ARTICLES

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CONTRACT AND EQUITY : STRIKING A BALANCE

"By the growth of equity on equity the heart of the common law is eaten out."[1]

1. INTRODUCTION

Equity and Contract have four present points of contiguity. In providing rules for regulating the bargaining process, such as those relating to duress or mistake; in giving effect to some promises by threat of legal sanction predominantly through the doctrine of consideration; in regulating the enforcement of obligations within a completed contract where no defect in the bargaining process is apparent, for example in relation to penalties; and in providing (or refusing to provide) the legal sanctions themselves, such as specific performance. Forty years past a general treatise on contract law[2] would have excluded equity from the second category entirely; and of the first no mention of any vitiating disability beyond lunacy, "complete intoxication", or infancy, would exist. Today judges and commentators alike threaten an equitable jurisdiction which can both enforce nude promises,[3] and relieve contractors from a "lower income group", or who are "less highly educated".[4] The growth of both these categories will be examined extensively in this paper, but the role of equity in the third and fourth categories will also be commented upon.

Further, no doubt in an appeal through the aphorism that unity is strength, to the revelation of a hitherto undiscovered but self-evident truth, this eclectic equity jurisdiction is increasingly said to inhere in the sole principle that one party can not unconscionably insist on the exercise of his strict legal rights,[5] so that all four categories are being drawn together. While in a general way explaining the basis of the greater part of equity jurisprudence, such a rationalisation is patently too broad for

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1 *Roscarrick* v *Barton* (1672) 1 Ch Cas 217, 219 *per* Hale CJ; cited in Browne (ed), *Ashburner's Principles of Equity* (2nd edn 1933) 12.

2 Eg Potter (ed), *Chitty's Treatise on the Law of Contracts* (20th edn 1947); Cheshire & Fifoot, *The Law of Contract* (1st edn 1945).

3 Eg *Crabb* v *Arun DC* [1976] Ch 179; cf *Western Fish Products* v *Penwith DC* [1981] 2 All 204, 217.

4 Eg *Creswell* v *Potter* [1978] 1 WLR 255, 257G; *Backhouse* v *Backhouse* [1978] 1 WLR 243, 251; cf *Wilton* v *Farnworth* (1948) 76 CLR 646, 655; *Blomley* v *Ryan* (1956) 99 CLR 362, 405, 415.

5 Finn, "Equitable Estoppel" Finn (ed), *Essays in Equity* (1985) 59, 60; 71 et seq; *Crabb* v *Arun DC* [1976] Ch 179, 195 *per* Scarman LJ; *Shaw* v *Applegate* [1977] 1 WLR 970, 977-978; *Taylor's Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147; *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] 1 QB 84, 103; *Taylor* v *Johnson* (1983) 57 ALJR 197, 200 *per* Mason ACJ, Murphy & Deane JJ; and cf Sir Anthony Mason, "Themes and Prospects" Finn (ed), supra n 5, at 242, 244-245.

certain or useful application. What it requires to be so is reduction to a matrix of rules which in *differing* contexts indicate the nature and degree of behaviour sufficient to "shock the conscience".[6]

The short history of such of the equitable rules which exist in relation to the general unconscionability doctrine has been one both of false starts and of frenetic but unsystematic judicial activity; so that in the courts at least, the concept of unconscientious exercise of legal rights still has some great distance to go before acceptance as a catholic doctrine. By comparison, the common law is often characterised as clinging to moribund doctrines, or as lacking the sophistication required to provide solutions to contemporary problems; claims which, if accepted uncritically, tend to the justification of the growth of equity.[7]

Given that the explosion of cases in the field of equitable estoppel and the steady reporting on other doctrines indicates a measure of deficiency in present common law doctrines, a number of obvious questions arise. First, are these examples of "hard cases", where the amelioration of existing rules needs to be evaluated in the context of specific and exceptional circumstances, without reformulating any general rule? Or do existing rules not provide the "correct" result more often than other rules would: "correct" in the sense that the result maximises the fulfilment of the objectives which contract law pursues?[8] If the latter is correct in what manner should reform proceed? What are the benefits and disadvantages of preferring an equitable doctrine (with the attendant sterilisation but not repudiation of the legal rules), to the growth of the common law?

The writer intends to examine the suitability of equitable doctrines as a vehicle for developing contractual rules, and to suggest that the present growth of equity in this direction tends to obscure the availability of existing common law doctrines as a basis of relief, or at least the desirability of developing those doctrines. Finally the question is raised whether the law/equity dichotomy should be maintained at all in respect of the law of contract. But first it is necessary to define the contractual model with reference to which these inquiries will be directed.

2. A CONTRACT MODEL

The essence of a contract is an agreement. It is the concept of congruent wills which marks contract off from delictual liability. Thus an

6 See Hardingham, "Unconscionable Dealing" Finn (ed), ibid 1-2. Cf s 52A Trade Practices Amendment Bill 1984 (Cth).

7 See eg Gummow, "Forfeiture and Certainty: The High Court and the House of Lords" Finn (ed), ibid 30-31. In particular, the existence of pre-Judicature Act statements in courts of Equity did not indicate the absence of a corresponding legal rule.

8 There are a number of obvious objectives, such as facilitating property transfer, regulating continuing relationships, and providing dispute mechanisms. More difficult is the use of contract as a device going beyond the effectuation of common or presumed intention, and being used to regulate morality or economic activity, of which the protection of poor people from improvident bargains is an example. Cf Atiyah, "Contracts, Promises & the Law of Obligations" (1978) 94 LQR 193. And see Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472.

9 See eg para 90 *Second Restatement on the Law of Contract* (US); discussed Sutton, *Consideration Reconsidered* (1974) ch 7; Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 771-778; Henderson, "Promissory Estoppel and Traditional Contract Doctrine" (1968) 78 Yale LJ 343; Goetz & Scott, "Enforcing Promises: An Examination of the Basis of Contract" (1980) 89 Yale LJ 1261.

enforcement model which attracts liability for non-contractual statements reasonably relied upon,[9] but where the reliance was not agreed upon, may provide for the protection of expectation interest, (which is normally associated solely with contract), but the liability is not contractual. Thus it is submitted, promises fall into two categories. Those that form part of an agreement and those that do not. The civil law would not recognise such a division because it enforces promises on a basis which cuts across these categories, and so for it to distinguish between contractual and delictual obligation proceeding from a promise would be meaningless. The common law however does make the distinction. Promises proceeding from an agreement are generally enforceable unless the agreement is in the nature of a gift: that is the agreement demands nothing but passive receipt by one party. Promises not proceeding from an agreement are generally unenforceable, unless the promisee acts in a manner requested by the promisor; (the unilateral contract). Although the request for reciprocal activity by the promisee is thus present in the enforcement of both agreement promises and non-agreement promises, there is not a perfect symmetry. Agreement promises are enforced even if executory, non-agreement promises only if executed. In the former it is submitted the liability is truly contractual; in the latter delictual, although the expectation interest is protected.

When an agreement is executory and one party repudiates, the law can protect either the expectation or reliance interest.[10] The reason why the common law chooses to protect the former has aroused considerable controversy,[11] but it is not necessary to address that issue in this paper. Where the contract is executed on one side, then not only the expectation and reliance interests, but also the restitutionary interest may be protected. In this situation it is easy to understand why the reliance and restitutionary interests should be protected; and since the execution of the contract by the innocent party has conferred a benefit on the promisor, there are obviously stronger arguments in favour of protecting the expectation interest too. This rationalisation applies similarly to unilateral "contracts". It is submitted that the concept of benefit embraces not only the objective conference of a benefit such as can be restored, but also any performance by the promisee requested by the promisor, since by binding himself to pay for it the promisor indicates that the performance subjectively benefits him. It is conceded that in some cases the common law does not go this far, for example the promise to confer a benefit if the promisee, not being a close relative of the promisor, marries; but this is due to a defect in the doctrine of consideration which is explicable on historical grounds.[12]

Because the common law protects the promisee's expectation interest both where the contract is executory as well as executed, the agreement acts as a piece of private legislation binding both parties to performance.[13] Agreements which are one sided do not so operate

10 For a definition of these terms and of "the restitutionary interest" see Fuller & Purdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52. Essentially the reliance interest is the amount claimed for detriment incurred, whereas the restitutionary interest is the amount claimed for a benefit objectively conferred.

11 Eg *supra,* n 9; Fried, *Contract as Promise* (1981); Atiyah, *Consideration in Contracts: A Fundamental Restatement* (1972).

12 Infra, pp. 17-18.

13 See eg Atiyah, "Contracts, Promises & The Law of Obligations" (1978) 94 LQR 193.

because of the doctrine of consideration; that is there is no requested benefit to the promisor, or what is the same thing, no requested detriment by the promisee. Non-agreement promises, carrying no such request suffer similarly. The issues which equity seeks to address then are two fold. First to give effect to promises or agreements otherwise unenforceable, not by providing the missing element of request, but because the promisor has as a consequence obtained a benefit, or the promisee has reasonably incurred a detriment. But the liability is not in contract, because the conference of an unrequested benefit made in consequence of a gratuitous promise does not cumulatively provide the ingredients of a contract, any more than unrequested detriment does. That does not mean that in providing a liability none-the-less, the law might not protect the expectation interest. The problem in doing so however is that the doctrine of consideration is said to apply not only to true contractual liability proceeding from agreement, but also to unilateral contract promises not so proceeding. Indeed it probably provides the only explanation for enforcement in the latter case.

The second concern of equity is in correcting defects in the bargaining process, usually resulting from an advantage possessed by one party but not the other. It is the writer's submission that the failure to correct these defects, if indeed they require correction, should not be laid at the door of contract law. If the contract is regarded essentially as private legislation, and contract law is seen as merely the machinery for the effectuation of intention, then it follows that contract theory is essentially neutral in operation. Apart from some limited exceptions such as implied terms and rules of construction, the law of contract is intended to give effect to common intention, not to impose objective standards of behaviour. Two beneficial consequences follow from this. First, and this is developed below, we have a ready theory to explain legal rules in a number of related fields.[14] Secondly, insofar as the courts proscribe certain contracts, for example those in restraint of trade, or which provide for below minimum award wages, they do not tinker with contract law itself, rather than having to justify not allowing the parties to so legislate.

Defects which prevent the objective intentions of the parties being expressed in the face of the contract, for example where rectification is available, or non est factum lies, do not usually arise from advantages in one party rather than from mistake. But in cases of fraud, non-disclosure, coercion, economic hardship, low intelligence and so forth, the contract will often reflect the imbalance of power and knowledge. Whether the exercise of that advantage should prevent contract law applying to the agreement depends on a range of factors from the protection of the market to theories of distributive justice.[15] There are three relevant questions here: *what* advantages should we allow, *why* should we do so, and *how* should we compensate for those advantages we choose not to allow? In response to the first we must answer the second. There is consensus that physical advantages should not be used to extract contracts, any more than information advantages should not be used to deliberately mislead the other party. Beyond this, whether

14 Infra, pp. 8, 9.

15 See eg Kronman, supra n 8, Schwartz, "Economics, Wealth Distribution, and Justice" (1979) Wisconsin L Rev 799.

advantages of intelligent, wealth, or information (objectively available to both parties and not used to the deceit of either) should be allowed can not be adequately explained on any a priori unfairness, wrongfulness or lack of good faith basis. A far more convincing explanation, and one suggested by economic writers[16] is that we enforce promises which either maximise utility, or which in the long run will benefit the disadvantaged party. Thus to use an example from Kronman:[17]

> Suppose that A owns a piece of property that, unbeknowst to A contains a rich mineral deposit of some sort. B, a trained geologist, inspects the property . . . discovers the deposit, and without disclosing what he knows, offers to buy the land from A at a price well below its true value . . . The general question here is whether buyers who have deliberately acquired superior information should be permitted to exploit their advantage by making contracts without revealing what they know or believe to be true . . . This rule can be defended in the following way. If B has made a deliberate investment in acquiring the information that gives him an advantage in his transaction with A, imposing a duty of disclosure will prevent him from reaping the fruits of his investment and thereby discourage others from making similar investments in the future. But this means that a smaller amount of useful geological information will be produced. As a result the efficient allocation of land, the allocation of individual parcels to their best use will be impaired. It is plausible to argue that this will hurt those at an informational disadvantage in particular exchanges more than they would be helped by imposing a duty of full disclosure in sale transactions such as the one involved here. For example, although imposing a duty of this sort will enable A to back out of a disadvantageous transaction with B, it will also increase the price A has to pay for oil and aluminium because the incentive to make the investment necessary to determine which pieces of land should contain those resources in the first place will have been weakened as a result. Thus, a legal rule permitting B to buy A's property without disclosing its true worth arguably works to A's own benefit, since it provides a stimulus for the production of efficiency-enhancing information.

Of course there are other explanations such as Social Darwinism, or Liberatarianism, which might also carry the implication that wealth redistributions occur by other means, notably taxation, rather than by contractual regulation. The view of the writer is that a pareto-optimal[18] model such as that outlined by Kronman above, and even a utilitarian or libertarian model are apposite in a commercial market situation, since the protection of competition ultimately creates benefits for the greater part, if not all, of society. But where individuals enter the market in order to purchase necessaries or consumer durables, or to realise assets in circumstances not amounting to the carrying of a business, it is probably necessary to temper those benefits with considerations of wealth

16 Ibid, and see infra n 42.

17 Supra n 8.

18 A result in pareto optimal if no party is worse off as a consequence of it, although some parties may be better off: see ibid; cf Calabresi & Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, (1972) 85 Harvard LR 1089, 1093 et seq.

goods, the trend both in law[31] and equity[32] has been to resist claims from prior claimants in title based on constructive notice, or at least to limit the remedies available to such claimants to damages[33] or in certain cases quia timet injunction.[34] The operation of an unconscionability doctrine based on knowledge of interest will thus differ according to whether the transaction is "mercantile" or not; although if real property is involved the distinction between commercial transactions and others becomes blurred.[35] For different reasons[36] knowledge of disadvantage should not be sufficient per se to set aside a mercantile transaction.

Secondly, the concept of wrongdoing based on knowledge of adverse rights or disadvantage, cuts across the classic will-theory of contract law. Of course the notion of congruent wills is transparently inadequate because the parties rarely contemplate every contingency, but part of that inadequacy has paradoxically strengthened the acceptability of the theory, by providing a useful ambit for the operation of implied terms and other legal fictions.[37] And it has also ensured that contract law has remained (within bounds) neutral and certain. With the knowledge that no obligations exist without consent, and that consent is largely immutable, each party can regulate his economic activity and maximise his utility. A theory of obligation based on unconscionability is unlikely to provide that facility; first because expectations generated by representation and reliance consequent thereon may not be known to or contemplated by the representor; and secondly because the unconscionability model needs to be so complex in practice that knowledge of compliance (certainty) is much more difficult than with the concept of agreement. The will-theory is not of course the only accepted theory of contractual obligation,[38] but it would be palpably wrong to overturn it by an equitable side wind without at least weighing the competing advantages and disadvantages of doing so, and in particular the effect upon mercantile transactions.

Thirdly, a theory of obligation based not on consent and enforced in equity would carry implications for other branches of law which would be outside the present ability of a court of equity to assess. An example of the intertexture of the common law is as follows:

> the finding that a servant had "custody" not legal possession of his master's chattel had immense implications not just in the law of personal property, but also in tort (could the servant maintain

31 Eg *Re Wait* [1927] 1 Ch 606, 635; *Manchester Trust* v *Furness* [1895] 2 QB 539; *Feuer Leather Corp* v *Frank Johnson & Sons* [1981] Com LR 251.

32 *Swiss Bank Ltd* v *Lloyds Bank Ltd* [1982] AC 584; 593; *Hospital Products Ltd* v *United States Surgical Corp* (1984) 55 ALR 417. The issue of whether fiduciary obligations should be imposed upon parties at arms length raises related issues.

33 For an action in breach, conversion, detinue, or interference with contractual relations. And see *Hospital Products Ltd* v *United States Surgical Corp* ibid 417; cf *Snepp* v *United States* (1980) 444 US 507.

34 See eg *Swiss Bank Ltd* v *Lloyds Bank Ltd* supra n 32 at 571H-572E; 575C-G.

35 *Jones* v *Smith* (1841) 1 Hare 43; in certain cases concerning chattels (but not contracts for the sale of goods) an agreement, for example to bail goods, may be specifically enforceable; and thus create an equitable interest in the promisee which may affect parties with constructive notice. A similar situation would exist where the contract was executed on one side: *Swiss Bank Corp* v *Lloyds Bank Ltd* ibid 598.

36 Since entrants in the market can squeeze out a weaker competitor through trading, there seems little objection to a more direct advantage taking.

37 Esp rules of construction; but see *Gullespie Bros* v *Roy Bowles Ltd* (1973) 1 QB 400.

38 Eg para 90 *Second Restatement of the Law of Contracts* (US); Wessels, *The Law of Contract in South Africa* (1937) 118-123.

an action in conversion against the person who took his master's chattel from him); and also in criminal law (whether the servant was guilty of theft if he appropriated the chattel depended upon whether he had legal possession or custody of it).

Likewise the consent doctrine is a "staple" of the law of real and personal property (through the partial integration of assumpsit into the rules of grant and conveyance);[39] regulates the application of quasi-contract;[40] and provides an easy demarcation between contract and tort. The experience in equitable estoppel of reconciling the grant of proprietory remedies with established property law is only a glimpse of the conceptual difficulties any general theory of unconscionability would raise.

Lastly the inherent limitation in the equity credo is that its principal concern is in regulating bilateral relationships; which makes it especially inadequate as a doctrine through which to calculate flow-on effects resulting from a judgment, especially where the merits of the individual case appear to favour the disadvantaged or impecunious. That is not to suggest that the will-theory is not in need of review, or rather those doctrines which regulate when the neutral contract rules will be applied and enforced are not, but rather that there are sound general reasons why equity is the wrong horse to straddle in doing so.

4. REGULATING THE BARGAINING PROCESS

The classic paradigm here, (as already outlined) is that bargains freely entered should be enforced. This supports a correlative theory that contract theory is essentially neutral[41] in operation. Contract law makes few judgments about morality of action, but exists as a positive system of laws giving effect to concurrent intentions. This neutrality has both philosophical (libertarianism) and economic (free market allocative efficiency) underpinnings.[42] Existing exceptions to the operation of these rules can be explained on a number of bases. Those exceptions which protect one party from defects in the *object* of the contract might be explicable on the basis that the purchaser will practically always be worse off as a result of his not having access to the goods before sale if the seller fails to disclose, but with a disclosure rule he would conceivably be better off, because inspection costs are lower for the seller than the buyer.[43] An example is the attenuation of caveat emptor principle where the means of knowledge is practically confined to the vendor.[44] The balance of its exceptions falls into two broad categories: those rules

39 Eg Bargain and Sale at Common Law, discussed Baker, *An Introduction to English Legal History* (1979) 257; Hinde, McMorland & Sim, *Land Law* Vol 2 (1979) 10-001; s 22 Sale of Goods Act 1923 (NSW); and for bargain and sale for chattels see Stoljar, *A History of Contract at Common Law* (1975) Ch 2.

40 *Western* v *Downes* (1778) 1 Doug. 23; *Britain* v *Rossiter* (1879) 11 QBD 123; cf *Deglman* v *Guarantee Trust Co of Canada & Constantineau* [1954] 3 DLR 785.

41 "Neutral" is used in the sense of "favouring neither party" rather than in the alternative meaning of "not creating incentives for either party to enter into a transaction which they otherwise may not have entered".

42 See eg Posner, *Economic Analysis of Law* (2nd edn 1977) 404-405; 439-441; Goetz & Scott, supra n 9 at 1292-1301, 1320-1322; Kelman, "Choice & Utility" (1979) Wisconsin L Rev 769.

43 Cf Kronman, supra n 8 at 491.

44 Other examples are implied terms in sale of goods legislation; consumer protection legislation.

should be held to their liability if they have signed documents without inquiry,[58] any more than it is if purchasers sign agreements of sale and purchase; or contractors sign forms in a foreign language. Of course guarantors are in an exposed position because the guarantee benefits both the debtor and creditor without any corresponding benefit for the guarantor. If to protect the latter it is felt necessary to relax the normal rules of non-disclosure and objectivity of informed consent,[59] the courts should face the issue directly, rather than attempting to ascribe a species of 'wrongdoing' to the creditor which bears little relation to commercial reality. It might have been relevant for example to calculate the effect *Amadio* is likely to have on bank lending against guarantees; a situation which usually exists in relation to small business loans. For instance Mason J relies heavily[60] on the supposition that it must have occurred to the bank's agent that the parent's execution of the guarantee was due to them not understanding the terms of the guarantee, the terms of the agreement being so obviously improvident; but any guarantee is improvident unless there are collateral advantages accruing to the guarantor. Further, (and putting to one side the desirability of appellate courts overturning reasonable findings of fact by trial judges), if the bank knew that the guarantor was mistaken as to a fundamental term of the contract, then there is adequate relief at common law.[61] If the bank did not know of the mistake, but were only procuring the guarantee to protect their financial exposure, knowing that the company could not trade out of their position, then this could amount to special circumstances such as at common law require disclosure.[62] It is difficult to see how for example, the financial interest of the bank in a joint venture with the debtor's subsidiary would add anything to the exposure of the guarantor if the debtor collapsed. It might explain the selective dishonouring of cheques, but unless this was done in order merely to keep a hopeless debtor afloat (in which case the common law rules of suretyship should provide a remedy[63]), then it was in everyone's interest, including the guarantor's, that the practice should continue. In short the decision in *Amadio* may well result in long term loss for contractors in the position of the Amadios or their son, but the apparent lack of principle in the present unconscionability model makes it difficult to know whether this consequence was considered.

When looking at those classes which require special protection the courts must weight the demands of commerce, such as certainty and freedom from equitable concepts of notice, against the naivety of individuals, who are forced into the market place in order to survive rather than to trade. This requires an inquiry as to the *what, why,* and *how* of protection of a far less reflexive nature than occurs at present. It may be that the disadvantaged group which the law should protect will ultimately be found to be as wide as all those who are consumers entering contracts in the ordinary course of daily existence. But the

58 *L'Etrange* v *Graucob (F) Ltd* [1934] 2 KB 394; cf Tiplady, supra n 26 at 609 et seq.
59 Cf *National Westminster Bank PLC* v *Morgan* (1985) *The Times* 8 March 1985 (HL).
60 Supra n 24 at 364-365.
61 See eg *Smith* v *Hughes* (1871) LR 6 QB 597; infra nn 65 & 69.
62 *Hamilton* v *Watson* (1845) 12 Cl & Fin 109; *Lloyds Bank Ltd* v *Harrison* (1925) 4 Legal Decisions Affecting Bankers 12 (CA). Cf McGrath & Ryder, *Paget's Law of Banking* (9th edn 1982) 497 "no guarantor . . . expects to be called upon to pay."
63 Ibid.

O'Deas[64] and the Amadios, not unlike the real property purchaser, who enter a quasi-business relationship, might seem less deserving of protection if they fail to protect themselves through seeking information from the other party or from outside, especially when they are aware of the potential dangers inherent in the transaction.

There are occasional suggestions that the nature of the disadvantage protected should be transactional and not class orientated.[65] The difficulty with this approach is that once the courts go beyond class identification, there is a high risk that *any* disadvantage will be seized upon to give case by case relief. It is important, for example, at least for the preservation of free market benefits, that the courts continue to recognise that a party does not deserve protection merely because he is faced with unpleasant choices,[66] or because he makes a mistake of judgment.[67]

Where the transaction is deserving of protection the cheapest form of providing it is by information sharing, either by insisting on a high level of disclosure and explanation of contractual terms, or by a stricter insistence on the consensus ad idem rule, or by relaxing the rules relating to rescission for misrepresentation. But of course the parties would only be required to disclose information relating to the ordinary or contemplated use of the *object* of the contract, in line with the present rule governing damages for breach.[68] But any greater degree of protection, such as requiring the defendant to prove the contract was "fair",[69] or that independent advice was taken, or that the contract was not on a "take it or leave it basis" [70] go much too far it is suggested, as amounting to a social and economic engineering which the courts have so far given little indication they are equipped to undertake.[71] It must be acknowledged that there are a number of miscellaneous examples which do not fit the above schema. First, as with duress,[72] there may be good reasons for applying different contract rules as to consent or ability to protect interests where the parties are already locked into a bilateral arrangement, such as a disintegrating marriage,[73] because the parties are forced to contract with each other, and therefore may be subject to

64 *O'Dea* v *Allstates Leasing System (WA) Pty Ltd* (1983) 57 ALJR 172; and cf Muir, "Stipulations for the Payment of Agreed Sums" (1985) 10 Syd LR 503.

65 *Commercial Bank of Australia Ltd* v *Amadio* (1983) 57 ALJR 358, 363 *per* Mason J; and cf Sir Anthony Mason, supra n 5 at 244.

66 See *Alec Lobb Ltd* v *Total Oil GB Ltd* at supra n 47 at 313 *per* Dillon LJ.

67 Eg *Multiservice Bookbinding Ltd* v *Marden* supra n 48.

68 *Hadley* v *Baxendale* (1854) 9 Ex 341.

69 *Commercial Bank of Australia Ltd* v *Amadio* supra n 24 at 369 *per* Deane J; cf *Alec Lobb Ltd* v *Total Oil GB Ltd* supra n 47 at 303, 311-312 *per* Dillon LJ.

70 Eg *Commercial Bank of Australia Ltd* v *Amadio* supra n 24 at 358, 364 *per* Mason J; *Schroeder (A) Music Publishing Co Ltd* v *Macaulay* supra n 26 at 1308, 1314-1316 *per* Lord Diplock; cf *Alec Lobb Ltd* v *Total Oil GB Ltd* ibid 313.

71 Cf *Tufton* v *Sperni* [1952] 2 TLR 516, 519 *per* Evershed MR; *Bridgeman* v *Green* (1757) Wilm 58, 60 *per* Wilmot; *Brusewitz* v *Brown* [1923] NZLR 1106, 1109 *per* Salmond J. On information provision see *Walters* v *Morgan* (1861) 3 De G F & J 718, 723-724.

72 Although the courts have adopted a will related test in relation to contracts obtained under duress, the example of corporate contractors demonstrates the fallacy of this. It is submitted (infra nn 75 & 76) that different considerations, relevant because of the nature of the bilateral relationship, will be ultimately found important: cf Atiyah, "Economic Duress and the Overborne Will" (1982) 98 LQR 197.

73 Eg *Backhouse* v *Backhouse* supra n 4.

advantage-taking by a stronger party, which they could otherwise avoid. Second, there are some individuals who through immaturity, senility, or mental defect are not even aware of the need to seek advice. How wide this exception should be, (for example should it include the poorly educated) and the nature of the protection granted (which must obviously go beyond information provision), should be faced squarely as policy issues. The use of unconscionability to do so affords imperfect relief by relying on the percipience of the other party in detecting the disadvantage; threatens to include persons whose defects do nothing to make them less aware of the nature of the transaction, and should in fact make them more so;[74] and of course it suffers the conceptual handicaps of equity discussed above.[75]

Finally something must be said about mistake and misrepresentation, and undue influence, because these do not fit comfortably within an unconscionability theory. Common mistake does not of course result from any unilateral disadvantage, unfair advantage taking, or the need to protect a class of contractor. It is concerned rather with the allocation of risk where there is a defect in the *object* of the contract.[76] Neither does mutual mistake, being directed rather to offer and acceptance and the objective theory of contract. The general rule here is said to be that equity follows the law[77] although in *Taylor* v *Johnson*[78] the High Court displayed a proclivity to put the cart before the horse,[79] and look to equitable relief first. Unilateral mistake, where there is an objective sense of the contract, but one party believes the terms to be otherwise[80] is much more sympathetic to an application of the "knowledge of disadvantage" criteria postulated for unconscionability. Although some of the relevant authorities are a little ambiguous,[81] knowledge or inducement by the second party of the other's mistake of the terms appears crucial to the availability of rescission or rectification;[82] but granted this flexibility of remedy in equity, it is not obvious why, if the party who correctly interprets the contract did not induce or encourage the mistake

74 Eg Lack of facility in English; cf *Commercial Bank of Australia Ltd* v *Amadio* supra n 24 at 375 *per* Dawson J.

75 Supra pp. 1-2, 6-9, 10.

76 See eg different interpretations of the scope of this doctrine: Treitel, *The Law of Contract* (6th edn 1983) ("fundamental" or "essentially different in kind"); Starke, Higgins & Seddon, *Cheshire & Fifoot's Law of Contract* (4th (Aust) edn 1981) (no independant doctrine apart from *res sua* or *res extincta*); Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 LQR 385 (no independant doctrine); Guest, *Anson's Law of Contract* (25th edn 1979) (Question of Construction); cf Meagher, Gummow & Lehane, supra n 20 at 358-365; Tiplady, supra n 26 at 616-618. It is submitted that even the construction approach will in most instances be the exercise of a legal fiction.

77 See eg Guest, ibid 327-329; *Cheshire & Fifoot,* ibid 241-244.

78 (1983) 57 ALJR 197.

79 The contract would have been void at law if one party had been mistaken as to a fundamental term of the contract: *Smith* v *Hughes* supra n 61 *and* the other party was aware of this mistake: cf *Taylor* v *Johnson* ibid 201 *per* Mason ACJ, Murphy & Deane JJ, where their Honours declined to recognise the objective theory of contract as a necessary rule of convenience to which exceptions could be made where one party deliberately misled the other. Cf Dawson J 206-207.

80 See eg *Cheshire & Fifoot,* supra n 76 at 229, 243; Treitel, supra n 76 at 229; Guest, supra n 76 at 301.

81 *Paget* v *Marshall* (1884) 28 Ch D 255; *Torrance* v *Bolton* (1872) 8 Ch App 118.

82 *Riverlate Properties Ltd* v *Paul* [1975] Ch 133; *Roberts (A) & Co Ltd* v *Leicestershire County Council* [1961] Ch 555; *Webster* v *Cecil* (1861) 30 Beav 62; *Garrard* v *Frankel* (1862) 30 Beav 445.

of the other party, that such a contract should not be enforceable at law either.[83] Not much need be said about innocent misrepresentation. The defect in legal theory[84] which prevents common law relief has been steadily corrected in equity and by statute; but the equitable remedy is certainly not concerned with protecting a disadvantaged contractor as it can be pleaded by a party who had the easy means of ascertaining the truth, but chose not to do so.[85] Nor is there any defect in the bargaining process strictu sensu, rather than that one party has unknowingly caused the process to operate on the basis of incorrect assumptions. In fact the true basis of the jurisdiction has never been adquately explained.[86]

Undue influence, like duress, would be rationalised at law[87] by reference to the "overborne will theory".[88] But there is too great an imprecision in this concept for it to be otherwise than misleading, as is now being realised.[89] It is submitted that the abdication of contractual independence by reliance upon others, whether intentionally by delegation or agency, or unintentionally through influence, does not offend or affect the congruent will concept as such, but rather may introduce a degree of trust which is the traditional preserve of equity.[90] Actual fraud, whether at law or in equity stands on its own feet, as universally regarded as deserving remedy.

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83 *Smith* v *Hughes* (1871) LR 6 QB 597. Where the mistake is not to a term of the contract but to an underlying assumption, then providing the other party has not induced or encouraged the mistake, the contract is enforceable and no rescission is available for misrepresentation, even where the mistake is known to the other party. Had the mistake in *Taylor* v *Johnson* been not to a term but only to an underlying assumption, then given the efforts to prevent the plaintiff ascertaining the truth before the option was exercised, the court would have been justified in refusing specific performance: *Leighton* v *Parton* [1976] 1 NZLR 165; cf Tiplady, supra n 26 at 607-608.

84 *Rutherford* v *Acton Adams* [1915] AC 866.

85 *Redgrave* v *Hurd* (1881) 20 Ch D 1.

86 The best discussion is in Meagher, Gummow & Lehane, supra n 20 at 339-341. Although the authors indicate the basis is fraud, the cases extracted point more specifically to an unjust enrichment basis. But it is submitted that this would confuse the *consequences* of rescission with the *necessity* for it. The contract is rescinded because the representee would not have entered the contract but for a mistaken assumption; and the risk of mistaken assumption which normally lies on the person making it, is however transferred to the party inducing it: there is therefore a close if not perfect analogy with common mistake.

87 And apparently also in equity: see *Commercial Bank of Australia* v *Amadio* (1983) supra n 24 at 363 *per* Mason J; 369 *per* Deane J; cf Meagher, Gummow & Lehane, ibid 371-372.

88 See eg *Occidental Worldwide Inv Corp* v *Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, 335-336 *per* Kerr J; *Pao On* v *Lau Yiu* [1980] AC 614.

89 See eg *Universe Tankships Inc of Monrovia* v *ITF* [1982] 2 WLR 803, 813-814, 820, 828. But their Lordships, by tying relief to the necessity for isolating some tortious or illegal conduct have (temporarily one hopes) lost the chance to place the doctrine on a more rational basis: see infra. And cf *Lynch* v *DPP of Northern Ireland* [1975] AC 653.

90 See eg Finn, *Fiduciary Obligations,* (1977) 82-87; Meagher, Gummow & Lehane, supra n 20 at 368-384. Duress it is submitted is concerned rather than the situation where one party having created a bilateral relationship with the plaintiff, whether by contract, seizure of goods etc, seeks to take advantage of the party "captured" by the relationship. Free will as such is not an important criteria. The theory can be tested by reference to the bedouin who offers the thirsty desert traveller a glass of water for $1000. Hardingham, supra n 6 at 23-24 argues that duress and undue influence are "not substantially different", a notion which the writer vigorously denies as predicated on only a common "illegitimacy"; which in turn may be interpreted in such a wide context no more narrowly than as meaning only "wrongful". On undue influence see esp *Johnson* v *Buttress* (1936) 56 CLR 113, 135 *per* Dixon J.

5. THE ENFORCEMENT OF PROMISES AND REPRESENTATIONS

(a) *Statements Inducing Performance*

The typical companion helper of a dependant relative seeking to enforce a vague promise to confer a benefit, conceivably is thwarted at common law by four concerns which counter-balance enforcement. The first is the protection of the congruent will-theory, through the doctrines of offer and acceptance, certainty, and intention to create legal relations. Second, the doctrine of consideration reflects a broad perception that only promises either forming part of a bargain, or at least requesting performance and acceded to, should be enforced. As a corollary of this concern, (although often explained with reference to different factors[91]) is the rule as to sufficiency of consideration. Thirdly there is the policy concern evident in the statute of frauds,[92] and finally there may be difficulties raised by the privity rule, which is often reformulated[93] and confused[94] with the consideration doctrine, although it raises distinct issues.[95] Because of these doctrines, attempts to mould classic contract doctrine around the type of example postulated of the dependant relative become too artificial to be useful,[96]

If notwithstanding this impedimenta, the courts perceive a need to enforce promises on a wider basis than at present, they have a choice either to restate general contractual principles in sufficiently wider terms, or to develop a parallel matrix of enforcement rules. The former possibility would require a radical departure from the accepted will-theory and consideration models, presumably to a reliance based,[97] reasonable expectation based,[98] or civil *causa* notion of enforcement. Such a redefinition in particular would have to consider (i) the reason for enforcing promises, (ii) the relationship between contract and delictual obligation, especially in tort, (iii) the rationalisation for vitiating factors such as mistake and duress, presently and conveniently synthesised within the congruent will-theory, and (iv) the implications for commerce. Revision of the statute of frauds, sufficiency of consideration, and the privity rules[99] would, by contrast, provide fewer difficulties for reform.

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91 Eg Ames, "Two Theories of Consideration" (1899) 12 Harv LR 515, 521; Stoljar, "The Modification of Contracts" (1957) 25 Can Bar Rev 485, 488; Sutton, supra n 9 at 21.

92 See eg Teeven, "Seventeenth Century Evidentiary Concerns and the Statute of Frauds" (1983) 9 Adel LR 252, 258-261.

93 As the rule that consideration must move from the promisee; see eg Treitel, supra n 76 at 65.

94 Cf Furmstom, "Return to *Dunlop* v *Selfridge?*" (1960) 23 MLR 353.

95 So that allowing a *jus quaesitum tertio* would not mean that the parties to the contract would not have to provide consideration; and the opposite would also appear to be true: *Kepong Prospecting Ltd* v *Schmit* [1968] AC 810 (PC).

96 Consideration and certainty are the major practical hurdles. Most of these situations might be construed as unilateral contracts but for the lack of certainty. Writing is no major hurdle if there is part performance, and the doctrine of intention to create legal relations operates more in practrice as a controlling device than an objective doctrine. Request is the important ingredient, because consideration and offer and acceptance both depend on it, as does part performance. The courts however have been slow to imply it.

97 Eg Atiyah, "Contracts, Promises and the Law of Obligations" (1978) 94 LQR 193.

98 See generally, Baker, "From Sanctity of Contract to Reasonable Expectation?" [1979] CLP 17; Thompson, "From Representation to Expectations" [1983] CLJ 257; cf *E R Ives Investments Ltd* v *High* [1967] 2 QB 379, 394.

99 Cf *Woodar Investments Development Ltd* v *Wimpey Construction UK Ltd* [1980] 1 All ER 571, 591 *per* Lord Scarman.

It is not intended to pursue the possibility of such a radical reformulation of contractual obligation in this article, but rather to suggest more limited reforms.[100]

The second possibility, that of leaving the present contract model largely intact, but developing supplementary rules, has obvious attractions for appellate as well as puisne judges, because of the difficulty of restating broad principles of law (together with the necessary minutiae for the operation) within the factual confines of individual cases. The obverse disadvantage however is the increased complexity in the law, especially where that development takes place not in contract theory but in equity, and given that the latter, because of its emphasis on the bilateral fact situation at bar, is an imperfect medium through which to develop general law rules.[101] It is therefore proposed to examine the availability of common law doctrines to protect the representee who has relied on a non-contractual representation of intention or promise; that is to say promises proceeding from an agreement not supported by consideration, or if not so proceeding unaccompanied by a request;[102] and then to question the necessity for equity providing this.

The common law has permitted a number of exceptions to contractual theory by way of redressing perceived lacunae, although many would not be recognised as such. First, by attaching to an otherwise often ambiguous distinction[103] between promise and representation markedly divergent consequences,[104] a bare statement might be construed as a representation rather than a promise, so that estoppel or tort would operate. Obviously this approach is limited by the express use of promissory language, and also by the rule in *Jorden* v *Money*.[105] Secondly, the line between fact and intention is often blurred, especially in relation to estoppel by convention. If I represent your status as, for example, an invitee, I can not later treat you as a trespasser. But since your rights are concessional rather than legally enforceable, there is an inescapable flavour of futurity in my representation; namely that I will not sue you for trespass.[106] Thirdly, it is often accepted that a request for the promisee to do some act which confers no material benefit on the promisor, but neither is a detriment to the promisee, is not good consideration. Promises to confer benefits on marriage, or to do so if the promisee drinks a glass of port a night,[107] are examples. But whatever the other claims for *Hammersley* v *De Biel*,[108] (one of the leading modern authorities) the common law had a sufficiently flexible notion of benefit to include marriage of a close relative within the doctrine of consideration and that case is an example of it. Indeed it appears that formerly any requested act by the promisee was sufficient to support an assumpsit action, but in the conflict with *debt* the concept of

100 See eg Atiyah, supra n 11; Sutton, supra n 9 at Part IV.
101 Supra pp. 9, 11.
102 Supra pp. 3-4.
103 See eg *Heilbut, Symons & Co* v *Buckleton* [1913] AC 30, 56; discussed *Hospital Products Ltd* v *United States Surgical Corporation* supra n 32.
104 See Atiyah, "Misrepresentation, Warranty & Estoppel" (1971) 9 Alberta LR 347.
105 (1854) 5 HLC 185.
106 See eg Spencer-Bower & Turner, *Estoppel By Representation* (3rd edn 1977) 157; *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] supra n 5 at 116; cf *Bank Negara Indonesia* v *Hoalim* [1973] 2 MLJ 3.
107 See eg Treitel, supra n 76 at 67; cf *Hamer* v *Sidway* 27 NE 256 (1891).
108 (1845) 12 Cl & Fin 45; Finn, supra n 5 at 62 et seq; Dawson, 329 et seq.

benefit became distorted, and never recovered. More particularly, before *Slade's* case it was necessary to imply a promise to pay, subsequent to the execution of the considration, but in order to avoid the plea of past consideration the benefit had to be a continuing one, and it was easier to show this in respect for example of the marriage of a close relation rather than of a stranger. And secondly any wide concept of benefit where the subsequent promise could not be implied would let in *debt,* which required the receipt of a quid pro quo, and before 1602 thereby excluded assumpsit.[109] Leaving aside promissory estoppel,[110] these rather narrow common law exceptions can not be developed too explicitly, for example to *enforce* a non-contractual statement of future intention, because the common law has developed exhaustive rules for contractual theory. To argue that a non-contractual representation of intention should found a good cause of action goes beyond criticism of a phalanx of House of Lords decisions;[111] because if they are wrong then most of our law of contract is too. That, however, is not to say that *Jorden* v *Money alone* should not be regarded as having been wrongly decided as a decision on the law of estoppel (properly so-called),[112] because it confused the impediments to a delictual obligation[113] for a statement of intention, with those relating to a wider rule of evidence. Thus it could be argued that if there are circumstances where one party's expression of future intention carries no implication of a *locus poenitentiae,* for example, where both parties anticipate its fulfilment as a basis of their relationship, that at least an estoppel by convention operates.[114] Because one could rationalise such a development as evidential rather than obligatory, the integrity of contract law is not directly challenged; although the extent of protection afforded suffers obvious limitations, in that there is no cause of action available for an estoppel.

Alternatively the common law may protect the restitutionary rights[115]

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109 Lucke, "Slade's Case and the Origins of the Common Counts" (1965) 81 LQR 429-434, 435-437, cf *Shadwell* v *Shadwell* (1860) 9 CB (NS) 159.

110 Infra, p 22, pp. 26 ff.

111 *Jorden* v *Money* (1854) 5 HLC 185; *Maddison* v *Alderson* (1883) 8 App Cas 467; *Derry* v *Peek* (1889) 14 App Cas 337; *Low* v *Bouverie* [1891] 3 Ch 82 (CA).

112 As a *defense* by preventing the representor from denying a statement of *fact:* Spencer-Bower & Turner supra n 106 at 7-12. The terminology "estoppel as a sword" appears meaningless. If the plaintiff sues on the representation, whether the representor is estopped or not from denying it, the plaintiff must still found his action on a recognised cause of action such as contract. The contradiction claimed for *Low* v *Bouverie* ibid may perhaps be explained on this basis: Meagher, Gummow & Lehane, supra n 20 at 403-404; Davidson, "The Equitable Remedy of Compensation" (1982) 13 MULR 349. The academic interpretations of *Jorden* v *Money* have varied greatly: see eg Atiyah, supra n 11; Treitel, "Consideration — A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 ALJ 439; F Dawson, "Making Representations Good" (1981) 1 Canterbury LR 329; Meagher, Gummow & Lehane, supra n 20 at 402-404; Heydon, Gummow & Austin, *Cases and Materials on Equity & Trusts* (2nd edn 1982) at 293-295.

113 In particular that statements of intention cannot be negligent because they do not when given relate to a fact which can be true or false: supra n 105. This difficulty for delictual obligation would incidentally appear to undermine the operation of the jurisdiction claimed in equity to compensate for misrepresentations: infra n 120.

114 Supra n 91.

115 In the majority of the equitable estoppel cases, the restitutionary right will consist of an action for a *quantum meruit* for work and materials, rather than for specific restitution: see Goff & Jones, *The Law of Restitution* (2nd edn 1978) 14-18.

of the promisee in the absence of contract,[116] where the promisee has conferred a *requested* benefit upon the promisor,[117] and perhaps in special circumstances where the benefit is unrequested.[118] In the type of equitable estoppel cases coming before the courts the other requirements of a restitutionary claim, that is that the benefit not be conferred gratuitously or officiously, would be complied with. The major limitations of the restitution action however are two-fold. First the plaintiff is usually seeking to protect an expectation interest, for example the promise to grant a proprietary interest, rather than to obtain recompense for benefits conferred. Secondly, there may often be reliance without benefit conferred,[119] so that the courts can only grant relief by tortuously construing request plus reliance as conferring a benefit.[120] There are of course examples where conferring a benefit on the promisor will lead to a common law protection of the expectation interest, and not merely the restitutionary interest outside of agreement, but there must be a request for the promisee to so act as the "price" of the promise. The unilateral contract is the most obvious instance.

Tort offers a different possibility. Failure to perform a promise or representation of intention without more cannot support an action for *negligent misstatement* where the promisor promised in good faith and for the same reasons a deceit action will not lie.[121] But where the promisor makes the representation believing he will perform it, but neglects to check on facts which would indicate conclusively to him that he would not be able to do so, it might be that there was a negligent misstatement. But the promise would have to be one which the promisee *knew* would be acted upon, or would be likely to be acted upon, since its gratuitous nature would otherwise properly lead him to believe it would not be acted upon. In any event having made the statement, it could be regarded as a *negligent omission* not to warn the representee that the promisor reserves a *locus poenitentiae.*[122] However there are considerable difficulties with this extension of tort doctrine. First it could not suffer any additional ingredient, such as knowledge of loss or threatened loss (reliance expenditure), because a promisor who changed his mind after the loss (or some loss) had been incurred would rightly claim that at the time it was incurred he believed, without deceit or

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116 And even in some instances where the contract is still on foot, though unenforceable: Treitel, supra n 76 at 791-794; *Deglman* v *Guarantee Trust Co of Canada & Constantineau* supra n 40; *Way* v *Latilla* [1937] 3 All ER 759; and see Goff & Jones, ibid 319-323.

117 *Van der Berg* v *Giles* [1979] 2 NZLR 111. Similarly where the owner has a chance to restore the benefit: *Sumpter* v *Hedges* [1898] 1 QB 673. *Quaere* whether the protection of this interest should not have been adequate relief in *Plimmer* v *Mayor etc. of Wellington* (1884) 9 App Cas 699.

118 *Jensen* v *Probert* 148 P 2d 248 (1944); *Nicholson* v *St Denis* (1976) 57 DLR 3d 699; Fuller & Perdue, supra n 10 at 392-394. Cf *Pilling* v *Armitage* (1805) 12 Ves 84; *Ramsden* v *Dyson* (1866) LR 1 HL 129, 171. But cf *Sumpter* v *Hedges* ibid.

119 Eg *Crabb* v *Arun D C* supra n 5.

120 As in *Planche* v *Colburn* (1831) 8 Bing 14; *Inchbald* v *Western Neilgherry Coffee Co* (1864) 17 CB (NS) 733; cf Beatson, "Discharge for Breach: The Position of Instalments, Deposits & Other Payments Due Before Completion" (1981) 97 LQR 389; Treitel, supra n 76 at 616-617.

121 *Parsley* v *Freeman* (1989) 3 TR 51. It is difficult to understand how a statement of intention made in the belief it would be performed, could be either fraudulent or negligent.

122 Cf Ziegler (ed) *Leage's Roman Private Law* (2nd edn 1954) 337; Stein (ed) *Buckland's Textbook of Roman Law* (3rd edn 1954) 517.

negligence, that it would not be a loss. That is that he still intended at that time to confer the benefit the promisee expected in return for his reliance. The only exception to this is the one mentioned above, where there exists at the time of representation facts showing the promise could not be performed.

Secondly, tort (allegedly) protects only actual loss and not loss of expectations.[123] Lastly, such a doctrine would not only render common law contract otiose, but it would also have the practical effect of going beyond the sensible limitations placed on the analogous doctrine in *Mutual Life & Citizens Assurance* v *Evatt*[124] (in relation to advice-givers who hold themselves out as such), and more generally, in the recent case of *L Chadwick & Associates Pty Ltd* v *Paramatta City Council.*[125]

Finally, there are suggestions in the law reports of a common law concern that certain agreements or understandings, lacking some formal contractual element, nonetheless be kept where one party has performed his part.[126] The rationale of this doctrine appears to be close to that of the part performance doctrine, namely that it would be fraud to accept a benefit under an understanding that something be given in return, and then refuse to do so. But apart from the sui generis marriage cases (which were probably contractual, or at least unilateral contracts,[127] but otherwise received their quietus last century[128]), the allegation of fraud appeared to require an element of actual benefit to the promisor either such as could be returned or had been requested, which is corroborated in respect of the former by subsequent conterminous developments in quasi-contract.[129] This requirement of benefit, if indeed the doctrine exists, is explicable by reference to a morally accepted notion of fraud, which regards wrongful acceptance of a benefit as much more culpable than wrongly causing detriment. The analogy to the doctrine of part performance,[130] which is sometimes cited as supporting a wider concept of fraud grounded in detriment alone is misleading. While there may be contractual performances which objectively confer no benefit, because the promisor is prepared to pay for their performance he places a value (benefit) upon them.[131] That assumption becomes much more tenuous where the promise is gratuitous in the sense that nothing is requested in

123 Cf *Ross* v *Caunters* [1980] Ch 297; *Gartside* v *Sheffield, Young & Ellis* [1983] NZLR 37, discussed infra p 25.

124 [1971] AC 793.

125 (1982) 150 CLR 590.

126 If one party performs a requested act both parties knowing that it was not intended to be gratuitous, then the law will not regard it as post consideration upon a subsequent promise: *Sidenham and Worlington's Case* (1585) 2 Lev 224; or if one does not fulfil the requested performance perfectly, nonetheless an action might lie for a benefit conferred, or indeed for the whole expectation: *Keyme* v *Goulston* (1665) 1 Lev 140; *Boone* v *Eyre* (1779) 2 Black W 1312. This concept might actually be so important as to explain why in many cases the party in breach can nonetheless maintain an action on the contract, and also to explain why the expectation interest is protected in unilateral contracts: see Atiyah, supra n 9 at 181-193.

127 *Supra,* n 93.

128 *Maddison* v *Alderson* supra n 111.

129 Eg Anticipated contracts which fail to materialise, or are void or uncompleted. Treitel, supra n 76 at 792; Stoljar, *The Law of Quasi-Contract* (1964) 195-206.

130 Eg Dawson, supra n 112 at 331.333; Baker, supra n 39 at 26-27; but cf Lord Cranworth's explanation in *Caton* v *Caton* (1865) LR 1 Ch App 137, 145.

131 And therefore should not support a quasi-contract action for benefit conferred; although this qualification is often technically not complied with: see supra n 104.

return, since by definition the promisor is not concerned to receive a corresponding benefit nor to ensure that the promisee acts to his detriment. But it is strange that the common law does not enforce an *agreement* (containing an element of request) which, while lacking some technical contractual requirement, nonetheless has been executed on one part by the promisee; especially since promises not proceeding from an agreement are enforced as unilateral contracts where executed.

The major handicap to adequate relief at law in the "non-contractual promise or representation of intention plus reliance" paradigm appears in summation to be the failure to protect the expectation and reliance interests in most cases. Therefore despite the arguments against equitable intervention in contract discussed above, it is now relevant having discovered common law limitations, to see if equity can provide better solutions.

The equitable doctrines of estoppel[132] and constructive trusteeship[133] provide that measure of protection in two clear instances. First where there has been part performance of a contract, which although otherwise enforceable, is subject to the Statute of Frauds.[134] Secondly where one party has received a benefit under the aegis of an understanding, common intention, or as it is sometimes said "an expectation, created or encouraged. . .", he cannot disclaim the understanding.[135] The latter may merely be the equitable reflection of an identical common law doctrine; the former might more properly be regarded as existing in equity only, given the necessity for justifying non-compliance with the Statute. A third strand, at least of the equitable estoppel doctrine, based on representation/promise plus reliance (but not benefit conferred), is much more speculative.[136]

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132 See generally Ford & Lee, supra n 20 at 1019-1039.

133 Ibid.

134 Ibid; Davies, "Constructive Trusts, Contract and Estoppels: Proprietary and Non-proprietary remedies for Informal Arrangements Affecting Land" (1980) 7 Adel LR 200.

135 These alternatives explain the full text of Lord Kingsdown's test in *Ramsden* v *Dyson* (1866) LR 1 HL 129, 170:

> If a man under a *verbal* agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation [emphasis added].

136 See eg Dawson, supra n 112; Davidson, supra n 112; Meagher, Gummow & Lehane, supra n 20 at 402 et seq. In particular there is some debate as to the true explanation of many of the cases: whether they are examples of a broad jurisdiction which included the ability to enforce representations of intention, or rather were explicable by actual fraud, negligent misrepresentation, or some form of estoppel by convention. And secondly whether the form of relief was monetary compensation, or a decree to fulfil the representation. Some of the claims made for this jurisdiction, eg Romilly M R in *Re Ward* (1862) 31 Beau 1, 7; *Stephens* v *Venables (No. 2)* (1862) 31 Beav 124, 127-128 are patently too wide to be acceptable or useful. In the light of the growth of negligence, and the arguments advanced in this paper for confining the role of equity in contract, this line of authorities may best be viewed as an historical curiosity.

Yet despite these convenient distinctions the constructive trust should not be seen as alternative doctrine to equitable estoppel, but rather as a sub-category of it. The wider doctrine purports to enforce certain promises, representations, or understandings by providing tests for liability, and where that exists tests for remedies.[156] Constructive trusteeship conflates these two steps because the nature of the relief necessarily limits the ambit of the liability,[157] but the mischief is identical. As are the implications for many present legal doctrines of a "non-contractual promise/representation of intention plus detriment" enforcement model. It is submitted that like existing common law doctrines, present equitable doctrines suffer too many confusions and limitations to provide a comprehensive enforcement rule in this situation.

What is required is a principle which protects (reasonable) reliance and/or perhaps expectation by the promisee, without the requirements of knowledge or benefit,[158] but which finds an honest accommodation with the accepted contract model. There is no obvious way in which to cut this gordian knot, but it is submitted that the problems raised by contract formation and writing[159] suggest a delictual obligation, based neither on fraud nor negligence,[160] but on simple causation and loss. Two preliminary points worth making are that first, a duty to warn is not an adequate tort mechanism, given that loss may be incurred before the representor decides to reneg on his stated intention; and secondly that, given the tortious origins of special assumpsit, there is nothing inherently artificial in this suggestion for a delictual obligation.[161] To borrow a metaphor from the rules on tacking, having thrown out the plank and invited the shipwrecked upon it, one can not push them off at the entry-port.

This suggested tortious liability only arises because the representor has indicated an assumpsit of responsibility for the reasonable acts of the representee, and can not later disavow them so causing loss. This is not to suggest a contractual enforcement model; the reliance must be "executed", so that the representor has an ability to resile from his statement of intention before that occurs; and as with estoppel there is no necessary consensus, the relevant emphasis is on the reliance of the second party, not the knowledge of the first. Further it is submitted that only reliance loss be compensated, since the argument of Megarry J in

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conferral of a benefit on the putative trustee, in order for the expectation to be protected. This will always be the case where the promisee has relinquished a property right to the promisor: eg resulting trusts; *Avondale Printers & Stationers Ltd* v *Haggie* [1979] 2 NZLR 124, 163-164. But where there is merely a promise plus detriment (without benefit conferred) it is submitted that unless there is a *request* so that a benefit can be construed (supra pp 3-4) then only the reliance interest should be protected. Cf *Last* v *Rosenfeld* [1972] 2 NSWLR 923; *Pallant* v *Morgan* [1953] Ch 43.

156 See eg Finn, supra n 5 at 90-93.

157 A conclusion which is reinforced by the attempts of the Courts to read down the doctrine to instances of common understanding: Ford & Lee, supra n 20; cf *Hussey* v *Palmer* [1972] 1 WLR 1286. In this way the doctrines of resulting and constructive trust are drawn together: *Allen* v *Snyder* [1977] 2 NSWLR 685; Davies, supra n 134.

158 Cf Para 90, *Second Restatement of the Law of Contracts* (US); Sutton, supra n 9 at Ch 7.

159 Both the Statute of Frauds and the Parol Evidence Rule.

160 Supra n 105.

161 Cf *Bowen* v *Paramount Builders Ltd* [1977] 1 NZLR 394, 423 *per* Cooke J.

Ross v *Caunters*[162] that loss of an expectation is a real and not a speculative loss has a sophistic flavour when the benefit is expected not from a third party but from the party preventing its accrual. This limitation also creates a barrier to the enforcement of disappointed expectations such as occur in everyday life, but which society would not regard as deserving of remedy, because in such cases consequential loss will often be de minimis. But granting a non-contractual remedy raises difficulties with the concept of mutuality, which the following example illustrates:

> A's automobile breaks down one mile from a garage. He walks back to the garage, who indicate what they believe the problem to be and that when the car is towed back they can have a mechanic work on it that afternoon. A goes back to his car, but on the way he is stopped by his neighbour B who happens to be driving past. B suggests that A accept a tow from him to C who is a mechanic known to B who will do the job much cheaper than the quote received from the garage. A agrees to this course of action without informing the garage.

Obviously A offends concepts of good neighbourliness but should he be liable to the garage? Let us change the facts around. Suppose that shortly after A approaches the garage, D, who is an old customer or who has a lucrative job arrives there with his car, and the only free mechanic is the one who is waiting for A's car. When A later tows his car in there is no-one therefore available to work on it. Or suppose even that that mechanic goes home sick. If A subsequently tows his car to the garage should he have an action too? If the garage could have a remedy against A in the above hypothesis, it would only be proper that A has reciprocal rights. This would indicate that in order for a reliance action to succeed the plaintiff must show not only reasonable reliance, but that where it proceeded from an understanding, he attached legal consequences to the compliance therewith, such that had he (A) been non-feasant, the now defendant could have a claim against him. Where, as in *Crabb* v *Arun DC*[163] the benefits all flow one way, that is to say there was nothing the council could receive from the transaction, that will be an easy hurdle. In the case of a gift however, the controlling factor will have to be the element of reasonableness of reliance (in the absence of encouragement beyond mere promising), and here the concept of the "reasonable man" would seem appropriate.[164]

(b) *Statements Inducing Forbearance*

Athough the equitable doctrine of promissory estoppel appears to have reserved an exclusive operation in relation to statements in a contractual

162 [1980] 1 Ch 297, 321. Cf Baker, supra n 39 at 29. Cf *Restatement of the Law of Torts* (US) para 552C. The concept of protecting the reliance interest only within a "contractual framework" where the promisor has caused the loss is in fact a very old one. Many writers draw strength for a reliance based excuse for the protection of the expectation interest on mediaeval practice, but in fact in the fifteenth century when assumpsit was emerging from trespass it appears that in the absence of benefit, e.g. prepayment, only the reliance loss was compensated in cases of misfeasance, and later non-feasance: see eg Baker 274 et seq. This essentially tortious concern may well provide a less complex answer to such difficult issues as the nature of the remedy for breach of warranty of authority, revocation of conditional gifts before the condition is fulfilled, and revocation of unilateral offers after performance has commenced.

163 Supra n 5.

164 Cf Finn, supra n 5 at 82.

situation inducing forebearance, it is submitted that there exists adequate common law explanations for the enforcement of such statements which appear to have been overlooked in the last forty years. The same is also true for similar statements made outside the contractual relationship. Where the parties are already in a contractual relationship, the normal rules as to formation and consideration need not have any great operation. Variation, release, and accord and satisfaction, providing they are each treated as non-exhaustive doctrines can be dismissed without difficulty.[165] Post-breach representations can be treated as elections between inconsistent rights, and are not as such prejudiced by the rules in *Jorden* v *Money* or *Low* v *Bouverie.*[166] In the post-contract, pre-breach situation, there is no compelling logical reason why a statement of *fact* can not operate as a (true) estoppel, even if the contract falls within the Statute of Frauds, or is otherwise written.[167]

Where the statement contains an element of futurity, there is an alleged doctrine of waiver at common law to explain the efficacy of gratuitous waivers. But as Ewart [168] pointed out sixty years ago there are few examples of so-called waiver which can not be characterised as election or estoppel. Those that cannot are of two types: unilateral waiver of a condition inserted solely for the benefit of the party purporting to waive it;[169] and requested waiver of strict compliance by the other party.[170] The former doctrine is difficult to reconcile with the idea of mutual submission to all obligations, (especially where the party who has failed to fulfil the condition now seeks to plead it); but the second doctrine is conceptually acceptable. It does not rest on an estoppel;[171] is not defeated by the Statute of Frauds;[172] nor is it limited to statements of fact. It has been argued that it is a rule grounded in the notion of (legal) fraud; one party may not induce another to breach his contract and then set up the breach against him.[173] It is equally

165 But see Stoljar, supra n 91 Bar Rev 485.

166 (1854) 5 HLC 185; [1891] 3 Ch 82. See further Dugdale & Yates, "Variation, Waiver & Estoppel: A Re-Appraisal" (1976) 39 MLR 681.

167 Providing the estoppel operates as a rule of evidence. This is also the case in respect of waiver and election.

168 Ewart, *Waiver Distributed* (1917). And see also Campbell, "Gratuitous Waivers of Contractual Obligations" (1964) 1 NZULR 232.

169 See eg Robinson "Waiver of Benefit of Conditional Clauses" (1975) 39 Con (NS) 251; Coote, "Agreements Subject to Finance" (1976) 40 Con (NS) 40.

170 Eg *Hickman* v *Hayes* (1875) LR 10 CP 598; *Birmingham etc, Co* v *London & North-Western Rly* (1888) 40 Ch D 268; Gordon, "Creditor's Promises to Forgo Rights" [1963] CLJ 222, 229 et seq cf Meagher, Gummow & Lehane, supra n 20 at 1707. Fuller, *Basic Contract Law* (1947) 907-908 criticises Ewart for "overstating" his case. It is submitted that the aberrant examples cited by Fuller fall into one of the two categories described; Stoljar, supra n 91 at 494 et seq.

171 *Levey & Co* v *Goldberg* [1922] 1 KB 688; *Leather Cloth Co* v *Hiesonimus* (1875) LR 10 QB 140; *Bressler Waechter Glover & Co* v *South Derwent Coal Co* [1938] 1 KB 408; Stoljar, ibid 526-527.

172 Ibid; cf *Plevins* v *Downing* (1876) 1 CPD 220. But see *Hartley* v *Hymans* [1920] 3 KB 475.

173 Adams, "Waiver Redistributed" (1972) 36 Con (NS) 245. The distinction between a contractual waiver of strict performance on a request, and variation of the contract may be no more than this: that the latter must comply with the Statute of Frauds (and the Rules in *Pinnel's Case* (1602) 5 Co Rep 117a and *Stilk* v *Myrick* (1809) 2 Camp 317 where the contract is discharged: Stoljar, supra n 91 at 527-528); but the former need not. In order to keep this blatant statutory breach in hand, the waiver doctrine was restricted to minor modifications of performance.

explicable on the basis of an election, which has the advantage of drawing in the non-contractual concessions, for example in respect of the exercise of proprietary rights.

The explanation is as follows. Every concession, even if expressed in the active, "you may do x (even though the contract forbids x)", is really a promise of a negative, not to sue if x is done. The promisee does not require the concession to do x, but does require it to exculpate himself from the legal consequences of acting. A contractor has a right to this election theoretically[174] in every post breach situation, a non-contractor wherever his proprietary or other rights are infringed.[175] Although the rules for an election between two legal situations presuppose an actual infringment has occurred, these rules are intended to protect the elector from an unintentional exercise,[176] but would not therefore preclude an informed anticipatory election. It is submitted that such an explanation would neatly explain why such statements should be enforced but would avoid any messy reconciliation with the consideration doctrine in particular. Whether the promisor could resile from his election in the face of *threatened* infringements must be limited to the giving of reasonable notice of intention to do so, otherwise election would be in direct conflict with the doctrine of consideration.

This approach has several advantages over equitable estoppel or unconscionability. First there is no need for an artificial division between "positive" and latent rights, because there is no relevant relationship between promisee detriment and infringment of latent promisor rights. That is to say, with election the parties must already be in a bilateral relationship so that the problem of enforcing gratuitous promises never arises. Second, within the scope of its operation the concept of promise is removed, as it is not with promissory estoppel, so that there is no unnecessary tension with the consideration model. This circumstance also resolves any problem raised by the doctrine of sufficiency of consideration; a difficult concept to explain anyway in the existing contractual relationship, as its narrow interpretation precludes its use as an effective counter to duress,[177] and the bilateral relationship precludes any open-ended liability for gratuitous statements such as the consideration doctrine is otherwise designed to prevent. By comparison, most of the problems the equitable doctrine raises, for example whether there is a requirement of detriment or merely change of position, derive from its unlikely position between the stools of estoppel by representation of fact and contractual promise.

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174 *Johnson* v *Agnew* [1980] AC 367. There may however be situations where the contract is discharged automatically: eg Harbutt's *"Plasticine" Ltd* v *Wayne Tank Co Ltd* [1970] 1 QB 477; *Aberfoyle Plantations* v *Cheng* [1960] AC 115.

175 See eg *Durham Fancy Goods Ltd* v *Michael Jackson (Fancy Goods) Ltd* (1968) 2 QB 839.

176 Ewart, supra n 168 at 74 et seq; Spencer-Bower & Turner, supra n 106 at Ch XIII; *The Laconia* [1977] AC 850; cf *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1971] AC 850.

177 The Courts have interpreted any slight variation in performance as sufficient consideration: *Hirachand Punamchand* v *Temple* [1911] 2 KB 330; *Pinnel's Case* (1602) supra n 173. *Couldery* v *Bartrum* (1881) 19 Ch D 394, 399; Ames, supra n 9 at 521 et seq; but unsophisticated debtors will be caught: *D & C Builders Ltd* v *Rees* [1966] 2 QB 617.

(c) *Estoppel by Acquiescence*[178]

This doctrine, which is embraced by general equitable theories of wrongdoing, has no immediate relationship to contract law and is mentioned only to exclude the claim that its existence justifies those theories by reason that relief is not otherwise available to a plaintiff in this situation. A mistaken party conferring a benefit upon a second party who knows of the mistake and that the benefit is not intended to be gratuitous, may have a claim in restitution for the value of the benefit conferred.[179] He may also, for example where the onus is on the proprietor to bring ejectment proceedings, be able to plead an estoppel. Whether he is in need of greater protection is doubtful, since he is partially the author of his own loss, and because in any event there is no positive duty in tort to prevent reliance expenditure in these circumstances.[180]

6. SUBSTANTIVE UNFAIRNESS AND REMEDY REGULATION

The third point of contiguity between contract and equity is in regulating the enforcement of obligations within a completed contract where no defect in the bargaining process is apparent. Perfected obligations may be unenforceable because of some policy external to contractual theory;[181] or because of breach, frustration, or supervening incapacity. While these are not relevant here, there is however a further pertinent category of which the rules against penalties and forfeiture are examples. In American jurisprudence they would be embraced by the rubric of "substantive unfairness" in distinction to such "procedural unfairness" as duress or fraud.[182] Procedural unfairness refers to some perceived defect in the bargaining process, or some imbalance in the relative bargaining power of the parties. Substantial unfairness is much more an example of a posteriori reasoning, assuming unfairness procedurally because of the terms of the agreement, or because, even if the agreement under review is not unfair, taken in the aggregate, such agreements are more likely than not to be unfair. But it is difficult to understand how per se contractual terms can be regarded as substantively unfair if the courts are unable to identify unfairness in their acquisition; and this conundrum has prompted the writer to argue elsewhere for reform of the penalty rules.[183] Of course there may be *such* a discrepancy in value that, *taken together* with other relevant circumstances the court can make findings of fact in favour of one party, for example their intellectual vacancy, and their need for

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178 See generally Spencer-Bower & Turner, supra n 106 at Ch XII; the doctrine in *Willmot* v *Barber* (1880) 15 Ch D 96 which operates to vest property rights should not be confused with the more common application of acquiescence as indicating an estoppel in evidence, or laches in equity. See *Habib Bank Ltd* v *Habib Bank A-G* [1981] 1 WLR 1265; *Shaw* v *Applegate* supra n 5.

179 Supra n 101; *Craven-Ellis* v *Canons Ltd* [1936] 2 KB 403; *Brown* v *Smitt* (1924) 34 CLR 160.

180 Eg *L Chadwick & Associates Pty Ltd* v *Paramatta City Council* [1979] 1 NSWLR 566; on appeal (1982) 150 CLR 590. Cf Heydon, Gummow & Austin, supra n 20 at 300-301. But see *Pacol Ltd* v *Trade Lines Ltd* supra n 146 at, 465, 469; *Taylor's Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* supra n 5 at 147; for estoppel under a duty to speak see Spencer-Bower & Turner, supra n 106 at 48 et seq.

181 Eg restraint of trade; illegality; immorality.

182 See eg Leff, "Unconscionability and the Code: The Emperor's New Clause" (1967) 115 U Pa L Rev 485, 487; cf Peden, *The Law of Unjust Contracts* (1982) 138.

183 Muir, supra n 64.

protection; or whether they were mistaken as to the terms of the contract rather than to the value of its object.[184]

Where the courts have identified a class of contractor rather than a class of promises requiring protection, the existence of an inequality of exchange attracts scrutiny and it is possible to postulate circumstances where this is so despite no identifiable procedural unfairness. But once disadvantage is exorcised from knowledge, these classes of contractors, which are likely to be small, are capable of development at law as well as in equity, as the infancy rules demonstrate.[185] The equitable categories of presumed undue influence look at first blush like examples of a prophylactic class protection rule, but it is submitted that it would be more correct to regard them as examples of fiduciary obligation overlaid with a presumptive rule of evidence.[186]

The final point of contiguity between contract and equity occurs in relation to the availability of contractual remedies. Remedy regulation suggests two points of collision between law and equity. The first occurs when equity offers alternative remedies to those available at law. It is not necessary to refer to the recognised examples beyond the comment that specific enforcement of covenant through the *praecipe* writ was at one time the common "contractual" remedy,[187] so that specific performance is not so far from the heart of the common law as is often supposed. But the nature of relief being awarded in the equitable estoppel cases does call for discussion. It has been suggested by the writer that the expectation and/or restitutionary interests should be protected where a benefit has been conferred; otherwise, providing the case is one where liability should accrue, reliance damages only be granted. Where the expectation interest is protected, the object of the promise will determine whether damages are adequate, or whether a specific remedy is appropriate. There are however two difficult examples. The first occurs when both parties are mistaken and the plaintiff builds partly onto the other's land.[188] In this case the prevention of economic waste dictates that the building not be demolished and a reasonable adjustment of rights take place. And secondly, where in consequence of a common mistake one party incurs reliance loss and the other party then seeks to insist on his true rights, only later discovered. Most of the examples here have related to easements, but in all, the estoppel rule that it is the effect upon the representor which is operative has been adopted.[189]

184 See eg *Blomley* v *Ryan* supra n 46 at 47 at 105 *per* Fullagar J; cf *Alec Lobb Ltd* v *Total Oil GB Ltd* supra n 47 at 312-313 *per* Dillon LJ; Meagher, Gummow & Lehane, supra n 20 at para 1604.

185 See eg Guest, supra n 76 at 206-207.

186 Supra pp. 14-15.

187 Baker, supra n 93 at 263 et seq.

188 Eg *ER Ives Investment Ltd* v *High* [1967] 2 QB 379.

189 Eg *Ibid;* cf *Sutton* v *O'Kane* [1973] 2 NZLR 304, esp 314 *per* Wild C J; and see *Midland Bank Trust Co Ltd* v *Green* [1981] AC 513; *Taylor Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* supra n 5; *Lee-Parker* v *Izzet (No 2)*[1972] 2 All ER 800. *Van der Berg* v *Giles* [1979] 2 NZLR 111. *Quaere* whether a restitutionary remedy should not be sufficient (although on the facts it would not always be available) where the owner had merely acquiesced: supra p 000; *Willmot* v *Barber* supra n 77 at 105; and see *Crabb* v *Arun D C* supra n 5 at 197-198 *per* Scarman LJ. The emphasis on the belief of the improver seems incongruous when contrasted with the rules for recovery of mistaken payments in quasi-contract *(Barclay's Bank Ltd* v *W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677) and under a frustrated contract. Where