32nd EDITION

ANSON'S LAW OF CONTRACT

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OXFORD

November LLC, 2025 (rejecting the approach of the House of Lords in *Mackay v Dick*, 1881); *Times Travel (UK) Ltd v Pakistan International Airlines Corp*, 2021 ('lawful act' duress); *Law Debenture Trust Corp plc v Ukraine*, 2023 (duress, and the approach to good faith). They also include *One Savings Bank plc v Waller-Edwards*, 2025 (third party misrepresentation and undue influence); *Sharp Corporation v Viterra BV*, 2024 (mitigation); *Primeo Fund v Bank of Bermuda (Cayman) Ltd*, 2023 (role of contributory negligence in contract) and *Secretary of State for the Department of Environment, Food and Rural Affairs v Public and Commercial Services Union*, 2024 (the first decision of the Supreme Court on the Contracts (Rights of Third Parties) Act 1999).

Other Supreme Court and Privy Council cases since the last edition include *National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive*, 2024 (rectification); *Grondona v Stoffel & Co*, 2020, and *Henderson v Dorset Healthcare University NHS Foundation Trust*, 2020 (illegality); *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*, 2020, and *Harcus Sinclair LLP v Your Lawyers Ltd*, 2021 (restraint of trade); *Cobalt Data Centre 2 LLP v Revenue and Customs Commissioners*, 2024 (discharge by agreement: variation or rescission); *RTI Ltd v MUR Shipping BV*, 2024 (discharge by frustration and force majeure clauses); *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corp*, 2020 (affirmation); and *Ramsbury Properties Ltd v Ocean View Construction Ltd*, 2024 (repudiatory breach of lease).

We have again sought to refer to all significant decisions in the Court of Appeal and the High Court, but here single out only *IGE USA Investments Ltd v Revenue and Customs Commissioners*, 2021, and *MDW Holdings Ltd v Norvill*, 2022. The first deals with the application of the statutory limitation period in tort of deceit to a claim for equitable rescission. The second provides guidance on the use of hindsight in the context of claims for breach of warranty.

The initial drafting of each chapter was undertaken by either John Cartwright or Paul Davies. As in the last edition, Jack Beatson acted as general editor and is immensely grateful to them for doing all the heavy lifting. The three of us each read, commented on and discussed all chapters so that the final result remains a collaborative joint enterprise in the sense that term is used in the criminal law.

We are very grateful to our publishers' production team for their courteous, patient and efficient assistance. We are also very grateful to friends, colleagues and students for assistance, and for comments on the contents of the last edition. The law is stated as at 31 October 2025 but it has been possible to include some material since that date.

JB, JC and PS

April 2026

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Lord Clarke insisted that the parties must have intended to create legal relations through their conduct, and no longer required an executed and signed contract, since '[a]ny other conclusion makes no commercial sense', and that 'the reasonable honest businessman ... whether he was an RTS man or a Müller man ... would have concluded that the work should be carried out for the agreed price on the agreed terms ... without the necessity for a formal written agreement, which had been overtaken by events'.[260] Of course, it may be difficult to decide exactly when 'the die was cast'[261] and the requirement for a signed contract has been dispensed with, but this is a question to be decided on the facts of any particular case.[262]

As Lord Clarke urged in *RTS v Müller*, '[t]he moral of the story ... is to agree first and to start work later'.[263] Parties who begin to perform without an agreement in place run substantial risks. Commencing the work contemplated by the parties before any contract is formally concluded does not always give rise to a binding contract.[264]

(iv) Contracts subject to condition

There are situations which at first sight appear to be cases of incomplete agreement, but really turn out to be cases where there is an immediate binding contract, although some of the parties' rights and obligations may be dependent upon the happening of a particular event.[265] For example, the agreement may contain such a term as 'subject to the purchaser's solicitors approving the title'. Until this approval is given, the contract need not be implemented, although neither party is free to withdraw from it unilaterally. Alternatively, the contract may be fully operative at once, but upon the happening of a particular event it is thereby discharged.[266] The insertion of such conditions produces a quite different effect from a reservation like 'subject to contract' which prevents the formation of any contract at all. They are dealt with in Chapter 5.[267]

6. INTENTION TO CREATE LEGAL RELATIONS

Although a separate requirement of intention to create legal relations did not exist until the nineteenth century,[268] it is now established that an agreement will not constitute a binding contract unless it is one which can reasonably be regarded as having been made in contemplation of legal consequences. A mere statement of intention made in the course of conversation will not generally constitute a binding promise, though acted upon by the party to whom it was made,[269] and even negotiated agreements do not

[260] *Ibid* at [86]. [261] *Ibid* at [87]. [262] *DAZN Ltd v Coupang Corp* [2025] EWCA Civ 1083.
[263] *Ibid* at [1].
[264] *SMIT Salvage BV v Luster Maritime SA* [2024] EWCA Civ 260, [2024] 2 All ER (Comm) 504.
[265] *Smith v Butler* [1900] 1 QB 694; *Marten v Whale* [1917] 2 KB 480. Cf *Pym v Campbell* (1856) 6 E & B 370, below, p 148.
[266] *Head v Tattersall* (1871) LR 7 Ex 7, below, p 149. [267] Below, pp 146–9.
[268] Simpson (1975) 91 LQR 247, 263–5; Hedley (1985) 5 OJLS 391.
[269] *Weeks v Tybald* (1605) Noy 11; *Guthing v Lynn* (1831) 2 B & Ad 232. But these cases appear to turn on uncertainty and vagueness rather than lack of intent. There is a close link between uncertainty and lack of intention to contract.

necessarily give rise to legal obligations. For example, a collective agreement between employers and trade unions is conclusively presumed not to have been intended by the parties to be legally enforceable unless it is in writing and contains a provision stating that the parties intend it to be a legally enforceable contract.[270]

An entertaining example of the requirement of an intention to create legal relations is provided by *Blue v Ashley*:[271]

> In a conversation in a pub, A said to B that he would pay him £15 million if B could get the price of shares in Sports Direct, which A owned, to £8. B alleged that that was a binding offer of a unilateral contract and that, when the shares did reach £8, A had broken the contract by refusing to pay him the £15 million.
>
> It was held that there was no binding contract. This was essentially because A had had no intention to create legal relations when he made that 'promise'. No one present thought that A had made a serious commitment. What he had said was merely jocular banter.

However, in ordinary business matters there is a strong presumption that legal relations are intended, which is even stronger when the parties have acted on their agreement.[272]

(a) SOCIAL ENGAGEMENTS

Sometimes it is clear from the nature of the agreement that there was no intention to enter into a binding contract. A prime example is a social engagement. This is not always because such engagements are not reducible to a money value, since they often may be. The acceptance of an invitation to dinner or to play in a cricket match,[273] of an offer to share the cost of petrol used on a journey,[274] or to take part in a golf club's competition[275] or between friends relating to musical performances by them[276] form agreements in which the promisee may incur expense in reliance on the promise. The damages resulting from breach might be ascertainable, but the Courts would hold that, if no legal consequences could reasonably have been contemplated by the parties, no action will lie.

In *Balfour v Balfour*, Atkin LJ stated:[277]

> It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where

[270] Trade Union and Labour Relations (Consolidation) Act 1992, s 179, see *NCB v NUM* [1986] ICR 736. The position at common law was similar: *Ford Motor Co Ltd v AUEFW* [1969] 1 WLR 339. See Hepple [1970] CLJ 122.
[271] [2017] EWHC 1928 (Comm). Leggatt J also decided that the arrangement was not sufficiently certain to be enforceable: see above, n 196.
[272] eg *Wells v Devani* [2019] UKSC 4, [2020] AC 129 at [17]–[26].
[273] See Atkin LJ in *Balfour v Balfour*, below, n 277.
[274] *Coward v Motor Insurers' Bureau* [1963] 1 QB 259; *Buckpitt v Oates* [1968] 1 All ER 1145. But see now Road Traffic Act 1988, ss 145, 149.
[275] *Lens v Devonshire Club*, The Times, 4 December 1914 (Scrutton J), referred to in *Rose and Frank Co v JR Crompton & Bros Ltd* [1923] 2 KB 261, 288. Cf *Clarke v Earl of Dunraven* [1897] AC 59, above, p 34 (contract between competitors in yacht club regatta).
[276] *Hadley v Kemp* [1999] EMLR 589, 623.
[277] [1919] 2 KB 571, 578. See also *Vaughan v Vaughan* [1953] 1 QB 762, 765; *Gould v Gould* [1970] 1 QB 275.

two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract.

(b) FAMILY ARRANGEMENTS

Family arrangements are another category of agreement in which there may be no intention to create legal relations. In *Balfour v Balfour*:

> A husband was employed in a government post in Ceylon. He returned with his wife to England on leave, but she was unable to go back to Ceylon with him for medical reasons. He consequently promised orally to make her an allowance of £30 a month until she rejoined him. He failed to make this payment and she sued him.

The Court of Appeal held that, although it was not impossible for a husband and wife to enter into a contract for maintenance, in this case they never intended to make a bargain which could be enforced in law. While that decision has been criticized,[278] agreements between spouses and between parents and children[279] are, as we shall see, presumed not to be enforceable contracts. Thus, it has been said that a parent's promise to pay a child an allowance while at university ordinarily creates only a moral obligation.[280]

(c) DETERMINING INTENTION

The test of an intention to create legal relations is an objective one. It may be that the promisor never anticipated that the promise would give rise to any legal obligation, but if a reasonable person would consider there was an intention so to contract, then the promisor will be bound.[281] It has therefore been contended that the common law does not require any positive intention to create a legal obligation as an element of contract, and that 'a deliberate promise seriously made is enforced irrespective of the promisor's views regarding his legal liability'.[282] This view commands considerable respect, but there are difficulties in the way of its acceptance.

First, parties to a business transaction may deliberately state that they do not intend to enter into any legal obligation, and the Court will then treat their promises as binding in honour only. In *Appleson v Littlewood Ltd*[283] a competitor who claimed to have sent in a successful coupon in a football pool could not rely upon an enforceable contract

[278] Below, pp 75–6. [279] *Jones v Padavatton* [1969] 1 WLR 328.
[280] *Fleming v Beeves* [1994] 1 NZLR 385, 389 (New Zealand).
[281] *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *British Airways Board v Taylor* [1976] 1 WLR 13. See above, p 34.
[282] Williston, *Contracts*, vol 1, para 21; Hepple [1970] CLJ 122; Hedley (1985) 5 OJLS 391; ALI *Restatement, Contracts (2d)* para 21B.
[283] [1939] 1 All ER 464. See also *Rose and Frank Co v Crompton & Bros Ltd* [1925] AC 445; *Jones v Vernons' Pools* [1938] 2 All ER 626. Cf *Edwards v Skyways Ltd* [1964] 1 WLR 349 ('*ex gratia*' payment); *Home Insurance Co Ltd v Administratia Asigurarilor* [1983] 2 Lloyd's Rep 674, 677 (agreement to be 'interpreted as an honourable engagement').

since one of the conditions was that the conduct of the pools was not to be 'attended by or give rise to any legal relationship whatsoever'. As regards a 'minister' and his church, there is no longer any presumption of there being no intention to create legal relations but the circumstances may indicate that there was no such intention.[284] Moreover, until recently the Crown and civil servants were held not to be in a contractual relationship because the Civil Service Pay and Conditions Code's statement that 'a civil servant does not have a contract of employment enforceable in the courts' meant that the Crown did not have the requisite intention to contract.[285] What was said when the agreement was made,[286] and the vagueness of the language used[287] may be held to be inconsistent with an intent to contract.

Where the agreement is made in a commercial context, it has been said there that there is a presumption that there is an intention to create legal relations and that the onus on a party who asserts that an agreement was made without the intent is a heavy one.[288] And where a term is introduced into a pre-existing contractual relationship, there is a strong presumption that it is intended to be legally binding.[289] However, the presumption does not apply so strongly in respect of contracts that are wholly or partly implied from conduct, where it is for the party alleging that there is a contract to prove that intention.[290]

Secondly, in contexts where legal contracts are not normally made, exemplified by social engagements or family arrangements, it will be presumed that no intent to create an enforceable contract is present, even though there may have been an exchange of mutual promises and a 'consideration' moving from the promisee.[291] On the other hand, this presumption may be rebutted upon proof of the true intention of the parties, which is to be inferred from the language they use and the circumstances in which they use it. In *Parker v Clark*:[292]

[284] See *Preston v President of the Methodist Conference* [2013] UKSC 29, [2013] 2 AC 163 and *President of the Methodist Conference v Parfitt* [1984] QB 368 (no intention to create legal relations). Cf *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28; *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] ICR 282 (in both of which, an intention to create legal relations was found).
[285] *R v Civil Service Appeal Board, ex p Bruce* [1988] ICR 649, [1989] ICR 171; *McLaren v Home Office* [1990] ICR 84; *R v Lord Chancellor's Department, ex p Nangle* [1991] ICR 743; Trade Union and Labour Relations (Consolidation) Act 1992, ss 62(7) and 245.
[286] *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239.
[287] *Vaughan v Vaughan* [1953] 1 QB 762, 765; *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1988] 1 WLR 799, [1989] 1 WLR 379, above, p 70.
[288] *Edwards v Skyways Ltd* [1964] 1 WLR 349, 355; *Esso Petroleum Co Ltd v Commissioners of Customs and Excise* [1976] 1 WLR 1 (World Cup coins given to purchasers of petrol held to be given under a contractual obligation—because of an intention to create legal relations—and not as a gift); *Orion Insurance Co plc v Sphere Drake Insurance plc* [1992] 1 Lloyd's Rep 239, 263, 292.
[289] *Attrill v Dresdner Kleinwort Ltd* [2013] EWCA Civ 394, [2013] 3 All ER 607.
[290] *Blackpool and Fylde Aero Club v Blackpool BC* [1990] 1 WLR 1195, 1202; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 at [62]; *Assuranceforeningen Gard Gjensidig v The International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm) at [89]–[103].
[291] *Balfour v Balfour* [1919] 2 KB 571, 578; *Buckpitt v Oates* [1968] 1 All ER 1145; *Jones v Padavatton* [1969] 1 WLR 328.
[292] [1960] 1 WLR 286. Cf *Re Goodchild* [1997] 1 WLR 1216.

The defendants, an elderly couple, agreed with the claimants, who were 20 years younger, that if the latter would sell their cottage and come to live with the defendants, sharing household expenses, the male defendant would leave them a portion of his estate in his will. The claimants sold their cottage and moved in with the defendants. Difficulties developed between the two couples, and the defendants repudiated the agreement by requiring the claimants to find somewhere else to live. The claimants sought damages for breach of contract.

It was argued that the agreement amounted to no more than a family arrangement of the type considered in *Balfour v Balfour*, but Devlin J held that the circumstances indicated that the parties intended to affect their legal relations and that the defendants were therefore liable. Indeed *Balfour v Balfour* has been said to be an extreme example of this presumption,[293] and there are several cases in which it has been held that a husband's promise to his wife, from whom he was about to separate, that she could have the matrimonial home, was enforceable as a contract.[294] Similarly, in *Radmacher v Granatino*[295] a majority of the Supreme Court took the view, in *obiter dicta*, that prenuptial agreements are binding contracts. And an informal family arrangement to share the winnings of a football pool entry was enforceable since the necessary intention was present.[296]

Thirdly, it has been clearly established that the distinction between a warranty, which is a term of a contract, and a 'mere representation' depends upon whether the parties intended the statement to have contractual effect.[297] It would be somewhat curious if contractual intention could be dispensed with in proving the existence of a contract, but not in proving the terms of that contract.

The conclusion is that an intention to create legal relations is essential to the formation of a contract in English law.

FURTHER READING

Hudson, 'Retractation of Letters of Acceptance' (1966) 82 LQR 169

Hudson, 'Gibbons v Proctor Revisited' (1968) 84 LQR 503

Hepple, 'Intention to Create Legal Relations' [1970] CLJ 122, 127–37

[293] *Pettitt v Pettitt* [1970] AC 777, 806, 816.

[294] *Ferris v Weaven* [1952] 2 All ER 233; *Merritt v Merritt* [1970] 1 WLR 1121; *Eves v Eves* [1975] 1 WLR 1338 (cohabitation); *Re Windle* [1975] 1 WLR 1628; *Tanner v Tanner* [1975] 1 WLR 1346 (cohabitation). Cf *Vaughan v Vaughan* [1953] 1 QB 762; *Spellman v Spellman* [1961] 1 WLR 921; *Morris v Tarrant* [1971] 2 QB 143; *Horrocks v Forray* [1976] 1 WLR 230 (cohabitation). See generally Freeman, in Halson (ed), *Exploring the Boundaries of Contract* (1996) 68.

[295] [2010] UKSC 42, [2011] 1 AC 534 at [52] (Lord Mance and Baroness Hale dissented on this point). But such agreements cannot oust the jurisdiction of the Courts (below, pp 418–9) to make orders about the parties' financial arrangements: see analogously the Matrimonial Causes Act 1973, s 34 (maintenance agreements).

[296] *Simkins v Pays* [1955] 1 WLR 975.

[297] *Heilbut Symons & Co v Buckleton* [1913] AC 30, 51; *Oscar Chess Ltd v Williams* [1957] 1 WLR 370, 374. See below, pp 143–6.

Miller, 'Felthouse v Bindley Revisited' (1972) 35 MLR 489

Rawlings, 'The Battle of Forms' (1979) 42 MLR 715

Hedley, 'Keeping Contract in its Place—*Balfour v Balfour* and the Enforceability of Informal Agreements' (1985) 5 OJLS 391

Gardner, 'Trashing with Trollope: a Deconstruction of the Postal Rules in Contract' (1992) 12 OJLS 170

Simpson, 'Quackery and Contract Law: *Carlill v Carbolic Smoke Ball Company*' in *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995) 259

Nolan, 'Offer and Acceptance in the Electronic Age' in **Burrows** and **Peel** (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010) 61

Peel, 'The Status of Agreements to Negotiate in Good Faith' in **Burrows** and **Peel** (eds), *Contract Formation and Parties* (Oxford: Oxford University Press, 2010) 37

Leggatt, 'Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law' [2019] JBL 104

3

FORM

1. FORMAL REQUIREMENTS

Sam Goldwyn is reported to have said that 'a verbal contract is not worth the paper it's written on'.[1] Yet valuable agreements involving very substantial sums can be established entirely orally.[2] In *Wells v Devani* Lord Briggs recognized that 'the common law will recognise an enforceable liability to pay as arising from the briefest and most informal exchange between the parties'.[3] And in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* Lord Sumption acknowledged that '[t]he advantages of the common law's flexibility about formal validity are that it enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents'.[4]

As a general rule, a simple contract need not be made in any special form, but requires the presence of consideration, which broadly means that something must be given in exchange for a promise.[5] The paradigm of the simple contract is therefore a bargain, but because the requirement of consideration can be satisfied by nominal consideration, such as a peppercorn, it has been argued that consideration is really no more than a requirement of form.[6] In some simple contracts, statute imposes (in addition to the requirement of consideration) the necessity of some kind of form, such as writing, either as a condition of their existence or as a requisite of proving the contract.

The other kind of contract recognized by English law is a contract made by deed. This derives its validity neither from the fact of the agreement nor because it is an exchange but solely from the *form* in which it is expressed.

In this chapter, we shall examine (1) contracts by deed and (2) (simple) contracts for which writing is required.[7]

Historically, formal requirements played a large role in the English law of contract because the Statute of Frauds 1677 provided that many important and widely used types of contract were unenforceable unless supported by a note or memorandum in writing,

[1] As recognized by Rares J in *TWW Yachts Sarl v The Yacht 'Loretta' (No 1)* [2021] FCA 240 at [1].
[2] See *Blue v Ashley* [2017] EWHC 1928 (Comm).
[3] [2019] UKSC 4, [2020] AC 129 at [63].
[4] [2018] UKSC 24, [2019] AC 119 at [12].
[5] See Chapter 4.
[6] *Vantage Navigation Corp v Suhail & Saud Bahwan Building Materials Llc, The Alev* [1989] 1 Lloyd's Rep 138, 147 (Hobhouse J); see below, pp 137–9.
[7] See Cartwright, *Formation and Variation of Contracts* (4th edn, 2024) Part II.

in particular contracts for the sale or disposition of an interest in land and, until 1954, contracts for the sale of goods of over £10 in value.[8]

The significance of formal requirements has now diminished, save in sales of land, guarantees, and a limited number of other types of contract, notably to protect parties (such as tenants, consumers, borrowers, and employees) who are in the weaker bargaining position. Nevertheless, although it has been stated that the advantages of requirements of formality are purely negative in nature and consist in the avoidance of various evils,[9] it should not be forgotten that formality serves a number of useful functions.[10]

First, there is an important evidential function.[11] A requirement such as writing facilitates and renders certain the existence of a transaction and its terms as well as identifying the intention of the parties. The particularly significant issues of authenticity and integrity which arise in the case of contracts made by e-mail can, for example, be addressed by a suitable formal requirement for such transactions.[12]

Secondly, there is the paternalistic and cautionary function of helping to ensure that a party deliberately considers whether to contract and to prevent people accidentally binding themselves on impulse or because of improper pressure. For instance, classes of contractors considered to be weaker, such as tenants, employees, borrowers, and consumers, may be protected by requiring a written agreement and clear language.[13] In some such cases, in particular contracts with consumers, there may also be a statutory 'cooling off' period.[14] This is a paternalistic qualification to the substantive requirement of agreement rather than a formal requirement, but the requirement that notice must be given to the protected person of the right to cancel[15] is a requirement of form. The corollary of the evidential and cautionary functions is that formal requirements allow parties to bind themselves with certainty and to know to what they are binding themselves. Formality requirements may also furnish a well-recognized and objective test of enforceability, and provide a 'channel' for the legally effective expression of intention.[16]

As against these useful functions, if the form is complex, it can be inconvenient, mysterious, and inaccessible to ordinary people. Formal requirements may also affront social and commercial attitudes to promises ('my word is my bond') since requiring, for

[8] This requirement was repealed by the Law Reform (Enforcement of Contracts) Act 1954.
[9] Jhering, *Geist des Roemischen Rechts* (4th edn, 1883) vol 2, 480–2.
[10] Law Com No 164, *Formalities for Contracts for Sale etc of Land* (1987) paras 1.4, 2.3–2.11.
[11] *Ibid*, para 2.5. See also Simpson, *A History of the Common Law of Contract* (1975) ch XIII.
[12] Below, pp 93–4.
[13] *Writing*: Consumer Credit Act 1974, s 60. *Notice of specified terms*: Landlord and Tenant Act 1985, s 4; Estate Agents Act 1979, s 18; Employment Rights Act 1996, ss 1–2, 4–6.
[14] eg Consumer Credit Act 1974, ss 67–68; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013 No 3134); Timeshare, Holiday Products, Resale and Exchange Regulations 2010 (SI 2010 No 2960).
[15] eg Consumer Credit Act 1974, s 64.
[16] This has been described by Fuller as a third 'channeling function' of formalities:(1941) 41 Col L Rev 799, 800–4.

instance, a deed or writing implies mistrust. These factors may mean that the required form is not used, whether deliberately or by accident, and thus the requirement can have the effect of reducing rather than promoting the security of transactions.

Formal requirements can help to prevent impulsiveness, coercion, inadequate evidence, and manufactured evidence, but may undermine security of transactions if their complexity or social or commercial morality mean they are not observed.

2. CONTRACTS BY DEED

(a) HOW A CONTRACT BY DEED IS MADE

At common law it was often said that a contract by deed was executed by being 'signed, sealed and delivered'. But the position is now largely governed by section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.[17] To be a deed an instrument must make it 'clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise)'.[18] The 1989 Act does not, however, lay down any prescribed manner of making it clear because to do so 'would invalidate what would otherwise be perfectly acceptable deeds merely for failure to include one vital word'.[19]

(i) Signature and attestation

In the case of deeds executed by an individual the 1989 Act abolished the requirement of sealing.[20] The instrument must either be signed by the person making it in the presence of an attesting witness or, where it is not signed by that person, perhaps because of some physical incapacity, it must be signed at the direction and in the presence of that person and in the presence of two attesting witnesses.[21] In the case of a company incorporated under the Companies Acts either its common seal must be affixed or the instrument must be signed by two 'authorised signatories' (which includes the directors and the company secretary) or by a director of the company in the presence of a witness who attests the signature.[22] The requirement of sealing still applies to corporations sole[23]

[17] Implementing Law Com No 163, *Deeds and Escrows* (1987). Section 1 applies to all deeds, and not just those relating to land, made on or after 31 July 1990; SI 1990 No 1175. The Law Commission has plans to review the law of deeds in its 14th programme of law reform: Law Com No 241 (2025).

[18] Law of Property (Miscellaneous Provisions) Act 1989, s 1(2)(a). For the similar rule for companies, see Companies Act 2006, s 46(1). A document which is executed as a deed but does not meet the requirements of a deed may still take effect as a simple contract as long it is supported by consideration: *Signature Living Hotel Ltd v Sulyok* [2020] EWHC 257 (Ch), [2020] Bus LR 588.

[19] Hansard, HL Deb vol 503, col 599 (24 January 1989) (The Lord Chancellor, Second Reading Debate).

[20] Law of Property (Miscellaneous Provisions) Act 1989, s 1(1)(b).

[21] Law of Property (Miscellaneous Provisions) Act 1989, s 1(3)(a). 'Signature' includes making one's mark: *ibid*, s 1(4). See *Euro Securities & Finance Ltd v Barrett* [2023] EWHC 51 (Ch), [2023] Ch 279.

[22] Companies Act 2006, s 44.

[23] See below, pp 250–1.

and corporations incorporated under other statutes or by royal charter.[24] Today, a seal is often merely an adhesive wafer attached to the document or even a printed circle containing the letters 'LS' (*locus sigilli*).[25] Even a document bearing no indication of a seal at all will suffice, provided that there is evidence (eg attestation) that it was intended to be executed as a deed.[26] Failure to have a signature witnessed and attested or, where this is still required, to have the document sealed, will not be fatal if the signatory is estopped from denying its validity because another has detrimentally relied on it.[27]

(ii) Delivery

The 1989 Act preserves the requirement of 'delivery'.[28] In this context 'delivery' does not signify handing over to the other party, but means an act done or word said so as to make it clear that the person making the deed regards it as binding. Thus, a deed may be 'delivered' even though it is retained in the custody of the grantor.[29]

(iii) Escrow

A deed which is delivered subject to a condition does not take effect until the condition is performed. For example, on a sale of land the vendor does not normally intend the deed to operate until the purchase price has been paid and (where appropriate) the deed has been executed by the purchaser. In such a case, it is termed an *escrow*, but if the condition is fulfilled within a time which is reasonable in all the circumstances,[30] it becomes operative as from the date of its delivery.[31] At one time an escrow could not be handed to one who was a party to it, or else it took effect at once, on the ground that handing it over outweighed oral conditions. But nowadays the intention of the parties prevails if they clearly mean the deed to be delivered conditionally.[32]

(b) WHEN IT IS ESSENTIAL TO CONTRACT BY DEED

Statute sometimes makes it necessary to use an instrument in the form of a deed if the transaction is to be valid. For example, the conveyance of a legal estate in land must normally be made by deed in accordance with the provisions of the Law of Property Act 1925.[33]

[24] Law of Property (Miscellaneous Provisions) Act 1989, s 1(9)–(10).

[25] *First National Securities Ltd v Jones* [1978] Ch 109.

[26] *Ibid*; *Commercial Credit Services v Knowles* [1978] 6 CL 64. Cf *TCB Ltd v Gray* [1986] Ch 621.

[27] *TCB Ltd v Gray* [1986] Ch 621; Law Com No 163, *Deeds and Escrows* (1987) para 2.15; *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 (estoppel in relation to the Law of Property (Miscellaneous Provisions) Act 1989, s 1); *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (distinguishing *Shah v Shah*).

[28] Law of Property (Miscellaneous Provisions) Act 1989, s 1(3)(b). Authority by a party making a deed to an agent to deliver it need not be given by deed: *ibid*, s 1(1)(c).

[29] *Xenos v Wickham* (1867) LR 2 HL 296; *Macedo v Stroud* [1922] AC 330; *Vincent v Premo Enterprises Ltd* [1969] 2 QB 609; *D'Silva v Lister House Development Ltd* [1971] Ch 17.

[30] *Beesly v Hallwood Estates Ltd* [1961] Ch 105; *Kingston v Ambrian Investment Co Ltd* [1975] 1 WLR 161. Cf *Glessing v Green* [1975] 1 WLR 863.

[31] *Alan Estates Ltd v WG Stores Ltd* [1982] Ch 511.

[32] *London Freehold and Leasehold Property Co v Lord Suffield* [1897] 2 Ch 608, 621; *Glessing v Green* [1975] 1 WLR 863.

[33] ss 52, 54.

At common law, a deed need only be used to make a contract if there is no consideration for the promise made on one side and accepted on the other (eg a gratuitous promise). One of the most common uses today of a deed (outside conveyances of land) is that of a promise to make a payment to a charity.

3. CONTRACTS FOR WHICH WRITING IS REQUIRED

(a) STATUTORY REQUIREMENTS OF WRITING

Although there is a popular belief that only contracts in writing are enforceable, this belief is completely illusory and forms no part of the English common law. A simple contract (ie one not made by deed) depends for its validity upon the presence of consideration and is in general valid whether in writing or oral.

In certain exceptional cases, however, the law requires writing, sometimes as a condition of the validity of the contract itself, but sometimes only as evidence without which it cannot be enforced. In these contracts consideration is as necessary as in contracts for which no writing is required: 'If contracts be merely written and not specialties, they are parol, and a consideration must be proved.'[34] The following are examples of contracts which must, by statute, be made in writing:

(1) The Bills of Exchange Act 1882[35] requires that a bill of exchange or promissory note and the acceptance of a bill of exchange must be in writing.

(2) A consumer credit agreement, for example a hire-purchase or loan agreement, must be in writing and be signed by the hirer or debtor and by or on behalf of the owner or creditor. It must also be made in a certain form and contain certain information including prominent notices advising the hirer or debtor of the protection and remedies, including the right to cancel, available under the Act and the annual percentage rate of charge.[36]

(3) A contract for the sale or other disposition of land must be in writing.[37] This is considered in detail below.[38]

Certain other contracts are not required by statute to be made in writing, but merely to be evidenced by writing before they can be enforced. Until 1954 the most frequent examples of such contracts were provided by those specified in the Statute of Frauds 1677, which rendered various contracts unenforceable unless they were supported by a note or memorandum in writing.[39] The object of these statutory requirements was 'for prevention of many fraudulent practices which are commonly endeavoured to be

[34] *Rann v Hughes* (1778) 7 Term R 350n.
[35] ss 3(1), 17(2). See too Electronic Trade Documents Act 2023, s 1.
[36] Consumer Credit Act 1974, ss 60, 64; Consumer Credit (Agreements) Regulations 1983 (SI 1983 No 1553).
[37] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1).
[38] Below, p 87.
[39] See also contracts of marine insurance which, by reason of the Marine Insurance Act 1906, s 22, must be evidenced by a written policy.

upheld by perjury and subornation of perjury'.[40] But almost from its inception, this requirement that a contract be evidenced by writing exhibited a tendency to encourage, rather than to prevent, dishonest dealing. The attempts of the judges consequently to circumvent the Statute of Frauds, and the niceties of legal learning which resulted, rendered its operation both arbitrary and artificial. By the Law Reform (Enforcement of Contracts) Act 1954,[41] most of its provisions, together with their re-enacting statutes,[42] were repealed. The one important type of contract still governed by the Statute of Frauds is a contract of guarantee.

(b) CONTRACTS OF GUARANTEE

By section 4 of the Statute of Frauds 1677:

> No action shall be brought . . . whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

A promise 'to answer for the debt, default or miscarriage or another person' is a contract of guarantee or suretyship. It can usually be reduced to this form: 'Deal with X, and if X does not meet his obligations, I will be answerable.'

(i) Guarantees distinguished from contracts of indemnity

A contract of indemnity, unlike a guarantee, is not subject to any statutory requirement of writing. In a contract of guarantee there must always be three parties in contemplation: a principal debtor (whose liability may be actual or prospective), a creditor, and a promisor (the guarantor) who promises to discharge the debtor's liability *if the debtor should fail to do so*. The guarantor's liability is therefore secondary to that of the principal debtor. In a contract of indemnity, however, the promisor is primarily liable, either alone or jointly with the principal debtor, and undertakes to discharge the liability *in any event* whether or not the principal debtor defaults.[43]

For a contract to be a guarantee there must, in fact, be an expectation that another person will perform the obligation undertaken by the promisor. If the promisor is primarily liable the promise is not within the Statute of Frauds, and need not be in writing.[44] The question whether the undertaking is primary or secondary is determined, not merely from the particular words of the promise, but from the general circumstances of the transaction.[45] The borderline is often very artificial and the subject 'has raised

[40] Statutes of the Realm, vol V, p 840.
[41] See the Sixth Interim Report of the Law Revision Committee (Cmd 5449, 1937), and the First Report of the Law Reform Committee (Cmd 8809, 1953).
[42] Sale of Goods Act 1893, s 4 (writing required for contracts for the sale of goods of over £10 in value).
[43] *Guild & Co v Conrad* [1894] 2 QB 885, 896; *Pitts v Jones* [2007] EWCA Civ 1301, [2008] QB 706.
[44] *Birkmyr v Darnell* (1704) 1 Salk 27, 28.
[45] *Keate v Temple* (1797) 1 B & P 158; *Abbhi v Slade* [2019] EWCA Civ 2175, [2019] 2 CLC 949.

many hair-splitting distinctions of exactly that kind which brings the law into hatred, ridicule and contempt by the public.'[46]

(ii) Nature of liability guaranteed

The liability guaranteed may be tortious as well as contractual.[47] It may be prospective at the time the promise is made, as, for example, in consideration of a future advance of money; or it may be past, provided some new consideration is given.[48] Yet there must be a principal debtor at some time; if not, there is no contract of guarantee, and the promise though not in writing will nevertheless be actionable. This is illustrated by *Lakeman v Mountstephen*:[49]

> M stated that he would construct certain drains if L, the Chairman of a local Board of Health or the Board, would become responsible for payment. L responded, 'Go on, [M], and do the work, and I will see you paid.' The Board repudiated liability on the ground that it had never entered into any agreement with L. When sued, L pleaded that his statement was a promise to be answerable for the debt of another and, not being in writing, was unenforceable.

The House of Lords held that L's promise was enforceable. The Board had incurred no liability which could be guaranteed, and there could be no contract of guarantee unless there was a principal debtor. L's oral promise to M, when properly construed, indicated that he would be liable, not as guarantor, but as sole debtor.

(iii) A continuing liability

The promise must also not effect a release of the original debtor, whose liability must be a continuing liability. If there is an existing debt for which a third party is liable to the promisee, and the promisor undertakes to be answerable for it, there is no guarantee if the terms of the undertaking are such as to extinguish the original liability. If A says to B, 'Give C Ltd a receipt in full for its debt to you, and I will pay the amount', this promise is not a guarantee within the Statute of Frauds, but a substitution of one debtor for another.[50]

(iv) Exceptions

In two exceptional situations a contract of guarantee has been held to fall outside the Statute of Frauds although it is a promise to answer for the debt, default, or miscarriage of another.

The first is where the guarantee is merely incidental to a larger contract and not the sole object of the parties to the transaction. So in *Sutton & Co v Grey*,[51] where the defendants entered into an oral agreement with a stockbroker to introduce business to him on the terms that they were to receive half the commissions earned and to pay half the losses in the event of a client introduced by them failing to pay, it was held that their

46 *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828, 892 (Harman LJ).
47 *Kirkham v Marter* (1819) 2 B & Ald 613.
48 *Board v Hoey* (1948) 65 TLR 43.
49 (1874) LR 7 HL 17.
50 *Goodman v Chase* (1818) 1 B & Ald 297.
51 [1894] 1 QB 285.

promise to answer for the debt of such a client did not fall within the Statute. It was incidental to a wider transaction and did not have to be evidenced in writing.

Secondly, where the guarantor's main purpose is to acquire or retain property, and the guarantee is given to relieve the property from some charge or incumbrance in favour of a third party, it is not within the Statute of Frauds. Thus if A buys goods from B which are subject to a lien in favour of C, and in order to discharge the lien A promises C to pay B's debt if B does not do so, this promise need not be evidenced in writing.[52] But the interest to be acquired or retained must be substantial and proprietary. An oral promise by a shareholder in a company to guarantee the company's debts in order to prevent an execution being levied on its assets does not come within this exception. The interest of a shareholder in the company's assets is purely personal, and is not a proprietary interest.[53]

(v) Criticism of the scope of the Statute of Frauds

These legal niceties have nothing to commend them. It is a matter for regret that, if special protection is to be afforded by the law to guarantors, it is not embodied in a statute requiring the terms of all contracts of guarantee or indemnity to be set out in a written document,[54] instead of perpetuating subtle distinctions.

(vi) The form required

Until the enactment of the Law Reform (Miscellaneous) Provisions Act 1989 substantially the same form was required for contracts of guarantee and contracts for the disposition of an interest in land. The provisions of the Statute of Frauds 1677, which still govern guarantees, were substantially re-enacted as regards sales of land by section 40(1) of the Law of Property Act 1925. Many of the decisions under section 40(1) concerning contracts for the sale of land remain applicable to guarantees.

Under section 4 of the Statute of Frauds, a guarantee does not have to be signed by both parties, but only by the party to be charged or that person's agent.[55] The signature need not be an actual subscription of the party's name as it may be a mark; nor need it be in handwriting as it may be printed or stamped; nor need it be placed at the end of the document as it may be at the beginning or in the middle.[56]

The parties and the subject-matter of the contract must appear in the note or memorandum. Where the parties are not named they must be so described as to be identified with ease and certainty.[57] All the material terms of the guarantee must be accurately set out in the memorandum, but by section 3 of the Mercantile Law Amendment Act 1856, the consideration need not be stated.

52 *Fitzgerald v Dressler* (1859) 7 CBNS 374.
53 *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778.
54 As in the case of certain contracts of guarantee and indemnity given in relation to regulated consumer credit agreements: Consumer Credit Act 1974, s 105(1).
55 Above, pp 80–1.
56 *Leeman v Stocks* [1951] Ch 941.
57 *Rossiter v Miller* (1878) 3 App Cas 1124. Cf *Potter v Duffield* (1874) LR 18 Eq 4.

The note or memorandum of a guarantee may consist of various letters and papers, but they must be connected and complete.[58] A sequence of negotiating e-mails may also satisfy the requirements of writing and signature under the 1677 Act.[59]

(vii) The effect of non-compliance

The effect of a failure to comply with the provisions of the Statute of Frauds is not that the contract is void, or voidable, but that it cannot be enforced against a party who has not signed a note or memorandum because it is incapable of proof.[60] No action can be brought until the omission is made good. But, provided the note or memorandum acknowledges the existence of the contract,[61] and is signed by the party or his agent,[62] it may be made at any time before the commencement of the action,[63] and it does not matter that it was never intended to serve as a note or memorandum but was prepared for some entirely different purpose.[64]

The law on claims for restitution of money paid under unenforceable contracts is difficult. Money should be recoverable if the payor can establish that there has been a total failure of consideration.[65] But it is debatable whether the standard ground that a payment made under a mistake of law can be recovered applies where the payor paid money under an unenforceable, but not void, contract mistakenly believing that it could enforce the contract.[66]

(viii) Limited role for estoppel

Estoppel, founded only on the guarantor's promise without any additional encouragement or assurance, cannot be invoked as a means of avoiding section 4 of the Statute of Frauds. In *Actionstrength Ltd v International Glass Engineering SpA*:[67]

> An employer in a building project was alleged to have orally promised a sub-contractor to guarantee payments owing to the sub-contractor by the head-contractor in return for the

[58] *Stokes v Whicher* [1920] 1 Ch 411, 418; *Elias v George Saheley & Co (Barbados) Ltd* [1983] 1 AC 646. Cf *Timmins v Moreland Street Property Ltd* [1958] Ch 110; *Moat Financial Services v Wilkinson* [2005] EWCA Civ 1253.

[59] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674.

[60] *Leroux v Brown* (1852) 12 CB 801; *Maddison v Alderson* (1883) 8 App Cas 467, 474.

[61] *Buxton v Rust* (1872) LR 7 Ex 279 (notwithstanding announced intention to repudiate contract). See also *Reuss v Picksley* (1866) LR 1 Ex 342; *Parker v Clark* [1960] 1 WLR 286 (written offer containing all material terms suffices though contract concluded by subsequent oral acceptance). Cf *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 (agreement 'subject to contract' insufficient).

[62] *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21, 28.

[63] *Re Hoyle* [1893] 1 Ch 84; *Elpis Maritime Co Ltd v Marti Chartering Co Inc* [1992] 1 AC 21.

[64] *Jones v Victoria Dock Co* (1877) 2 QBD 314 (entry in company's minute book); *Phillips v Butler* [1945] Ch 358 (receipt for deposit).

[65] Cf *Thomas v Brown* (1876) 1 QBD 714; *Monnickendam v Leanse* (1923) 39 TLR 445.

[66] In the leading case on mistake of law, *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, the contract in question was void not unenforceable. For a prior case suggesting that money cannot be recovered under an unenforceable contract, see *Boddington v Lawton* [1994] ICR 478 (Nicholls LJ). See further Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) s 3(6) and pp 32–5.

[67] [2003] UKHL 17, [2003] 2 AC 541. Cf above, n 27 (estoppel in relation to the Law of Property (Miscellaneous Provisions) Act 1989, s 1); below, pp 91–2 (estoppel in relation to the Law of Property (Miscellaneous Provisions) Act 1989, s 2).

> sub-contractor not withdrawing its labour. When the sub-contractor sought to enforce the guarantee, the employer argued that it was unenforceable under section 4 of the Statute of Frauds because it was not supported by a written note or memorandum. In answer to this, the sub-contractor sought to rely on estoppel constituted by its reliance on the oral promise.

The House of Lords held that estoppel could not succeed because to allow it to do so would entirely undermine section 4. It would contradict section 4 for relied-upon oral guarantees to be routinely enforceable by means of estoppel.

(c) CONTRACTS FOR THE SALE OR OTHER DISPOSITION OF LAND

(i) Scope of the 1989 Act

The most important class of contracts subject to requirements of form are contracts relating to land. The Law Commission considered and rejected the abolition of all formal requirements for such contracts, primarily because of the need for certainty, but also for protective, paternalistic reasons; time to reflect and, if necessary to seek legal advice 'is especially important in the case of contracts dealing with land because they often involve acceptance of a complexity of rights and duties'.[68] Indeed the Commission's recommendations, substantially enacted by the Law of Property (Miscellaneous Provisions) Act 1989 (the '1989 Act'), are in important respects more rigorous than what had hitherto been required.[69] By section 2(1) of the 1989 Act, contracts for the sale or other disposition of an interest in land:

> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

The section applies to a contract for a 'disposition'[70] of an interest in land, and 'interest in land' is defined as 'any estate, interest or charge in or over land'.[71] Thus, the section applies to a contract for a lease, a mortgage, a release, and a disclaimer. It applies where neither party has any proprietary interest in the relevant property.[72] Contracts for the grant of a lease for a period not exceeding three years,[73] those made in the course of a public auction, and those regulated under the Financial Services and Markets Act 2000 (for instance unit trusts investing in land) are excluded.[74]

[68] Law Com No 164, *Formalities for the Sale etc of Land* (1987) paras 2.7–2.9. For other advantages of formality, see above, pp 78–80.

[69] Contracts made before the 1989 Act came into force on 27 September 1989 had to comply with Law of Property Act 1925, s 40(1) which substantially re-enacted the relevant portion of the Statute of Frauds, s 4. The principles were therefore substantially the same as those for guarantees.

[70] It has the same meaning as in the Law of Property Act 1925: Law of Property (Miscellaneous Provisions) Act 1989, s 2(6).

[71] Law of Property (Miscellaneous Provisions) Act 1989, s 2(6), as amended.

[72] *Singh v Beggs* (1995) 71 P & CR 120.

[73] Contracts to grant leases not exceeding three years need no formality (Law of Property (Miscellaneous Provisions) Act 1989, s 2(5)) because the grant of such a lease itself needs no formality if it takes effect in possession, but contracts to assign such leases are subject to s 2: see Law Com No 164 (1987) para 4.10.

[74] Law of Property (Miscellaneous Provisions) Act 1989, s 2(5)(b), (c), as amended. See Law Com No 164, paras 4.11–4.12.

Equitable mortgages by deposit of title deeds were previously valid without any writing, but have now been held to be subject to section 2 of the 1989 Act and void if they do not comply with it, because the basis of such equitable mortgage is contract.[75] An option granted by the vendor of land is also a 'contract' within section 2[76] but the subsequent exercise of that option is a unilateral act and not within the section: 'It would destroy the very purpose of the option if the purchaser had to obtain the vendor's countersignature to the notice by which it was exercised.'[77] A 'lock-out' agreement, where the owner of property agrees with a prospective purchaser not to consider any other offers for property for a fixed period, is, however, not subject to section 2 because its negative nature—the vendor cannot sell to a third party but is not committed to a sale to the prospective purchaser—means that there is no disposition of an interest in land.[78] Again, contracts which are preliminary to the acquisition of such an interest, or such as deal with a remote and inappreciable interest, would appear to be outside the section.[79]

In one respect the 1989 Act probably requires a greater degree of formality than the Law Commission recommended. It appears that it is no longer possible to have an enforceable contract by written offer and acceptance in correspondence; there must either be a single document incorporating all the terms agreed and signed by the parties or each party must sign a document incorporating the terms in the expectation that the other has also executed or will execute a corresponding document incorporating the same terms.[80]

Separate supplementary or collateral agreements to contracts relating to land are not within section 2. For instance, in the case of a contract to grant a lease, the agreement by the prospective tenant to carry out certain work on the premises in exchange for payment has been held to be outside it, as long as the non-land elements are independent of the land contract.[81] The line between the contract relating to land and the supplementary

[75] *United Bank of Kuwait v Sahib* [1997] Ch 107, rejecting the argument that such deposits are equitable charges rather than agreements to mortgage. But cf *Target Holdings Ltd v Priestley* (1999) 79 P & CR 305 (writing not needed for agreement which disposed of a mortgage).

[76] *Spiro v Glencrown Properties Ltd* [1991] Ch 537; Law Com No 164, para 4.3.

[77] *Ibid*, 541 (Hoffmann J). See also *Trustees of the Chippenham Golf Club v North Wiltshire DC* (1991) 64 P & CR 527, 530.

[78] *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327, above, p 68.

[79] eg *Angel v Duke* (1875) LR 10 QB 174 (agreement to repair house for prospective tenant); *Humble v Mitchell* (1839) 11 A & E 205 (agreement to transfer shares in company possessed of land). Cf *Driver v Broad* [1893] 1 QB 744 (contract to sell debentures of company possessed of land is subject to the statute). These decisions concerned the Statute of Frauds.

[80] *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567. NB cl 1(1) of the Draft Bill attached to the Report differs from s 2 and see Law Com No 164, para 4.15. But cf *Hooper v Sherman*, 30 November 1994 (CA), which did not refer to the Act's difference from the Law Commission's Draft Bill and relied on para 4.15.

[81] *Tootal Clothing Ltd v Guinea Properties Ltd* (1991) 64 P & CR 452, 455–6 (Scott LJ); cf *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 WLR 2855 at [46]–[48]. See also *Record v Bell* [1991] 1 WLR 853; *North Eastern Properties Ltd v Coleman* [2010] EWCA Civ 277, [2010] 1 WLR 2715. For boundary agreements, see *Neilson v Poole* (1969) 20 P & CR 909; *Joyce v Rigolli* [2004] EWCA Civ 79, [2004] 1 P & CR DG22.

or collateral one is, however, not always easy to draw particularly where, as commonly occurs, the contract has been duly signed and is awaiting exchange but a further term is orally agreed immediately prior to exchange. So, in *Record v Bell*:[82]

> The vendor of property had not received a copy of the entries from the Land Registry by the day before the contract, which had been drawn up, was to be exchanged. He agreed with the purchaser, who was concerned about undisclosed entries, to warrant his title if the purchaser exchanged contracts and this oral agreement was confirmed by letters. Contracts were exchanged and the title was as warranted but the purchaser, whose financial position had deteriorated, refused to complete and relied *inter alia* on non-compliance with section 2 of the 1989 Act, since all the terms were not in either the contracts exchanged or the exchange of letters.

Although the purchaser seemed to be thinking in terms of amending the main contract rather than a separate contract, the agreement was held to be a collateral contract and outside the section:

> It would be unfortunate if common transactions of this nature should nevertheless cause the contracts to be avoided. It may, of course, lead to a greater use of the concept of collateral warranties than has hitherto been necessary.[83]

(ii) The form required

Under section 2(1) of the 1989 Act, contracts for the disposition of an interest in land must now be made in writing and not merely evidenced in writing. Furthermore, section 2(3) of the 1989 Act requires all the parties to a contract for the sale or disposition of an interest in land or their agents[84] to sign the document incorporating the terms. The parties must all be identified by their signature and all the express terms must be incorporated in the document.[85] Section 2 does not require the inclusion of implied terms, such as a landlord's covenant of quiet enjoyment,[86] and, if the parties have reached agreement but fail to record all the terms in writing or record one or more of them wrongly, the Court may order the written document to be rectified, although rectification must not be used to undermine the 1989 Act.[87] Where the written agreement is so rectified, the order does not necessarily have retrospective effect; 'the contract shall come into being . . . at such time as may be specified in the order'.[88] Where contracts

[82] [1991] 1 WLR 853; Smith (1992) 108 LQR 217; Harpum [1991] CLJ 399. Cf *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38 (a variation of material term had to comply with s 2).

[83] [1991] 1 WLR 853, 862. This was anticipated by the Law Commission, Law Com No 164, para 5.7. On collateral warranties, see below, p 146.

[84] In *Rabiu v Marlbray Ltd* [2013] EWHC 3272 (Ch) one of the contracts was void as against one of the alleged parties because there had been no authority to sign on behalf of that party (and no ratification). On contracts made by an agent on behalf of an unnamed or undisclosed principal, see below, p 691.

[85] *Francis v F Berndes Ltd* [2011] EWHC 3377 (Ch), [2012] 1 All ER (Comm) 735.

[86] *Markham v Paget* [1908] 1 Ch 697.

[87] *Francis v F Berndes Ltd* [2011] EWHC 3377 (Ch), [2012] 1 All ER (Comm) 735. On rectification see below, pp 284–90.

[88] Law of Property (Miscellaneous Provisions) Act 1989, s 2(4). See Law Com No 164, para 5.6.