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Poole's Textbook on CONTRACT LAW

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There is much to commend the reasoning of Salmon LJ in this case. It suggests that while families' trivial agreements are beyond the scope of the law, when families come to agreements that will have a serious impact on the lives of their members, they are as entitled to the remedies of the courts as everybody else. An example is provided by **Granatino v Radmacher** [2010] UKSC 42, [2011] 1 AC 534, which concerned a prenuptial agreement between husband and wife as to ownership of assets. Baroness Hale stated, at [142]:

> There is nothing to stop a husband and wife from making legally binding arrangements, whether by contract or settlement, to regulate their property and affairs while they are still together (type (a) agreements). These days, the commonest example of this is an agreement to share the ownership or tenancy of the matrimonial home, bank accounts, savings or other assets. Agreements for housekeeping or personal allowances, however, might run into difficulties.

This suggests that the agreement in *Balfour v Balfour* was not sufficiently serious for these purposes, since it was an agreement for housekeeping.

Other cases also seem to support the idea that where the subject matter of the dispute is more than trivial, the courts will be more willing to find the requisite intention to ensure that a contractual remedy will be available. For example, **Parker v Clark** [1960] 1 WLR 286 concerned an agreement between family members.

> The defendants, an elderly couple, agreed with another couple (their niece and her husband, who were much younger) that if the younger couple would sell their home and move in with them, sharing household expenses, the defendants would leave their house to the niece, her sister, and daughter. The younger couple, the claimants, sold their own home and moved in with the older couple. The two couples fell out and the claimants, who were told to find alternative accommodation, sought damages for breach. Devlin J held that the language of the correspondence, the surrounding circumstances, and the precise details governing the arrangement indicated that the parties intended to create legal relations.
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> The presumption normally applicable in domestic arrangements had, in this case, been rebutted. In particular, the judge could not believe that the claimants would have taken the drastic step of selling their own house without the security of a legal right to live in the home of the other couple. On these facts, there was seriousness, certainty of terms, and reliance.

By comparison, an arrangement between family members, friends, or work colleagues to share prizes or competition winnings would not be sufficient to rebut the presumption of no intention in the absence of a written document recording the terms of the arrangement and thereby indicating the seriousness of the parties' intent: *Wilson v Burnett* [2007] EWCA Civ 1170, (2007) 151 SJLB 1399, in which there was no binding agreement to share bingo winnings. Compare *Simpkins v Pays* [1955] 1 WLR 975, where there was a coupon containing forecasts by each of the three parties who lived in the same house and evidence of agreement whereby they would share any winnings. In the latter case, the claimant had established that the parties contemplated legal consequences.

4.2.1.3 Intention and reasonable expectation

The view that social and domestic agreements are enforceable where they have a serious impact on the parties is problematic as it is not entirely consistent with what the judges say they are doing. Moreover, the orthodox language of intention appears to be based on a legal fiction, in that few (if any) parties turn their minds at the time of forming such agreements to the question of whether legal rights are created. This is unsurprising, since such agreements are entered into in confident anticipation of continued good relations. It would be undesirable if the nobler feelings of parties to serious social or domestic agreements were to become an impediment to legal recourse in situations in which their good relations have broken down. For this reason, the courts must put themselves in the place of the parties at the time of the agreement and ask whether it would have been reasonable to expect legal relations to result from the agreement in the undesirable event of amicable relations ending. The courts' willingness to find intention increases the more serious the promises made in the agreement, the more precisely they are expressed, and the greater the reliance on the agreement.

4.2.1.4 Policy considerations and agreements to provide lifts to work

Policy considerations are important in the social or domestic context (**4.2.1.1**). In **Balfour v Balfour** [1919] 2 KB 571 the desire to prevent the courts from being flooded with litigation concerning domestic agreements was clear (see e.g. Atkin LJ's statement at p. 579 that 'the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations').

For agreements to provide lifts to work, the basic policy objective and the inevitable 'hazards of everyday life' were such that there was no intention to create legal relations: *Coward v Motor Insurers' Bureau* [1963] 1 QB 259, at 271 (the main question in this case was to know whether Coward, who received a daily lift to the factory by a co-worker, was being carried 'for hire or reward under s. 36 of the Road Traffic Act 1930'). However, the broader social need to ensure that such passengers are nevertheless covered by insurance appears to have led the House of Lords in *Albert v Motor Insurers' Bureau* [1972] AC 301 to conclude that, in this instance, there was an intention to create legal relations (based on a finding that it was a business arrangement and therefore subject to the presumption applicable to commercial contracts).

The determination of contractual intention may even turn on the precise question before the court: see Hedley (1985) 5 OJLS 391, who claimed that the question in *Coward v MIB* was whether a driver could be compelled to carry others in future (an executory arrangement), whereas in *Albert v MIB* the issue was whether there was an obligation to pay for services rendered (i.e. an executed arrangement). Thus, the courts may be unwilling to declare that there is no contractual intention when faced with a question reflecting the existence of an executed social or domestic agreement.

4.2.2 Commercial agreements

As seen earlier (**1.1**), one of the main economic purposes of contracts is to stimulate exchange. For this reason, the presumption that intention exists in such contracts is extremely difficult to displace—see the arguments attempted unsuccessfully in **Dresdner Kleinwort Ltd v Attrill** [2013] EWCA Civ 394, [2013] 3 All ER 607, for an announcement of a guaranteed employment bonus—so that only a party with solid evidence of a contrary intention would risk litigation.

4.2.2.1 Advertising: advertising gimmick or promissory statement?

For commercial agreements, advertisers may seek to rely on an absence of intention to create legal relations to avoid being held to the exact words of advertisements. If a beer producer chooses to promote its product by claiming that it enables those who drink it to achieve impossible feats beyond the reach of ordinary mortals, such a statement clearly has no legal consequence, it is a mere advertising gimmick, or 'puff'. Nevertheless, an advertisement can be a promise if, on the facts, there is evidence of an intention to be legally bound as highlighted by ***Carlill v Carbolic Smoke Ball Co.*** [1893] 1 QB 256 (for facts, **2.3.2.1.2**). The fact that the advertisement stated that the company had placed £1,000 in a specific bank account as proof of its sincerity led the Court of Appeal to conclude that there was an intention to be bound by the promise.

A similar position was held by the Court of Appeal majority in ***Bowerman v ABTA Ltd*** [1996] CLC 451.

> The claimants had booked a holiday through a tour operator, a member of ABTA. The tour operator had become insolvent and the question was whether the ABTA notice displayed on the premises of the tour operator amounted to a binding offer of protection, so that customers were entitled to be reimbursed the full cost of the holiday.
>
> The Court of Appeal majority (Waite and Hobhouse LJJs) held that the notice was intended to be read, and would reasonably be read by customers, as constituting a binding offer that a customer could accept by booking a holiday with the tour operator.

Hobhouse LJ stated, at p. 461, that the document 'is clearly intended to have an effect on the reader and to lead him to believe that he is getting something of value'. He added that, given this reasonable interpretation by the public, ABTA could not deny that it intended to accept any legal obligation to the customer or say that it was not making any promise. If ABTA had wished to deny legal effect, it should have done so by the use of express words to this effect. However, as Hobhouse LJ recognized, at p. 464, from a commercial perspective, ABTA would not have wished to do this, because:

> To have included such words would have destroyed the value of the document in the eyes of the public and nullified the very effect which ABTA intended it to, and which it did, achieve—to induce the public to book with and entrust their money to ABTA members.

This approach can be compared with the denial of legal effect contained in the dissenting judgment of Hirst LJ, who considered that this was a non-promissory notice intended only to reassure the public. He placed emphasis on the language used as indicating a lack of contractual commitment and considered that this position was supported by the decision of the Court of Appeal in ***Kleinwort Benson v Malaysia Mining Corporation Bhd*** [1989] 1 WLR 379 (**4.2.2.2**).

These cases indicate that whether a particular advertisement is regarded as promissory and as intended to have legal effects will depend upon the particular facts, and it seems that the 'promissory hurdle' must be overcome before the presumption of an intention to be legally bound will apply in the commercial context.

As the difference of opinion in *Bowerman* illustrates, judges may be in total agreement about the law applicable, but unable to agree upon its application to the facts. A similar difference of opinion occurred in the House of Lords in ***Esso Petroleum Co. Ltd v Commissioners of Customs and Excise*** [1976] 1 WLR 1.

> The company had organized a promotion in conjunction with the 1970 World Cup, whereby purchasers of four gallons of petrol received a free 'World Cup coin'. It was sought to recover purchase tax on the coins since they had been produced for general sale. In the House of Lords, one argument was that the coins could be 'for sale' only if there was an intention to create legal relations in respect of the transfer of the coins between garage proprietors and customers purchasing petrol. Lords Simon and Wilberforce considered that there was such an intention, relying on the business context and the large commercial advantage that Esso expected to derive from the scheme. Viscount Dilhorne and Lord Russell came to the opposite conclusion, relying on the language of the offer, the trivial value of the coins, and the fact that it was unlikely that any motorist denied a coin would bring an action in the belief that a legal remedy was available.

4.2.2.2 Comfort letter or guarantee?

The question of intention to create legal relations in commercial agreements was considered in ***Kleinwort Benson Ltd v Malaysia Mining Corporation Bhd*** [1989] 1 WLR 379 in relation to a 'letter of comfort'.

> The claimant bank agreed to lend money to M, a wholly owned subsidiary of the defendants. During the negotiations, the defendants had provided a 'letter of comfort', containing the key sentence: 'It is our policy to ensure that the business of M is at all times in the position to meet its liabilities to you under the above arrangements.' When the tin market collapsed, M ceased trading and went into liquidation without paying its very considerable debt to the claimant bank. The bank sued the defendants, claiming that this sentence in the 'letter of comfort' was a contractual promise, which had been broken.
>
> At first instance in ***Kleinwort Benson***, the judge had approached the question of whether there was a contractual promise by considering whether there was an intention to create legal relations. Applying the presumption for commercial agreements he concluded that there was. However, the Court of Appeal considered that the correct approach was first to consider whether, on the construction of the statement, it was promissory in its nature. On these facts, the particular statement was no more than a statement of present intention and not a promise about the future conduct of the defendants. Therefore, it had no contractual force.

In coming to this conclusion, Gibson LJ for the Court of Appeal noted the fact that the parties had been unable to agree upon more formal security, and that the notion of a comfort letter was known by both sides to describe a document by which the defendants gave comfort to the claimants (at 391F) 'by assuming, not a legal liability to ensure repayment of the liabilities of the subsidiary, but a moral responsibility only'.

A similar conclusion was reached in *LNT Aviation Ltd v Airbus Helicopter UK Ltd* [2022] EWHC. Discussed mainly on the ground of lack of certainty (**3.3.2**), the court added that the 'the communications between AHUK and LNT from the time that the ASB [Alert Service Bulletin] was issued are in my view more consistent with AHUK seeking to reach a goodwill agreement without any intention to create legal relations' (at [131]). The court paid particular attention to the language used by the parties during their email exchanges, emphasizing the repetition of words such as 'commercial gesture of goodwill', 'goodwill offer', and 'gesture of goodwill' as an indication of the lack of intention to create legal relations. Also of note for the court was the fact that the 'arrangement between the parties was not reduced to writing' (at [135]).

The same approach of looking at the exchange that took place between the parties and their conduct as a whole was taken more recently by the Court of Appeal in *SMIT Salvage v Luster Maritime SA* [2024] EWCACiv 260 (discussed at **2.3.1.2**) to find that no contract had been created.

4.2.2.3 Rebutting the presumption in the context of commercial agreements: 'honour clauses' and other express statements denying enforceability

As indicated in the majority decision in ***Bowerman v ABTA Ltd*** [1996] CLC 451 (4.2.2.1) and assuming the necessary promissory statement, a presumption of intention arises in commercial agreements. However, this presumption may be rebutted by express words denying that the agreement is to have legal consequences and to be enforceable in the courts by stating that it is 'binding in honour only'. For example, football pools coupons contained such a statement: see ***Jones v Vernon's Pools Ltd*** [1938] 2 All ER 626. The leading case accepting the validity of such honour clauses is ***Rose & Frank Co. v J. R. Crompton & Bros. Ltd*** [1925] AC 445.

> The claimants in ***Rose & Frank Co. v J. R. Crompton & Bros. Ltd*** were to be the defendants' agents to sell a certain kind of paper in the United States. The document setting out the agency agreement contained a term usually referred to as the 'honourable pledge clause'. It purported to provide that the agreement was to be viewed as a definite expression of intention, but not as a formal or legal agreement subject to the jurisdiction of the courts. From time to time, the claimants would place an order, which was met by the defendants. The defendants then suddenly announced that they would fulfil no more orders and the claimants sued to enforce the general agency agreement. The House of Lords upheld the 'honourable pledge clause', effectively saying that, in the main agency agreement, there was no intention to create legal relations and no legally binding contract.
>
> On this basis, there could therefore be no obligation on the claimants to place orders and no obligation on the defendants to fulfil those orders. However, their Lordships treated actual transactions under this agency agreement as giving rise to 'ordinary legal rights', so that there was an obligation to deliver goods where orders had been accepted and there was an obligation to pay for those goods on delivery.

The presumption of intention can be seen as having been rebutted by the express clause in the agreement, but there is some logical difficulty about this view, since ironically it would seem that the clause could have no legal force if the agreement in which it was contained were found not to be a contract.

4.2.2.3.1 *The burden of proof*

There is, seemingly, little difference between the approaches towards intention adopted in ***Rose & Frank Co. v J. R. Crompton & Bros. Ltd*** [1925] AC 445 and in ***Kleinwort Benson Ltd v Malaysia Mining Corporation Bhd*** [1989] 1 WLR 379. However, although it was said to be of no practical significance in the outcome of the case, the Court of Appeal in *Kleinwort Benson* suggested that, in its approach of relying simply on the construction of the words used, the onus of proof lay on the claimants to show that the letter of comfort should be treated as a contractual promise. However, where the promise is clear, for a commercial contract, the onus

is on the party seeking to rebut the presumption that there is an intention to show that the contract is unenforceable. Thus, there is a difficult distinction between:

1. clauses stating that commercial agreements will not be legally enforceable (where the burden of proof is on the party denying legal enforceability to rebut the normal presumption of intention to create legal relations); and
2. statements in commercial agreements that are non-promissory in nature and so without legal force (where the burden of proof is on the party asserting that the statement is promissory and therefore has legal force because of the operation of the presumption in the commercial context).

It is perhaps for this reason that the decision in *Kleinwort Benson* is criticized because it makes it too easy to avoid legal responsibilities in the commercial context by establishing that statements are non-promissory: see ***Banque Brussels Lambert SA v Australian National Industries Ltd*** (1989) 21 NSWLR 502, noted by Tyree (1989–90) 2 JCL 279.

4.2.2.3.2 *Implied agreements in the commercial context*

Where it is alleged that an *implied* agreement has been reached, as was the case in ***Baird Textile Holdings Ltd v Marks & Spencer plc*** [2001] EWCA Civ 274, [2001] 1 All ER (Comm) 737, despite the commercial context, it is for the party alleging that there is a contract to establish the necessary intention to create legal relations: ***Modahl v British Athletics Federation*** [2002] 1 WLR 1192 and ***Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund*** [2014] EWHC 3369 (Comm), [2014] 2 CLC 699, at [98] for an alleged hybrid agreement—that is, based partly on implication from conduct and a combination of meetings and communications.

As Mance LJ stated in *Baird Textile*, at [61]:

> An intention to create legal relations is normally presumed in the case of an express or apparent agreement . . . it is otherwise when the case is that an implied contract falls to be inferred from parties' conduct . . . It is then for the party asserting such a contract to show the necessity for implying it.

An intention to be legally bound was not established on the facts, since the evidence pointed towards a deliberate decision not to enter into any express contract to maintain flexibility in the commercial relationship.

In the more recent decision by the Court of Appeal in the case of *Mackie Motors (Brechin) Limited v RCI Financial Services Ltd* [2023] EWCACiv 476, the question was whether an implied contract for the provision of services had been created between Mackie and various car manufacturers and RCI under an 'umbrella agreement'. On the facts as given in the case, Mackie was the authorized distributor of Renault, Nissan, and (later) Dacia cars in the north-east of Scotland. Within those formal dealership agreements, Mackie was granted the right to promote, market, supply, sell, repair, and maintain Renault, Nissan, and, Dacia vehicles within its 'exclusive territory'.

Of particular importance for the dispute is the relation between Mackie and RCI, a wholly owned subsidiary of Renault which had been providing financing and administrative services to Mackie. Prior to 2007, financing was provided by Renault Finance Services and Nissan

Finance. There were six contracts between Mackie and RCI in relation to dealer financing which included the financing of the purchase of stock both of new and used cars and of parts (the 'RCI contracts'). Those contracts operated on a rolling basis. Under the Dealership Agreements, among other things, Mackie was subject to an annual ordering commitment in relation to Renault vehicles and was obliged to offer RCI financing agreements to its customers. Customer finance, when offered, was provided through agreements made directly between RCI and the customer. There was no written contract with Mackie in relation to the provision of such customer finance.

RCI also provided Mackie with ancillary administrative services, referred to as 'platform services' and 'database services', for which there were no written agreements either. The platform services were provided via online platform systems through which Mackie could order vehicles and parts and propose new customers to RCI, Renault, and Nissan. The database services were in the form of online databases of existing finance agreements to which Mackie was given access. Clearing services were also provided and those were pursuant to written agreements (the 'Clearing Agreements'). Those services took the form of clearing accounts controlled by RCI through which all financial transactions between Mackie, RCI, Renault, and Nissan were conducted.

In November 2021, RCI became concerned about whether Mackie was involved in money laundering and made a suspicious activity report to the National Crime Agency on 23 November 2021. Following this, the supply of spare parts to Mackie ceased on 24 November 2021 and all other services were terminated on 27 November 2021. On 7 December 2021, notices determining the RCI contracts were served. Following a failed attempt by Mackie to prevent RCI from ceasing to provide the dealer financing services pursuant to the RCI contracts, Mackie sold its sites to another Renault/Nissan franchised dealership in what it described as a 'fire sale'. Mackie then produced draft amended particulars of claim (the 'DAPOC') in which its claim was re-characterized and alleged that Mackie, RCI, Renault, and Nissan were parties to an implied umbrella 'relational' agreement entered into in around 1976 between Mackie and Renault, in 1998 in respect of Nissan, and in 2007 in respect of RCI. Alternatively, it was alleged that the umbrella agreement was entered into between Mackie, Renault, Nissan, and RCI no later than 2008. Mackie also alleged two specific implied terms of the umbrella agreement. All claims were rejected by the Court of Appeal.

On the implied umbrella agreement, Lady Justice Asplin confirmed the High Court decision. There is 'nothing in the matters pleaded in the DAPOC which necessarily implies an intention to create legal relations in relation to the Services which were not contained in written agreements' (at [38]). Of particular importance here for this decision is the reference in the High Court of Bingham LJ's dictum in The Aramis [1989] 1 Lloyd's Rep 213 at 224, that 'it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract . . .' (quoted here at [37]).

This was clearly fatal to Mackie, and LJ Asplin concluded:

> In the circumstances of this case, the provision of the database services, the customer finance services and the platform services by RCI are not explicable only on the basis that they had a contractual foundation. As the judge put it, it was clearly the common objective of the manufacturers and Mackie to sell more cars and it was to be expected that the manufacturers would assist Mackie in that endeavour. It does not follow, however, that in providing those additional services that RCI and, possibly, Renault or Nissan

> intended to become legally bound to provide them. They would or might have acted exactly as they did in the absence of a contract. To put the matter another way, it is not necessary to imply an agreement of the nature for which Mackie contends. (at [39])

Her Ladyship also concluded that 'the parties might well have acted exactly as they did without an umbrella agreement being in place' (at [40]).

4.2.2.3.3 *Difficulties with evidence of contractual intent*

In many cases, direct evidence of intention will not be available and the courts must draw such implications as they may from the surrounding circumstances.

The willingness to examine the wider background and circumstances to determine promissory statements and contractual intention is evident in the majority decision of the Court of Appeal in ***Bowerman v ABTA Ltd*** [1996] CLC 451. This is in marked contrast to the Hirst LJ (dissenting), who limited his evaluation to the wording of the document and concluded that the words used were non-promissory. The approach adopted can therefore be pivotal in the evaluation of intention.

In both ***Rose & Frank Co. v J. R. Crompton & Bros. Ltd*** [1925] AC 445 and ***Kleinwort Benson Ltd v Malaysia Mining Corporation Bhd*** [1989] 1 WLR 379, a document indicated an apparent absence of legal intention, respectively in the 'honourable pledge clause' and the designation of the document containing the relevant assurances as a 'comfort letter'. This evidence is fairly conclusive. Frequently, it seems that a decision on the question of intention to create legal relations is a cloak for a more pressing policy question. In ***Ford Motor Co. Ltd v AUEFW*** [1969] 2 QB 303, the court had to consider whether a collective bargaining agreement between management and the trade union was legally binding. The matter was clearly commercial and so the burden lay on the union, which sought to deny contractual intention. The court found in the union's favour. In so doing, it relied on evidence from industrial relations experts, which was general rather than relevant to the particular agreement. Thus, the actual intentions of the parties seem to have been less relevant than the court's view that it was desirable as a matter of policy to keep such agreements out of the courts. The matter is now governed by s. 179 of the Trade Union and Labour Relations (Consolidation) Act 1992, which reverses the presumption otherwise prevailing in commercial cases.

4.3 A contextual approach

In ***Edmonds v Lawson*** [2000] QB 501, the Court of Appeal considered the question of intention to create legal relations on a claim by a pupil barrister that her pupillage constituted a contract of employment for the purposes of the National Minimum Wage Act 1998. This decision was potentially of great significance to the operation of the pupillage system. The judge at first instance had found for the claimant, having concluded that there was an intention to create legal relations in an offer of pupillage because it was a business (commercial) arrangement. However, the Court of Appeal, while holding that there was such an intention and hence a binding contract, held that the pupillage was not a contract of apprenticeship (pupils are not 'workers'): pupil barristers were therefore not covered by the legislation.

The Court of Appeal's approach shows that it was unclear which presumption should apply to the agreement. Arguably, it was not commercial, since pupils are not paid, but should such an agreement be classified as social or domestic? Rather than being bound by such constraints, the court focused on the specific context to determine whether, objectively, there was the necessary contractual intention to be legally bound. In particular, the court focused on the seriousness of the arrangement for all of the parties concerned as indicating that necessary intent. The court emphasized the process leading up to the making of an offer of pupillage and the benefit of recruiting the ablest pupils who might later go on to be considered for tenancy. Lord Bingham CJ specifically stressed, at p. 515, that whether either the pupil or chambers would sue in the event of default made no difference to the conclusion on the question of whether there was the necessary intention to be legally bound.

4.3.1 Conclusion

Difficulties can exist in identifying the type of contract for the purposes of the application of the presumptions. *Edmonds v Lawson* [2000] QB 501 highlights that it can be difficult to make a clear identification of a contract as either commercial or social/domestic, and the very existence of the presumptions can force an artificial classification that fails to reflect the realities of the contractual context. It is the nature and context of the agreement that should determine, rather than the identity of the parties to that agreement. A good example of this is *Snelling v John G. Snelling Ltd* [1973] 1 QB 87 (discussed at **7.7.2**), which involved a business agreement between brothers.

Context is therefore particularly relevant, especially when negotiations take place in an informal setting such as a pub as in *Blue v Ashley* [2017] EWHC 1928 (Comm) or a restaurant as in *MacInnes v Gross* [2017] EWHC 46. The informality of setting alone is not sufficient a reason to regard that there is no contract as Leggatt J made clear in *Blue v Ashley* (at [81]). In this case, the setting of the pub together with the purpose of the meeting were therefore important elements in the particular circumstances to show that in spite of the informal setting, the meeting was not merely a social engagement but a commercial one (at [81]–[84]). However, on the facts, the claim that a contract was created was rejected as lacking seriousness.

4.4 Formalities: unenforceability by defect of 'form'

4.4.1 Introduction

Where the law states that a contract is enforceable only if recorded in a particular way, this is described as a requirement of form.

The commonest misconception of contract law among lay people is that contracts are enforceable only if in writing. To insist that all contracts be put in writing would mean that each time anyone bought a loaf of bread or a drink in a pub, they would be obliged to countersign an invoice. There would be an intolerable burden on daily consumer intercourse. The general rule is therefore that contracts are not required to be made in writing and the parties are left to their own good sense as to whether written evidence is necessary. (For a discussion on the impact of this in relation to the parties choosing specified formalities to be observed for a variation, **5.2.1.5**.)

In commercial dealings, written evidence is almost inevitably available, but that is a matter of choice, not a matter of law. Where complex obligations of great value are undertaken on each side, so that any dispute may involve liability for very large sums of money, parties will inevitably choose to keep an accurate record of their agreement (**8.4.1** on the rectification of written agreements).

Today, the law insists on writing only where the subject matter or nature of the contract requires either absolutely certain evidence or some cautionary element to bring home to one of the parties the seriousness of the legal agreement being entered into. Thus, some consumer credit, hire purchase, and distance selling agreements (defined at **4.4.2.2.3**) require a particular form of writing and subject parties to informational duties as a means of protecting consumers. In recent years, there has been a growth in the formality requirements in the consumer context, with a view to increasing the level of protection for consumers: see, in particular, European directives such as the Consumer Rights Directive (CRD) 2011/83/EU and its implementation in English law by means of the Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013, SI 2013/3134 and Part 1 of the Consumer Rights Act (CRA) 2015.

4.4.2 Instances in which there are requirements of form in English law

Requirements of form are of four types:

1. contracts required to be made by deed (**4.4.2.1**);
2. contracts required to be in writing (**4.4.2.2**);
3. contracts required to be evidenced in writing (**4.4.2.3**); and
4. in relation to e-commerce, contracts requiring electronic signature (**4.4.2.4**).

4.4.2.1 Contracts required to be made by deed

The common law made provision for a particularly formal kind of legal writing by means of the document made under seal (a deed). Deeds must still be made in accordance with certain formal requirements, as set out in s. 1 of the Law of Property (Miscellaneous Provisions) Act 1989, although the need for a seal was abolished by s. 1 of that Act. These include the requirement of properly attested signature and delivery (s. 1(3)). The word 'deed' does not need to be used in the document, but it must be clear on the face of the document that the parties intended the document to have this extra status of formality (s. 1(2)).

The most common transaction to be made in the form of a deed is the conveyance of a legal estate in land, such as a lease for more than three years (see ss. 52 and 54 of the Law of Property

Act 1925). A deed is also the means by which to make enforceable a gratuitous promise that otherwise would have no legal effect (**4.1**): if there is a deed, there is no requirement to plead and establish the existence of consideration and a longer limitation period applies to a contract made in a deed—12 years from the date of the breach of contract, under s. 8(1) of the Limitation Act 1980—whereas the period applicable to a simple contract (i.e. not contained in a deed) is six years (s. 5(1) of the Limitation Act 1980).

4.4.2.1.1 *Corporate deeds*

In the corporate context, the Companies Act (CA) 2006, s. 46 provides for a document to be validly executed by a company if duly executed and delivered as a deed. Delivery is presumed to occur on execution unless it is clear that this was not the intention—for example, if the intention was to sign and hold the deed until satisfaction of an outstanding condition.

To be validly executed as a deed (CA 2006, s. 44) the company document must be in writing and accord with the signature requirements set out in that section. The CA 2006 provides for signature by either two directors, by a director and a company secretary, or by one director in the presence of a witness who attests the signature. Alternatively, the company's common seal may be affixed to the document if the company has elected to retain a seal (CA 2006, s. 45).

4.4.2.2 Contracts required to be made in writing

Some contracts must be made in writing. The most important ones are: contracts for the sale or disposition of an interest in land, consumer credit agreements, distance selling contracts, marine insurance contracts, and bills of exchange.

4.4.2.2.1 *Contracts for the sale or disposition of an interest in land*

Such contracts must be made in writing, signed by both parties (as to signature, see the discussion of electronic signatures at **4.4.2.4**) pursuant to the Law of Property (Miscellaneous Provisions) Act 1989, s. 2.

Case law determines which transactions fall within s. 2 and whether or not the requirements of s. 2 are satisfied.

1. Transactions falling within s. 2

The grant of an option to purchase land falls within the scope of the section, but its exercise does not and so need not be signed by both parties: *Spiro v Glencrown Properties Ltd* [1991] Ch 537. An agreement made not to enter into negotiations with any rival purchaser for a period of time (a 'lock-out' agreement) is not a disposition of an interest in land and so does not fall within the scope of s. 2(1): ***Pitt v PHH Asset Management Ltd*** [1994] 1 WLR 327 and *Dandara Holdings Ltd v Co-operative Retail Services Ltd* [2004] EWHC 1476 (Ch), [2004] 2 EGLR 163. A contract where the consideration, or part of it, is the actual disposition of an interest in land rather than an agreement to dispose of the interest does not fall within s. 2: *Keay v Morris Homes (West Midlands) Ltd* [2012] EWCA Civ 900, [2012] 1 WLR 2855, at [8]. In *Rollerteam v Riley* [2016] EWCA Civ 1291, [2017] 2 WLR 870, the Court of Appeal, after reviewing the case law on s. 2, clarified the situations where s. 2 applies or not. In this case, which involved a settlement agreement over a dispute on a family business, it was held that s. 2 applied only to executory contracts for the future sale or other disposition of an interest in land, and not to a contract which itself effects such a disposition. In other words, s. 2 does not apply to leases, mortgages, and charges, or, in this instance, the settlement agreement. Performance of the settlement agreement constituted both the performance of the contract and the consideration and therefore could not be covered by s. 2.

2. Satisfying the requirements of s. 2

Incorporation of the terms following s. 2 of the 1989 Act is achieved by setting them out in the contract document or by reference to another document (s. 2(2)). In *Record v Bell* [1991] 1 WLR 853, it was held that where incorporation is alleged to have been achieved by reference to another document, to be effective for the purposes of s. 2 the contract of sale that both parties have signed must refer to and identify that other document.

Each party must sign a document incorporating the terms, although it need not be the same document that bears both signatures, especially where there is to be an exchange of contract documents (s. 2(3)). It is clear that, where the terms of a secondary document are to be incorporated, it is the principal document that needs to be signed. In *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567, the document that it was claimed contained the contract between the parties referred to an attached plan. The purchaser signed the plan, but not the principal document, and the Court of Appeal found that the requirements of s. 2 were not satisfied.

More recently, the question of whether emails can satisfy, in themselves, the requirement of s. 2 was raised. In *Stealth Construction Ltd Re (also known as Green v Ireland)* [2011] EWHC 1305 (Ch), [2012] 1 BCLC 297, the judge suggested that an exchange of emails may also, in some circumstances, satisfy the requirements of s. 2. However, the emails would need to refer to all of the terms that had been agreed orally—specifically terms relating to price—and had to point to binding obligations being undertaken. In *Marlbray Ltd v Laditi and another* [2016] EWCA Civ 476, [2017] 1 WLR 5147, the Court of Appeal held that a contract signed by a husband on behalf of his wife but without her authority was nevertheless valid as it satisfied the requirements of s. 2. This was possible, on the interpretation of the contract which stipulated 'where two or more persons constitute the Purchaser all obligations contained in this Agreement on the part of the Purchaser shall be joint and several obligations on the part of such persons'. In this context, the court considered that there was no reason why the several obligations of the husband should not be binding upon him. In *Neocleous v Rees* [2019] EWHC 2462 (Ch), [2020] 2 P&CR 4, HHJ Pearce held that an automatically generated email footer containing the name, role, and contact details of the sender meant that the document was 'signed' for the purpose of s. 2. After ensuring that this interpretation was in line with the policy behind the 1989 Act (at [56]), HHJ Pearce agreed that, although the footer was automatically generated, the 'intent' to sign, as required by s. 2 was clearly present. Indeed, the presence of the footer means that it had been included as a 'conscious decision' (at [57]). This is important for electronic signature (**4.4.2.4**) and highlights the ability of the law to change with the times.

3. Failure to comply with the s. 2 requirements

A purported contract made in contravention of these rules would be without effect. Protections exist through rectification, collateral contract, proprietary estoppel, and constructive trust.

4.4.2.2.2 *Consumer credit agreements*

Other important contracts required to be made in a particular form of writing are consumer hire purchase and credit sales agreements, which are regulated agreements under the Consumer Credit Act (CCA) 1974, s. 60 (updated). Such contracts must be in the form prescribed by regulations (s. 61(1)(a))—that is, the express terms must be set out in a prescribed order and various notices given (e.g. the notice of the right to cancel during the 'cooling-off period'). This document must be signed by both parties 'in the prescribed form' (which has been held to include electronic signature—that is, clicking on the 'I accept' button to generate a document containing the typed name: *Bassano v Toft* [2014] EWHC 377 (QB), [2014] ECC 14, [2014] Bus LR D9). A copy must be supplied to the debtor. There are also certain prescribed informational requirements.

Failure to comply with the formalities set out in the legislation may not be fatal to such an agreement, but it will require a court order if the agreement is to be enforced (CCA 1974, s. 65(1)), and such an order will not be issued if the consumer did not sign the agreement, or did not receive a copy of the agreement or notice of his right to cancel.

4.4.2.2.3 *Distance selling contracts*

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134, came into force on 13 June 2014 and apply to contracts entered into on or after that date. These Regulations implement the Consumer Rights Directive (CRD) 2011/83/EU, which repealed and replaced the European Distance Selling Directive 97/7/EC. The previous law, which implemented that Distance Selling Directive, is contained in the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, as amended by the Consumer Protection (Distance Selling) (Amendment) Regulations 2005, SI 2005/689, and this will continue to apply to contracts entered into before 13 June 2014. The CRD also repealed the Doorstop Selling Directive 85/577/EC, protecting consumers in respect of contracts negotiated away from business premises. It follows that the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008, SI 2008/1816, are also superseded by the 2013 Regulations for contracts entered into on or after 13 June 2014.

The new Regulations strengthen consumer rights in relation to distance sales—for example, the seven-day cooling-off period is extended to 14 days and there is an extended definition of a distance sale, thereby extending the scope of the consumer protection.

The 2013 Regulations apply to consumer contracts between a consumer and a trader (defined in reg. 4) other than those consumer contracts that are excluded by reg. 6. Part 2 details the information that must be supplied to the consumer prior to the conclusion of the contract (the so-called 'informational requirements') and extends these requirements to on-premises (Sch. 1 information), off-premises, and distance contracts (Sch. 2 information). Distance contracts can include contracts concluded by electronic means and contracts that commence with a telephone call. The information that is required to be made available, and which can include cancellation rights, is stated to be 'treated as included as a term of the contract'. Regulations 12 and 16 impose a requirement on the trader to provide the consumer with a copy of the signed contract or a confirmation of the contract within a reasonable time after the contract is concluded. A failure to give notice of the right to cancel may also constitute an offence in an off-premises contract (regs 19–26).

Provisions covering the right to cancel in a distance or off-premises contract are contained in Part 3 of the 2013 Regulations.

4.4.2.2.4 *Marine insurance contracts*

By ss. 21–24 of the Marine Insurance Act 1906, a contract of marine insurance will not be admitted in evidence unless contained in a document (a policy) signed by the insurer. Thus, the whole contract must be in writing. This provision's original purpose was to prevent evasion of the stamp duty payable on a policy (that duty was abolished in 1958). While in theory the writing requirement might prevent enforcement of what is otherwise a valid policy, in practice no insurer has ever taken the point. Market reforms introduced in 2009 now require all policies to be in writing as a condition of being signed by the insurers, so the point no longer arises.

4.4.2.2.5 *Bill of exchange*

A bill of exchange must be in writing and signed (ss. 3(1) and 17(2) of the Bills of Exchange Act 1882). It is therefore an instrument. A typical example of a bill of exchange is a cheque (7.5.4). A bill of exchange is an instrument which contains an unconditional promise of payment to the holder of the bill by the issuer of the bill. The main advantage of a bill of exchange is that it is freely transferable to a third party and thus can be used to make unconditional payment. There is no better example of a negotiable instrument than a £5 note. It contains a promise by the Bank of England to pay whosoever happens to be in possession of the note at the time. If the instrument is not in writing, it will not be a bill of exchange and the usual characteristics of that instrument will be lost (e.g. negotiability).

4.4.2.3 Contracts required to be evidenced in writing

Contracts of guarantee are required to be evidenced in writing (Statute of Frauds 1677, s. 4). There must be 'some memorandum or note thereof' in writing, which is signed by the party to be charged. A guarantee is defined by s. 4 as a 'promise to answer for the debt, default or miscarriage of another person'. In other words, there is a promise by one person to meet the liabilities of another should that other become liable and fail to pay. It follows that it is considered appropriate to protect against alleged purely oral commitments to guarantee.

The definition of a guarantee is important because the formality rule is said not to apply to contracts of indemnity. Contracts of indemnity are defined as promises to pay for another whether or not there is liability on that other. Thus, in the case of indemnities, the guarantor is taking on primary liability, whereas s. 4 applies only where the guarantor takes on secondary liability. However, this distinction has been subject to severe criticism—see *Yeoman Credit Ltd v Latter* [1961] 1 WLR 828—and appears illogical in policy terms.

The s. 4 requirement continues to offer protection. In *Carlton Communications plc v The Football League* [2002] EWHC 1650 (Comm), 1 August 2002, it was claimed that Carlton and Granada, as shareholders of the parent company of ONdigital plc, were liable under an alleged guarantee for ONdigital's liabilities under a contract with the Football League. This argument failed because: (i) there was no such guarantee, only a statement in a bid document that was 'subject to contract'; (ii) there was no authority to give such a guarantee; and (iii) even if there had been a guarantee, it would have been unenforceable under s. 4 of the Statute of Frauds 1677 because of the lack of a written document containing an unequivocal guarantee.

However, a party may not seek to deny a guarantee by relying on s. 4 if there is clear written evidence of the guarantee. In *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 WLR 3674, the Court of Appeal confirmed that the s. 4 requirements were satisfied in relation to a guarantee where the parties had been negotiating by email and had finally reached agreement on the basic terms of a charterparty and guarantee, but subsequent emails refining the detailed terms of the charterparty had stopped making express reference to the guarantee. It was alleged that s. 4 would be satisfied only if there were express reference made in later documents. The Court of Appeal considered that the conclusion of commercial contracts—particularly charterparties—by means of such a sequence of communications was 'entirely commonplace': *per* Tomlinson LJ at [22]. Since the last emails in the sequence had referred impliedly to those earlier in the process, there was sufficient agreement for a guarantee. The guarantee did not need to be in a separate document or in ampler terms. In addition, although the final email was not of itself the contract of guarantee, the broker's signature on that document, assuming the broker's authority, authenticated the contract of guarantee contained in the sequence of emails.

In ***J. Pereira Fernandes SA v Mehta*** [2006] EWHC 813 (Ch), [2006] 1 WLR 1543, the question was whether an email could satisfy the requirements of s. 4.

> Mehta was a director of a company that had failed to pay for goods supplied by the Portuguese company. Mehta had sent an email offering a personal guarantee of £25,000 and repayment terms. The body of the email did not mention Mehta's name and there was no signature at the bottom. However, the service provider automatically indicated the email address of the sender in the email header of all messages sent and received. It was held that although (i) the email constituted a written memorandum of the guarantee for the purposes of s. 4 because it was in writing, the terms were clear, and the evidence was that this offer had been accepted orally, (ii) it could not satisfy the s. 4 requirements because the email contained no signature. The name of the sender inserted at the end of the body of the text would constitute a signature if it were clear that it had been inserted to give authenticity to the guarantee commitment, but the automatic insertion of the email address would not clearly be intended to operate as a signature, in the absence of evidence to the contrary, and could not suffice for these purposes because it was merely an 'incidental' inclusion. It followed that the guarantee was unenforceable.

The decision in *Mehta* seems correct on the facts and has contributed to some degree of clarity for electronic contract formation, since clearly emails can satisfy any requirement for writing. It also provides guidance on the form needed to satisfy any signature requirement.

The policy underlying s. 4 of the Statute of Frauds was confirmed by the House of Lords in ***Actionstrength Ltd v International Glass Engineering SpA*** [2003] UKHL 17, [2003] 2 AC 541, in which a claim based on estoppel was made in an attempt to avoid the s. 4 formality requirement.

> The case concerned an alleged oral agreement between the claimant (which was providing labour for International Glass) and Saint-Gobain Glass (for whom International Glass was building a factory) that, in consideration of the claimant not withdrawing its labour from the site, Saint-Gobain would attempt to persuade International Glass to pay the claimant in full and on time, and failing this Saint-Gobain would withhold sums due to International Glass to pay the claimant directly. When the claimant sought to rely on this alleged oral agreement, Saint-Gobain claimed that the agreement amounted to a guarantee and was unenforceable, since the s. 4 formalities had not been complied with. In response, the claimant argued that Saint-Gobain was estopped from relying on s. 4 once the claimant had acted to its detriment on the faith of Saint-Gobain's oral promise.
>
> The House of Lords could find no evidence for any estoppel because there was no evidence that Saint-Gobain had represented either that there was a guarantee or that the absence of writing would not be a problem. The only representation was the oral agreement, which was unenforceable in accordance with s. 4. In any event, their Lordships considered that to allow an argument based on estoppel would be inconsistent with the statute and would undermine its purpose. It would always be the case that the party seeking to enforce a guarantee would have performed first and would have acted to its detriment on the faith of the promise in the guarantee. Section 4 could not be defeated by an argument that the unenforceable oral promise in the guarantee amounted to an enforceable estoppel.

However, their Lordships considered that some estoppels might prevent reliance on the statutory formalities—for example, if there were a representation that the statute would not be invoked or that the guarantee would be confirmed in writing.

4.4.2.4 Electronic signatures and the implications of e-commerce

4.4.2.4.1 *Recognition of electronic signatures*

Electronic signatures were given legal recognition by s. 7 of the Electronic Communications Act 2000 (implementing aspects of the Electronic Signatures Directive 1999/93/EC, OJ L 13/12 of 19-1-2000). The Act was amended in part by the eIDAS Regulations 2016 (the Electronic Identification and Trust Services for Electronic Transactions Regulations 2016 (SI 2016/696)). Section 7(1) refers to the admissibility of an electronic signature 'incorporated into or logically associated with a particular electronic communication or particular electronic data' and 'certification by any person of that signature', as evidence of the authenticity or integrity of the communication or data. In other words, an electronic signature may fulfil the same function as a hand-written signature in relation to electronic communications. This is vitally important for the effectiveness of Internet contracting. Following the eIDAS Regulations, s. 7(2)(b) also states that the signature must be intended to be used by the individual creating it to sign. Authenticity is explained in s. 15(2) as relating to questions of whether the communication comes from that person, whether the communication is 'accurately timed and dated', and whether it is intended to have legal effect. The importance of the ability to sign electronically was confirmed by the Law Commission in 2019 (Law Com. No. 386) (https://www.lawcom.gov.uk/electronic-signatures-are-valid-confirms-law-commission/).

The decision in ***J. Pereira Fernandes SA v Mehta*** [2006] EWHC 813 (Ch), [2006] 1 WR 1543 (**4.4.2.3**) has clarified the fact that signature can occur by including the sender's name in the email text, provided that the name was clearly intended to operate as a signature.

4.4.2.4.2 *Facilitating the effectiveness of e-commerce*

Section 8 of the Electronic Communications Act 2000 gives the Secretary of State the power by statutory instrument to remove restrictions in any other legislation that impede the effectiveness of electronic commerce (e.g. formalities, such as deeds or other writing, or a requirement that the post be used). In addition, Art. 9(1) of the E-Commerce Directive 2000/31/EC (as implemented by the Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, **2.4.5.4**) provides that EU member states must ensure that their legal systems allow contracts to be concluded by electronic means, and that this means ensuring that any legal requirements that apply to the contractual process 'neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their being made by electronic means'. Article 9(2) provides for various exceptions; in particular, Art. 9(2)(a) allows for exemptions in relation to 'contracts that create or transfer rights in real estate except for rental rights'. The problem with this is that it does not appear to exempt leases, so that leases may need to be capable of being created or transferred electronically. There is also an exemption in Art. 9(2)(c) for 'contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession', which would take some guarantees outside the electronic requirements. However, the provision specifies that the exemption will apply only if the guarantor was 'acting outside their trade, business or profession'. Therefore, business guarantees will also need to be capable of being effected electronically.

4.5 Contractual capacity

Contractual capacity (the ability to enter into legally binding agreements) is governed by principles which aim to balance the interests of those who are considered to need protection (in the form of a denial of capacity and hence the ability to contract) and the persons or firms who contract with them without knowledge of the relevant impediment.

4.5.1 The capacity of individuals

The contractual capacity paradigm is embodied in the adult of sound mind, and any deviation from that state is cause to question a party's capacity to contract.

4.5.1.1 Mentally impaired and intoxicated persons

4.5.1.1.1 *Persons lacking capacity under the Mental Capacity Act*

The Mental Capacity Act 2005 provides that a person lacks capacity if he is 'unable to make a decision for himself in relation to the matter' at the time that the contract is made (s. 2(1)). It does not matter whether the mental impairment is permanent or temporary (s. 2(2)). Section 3(1) describes the impairment in terms of the inability:

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language, or any other means).

The mentally impaired person remains liable to pay a reasonable price for 'necessaries' (s. 7(1)), which are defined as goods or services 'suitable to a person's condition of life and to his actual requirements at the time when the goods or services are supplied' (s. 7(2)); see also the Mental Capacity Act 2005 Code of Practice, para. 6.58, and the discussion of 'necessaries' for minors' contracts at **4.5.1.2**.

4.5.1.1.2 *Vulnerable adults with capacity under the Mental Capacity Act*

DL v A Local Authority [2012] EWCA Civ 253, [2012] MHLO 32 highlights the limitations of the Mental Capacity Act. In this Court of Appeal judgment, MacFarlane LJ clarified that the Mental Capacity Act is aimed solely at those who are legally lacking in capacity. He added, at [1], that for those 'vulnerable adults' that fall outside of the scope of the Mental Capacity Act, there could be a risk of falling within a 'jurisdictional hinterland'. Consequently, he concludes, at [77], that further protection is needed whenever the Mental Capacity Act does not apply and is provided through the 'inherent jurisdiction' of the courts.

The case concerned an elderly couple, Mr and Mrs L and their adult son DL. While Mr and Mrs L were partially disabled, they were deemed to have capacity under the Mental Capacity Act. It is alleged that DL was physically and emotionally abusive towards his parents, controlling their freedom, both outside and within their own home, restricting social contacts, and taking control of their finances. Because Mr and Mrs L had capacity, it was claimed by DL that his parents fell outside the scope of the Mental Capacity Act and that therefore their decision-making could not be challenged. MacFarlane LJ, making specific reference to the issue of abuse of vulnerable adults, held, at [56], that where the Mental Capacity Act did not apply, inherent jurisdiction of the courts would provide a 'safety net' for vulnerable adults. Thus, common law principles regarding coercion and undue influence would be considered.

The court did not provide a definition of the 'vulnerable adult'. This omission creates some uncertainty regarding who is protected by the 'safety net' of inherent jurisdiction. Further case law may be required to determine this point fully, but it appears that vulnerable adults include all those at risk, be it because of an inherent vulnerability or due to external circumstances.

4.5.1.1.3 *Intoxicated persons, and those whose understanding and awareness is otherwise impaired*

Where a person does not fall within the Act's definition for mental impairment, if it can be shown, however, that, at the time of contracting, the person was incapable of understanding the nature of the actions in question or was intoxicated—*Matthews v Baxter* (1873) LR 8 Ex 132—*and* the other contracting party knew or ought to have known of this at the relevant time—see *Imperial Loan Co. v Stone* [1892] 1 QB 599—the contract will be voidable (capable of being set aside by that party) subject to the usual rule concerning 'necessaries'. Where the other party does not know, nor ought to have known, of the mental impairment at the time of contracting, the contract will be binding and enforceable: ***Hart v O'Connor*** [1985] AC 1000 (elderly man suffering from dementia). It is, however, questionable if this Privy Council decision, whereby 'the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of "unfairness" unless such unfairness amounts