English law relating to 'waiver' is not really something to be attempted within the understandable confines of the space herein, if only because the word 'waiver' is often used both by the courts and contract drafters to refer to several quite different principles or doctrines.[56] In the context of a no waiver clause, one may be concerned with a waiving of any breach of the contract or a waiving of the rights to which such a breach may give rise. Thus, there may be 'waiver by election', i.e., the breach may have entitled the innocent party to elect either to terminate the contract or affirm it. He or she must make his or her election and if he or she chooses to affirm the contract, he or she has waived by election the right to terminate. There may also be 'total waiver', i.e., the innocent party waives the breach itself so that he or she may not even sue for damages.

Whichever type of waiver one is referring to, it will not be made out unless there is a 'clear and unequivocal representation' from the innocent party by words or conduct, e.g., in the context of waiver by election, that he or she elects to affirm the contract rather than terminate. Therefore, the right to terminate is not lost by *mere* failure to exercise it: such failure is not normally a sufficiently clear indication that the right will not be exercised.[57] But where, as a matter of business, it is reasonable to expect the injured party to act promptly, unreasonable delay in exercising the right to terminate may give rise to the inference that the contract has been affirmed.[58] The aim of a no waiver clause is to influence the inferences which may be drawn from a delay or failure to exercise the right.

In the last of the workshops, it was reported that there had been virtually no judicial consideration of how such a clause might fare. It was possible to point to *State Securities Plc* v. *Initial Industry*,[59] in which a no waiver clause prevented any affirmation being implied from the acceptance of payments due under the contract. According to the High

[56] See further, *Treitel*, paras. 18–075ff.
[57] See *The Scaptrade* [1981] 2 Lloyd's Rep. 425 at 430 (affirmed [1983] 2 AC 694, without reference to this point).
[58] *Ibid.* at 430; *The Laconia* [1977] AC 850 at 872. [59] [2004] All ER (D) 317 (Jan).

Court, 'it appears that there is no general principle of (English) law that one cannot restrict the operation of the doctrine of waiver by contract'. It was suggested that while that statement of principle may be correct, the point could nevertheless be reached where a court would be persuaded of the clear and unequivocal representation necessary for affirmation, notwithstanding the existence of such a clause.

This was not a bold prediction, but it has been fulfilled by the decision of the Court of Appeal in *Tele2 International Card Co* v. *Post Office Ltd*.[60] It provides an ideal test case.[61] In short, under a contract for the supply of prepaid phonecards, Tele2 had, by 24 December 2003, failed to provide a parent-company letter of guarantee and was therefore in 'material breach', giving the Post Office the right to terminate.[62] The Post Office did not exercise that right until a year later and in the meantime continued with the performance of the contract (under which phonecards were supplied for sale to Post Office customers).[63] The defence of the Post Office to the argument that it had, by its conduct, elected to affirm the contract and could not now terminate rested on the following Clause 16:

> In no event shall any delay, neglect or forbearance on the part of any party in enforcing (in whole or in part) any provision of this Agreement be or be deemed to be a waiver thereof or a waiver of any other provision or shall in any way prejudice any right of that party under this Agreement.

That defence failed, for the following reasons given by Aikens LJ:[64]

> In short, Clause 16 cannot prevent the fact of an election to abandon the right to terminate from existing: either it does or it does not. This

[60] [2009] EWCA Civ 9.

[61] Perhaps inevitably after so little judicial consideration, the decision in *Tele2* was quickly followed by a further decision in *CDV Software Entertainment AG* v. *Gamecock Media Europe Ltd* [2009] EWHC 2965. It does not appear to add anything to what is said by Aikens LJ in the *Tele 2* case.

[62] The obligation to provide the guarantee was an annual one, i.e., it had to be provided in each December to cover the following year. One suspects that this is why there was no submission by the Post Office that Tele2 was guilty of a continuing breach on the strength of which the contract could be terminated even after an earlier affirmation.

[63] It may be noted that no point was taken that the Post Office's real motivation for wishing to terminate the contract was dissatisfaction with the performance of Tele2 rather than the failure to provide the guarantee. If a party has the right to terminate, it is no bar to its exercise that the innocent party has some ulterior motive, including the wish to escape from a bad bargain: *Arcos Ltd* v. *Ronaasen Ltd* [1933] AC 470 (where the contract was terminated for breach of 'condition'). Where, however, the task is to establish whether the innocent party has the right to terminate at all (on the grounds of a 'substantial failure to perform'), some account may be taken of any ulterior motive: see *Treitel*, para. 18–033 and the cases discussed therein.

[64] At [56].

> conclusion is reinforced, I think, by the terms of Clause 16 itself. Although it stipulates that 'in no event shall any delay, neglect or forbearance' on the part of any party in enforcing a provision of the Agreement '. . . be or be deemed to be a waiver' of the provision or '. . . shall in any way prejudice any right of that party under this Agreement,' it does not deal at all with the issue of election of whether or not to exercise a contractual right. The general law demands that a party which has a contractual right to terminate a contract must elect whether or not to do so. This clause does not attempt to say that the doctrine of election shall not apply – *even assuming that any contractual provision could exclude the operation of the doctrine.*

This passage exhibits the same two-pronged approach noted in relation to entire agreement clauses. First, there is an element of interpretation, in the sense that Aikens LJ leaves open the possibility that a differently worded clause might meet with greater success, e.g., one which deals explicitly with election by reserving the right to terminate notwithstanding continued performance. Nonetheless, one suspects that it would still fall foul of the words highlighted in italics,[65] i.e., even an appropriately drafted clause would have to give way to broader considerations of fairness if, in the assessment of the court, one party had, by its conduct, evinced an intention to affirm the contract.[66] This conclusion may be reached on the basis that such conduct amounted to a waiver itself of the protection of the no waiver clause.

2.3 No oral amendments

The sample clause states as follows:

> No amendment or variation to this Agreement shall take effect unless it is in writing, signed by authorised representatives of each of the Parties.

It is another clause which is surprisingly short on direct consideration by the English courts. If it was not there, then, assuming the contract is not one which is required to be in writing under the general law (e.g., contracts for the sale of land[67] or contracts of guarantee),[68] the parties

[65] Which may be contrasted with the statement of principle in the *State Securities* case above.
[66] *Quaere* if that conduct is accompanied by express and continuous reservations of the right to terminate?
[67] Law of Property (Miscellaneous Provisions) Act 1989, Section 2. See *Treitel*, para. 5–008.
[68] Statute of Frauds 1677, Section 4. See *Treitel*, paras. 5–010ff.

would be free to amend or vary their agreement in writing or orally, but of course variations made orally may be harder to prove than those put in writing. Any question of 'authorisation' would be one for the law of agency.

In *World Online Telecom Ltd* v. *I-Way Ltd*,[69] the Court of Appeal considered it sufficiently *arguable* that a no oral amendments provision could, itself, be overridden by an oral variation that it should dismiss an application for summary judgment which depended on a finding that the provision was conclusive.[70] This further observation of Schiemann LJ might be noted:[71]

> I have been impressed by the submission that the purpose of a clause such as clause 21 is not to prevent the recognition of oral variations, but rather, casual and unfounded allegations of such variations being made . . . [I]f in cases such as the present we allow something going to trial, precisely that is allowed against which the parties may be regarded as having sought to safeguard themselves.

Schiemann LJ may have been 'impressed', but he still allowed the claim of an overriding oral variation to go to trial. The dilemma here is not dissimilar to that with entire agreement clauses above. An entire agreement clause may make complete sense if it rules out claims of additional terms based on what has been referred to as 'a threshing through the undergrowth' of the parties' contractual negotiations,[72] but the courts feel uneasy if it is relied upon to prevent the enforcement of what appears to have been an otherwise valid and enforceable agreement of the parties. Similarly, if the evidence, in the absence of a no oral amendments clause, indicates that the parties plainly intended a variation of the contract, may the clause be relied upon by one of them to resile from that agreement? For any legal system which allows some room for the will theory, the dilemma is acute: which manifestation of the parties' intention is to be preferred – their initial intention that there should be *no* oral variation or their later intention that the contract *has been* orally varied? Clearly, the courts are unwilling to rule out the latter.

[69] [2002] EWCA Civ 413.

[70] See also *Westbrook Resources Ltd* v. *Global Metallurgical Inc* [2009] EWCA Civ 310, [2009] 2 Lloyd's Rep. 224 at [13], per Moore-Bick LJ: 'there is no reason why the contract, including the clause requiring variations to be in writing, could not have been varied orally.'

[71] At [9]. [72] *Inntrepreneur Pub Co Ltd* v. *East Crown Ltd* [2000] 2 Lloyd's Rep. 611 at [7].

2.4 *Conditions*

By conferring on a term the status of a 'condition', the intention of the parties is to predetermine that any breach of the term in question will confer on the innocent party the right to terminate the contract. As a matter of general law, the innocent party may terminate the contract if there has been what may be referred to as a 'repudiatory breach', which will occur in two situations: where the term breached is regarded as a 'condition' or where the term is not a condition, but the effect of the breach is sufficiently serious that termination is justified. There are also some terms where it is thought that their breach could never justify anything more than damages and such terms are, for these purposes, referred to as 'warranties'. The end result of all of this is a tripartite classification of the terms of the contract into the following:

Conditions: a term of the contract, any breach of which will entitle the innocent party to terminate, regardless of how serious the effect of the breach actually is.

Warranties: a term of the contract, any breach of which will only sound in damages (though there is room to argue that even a sufficiently serious breach of warranty could give rise to the right to terminate and, on this basis, there are really only two categories: conditions and all other terms).[73]

Innominate terms: as the name rather suggests, these are terms which are regarded as neither conditions nor warranties; if the effects of the breach of an innominate term are sufficiently serious, the innocent party will have a right to terminate; otherwise, he or she will have only his or her right to damages.

The condition/warranty distinction has the obvious advantage of certainty; a party who can point to a breach of condition can terminate the contract safe in the knowledge that he or she has the right to do so. A party who terminates for what he or she thinks is a sufficiently serious breach of an innominate term is at the risk of a later finding by the court that the breach was not sufficiently serious and it is the innocent party's termination which was unlawful, putting him or her in the position where he or she is guilty of a repudiatory breach and liable in damages.

[73] See, further, *Treitel*, para. 18–048; cf. *Koompahtoo Local Aboriginal Land Council* v. *Sanpine Pty Ltd* [2007] HCA 61 (13 December 2007) at 109, per Kirby J.

The courts may find for themselves that a term is a condition if it is regarded as sufficiently important[74] and they may be directed to so classify a term by legislation.[75] But what is most helpful to the parties and most conducive to certainty is that they may *expressly* stipulate that a term is a condition. The sample clause employs the following language:

> The obligations regulated in Section 13 are fundamental and any breach thereof shall amount to a fundamental breach of this contract.

In fact, such language is rarely likely to be employed, if only because the term 'fundamental breach' has a specific and rather checkered history in English law (mainly in relation to the enforceability of exclusion clauses),[76] to the extent that its use is rather disapproved of. If one thinks about other forms of wording, one could be forgiven for thinking that one should simply say which of the terms of the contract are to be regarded as 'conditions'. But use of the word 'condition' alone may not work. For example, in *Wickman Ltd* v. *Schuler AG*,[77] under a distribution contract, the distributor was required to visit six named customers per week. This was described as a 'condition', but the supplier was held to be not entitled to terminate for its breach – it was said that the parties could not reasonably have intended it to be a condition in the strict sense.[78] Once again, one sees the control over potential unfairness which may be maintained through interpretation; indeed, *Schuler* is the case in which one finds the *dictum* of Lord Reid referred to above that the more unreasonable the result, the more unlikely it is that the parties can have intended it.

But what if the parties have employed language that leaves no room for interpretative control? What is the scope for potential unfairness and is there any control over it beyond interpretation? The fact that breach of a condition leads to the right to terminate may not, in itself, promote unfairness, since the parties may include express provisions allowing

[74] This is usually the case with precise time clauses in commercial contracts, e.g., the type of time clauses seen in cif and fob contracts such as the giving of notice of readiness to load: *Bunge Corp* v. *Tradax Export SA* [1981] 1 WLR 711.

[75] E.g., the implied terms in contracts for the sale of goods that the goods will comply with description or sample and will be of satisfactory quality or fit for purpose are implied as conditions: Sale of Goods Act 1979, Sections 13–15. But note that the right to terminate may be qualified by the provisions of Section 15A, discussed further below.

[76] See notes 19 and 20 above.

[77] [1974] AC 235.

[78] To put this decision into some sort of context, it should be noted that the contract as a whole was not well drafted and there have been very few reported decisions to similar effect when the parties have chosen to employ the language of 'condition'.

for termination if one of a number of 'triggers' is met, one of which may be a breach falling short of a breach of condition[79] (such provisions may be referred to as an express contractual power to terminate to distinguish them from a breach of condition, which gives rise to a right to terminate under the general law). If there is any room for unfairness in this regard, it is that where the right to terminate is based on a breach of 'condition', one of the parties may have been taken by surprise,[80] but as we have seen in the *Schuler* case, this is precisely where there is a role for interpretation.[81]

Perhaps greater potential for unfairness lies in the fact that while a breach of condition and a breach which triggers a contractual power to terminate can both give rise to termination, the former also amounts to a 'repudiatory breach', whereas the latter does not, unless the breach in question also happens to be sufficiently serious to amount to a repudiatory breach.[82] The principal practical consequence of this lies in any associated claim for damages. Where a contract has been terminated for a

[79] Other triggers may not involve any *breach* at all but only certain *events*, such as the appointment of a receiver.

[80] It may also be noted that certain phrases have, in effect, acquired the status of a code which is accepted by the courts as indicating designation as a condition, e.g., terms stating that time shall be 'of the essence' expressly convert the relevant time stipulation into a condition. The potential for surprise may provide the basis for a challenge that the term in question is 'unfair' under the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083).

[81] There is also room for interpretative control where termination is based on a contractual power: in *Rice* v. *Great Yarmouth BC*, unreported, 30 June 2000, CA, a four-year contract for gardening/grounds service contained the following clause: 'If the contractor commits a breach of any of its obligations under the Contract, the Council may, without prejudice to any accrued rights or remedies under the Contract, terminate the Contractor's employment under the Contract by notice in writing having immediate effect.' It was held that the parties could not have meant to confer the right to terminate for literally *any* breach and what they must have meant was for any repudiatory breach. On this basis the clause added nothing to the parties' rights under the general law. The decision is somewhat controversial: S. Whittaker, 'Termination Clauses', in Burrows and Peel, *Contract Terms*, Chapter 13. It is precisely to avoid the sort of decision reached in *Rice* that the parties often stipulate that the breach must have been more than just *a* breach, e.g., a 'material breach' (on which see *Dalkia Utilities Services Plc* v. *Celtech International Ltd* [2006] EWHC 63, [2006] 1 Lloyd's Rep. 599 at [92]).

[82] Since this elusive distinction between the two modes of termination is one which can escape even those familiar with English law (see the difficulties faced by the terminating party in the following: *Dalkia Utilities* v. *Celtech* [2006] EWHC 63, [2006] 1 Lloyd's Rep. 599; *Stocznia Gdynia SA* v. *Gearbulk Holdings* [2010] QB 27, [2009] EWCA Civ 75; *Shell Egypt West Manzala GmbH* v. *Dana Gas Egypt Ltd* [2010] EWHC 465 (Comm)), there is a rather obvious potential for problems to emerge if the types of clause on which they are based are made subject to a different governing law.

repudiatory breach, including a breach of condition, damages may be claimed in full for the 'loss of bargain', i.e., to put the claimant in the same position as if the remaining obligations under the contract had been performed. Where a contract has been terminated under a contractual power and the trigger for that termination is a non-repudiatory breach, damages may only be awarded for the loss which flows from that particular breach and not for the loss of the contract as a whole. It has been suggested elsewhere in this chapter that, in many instances, English law is capable of reaching a 'fair' result in the face of the otherwise unreasonable consequences of a boilerplate clause, but this may be one instance where that view cannot be advanced. The point may be illustrated by one leading case.

In *Lombard North Central* v. *Butterworth*,[83] computer equipment was provided under a hire-purchase agreement which contained the following standard terms:

> The Lessee agrees . . .
>
> 2(a) to pay to the lessor: (i) punctually and without previous demand the rentals set out in Part 3 of the Schedule together with Value Added Tax thereon punctual payment of each which shall be of the essence of these Leases . . .
>
> 5. In the event that (a) the Lessee shall (i) make default in the due and punctual payment of any of the rentals or any sum of money payable to the Lessor hereunder or any part thereof . . . then upon the happening of such event . . . the Lessor's consent to the Lessee's possession of the Goods shall determine forthwith without any notice being given by the Lessor, and the Lessor may terminate this Lease either by notice in writing or by taking possession of the Goods . . .
>
> 6. (Upon termination) (a) the Lessee shall pay . . . to the Lessor: (i) all arrears of rentals; and (ii) all further rentals which would . . . have fallen due to the end of the fixed period of this Lease less a discount thereon for accelerated payment at the rate of 5 per cent per annum . . .

The lessee defaulted in the payment of one instalment of £584.05, the contract was terminated and the equipment repossessed. The principal issue was whether the lessor's claim for payment of the sum due under Clause 6 amounted to a penalty and was therefore unenforceable.[84] If the contract could only have been terminated under the express contractual power provided by Clause 5, then the only claim for damages at large was for the loss flowing from the failure to pay the instalment, i.e., £584.05.[85] If the contract could be terminated for a repudiatory breach, then

[83] [1987] 1 All ER 267. [84] For the law on penalties generally, see Section 2.7 below.
[85] As in *Financings Ltd* v. *Baldock* [1963] 2 QB 104, with which the *Lombard* decision is usually contrasted.

damages at large would represent the full 'loss of bargain', i.e., the remaining instalments due (£8,264.31), less a discount in the interest element because of accelerated receipt (£1,221.49) and the proceeds from the resale of the equipment (£172.85),[86] making for a total of £6,869.97. Since, under Clause 2, punctual payment had been made 'of the essence', the hirer was guilty of a breach of condition and the higher sum was recoverable as damages at large, which meant that the figure produced by Clause 6 could not be regarded as a penalty.[87]

In the context of this book, two observations may be made. First, the enforceability of Clause 6 was very much dependent on the inclusion of Clause 2, and its interpretation and effect as a matter of English law. The result could be quite different if both clauses are divorced from the governing law on the basis of which they have been drafted. Secondly, the decision in *Lombard* was reached by the Court of Appeal with evident reluctance, but on this occasion it was considered unavoidable in order to ensure consistency in the underlying governing law; in particular, allowing the parties to stipulate expressly which of the terms of the contract were to be regarded as conditions with the consequence that any breach thereof would be regarded as a repudiatory breach.[88]

2.5 Sole remedy

The sample clause included for consideration states as follows:

> [Liquidated damages paid in accordance with the foregoing provision] shall be the Buyer's sole remedy for any delay in delivery for which the Seller is responsible under this Agreement.

[86] Given that over £8,000 was still due in payments for the equipment, it is a little surprising that the resale figure was not challenged as a failure to mitigate.

[87] See, to similar effect, the decision in *BNP Paribas* v. *Wockhardt EU Operations (Swiss) AG* [2009] EWHC 3116 (Comm). Since that involved an attack on the closing out provisions in the ISDA Master Agreement, one cannot underestimate the commercial significance of the decision that those provisions do not amount to a penalty and are therefore enforceable.

[88] It has been noted above that there may be a basis for intervention under the 1999 Regulations (note 80), but those Regulations are of course confined to consumer contracts. Similarly, for agreements which are regulated under the Consumer Credit Act 1974, the hirer can avoid the worst rigours of the decision in *Lombard* by exercising his or her right to terminate (Section 99) subject to payment of a maximum of one-half of the total price of the goods or such lower sum as the court may order (Section 100). In the context of termination under an express contractual power, there may be scope to grant equitable relief from forfeiture: *On Demand Information Plc* v. *Michael Gerson (Finance) Plc* [2002] UKHL 13, [2003] 1 AC 368; *Treitel,* para. 18–063.

In the absence of such a clause, the parties would have the full range of the remedies available under the general law. The guiding principle in the assessment of a sole remedy clause was laid down by Lord Diplock in *Gilbert-Ash* (*Northern*) *Ltd* v. *Modern Engineeering* (*Bristol*) *Ltd*:[89]

> It is, of course, open to parties to a contract ... to exclude by express agreement a remedy for its breach which would otherwise arise by operation of law ... But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption.

Following on from the discussion of termination above, as a recent example, one might refer to the *Dalkia Utilities* case,[90] in which one of the issues was whether the parties had agreed to limit themselves to the remedies set out in a self-contained contractual regime for termination. The relevant clause in this regard stated as follows:

> 15.7 The consequences of termination set out in this clause represent the full extent of the parties' respective rights and remedies arising out of any termination save for those rights remedies and liabilities which arise prior to termination.

Based on the *Gilbert-Ash* principle, this was interpreted to refer only to 'termination' pursuant to the express contractual power set out in the contract, so that the parties retained all the rights and remedies which attached to a termination for repudiatory breach.[91] As the judge said:[92]

> Clause 15.7 does not seem to me sufficiently clear, as it would need to be, to exclude the parties' common law right to accept a repudiatory breach of contract (e.g., an outright refusal to perform) as discharging the innocent party from further liability and to claim damages for the loss of the contract.

The *Gilbert-Ash* principle is yet another instance of interpretative control; since the starting point is that the parties should be entitled to whatever remedies the general law would award to them, they will only be deprived of those remedies if their intention in this regard is sufficiently manifest. It is with the *Gilbert-Ash* principle in mind that the sample clause appears to have been worded and one is inclined to think

[89] [1974] AC 689. [90] See above, note 81.
[91] For the differences between the two modes of termination, see text to note 82.
[92] At [21].

that it would work as a matter of interpretation. What then of controls beyond interpretation as a means of avoiding an unjust outcome?

As a matter of the common law, with few exceptions,[93] the parties are as free to determine the availability and extent of remedies as they are to determine their primary obligations. One notable exception is the rule against penalties, which is discussed below.[94] It should also be noted that a term which seeks to exclude remedies rather than liability still qualifies as an exclusion clause for the purposes of the statutory controls on the use of such clauses in the Unfair Contract Terms Act 1977.[95] So, in consumer contracts or commercial contracts made on one party's written standard terms,[96] such a clause will be unenforceable if it fails the test of reasonableness.[97]

2.6 Subject to contract

The sample clause put up for consideration states as follows:

> This document does not represent a binding agreement between the parties and neither party shall be under any liability to the other party in case of failure to enter into the final agreement.

This may be regarded as a long-form subject to contract provision, since the phrase 'subject to contract'[98] has itself come to bear an acknowledged meaning. In the absence of such a clause, the question of whether the parties had reached a binding and enforceable agreement would turn on the general law under which it may not be binding because it is 'incomplete', i.e., the parties have failed to reach agreement on matters of

[93] E.g., where fraud is involved: *Treitel*, para. 7–040; *HIH Casualty & General Insurance* v. *Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61; *S Pearson & Son Ltd* v. *Dublin Corp* [1907] AC 351 at 353, 362.

[94] Section 2.7.

[95] By virtue of Section 13(1)(b): 'To the extent that this Part of this Act prevents the exclusion or restriction of any liability it also prevents . . . (b) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy.' It is beyond the confines of this chapter to consider the scope and effect of the provisions of the 1977 Act, but they are one of the principal controls over the abuse of certain types of boilerplate clause. See, generally, *Treitel*, paras. 7–049ff.

[96] Section 3(1).

[97] Sole remedy clauses may also be challenged as unfair under the 1999 Regulations: see above, note 80.

[98] Or its equivalent, e.g., 'subject to details' in the context of shipping: *The Nissos Samos* [1985] 1 Lloyd's Rep. 378 at 385; *The Junior K* [1988] 2 Lloyd's Rep. 583.

sufficient importance that the court is able to conclude that the parties did not intend to be bound. But if the agreement is complete, or appears to be, the presumption will be that the parties intended to be bound. The inclusion of a 'subject to contract' provision is meant to negate the intention to be bound even if the agreement is 'complete', at least until the parties have taken some further formal step, such as the execution of a final agreement or the 'exchange' of contracts.[99]

Reliance on a subject to contract clause by sellers of land to threaten to withdraw at the last minute in order to extract a higher price[100] has been described by one judge as a 'social and moral blot on the law'.[101] There are also other instances where, at the very least, a sense of unease can be felt about the impunity with which one party may go back on what is otherwise a concluded agreement. In a few cases, the courts have been able to find that 'subject to contract' did not really mean, or no longer meant, to negate contractual intention.

A good example of the first category of case is *Alpenstow* v. *Regalian Properties*.[102] The parties entered into an agreement under which the claimants agreed that if, following the grant of planning permission which the defendants had helped them to secure, they wished to dispose of the land in question, they would serve a notice on the defendants of their willingness to sell a 51 per cent interest in the freehold or pay the defendants £500,000. The defendants agreed to accept the notice within twenty-eight days after its service 'subject to contract'. The letters in which this agreement was set out went on to provide a detailed timetable for submission, approval and exchange of contracts and completion; in particular, the defendants were under a duty to approve the draft contract, subject only to reasonable amendments. In these circumstances, the words 'subject to contract' were held not to negate contractual intention, but to mean that the parties had not yet settled all the details of the transaction, i.e., this was one of those cases where they went to the issue of *agreement* and not *intention*. It should be noted that, although the *Alpenstow* case was referred to above as a good example, counsel's endeavours in the case had been unable to unearth any earlier authority. That is a fair reflection of the strength of the presumption as to the meaning of 'subject to contract' and the need for a 'very strong and

[99] *Winn* v. *Bull* (1877) 7 ChD 29; *Eccles* v. *Bryant & Pollock* [1948] Ch 93.
[100] A phenomenon known as 'gazumping'.
[101] *Cohen* v. *Nessdale* [1981] 3 All ER 118 at 128 (decision affirmed [1982] 2 All ER 97).
[102] [1985] 1 WLR 721.

exceptional context'[103] in which to rebut it. One might nevertheless add to this category the auction sale where the words 'subject to contract' were typed on one of the contractual documents by clerical error[104] or the notice exercising an option to purchase land which was expressed to be 'subject to contract'.[105] In both cases, those words were regarded as meaningless and there was found to be a clear intention to be bound. One might say that these decisions are examples of a 'purposive' interpretation and now that the courts seem more purposive[106] than they might have been in the past,[107] there may be greater scope to reach similar decisions in cases where the 'background'[108] would allow for it. This might be supported, indirectly, by cases where a similarly purposive approach has led to a finding that the parties did not intend to be bound, notwithstanding the absence of the words 'subject to contract'.[109]

The second category of case, where 'subject to contract' is expunged by implication rather than through formal exchange, includes cases where the courts have overlooked certain technical slips in the process of

[103] *Ibid.* at 730.

[104] *Munton* v. *GLC* [1976] 1 WLR 649. The intention of parties to an agreement for the sale of land by auction is to enter into a binding contract as soon as the bidder's offer is accepted by the fall of the auctioneer's hammer: *Treitel*, para. 2–008.

[105] *Westway Homes* v. *Moore* (1991) 63 P & CR 480.

[106] The 'literal' approach was never entirely literal and nor is the 'purposive' approach entirely purposive: *Charter Reinsurance Co Ltd* v. *Fagan* [1997] AC 313 at 326, 350; *Petromec Inc* v. *Petroleo Brasileiro SA Petrobras* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121 at [23]. See also *Prenn* v. *Simmonds* [1971] 1 WLR 1382 and the observation of Lord Wilberforce (at 1384) that: 'there is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Commissioners* v. *Adamson* (1877) 2 App Cas 743, 763 provides ample warrant for a liberal approach.'

[107] As a consequence of Lord Hoffmann's 're-statement' of the principles of interpretation in *Investors Compensation Scheme Ltd* v. *West Bromwich Building Society* [1998] 1 WLR 896 at 912–913 (it might, strictly speaking, have to be said that they apply here only by analogy, since the question to be decided is whether there *was* a contract between the parties). And see now *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38, (2009) 1 AC 1101. Not all agree with purposiveness: see, e.g., Sir C. Staughton, 'How Do Courts Interpret Commercial Contracts?' [1999] CLJ 303 and a number of Court of Appeal decisions referred to therein.

[108] Or the 'matrix of fact' as some may still prefer to call it.

[109] *Pateman* v. *Pay* (1974) 263 EG 467. It has to be said that there are equally few of these cases. The fact that the test of contractual intention is an objective one (in *Pateman*, there was a finding of sharp practice on the party who sought to claim that the agreement was binding) will usually mean that the parties *are bound* in the absence of an express qualification that their agreement is 'subject to contract': *Tweddell* v. *Henderson* [1975] 1 WLR 1496; *Storer* v. *Manchester CC* [1974] 1 WLR 1403 at 1408.