3. Certainty and the intention to create legal relations

Learning objectives

This chapter will help you to:

- realize that vague or incomplete agreements cannot normally form the basis of a contract;
- recognize that the parties to an agreement must intend to create a legal relationship in order to form a contract;
- apply a presumption of intention in domestic and commercial agreements;
- distinguish between executory and executed agreements; and
- understand that vague or incomplete agreements are more likely to be interpreted as sufficiently certain when they have been performed (executed).
3. Certainty and the intention to create legal relations

Introduction

Most undergraduate courses start by teaching that an agreement is necessary to form a contract, then move on to analyse the dual requirements of offer and acceptance in depth, followed by consideration. Two further requirements, certainty and the intention to create legal relations, often take a back seat and are tagged on to the end of a reading list. This chapter will be short, but its importance should not be underestimated: in practice, large sums of money can hinge on whether an agreement is uncertain and void, and on whether there was an intention to create a legal relationship.

The initial section on certainty could form part of Chapter 2 on the formation of an agreement as—even if the requirements of offer and acceptance are met—an uncertain agreement is no agreement at all. The requirement that the parties intend to create a legal relationship is a safety catch which prevents people from stumbling unwittingly into a contractual situation.

Agreements and contracts

‘Agreements’ and ‘contracts’ are often used interchangeably in the law. Reference is sometimes made to a ‘contract’ but later it is revealed that in fact the contract is void and never existed (e.g. due to lack of intention to create legal relations). It is more accurate to say that only an agreement existed (i.e. that there was offer and acceptance) which did not give rise to contractual obligations or a contract. Rather than writing about ‘void contracts’ (which have never existed as contracts and so are ‘non-contracts’) we will refer in this Part of the book to agreements which may or may not give rise to contracts. If the agreement lacks one of the necessary ingredients for creating a contract (e.g. it is not intended to create legal relations or lacks consideration) then it will never form a contract and its description simply as an agreement will be appropriate. If all of the creation requirements are met then the agreement may form a contract and it will be appropriate to then describe it as such. Later on in this book you will come across voidable, rescinded and terminated contracts. Unlike ‘void contracts’, these actually are (or were originally) valid contracts, but the courts have decided to unravel or cancel them for some reason. The important difference is that a contract has been formed in these cases, whereas a ‘void contract’ never even gets beyond being, at most, an agreement and is possibly not even that if it turns out that the ‘agreement’ lacked certainty, which is the first issue we will look at.
3. Certainty and the intention to create legal relations

3.1 Certainty

This section first deals with cases where the parties have used ambiguous or unclear language and then looks at cases where the parties have deliberately left terms to be agreed at a later date. In the former cases the agreement is often described as ‘vague’ whilst in the latter cases it is described as ‘incomplete’. You should not worry unduly about separating these two types in your mind because the cases on vagueness always shade into incompleteness. By way of example, if an agreement is vague about the price to be paid then it is in reality incomplete as it lacks a term specifying the price. By contrast, an agreement can be incomplete without being vague if the parties agree to come to an agreement at a later date. Such a contract is clear on the face of it how the price should be determined (by agreement of the parties) but, as we will see later, the courts are reluctant to enforce such an agreement unless there is a mechanism included for completing the agreement in the event that the parties fail to agree on the price.

One danger in this area is to think of an agreement as a thing that must be certain from the outset. In reality, the focus is on whether any obligations allegedly created by the agreement are workable, in the sense that they can be enforced by the courts. You will therefore come across some agreements where the terms are initially uncertain but are allowed to stand on the basis that the court feels that it would be able to enforce the obligations created in the event of a breach.

3.1.1 Vague agreements

In *Scammell v Ouston* (1941) the buyer purchased a lorry with the price to be paid ‘on hire purchase terms’ over two years. The problem centred on the meaning of ‘hire purchase terms’. The House of Lords held that the agreement was uncertain and therefore the contract argued (p. 56) for was void (i.e. did not exist). Viscount Maugham conceded that in some cases it was possible to imply terms that would explain what ‘hire purchase terms’ meant, but it was impossible to do so in this case. He thought that the words had such a wide range of possible meanings that it was impossible to arrive at a single one.

It is useful to compare *Scammell v Ouston* with *Hillas & Co. Ltd v Arcos Ltd* (1932) where an agreement to buy and sell timber contained two important terms. The first was that the buyer would buy 22,000 standards of ‘fair specification’. The second was that the buyer was granted an option to buy ‘100,000 standards’.
3. Certainty and the intention to create legal relations

An irrevocable promise by one party to another who may call for performance of the promise at any time up to a specified date.

When the buyers tried to exercise their option (i.e. called on the sellers to perform) the sellers did not have any timber to sell to them and so the buyers sued for breach of the option. Much of the debate centred on the meaning of ‘100,000 standards’ in the option. The phrase was undeniably vague, but would the court imply terms explaining what ‘100,000 standards’ meant?

The House of Lords accepted that the agreement was complete and binding. Lord Tomlin thought that the option implicitly referred to 100,000 standards of fair specification, like the first term for the sale of 22,000 standards of fair specification, even though it did not expressly say so. He also thought that the meaning of ‘fair specification’ was itself vague, although it was again possible to imply a meaning to make it sufficiently certain on the basis that the parties must have attributed some meaning to ‘fair specification’ because they had performed the first term relating to the sale and purchase of 22,000 standards of fair specification. In other words, by accepting the first batch of timber, the buyers must have accepted that it was of ‘fair specification’ and therefore attributed a meaning to ‘fair specification’. Lord Tomlin also looked at evidence of how the timber trade was conducted so that he could imply a specific meaning into the phrase ‘fair specification’. He came to the conclusion that ‘fair specification’ meant:

that the 22,000 standards are to be satisfied in goods distributed over kinds, qualities, and sizes in the fair proportions having regard to the output of the season 1930, and the classifications of that output in respect of kinds, qualities, and sizes. That is something which if the parties fail to agree can be ascertained just as much as the fair value of a property … Thus there is a description of the goods which if not immediately yet ultimately is capable of being rendered certain.

Incompleteness (Chapter 3, section 3.1.2)

Why do you think it was important that the standard of the timber could be ascertained even if the parties failed to agree (see the last line of Lord Tomlin’s conclusion quoted earlier)? Refer to section 3.1.2 on incomplete agreements where we look at cases where the parties
3. Certainty and the intention to create legal relations

agree to come to an agreement without providing any other mechanism for completing their agreement if they fail to agree.

(p. 57)

Link to ...

**Executory and executed agreements (Chapter 3, section 3.3)**

Why was so much weight placed on the fact that the parties in *Hillas* had already performed the part of the agreement requiring the sale of 22,000 standards of fair specification? Note that Lord Tomlin recognized that if ‘fair specification’ could not be made certain then both the agreement to sell 22,000 standards of fair specification and the option to buy 100,000 standards could not give rise to contractual obligations. What kind of problems would there be if the sale of 22,000 standards of fair specification (which had already taken place) was held not to be a binding obligation?

The low cost flights industry provides two more recent examples of apparently vague terms being treated as sufficiently certain in the Court of Appeal. Firstly in *Durham Tees Valley Airport v bmibaby* (2010), the court found in favour of the airport that a promise by the airline to establish a ‘2 based aircraft operation’ for ten years at the airport was not void for uncertainty even though this did not impose a liability to operate a specific number of flights. The second example is *Jet2.com v Blackpool Airport* (2012) where it was the airline that won. The Court of Appeal found that a promise by the airport to ‘use their best endeavours to promote Jet2.com’s low cost services ... and use all reasonable endeavours to provide a cost base that will facilitate Jet2.com’s low cost pricing’ was binding. This meant that after four years of allowing Jet2 to operate some flights outside normal opening hours, it was a breach of the best endeavours clause for the airport to suddenly say it was no longer allowed. As is often the case (see section 3.3 on executed agreements), the fact that the term had been given meaning to in a contract that had actually been operating for four years already was an important consideration. As Longmore LJ put it:

The ‘out of normal hours’ use of the airport caused no problems for four years; reasonable endeavours had been used to promote Jet2’s low cost services. [The airport’s] sudden change of stance needed a
3. Certainty and the intention to create legal relations

justifiable explanation. The judge did not think there was one and neither do I.

Thinking point

It is interesting to note that the losers in both of these cases have each since gone out of business (bmibaby in September 2012 and Blackpool Airport in October 2014). That this happened (in each case two years after the relevant decision) may or may not be coincidental. Do you think it tells us anything about what drives commercial parties to litigation in the first place and/or what may be the effects of losing a case thought worth litigating up to Court of Appeal level? Read Lewison J’s dissenting judgment in the Blackpool Airport case where he starts almost prophetically by noting that it would be possible, but unusual, for a commercial organization to promise to run a loss-making business for a period as long as 15 years.

In Walford v Miles (1992) the House of Lords had to decide whether an agreement to negotiate and an agreement not to negotiate could be enforceable. The seller agreed in principle to sell its business to the buyer. Whilst they negotiated the exact terms of the sale the parties agreed to a ‘lock out’ agreement that prevented the seller from negotiating with any other party, therefore giving the buyer exclusive access to the seller. The seller subsequently changed his mind about selling to the buyer and sold to a third party instead, prompting the buyer to bring an action for breach of the ‘lock out’ agreement. The buyer also argued that there was an implied term in the ‘lock out’ agreement that the seller would negotiate in good faith with the buyer. The buyer therefore argued that the seller had made two separate promises giving rise (p. 58)
3. Certainty and the intention to create legal relations

Diagram 3.1
*Walford v Miles* (1992)

to the following obligations: (1) an express obligation not to negotiate with any other party; and (2) an implied obligation to negotiate with the buyer in good faith (see Diagram 3.1).

Lord Ackner thought that the implied ‘agreement to negotiate in good faith’ was unenforceable for uncertainty. Negotiating in good faith is intrinsically vague because a crucial part of any negotiation is the ability to leave for any reason whatsoever. If there are no proper or improper reasons for leaving the negotiating table then it is not possible to judge whether a party has negotiated in good faith once negotiations have broken down. Of course, you may like to point out that, whilst the propriety of some negotiating positions might be borderline and uncertain, there are plenty of examples of outright bad faith which can be identified (e.g. if a party simply does not turn up to negotiate).

**Thinking point**

Imagine an agreement in which the parties laid down the minimum standard required from each party in a negotiation. Would a breach of one of these minimum standards—say, an obligation to be present to negotiate at 9 a.m. on a particular date—be enforceable? When the parties simply agree to negotiate in good faith without expressly laying out the standards for the negotiation is it fair to imply that they are asking the courts to apply minimum standards to their negotiations, even if the court cannot define with precision exactly what good faith negotiation requires of the parties (if anything)? See
3. Certainty and the intention to create legal relations

now the discussion by Teare J in the Emirates Trading case later in the chapter.

Lord Ackner then addressed the validity of the ‘lock out’ agreement itself. He thought that negative agreements not to negotiate with a third party were enforceable if they were for a definite duration. The reason for this is linked to the earlier discussion relating to when it is proper for a party to walk away from negotiations. An indefinite ‘lock out’ agreement would—by implication—last for a ‘reasonable time’ and a ‘reasonable time’ can only be determined by looking at when good faith negotiations could properly come to an end. In other words, a reasonable time for the seller to refrain from negotiating with other parties rested on what was a reasonable time for the seller to negotiate in good faith with the buyer. As discussed earlier, the duty to negotiate in good faith is vague because there are no proper reasons for ending negotiations and, as a consequence, an indefinite agreement not to negotiate is also vague.

The ‘lock out’ in Walford v Miles was void for uncertainty as it was not for a fixed period, but a ‘lock out’ agreement for a fixed two-week period was upheld in Pitt v PHH Asset Management Ltd (1993). Furthermore, Walford v Miles was distinguished in Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd (2014) where a dispute resolution clause, requiring the parties first to ‘seek to resolve the dispute or claim by friendly discussion’ and only to refer the dispute to arbitration after four weeks, was held enforceable. It was not uncertain in that it had ‘an identifiable standard of fair, honest and genuine discussions aimed at resolving the dispute’ and the objective was ‘to avoid what might otherwise be an expensive and time consuming arbitration’. Again it should be noted that the obligation, effectively to discuss in good faith, was enforceable on this occasion partly because it was for a fixed time, four weeks, and as the court found on the facts, had actually been carried out and executed (thus the arbitration could legally begin).

3.1.2 Incomplete agreements

The courts will not enforce an agreement which is missing essential elements. May & Butcher v The King (1929) provides a good example of this where the parties put off agreeing a price at the time of contracting but instead agreed to agree the price at a later date.

Case close-up

May & Butcher v The King (1929)

May & Butcher agreed to buy surplus tentage from the Disposals Board (a representative of the Crown charged with selling off surplus equipment produced for the First World War). The agreement
3. Certainty and the intention to create legal relations

provided that the price and the dates for payment were to be agreed from time to time between the Board and the buyer.

The House of Lords held that the agreement was incomplete at the time of its creation as it lacked a price and payment schedule. The argument ran that if you had asked the buyer and the Board how much they would pay and receive and when, they would not have been able to tell you. Viscount Dunedin accepted that an agreement may leave something to be determined in the future—for instance, by a third party—and still be certain but it must not rely upon the parties coming to an agreement in the future. On the facts, the incomplete agreement could not be made to work because it contained an agreement for the parties to agree the price at a later date—an agreement to agree.

The principle in *May & Butcher*—that an agreement to agree is unenforceable—was reaffirmed by Lord Denning MR in *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* (1975) where the parties agreed to negotiate fair and reasonable contract sums to pay for the construction work to be done. The construction contract was incomplete and void for uncertainty because the price was to be agreed between the parties at a later date.

The second important point to come out of *May & Butcher* relates to the interpretation of s.8 of the Sale of Goods Act (‘SoGA’) 1979. SoGA 1979 regulates the sale of goods (i.e. ‘things’, such as televisions, cars and other physical objects).

**Statute**

**SoGA 1979 s.8**

(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined as mentioned in point (1) the buyer must pay a reasonable price.

(3) What is a reasonable price is a question of fact dependant on the circumstances of each particular case.

Viscount Dunedin (applying SoGA 1893, a predecessor of SoGA 1979) thought that s.8(2) only applied to cases where the contract was silent on the price, i.e. where it was not fixed, left to be fixed in the future or to be determined by course of dealing, as permitted by s.8(1). On the facts of *May & Butcher* the agreement was not silent on the price as it provided
3. Certainty and the intention to create legal relations

that the price was to be agreed from time to time and so s.8(2) could not
apply. We saw earlier that this agreement to agree left the contract
incomplete and uncertain.

Vagueness (Chapter 3, section 3.1.1)

Is it necessary for the courts to say that an agreement with a term left
to be agreed in the future does not form a contract (i.e. any purported
contract is void) or could the courts imply an agreement for a
reasonable price in the event of no agreement?

The case of Hillas discussed in section 3.1.1 Vague agreements, was
very similar to May & Butcher in the sense that a ‘fair specification’
was implicitly something which the parties would have to agree at a
later date. The court in Hillas was prepared to imply a meaning into
the phrase ‘fair specification’ but the court in May & Butcher would
not imply a price.

One distinction worth making is that the parties in May & Butcher
expressly left the price to be agreed between themselves. The courts
could be accused of rewriting the parties’ contract and overriding
their freedom of contract if they implied an agreement for a
reasonable price because this is clearly not something agreed by the
parties. Less damage is done to the parties’ freedom of contract in a
case such as Hillas where there was never actually an express
agreement between the parties to agree in the future the meaning of
‘fair specification’.

(p. 61) The courts will accept an agreement to agree as workable when
the parties provide a mechanism for completion in the event of their not
being able to agree. Such an agreement is therefore incomplete from the
outset (because the price has not yet been decided) but the courts are
happy to enforce obligations arising from the agreement because they are
capable of being ascertained. In Foley v Classique Coaches Ltd (1934) the
buyer agreed to buy all his petrol from the seller ‘at a price to be agreed
by the parties in writing and from time to time’. At this stage the
agreement looked suspiciously like the one in May & Butcher, but a later
term provided that ‘if any dispute or difference shall arise on the subject
matter or construction of this agreement the same shall be submitted to
arbitration’. The Court of Appeal were happy to enforce the obligations
under the agreement because the parties had provided a mechanism (i.e.
referral to arbitration) for completing their agreement if they were
unable to agree. Their obligation to pay could be ascertained even if the
parties failed to agree because an arbitrator would set the price.
Interestingly, the agreement in May & Butcher contained a similar
3. Certainty and the intention to create legal relations

arbitration clause which read: ‘It is understood that all disputes with reference to or arising out of this agreement will be submitted to arbitration.’ Viscount Dunedin thought that this clause did not provide a completion mechanism in the event of there being no agreement over the price and payment schedule because it referred only to ‘disputes’. In his own words, the problem in the case was ‘a failure to agree, which is a very different thing from a dispute’. The slightly wider wording in Foley to include disputes or differences arising on the subject matter or construction of the agreement can perhaps justify the different conclusions (as summarized in Diagram 3.2), but section 3.3.2 discusses a more secretive motive.

A final point to note is that SoGA 1979 provides a solution if the mechanism for ascertaining the price fails in a contract for the sale of goods.

Diagram 3.2
Summary of courts’ approach to incomplete prices

Statute

SoGA 1979 s.9

(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and he cannot or does not make the valuation, the agreement is avoided; but if the goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them.

(2) Where the third party is prevented from making the valuation by the fault of the seller or buyer, the party not at fault may maintain an action for damages against the party at fault.
3. Certainty and the intention to create legal relations

We can see that if an arbitrator appointed by the parties fails to ascertain a price there will be no contract. This is common sense; Parliament does not want the courts to have to enforce obligations to pay a price when that price has not been ascertained and is therefore incomplete. However, if the agreement has been partly performed (i.e. the goods delivered) then Parliament has quite sensibly refused to scrap the agreement but instead has provided that a reasonable price is payable.

3.2 An intention to create a legal relationship

If you are a student looking for rules, then this topic contains two but they are only prima facie or ‘first impression’ rules which can be reversed in appropriate circumstances. Like the rules of offer and acceptance, such rules are called (rebuttable) presumptions. The first (rebuttable) presumption is that domestic and social agreements lack an intention to create a legal relationship. The second (rebuttable) presumption is that commercial agreements are intended to create a legal relationship between the parties. This means that in a commercial relationship, the burden is on the person claiming that there is no intention to create legal relations to prove that there is no such intention. In Attrill v Dresdner Kleinwort Ltd (2013) the employers could not do this and were therefore liable to provide the promised multi-million-euro bonus pool. Elias LJ thought that:

there was a very strong presumption that a promise of this nature would be intended to be legally enforceable … this was a promise made in the context of a pre-existing legal relationship. In my judgment, viewed objectively, the natural inference would be that any promises made to staff relating to the terms of their employment would take effect in the same way as other contractual terms.

This quotation reminds us that, in line with the general approach to contractual formation, the court will ascertain the parties’ intentions objectively and not by reference to the actual state of each party’s mind; see Longmore LJ in Maple Leaf Macro Volatility Master Fund & Anor v Rouvray (2009), para. [17]. In that case, the Court of Appeal upheld the first instance judge’s finding that there was a binding contract despite the fact that he had found that one of the parties did not subjectively intend to be bound when it signed the contract. In contrast to the Dresdner Kleinwort case above, in Blue v Ashley (2017), a promise by Mike Ashley (the owner of Sports Direct) to Jeffrey Blue, a consultant employed by him, that he would pay him £15 million if Mr Blue could get the share price of Sports Direct to double in price, was held not to be binding. Although the parties were in a commercial relationship with one another, the promise was made in a public house when several pints of beer had been consumed and was in the course of a jocular conversation with others. As Leggatt J put it, ‘… no reasonable person present in the Horse
3. Certainty and the intention to create legal relations

and Groom ... would have thought that the offer to pay Mr Blue £15 million was serious and was intended to create a contract ...’. (It also failed for uncertainty since there was no period specified within which the share price had to double, the trial judge having rejected Mr Blue’s evidence that the period was specified as within three years. In the event, the share price doubled in just twelve months, leaving the claimant ultimately feeling rather blue!)

3.2.1 Domestic agreements

In *Balfour v Balfour* (1919) Mr Balfour promised to pay his wife, Mrs Balfour, £30 per month whilst his government post abroad kept them apart. Mrs Balfour sued Mr Balfour for her monthly allowance after they had made their separation permanent. Two of the three Lords Justices in the Court of Appeal thought that there was no contract on the basis that Mrs Balfour had not provided consideration for the promise of Mr Balfour, but the third, Atkin LJ, expressly based his refusal to enforce the agreement on the lack of an intention to create a legal relationship: ‘I think it is plainly established that the promise here was not intended by either party to be attended by legal consequences.’

Neither Mr Balfour nor Mrs Balfour had expressly said that they did not intend to create a legal relationship and so we can say that Atkin LJ presumed this to be the case. In arriving at this presumption, his Lordship was plainly influenced by the fact that the two parties were married: ‘[It] is quite common, and the natural and inevitable result of the relationship of husband and wife, that the two spouses should make agreements between themselves ... To my mind these agreements, or many of them, do not result in contracts at all.’

This emphasizes the point that married couples make agreements in order to get on with their everyday lives rather than to create legal relationships. Further, his Lordship thought that if all such agreements gave rise to legal obligations, ‘then the small courts of this country would have to be multiplied one hundredfold’. This type of argument is commonly known as the ‘floodgates argument’ and is put to work across all areas of law. The fear is that too many cases would be brought before the courts if domestic agreements were legally binding; the ‘floodgates’ would burst open under the weight of proceedings. The floodgates argument rarely amounts to anything more than scaremongering unless it is backed up with reliable evidence: do you really think that there would be a huge influx of cases where husbands sued their wives and friends argued their disputes across a courtroom? Atkin LJ also made it very
3. Certainty and the intention to create legal relations

clear that the law had no business interfering with family affairs. He said: ‘The parties themselves are advocates, judges, courts, sheriff’s officer and reporter. In respect of these promises each house is a domain into which the king’s writ does not seek to run, and to which his officers do not seek to be admitted.’

The presumption is therefore based partly on the likely intentions of the parties and partly on the court’s reluctance to adjudicate on domestic matters. This policy of non-interference in the domestic sphere is independent from the parties’ intention and, if the presumption is based on this ground, you might argue that it is more accurate to say that the intention to create legal relations is deemed rather than presumed.

The presumption is weaker when the parties are splitting up their property after the end of their relationship. In such a situation their agreements are not as commonly ‘the natural and inevitable result of the relationship’ but instead made in order to create specific rights between the parties. This is illustrated by the Court of Appeal’s decision in Merritt v Merritt (1970).

**Case close-up**

*Merritt v Merritt (1970)*

Mr Merritt left Mrs Merritt for another woman and moved out of the matrimonial home. They met subsequently to sort out their financial affairs. Mr Merritt promised to pay Mrs Merritt £40 per month and to transfer his share in the house once she had paid off the mortgage. With typical clarity, Lord Denning MR distinguished the facts from Balfour v Balfour, stating that in this case ‘it may be safely presumed that they intend to create legal relations’. He pointed out that in Balfour v Balfour the parties were living happily together at the time of the promise, whereas Mr and Mrs Merritt’s agreement arose after a breakdown in their marriage. His Lordship noted that ‘[t]hey then bargain keenly’.

The position of separated couples is more akin to businessmen approaching the negotiating table than partners sorting out their domestic affairs. The presumption is accordingly rebutted; or (which amounts to the same result) there is no overriding policy reason to deem that there is no intention to create legal relations.

The presumption is not limited to married couples. Any domestic or social arrangement will attract the presumption to various degrees. In Balfour v Balfour Atkin LJ spoke about agreements to take a walk together or of hospitality. Cohabiting couples also make everyday agreements which are more attributable to their relationship than their desire to create binding
3. Certainty and the intention to create legal relations

obligations. The key point in these situations is that the agreement is underpinned by the obligations of trust inherent in the relationship between the parties; they do not intend and do not need to create any legal obligations.

It is important to remember that, as in *Merritt v Merritt*, the presumption against an intention to create a legal relationship can be rebutted; it is only an initial guess as to what the parties intended and, if the circumstances suggest that two domestic or social parties did in fact intend to create legal relations, the presumption will be reversed. We will see in section 3.3.2 that detrimental reliance by one party was a sufficient reason to rebut the presumption in *Parker v Clark* (1960). Furthermore, in *Radmacher v Granatino* (2010) a majority of the Supreme Court considered that the parties to increasingly common ‘ante-nuptial’ agreements can be thought to intend that they should be of legal effect.

3.2.2 Commercial agreements

As noted earlier, there is an opposite presumption that commercial agreements are intended to create legal relationships. Generally speaking, commercial parties expect to be able to enforce an agreement if the other side does not perform its promise and recover any losses suffered as a result of the breach. That is not to say that commercial parties will always sue on a breach—they rarely do as it is generally better for the business relationship (and cheaper) to solve the dispute amicably—but, as a last resort, they expect the protection of the law (and that is why for particularly valuable transactions they pay lawyers large sums of money to draft their contracts (and that is one reason why there are so many law courses and so many lawyers!)).

As was the case with the social and domestic agreements, the presumption may be displaced, for example by an express statement in the agreement that it is not to create a legal relationship. In *Rose & Frank Co. v J. R. Crompton Bros* (1925) the agreement was binding in honour only because the parties agreed that:

This arrangement is not entered into, nor is this memorandum written as a formal and legal agreement, and shall not be subject to legal jurisdiction in the Law Courts of either the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence—based on past business with each other—that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

Scrutton LJ rejected the first instance judge’s reasoning that an agreement not to create legal relations was contrary to public policy for ousting the jurisdiction of the courts. He made it clear that the courts
3. Certainty and the intention to create legal relations

should follow the expressed intentions of the parties and only presume an intention when the parties had not made their intentions clear. This clearly shows that the will of the parties—their freedom to contract—will prevail over the desire of some judges to control all commercial agreements. You might be wondering why businessmen bother to make an agreement if it has no legal effect—is it worth the paper it is written on? In banking practice ‘comfort letters’ are used literally; they provide comfort to a lender that he will get his money back. A borrower’s parent company (i.e. its main shareholder) will usually be saying something along the lines of ‘we will try to be a really good parent company and make sure that our subsidiary pays all your money back’. The bank does not expect to be able to sue on this agreement, and should insist on receiving a guarantee if it wants to have legally enforceable rights against the parent company.

**guarantee**

A binding promise made by A to B to perform C’s obligations owed to B if C fails to perform (e.g. C’s failure to pay a debt to B).

In *Kleinwort Benson Ltd v Malaysia Mining Corp.* (1989) the following wording in a comfort letter was held not to contain an intention to create legal relations: ‘It is our policy to ensure that the business of [our subsidiary] is at all times in a position to meet its liabilities to you under the above arrangements.’ Companies must be careful not to promise to ‘guarantee’ or ‘undertake’ to do anything as this is more likely to be interpreted as a binding agreement.

The intention behind certain commercial agreements is sometimes tricky to classify.

In *Esso Petroleum Ltd v Commissioners of Customs and Excise* (1976) the House of Lords had to decide whether the free World Cup coins offered to drivers who bought four gallons or more of petrol were produced for sale. If they were then Esso had to pay tax on them (hence the presence of Customs and Excise). The Law Lords considered whether there was a contract in relation to the coins (there was obviously one in relation to the petrol) between Esso and drivers who bought more than four gallons. Lord Simon, Lord Fraser and Lord Wilberforce thought that the parties intended to create legal relations because, in the words of Lord Simon, ‘the whole transaction took place in a setting of business relations’. Lord Russell and Viscount Dilhorne thought that there was no intention to create legal relations because it was simply unnecessary in order for the ‘free coins’ scheme to work. It was in the interest of Esso to abide by its coins offer and a disgruntled driver who was denied his coins would simply refuse to buy Esso petrol in the future, rather than consider his legal rights. The majority opined that the coins contract was collateral to
3. Certainty and the intention to create legal relations

the main contract for the sale of petrol and so the coins were not produced for sale but as consideration to enter into the main contract for petrol. In the final analysis, it was not fatal to Esso’s case that a majority of Law Lords thought there was a contract governing the coins.

In Baird Textile Holdings Ltd v Marks & Spencer plc (2002) M&S terminated a 30-year-old relationship with their main clothes supplier. The supplier claimed that this relationship gave rise to an agreement under which M&S had promised not to terminate the relationship except on reasonable notice of three years. The House of Lords rejected the claim on the basis that M&S had deliberately avoided entering into formal long-term contracts with the supplier and consequentially it did not intend to create legal relations between it and the supplier.

Where there is not an express agreement but an alleged agreement based on conduct over a period of time, the presumption does not apply and the onus is on the party claiming that a binding agreement was made to prove that there was an intention to create legal relations, as is discussed at para.106 of Assuranceforeningen v IOPCF.

The operation of the presumptions in this area is summarized in Diagram 3.3.

3.3 Executory and executed agreements

3.3.1 Basis of the distinction

Agreements are sometimes performed instantaneously but often there is a gap between completing the agreement and performance. Agreements are known as ‘executory agreements’ before either side has performed any part of the agreement, such as when a university promises to provide tuition for three years and a student promises to pay the appropriate fees each year. Once performance has commenced the agreement becomes executed, for example once the student attends university and eventually completes the course. There are differing degrees of executed agreements, in the same way that there are differing degrees of performance, and so an agreement may be partly or wholly executed depending upon the extent of its performance.
3. Certainty and the intention to create legal relations

Diagram 3.3
Summary of intention to create legal relations

The label ‘executory’ or ‘executed’ is therefore simply a way of stating whether there has been any performance.

The courts are reluctant to find that there is no contract once performance has begun (i.e. once the agreement is partly executed). By performing the agreement the parties have shown that the agreement is workable in practice and that it is robust enough to meet many of the objections that the agreement is too uncertain to be workable. Similarly, it can appear extremely harsh to find that there is no enforceable contract in a situation where a party has performed his part of the agreement and relied upon the agreement to his detriment.

Example

**Partly executed agreement**

If, pursuant to an agreement, I spend time and money building a house for you and I get to the point where only the roof has to be added, it would seem harsh for a court to say that our partly executed agreement has not formed a contract (e.g. for uncertainty). The consequence would be that I could not claim the price from you even though I had virtually built your house. By asking for a contractual right to enforce the agreement I am asking for my bargain: the price in return for a house. If the courts leave me with an almost finished house but no money then I am denied my bargain and have wasted expenses. Consider whether the law of unjust enrichment could provide a remedy on the basis that you have been enriched (to the value of a roofless house) at my expense.
3. Certainty and the intention to create legal relations

3.3.2 Application of the distinction in the case law

We saw at the end of section 3.1.2 that s.9 SoGA 1979 distinguishes between executed and executory contracts, implying a reasonable price in the case of executed agreements. The case law on uncertainty and intention to create legal relations also demonstrates such a distinction, although it is not as openly expressed. In relation to incomplete agreements, the agreement to buy and sell petrol in Foley had been performed for three years (i.e. it was executed) whereas the agreement in May & Butcher was executory—neither side had yet performed. The court interpreted the Foley agreement in such a way that an arbitrator could ascertain the price in the event of the parties failing to agree, but in May & Butcher it placed a stricter interpretation on the clause referring disputes to an arbitrator, holding that a failure to agree did not amount to a dispute. The different results could be due to an underlying policy of the courts to enforce obligations when the agreement is executed (such as the agreement in Foley). The cases on vague agreements also display the same trend to favour executed agreements. In Hillas the court was comfortable implying a meaning to ‘100,000 standards’ and ‘fair specification’ in the partly executed agreement. By contrast, in Scammell v Ouston a meaning could not be implied into ‘hire purchase terms’ in the executory contract.

Denning J recognized this broad principle in favour of enforcing executed agreements at first instance (and he was supported by the Court of Appeal) in British Bank for Foreign Trade Ltd v Novinex Ltd (1941). Denning J said:

> [I]f there is an arrangement to supply goods at a price ‘to be agreed,’ or to perform services on terms ‘to be agreed’ then, although, while the matter is still executory there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without (p. 68) having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied from the conduct of the parties a contract that, in default of agreement, a reasonable sum is to be paid.

The distinction between executed and executory contracts is also utilized in the context of an intention to create a legal relationship. Just as the court will strain to enforce a vague or incomplete executed agreement, it will also strain to find an intention to create legal relations in an executed agreement. In Parker v Clark (1960) a couple sold their house and loaned the proceeds to their daughter to help her buy a flat in reliance on an agreement that they live with an elderly couple and receive a share of the elderly man’s will. Devlin J held that their agreement was enforceable as it was inconceivable that the elderly couple could break off the agreement at any time and leave the younger couple with nowhere to live. In
3. Certainty and the intention to create legal relations

rebutting the presumption of no intention to create legal relations, it appears that he was influenced by the substantial detrimental reliance of the younger couple who had partly performed the agreement by moving out of their old home and loaning the proceeds.

Introduction (Chapter 1)
The policy of enforcing executed agreements relates to the theoretical basis for contract law.

If the courts favour executed agreements they are ostensibly protecting reliance placed on the agreement. The traditional approach to contract law is that the parties are free to contract and their expectations and bargains will be protected. Protecting reliance through contractual obligations shifts the emphasis away from the parties’ intentions and towards their actions, leading the courts to rewrite the parties’ agreement for them. This latter approach is known as ‘paternalistic’ as opposed to the ‘individualist’ approach that protects the parties’ freedom of contract.

Digging deeper

The question is often asked as to whether there should be a separate doctrine of intention to create legal relations or whether it should really be seen as an aspect of the rules on offer and acceptance, especially given that the essence of an offer is that it is made with an intention that it become binding upon acceptance by the other party. Blue v Ashley discussed at section 3.2 is an interesting example where the offer to pay £15 million was not regarded as an offer made with intention to be bound (not even morally, according to the judge) and separately there was no intention to create legal relations. McKendrick is of the view that on balance it is better to have the separate doctrine and that it is likely to be of increasing importance if the doctrine of consideration (for which see Chapter 4) loses its force as the distinguishing feature of enforceable agreements. O’Sullivan and Hilliard on the other hand think it is better regarded as part of the rules on offer and acceptance rather than as a separate doctrine. This may seem a rather semantic question except that there are cases where it is clear that there is agreement but not (yet) an intention to create legal relations. Thus in sales of land (and houses built on that land) the parties will normally have reached agreement on the price but their agreement is almost invariably made expressly ‘subject to contract’ and thus is not intended to be legally binding until contracts are formally ‘exchanged’ once the purchaser has the
3. Certainty and the intention to create legal relations

mortgage or other finance in place and is ready to commit contractually to the agreement. A related and interesting point is made at p.73 of *A Restatement of the English Law of Contract* (Burrows, OUP, 2016). This modern and concise *English Restatement*, written by Professor Burrows in collaboration with an advisory group of leading judges, academics and practitioners, is well worth consulting on a wide range of issues. Paragraph 10(5) of the text of the *Restatement* says: ‘It is commonplace in a written contract for there to be no intention to create legal relations until all the parties have signed the document.’ The commentary at p.73 explains that this has been included ‘because it is often not appreciated that many commercial agreements are not binding unless and until there has been signature by all the parties’. One might therefore say that the presumption of intention to create legal relations in such commercial cases is modified so as to be an intention to create legal relations once all parties have signed. Such examples tend to suggest that the intention to create legal relations is indeed best seen as a separate requirement to those of offer and acceptance.

Summary

1. Certainty

An agreement must be capable of being enforced by the courts in order to form a contract. The courts will not enforce an uncertain (vague or incomplete) agreement.

An initially vague agreement may be made certain by implying a meaning into the vague terms. An agreement to negotiate in good faith (but not an agreement not to negotiate with anyone else for a fixed period) is vague and incapable of being made certain.

An agreement is initially incomplete if some of its terms are not yet decided. The terms can be completed through a mechanism provided for in the agreement or by statutory implication. They cannot be left to be agreed by the parties at a later date; such an agreement cannot be enforced and cannot form a contract.

2. Intention to create legal relations

Both parties must intend to enter into a legal relationship in order to form a contract.

There is a presumption that domestic and social agreements are entered into without the intention to enter into legal relations but this does not apply to express commercial agreements where the necessary intention can almost always be presumed unless expressly excluded.
3. Certainty and the intention to create legal relations

The particular circumstances of each case and part performance or detrimental reliance by one party may influence the court’s decision to depart from the presumptions.

3. Executory and executed agreements

Partly or fully performed agreements are known as ‘executed’ whilst wholly unperformed agreements are ‘executory’.

The courts appear to be more willing to find an enforceable agreement where there is an executed agreement—despite a degree of vagueness or incompleteness—particularly where one party has relied on the agreement to his detriment.

Questions

1. In August 2006, Wembledon tennis club agreed a seven-year supply contract with Loadsofballs Ltd Loadsofballs must supply ‘International Tennis Federation approved tennis balls’ for the next seven of Wembledon’s annual June tournaments with the price to be agreed six months before the start of each tournament. It is September 2006 when Loadsofballs’ chief executive rings you (his lawyer) in a panic because he has heard that all the top tennis players are pulling out of Wembledon and he wants reassurance that he has a valid contract for the supply of balls. How would you respond? Would your answer be any different if the call came in January 2010 and there had been no problems between the parties at past tournaments?

2. Is it necessary to have presumptions in respect of the intention to create legal relations? What purposes do they serve?

3. ‘The protectionist policy of enforcing executed but not executory agreements is an affront to the parties’ individual freedom to choose how and when they contract.’ Discuss.

For a suggested approach to answering question 1, visit the online resources

Test your knowledge by trying this chapter’s Multiple Choice Questions

Further reading

Books

Chen-Wishart, M, Contract Law, 6th edn (Oxford University Press, 2018) sections 2.6 and 2.7.
3. Certainty and the intention to create legal relations


Articles


Hoskins, H, ‘Contractual obligations to negotiate in good faith: Faithfulness to the agreed common purpose’ (2014) 130 LQR 131.