Contract Law

Eoin O'Dell, School of Law, Trinity College Dublin

BREACH OF CONTRACT

In *Clarke v. Kilternan Motor Co.* (High Court, December 10, 1996) the parties had concluded an oral agreement that the plaintiff would run the defendant's filling station and shop, retain a commission, and pay the remaining proceeds over to the defendant. The defendant claimed that there had been a subsequent oral variation, but McCracken J. did "not think that the plaintiff agreed to it in any real sense of that word, or that there was an sufficient meeting of minds to vary the terms of the original agreement" (p. 4). The plaintiff suffered financial difficultes, and operated a bank account in which he kept for his own use for several days the proceeds due to the defendant. The parties had two inconclusive meetings, one quite heated, after which they held a stocktake, and the plaintiff returned the keys of the premises to the defendants. Nevertheless, the plaintiff claimed that the agreement had been wrongfully terminated by the defendant, and that he was entitled to six months minimum reasonable notice. There were also amounts due to both parties at that date, including proceeds due to the defendant under the contract which the plaintiff had retained and subsequently spent. McCracken J. held that either the agreement was in fact terminated by the plaintiff, whose financial difficulties were such that it was impossible for him to continue, or, the defendant would have been entitled to terminate without notice for the plaintiff's operation of the bank account in breach of contract. On this latter point, he held that "it was clearly a fundamental condition of the agreement" that the plaintiff would pay the proceeds to the defendant. The operation of the bank account had "the effect of delaying the payment to the defendants for several days, while the plaintiff had the use of the money during that time, and in my view was a fundamental breach of the agreement between the parties, which would have justified an immediate termination by the defendant". (p. 8). He also calculated the amounts due each way and gave judgment for the difference. Accordingly, although he held that a term providing for reasonable notice of termination could be implied into the contract, (discussed in the Implied Terms section, below, pp. 195-200), McCracken J. did not have to consider what would have constituted reasonable notice in the circumstances.

CONDITIONAL CONTRACTS

Where a contract makes completion subject to certain matters being completed not later than a specified date or such later date as the parties may agree, the parties may agree such later date orally and not necessarily in writing. In agreeing a date orally, they were not varying the agreement, but merely performing it. Keane J. (Hamilton C.J. and O'Flaherty J. concurring) so held, *ex tempore*, in *Duggan v. AIB Finance* (Supreme Court, November 19, 1996). Pursuant to a scheme which required the consent of the Minister for Finance, the business of a third party was to be tranferred to the respondent bank; as a consequence, a debt owed by the appellant to the third party had, by contract in writing, been assigned to the respondent, conditional upon the Minister's approval and other matters being completed not later than a specified date or such later date as the parties may agree. In an action to enforce the debt, the High Court had found in favour of the respondent bank, and, for the above reasons, Keane J. dismissed appeal. In so doing, he also observed that "an equitable assignment of a chose in action . . . requires no particular formalities" (approving *Brandt's v. Dunlop Rubber Co.* [1905] A.C. 454), but observed that the relevant assignment had nevertheless been in writing. For these reasons, the debt had been validly assigned, and the appellant was properly held liable upon it.

CONSIDERATION

Past Consideration The issue of consideration was briefly before the Supreme Court in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 (*aff'g* High Court, unreported, February 20, 1996, Costello J., *ex tempore*) in which the defendant sought (unsuccessfully) to resist the enforcement of a guarantee on the grounds that it was unsupported by consideration, any relevant consideration being past.

In the 1995 Review, 184-96, it was argued that the essence of consideration is that each party to a contract gives and receives something: a bargained-for exchange. In this scenario, it may be said in respect of each party's giving, that the party giving suffers a detriment and the other party gains a corresponding benefit; or, in respect of each party's receipt, that the party receiving gains a benefit and the other party suffers a corresponding detriment. So, in the situation of a sale of goods for a price, there is 'something for something': the seller suffers the detriment of giving over the goods and the buyer gains the benefit of getting them, while the seller gains the benefit of the receipt of the price and the buyer suffers the detriment of paying it. If the paradigm is 'something in return for something', then it follows that where a contract seems to provide for 'something for nothing', it does not provide for consideration

and is consequently unenforceable. Thus, let something be done by P, for which D later promises to pay; "it is clear that the service was not performed as the price of the promise. The notion of bargain involves that the promises (or the promise and the act in a unilateral contract) should be given, each in return for the other. . . ." (Atiyah, *An Introduction to the Law of Contract* (5th ed., Clarendon Press, Oxford, 1995), p. 123). Since D already has the benefit of P's performance, his promise is not given in return for the performance; in effect, P would get something for nothing; thus, from the perspective of D's promise, the consideration to support it was past, and P cannot enforce it.

For example, in *Provincial Bank of Ireland v. O'Donnell* (1933) 67 I.L.T.R. 142; [1934] N.I. 33 (NI CA) (cited with approval in *Riordan v. Carroll* [1996] 2 I.L.R.M. 263, 273 *per* Kinlen J; see the 1995 Review, 183) the defendant wife gave a guarantee to the plaintiff bank in consideration of "advances heretofore made . . ." by the bank to her husband. The bank sought to enforce the guarantee against the wife, but, from the perspective of this agreement, the bank having already given the advances had given only a past consideration, and the guarantee was unenforceable.

Thus, essence of the rule against past consideration is that if P has performed, and D had later promised to pay, P cannot enforce D's promise. However, if P had performed as a consequence of D implicitly promising to pay, the later express promise is simply an express articulation of this prior implicit but unarticulated promise. On this analysis, P's performance was in return for D's unarticulated but implicit promise to pay, and from the perspective of this promise, the consideration is good. In other words, the situation is in fact the pardigmatic 'something for something': a performance in return for the promise to pay.

The best way to prove this prior implicit promise is by a request from D to perform, since the promise to pay for performance can easily be discovered in that request, as in the leading cases of *Lampleigh v. Braithwait* (1615) Hob. 105; 80 E.R. 255 and *Pao On v. Lau Yiu Long* [1980] A.C. 614; [1979] 3 All ER 65. In *Pao On*, P agreed with a third party (T) to sell shares in one company in return for shares in another company, and further agreed with T not to sell 60% of the shares received for at least a year in return for an indemnity from T on the share price. However, this indemnity was cancelled. D (T's owners) then agreed with P that they, D, would indemnify P if the share price fell, in consideration of P having entered into the main sale agreement with the T. As in *Provincial Bank of Ireland v. O'Donnell*, from the perspective of this second agreement, P, having already entered into the main sale agreement, would seem to have given only a past consideration; so that the contract of indemnity would have been unenforeceable. P nevertheless sued upon it, and D predictably argued that the consideration was past. Lord Scarman for the Privy Council held otherwise: D had requested P not to sell 60% of the shares for a year, in return for which P would be indemnified for any loss

arising out of holding the shares. When the initial indemnity was cancelled, and the later indemnity agreement put in place, there was in effect an initial request by D coupled with an implicit promise to pay, D's later promise was merely the later articulation of this implicit promise, and from the perspective of this initial implicit promise, the consideration was not past but contemporary.

Furthermore, if it is correct to explain the principle in *Pao On* and *Lampleigh* as turning upon an unarticulated but nonetheless real promise prior to the performance, of which the subsequent promise is merely the articulation, then, although a request is probably the best way to show this prior unarticulated promise, in principle, anything which goes to show a prior unarticulated but nonetheless real promise to pay for the performance should be sufficient.

A situation which at first blush seems very similar to *Provincial Bank of Ireland v. O'Donnell* arose in *First National Commercial Bank v. Anglin*. The plaintiff bank made a loan to a company; the defendant executed a guarantee in respect of that loan in favour of the plaintiffs, who issued a summary summons to enforce it; the Master transferred the case to the judge's list, and in the High Court, (unreported, February 20, 1996) Costello J. in an *ex tempore* granted summary judgment in favour of the plaintiff. On appeal, Murphy J. (Hamilton C.J. and Denham J. concurring) affirmed. (On the summary nature of the proceedings, see our Practice and Procedure chapter, 493, below). In the appeal, it was argued that if the loan had been made in February 1989, but the guarantee had not been executed until September 1989, "it followed that the Guarantee was void as having been given for a past consideration" ([1996] 1 I.R. 75, 78). However, Murphy J. had "no doubt but that the Guarantee was executed by Mr Agnlin not on, but before, the 1st of February" ([1996] 1 I.R. 75, 81). Thus, there was "no question whatever of that document having been executed subsequent to the 1st of February 1989 and certainly not as late as September of that year." (*ibid*). Since there was no credible evidence for what the defendant had sought to assert, a probable defence had not been established on the facts, and the summary judgment was affirmed.

However, Murphy J. did go on to examine briefly the substantive point of law raised on the appeal, to the effect that the execution of the guarantee subsequent to the draw-down of the loan constituted past consideration. Had the circumstances in *Anglin* simply been as the defendant-appeallant had contended, then, by analogy with *O'Donnell*, the guarantee, given subsequent to the loan and merely in consideration for it, would have been given for a past consideration, and thus for no valid consideration, and would therefore have been void and unenforceable. However, Murphy J. found that, in "the first place, the loan was made expressly and unequivocally on terms that the Guarantee would be given by Mr Anglin . . . as he recognises and, secondly, the Guarantee in its terms extends to present as well as future indebtedness of the Principal Debtor." ([1996] 1 I.R. 75, 81). Whether or not the second reason is

sufficient in the light of *O'Donnell*, the first is determinative: if the contract expressly stated that the loan was given in return for both the debtor's liability to pay and the guarantee, then a later execution of the guarantee is merely the fulfilling of a valid contractual obligation undertaken for a consideration which was contemporary and not past; in other words, it is the pardigmatic 'something for something': a performance by the plaintiff bank in return for the defendant's express promise of a guarantee. Thus, there was consideration for the guarantee.

It will thus be seen that there can be problems with whether a guarantor or surety has received consideration in return for the guarantee or security. In practice, as we have just seen, in "the case of a guarantee for existing debts, the lending of the money in the past is generally insufficient since it constitutes 'past consideration'. [Therefore, t]he consideration relied upon in practice commonly takes the form of the lender, at the request of the surety, forebearing to sue the principal debtor for a period (often only one day) and/or making or continuing advances or otherwise giving credit or affording banking facilities for as long as the bank may think fit to the principal debtor". (Mee (1995) 46 *N.I.L.Q.* 147, 159 referring to *Chitty on Contracts* (26th ed, Sweet & Maxwell, London, 1989) vol. II, pp. 1349-1352; (see now 27th ed, (1994), vol II, pp. 1313-1315, and supplement (1996), p. 343); however, where such a consideration is not expressed, "though this might easily have been done" Andrews L.J. in *O'Donnell* felt "unable to put a forced construction upon words which [were] in no way ambiguous merely to make the guarantee binding" (1933) 67 I.L.T.R. 142, 143; [1934] N.I. 33, 44). Of course, since forebearance to sue is good consideration, the bank undertaking to forebear to sue for a day gives good consideration for the guarantee.

The alternative consideration, the promise to make further advances or supply other credit or banking facilities, seems very common; for example, it was the form of consideration given the bank to the surety wife who secured the banks previous advances to her husband in *Bank of Novia Scotia v. Hogan* (Supreme Court, 6 November 1996; affirming High Court, December 21, 1992; see at p. 2 of the judgment of Keane J. in the High Court. This case is discussed in detail in the Undue Influence section, below, 219-27). Though common, this type of consideration is rather problematic. For example, in *O'Donnell*, the bank secured the guarantee in consideration of "advances heretofore made or that might hereafter be made", and not only did the first half of this fail for past consideration, but the second half also failed as embodying only an illusory consideration. This may be an extreme example, but it is indicative of the care which has to be taken in respect of guarantees sought after the principal loan has been granted. In the event, on the facts of *Anglin*, past consideration was not made out and illusory consideration did not arise, but they are nonetheless traps for unwary banks.

Consideration and the part payment of a debt The issue of consideration also arose in *Truck and Machinery Sales v. Marubeni Komatsu* [1996] 1 I.R. 12 where Keane J. was faced with the question of whether and when, in principle, part payment of an existing debt can constitute consideration for a contract. As outlined above, the essence of consideration is that each party to a contract gives and receives something, a bargained-for exchange, in which the paradigm is 'something in return for something'; from which it follows that where a contract seems to provide for 'something for nothing', it does not provide for consideration and is consequently unenforceable. Thus, where a contract already provides for a given price for a given performance, an agreement to accept a lesser price for that same performance is unenforceable for want of consideration: given that the price is already due, the reduction in the amount owed is 'something for nothing', unsupported by consideration, and thus unenforceable. This rule, that part payment of an existing debt does not discharge that debt and is no consideration for an agreement that the debt is discharged, is usually taken to have been established by *Pinnel's Case* (1602) 5 Co. Rep. 117a; 77 E.R. 237 and confirmed by the House of Lords in *Foakes v. Beer* (1884) 9 App. Cas. 605 (over a powerful dissent from Lord Blackburne). However, to this rule, there are some recognised exceptions; so that part payment early, or in a different place, or by some new means, or in a composition with creditors, can constitute consideration. In all such cases, there is again a something for something: the additional matters are in return for the promise to forgive the debt (see also Lyall, *Land Law in Ireland* (Oak Tree Press, Dublin, 1994), p. 117 for a further interesting exception).

These matters were extensively analysed in the 1995 Review, 186-96, in the context of the decision of the Court of Appeal in *Williams v. Roffey* [1991] 1 Q.B. 1; [1990] 1 All E.R. 512, where it was held that although the performance an existing duty will usually not constitute consideration for a promise so to perform, if the promisee derives a practical benefit from such performance, that benefit can constitute consideration for such a promise. Although the case has been welcomed as demonstrating a "flexible approach to consideration in a commercial context" (*European Consulting v. Refco* (April 12, 1995, Queen's Bench, Mance J.); see the 1995 Review, 186 with references, and Meyer-Rochow (1997) 71 *A.L.J.* 532), both aspects of this holding are entirely consistent with the approach to consideration as paradigmatically 'something for something' (and paradigmatically not 'something for nothing') set out above. Thus, where a contract already provides for a given performance for a given price, an agreement merely to perform that same performance for a higher price is unenforceable: given that the performance is already due, the increase in price is 'something for nothing', unsupported by consideration, and thus unenforceable. However, if the background circumstances have changed, then the receipt of the original performance in the new circumstances is a practical benefit, a 'something different', and there is again

a 'something for something'. In the 1995 Review, 188, it was argued that this is the key to *Williams v. Roffey*. It was further argued, first, that a similar notion of practical benefit is to be found in Irish law in the judgment of Murphy J. in *In re PMPA Garage (Longmile) Ltd (No. 1)* [1992] 1 I.R. 315, and second, that "[v]ery often it will be of practical benefit to a trade creditor to receive a part-payment in satisfaction of the full amount, especially where payment is early, or in a different place, or by some new means, or in a composition with creditors; thus, the recognised exceptions to *Foakes v. Beer* can be seen simply as examples of the recognition of practical benefit in the context of part-payment prior to *Williams v. Roffey*. . . . In all cases, it is of the essence of the second agreement that the creditor is in fact getting 'something different'. Thus, where part-payment results in the debtor getting 'something for nothing', there is no consideration, (*Foakes v. Beer*), but where the creditor in fact gets a practical benefit (a 'something different') then there is good consideration (*Williams v. Roffey*). On this analysis, . . . the latter case does not amount to the death-knell for the former; it merely rationally explains the existing exceptions to the former. . . . Consequently, then, the notion of 'practical benefit' has an important role to play in the context of consideration for part payment of a debt. Furthermore, adherence to precedent (the rule in *Pinnel's Case* and *Foakes v. Beer*) should not preclude its application because the exceptions to that rule are best understood as examples of such a practical benefit. " (1995 Review, 193-4).

Thus, in *Re Selectmove* [1995] 1 W.L.R. 474; [1995] 2 All E.R. 533 (C.A.), where a company owed a debt to the Revenue, the Court of Appeal considered that, whilst a subseqenlty agreed repayment schedule might have constituted a "practical benefit" within the *Williams v. Roffey* understanding of that notion, the decision of the House of Lords in *Foakes v. Beer* rendered it "impossible" find consideration for what in fact amounted to a part payment of a debt. On the approach urged in the 1995 Review and outlined above, however, this conflict disappears; there is no inconsistency between *Pinnel's Case* and *Williams v. Roffey*, and it is not necessary to feel constained by the former into the non-application of the latter.

On the other hand, if *Foakes v. Beer* is understood to preclude a finding of 'practical benefit' in the context of the part payment of a debt, then the Court of Appeal in *Re Selectmove* was constrained by the doctrine of precedent to arrive at the conclusion it did. However, in the New South Wales case of *Musumeci v. Winadell* (1994) 34 N.S.W.L.R. 723, Santow J. did not feel bound by the chains of precedent to follow *Foakes v. Beer*, and preferred instead to follow *Williams v. Roffey*. It was pointed out in the 1995 Review that there seemed until then to have been no post-1961 (mistyped as 1963 on p. 194 of the 1995 Review) – and thus binding – example of the application of *Foakes v. Beer* in an Irish court. Had matters remained so, – and if the reconciliation between *Foakes v. Beer* and *Williams v. Roffey* advanced above were not

accepted – then the type of considerations of precedent which constrained the Court of Appeal in *Re Selectmove* would still not have prevented an Irish court reaching a result similar to *Musumeci v. Winadell* in an appropriate case. However, the context of the discussion in the 1995 Review was the acceptance of the rule in *Pinnel's Case* and *Foakes v. Beer* by Kinlen J. in *Riordan v. Carroll* [1996] 2 I.L.R.M. 263, a case of a simple waiver of rent, a reduction of a debt without consideration, and properly held unenforceable (*Pinnel's Case*, *Foakes v. Beer*). It was submitted that "[t]here was nothing on the facts to suggest that the lessors or the plaintiff-assignees received any practical benefit from the waiver; in fact, quite the contrary. Thus, there was nothing upon which to ground an argument based upon *Williams v. Roffey*, or *PMPA*; and nothing in the facts or the holding in *Riordan v. Carroll* precludes an Irish court applying them to reach a result such as that in *Musumeci v. Winadell* . . .", 1995 Review, 195. This conclusion must now be revisited and may need to be revised in the light of the decision of Keane J. in *Truck and Machinery Sales v. Marubeni Komatsu* [1996] 1 I.R. 12.

A company, intending to sell machinery in Dubai, purchased it from the creditor, but then ran into difficulties in Dubai and were unable to sell it on. St£ 2.3m of the purchase price remained due to the creditor. To the company's consequent difficulties, the creditor adopted a "patient and understanding attitude" ([1996] 1 I.R. 12, 30), but when it could wait no longer, the creditor presented a petition seeking to wind up the company. In this action, the company in turn sought to prevent the presentation of the petition, *inter alia* on the ground that there was an agreement between the parties that the debt had been waived. (On the principles underlying the company's application, see the Company Law chapter, above, 107-113; Canniffe (1997) *C.L.P.* 30; McCann (1996) *Bar. Rev.* 6). Keane J. dismissed the application; and his decision was upheld *ex tempore* on appeal March 13, 1996 (see reporter's note: [1996] 1 I.R. 12, 31). As to whether there was such an agreement, the creditor had sent a fax to a bank with which the company were in discussion in which the creditor said that it had told the company that "provided a part payment of approximately 0.75 to 1.0 million pounds is paid to us promptly, we would wait for the balance . . .". Though in isolation this might have appeared to constitute an agreement to waive the debt, Keane J. held that "when one reads the entire correspondence, it becomes clear beyond argument that [the creditor] at no stage waived the balance of the purchase price due to it." ([1996] 1 I.R. 12, 30).

Furthermore, the question of whether any such agreement would have been enforceable was fully argued before him, and Keane J. continued that "even if I were satisfied as a matter of fact that [such an agreement existed] . . . it would seem clearly unenforceable in the light of the legal principles to which I have referred." (*id.*). Those legal principles were the decisions in *Pinnel's Case* and *Foakes v. Beer*,and, since, it had not been urged upon him that he should depart from those cases, he was, accordingly, satisfied that he should adopt the approach taken by the Court of Appeal in *In re Selectmove* ([1996] 1 I.R. 12, 29). In the first place, as has been argued above, the application of *Pinnel's Case* and *Foakes v. Beer* does not preclude a finding of consideration based upon practical benefit to enforce a promise to waive part of an existing debt. In the second, even if it does, since it was not urged upon Keane J. that he should depart from *Foakes v. Beer*, his approval of *Re Selectmove* was, strictly speaking, unnecessary; and a re-consideration of the issue, in the context of a full appraisal of the status of *Foakes v. Beer* in Irish law, is still possible; in which case, *Musumeci v. Winadell* provides support for the view that in jurisdictions in which *Foakes v. Beer* is not directly binding, there can be good reasons to depart from it so as to allow for such a finding of consideration.

If, for either of the above two reasons, Keane J. had sought on the facts for a 'practical benefit' to the creditor as consideration received for the alleged promise to waive the existing debt, it is submitted that he would have found none. In *Williams v. Roffey*, the builder had obtained many practical benefits from the continuance of contract: he avoided penalties under his headcontract, he obtained the carpenter's continued performance in circumstrances where otherwise he would not have and thus also avoided the trouble and expense of obtaining a substitute, he obtained a generally more orderly and efficient performance of the contract, and avoided substantial penalties under his headcontract. In *Anangel v. Ishikawajima-Harima (No 2)* [1990] 2 Lloyd's Rep. 526, the ship-builder obtained the practical benefit of completing a sale to a key customer in a difficult market in order to encourage their other reluctant customers to follow suit ([1990] 2 Lloyd's Rep. 526, 544). And in *Musumeci v. Winadell*, a landlord who received part payment thereby improved his cash flow, creating immediate benefits. Thus, the benefits tend to flow from improved cash flow consequent upon the fact of payment. On the other hand, there is no such improvement in market position or cash flow to be found on the facts of *Re Selectmove*, where it is difficult to see how the Revenue would have obtained a practical benefit on the facts from part payment. Although part payment or instalment payments by debtors are often of practical benefit to creditors, they will not invariably be so: if there is no practical benefit, then *Foakes v. Beer* applies; but if there is such a practical benefit, then the situation is within one of the exceptions. On the facts of *Truck and Machinery Sales v. Marubeni Komatsu*, first, the creditor does not seem to have been in cash flow or market difficulties where the part payment would have constituted a practical benefit; second, no relevant part payment had in fact been made, so that those benefits could not have accrued; and, third, there would seem to have been no benefits accruing to the creditor from the mere fact of company's promise to make the part payment. There being no benefit to the creditor, the facts come properly within the *Foakes v. Beer* rule, rather

than *Williams v. Roffey*.

In sum, then, whilst it is well settled that the part payment of a debt provides no consideration for a promise not to enforce that debt (*Pinnel's Case*, *Foakes v. Beer*), if there is something more on the facts (such as payment in advance, or in a different place, or by some new means, or in a composition with creditors) it is also well settled that there is in such circumstances good consideration. If such matters are described as practical benefits, then *Williams v. Roffey* explains why there is good consideration in such circumstances. The question then becomes whether there is simply a promise to waive a debt (which *Pinnel's Case* properly holds confers no benefit and thus does not constitute consideration) or whether the part-payment confers a practical benefit upon the promisor (in which case it will constitute good consideration). Thus, there is no conflict between *Pinnel's Case* and *Williams v. Roffey*. It is submitted, therefore, that the Court of Appeal in *Re Selectmove* and Keane J. following them in *Truck and Machinery Sales v. Marubeni Komatsu* ought not to have preceived one. However, on the facts of the both such cases, there was no practical benefit, and thus no consideration; so the decision would not have been different had the practical benefit approach been applied.

Nevertheless, since, as pointed out above, the decision of Keane J. need not be seen as the last word in an Irish court on this topic, it is to be hoped that if the matter is once again to be litigated, an Irish court will consider whether the circumstances of part-payment amount to a practical benefit to the promisor, and can therefore constitute good consideration, rather than feel constrained by received misunderstanding of precedent not to do so.

Estoppel Since the decsion of Denning J. in *Central London Property Trust v. High Trees House* [1947] K.B. 130, in which he disinterred the judgment of Lord Cairns in *Hughes v. Metropolitan Railway Co* (1877) 2 App. Cas. 439 and deployed it as the basis of a doctrine by which a person who has foreseeably relied to his detriment upon the promise of another may be allowed to prevent that other from going back upon that promise, it has been accepted that if a person promises to waive a debt, and the debtor foreseeably detrimentally relies upon that promise, the promisor may be estopped from denying that promised waiver. Such were the facts of *High Trees* itself, where a landlord, promising to require only half-rent for the duration of the war, was not allowed to go back on that promise; but, once the war was over, the terms of the promise had been spent, and he was once again free to charge full rent. Thus, where consideration fails, estoppel is often reached for as an alternative reason to enforce a promise. It was thus in *Riordan v. Carroll* (above); and it has been argued that the doctrine would provide a more appropriate basis for the decision in *Williams v. Roffey* (see the 1995 Review, 195). Almost predictably, therefore, the applicant in also *Truck and Machinery Sales v. Marubeni Komatsu* sought to rely on *High Trees*. Keane J. cited it as authority for the

proposition that "where parties to a contract enter into a course of negotiations which has the effect of leading one of those parties to suppose that strict rights arising under the contract will not be enforced, or will be kept in suspense, the person who might otherwise have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have taken place between the parties" ([1996] 1 I.R. 12, 29) and pointed out that "a not dissimilar approach was adopted by the Supreme Court in *Webb v. Ireland* [1988] I.R. 353" (*id.*, for an analysis of the modern status of promissory estoppel in Irish law in the light; *inter alia*, of *Webb*, see O'Dell (1992) 14 *DULJ* (*ns*) 123; cf Coughlan (1993) 15 *D.U.L.J.* (*n.s.*) 188). However, as with a similar plea in *Riordan v. Carroll*, the estoppel argument failed on the facts: it could not be said that "the course of negotiations between the parties was such that it could have left any reasonable person under the impression that [the creditor was] waiving . . . [its] entitlement to the balance of the debt. On the contrary, the correspondence indicates that the repeated requests from [the creditor] for payment of its account were met with a succession of proposals from [the company] which, for the most part, were never implemented by the latter. To hold, at this stage, that [the creditor] should be estopped from taking legal proceedings to enforce its right would, in the light of the correspondence, be a negation of equity." ([1996] 1 I.R. 12, 30-31). *D&C Builders v. Rees* [1966] 2 Q.B. 617 is often presented as an example of inequity on the part of a plaintiff rendering it inequitable for the plaintiff to rely on the equitable doctrine of promissory estoppel; this aspect of the decision of Keane J. in *Truck and Machinery Sales v. Marubeni Komatsu* supplies another.

DEFENCES

Contributory negligence Contributory negligence is often seen to reduce liability in the tort of negligence. However, it can also reduce liability in contract (sections 2 and 34(1) of the Civil Liability Act, 1961; *Lyons v. Thomas* [1986] I.R. 666 (H.C., Murphy J.). This would seem to be sufficient to meet claims for negligent misstatement in tort and for damages in contract under the terms of section 45(1) of the Sale of Goods and Supply of Services 1980. In England, where there is no equivalent extension of the principle of contributory negligence in the Law Reform (Contributory Negligence) Act, 1945 beyond tort (see section 4 of the 1945 Act), it has however been held that a claim under section 2(1) of the Misrepresentation Act, 1967 – which is in the same terms as section 45(1) of the Irish 1980 Act – is nevertheless susceptible to a (partial) defence of contibutory negligence (*Gran Gelato v. Richcliff* [1992] Ch 560, 572-575). In light of such considerations, in *O'Donnell v. Truck and Machinery Sales* (High Court, June 7, 1996) (discussed in the Implied Terms

section, below, 199) Moriarty J. held that the defendant's liability in damages for negligent misrepresentation in tort, and under the terms of section 45 of the 1980 Act in contract, could "in principle" (p. 13) be reduced by the plaintiffs' contributory negligence, though he continued that he "would readily accept that in many commercial cases involving representations or contractual terms it may be deemed inappropriate".

He had found that O'Donnell were liable for such misrepresentations in relation to the sale of Volvo L150 mechanical shovels to TMS; TMS had requested that they be fitted with larger tyres, and one of O'Donnell's misrepresentations consisted in his failure to give an adequate warning about the unsuitability of these larger tyres. On the question whether TMS were guilty of contributory negligence in requesting the larger tyres, Moriarty J. held that since TMS "insisted on a relatively radical departure from the then standard specification for . . . commercial reasons, in the knowledge that it must to some degree impact negatively upon performance, albeit not to the extent of general sluggishness . . . some appropriate discounting on a basis of contributory negligence will be required" (p. 14) and was in fact awarded (pp. 18-19).

The National Lottery It was only a matter of time before the new national pastime, the National Lottery, generated litigation; the only surprise is that the first reported decision comes ten years after the National Lottery Act, 1986 installed the Lottery in the national psyche. That decision is *Carroll v. An Post National Lottery Company* [1996] 1 I.R. 443 (analysed further in this chapter in the sections on Exclusion Clauses (immediately below), Implied Terms (197-99), and Offer and Acceptance (208-10). In *Carroll*, if Costello P. had found that the failure by a vendor to process a tendered playslip amounted to a breach of contract by the Lottery company, he indicated (*obiter*) that, as the "plaintiff was bound by the term of the contract which incorporated the rule requiring examination of the ticket by a player after its receipt (Rule 4(5)(a)) and as this rule was breached" a slight degree of contributory neglience would have been established, amounting to 10% of the relevant liability. ([1996] 1 I.R. 443, 465-466).

EXCLUSION CLAUSES

Incorporation A contract may contain terms set out on its face, or it may incorporate a clause or clauses by reference to other documents. For example, in *Sweeney v. Mulcahy* [1993] I.L.R.M. 289, an architect, in respect of work to be done in 1984, had sent the plaintiff a copy of Royal Institute of Architects of Ireland Conditions of Engagement; in 1987, the same architect offered to carry out other work subject to the RIAI conditions. O'Hanlon J. held that "the agreement between the plaintiff and the defendant must be regarded as incorporating the RIAI Conditions . . . as this was expressly put forward by the defendant at the outset as the basis upon which she was prepared to act as architect in the matter . . ." ([1993] I.L.R.M. 289, 291). However, the cirsumstances are often more disputed – and thus scrutinised with more care by the courts – when the clause which it is sought to incorporate is one which excludes the liability of one party for injury or loss caused to the other. In such circumstances, "[i]f the exemption clause is set out, or referred to, in a document which is simply handed by one party to the other . . . it will be incorporated into the contract only if reasonable notice of its existence is given to the party adversely affected by it. . . . The party relying on the exemption clause need not show that he actually brought it to the notice of the other party, but only that he took reasonable steps to do so. The test is whether the former party took such steps – not whether the latter should, in the exercise of reasonable caution, have discovered or read the clause." (Treitel, *The Law of Contract* (Sweet & Maxwell, London, 9th ed, 1995), p. 198).

Many of the early leading cases on this involve plaintiffs suing railway companies. In such cases, railway tickets often had printed on their face an instruction like "See Back". On the back, there was often a statement to the effect that the ticket was issued subject to the conditions set out in the company's timetables or bye-laws; these conditions almost invariably contained exclusion clauses. If the plaintiff had read such conditions and then bought a ticket, he would of course be taken to have agreed to contract on the basis of such conditions. The difficulties began where a plaintiff had not read the conditions, and the question was whether the defendant railway company could nevertheless rely on any exclusion clauses contained in such conditions. In the early days of the railways in Ireland and England, it was held that the railway companies could rely on such clauses, first, because the plaintiff had the means to read the timetable or bye-law and thus had constructive notice (as in the early Irish case of *Johnson v. Great Souther and Western Railway Co* (1874) I.R. 9 C.L. 108), and then, in a change of focus from the position of the plaintiff to the actions of the defendant, because the steps taken by the defendant to bring the clause to the attention of the plaintiff were reasonable in the circumstances, as in the early and leading English case of *Parker v. South East Railway* (1877) 2 C.P.D. 416. In that case, the plaintiffs had deposited his bag at the defendant's cloak room, and received a ticket the front of which contained *inter alia* the words "see back" and the back of which contained an exclusion clause. The bag was lost or stolen, the plaintiff sued, and the defendant sought to rely on the exclusion clause. Mellish L.J. held that "if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper *knows* that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does

not read, and does not know what they are". ((1877) 2 C.P.D. 416, 421, *per* Mellish L.J. (emphasis added)). As to whether the "party receiving the paper" in fact "*knows* that the paper contains conditions", Mellish L.J. went on to hold that if what the railway company "do is sufficient to inform people in general that the ticket contains conditions", if what they do, in other words, is "reasonable notice that the writing contained conditions" (p. 423) such a party will be taken to have so known. Consequently, in what has become the classical statement of the relevant principles, Mellish L.J. summarised the relevant law in a series of directions for a jury:

> if the person receiving the ticket did not see or know that there was writing on the ticket, he is not bound by those conditions; . . .
>
> if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by those conditions . . .
>
> if he knew there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket to him in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions. (423).

On this analysis, whether the plaintiff is bound by the exclusion clause turns on whether he knew of its existence, which itself turns on first, whether he knew there was writing on the ticket, and second, whether the defendant had taken reasonable steps to bring to the attention of the plaintiff that the writing contained or referred to conditions such as the exclusion clause. In *Parker*, the requirement that the plaintiff know that there was writing on the ticket was important, since at the time, such a tickets was regarded "'as a mere voucher for the reciept of the package deposited, and a means of identifying him as the owner when he sought to reclaim it' and in that sense not containing any special condition to which his attention was to be drawn". (*Thompson v. London Midland & Scottish Railway* [1930] 1 K.B. 41, 49-50 *per* Lord Hanworth M.R.). Thus, where writing on a ticket or receipt was not usual, for a plaintiff to be bound by such writing, he must have known of it; but, once he knows of it, (even, it seems, if the plaintiff was aware only in a vague and general way that the ticket is issued subject to some conditions, as in *Taggant v. Northern Counties Railway* (1897) 31 I.L.T. 404n (Palles C.B.)) he is bound by any conditions of which he was aware or in respect of which the defendant had taken reasonable steps to bring to his attention.

Where writing on tickets and receipts was the exception, it was necessary that there be a finding of suh specific knowledge; but according as such writing became practically universal, courts almost came to regard it as a matter of

general knowledge that there would be such writing, and the cases turned instead simply on whether the defendant had taken reasonable steps to ensure that the fact that the writing contained conditions including exclusion clauses had been brought to the attention of the plaintiff. If Mellish L.J. in *Parker* provided a classical offer and acceptance analysis for the case in which the plaintiff did not have such general knowledge, the later decision of Swift J. in *Nunan v. Southern Rly Co* [1923] 2 KB 703 provided a similar analysis for the case in which the plaintiff did possess such general knowledge: "where a contract is made by the delivery . . . of a document in a common form stating the terms upon which the person delivering it will enter into the proposed contract, such a form constitutes the offer of the party who tenders it, and if the form is accepted without objection . . . [the acceptor] is as a general rule bound by its contents and his act amounts to an acceptance whether he reads the document or otherwise informs himself of its contents or not, and the conditions contained in the document are binding upon him" (47; approved in *Thompson v. London Midland & Scottish Railway* [1930] 1 K.B. 41, 47 *per* Lord Hanworth M.R.; see also *ibid.*, p. 51).

The position which emerges from the ticket cases – which seemed to have come to assume assume that a plaintiff is aware, as a matter of general knowledge, that tickets and receipts contain writing, – is that if the actions of the defendant in seeking to bring the clause to the attention of the plaintiff are reasonable, the clause will be effective. A particularly striking example of this is supplied by *Thompson v. London Midland & Scottish Railway* [1930] 1 K.B. 41, a niece and her father as agents for an illiterate aunt bought her a railway ticket. The ticket said "Excursion. For conditions see back"; the back referred on to the conditions in the company's timetables which contained an exclusion clause; and the Court of Appeal held that such steps constituted reasonable notice to the agents and thus to the aunt. Indeed, for them, it was the only question to be decided (see, e.g. at p. 52 *per* Lawrence L.J.; at p. 54 *per* Sankey L.J.). To similar effect on the question of reasonable notice are the decisions of the Supreme Court in *Early v. Great Southern Railway* [1940] I.R. 409 (*cp* the earlier *Stewart v. London and NW Rly Co* (1864) 33 L.J. (Ex.) 199) and Davitt P. in *Shea v. Great Southern Railway* [1944] Ir. Jur. Rep. 26. Of course, if the steps taken by the defendant are not reasonable, (as in *Ryan v. Great Southern & Western Railway* (1898) 32 I.L.T.R. 108, where the conditions could not have been learned without special enquiry) then the plaintiff will not be held to have notice of the terms and will not be bound by them.

The National Lottery has introduced many new kinds of tickets, playslips, cards and so on, many of which contain or refer to exclusion clauses. Whether the exclusion clauses referrred to on a playslip were properly incorporated was the key issue in the judgment of Costello P. in *Carroll v. An Post National Lottery Company* [1996] 1 I.R. 443, which in many ways provides a moden

example of the railway ticket cases discussed above. The plaintiff handed four Lotto playslips to a vendor, who processed three, one twice. He failed to process the fourth, which the plaintiff claimed contained the numbers which won the relevant Lotto draw. He claimed that this amounted, first, to negligence for which the Lottery company were vicariously liable, and, second, to a breach of contract by the Lottery company itself. On the plaintiff's claim in tort, Costello P. held that the vendor was an independent contractor for whose negligence the Lottery company was not vicariously liable. On the plaintiff's claim in contract, Costello P. held that no term, express or implied, had been breached. Had one been, the defendant claimed that the exclusion clauses in the contract provided them with a complete defence, and "as the parties may [have] wish[ed] to have [a] decision on all the issues that have been raised" Costello P. considered "whether or not the defendant company can rely on the exemption clauses . . ." ([1996] 1 I.R. 443, 459). Strictly speaking, therefore, Costello P.'s conclusions on this issue are *obiter*, but it arose as follows. On the front of the playslip, at the bottom, and printed in red in block captials, was the direction to the player: "See Instructions On Reverse Side". On the reverse side, under the heading "Rules and Regulations" it was provided that:

> tickets may not be sold to persons under the age of 18. The National Lottery, its agents or contractors, shall not be responsible for lost or stolen tickets. Players acknoledge that Lotto Agents are acting on their behalf in entering plays into the National Lottery computer system. The National Lottery accepts no responsibility for tickets cancelled in error or where the apparent numbers on a ticket disagree with the numbers on file at the central computer for that ticket.

Immediately following it, in bold type, it was provided that:

> By playing the game, a player agrees to abide by the National Lottery Rules and Regulations in effect at the time the play is made. A summary of these rules is available for inspection at your local Lotto Agent.

Those rules and regulations (as authorised by the Minister for Finance pursuant to the terms of section 28 of the National Lottery Act, 1986) in turn provided that:

> The National Lottery shall not in any circumstances be liable to a player for any acts or ommissions by the Lotto agents. (Rule 4(3)(f))

Applying the rules of offer and acceptance (below, 208-10) Costello P. held that the terms of the contract were "contained on the reverse side of the

playslip", that the clause in bold type "incorporated into their contract all terms of the rules authorised by the Minister", so that the "two exemption clauses . . . Rule 4(3)(f) of the incorporated rules and [the] 'playslip exemption' printed on the reverse of the playslip, are part of the parties' contractual terms" ([1996] 1 I.R. 443, 454). Thus, he found as a fact:

> that the plaintiff knew there were rules printed on the reverse side of the playslip and that he did not read them. This finding means that . . . the plaintiff is bound by them (see *Parker v. South Eastern Railway* (1877) 2 CPD 416, 423) and they are enforceable terms of the parties' contract. And this applies both to the term printed on the reverse side of the playslip by which a player accepted that the Lotto agents acted on their behalf in entering plays into the National Lottery computer system and also to the Rule 4(3)(f) incorporated into the contract by the term on the reverse side (see *Thompson v. London Midland and Scottish Railway Co* [1930] 1 K.B. 41). This means that, in principle, . . . [these terms] had contractual effect . . . and will be enforced by the courts. ([1996] 1 I.R. 443, 461; cp 456).

Costello P. qualified this in two ways:

> [First.] When it is generally known that tickets and other documents which contain documents are not read by those to whom they are given there is an implied understanding that there is no condition included in them which is unreasonable to the knowledge of the party tendering them . . . So, if it can be shown in this case that either of the exemption clauses on whic the defendant relies was unreasonable the plaintiff is not bound by it. [Second,] if the condition relied on by the party tendering the document is particularly onerous or unusual that party must show that it has been fairly and reasonably brought to the other party's attention. ([1996] 1 I.R. 443, 461; citing, for the second qualification, *Spurling v. Bradshaw* [1956] 3 All E.R. 121; *Thornton v. Shoe Lane Parking* [1971] 2 Q.B. 163; *Interfoto Picture Library v. Stilletto Visual Programmes* [1989] Q.B. 433).

There is much here to conjure with. For example, though the ticket cases proceed from a position that the the plaintiff must have known at least that there was writing on the relevant ticket, the fact that the existence of such writing on such tickets is almost a matter of common knowledge has meant that in many of the more recent analyses, courts and commentators have proceeded directly to the question whether the actions of the defendant were reasonable in bringing any conditions in the writing to the attention of the plaintiff. However, for Costello P. in *Carroll*, the "fact that the plaintiff knew there were

rules printed on the reverse side of the playslip . . . *means* that . . . the plaintiff is bound by them" (emphasis added, citing *Parker v. South Eastern Railway* (1877) 2 C.P.D. 416, 423); here, Costello P. has gone back to first principles and reaffirmed that the knowledge of the plaintiff is the base from which further analysis proceeds. Building upon *Parker*, many subsequent authorities establish the proposition that, where a plaintiff has not read the terms and conditions before entering into the contract, the defendant must have taken reasonable steps to bring the terms to the notice of the plaintiff before the plaintiff is bound by them. *Carroll* draws attention once more to the logically prior proposition that a plaintiff who knows that there are rules or conditions printed on the reverse side of a ticket or playslip is bound by them, whether or not the defendant took reasonable steps to bring them to his attention. In this respect, his decision provides a welcome and crucial reminder of this important matter. However, since the existence of such rules on such playslips is a matter of common knowledge, Costello P. could have reached the same conclusion on the basis of Swift J's analysis in *Nunan*. Indeed, – and notwithstanding the examples given in the judgment of Mellish L.J. in *Parker*, – it is now difficult to conceive of circumstances in which a plaintiff could successfully plead that he was not aware (whether as a matter of specific or of general knowldge) that a ticket did not contain some writing.

The terms in which Costello P. chose to express the first of his two qualifications above are, however, not free from difficulty. In the ticket cases, the courts required that reasonable steps be taken by the railway companies to bring conditions to the notice of the passanger; in the modern development of the ticket cases approved by Costello P., the courts required that onerous or unusual terms be specifically brought to the attention of the other party. In both such situations, a court is not striking down the clause because of its substance but because the process by which it was sought to be incorporated was not sufficient to bring it to the attention of the other party. In other words, the court is not so much concerned with the reasonableness or the substantive fairness of the term as with the reasonableness of the procedure by which the term became part of the contract (on the distinction between procedural and substantive unfairness, see, e.g., Leff "Unconscionability and the Code: The Emperor's New Clause" 117 *U.Pal. Rev.* 485 (1967); for an application of the distinction, see, e.g., *Hart v. O'Connor* [1985] A.C. 1000, 1018 *per* Lord Brightman; for various critiques of Leff's conception, see Craswell 60 *UChiLRev* 1 (1993); Epstein 18 *Journal of Law and Economics* 293 (1975); Schwartz 63 *Virginia L.Rev.* 1053 (1977)). Sometimes, statute adds a requirement of substantive fairness to one of procedural fairness; for example, section 40(1) of the Sale of Goods and Supply of Services Act, 1980, provides that ". . . any term of a contract implied by virtue of section 39 may be negatived or varied by an express term . . . except that where the recipient of the service deals as a consumer it must be shown that the express term is fair and reasonable and has been specifically brought to his attention." The express statutory requirement that, in certain circumstances, an exclusion clause be fair and reasonable, is a requirement of susbstantive fairness, additional to the requirement of procedural fairness that the clause be brought specifically to the consumer's attention. Absent such express statutory examples, the focus of the common law's protection is not on the substantive fairness of the term but upon the procedural fairness of the process by which it became a term of the contract.

On the other hand, there are some faint traces of substantive fairness in both *Parker* and *Thompson*. Thus, in the former, Bramwell L.J. was of the view that there should be "an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read" ((1877) 2 C.P.D. 416, 428), a view approved in the latter by Lord Hanworth MR ([1930] 1 K.B. 41, 50) and Lawrence L.J. ([1930] 1 K.B. 41, 53). Neverthekess, it is clear that Bramwell L.J.'s *dictum* is predicated not upon the unreasonableness of the term *per se*, but upon the failure of the party tendering it to insist upon it being read. In other words, the *dictum* requires that the unreasonable term be struck down, not because it was unreasonable, but because it was not brought to the attention of the other party. In this respect, therefore, it is no more than a precursor to Lord Denning's judgments in *Spurling* and *Thornton*, (and Bingham L.J.'s judgment in *Interfoto* folloing them) and is still consistent with notions of procedural rather than of substantive unfairness. Indeed, in *Carroll*, Costello P. specifically approved this line of authority (in his second qualification above), and, applying it, held that neither exclusion clause was particularly onerous or unusual, so that defendant Lottery company was "not required to give special notice of these particular terms to the purchasers" ([1996] 1 I.R. 445, 465).

Nevertheless, in *Carroll*, referring, it seems, to Bramwell L.J.'s *dictum* above, Costello P. also held that "if it can be shown in this case that either of the exemption clauses on which the defendant relies was unreasonable the plaintiff is not bound by it." To hold that if a clause is unreasonable, the other party is not bound by it, is to focus on the substantive fairness or reasonableness of the term rather than upon the reasonableness of the procedure by which the term became part of the contract. That Costello P. understood this to mean that an unreasonable exclusion clause is not binding seems to be borne out by his enquiry into whether the clauses were reasonable ([1996] 1 I.R. 443, 464), his conclusion that they were, and his view that his conclusions on the common law "*also* means that . . . there had been compliance with section 40 of the Act of 1980" ([1996] 1 I.R. 443, 465; emphasis added). This could only be so if, in Costello P.'s opinion, the common law analysis which he derived from the ticket cases contained a focus upon the substantive fairness of the terms, as the statutory analysis expressly requires.

Lord Denning, in another of his innovations – that, as a matter of law, an

exclusion clause could not exclude liability for a fundamental breach – made an attempt in this area to move from the traditional focus upon procedural fairness to a focus instead upon the substantive fairness or reasonableness of the term itself. This radical approach sat uncomfortably with the orthodox common law focus upon procedural fairness, until, in England, the Unfair Contract Terms Act 1977 gave the courts a more general power to police the substantive fairness of certain contractual terms, supplemented now by the statutory instrument (S.I. No. 3159 of 1994) implementing the *Unfair Contract Terms Directive*, and they felt able to abandon Lord Denning's approach in favour of the statutory regime. Whether Irish law has or should have likewise abandoned that approach is unclear and is the focus of the analysis in the1995 Review. For present purposes, it is sufficient to note that if Costello P. is properly to be taken as having said, in *Carroll*, that an unreasonable exclusion clause is not binding, then he seems to have gone even further than Lord Denning's doctrine of fundamental breach. This is not to say that such a development is unwelcome – indeed, there is much to be said for the development of doctrine of substantive fairness (see, e.g., Smith "In Defence of Substantive Fairness" (1996) 112 *L.Q.R.* 138, where, however, the analysis focusses on harmful abnormal prices as the index of substantive unfairness) – it is merely to point out that, not only is it *obiter*, but the ticket cases from which Costello P. purported to derive this development do not support it.

In any event, it is clear from Costello P.'s judgment that, whether one applied a test focussed upon whether the defendant had taken reasonable steps to bring the terms to the notice of the plaintiff (the traditional test), or a test focussed upon whether the terms were reasonable (as Costello P. seems to have done), the defendant Lottery Company could rely on the conditions on the reverse of the playslip. First, as to whether the defendant had taken such reasonable steps, Costello P. held that they had "done what was reasonably necessary to bring to the notice of the purchasers of Lotto tickets the exempting term relating to the status of the agent printed on the back of the playslip by drawing the attention of purchasers to 'instructions' on the rear of the playslip and by printing the exempting term in such a way as to make it readily accessible to, and understandable by, readers of the matter printed on the reverse side of the playslip." ([1996] 1 I.R. 445, 465). He had earlier, in a passage set out above, held that the exclusion clause comprised in Rule 4(3)(f) referred to but not set out on the playslip was also incorporated ([1996] 1 I.R. 443, 461; cp 456), approving *Thompson.* Indeed, given that Costello P. had no difficulty in finding that reference on the reverse of a playslip to a set of rules – set by and available from the Minister, but only a summary of which was available from the vendor – was sufficient notice, it may be questioned whether Treitel's speculation that "it seems probable that the steps taken [in *Thompson*] to incorporate the clause would not now be regarded as sufficient" (Treitel, p. 199) accurately reflects the position in Ireland. On the other hand, in *Ryan v. Great*

Southern & Western Railway (1898) 32 I.L.T.R. 108, where the conditions could not have been learned without special enquiry, Gisbon J. held that the "defendants failed to do what was reasonably sufficient to give the plaintiff notice of the restriction of liability" ((1898) 32 I.L.T.R. 108, 108); *quaere* whether the availability from the vendor of merely a summary of the rules, coupled with the need to enquire of the Lottery company or of the Minister for a full set of the rules, might not amount to such "special enquiry"? Furthermore, it would not be difficult for a clause in terms similar to Rule 4(3)(f), excluding any liability of Lottery company for any acts or ommissions by the vendor, to be added to the reverse of the playslip in the paragraph containing the agency exemption; perhaps, therefore, it would not be difficult to hold that this incorporation by reference does not amount to the taking of reasonable steps.

Second, as to whether the exclusion clauses were reasonable, Costello P. held that Rule 4(3)(f) exempting the Lottery company from vicarious liability for the negligence of vendors is "merely declaratory of the existing legal position, and is therefore reasonable." ([1996] 1 I.R. 445, 464). He further held that the term relating to agency printed on the reverse of the playslip "must be construed as meaning that the Lotto agent is acting s the *company's* agent (not the *player's* agent) when receiving playslips and entering them into the terminal. . . . [This] draws attention and gives effect to the rule by which the company is not liable for the agent's negligence. . . . [It] is declaratory of the existing legal position . . . [because] it gives recognition to the legal relationship arising from the rules authorised by the Minister." (*Id.*) Furthermore, both exemptions were reasonable protection from fraud, as "the absence of a protective exemption clause might make the whole National Lottery unworkable" (*Id.*) However, whilst the need to protect itself from fraud might make *some* exclusion clause reasonable, it does not necessarily make *every* exclusion clause reasonable; whether a particular clause is in fact reasonable would depend on the proper interpretation of its terms; and that interpretation would be informed by the standard rules for the interpretation of exclusion clauses, in particular, the *contra proferentem* rule. Thus, although the absence of an exclusion clause might make the Lottery unworkable, it is up to the Lottery company to draft with special care a clause which achieves that end, even when, consistently with the *contra proferentem* rule, the clause is read strictly against the interests of the Lottery company; it is not for a court to supply a broad interpretation to the clause to achieve an end which eluded those who drafted the clause. Thus, on the question of whether the need to protect itself from fraud justified the Lottery company inserting an exclusion, Costello P.'s analysis was incomplete; but, in the light of his finding that the clauses were declaratory of the general law, this is not fatal to his conclusion that the exclusion clauses were reasonable.

Of course, as we have seen, section 40 of the 1980 Act makes such an

enquiry necessary if a term has been implied by section 39 and the contract seeks to exclude liability for its breach. In *Carroll*, Costello P. held that contract between the plaintiff-player and the defendant-Lottery company was not one for the supply of a service, and so the section 39 and the section 40 enquiry did not arise; but he went on to hold that if it were a contract for the supply of a service, "the exemption printed on the playslip to the effect that the Lotto agent at the time was the player's agent was brought to the plaintiff's attention and as required by section 40 the implied term on which the plaintiff relies had been lawfully negatived in this case". ([1996] 1 I.R. 445, 459). Returning to that point in the aftermath of his conclusion that the exclusion clauses were reasonable at common law, Costello P. held that this "also means that . . . there had been compliance with section 40 of the Act of 1980 in that the term was fair and reasonable and had been specifically brought to the plaintiff's attention." ([1996] 1 I.R. 445, 465).

Finally, the question whether exclusion clauses form part of a contract is only half the battle; there must also be an enquiry as to whether the clauses are sufficiently precisely drafted to exclude the particular breach, and in this interpretation exercise, the clauses are construed strictly *contra proferentem.* Though the plaintiff submitted that the clauses were not free from doubt so that the *contra proferentem* rule was applicable; in particular, the plaintiff submitted that since the playslip exclusion clause contained an acknowledgement that the Lotto vendor was acting on behalf of the player in "entering plays into the National Lottery computer system", and the act of negligence ocurred "when the playslip was not being entered into the computer system" the exemption clause does not apply. ([1996] 1 I.R. 445, 460). Costello P. does not seem anywhere to have provided a direct reply to this submission, but even if this clause does not protect the defendant Lottery company, the other exclusion clause contained in Rule 4(3)(f) that the "National Lottery shall not in any circumstances be liable to a player for any acts or ommissions by the Lotto agents" would seem, on even the strictest *contra proferentem* reading, capable of excluding the Lottery company's liability to the plaintiff.

In the end, therefore, this aspect of *Carroll v. An Post National Lottery Co* came to this: whether the contract between the plaintiff and the defendant contain a clause or clauses which successfully exclude any liability which the defendant may bear towards to the plaintiff; and, though *obiter*, Costello P. held that it did.

GOOD FAITH

The principle of good faith has recetly begun to find a place in the sun in the common law (see e.g. O'Connor, *Good Faith in English Law* (Dartmouth, 1990) and Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law* (Clarendon Press, Oxford, 1995). This development has been especially marked in Australia; thus, in an important judgment in *Renard Constructions v. Minister for Public Works* (1992) 26 N.S.W.L.R. 234 (N.S.W. C.A.) 263-268; (1992) 33 Con. L.R. 72, 107-113, Priestly JA, building upon a paper by Lord Steyn (since published as "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy ?" (1991) Denning L.J. 131), derived a principle of good faith as a matter of Australian law.

The main modern attempt in England to develop and deploy a common law principle of good faith is to be found in the judgment of Bingham L.J. in the Court of Appeal in *Interfoto Picture Library v. Stilletto Visual Programmes* [1989] Q.B. 433 rationalising the requirement that onerous conditions be specifically brought to a contracting party's attention on that basis (on which issue, see now generally Harrison, *Good Fatih in Sales* (Sweet & Maxwell, London, 1997) esp chapters 2 and 18). Though the House of Lords seems, in the later case of *Walford v. Miles* [1992] 2 A.C. 128 (HL), to have treated a principle of good faith in negotiation as inconsistent with the common law, Colombo "Good Faith: The Law and Morality" (1993) Denning L.J. 23 argues that the ethic of individualism, upon which objections to good faith reasoning in the common law are founded, does not in fact preclude some limitations upon economic ruthlessness, allowing the choice in favour of a principle of good faith to be sqaurely faced. Again, Bingham LJ's approach in *Interfoto* also underlies the Unfair Contract Terms Directive (see the 1995 Review, 197-201), and there is now a substantial body of academic literature on the contours of the emerging principle of good faith in English law (see e.g. Brownsword (1994) 7 *JCL* 197; Brownsword (1996) 49(2) *C.L.P.* 11). There some are important traces of an incohate good faith principle in Irish law. Thus, in *Hickey v. Roches Stores (No. 1)* [1993] *Restitution Law Review* 196 (14 July 1976) Finlay P. held that a party who makes a profit from a bad faith breach of contract must make restitution of that profit to the innocent party. And in the 1993 Review, it was argued that the expansive Irish judicial deployment of the principle of good faith in insurance cases was such as to make it "clear that if the Irish judiciary were to discover a duty of good faith elsewhere or more generally in the law of contract, they would be able to deal with its complexities".

Another appreciable trace of good faith in the judgment of Costello P. in *Carroll v. An Post National Lottery Co.* [1996] 1 I.R. 445 seems to bring the development of such a generalised principle ever closer. In *Carroll*, the plaintiff had sued the Lottery company for a breach of contract, comprised in the failure of the vendor to process a playslip, and the defendant had sought to rely on certain exclusion clauses (immediately above). Approving the approach of Bingham L.J. in *Interfoto*, Costello P. explained, *obiter*, that whilst the refusal of the courts to permit a party to rely on unfair or onerous clauses was based on the principles of consent underlying the law of contract generally, it

was also based on "the application of the concept of fair dealing in the particular circumstances" ([1996] 1 I.R. 445, 463). Indeed, in *Carroll*, Costello P. held, *obiter* in respect of the rules to be derived from the antecedent ticket cases that "if it can be shown in this case that either of the exemption clauses on which the defendant relies was unreasonable the plaintiff is not bound by it" ([1996] 1 I.R. 443, 461). It was submitted above that this focus on the substantive fairness of the term is not justified by the authorities relied upon by Costello P.; but if it is nonetheless accepted, then, as an example of how Irish law is prepared to test the fairness of the terms of the contract, it may also be presented as another infiltration of good faith notions into Irish law. Given that the decision of Bingham L.J. was one of the matters relied upon by Lord Steyn in his paper (*supra*) and by Priestly J.A. in *Renard* in their spelling out of a common law principle of good faith, the decision of Costello P. in *Carroll* may be another important straw suggesting that the wind in Ireland is beginning to blow in favour of a principle of good faith, as it seems strongly now to do in Australia.

ILLEGALITY

Evolving flexibility The 1993 Review (184-189) and the 1995 Review (204-9) contained analyses of increasing judicial flexibility – under the guise of the 'public conscience' test – when faced with a plea that a claim fails for illegality. Perhaps an example of such flexibility, though not in that guise, is to be found in *Vogelaar v. Callaghan* [1996] 1 I.R. 88 (see Simons (1996) *Bar Review* 68). The parties had entered into a building contract containing terms designed to underpay VAT. A dispute arose, which was referred to arbitration, and the arbiter awarded the builder £ 13,270.10 inclusive of VAT. On an application to set aside the award (on which see, generally, Simons (1997) 15 *I.L.T.* (*n.s.*) 74) Barron J. acknowledged that the "courts will not stand over an illegal contract" but continued that "the arbitrator has made it clear that he did not regard the contract as being one to defraud the Revenue in respect of VAT. There is no reason for seeking to upset that decision upon the grounds that it could not have been come to. The arbitrator heard the evidence and was in a proper position to ascertain the truth". ([1996] 1 I.R. 88, 93; [1996] 2 I.L.R.M. 226, 231).

Barron J. has in the past taken a much less tolerant attitude to contracts to defraud the Revenue (see, e.g., *Hayden v. Quinn* [1994] E.L.R. 45; on which see Barry (1994) 12 *I.L.T.* (*ns*) 32, and the 1993 Review, pp. 188-189, 379, where *Hayden* is criticised as a step back to the days before the evolving judicial flexibility to illegality as a consequence of the public conscience test) and the courts in general have not been slow to refuse to entertain contractual

or restitutionary claims arising out of building contracts tainted by illegality (see, e.g., *Taylor v. Bhail* [1996] C.L.C. 377; on which see Rose (1996) 112 *LQR* 545). It would not therefore have been difficult for Barron J. to hold that the contract was void for illegality, thereby posing the question whether the arbitration clause could survive (see, e.g. *Harbour Insurance v. Kansa General* [1993] Q.B. 701 where that question was answered in the affirmative: see pp. 708-709 *per* Ralph Gibson L.J., 715-717 *per* Leggatt L.J., 722-726 *per* Hoffmann L.J., and, at first instance: [1992] 1 Lloyd's Rep 81, 93 *per* Steyn J.). Of course, the general trend is for the courts to hold that an arbitration clause in a contract terminated by a supervening event may survive (*Heyman v. Darwins* [1942] A.C. 356 (H.L.); *Parkarran v. M&P Construction* [1996] 1 I.R. 83; cf. *Superwood v. Sun Alliance* [1995] 3 I.R. 303, 377-381 *per* Blayney J., criticised in the 1995 Review, 231-2). Such decisions are often seen as evidence of strong policy of judicial support of the arbitration process; and whilst they deal with terminated valid contracts, it may be that decisions like *Harbour Insurance* and *dicta* like that of Barron J. above, allowing the issue of whether the contract is void for illegality to go to the arbitrator, simply illustrate that such a policy may be sufficiently strong to allow such matters as the prior validity of the contract to be referred to arbitration: for example, in *Harbour Insurance*, Hoffmann L.J. was of the view that it "is necessary to bear in mind the owerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule" ([1993] Q.B. 701, 724).

On the other hand, the essential point in *Heyman* is that in a contract which is terminated, certain clauses can continue to bind the parties; and it may be questioned whether the same logic can apply to a contract void *ab initio* (compare Mustill and Boyd *Commercial Arbitration* (2nd ed, Butterworths, London, 1989), p. 113). In such a case, there being no contract in the first place, there is no binding arbitration clause, and thus no jurisdiction for the arbitrator. Nevertheless, by allowing the issue to be adjudicated upon, the decision of Barron J. in *Vogelaar* – like the decision of the Court of Appeal in *Harbour Assurance* – may be indicative of a softening of judicial hostility to illegality, since, in its strictest form, the maxim *ex turpi causa non oritur actio* would necessarily render a contract void and – on the analysis immediately above – preclude any adjudication upon a dispute arising from it. By allowing an arbitrator to address that question, the implication is that the alleged illegality need not automatically have the effect of rendering the contract void.

An more express example of such flexibility is to be found in the judgment of Keane J. in *Carrigaline Community Television Broadcasting v. Minister for Transport* [1997] 1 I.L.R.M. 241. In the context of pleas based upon equitable principles such as laches and the maxim that he who comes to equity must come with clean hands ([1997] 1 I.L.R.M. 241, 292-293), Keane J. observed that there "is also a legal principle of more general appliction, which has been

invoked in these proceedings, *ex turpi causa non oritur actio.* This maxim recognises the reluctance of courts to allow thoe who have themselves repuidated the law to invoke the law when it seems expedient to them to do so". ([1997] 1 I.L.R.M. 241, 293). Note first that Keane J. described a judicial "*reluctance*", not a judicial refusal. In applying the equitable principles, Keane J. was prepared to grant some relief to the plaintiff, notwithstanding "significant delay" and "circumstances which render it arguably inequitable to grant the relief in the present case" ([1997] 1 I.L.R.M. 241, 299) since he was prepared to "have regard to the serious injustice that would result to the plaintiffs if they were refused relief in the circumstances where, as I have found, they have been unjustifiably deprived by the Minister of their constitutional right to a fair and impartial assessment of their application." ([1997] 1 I.L.R.M. 241, 300). And, in a similarly flexible application of the maxim *ex turpi causa non oritur actio*, although the plaintiffs' rebroadcasting activities were in breach of the law, Keane J. held that:

> A court required to uphold the law cannot condone or excuse that conduct. Nor should it seek to punish the offender by depriving him of his constitutional rights. . . . The salutory *ex turpi causa* maxim and the equitable principle that he who comes to equity must come with clean hands retain their ancient vigour in the law. But they should not be allowed to work a greater injustice by depriving citizens of the right to natural justice and fair procedures. ([1997] 1 I.L.R.M. 241, 300)

If this approach to *ex turpi causa* holds good in the context of contracts, and there is every reason why it should, then, rather than simply holding that a claim fails *in limine* because the contract is tainted by illegality, a court will consider whether dismissing a plaintiff's claim would work a greater injustice than entertaining a cliam tainted by illegality. This is precisely the enquiry mandated by the public conscience test, and it is submitted that this decision of Keane J. ought to be seen as another Irish example of its application.

Contracts prejudical to the constitutionally protected special position of marriage Public policy, rendering contracts unenforceable, is at best a vague and amorphous conept, at worst a dangerous and destabilising legal doctrine. Indeed, in *Fender v. St John Mildmay* [1938] A.C. 1, Lord Atkin, after a thorough citation of authorities counselling caution in the use of such public policy, stated that "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend on the idiosyncratic inferences of a few judicial minds. In popular language . . . the contract should be given the benefit of the doubt". ([1938] A.C. 1, 12). Even more trenchantly, Lord Wright in the same case expressly disavowed the proposition that "a judge has peculiar powers in a question of public policy in acting upon his individual views of predilection and can on these grounds refuse to enforce a contract . . .". ([1938] A.C. 1, 40).

On the other hand, the common law has always regarded with suspicion contracts tending to encourage immorality, so that, for example, a payment "to a mistress for past or future habitation . . . [is given] for no consideration that law recognise[s]" (*Banque Belge pour l'Etranger v. Hambrouck* [1921] 1 KB 321 *per* Scrutton L.J.); though it now seems that where a promise by a man to pay money to a woman with whom he had "illicitly cohabited in the past is not contrary to public policy since it does not *promote* immorality. It is simply void because the consideration for it is past, and it will be valid if made in a deed". (Treitel, pp. 402-403). Furthermore, in this context, courts in other jurisdictions have been prepared to take a flexible, evolving view of immorality (e.g. Clark, *Contract Law in Ireland* (3rd ed, Sweet & Maxwell, London, 1992), pp. 298-230). Such a flexible view of whether a contract in fact is contrary to public policy is reflexive on this prior issue of the flexibility on the issue of whether, although the contract is contrary to public policy, it would nevertheless be enforced, seen in the public conscience test referred to above.

The common law has always regarded with equal suspicion contracts prejudicial to the institution of marriage. Thus, "a contract between husband and wife, made *during cohabitation*, for a future as distinguished from a present separation, is void" (*McMahon v. McMahon* [1913] 1 I.R. 428, 434 *per* Palles C.B., emphasis in original). Further, "an agreement in an ante-nuptial settlement . . . by which the husband makes provision for the wife in the event of their ceasing to cohabit, is void by reason of its being opposed to public policy". ([1913] 1 I.R. 428, 446 *per* Holmes L.J.). The Court of Appeal did accept, however, that an agreement between a *separated* couple dealing with separation was not contrary to public policy (see e.g. [1913] 1 I.R. 428, 447 *per* Holmes L.J.; 440-441 *per* Palles C.B. following, on this point, *Wilson v. Wilson* (1848) 1 H.L.C. 538, and followed in *Courtney v. Courtney* [1923] 2 I.R. 31, in turn followed in *K v. K* (High Court, February 12, 1988, MacKenzie J.); see also *Hyman v. Hyman* [1929] A.C. 601, 625 *per* Lord Atkin; and *Fender v. St John-Mildmay* [1938] A.C. 1, 18-21 *per* Lord Atkin; 43-44 *per* Lord Wright). In *McMahon* itself, the relevant contract, between separated parties seeking to become reconciled to one another again, was intended to regulate any future separation. The Court of Appeal held that such a contract encouraged the parties to reconcile, and, since "arrival at an agreement for a reconciliation is a matter which the law ought to encourage"([1913] 1 I.R. 428, 444 *per* Palles C.B.; cp. at 447 *per* Holmes L.J.) the contract tended "more to reconciliation and future cohabitation . . . than to future separation" (*id*), the contract was not, therefore, contrary to public policy.

The effect of Article 41 of the Constitution upon these two heads of public policy seems to have attracted little analysis, but it seems clear that it has also

generated a third, related but distinct, head of public policy, and may therefore be the fount for other such heads. As to that head generated by Article 41, before the amendment of section 3 subsection 2 of that article, the constitutional prohibition upon divorce it contained gave rise to a public policy leaning heavily against divorce. In particular, courts looked with disfavour upon applications to court which were consequent upon divorce proceedings. Thus, in *Mayo-Perrott v. Mayo-Perrott* [1958] I.R. 336, the Supreme Court denied an application for the costs of a foreign divorce, Kingsmill-Moore J. holding that it could not "be doubted that the public policy of this country, as reflected in the Constitution, does not favour divorce a vinculo and though the law may recognise the change of status effected by it as an accomplished fact, it would fail to carry out public policy if, by a decree of its own Courts, it gave assistance to the process of divorce by entertaining a suit for the costs of such proceedings."([1958] I.R. 336, 350). Again, in *Dalton v. Dalton* ([1982] I.L.R.M. 418), on an application to have made a rule of court a separation agreement which contained a clause by which the parties agreed "to obtain a Decree of Divorce a Vinculo . . .", O'Hanlon J. held that "considerations of public policy require that the Court shall not lend its support to an agreement providing for the obtaining of a divorce a vinculo by a husband and wife . . .". ([1981] I.L.R.M. 418, 419). The removal of the prohibition upon divorce, and its replacement with a constititutional right to divorce, must have spelt the demise of this particular head of public policy. The lesson to be drawn, though, is that the Constitution in general, and Article 41 in particular, can generate heads of public policy capable of precluding a court's aid in enforcing contracts. However, in this context, clarity of analysis requires that each of these three heads of public policy (those which render void, first, contracts prejudicial to the institution of marriage, second, contracts tending to promote immorality, and, third, contracts contrary to any special public policy generated by Article 41) be kept clearly separate.

An illustration of just such constitutional potency seems to have been provided by the decision of Kelly J. in *Ennis v. Butterly* [1996] 1 I.R. 426; [1997] 1 I.L.R.M. 28. The parties had separated from their respective spouses, and were involved in a relationship between 1984 and 1995, during most of which time they lived together as a family. The plaintiff claimed that she and the defendant had entered into an agreeement to marry and an agreement to cohabit as a couple until the marriage was possible, and sought damages for the defendant's breach of this contract. "In consideration of that agreement, the plaintiff discontinued her business and lived as a full-time housewife and homemaker". ([1996] 1 I.R. 426, 435; [1997] 1 I.L.R.M. 28, 36). The defendant applied to have the claim struck out.

As to the first agreement, Kelly J. held that section 2 of the Family Law Act, 1981 "which abolished the action for breach of promise of marriage . . . is fatal to [that] claim . . . Indeed, even before the enactment of the Act of 1981, at common law it had been held in England that a promise by a married person to marry one who knew that person was already married was unenforceable as being against public policy . . .". ([1996] 1 I.R. 426, 436; [1997] 1 I.L.R.M. 28, 36). As to the second, Kelly J. held that "the contract contended for here is unenforceable as a matter of public policy. . . . it is clearly an attempt to enforce a contract the consideration for which is wifely services being rendered on the part of a mistress. Such contracts were always regarded as illegal and unenforceable and remain so." ([1996] 1 I.R. 426, 439; [1997] 1 I.L.R.M. 28, 39). Thus, since the contract was contrary to public policy, the claim for breach would necessarily fail, and Kelly J. struck out that claim. However, the plaintiff also made a claim in tort in misrepresentation, but since Kelly J. could not conclude that that claim must inevitably fail, he refused to strike that out, and allowed it to proceed, but only in so far as it did not arise out of, or amount to the indirect enforcement of, the unenforceable contract. The issues arising from this case are also discussed in the Practice and Procedure chapter, below, 487. The analysis here is confined to the public policy issues, upon which there seem to be two distinct holdings in Kelly J's judgment. For him, public policy rendered necessarily unenforceable, first, a promise by a married person to marry one who knew that person was already married, and, second, an agreement by two separated people to live together as a family pending possible marriage.

As to the first, rendering unenforceable a promise to marry by a person already married, it does not appear from his judgment either that it was argued to him or that he considered that that public policy may have evolved beyond what was to be found in the cases which he cited, namely *Spiers v. Hunt* [1908] 1 K.B. 720, *Wilson v. Carnley* [1908] 1 K.B.729, and *Siveyer v. Allison* [1935] 2 K.B. 403. However, on a later issue, Kelly J. himself carried out just such an exercise: in response to an argument based on public policy embodied in an English case decided in 1846, Kelly J. observed that "[w]hatever may have been the public policy in England in 1846 . . . this case must be decided upon the public policy of this State". ([1996] 1 I.R. 426, 438; [1997] 1 I.L.R.M. 28, 38). In *Spiers v. Hunt*, a man promised to marry another woman upon the death of his wife, but the promise was held illegal as tending to break up a marriage, to encourage immorality and even lead to the crime of bigamy. In *Siveyer v. Allison*, (followed on this point in *Siveyer v. Allison*) a man's promise to marry another woman because he believed himself entitled to have his marriage annulled was likewise unenforceable. With respect, if the promise is to marry when the spouse is dead, none of these reasons holds; and if the promise is to marry upon annullment, the marriage has never in law existed, and again none of these reasons holds. These cases received very short shrift at the hands of the majority in *Fender v. St John Mildmay* [1938] A.C. 1 (see e.g. at pp. 15-16 *per* Lord Atkin; at pp. 46-50 *per* Lord Wright); Lord Atkin nevertheless accepted that "there is real substance in the objection that such a

promise tends to produce conduct which violates the solemn obligations of married life" (*id*, p. 16). With respect, whilst that may hold in respect of a valid marriage (as in *Spiers v. Hunt*), it can have no relevance to a situation where the marriage was void (as it was thought to have been in *Wilson v. Carnley*). Instead, it is suggested that the key element of these cases should be understood to be the fact that the promisee knew that there was no prospect that the promisor, because already married and thus required to be loyal to another, could carry out the promise. In the light of the major change effected to the social and legal landscape by the progressive liberalisation of divorce in England (see, e.g., Eeekelar. *Regulating Divorce* (Oxford, 1991); Stone *Road to Divorce. England 1530-1987* (Oxford, 1995)) it would not have been surprising if the public policy inherent in those three cases were to have been revised. Under the more liberal divorce regime now obtaining, the promisor would be in a position to obtain a divorce and then marry the promisee; in which case, the disability under which the promisor acted in the above cases – the lack of prospect, to the knowledge of the promisee, that the promisor, because already married, could carry out the promise, – is removed, and, on their logic, there would no longer be a bar to the enforcement of the promise.

For example, the House of Lords in *Fender v. St John Mildmay* [1938] A.C. 1 held that where a man had already obtained a decree *nisi* of divorce, and was awaiting the decree absolute, and in that interim made promises to marry, such promises were not contrary to public policy, and he could properly be held liable for their breach. Though authority prior to *Fender* suggested that a promise by a party seeking a divorce would not be enforceable (*Skipp v. Kelly* (1926) 42 T.L.R. 258, in which the divorce was described as "pending" (259) and in which the point seems to have been assumed rather than decided) the logic of Lord Atkin in *Fender* seems to apply to allow the enforceability of such agreements (though cf per Lord Thankerton at [1938] A.C. 1, 23). The abolition of the action for breach of promise to marry by section 1 of the Law Reform (Miscellaneous Provisions) Act 1970 in England meant that this issue has not been directly litigated. However, section 2 of the Act (cp section 5 of Ireland's Family Law Act 1980) contemplates some issues where the agreement is relevant, and in *Shaw v. Fitzgearld* [1992] 1 FLR 357, an already married man who promised to marry the woman upon divorce from his wife was successfully sued under section 2. In other words, public policy did not now lean against such a contract, and, since it could be relied upon in an action on foot of section 2, presumably, it would therefore have been enforceable in the absence of section 1. Thus, it seems that the three cases upon which Kelly J. relied probably no longer represent good law in England; consequently, the availability of divorce at English law has worked a change in this aspect of public policy, so that it does not now automatically render unenforceable a promise by one who is married to marry another.

As to whether Irish law has also made a similar move, for so long as marriage was constitutionally indissoluble, there would seem to be little space for such an evolution. On the other hand, both parties to *Ennis v. Butterly* were legally separated; in this respect, their duties in respect of their existing marriage were very similar to those of the husband in *Fender* between the decrees *nisi* and absolute: if his promise to marry has no impact upon his existing matrimonial obligations or upon the public interest (see [1938] A.C. 1, 16-17, 21 *per* Lord Atkin), neither should the respondent's promise in *Ennis*. Indeed, in *Fender*, Lord Atkin gave the following example: "If a respectable man whose wife has fled with the lodger leaving the children in his charge engages himself to another respectable person to marry her as soon as he is free, no public interests suffer. In my opinion they benefit, Similarly, in the converse case of a wife whose husband is living with another woman of whose child he is the father." Though reflecting a little of its time, nonetheless, this passage clearly illustrates that, as a matter of common law, a promise to marry by persons in the circumstances of those party to *Ennis v. Butterly* would not have been contrary to English public policy. Since that reasoning is predicated upon the non-existence in reality of the promisor's obligations to his or her formal spouse, and since that is the consequence of a judicial separation as a matter of Irish law, that logic would seem to be equally applicable at Irish law, notwithstanding the former terms of Article 41.3.2°.

However, as a matter of Irish law, marriage is no longer constitutionally indissoluble. Judgment was given in *Ennis v. Butterly* on July 26, 1996; more than seven months before, by referendum held on November 24, 1995, a majority of the People voted to amend the Constitution to provide for the introduction of a divorce jurisdiction, and, after the Supreme Court dismissed the challenge to the referendum in *Hanafin v. Ireland* (Supreme Court, June 12, 1996) the resulting amendment was enacted by the Fifteenth Amendment of the Constitution Act 1996. In *R.C. v. CC* [1997] 1 I.L.R.M. 401 Barron J. confirmed that the section thereby added in effect created a constitutional right to divorce. The exercise of that right is now regulated by the terms of the Family Law (Divorce) Act, 1996, which was signed by the President on November 27, 1996 and came into force on February 27, 1997 (on which, see generally, Walls and Bergin *The Law of Divorce in Ireland* (Jordans, Bristol, 1997), and the Family Law chapter, below, 352). However much the logic in *Wilson v. Carnley* [1908] 1 K.B. 729, *Spiers v. Hunt* [1908] 1 K.B. 720 and *Siveyer v. Allison* [1935] 2 K.B. 403 might have been applicable as a matter of Irish law prior to this amendment to the Constitution, on the date upon which Kelly J. gave judgment, the constitutional basis upon which Kelly J. purported to rely had been radically altered by the recognition of a constitutional right to divorce; the relevant public policy must likewise have altered, and yet the judgment of Kelly J. is bereft of discussion of this point. It is at least arguable that this consequential shift in the focus of public policy had swept away the logic underlying *Wilson*, *Spiers* and *Hunt*, and laid the groundwork for the

acceptance of *Fender* in Irish law.

Consequently, at Irish law, there should no longer be any justification for regarding as different the positions of unmarried and married promisors, since both could be in a position to fulfill the terms of the promise. Thus, if a batchelor who promised to marry a woman would have been liable for his breach of that promise, a man on the point of imminent divorce who promised to marry a woman would equally have been liable. However, any such argument has, in any event, been rendered moot by the terms of section 2 of the Family Law Act, 1981 in Ireland (and of section 1 of the Law Reform (Miscellaneous Provisions) Act 1970 in England), which abolished the action for breach of promise to marry, and the decision of Kelly J. on this point is sustainable on that ground. Nevertheless, the point is still of importance, since it illustrates the need for caution in matters of evolving public policy, in particular, that matters which were contrary to public policy in a byegone age may no longer be so.

As to the second aspect of public policy relied upon by Kelly J., rendering unenforceable an agreement by two separated people to live together as a family pending possible marriage, an argument similar to the above may also be possible, and, in this context, such an argument would be crucial, given that there is no statutory enactment determinative of the issue. Kelly J. began by observing that in England no obligation arose as a matter of law by which the defendant in this case would be obliged to support the plaintiff, and held that the law in Ireland "is no different and, if anything, would lean more strongly against such a concept having regard to the special position of marriage under the Constitution." ([1996] 1 I.R. 426, 438; [1997] 1 I.L.R.M. 28, 38). True this may be, but, with respect, it is irrelevant to the plaintiff's claim: she did not claim that an obligation on the defendant to support her arose as a matter of law, rather she claimed instead that by contract he voluntarily agreed to do so. It is of the essence of a contract that one agrees to assume obligations towards the other party or parties to the contract that would not otherwise arise. The mere fact that the law does not oblige the contractor to discharge the obligation is nothing to point, except in so far as its absence may provide the very reason why the contract, any contract, is entered into in the first place! Thus, the absence of an obligation arising by operation of law upon the defendant is irrelevant to the question whether he agreed to assume such an obligation, and to the question directly at issue in the case of whether the law ought to enforce such a contract. (Therefore, the dicussion of such an obligation imposed by the law upon one of the former cohabitees to make payments similar to maintenance to the other, desribed (*quaere*, perjoratively ?) as "palimony" was entirely irrelevant to the matter in hand, and was therefore *obiter.* Furthermore, if the discussion below as the proper understanding of Article 41 is correct, then Kelly J.'s *obiter* conclusions on this issue are, as shown below, insecure at best).

That matter to one side, the *ratio* of Kelly J.'s decision is to be found in his analysis of the question whether an agreement by two separated people to live together as a family pending possible marriage is contrary to public policy. That was to be found:

> in the first instance in the Constitution and, in particular, Article 41 thereof. In that Article, the State recognises the family as the natural primary and fundamental unit group of society and as a moral institution possessing inalienable and imprescriptible right antecedent and superior to all positive law. The State pledges itsef to guard with special care the institution of marriage, on which the family is founded and to protect it against attack. . . . Given the special place of marriage and the family under Irish law, it appears to me that the public policy of this state ordains that non-marital cohabitation does not and cannot have the same constitutional status as marriage. Moreover, the State has pledged to guard with special care the institution of marriage. But does this mean that agreements, the consideration for which is cohabitation, are incapable of being enforced ? In my view it does since otherwise the pledge on the part of the State, of which this Court is one organ, to guard with special care the institution of marriage would be much diluted. To permit an express cohabitation contract . . . to be enforced would be to give it a similar status in law as a marriage contract. It did not have such a status prior to the coming into effect of the Constitution, rather such contracts were regarded as illegal and unenforceable as a matter of public policy. Far from enhancing the position at law of such contracts the Constitution requires marriage to be guarded with special care. In my view, this reinforces the existing common law doctrines concerning the non-enforceability of cohabitation contracts. I am therefore of opinion that, as a matter of public policy, such agreements cannot be enforced. ([1996] 1 I.R. 426, 438-439; [1997] 1 I.L.R.M. 28, 38-39).

In this passage, Kelly J. seems to have deployed three distinct aspects of public policy: two at common law which render unenforceable, first, contracts tending to promote immorality, and, second, contracts prejudicial to the institution of marriage, and a third derived from the constitution which seems to be a stronger version of the second. As pointed out above, they are analytically distinct heads of public policy, treated separately in the books (e.g. Clark, p. 298 (immorality), p. 325 (marriage)). Each such matter, to the extent that it figures in the decision of Kelly J. in *Ennis v. Butterly* will therefore be analysed separately.

As to the first such aspect of public policy, that a cohabitation contract is void for tending to promote immoratility, though at one time the law regarded a promise between a man and woman to live together without being married

as immoral (e.g. *Fender v. St John Mildmay* [1938] A.C. 1, 42 *per* Lord Wright; and see generally Poulter (1974) 124 *NLJ* 999 and 1034), it is submitted that public policy has evolved well beyond a point where it would today have such an effect. For example, Clark (p. 298) quotes Sable J. in *Andrews v. Parker* [1973] Qd. R. 93, 104:

Are the actions of people today to be judged in the light of the standards of the last century ? As counsel for the plaintiff said, cases discussing what was then by community standards sexual immorality appear to have been decided in the days when for the sake of decency the legs of tables wore drapes . . . I do not accept that immoral today means precisely what it did in the days of *Pearse v. Brooks* [(1866) 1 Ex 213 in which the owner could not sue for damage to a carriage hired by a prostitute for her work]. I am, I believe, entitled to look at the word under modern social standards.

Following this, an agreement between cohabiting partners that one would buy the other's interest in the house if the relationship failed, was enforced in the New South Wales case of *Seidler v. Schallhofer* [1982] 2 N.S.W.L.R. 80, (see Clark, p. 299). Indeed, in *Fender v. St John Mildmay*, on an application to enforce a promise to marry made by a man after he had obtained a decree *nisi* of divorce, but before it was made absolute, Lord Atkin dismissed "with some indignation the idea that public policy is involved on the ground that such promises tend to immorality"([1938] A.C. 1, 17).

If the fact that a legal or equitable right derived from cohabitation meant that it was against public policy for the courts to lend their aid in the enforcement of those rights, it would mean, for example, that the courts would not only refuse to enforce such contracts, but also refuse to give effect to property rights arising from resulting or constructive trusts as between the parties to such a relationship, since that relationship would be the basis upon which the trust would be raised. However, in *Tinsley v. Milligan* [1994] 1 A.C. 340 (H.L.), the parties were cohabiting lesbians, the plaintiff sought a resulting trust, and it was nowhere objected that since the relationship which gave rise to the trust was immoral, public policy would for that reason preclude the courts from hearing the application (which was in the event successful). If the courts will give effect to such property rights, there is no reason why they should not also give effect to contractual ones arising from such a relationship. Thus, Treitel concludes that the "traditional common law approach to immoral contracts is progressively being abandonded in cases concerning the arrangements between person who live together in a common household as husband and wife without being married. . . . [illustrations of this suggest] that the old common law rule governing immoral contracts will in future be confined to meretricious relationships. Where domestic arrangements between parties to the present group of stable relationships satisfy the requirement of contractual intention, they should not be struck down on grounds of public policy." (Treitel, p. 404; cp Pawlowski (1996) 146 *N.L.J.* 1125; see generally, Barton, *Cohabitation Contracts* (Aldershot, 1985); Oliver, *Cohabitation. The Legal Implications* (Bicester, 1987); Lush, *Cohabitation and Co-Ownership Precedents* (Jordans, Bristol, 1995): there is a definite easing of the auhtors' perceptions of the role of public policy in invalidating such contracts over the period covered by these books). In other words, cohabitiation in a stable relationship is not for that reason to be regarded as meretricious; something more is required.

The 1996 Census shows that more than 31,00 family units consist of cohabiting couples; indeed, since many of the people involved are aged over 30, the census concludes that cohabitation is a permanent union rather than just a precursor to marriage (see the *Irish Times*, July 26, 1997, p. 5). In many respects, Irish law seems already to have accommodated itself to this important social reality. For example, in *W. O'R. v. E.H.* [1996] 2 I.R. 248, (see the Family Law chapter, below, 368) Murphy J. observed that "[f]or better or for worse, it is clearly the fact that long term relationships having many of the characteristics of a family based on marriage have become commonplace. Relationships which would have been the cause of grave concern a generation ago are now widely accepted." ([1996] 2 I.R. 248, 286). Consequently, Hamilton C.J. held, *inter alia*, that "where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a *de facto* family as opposed to a constitutional family, then the father, on application to the Court under section 6A of the Guardianship of Infants Act 1964 [to be appointed guardian of such children], has extensive rights of interest and concern." ([1996] 2 I.R. 248, 269-270). Such judicial acceptance of the social reality of non-marital *de facto* long term relationships, such judicial acceptance of the social reality of cohabitation as an alternative to marriage, signals strongly that there is now no justification for Irish law in condemning such relationships as immoral and thus condemning contracts between partners to such relationships as contrary to public policy. (On similar social and legal evolutions in this context, see, generally, Eekelaar and Katz (eds.), *Marriage and Cohabitation in Contemporary Societies* (Butterworths, London, 1980)).

It is submitted, therefore, that far from contemplating, in Kelly J.'s words, "*existing* common law doctrines concerning the non-enforceability of cohabitation contracts" (emphasis added) the common law (unencumbered by constitutional considerations) does in fact contemplate the enforceability of cohabitation agreements. On this approach, the agreement in *Ennis v. Butterly* would not be regarded as meretricious simply because of the cohabitation. Thus, here, as in the context of the discussion above of the policy rendering unenforceable a promise to marry by a person already married, public policy has been evolving to point where matters which were contrary to public policy in a byegone age are so no longer, and had Kelly J. considered such evolution, his decision on this aspect of public policy could, and it is submitted, should, have gone the other way. However, there are also in the above extract strong

elements of the public policy rendering unenforceable contracts prejudicial to the institution of marriage.

Turning, then, to this aspect of public policy, the key to Kelly J.'s reasoning is his view that to "permit an express cohabitation contract . . . to be enforced would be to give it a similar status in law as a marriage contract" which cannot be done, since this would "much dilute[]" the constitutional "pledge on the part of the State, of which this Court is one organ, to guard with special care the institution of marriage." Although the context of these remarks was as to the enforceability of an agreement by two separated people to live together as a family pending possible marriage, this analysis is clearly intended to apply to any cohabitation contract, and thus to an agreement by two separated people simply to live together, or indeed, an agreement by two unmarried people to live together. Further, his analysis seems apt to catch not just an agreement between such people to live together, but also any agreement made by such people in that context, such as an agreement relating to property, or to payments equivalent to maintenance in the event of the relationship breaking down. If Kelly J.'s reasoning from the special constitutional protection of marriage holds, then Irish public policy does properly render such contracts unenforceable.

It is submitted, however, that Kelly J.'s reasoning does not hold. For example, if it were based simply upon the common law public policy against contracts prejudicial to the institution of marriage, it would be vulnerable to the objections set out above that such a policy has undergone an evolution in parallel with social developments. Crucially Kelly J.'s reasoning sidesteps this and relies instead and exclusively upon the special constitutional protection of marriage secured by Article 41.

As a threshold issue, whilst it is true that before its amendment, Article 41 could be said to describe a coherent philosophy of a society the fundamental unit group of which is the family founded upon indissoluble marraige, nonetheless, the subsequent amendment of Article 41.3.2° to allow for a constitutional right to divorce has at least substantially altered that philosphy. Indeed, it may be queried whether, in the aftermath of the amendment, Article 41 really contains a unitary and coherent intelligbile public policy.

More generally, and absent *Ennis v. Butterly*, the effect of Article 41 seems to be that if the State were to secure to married couples or families some rights benefits entitlements or protections it was not extending to couples or familes not founded upon marriage, such an action would be constitutionally permissibe; but it would not require that securing such rights benefits entitlements or protections to couples or familes not founded upon marriage be deemed unconstitutional. For example, in *WO'R v. EH* (above) although the majority of the court held that such interests are materially different from the constitutional rights flowing from Article 41 which would accrue to a natural father married to the child's mother, the Supreme Court did not see the existence of such Article 41 rights as necessarily excluding the extensive rights of interest and concern which a natural father has for his child. Thus, whilst the law cannot provide a more favourable tax regime to cohabiting couples than to married couples (*Murphy v. AG* [1982] I.R. 241), and Article 41 does not require that cohabiting couples be subject to same tax or social welfare regimes as marred couples (e.g. *Lowth v. Minister for Social Welfare* [1994] 1 I.L.R.M. 378, see the 1993 Review, p. 523), the conventional understanding of that article (for example by analogy with *W. O'R. v. E.H.*) would not preclude a similar tax or social welfare regime being applied to both married and cohabiting couples.

On the other hand, to reason that anything that gives to a relationship "a similar status in law as a marriage" is contrary to the constitution, as Kelly J. seems to have done in *Ennis v. Butterly*, would amount to holding that the law is constitutionally not allowed to treat a cohabiting couple on the same basis as a married couple. In other words, the conventional constitutional position that it is permissible not to treat them the same becomes transmuted into one in which it is required that they be treated differently. This seems to countenance a constitutional mandate to discriminate against cohabiting couples. Quite clearly, this is inconsistent with the established approach to Article 41 outlined in the previous paragraph, and ought therefore to be rejected. Thus, it is simply not the case that anything that gives to a relationship "a similar status in law as a marriage" is contrary to the constitution. If it were, on a very practical level, it would have disturbing implications for vast areas of relatively settled legal and equitable doctrine, to say nothing of the type of statutory entitlements referred to in the previous paragraph.

For example, if Kelly J.'s reasoning were to survive, then, to the extent that the law already provides that cohabiting couples have the same treatment as married couples, such provision, on Kelly J.'s logic, seems to be constitutionally questionable. Take the example of the application of trust doctrines to a family home (see e.g., Delany, pp. 153-165 (resulting trusts), 215-216 (constructive trusts); Duncan and Scully, pp. 264–288, paras 10.007–10.049; Mee (1992) 14 *DULJ* (*ns*) 19). Such doctrines have been applied not only to matrimonial property, but also to property in stable non-marital relationships. Indeed, as Delany points out, such equitable doctrines "apply equally to cohabitees, and it is in relation to this category of persons that any future developments in this area are likely to take place, given that the position of spouses will probably continue to be increasingly governed by legislation." (p. 155). If Kelly J.'s understanding of constitutional policy is correct, this seems to render constitutionally suspect – at the very least – the application of such doctrines beyond the matrimonial context. Ineed, for a cohabitee, who could otherwise establish a resulting or constructive trust to be robbed of such proprietary interests in this way seems grossly harsh and unfair. Again, the doctrine of undue influence by a third party (see below, 219-27, with refer-

ences) is of particular application to the situation of a husband exercising undue influence over his wife to have her secure a loan from a bank; and Kelly J's reasoning may impact upon this doctrine in two ways. First, it would render constitutionally suspect the application of this doctrine to cohabitees; again, a grossly harsh and unfair result. Second, one understanding of the doctrine (the "special equity" strategy) provided protection simply because the surety was a wife, but it was suggested in the 1993 Review that such a strategy would be considered unconstitutional, and it seems to have been rejected by the Supreme Court in *Bank of Nova Scotia v. Hogan* (below, 222-7). However, Kelly J's understanding of constitutional policy seems, on the contrary, to make such a doctrine constitutionally required. On the other hand, in the absence of such an understanding, the fact that a spouse can rely on the equitable doctrines of resulting and constructive trusts, and of undue influence would not preclude a cohabitee likewise from relying upon those doctrines. (Similarly, and *pace* Kelly J. above, the fact that a spouse can, as a matter of law, claim maintenance upon separation or divorce, need not of itself preclude the development of a similar claim for cohabitees. Certainly, Article 41 might not require such an obligation, but it does not preclude, in an appropriate case, the generation of a similar entitlement by deploying an appropriate doctrine of law or equity (whether that doctrine is a development of an existing one, or is entirely novel, and whether or not it is characterised as "palimony")).

Of course, as Kelly J. himself pointed out, the existence of these equitable doctrines cannot determine the content of constitutional policy ([1996] 1 I.R. 426, 439-440; [1997] 1 I.L.R.M. 28, 39). It is not clear, however, whether Kelly J. himself crossed that line in seeming to use his understanding of the common law rules on the enforceability of cohabitation agreements to support his view that such agreements were contrary to the constitution and thus to public policy. Furthermore, although such doctrines do not directly determine the content of constitutional policy, they or similar doctrines are symptomatic of a more general development in the law also to be seen in the evolution of notions of public policy sketched above and may be taken as examples of the direction of the law, of society, of social policy, indeed of contemporary morality; and these matters in turn form the backdrop to an evoluvative interpretation of the constitution. Constitutional norms would almost certainly have required Kelly J's understanding of public policy in 1937. However, Bunreacht na hÉireann is not to be interpreted as a static document but as an instrument evolving in parallel with social evolution. Thus, for example, Walsh J., writing extra-judicially, has stated that "the meaning of a provision of the Constitution . . . can be construed in the context of constantly changing times . . . It always speaks in the present tense." (O'Reilly and Redmond, *Cases and Materials on the Irish Constitution* (Dublin, 1980), p. xi). Murphy J. in the Supreme Court in *W. O'R. v. E.H.* [1996] 2 I.R. 248 (above) was prepared to accept the social reality of cohabitation in the interpretation of the Constitution; Kelly J. in the High Court in *Ennis v. Butterly* should have done likewise. Had he done so, it is submitted that he ought to have concluded that constitutional policy, interpreted in the light of the social reality of cohabitation, would not preclude a court from enforcing a contract entered into between a cohabiting couple.

Finally it is not made clear in the judgment whether the constitution is being used to remould and reinforce the existing common law policy or is being used to generate a further head of public policy; but, in either case, such principles of constitutional interpretation likewise permit the courts to have regard to the social fact of the acceptance and acceptability of cohabitation.

It is therefore clear that the logic of Kelly J.'s decision in *Ennis v. Butterly* – to the effect that that anything that gives to a relationship "a similar status in law as a marriage" is contrary to the constitution – is inconsistent with established principles of constitutional law and interpretation, and has disturbing implications for much common law and equitable doctrine: it cannot be right, and ought not to be followed. However, the fact that the logic of Kelly J.'s main *ratio* falls does not of itself mean that the decision also falls, since it may be supportable on other grounds; in particular, if the action was no more than one seeking damages for breach of a promise to marry (when free to do so), then section 2 of the Family Law Act 1981, by abolishing the action for damage for breach of promise to marry, would seem to present, as Kelly J. found, an insuperable obstacle to the plaintiff's claim. But an action to enforce, or to seek damages for breach of, another agreement, for example, in relation to the distribution of property, which would fail under Kelly J.'s understanding of constitutional policy, would, if that understanding were to fall, be maintainable. This is as it ought to be.

IMPLIED TERMS

Terms may be implied into contracts either as a matter of fact (because the term was, or would be presumed to have been, intended by the parties) or as a matter of law. In the latter case, if the term is implied by the common law, it happens because certain terms are required by the nature of the contract itself (see, e.g., *Liverpool City Co v. Irwin* [1977] A.C. 239); a term may also be implied by statute, for example, by the Sale of Goods and Supply of Services Act, 1980.

Terms implied in fact An example of terms implied as a matter of fact is supplied by *Clarke v. Kilternan Motor Co.* (High Court, December 10, 1996). We have already seen above that in this case, the parties to an agreement had fallen out; the plaintiff claimed that the agreement had been wrongfully terminated by the defendant, and that he was entitled to six months minimum rea-

sonable notice. McCracken J. held that either the plaintiff had himself terminated the agreement or that his breaches of contract allowed the defendant to terminate without notice. However, McCracken J. had accepted that:

> There undoubtedly was a legally binding agreement between the parties which unfortunately was not reduced to writing. I am satisfied that the agreement did not provide for any specific form of termination, but that it would be implied into the agreement that either party could determine it on reasonable notice. It is also implied that either party could terminate the agreement without notice if there were a fundamental breach by the other party. (p. 7)

This seems to be consistent with the same judge's approach in *Carna Foods v. Eagle Star Insurance Co.* [1995] 1 I.R. 526; [1995] 2 I.L.R.M. 474 (see the 1995 Review, 210) in which he held that neither of the standard tests for the implication in fact of terms was satisfied, and thus supplies support for the view that in this case, the terms implied as to determination on reasonable notice are terms implied in fact. On the particular issue, in *Royal Trust Company of Canada v. Kelly* (High Court, February 27, 1989) Barron J. (having held that "a party to a contract cannot voluntarily create conditions which will prevent performance of that contract" (at p. 13)) held that "it is an implied term of every contract of employment other than for a fixed period that it can be terminated upon reasonable notice" (p. 14; *cp Walsh v. Dublin Health Authority* (1964) 98 I.L.T.R. 82 (Budd J.); *Carvill v. Irish Industrial Bank* [1968] I.R. 325, (SCt) 342-343 *per* O'Keeffe J.). On the other hand, in the contemporary *NEHB v. Grehan* [1989] I.R. 422 Costello J. held that in an employment contract with a specific termination clause, the implication of an additional term allowing termination on reasonable notice was thereby excluded by the actual or presumed intentions of the parties. Again, since the justification for such implication resides in the presumed intentions of the parties, if their intentions are quite clearly that the contract should run indefinitely, then there is no room for the implication of a term allowing unilateral termination on reasonable notice (see Clark, p. 122; *cp Walsh* (1964) 98 I.L.T.R. 82, 86-87 *per* Budd J.).

It would seem, therefore, that if a contract of employment is silent on termination, a term allowing for termination upon reasonable notice will readily be implied; but if the contract contains detailed provisions dealing with termination, or if it is clearly for a fixed term or for indefinite duration, a further term allowing for termination upon reasonable notice will not so readily be implied (see, generally, Forde *Employment Law* (Round Hall, Dublin, 1992), pp. 160-163). This approach has not been confined to contracts of employment. Thus, contracts "of agency are also terminable upon giving reasonable notice" (Clark, p. 121; citing *Ward v. Spivak* [1957] I.R. 40). It would seem to

be likewise with distribution agreements, at least at common law (*Irish Welding v. Philips Electrical* (High Court, October 8, 1976, Finlay P.) and the position does not seem to have been altered by relevant EU block exemptions (e.g., Regulation 1983/83) or Competition Authority category licences (e.g., C.A. Dec. No. 144; November 5, 1993)).

There being in *Clarke v. Kilternan Motor Co.* neither a term as to the termination of the contract between the parties nor a term fixing the duration of the contract, then, by analogy with these cases, there would seem to be no impediment to the implication of a term that the contract would have been terminable upon reasonable notice.

Lotto and implied terms When the inevitable happened, and the National Lottery finally generated litigation in the form of *Carroll v. An Post National Lottery Company* [1996] 1 I.R. 443, the decision of Costello P. provided an example of a plaintiff seeking the implication of a term into a contract both as a term implied in fact and as on implied by the Sale of Goods and Supply of Services Act, 1980. The plaintiff claimed that the failure by a vendor to process a tendered playslip amounted to a breach of contract by the defendant Lottery company. By an application of the rules of offer and acceptance (considered below, 208-10) Costello P. held that a contract had arisen between the plaintiff and the Lottery company, the terms of which were "contained on the reverse side of the playslip" ([1996] 1 I.R. 443, 454). The plaintiff argued that there was also implied into the contract a term that "the counterhand would use reasonable skill and care in entering his [the plaintiff's] plays into the Lotto draw". ([1996] 1 I.R. 443, 459). Costello P. rejected this claim:

> The Act of 1986 provides that the National Lottery is to be held in accordance with rules approved by the Minister for Finance (s. 28) and the rules so approved have an express condition that the National Lottery shall not in any circumstances be liable to a player for any acts or omissions by the Lotto agents (Rule 4(3)(f)). The court cannot properly imply into the parties' contract a term which not only is not contained in the rules but which would be directly contrary to an express term in the rules as approved by the Minister. Secondly the court will only imply a term in a contract if it is necessary to do so in order to give effect to the intention of the parties. In this case the defendant company quite clearly expressed its intention that it would not be liable for the negligence of its Lotto agents and so the court cannot imply a term which is contrary to the clear intention of one of the parties. ([1996] 1 I.R. 443, 459).

We have already seen that if a contract has a termination provisions, a court will not readily imply a term providing an alternative or contrary termination procedure; thus, in *Tradax v. Irish Grain Board*, Henchy J. would not counte-

nance "the introduction of the implied term . . . [which] would run counter to [an] express term". ([1984] I.R. 1, 17; note, however, the range of opinions expressed in *Johnstone v. Bloomsbury Health Authority* [1991] 2 All E.R. 293 (C.A.)). The approach of Costello P. here, in refusing to imply a term in the face of an express contrary term, is entirely consistent with this orthodoxy. Indeed, the second reason which he gives is usually given as the justification for this position. But there may be a little more to it than that. As the Supreme Court made clear in *Tradax*, terms are implied into a contract for two related but separate reasons. First, it may have been the intention of the parties that the term be included, but for them, it was "so obvious that it [went] without saying; so that, if while the parties making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'." (*Shirlaw v. Southern Foundries* [1939] 2 K.B. 206, 227 *per* MacKinnon L.J.; *affd* [1940] A.C. 701). Second, the courts presume that the parties intend that their contract will in fact be operable, and so will imply terms into it necessary to give it effect, thus a term may be implied "from the presumed intention of the parties with the object of giving the transaction such efficacy as both parties must have intended that at all events it should have." (*The Moorcock* (1889) 14 P.D. 64, 68 *per* Bowen L.J.). Clearly, if the parties had directed their minds to an issue and included a term expressly dealing with it, then there is no basis upon which it can be said that a contrary term was so obvious that it went without saying, and therefore no basis upon which to imply such a term for that reason. Thus, on the first test for the implication of terms, Costello P.'s reasoning holds. On the second, if the contract is plainly unworkable, to give it business efficacy and make it workable, as the parties are presumed to have intended, a necessary term will be implied; if that implied term has to override an express term to ensure that the contract is workable, that would seem to be justified by the presumed intention of the parties. There may thus be circumstances in which it is possible and justifiable for a court to imply a term into a contract contrary to the expressed intentions of the parties. However, on the facts of *Carroll*, the contract between the player and the Lottery company was not plainly unworkable, and thus there again is no basis on this test for the implication of a term.

The plaintiff also claimed that the contract was for the supply of a service, that by section 39 of the 1980 Act there was implied into that contract a term that the supply "will supply the service with skill, care and diligence", and that this term was breached on the facts. However, Costello P. had described the contract as one "by which the defendant company sells lottery tickets to members of the public who have agreed to purchase them in accordance with the authorised rules"; therefore he did "not consider that the defendant company has contracted to deliver a service to those seeking lottery tickets – the contract is to sell a ticket which confers rights and obligations on the parties to the contract". ([1996] 1 I.R. 443, 454). Thus, "there was no term implied into the parties' contract by virtue of [section 39 of] the 1980 Act." ([1996] 1 I.R. 443, 459). Indeed, it is pointed out below (208-10) that if Costello P. had been prepared to find that the Lottery company had offered to supply a service, it may be that the offer had not validly been accepted and no contract would anyhow have arisen. However, Costello P. went on to hold (*obiter*) that even if there had been a breach of contract, liability was successfully excluded by the terms printed on the playslip (see above, 197).

Terms implied by law A further, perhaps more orthodox, example of terms implied as a matter of law by the 1980 Act is supplied by the decision of Moriarty J. in *O'Donnell v. Truck and Machinery Sales* (High Court, June 7, 1996). Here, O'Donnell had supplied Volvo L150 and L180 mechanical shovels to TMS, and had sued TMS for the outstanding purchase price plus interest on two L180s; Costello P. (High Court, November 21, 1995) held for O'Donnell on this issue. TMS had counterclaimed, *inter alia*, that the L150s so sold were in breach of the terms implied into the contracts of sale by sections 14(2) and 14(4) of the Sale of Goods Act, 1893 as amended by section 10 of the Sale of Goods and Supply of Services Act, 1980; that counterclaim was the subject matter of the decision of Moriarty J., who held that

> on no realistic appraisal of appropriately proven defects in the L150s supplied can it be said that they were not of merchantable quality or reasonably fit for the purpose for which [they were] required. . . . it seems to me, construing the evidence in totality, . . . that given such factors as the relative prices obtained on resale in varying circumstances, the overall hire records, durability and income generated in favour of [O'Donnell] by those shovels which became part of the hire fleet, the relative incidents of repairs required and the apparent evaluation of the L150s in Ireland and other marketplaces by other purchasers and users[,] that neither term has been shown to be infringed. (p. 8)

This seems to have been the first occasion upon which the terms of section 14 of the 1893 Act have been the subject of a written Superior Court judgment since their amendement by section 10 of the 1980 Act (cp. Clark, p. 166; Gill (1987) 5 *ILT* (*ns*) 57; and see, generally, Bell, *The Modern Law of Personal Property in England and Ireland* (Butterworths, London, 1989), pp. 277-282; the leading Irish case on the section prior to amendment was *Wallis v. Russell* [1902] 2 I.R. 585; see also *McCullough Sales v. Chetham Timber* [1985] I.L.R.M. 217n (February 1, 1983; Doyle J.)). There is little more detail on such matters in the judgment than appears from the extract just quoted, and it is not clear however what the effect of such factors is to be. For example, as to "relative prices obtained on resale", it has been held in *Harlingdon v. Hull* that "the question whether goods are reasonably fit for resale cannot depend on whether they can or cannot be resold without making a loss" ([1990] 1 All

E.R. 737, 745 *per* Nourse L.J.; cp. p. 753 *per* Slade L.J.; cf. pp. 749-750 *per* Stuart Smith L.J. dissenting) even though one of the uses for the painting in question was that it could be resold, and the fact that it turned out to be an almost worthless fake made a loss on the resale inevitable. It may be that Moriarty J. is taking the contrary view; the context of his remark seems to suggest this. On the other hand, the import of "durability" and "the relative incidents of repairs required" are clear: if the goods are not durable (expressly required by section 14(3), and meaning that the goods "must remain in a merchantable state for some reasonable period following the sale . . ." (Forde, *Commercial Law in Ireland* (Butterworths, Dublin, 1990), p. 50)) or if relatively frequent repairs are required, then goods are not of merchanatble quality. The factors outlined in the above extract from Moriarty J's judgment constitute a useful exposition of the matters which may be taken into account in determining whether there has been a breach of the terms implied by section 14 that that goods be generally of merchantable quality and thus fit for the purposes for which they are meant (section 14(2)) or be fit for specific disclosed purposes (section 14(4); on which see now *Slater v. Finning* [1996] 3 WLR 190 (HL)).

MISREPRESENTATION

Definition A misrepresentation is a false statement of fact. In principle, silence will not usually constitute a misrepresentation, because silence is ambiguous, and as such cannot be understood as making a clear statement. However, if the circumstances give rise to a duty of disclosure, silence in such circumstances is no longer ambiguous and amounts to a representation that there is nothing to disclose. A duty of disclosure will arise, for example, if that which is unsaid negates that which is said; or if that which was said, though true at the time, is made false by events. In both cases, the incomplete disclosure creates just as incorrect an impression as an outright falsity and thereby constitutes a misrepresentation. A good example is provided by another aspect of the decision of Moriarty J. in *O'Donnell v. Truck and Machinery Sales* (High Court, June 7, 1996) (immediately above). Moriarty J. found that TMS had bought Volvo L150 mechanical shovels on foot of misrepresentations by O'Donnell that they were "equal to, and in some ways superior to" the relevant market leader (the Caterpillar 966), though he was in possession of and familiar with literature to the effect that the L150 was not the Caterpillar 966's equal. Further, O'Donnell knew that TMS intended to hire the shovels out for quarrying and was aware that Volvo were at an advanced state of development of a product more suited than the existing L150s for quarrying, but did not so inform TMS. Again, TMS requested that the tyres on the L150s be replaced with larger tyres, which O'Donnell did, but gave "no serious or adequate warning" that the larger tyres were unsuitable. Moriarty J. held O'Donnell liable both for the untruths and for the incomplete disclosures; in particular, he held that O'Donnell's knowledge of the development of an alternative model "ought to have been . . . conveyed to" TMS (p. 11), and he seems likewise to have required that an adequate warning as to unsuitability of the larger tyres be given to TMS (p. 12).

Remedies Where a misrepresentation has induced a contract, a plaintiff who has thereby suffered loss may have a remedy in tort or in contract. As to remedies in contract, the primary remedy is rescission of the contract, to put the parties back in the position they would have been in had the contract never been made. As to remedies in tort, if the misrepresentation which induced the plaintiff to enter into the contract was fradulent or negligent, then there are grounds for an action in tort on the basis of the fraud or negligence. The action for fraud or deceit is founded upon *Derry v. Peek* (1889) 14 App Cas 337 (approved in *Superwood v. Sun Alliance* [1995] 3 I.R. 303, 327-328 *per* Denham J.) and the calculation of damages in such a situation is governed by *Smith New Court Securities v. Scrimgeour Vickers* [1997] A.C. 249; [1996] 4 All E.R. 769 (H.L.), at pp. 777-779 *per* Lord Browne-Wilkinson; cp. at pp. 791-793 *per* Lord Steyn) that the plaintiff is entitled to be compensated for all the loss – including consequential loss – caused by the misrepresentation, whether or not it was foreseeable. The action for negligence derived is derived from *Hedley Byrne v. Heller* [1964] A.C. 465 and *Esso v. Mardon* [1976] 2 All E.R. 5 and the calculation of damages is governed by the ordinary principles of negligence, compensating the plaintiff for all foreseeable losses so as to put him in the position he would have been had the tort not occurred. (On the differences between the fraud measure and the negligence measure, see *Banque Bruxelles Lambert SA v. Eagle Star Insurance* [1997] A.C. 191, 215-216 *per* Lord Hoffmann).

There is no remedy in tort at common law for innocent misrepresentation, but if that innocent misrepresentation induced a plaintiff to enter a loss-making contract, then section 45(1) of the Sale of Goods and Supply of Services Act, 1980 provides the plaintiff with a remedy in damages:

> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the representation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

The remedy is available to a plaintiff as though the other party were fraudulent, even though not, unless the other party reasonably believed his representation. The courts in England have adopted a narrow view of what constitutes such a reasonable belief (*Howard Marine v. Ogden* [1978] 2 All E.R. 1134; Brownsword (1978) 41 *MLR* 735) thus preserving a relatively wide power to award damages. As to the measure of damages, in *Royscot Trust v. Rogerson* [1991] 2 QB 297 (see Hooley (1991) 107 *LQR* 547) the leading English case on section 2(1) of Misrepresentation Act 1967, which is in the same terms as section 45(1), it was held that on the true construction of that section: first, that damages under that section were intended to put the plaintiff in the position he would have been had he never entered the contract (ie, the tort measue; as opposed to the contract measure, by which he would have been put in the position he would have been had the misrepresentation been true); and second the relevant tort measure was the measure for fraudulent misrepresentation rather than for negligence at common law, so that a plaintiff would be entitled to recover all losses suffered by it flowing from the misrepresentation, which includes unforeseeable losses "provided that they were not otherwise too remote" (*Royscot Trust v. Rogerson* [1991] 2 Q.B. 297, 307)

In *O'Donnell v. Truck and Machinery Sales* the misrepresentations gave rise to liability both on the basis of the common law relating to negligent misrepresentation in tort and on the basis of the statutory remedy provided by section 45(1) of the 1980 Act. Moriarty J. found that O'Donnell was "[p]atently" under a duty of care in relation to the representations he made to TMS, which were "instrumental" in persuading TMS to purchase the shovels, which were clearly either untrue or incomplete, and hence constituted actionable mispresentations.

> . . . whilst differences in the measure of damages appropriate to negligent misrepresentation and statutory misrepresentation may arise, it is clear that what is applicable is such a sum of money as should suffice to place [TMS, the misrepresentees] into the position they would have been in had the relevant misrepresentations been true. (pp. 14-15).

Fourth, at common law, the negligence measure of damages is such amount as would put the plaintiff in the position he would have been had the tort not occurred; in the context of misrepresentation, this means putting the plaintiff in the position he would have been had there been no negligent misrepresentation by compensating him for those losses which were caused by the misrepresentation. Quaere whether this is different from putting him in the position he would have been had the misrepresentation been true ? In any event, the actual calculation of such damages caused Moriarty J. great difficulty, given that the figures claimed by TMS seem to have been "spuriously inflated to a high degree" (p. 17) but he nevertheless strove to "quantify a sum that is fair and appropriate" (p. 18) and, on a claim initially cast as "exceeding three quarters of a million pounds" (p. 15), in the event awarded £ 151,200.

With respect, it makes a great deal of difference whether a plaintiff has claimed at common law or under the statute. First, at common law, it is clear from *Banque Bruxelles* and *Smith New Court Securities* that a plaintiff who claims for fraudulent misrepresentation at common law is entitled to a greater measure of damages than one who claims for negligent misrepresentation. (*Downs v. Chappell* [1997] 1 W.L.R. 426, where Hobhouse L.J. had sought to equate the two measures, was doubted by Hoffmann in *Banque Bruxelles* and disapproved by Lord Browne-Wilkinson in *Smith New Court Securities*). Second, for so long as *Royscot Trust* is accepted, a plaintiff who sues on foot of section 45(1) of the 1980 Act (or section 2(1) of the English 1967 Act) gets the fraud measure of damages, not the negligence measure. Third, that section "was designed to establish liability in damages for negligent misrepresentation" (Hooley (1991) 107 *L.Q.R.* 547, 550); and from the previous proposition, it follows that a plaintiff pleading negligent misrepresentation on foot of the statute would nevertheless be entitled to the fraud measure of damages; even though the same plaintiff pleading negligent misrepresention at common law would only be entitled to the negligence measure of damages. Such matters may have mattered little, but as the English authorities illustrate, there are many circumstances in which they can matter a great deal.

MISTAKE

Recent authority has confirmed that when the parties to a contract share a common mistake, if it is sufficiently fundamental, relating to the essential basis upon which the parties contract, the common law will consider the contract void; if it is not so fundamental, but still serious or material, equity may consider the contract voidable and liable to be set aside. (e.g., *Associated Japanese Bank v. Crédit du Nord* [1988] 3 All ER 902; *O'Neill v. Ryan (No 3)* [1991] I.L.R.M. 674; [1992] 1 I.R. 166 (Costello J.); *aff'd* [1992] 1 I.R. 193 (S Ct)). The decision of the Court of Appeal in *Huddersfield Banking Co v. Lister* [1895] 2 Ch. 273 is often presented as a strong illustration of a wide application of the equitable jurisdiction (*e.g.* Cheshire, Fifoot and Furmston, *The Law of Contract* (13th ed, Butterworths, London, 1996), pp. 247-248; Clark, pp. 207-208), and that decision has recently been cited with apparent approval of that point in *Cue Club v. Navaro* (Supreme Court, October 23, 1996).

In *Huddersfield Banking Co v. Lister*, a bank which held a mortgage over a mill and fixtures agreed with the liquidator of the mill that certain looms in the mill were not fixtures, and therefore consented to a court order for the sale of the looms by the liquidator. However, it later transpired that the looms had

been attached to the mill and therefore constituted fixtures at the date of the mortgage and had thereafter been wrongfully detached. At first instance, Vaughan Williams J. held that he could "set aside the order . . . upon any ground which would justify [him[in setting aside an agreement" (276) so that "if a party has been induced by a mistake common to both parties to consent to a decree or order, the Court has power to relieve him . . .". (277). On appeal, the Court of Appeal upheld. Lindley L.J. held that such a consent order could be set aside "upon any grounds which invalidate the agreement [which] it expresses in a more formal way" (280); and that one such ground, made out here on the facts, was mistake (280-281); Lopes L.J. concurred; and Kay L.J. held "that, both on principle and on authority, when once the Court finds that an agreement has been come to between parties who were under *a common mistake of material fact*, the Court may set it aside, and the Court has ample jurisdiction to set aside the order founded upon the agreement". (284, emphasis added).

Huddersfield Banking v. Lister, along with the decision of the House of Lords on appeal from Ireland in *Cooper v. Phibbs* (1867) L.R. 2 H.L. 149, is a crucial plank in the reasoning of Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671, 694, where he championed a wide equitable jurisdiction to set aside contracts concluded on tbe basis of a material common mistake. He repeated these views many times (e.g. in *Leaf v. International Galleries* [1953] 1 QB 646; *Rose v. Pim* [1953] 2 Q.B. 450; *Oscar Chess v. Williams* [1957] 1 W.L.R. 370; *Magee v. Pennine Insurance* [1969] 2 Q.B. 507) and they have since been accepted by other judges, not only in those cases, but also in *Grist v. Bailey* [1967] Ch. 532 (Goff J.); *Laurence v. Lexcourt Holdings* [1978] 2 All E.R. 819 (Brian Dillon Q.C.) and *Associated Japanese Bank v. Crédit du Nord* [1988] 3 All E.R. 902 (Steyn J.). Thus, in *O'Neill v. Ryan (No 3)* [1991] I.L.R.M. 674; [1992] 1 I.R. 166 Costello J., following *Solle v. Buthcer*, held that "the court may in the exercise of equitable jurisdiction set aside an agreement", which observation was made in the course of a judgment on mistake which the Supreme Court approved as "a significant contribution to our jurisprudence on this aspect of of contract law" [1992] 1 I.R. 193, 196 *per* O'Flaherty J. Thus, it seems that as a matter of Irish law, a "court may . . . also set aside a contract on the ground of a shared common mistake even though it is not avoided by that mistake" (Farrell, *Irish Law of Specific Performance* (Butterworths, Dublin, 1994), p. 271, para 9.69).

On the other hand, it has been argued with much force that neither *Hudderfsield Banking* nor (in particular) *Cooper v. Phibbs* bear the meaning which Lord Denning sought to attribute to them in *Solle v. Butcher* (see, *e.g.*, respectively, Slade (1954) 70 *L.Q.R.* 385, 405; Matthews (1989) 105 *L.Q.R.* 599; Cartwright (1987) 103 *L.Q.R.* 594), and therefore, that equity does not and ought not recognise a jurisdiction to set aside contracts on the grounds of common mistake (*e.g.* Meagher, Gummow and Lehane *Equity: Doctrines and Remedies* (3rd ed, Butterworths, Sydney, 1992), pp. 374-379, paras 1417-1426). Nevertheless, the balance of the argument now seems to be with Goff and Jones' observation that, whilst it is probably still open to courts of final appeal such as the House of Lords (or in Ireland, the Supreme Court) "to conclude that there is no independent doctrine of mistake in equity . . . it would be regrettable if [such a court] did so, for equity's intervention has given the courts a balanced and flexible power to grant relief from the consequences of relief.The trend of the present authorities suggests that, despite the relative novelty and uncertatiny of Lord Denning's formulation of the equitable doctrine, the courts are ready to accept the exitence of an independent equitable jurisdiction to set aside a contract for mistake." (*The Law of Restitution* (4th ed, Sweet & Maxwell, London, 1993), pp. 216-217). Furthermore, the Irish writing on this subject seems unanimously to support this view. In addition to Clark and Farrell (referred to above) both Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, London, 1988), pp. 259-264 paras 17.09-17.15 and Delany, *Equity and the Law of Trusts in Ireland* (Round Hall Sweet & Maxwell, Dublin 1996), pp. 474-477 accept the existence of the equitable jurisdiction, the former concluding that "[d]espite the reservations expressed as to the correctness of [Lord Denning's decisions] . . . the courts should possess a jurisdiction in equity (even if it owes more to Lord Denning's penchant for innovation than strict precedent to set aside a contract into which the parties have entered under a shared misapprehension as to a fundamental matter[] . . ." (p. 262, para 17.13); and *O'Neill v. Ryan* (*supra*) provides Irish judicial approval of this approach.

As we have seen, this equitable jurisdiction is founded, in part, upon *Huddersfield Banking v. Lister*, which was approved (without reference to the above controversy) by the Supreme Court in *Cue Club v. Navaro* (Supreme Court, October 23, 1996). The plaintiffs held a lease from the defendants, owed them arrears of rent, and had consented to a judgment in the Circuit Court in respect of the arrears. The defendants subsequently sought to forfeit the lease, and the plaintiffs applied to the High Court for relief against the forfeiture, and also sought an order setting aside the judgment of the Circuit Court on the ground that the consent to the order was vitiated by a common mistake on the grounds that the amount of rent outstanding had been miscalculated. Barron J. (March 11, 1996) struck out the plaintiffs' application, and the plaintiffs appealed. In the Supreme Court, Murphy J. (Hamilton CJ., Barrington J. concurring), held that the claim for relief against forfeiture was bound to fail and was properly struck out but the claim for recovery of rent overpaid on the basis of the mistaken consent to judgment, (though "unlikely in the extreme . . . [to] succeed" (p. 11)) was allowed to proceed "but only so far as it relates to ascertaining the amount of rent properly due and the recovery of any possible overpayment" (p. 16). In this regard, Murphy J. referred (at p. 11) with apparent approval to the views of Kay L.J. in *Huddersfield Banking v. Lister*, set out above, that a

court of equity can set aside a contract concluded on the basis of a material common mistake, and can go on to set aside a consent judgment entered on the basis of such a contract. This would therefore seem to constitute some futher degree of Supreme Court approval of the equitable jurisidction consistent with the balance of the above argument, and thus, with *O'Neill v. Ryan*, may be taken as another recent authority confirming that when the parties to a contract share a common mistake, if it is serious or material, equity may consider the contract voidable and liable to be set aside (subject, of course, to the standard equitable bars to rescission, and to any terms which may be imposed).

OFFER AND ACCEPTANCE

Contracts of sale in shops, and contracts with all the world "Contractual obligations derive from agreement made between two or more parties under which one promises or undertakes with the other the performance of some action. Ordinarily the existence of agreement presupposes an offer by one party to perform the action on certain terms and the acceptance of that offer by the other."*Tansey v. College of Occupational Therapists* [1995] 2 I.L.R.M. 601, 615 *per* Murphy J. In the context of contracts concluded in a shop, it is generally thought that a customer by presenting selected items at the till makes an offer to buy them, which the shopkeeper then accepts. Thus, where goods are displayed in a shop with a price and/or other terms, that display is not usually taken to constitute an offer to sell, but instead an invitation to treat, *Minister for Industry and Commerce v. Pim* [1966] I.R. 154 (Davitt P.); in such a situation, "the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts the offer" *Pharmaceutical Society of Great Britain v. Boots Cash Chemists Ltd* [1953] 1 Q.B. 401, 406 *per* Somervell L.J.

Of course, though also justifiable as a matter of convenience, such a rule is usually justified on the basis that it represents the presumed intention of the shop owner that the displays in the shop constitute invitations to treat and not offers. However, something which would ordinarily be taken to constitute an invitation to treat, may have been intended as an offer, and if that intention is clear, then, of couse, it will be regarded as an offer capable of acceptance. For example, in the great case of *Carlill v. Carbolic Smoke Ball Co* [1893] 1 Q.B. 256, the Court of Appeal held that although advertisments are usually not intended to be offers, the advertisment in the case was so clearly and seriously meant that it in fact did constitute an offer; for Bowen L.J.: ". . . it was intended to be understood by the public as an offer which was to acted upon". Thus, "a notice in a shop window stating that 'We will beat an TV . . . price by £ 20 on the spot' has been described as 'a continuing offer'." (Treitel, p. 13, citing *R v.Warwickshire CC ex. p Johnson* [1993] A.C. 583, 588).

Take the example of a Lotto ticket sold in a shop. In the usual course of events, a ticket is purchased by the player filling in a playslip and handing it to a vendor, who processes it through a Lotto machine which prints the ticket; the vendor then hands over the ticket in return for the price. At least three analyses of the situation from the perspective of the rules of offer and acceptance seem possible. First, if the analysis in *Boots* and *Pim* were to be applied, when the playslip is tendered, the player offers, on the terms on the playslip, to buy a Lotto ticket; the vendor accepts the offer by processing the playslip. Second, if, by analogy with *Carlill* and *Johnson*, it was intended by the vendor that the playslip constitute an offer – and this intention was clear from the terms on the playslip – then the tender by the player constitutes the acceptance of the offer. In either case, a contract is then concluded between the player and the vendor, and its terms are the terms on the playslip. It is, however, simply a contract for the purchase and sale of a lottery ticket. There may in turn be a contract between the vendor and the Lottery company which runs the Lotto game; but the relevant contract upon which the player can sue and be sued is the contract with the vendor, and unless that contract provides otherwise, there is on this analysis no contract between the player and the Lottery company. If there is no contract between the player and company, the company cannot be liable to the player for breach of contract.

The third possibility arises by analogy with another aspect of *Carlill*, in which the manufacturer of the carbolic smoke ball, by means of an advertisment in a newspaper, made an offer to all the world that they would pay £ 100 to anyone who bought and used the smokeball but did not have their influenza cured. For Bowen L.J., the advertisment was "an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition ? . . . although the offer is made to the world, the contract is made with that limited portion of the public who some forward and perform the condition on the faith of the advertisment", and this approach was approved and followed by Murphy J. in *Tansey*. Thus, in *Carlill* itself, the offer in the advertisment was accepted by Mrs Carlill when she bought and used the smokeball, and when it did not cure her influenza, the manufacturer was liable in contract for the £100. By analogy, the playslip could constitute an offer by the Lottery company that if, in accordance with the terms contained on the playslip, a ticket were purchased from a vendor which contained the numbers in the draw, then the Lottery company would pay the ticket holder a prize. That offer would in turn be accepted by the player purchasing a ticket from a vendor. Not only would there be a contract between the player and the vendor (on either of the above two bases) but a further contract would then also be concluded between the player and the Lottery company, upon the terms contained on the playslip.

In *Carroll v. An Post National Lottery Company* [1996] 1 I.R. 443 (discussed above), faced with just this question of the proper contractual analysis

of the purchase of a Lotto ticket, Costello P. held that

> a contractual relationship arises between a player who obtains a ticket and defendant company who is holding the lottery. The payslip . . . constitutes an offer by which the defendant company offers to sell lottery tickets to members of the public who complete the payslips in accordance with the prescribed rules. This offer is accepted when the member of the public completes the playslip in accordance with the rules and tenders it to the Lotto agent together with the price prescribed by the rules appropriate for the number of 'plays' he or she has completed. The terms of the parties' contract are contained on the reverse side of the playslip. . . . The contract between players and the defendant is a contract by which the defendant company sells lottery tickets to members of the public who have agreed to purchase them in accordance with the authorised rules. ([1996] 1 I.R. 443, 454).

In effect, therefore, and without considering the relationship between the player and the vendor discussed in the first two analyses outlined above, Costello P. favoured an analysis along the lines of the third, by which the Lottery company makes an offer to all the world on each its playslips, which offer is accepted by a player when a playslip is tendered. (*Quaere* whether the same reasoning would have generated a contract in *Madden v. The Turf Club* [1997] 2 I.L.R.M. 148. In *Carroll*, the plaintiff handed four Lotto playslips to a vendor (the Lotto agent), who processed three, one twice, but failed to process the fourth, which the plaintiff claimed contained the numbers which won the relevant Lotto draw.

According to Costello P., the relevant contract – by which the Lottery company sells tickets to members of the public who have agreed to purchase them in accordance with the rules – was concluded when the player tendered the playslips to the vendor. At least two important consequences flow from this analysis: first, each playslip constitutes a separate offer, independently accepted by each tender resulting in a ticket, so that for each playslip there is a separate contract. Second, if there is, upon tender of the playslip, a contract to sell a ticket, if a ticket is not sold in accordance with the playslips tendered, then there would seem to be a *prima facie* a breach of contract. It follows from this second point that, here, the failure on the part of the vendor to process the fourth playslip and sell the resulting ticket would have constituted a breach of contract by the company: the relevant breach of contract consists in the mere failure to process the playslip. In the case itself, Costello P. considered that if there had been a breach of a term that the vendor would exercise due skill care and diligence, liability would nevertheless have been excluded by the terms of the contract; it follows that any liability for a mere failure to process the playslip would also have successfully been met with the exclusion clauses (above, 197-99).

In the alternative, Costello P. could have found that the terms of the Lottery company's offer, accepted by the player's tender of the playslip, was not so much an offer to sell a ticket as an offer to give a prize to winning tickets, or, perhaps, an offer to hold a draw and give a prize to winning tickets. This would have amounted to characterising the contract as one for the supply of a service, which he rejected ([1996] 1 I.R. 443, 454, 458-459). Had he so accepted, then he would have had to consider whether the player had in fact successfully accepted this offer. Clearly, when an offer is made to all the world, the putative acceptor must actually perform the conditions laid down in the offer for that performance to constitute acceptance of the offer. If, for example, Mrs Carlill, intending to buy the defendant's smokeball, instead purchased a different influenza remedy, she would not have satisfied the terms of the defendant's offer, and would not therefore have contracted with them. If she had requested the smokeball from the vendor, she may have an action in breach of contract against that vendor; but by not fulfilling the terms of the defendant's offer, she would not have concluded a contract with them. It is here that the terms of the Lottery company's offer become crucial. At least two alternatives suggest themselves.

First, if, on the facts of *Carroll*, the relevant offer by the Lottery company is to give a prize to winning tickets, then, since the plaintiff had not in fact purchased a ticket with the relevant numbers on it, he had not fulfilled the terms of the offer, and had not therefore concluded a contract with the Lottery company. The player may also have made a contract with the vendor (along the lines of the first and second analyses outlined above) and may therefore have an action in breach of contract against that vendor; but by not fulfilling the terms of the Lottery company's offer, he would not have concluded a contract with them. Unlike in the case itself, the acceptance would not be constituted by the player's tender of the playslip but by the purchase of the ticket, and if that purchase had not happened, as in this hypothetical, the player would not have fulfilled the terms of the offer and thereby accepted it, and no contract in relation to the prize would have arisen in the first place as between the plaintiff-player and the defendant-Lottery company for the breach of which the defendant could be liable. By denying the existence of a contract, this approach excludes contractual liability by the Lottery company to the player; in the event, however, Costello P. reached a similar conclusion by finding that there was a contract between the parties but that, either no term was implied of which the defendant was in breach, or, that the terms of the contract successfully excluded any liability that may have accrued to the defendant. (There is at least one significant difference between this approach and that actually taken by Costello P.: if the defendant were in breach of a duty of care in tort owed to the plaintiff – unlikely if *Madden v. The Turf Club* (Supreme Court, February 17, 1997, analysed in next year's Review) is correct – then the defendant

could have relied on the relevant exclusion clauses to exclude this liability only if there were a contract between them, which there would not have been on the approach discussed here, though there was on that taken by Costello P. Even then, Costello P.'s interpretation of the exclusion clauses as not "exempt[ing] the defendant company from liability for the negligence of own servants and employees" [1996] 1 I.R. 443, 465, it may be that the exemption clauses would not be sufficient to exclude liability for the breach of such a duty of care).

Second, if, however, the relevant offer by the Lottery company is to hold a draw and give a prize to winning tickets, then the relevant acceptance could either be the purchase of a ticket (as in the analysis immediately above) or the tender of the playslip (as in the case itself). If it is the former, then, the above analysis demonstrates that no contract arises between the parties; if the latter, then, as in the case itself, a contract does arise. It would then be a contract to supply a service into which section 39 of the 1980 Act would imply a term (above, 197-99) but, for the breach of which, liability would have been validly excluded (above, 199).

In any event, whatever the proper analysis of offer and acceptance here is, the facts of *Carroll* provide, in the context of the significant social phenomenon that is the National Lottery, a fascinating real-life example of that beast beloved of text-books and contract exams, the contract with all the world.

Communication of offers and acceptances; and prescribed modes of such communication Logic and principle dictate a general rule that the offer or acceptance must be communicated to the other party in the negotiations. This principle is at the heart of the great case of *Carlill v. Carbolic Smokeball Company* [1893] 1 Q.B. 256, in which Bowen L.J. held that "an acceptance of an offer ought to be notified to the person who makes the offer, in order that the two minds may come together" and Lindley L.J. held that "when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified". It is also at the heart of the decision of Murphy J. in *Tansey v. College of Occupational Therapists* [1995] 2 I.L.R.M. 601.

Whether there was such a communication was an issue which was addressed by Murphy J. in *Kennedy and ors v. AIB plc and AIB Finance Ltd* (High Court, 18 May 1995). Murphy J., after detailing the facts, held that essentially, the plaintiff's claim was laid in contract; they contended that "on three occasions the Defendants . . . agreed to provide [loan] facilities . . . On the balance of probabilities, I am not satisfied that [the agents] made the statements or representations alleged by the Plaintiffs. Accordingly, the claim in contract must fail." This claim is analysed in the 1995 Review, 217. Alternative claims in negligence and for breach of a bank's duty of confidentiality

also failed. The plaintiffs appealed (Supreme Court, 29 October 1996) and Hamilton C.J. (O'Flaherty and Denham JJ. concurring) dismissed the appeal. On the contract point, Hamilton C.J. sustained Murphy J.'s findings of fact, and dismissed the appeal (pp. 21-23; 31-33; 40-41).

The same issue was also addressed by Blayney J. (Hamilton C.J., Barrington J. concurring) in the Supreme Court *Embourg v. Tyler* (March 5, 1996); he held that since "the defendant never communicated to the plaintiffs an acceptance of the plaintiffs' offer to purchase, no contract ever came into existence and so there is no contract of which the plaintiffs could claim specific performance" (p. 19). There was on the facts the further wrinkle that the parties had prescribed a mode for that communication: the plaintiffs, by letter, indicated a willingness to sell certain property; the letter concluded with the sentence, *inter alia*, that "neither our negotiations to date, nor this letter, can form part of, nor create, any binding contract between the parties, which must await the formal execution of the appropriate legal documentation by both sides". The defendants, by letter, indicated a willingness to purchase the property; this letter stated, *inter alia*, that "no binding contract is to be deemed to exist until such time as a contract has herein has been executed by all parties". Further correspondence between the parties contained similar statements. Although the plaintiffs had exectued the contract, the defendants, (on officer of one of whom had signed it) had not returned it, and Murphy J. held that this did not amount to the execution of the contract; as the defendants' acceptance of the plaintiffs' offer was not in the presribed terms, no contract had come into existence (pp. 18-19): in "the absence of a communicated acceptance no contract ever came into existence". *Embourg v. Tyler* therefore provides a good example of the general principle that where "an offer states that it can only be accepted in a certain way, the offeror is not, in general, bound unless acceptance is made in that way. Thus if the offeror asks for the acceptance to be sent to a particular place an acceptance sent elsewhere will not bind him, nor, if he asks for an acceptance in writing, will be one bound by one that is oral." (Treitel, p. 29, footnotes omitted).

The case also contains *dicta* on the process adopted by the parties and their solicitors in this case. First, although the procedure of the exchange of contracts is a common feature of English rather than Irish conveyancing practice, Blayney J. (referring to the discussion of *Eccles v. Bryant* [1948] 1 Ch. 93 in the judgment of Keane J. in *Mulhall v. Haren* [1981] I.R. 364, 377-378) considered that "the Court [wa]s not being asked to decide in the abstract if the English practice should be followed. The issue is whether in the light of the negotiations between the parties, and their conduct, it was their intention that it should be." (p. 22). Second, whilst the letters between the parties were headed "subject to contract", the effect of that phrase, – now seemingly settled in the earlier Supreme Court judgment in *Boyle v. Lee* [1992] 1 I.R. 555; [1992] I.L.R.M. 65 (on which see the 1991 Review, 112-13, 125-27; and Dwyer

" 'Subject to Contract' – A Controversy Resolved ?" (1993) 3 *ISLR* 16) – was again on these facts to establish that the parties' intention was that an enforceable contract would not come into existence except by an exchange of written contracts (p. 23). However, he concluded that it "does not follow that whenever there is a sale subject to contract no binding contract comes into existence until contracts have been exchanged. Each case must be decided on its own facts." (p. 26). This should not be seen as an unfortunate prelude of a return to the controversy settled in *Boyle*, but rather as a signal that, although the effect of the phrase 'subject to contract' is that no contract can come into existence based upon correspondence in which that phrase was used, it does not follow that an exchange of written contracts will be necessary for such a contract to come into existence. In principle, all that is necessary is that there be an offer and an acceptance, which may be expressed in correspondence without the term, or which may be by means of an exchange of written contract, or by any other means amounting to an offer and acceptance.

PRINCIPLES OF INTERPRETATION

The *contra proferentem* rule If a party to a contract chooses "to adopt ambiguous words it seems to me good sense, as well as established law, that those words should be interpreted in the sense which is adverse to the persons who chose and introduced them. . . ." (*In re Sweeney and Kennedy Arbitration* [1950] I.R. 85, 98 *per* Kingsmill-Moore J.). Though this rule is especially striclty applied in the context of exclusion clauses and (*Lynch v. Lynch* [1996] 1 I.L.R.M. 311 provides a good example), it is nonetheless of general application across the entire of the law of contract, and formed the basis of the decision of Keane J. in the Supreme Court in *Cuffe v. CIE and An Post* (Supreme Court, 22 October 1996).

An employee of CIE was injured lifting a mail-bag at Thurles railway station, and recovered in negligence at common law from his employer, CIE. In turn, CIE sought an indemnity from An Post on foot of a contract which provided, *inter alia,* that CIE would indemnify An Post "from and against all actions suits claims or demands arising under the Workmen's Compensation Acts 1934 to 1955 or any statutory reenactment or modification thereof in respect of any personal injury by accident to any guard or servant of [CIE] while in charge of mails . . .". The claim for the indemnity succeeded in the High Court but failed in the Supreme Court. The net issue was whether the indemnity was confined to statutory actions or extended to common law actions.

Keane J. (Hamilton C.J. and Blayney JJ. concurring) held that "[a]s with any other contract, the court is essentially concerned with ascertaining the

intention of the parties" (p. 4), rejected an interpretation advanced on behalf of An Post which "would, in effect, . . . rewrite an important provision of the contract" (p. 5), and pointed out (pp. 5-6):

> that this provision was clearly inserted for the benefit of the Minister [the notional employer of CIE employees]. It may be, indeed, that the entire document emanated from the Minister, as the copy produced to us would suggest, but even if the *contra proferentem* rule did not apply to the document, it was undoubtedly for the Minister to ensure that the provision had the extended meaning which his successors now seek to attach to it and they cannot complain if an ambiguously worded provision – if such it is – inserted for their benefit is read against them rather than in their favour. The words of Kingsmill Moore J. in *Roscommon Co Co v. Waldron* [1963] I.R. 407, 419 seem to me to be entirely applicable to this situation:

If the council desired the clause to have a meaning so favourable to it, so onerous to the contractor, and so exceptional in an indemnity it was the business of the Council to make such meaning clear beyond dubiety.

Thus, the words of the clause, inserted by the Minister, envisaged an indemnity to him only in respect of statutory actions. A *contra proferentem* reading confined the clause to that meaning.

REMEDIES FOR BREACH OF CONTRACT

An interesting remedy, for breach by a lessor of a duty to insure leased goods, arose in the course of the judgment of O'Flaherty J. in *Homan v. Kiernan and Lombard & Ulster Banking* (Supreme Court, November 22, 1996; see Dignam (1997) *Bar Review* 403). Section 118 of the Road Traffic Act, 1961 provides that where "a person . . . uses a mechanically propelled vehicle with the consent of the owner of the owner the user shall . . . be deemed to use the vehicle as the servant of the owner but only in so far as the user acts in accordance with such consent". To the extent that a user is liable in negligence for an accident involving such a vehicle, section 118 operates to make the owner vicariously liable. In *Homan v. Kiernan and Lombard & Ulster Banking*, Lombard had leased a truck to Kiernan; Homan had been injured in a collision with the truck. *Prima facie*, Lombard, as owner of the truck could be vicariously liable to Homan. However, although the lease required Kiernan to insure, Kiernan had failed to do so, and the question was whether the failure to adhere to the terms of the lease rendered Lombard's consent void. Flood J. (High Court, July 19, 1996) so held; but on appeal (Supreme Court, Novem-

ber 22, 1996) O'Flaherty J. (Barrington and Murphy JJ. concurring) held, for policy reasons, that the failure to insure "did not vitiate the consent that Kiernan had undoubtedly had been given to drive this vehicle by Lombard" (p. 10).

During the course of his judgment, O'Flaherty J. observed that if "there is a breach of that obligation [on Kiernan to insure] then the owner [Lombard] may insure and recover the costs thereof from the lessee forthwith." (p. 7). This remedy would seem to be an alternative to the standard remedies provided by the law for breach of contract. It is not uncommon in leases of real property for the tenant to undertake to insure the demised premises (e.g. Wylie, *Irish Land Law* (2nd ed., Professional Books, Abingdon, 1986), pp. 815-816, para. 17.050) and in such circumstances if the tenant fails to insure, the it seems that landlord may do so and, if reasonable, recover such amount from the tenant (*Sepes Establishment v. KSK Enterprises* [1993] 2 I.R. 225; [1993] I.L.R.M. 46 (H.C., O'Hanlon J.); Supreme Court, May 21, 1996: here, the lessor undertook to pay 20% of the cost of insuring the premises, the lessee 80%; the lessor procured the insurance, it was held that the premium was not unreasonable and that the lessor was entitled to recover the lessee's 80%). O'Flaherty J. here plainly seems to allow the extension of this principle from leases of real property to leases of personal property, and, if justified, has extended the range of remedies available for such breaches of contract.

Damages An interesting approach to the calculation of damages for breach of a contract to sell property was taken by Costello P. in *Commerical Fleet Truck Rental v. The Mayer Co.* (High Court, October 11, 1996). The plaintiffs had exercised an option to purchase property they were leasing from the defendants, but difficulties had arisen. In the present action, the plaintiff purchasers were granted an order of specific performance against the defendants who had in breach of contract failed to complete. During the currency of the dispute (contained largely in fitful correspondence between the parties' solicitors) and the litigation, the plaintiffs had remained a tenant of the defendant paying rent according to the lease, and before Costello P. they sought to set off the rent so paid against the outstanding purchase price, on the grounds that such payment of rent would have been avoided had the sale not been prevented by the defendants' breach of contract. Costello P., however, held that the measure of the plaintiffs' loss flowing from the defendants' breach of contract "is the difference between the rent actually paid [in the relevant period] and the sums it would have to have paid to service the loan to purchase the premises" which damages would then be set off against the balance of the purchase price outstanding.

RISK ALLOCATION BY CONTRACT

Where the parties to a contract adopt terms *inter se* to distribute the risks of performance, in principle, the courts should respect this allocation. A strong form of this principle is to be found in the decision of O'Flaherty J. in the Supreme Court in *McCann and Cummins v. Brinks Allied and Ulster Bank* (Supreme Court, November 4, 1996). Here, the plaintiffs were security men employed by Brinks Allied. They were injured in a holdup during a cash delivery to the bank, and sued both Brinks and the bank. Their claim against Brinks succeeded in full on the basis that Brinks had failed to provide a safe system of work; but Morris J. refused to make the bank liable essentially on the grounds that the risk here had been cast upon Brinks by the contract between Brinks and the bank (High Court, May 12, 1995; see the 1995 Review, 232-4). On appeal, O'Flaherty J. (Blayney and Murphy JJ. concurring) expressly adopted this approach.

Brinks argued that the bank was also liable to the plaintiffs in tort, but O'Flaherty J. held that what subsisted between Brinks and the bank was "a contractual relationship between two commercial organisations. The bank engaged Brinks to carry out what was undoubtedly a hazardous activitiy and for which they would be responsible for providing for the safety of their own employees. It would be wrong to infer from the relationship between the parties that the bank, nonetheless, was to be held in a position of owing a duty of care to the Brinks employees". (p. 8). Thus, O'Flaherty J. concluded that "the legal solution to the problem posed is to say that the parties reached an agreement that the risk would lie with Brinks to make sure that the cash was delivered safely . . . In this case the contract was a circumstance which prevented any duty of care arising on the part of the bank *vis-á-vis* the Brinks' employees. It is, therefore, a preventative factor, rather than an intervening one, which negatives the existence of a duty of care here." (pp. 9-10).

The tort elements of the argument are analysed in the Tort chapter, below, pp. 000-000; for present purposes it is sufficient to observe that, so far as the law of contract is concerned, the essence of the case is that the parties' allocation of any risk ought to be respected. In the 1995 Review, 234, it was suggested that this result was "entirely consistent" with a line of authorities in which it has been held that, if A contracts to have B do some work, and B has the benefit of an exclusion clause in the contract, and B hires C to do the work, C may also the benefit of the exclusion clause, even though C is not a party to the contract between A and B (e.g. *Elder, Dempster v. Paterson, Zochonis* [1924] A.C. 522; *The Mahkutai* [1996] 3 All E.R. 502 (H.L.); *cp London Drugs v. Kuehne & Nagel International* (1992) 97 D.L.R. (4th) 261 (S.C.C.)). It should, however, be noted, that in such circumstances, the court is not denying that C owes A a duty of care, it is merely stating that though a duty of care arises, the exclusion clause provides C with a defence. O'Flaherty

J. in *McCann* expressly went further, denying that C owed A any duty of care, and it may be questioned whether the alloaction of risks as between two parties to a contract (here A and B) should require the denial of a duty of care by one of those parties (A) to a third party (C) who is not a party to a contract. In *McCann*, there was a contract between A and B, in which the risks of performance are cast upon B. If B performs and suffers loss, as between A and B that is a loss for which B has agreed that A is not to be responsible; he himself is to bear it, and he cannot look to A for compensation. If, instead, B has C perform, and C is injured, again, as between A and B that is a loss for which B has agreed that A is not to be responsible; again B has to bear it. This does not seem to require that A is not liable to C; instead, it seems to require that B indemnify A in respect of any liability which A may have to C; and if the express terms of the contract cast the risk upon B but do not expressly require such an indemnity, then an implied term that B will so indemnify A should not be far to seek.

On the facts of *McCann*, the employee-plaintiffs, C, had already recovered from their employer, B, and the question in the Supreme Court was whether A was also liable to C, so that B could treat A as a concurrent wrongdoer. In other words, the question was whether *as between A and B*, A could be made liable to C; and the contractual allocation of risks as between A and B required that the question be answered in the negative. On the particular facts of the case, since B had already been found liable to C, it did not particularly matter whether respect for the contractual allocation of risks as between A and B was to be achieved by denying any liablility (for example in tort) by A to C (as O'Flaherty J. did), or by requiring that B idemnify A in respect of any liability to C; since in either case B would be fully liable to C. But in some circumstances, it could matter considerably; for example, let the contract between A and B be the same, but C has chosen only to sue A. Here, whether C's claim against A entirely disappears, or whether A is liable to C but has an indemnity from B, becomes of great practical importance. On O'Flaherty J's approach, C is owed no duty of care, and C must lose. On the other hand, if A owes a duty of care to C but recovers an indemnity from B, then C need not lose. In either case, A is not out of pocket, which is the intent of the contract between A and B and the aim of O'Flaherty J's judgment. In both cases, the position of A is the same, but in the former, the result is unjust to C, whereas in the latter it is not. Consquently, the latter approach, by which B would indemnify A for any liability to C, ought to be preferred.

Two further considerations justify this conclusion. First, O'Flaherty J's reasoning in *McCann* destabalizes the law of tort; this is addressed below in the tort chapter, 577-9. Second, O'Flaherty J's reasoning in *McCann* also destabalizes the law of contract: it is a cardinal principle of the law of contract that a person who is not a party to a contract cannot acquire rights and liabilities under that contract. Though riven with exceptions, this doctrine of privity

is still central to the law of contract. On the facts of *McCann*, the risks as between A and B were allocated by a contract between A and B. C was not a party to the agreement between A and B, and could not thus be bound by it. Therefore, an agreement between A and B cannot exclude A's liability to C. It is true that there are many exceptions to the doctrine of privity, and that it has been the subject of many cogent judicial and academic attacks (see, for example, the 1995 Review, 234). It is also true that the exemption clause cases above represent one of those exception. But even if the doctrine of privity were held not to apply here, or the common law were to abandon the doctrine of privity so that the principle were accepted that a person not a party to a contract could in principle obtain rights and liabilities under that contract, it would still be necessary to determine whether in a case such as this, C should obtain, from the contract between A and B, an inability to sue A; nothing in the case suggests that O'Flaherty J. undertook such an analysis, and nothing in principle requires such an outcome. Thus, from the perspective of the Law of Contract, the approach of O'Flaherty J. is antithetical to the principle of privity, and his decision should not be seen as a *sub silentio* departure from it.

In conclusion, therefore, while the approach of Morris and O'Flaherty JJ. is to be welcomed for their deference to contractual allocation of risk, this principle does not require O'Flaherty J's denial of a duty of care in tort between the bank and the plaintiffs, and would have been better served by the implication of a term to the effect that if the bank were to be liable to the plaintiffs, Brinks would indemnify the bank for such liability. In that way, the principle of contractual allocation of risk would be subserved, but the structures of the law of tort and the law of contract would not be destabilized.

SPECIFIC PERFORMANCE

A relatively straightfoward claim for specific performance presented itself to Costello P. in *Commerical Fleet Truck Rental v. The Mayer Co.* (High Court, October 11, 1996) (above) and he granted the decree. The plaintiff company held from the defendant both a lease of factory premises, and a licence to use – in common with three other tenants – an adjoining yard for business purposes to use "with or without vehicles . . . for all purposes incidental to the use of the demised premises". The lease granted the tenant an option to purchase a 999 lease in the property on the terms of the Law Society's contract for sale, and an irrevocable 999 year licence over the yard "for the same purpose" as the former licence. The plaintiff purported to exercise these options, and the parties agreed that the under the resulting conveyance, the defendant would convey the fee simple rather than a 999 year lease in the premises. Though the defendants disputed it, Costello P. also found that the defendants agreed to convey not to the plaintiff company but to its two directors (p. 14), and that

since the licence was appurtenant to the lease, it would have been assignable with the lease, and was thus not personal to the plaintiff but assignable to and exerisable by the directors (pp. 16-17). In any event, the defendants agreement to convey to the directors "implied an agreement that the license would also be granted to them". (p. 17).

Some time after the exercise of the option, the defendant's solicitor wrote to the plaintiff's solicitor with a draft contract of sale (containing various special conditions) but referring to the yard as a car park shared with the other tenants and the defendants in which the plaintiffs could have four spaces. The plaintiff's solicitor replied, disputing as too narrow, and inconsitent with the licence and option, the definition of the yard as a car park, but enclosed a deposit in respect of the purchase and an amended draft contract of sale from which two of the special conditions had been deleted, and which named the plaintiff company's directors as purchasers. Seven months later, the defendant's solicitor replied with a draft licence on their earlier terms and an amended draft contract naming as purchasers the plaintiff and not its directors. The following month, the defendants served a notice to complete upon the plaintiffs; there followed acrimonious correspondence, and, in this action. the plaintiffs sought specific performance of a contract of sale of the premises and a licence over the yard on the terms set forth in the option, as varied by agreement to provide for conveyance of the freehold rather than a 999 year lease.

Costello P. held that the "plaintiffs are clearly entitled to have that contract specifically enforced if the defendant resiles from it. That is what in my opinion the defendant has done . . . [when he] refused to grant a licence in accordance with" (pp. 11-12) the terms of the original licence, for business use with the other tenants, rather than as a car park shared not only with the other tenants but also with the defendants. Thus, the defendant company was "contractually bound to grant a licence in the form granted in the option agreement, namely a licence to use the yard in common with the owners of the three adjoining factory units, but not in common with the defendant company as well". (p. 13) As to the terms of the contract of sale, the "parties had agreed that the sale would be subject to the conditions in the Law Society's draft contract. No condition similar to Special Condition 4 [one of the two conditions which had been inserted by the defendant but disputed by the plaintiff] was contained in it and the plaintiffs cannot be required to agree to it." (p. 15). Presumably, though Costello P. does not say so, the same reasoning would have applied to exclude the other disputed special condition, but, because the parties had agreed other special conditions, they would have been included. In the event, therefore, Costello P. ordered specific performance of a contract for the sale of the fee simple in the factory premises to the directors, including a licence to use the adjoining yard for business purposes.

UNDUE INFLUENCE

A bank makes a loan to a borrower, upon foot of a security provided by a surety. When the borrower defaults, and the plaintiff bank (P) seeks to enforce the security, the defendant surety (D) may seek to resist on the ground that the borrower (T, a third party to the contract between P and D) by means of undue influence, coerced the surety to grant the security to the bank. There are at least seven possible analyses of such a situation (see the 1993 Review, 194-209 and the 1995 Review, 235-9; note that apart from the seven positions outlined below, section 3 of the Family Home Protection Act, 1976 may also be relevant; see *id* analysing *Bank of Ireland v. Smyth* [1993] 2 I.R. 102; [1993] I.L.R.M. 790 (H.C.); [1996] 1 I.L.R.M. 241 (S.C.)).

First, since the enforceability of the contract against D is based upon D's consent, the simple fact of T's coercion vitiating D's consent to the contract should be sufficient to allow D to avoid the contract with P (the "coercion *simpliciter*" strategy). Second, if T were an agent for P, since the acts of the agent are the acts of the principal, if T has coerced D, in law it is as if P had coerced D, and D can avoid the contract (the "agency" strategy). Third, the contract between P and D may be said to be unenforceable because, and only when, P actually knew of T's undue influence: on this view, it is not enough that P have constructive notice of T's undue influence (the "actual knowledge" strategy). Fourth, since T's exercise of undue influence is an equitable wrong which gives the party coerced, D, an equity to set aside the contract, if P has notice of T's undue influence, then D can avoid the contract (the "notice" strategy). Fifth, the contract between P and D may be said to be unenforceable because of P's complicity or culpability in T's equitable fraud on D (and the basis of that complicity is P's notice of T's equitable fraud), (the "equitable fraud" strategy). Sixth, a court could simply hold that in all the circumstances of the case, T's coercion made it "unconscionable" for P to enforce the contract as against D, or the transaction was "improvident" for D (the "unconscionability" strategy) – (a recent important application of this doctrine is provided by *Crédit Lyonnais v. Burch* [1997] 1 All E.R. 144; [1997] 1 F.L.R. 11; [1996] 5 Bank L.R. 233; (1996) 146 *N.L.J.* 1421 (C.A.), on which see Hooley and O'Sulllivan [1997] *L.M.C.L.Q.* 17 (critical of the decision); Chen-Wishart [1997] *C.L.J.* 60 (approving of it, and seeing in unconscionability a general justification for the undue influence jurisdiction in equity). Seventh, if T and D are husband and wife, and if vulnerable wives possess a special equity as against creditors such as P to whom they offer security for debts of their husbands, then D may be able to avoid the contract with P (the "special equity" strategy).

The analysis in the 1993 and 1995 Reviews concluded in favour of the first, coercion *simpliciter*, strategy on the ground that it is entirely sound in principle. As to the alternatives: either a court enforces a contract plainly pro-

cured by objectionable means, or spuriously finds that T is an agent for P (if using the "agency" strategy), or that P knew of T's undue influence (if using the "actual knowledge" strategy), or that P had notice of T's undue influence (if using the "notice" or "equitable fraud" strategies). The unconscionability strategy allows the court to render objectionable contracts unenforceable, but if that result is achieved as a consequence simply of the fact of the (actual or presumed) undue influence, saying that the transaction is thereby unconscionable or improvident adds nothing of substance to the analysis and is not therefore necessary. As to the "special equity" strategy, it is probably unconstitutional having regard to the emerging constitutional doctrine of spousal equality, and, if not, should anyhow be rejected as adding as little to the analysis as characterising the transaction as unconscionable. The agency, actual knowledge, notice, equitable fraud, unconscionability and special equity strategies being unsatisfactory, the law should reject them and adopt the coercion *simpliciter* strategy. A similar conclusion seems to have been reached by Delany: "[p]erhaps the best approach is that if there is no wrongdoing on a husband's part, then a financial institution should not be penalised, even if it has failed to take any steps to ensure that the wife understands the transaction and has received independent legal advice. However, where a husband has been engaged in conduct amounting to the exercise of undue influence, the bank can only enforce the gurantee provided it has taken the steps just referred to." (*Equity and the Law of Trusts in Ireland* (Round Hall Sweet & Maxwell, 1996), pp. 489-490). For Delany, then, the simple fact of the undue influence would have the effect of invalidating the transaction, unless the undue influence were cured. Such an approach would have the merit of laying down clear guidelines which would protect any surety wife in need of protection, and allow a bank to be sure that any transaction entered into after such steps would be valid, without having recourse to unsatisfactory metaphysical debates about matters such as the quality of the bank's notice.

English law has committed itself to the notice strategy; the matter has been unequivocally settled by the speech of Lord Browne-Wilkinson in the House of Lords in *Barclays Bank v. O'Brien* [1994] 1 A.C. 180, though it is arguable that the authorities supported that position even before his Lordship's decision (see *e.g.*, Chin, "Undue Influence and Third Parties" (1992) 5 *J.C.L.* 108; *cp* Gardner "A Confused Wife's Equity" (1982) 2 *O.J.L.S.* 130, 134). However, before the decision of Murphy J. (O'Flaherty and Blayney JJ. concurring) in the Supreme Court in this year's *Bank of Novia Scotia v. Hogan* (unreported, November 6, 1996) the matter had not been judicially settled in Ireland, though five occasions for such a resolution had presented themselves to the courts.

The first opportunity seems to to have been *Provincial Bank of Ireland v. McKeever* [1941] I.R. 471. Trustees (T) advised beneficiaries (D) to secure an overdraft with the bank (P) by way of mortgages, thereby extinguishing the

trustees' personal liability on the overdraft. In an action by the bank against the beneficiaries to enforce the mortgages, Black J. held, first, that a presumption of undue influence arose as between the trustees and beneficiaries (T and D) (480-481); second, that it arose "not ony against [T], but also against [P], if that party is aware of the circumstances which give rise to the equity against [T]" (482); third, that since P was in fact aware of the circumstances, it would not be able to enforce the mortgages if the presumption were not rebutted; and fourth, that the presumption was rebuttable (484), and – altough D had not received independent advice (486) – had nonetheless been rebutted. Whilst it is clear that Black J.'s predicating of D's equity to set the mortgage aside upon P's "awareness" of the circumstances probably represented a judicial rejection of the "coercion *simpliciter*" stragegy, and the "agency" strategy (in particular, because Black J. held that it was unnecessary that P "should 'claim under'" T (482)) and probably of the "unconscionability" strategy, the requirement of "awareness" was ambiguous as between the "actual knowledge" and "notice" strategies (*dicta* at p. 483 speak of P "knowing" of the circumstances, whereas *dicta* at p. 484 refer to P having "taken with notice"), and may even have been sufficiently wide to encompass rationalisation as an example of the "equitable fraud" strategy; and by the very nature of the facts, the case said nothing as to the status of the wife's "special equity" strategy. The earlier *McMackin v. Hibernian Bank* [1905] I.R. 296 – contemplating the law protecing children not yet emancipated from their parents' influence "not by curtailing their capacity to deal with others, but by biding the consciences of those who deal with them . . . [when] the Court is jealous in its investigation of cases of the kind" ([1905] I.R. 296, 304-305 *per* Barton J.) seems to contain the seeds of quite a different "special equity", though in the end liability seems to have attached because the creditor had "full knowledge and full notice of all the circumstances that gave rise to the equity" (306), in which case, the decision is similar to *McKeever*. In any event, though the matter was raised, and some important clarification resulted, it could hardly have been said that either *McMackin v. Hibernian Bank* or *Provincial Bank of Ireland v. McKeever* had unequivocally settled it.

Second, in *Gregg v. Kidd* [1956] I.R. 183, although undue influence was pleaded against the recipient, "the evidence was mainly directed to establishing that influence had been obtained and exercised over [D] by . . . [T]. There is no doubt in my mind that if it be shown that this deed was obtained by the undue influence of [T] . . . this deed cannot stand" ([1956] I.R. 183, 195 *per* Budd J.). Although Budd J. later found that P "knew all about [T's] efforts . . . he was perfectly aware of [T's] influence over [D] and perfectly willing to accept the benefit of its exercise on his behalf" ([1956] I.R. 183, 200), in his statement of relevant principle, it was enough for him that T had unduly influenced D to confer the benefit upon P; which seems to be a rather straightforward assumption and application of the coercion *simpliciter* strategy.

Furthermore, Budd J. declined a request to decide the case on the basis of the unconscionability strategy (205-206), though in terms which recognised the general utility of that doctrine and did not reject it in principle on the facts. This, coupled with the absence of a discussion on this point of either *McMackin* or *McKeever*, or of the knowledge and notice strategies as matters of principle, probably means that the matter cannot be regarded as having been settled by *Gregg v. Kidd* either.

Third, the matter did not properly arise for discussion in the earlier proceedings of *Bank of Ireland v. Smyth* (see the discussion 1993 Review, pp. 202-208; Mee (1996) 14 *I.L.T.* (*ns*) 188 (part 1), 209 (part 2); and Sanfey (1996) 3 *C.L.P.* 31), since, in the end, the case resolved itself into a question of the proper interpretation of the Family Home Protection Act, 1976. A similar fate befell the fourth opportunity: this year's *AIB v. Finnegan* [1996] 1 I.L.R.M. 401. Here AIB, (the Bank) made a loan, secured by way of mortgage, to Mr Finnegan to purchase a family home. At the office of Mr Finnegan's solicitors, Mrs Finnegan signed a form under section 3 of the Family Home Protection Act, 1976 to the effect that she consented to that transaction. When the Bank sought possession on foot of the mortgage, she resisted, claiming that she did not understand the nature of the document which she had signed; but the Bank contended that it was a bona fide purchaser protected by section 3(3) of the Act. In the High Court (July 11, 1995), Carroll J. held that the Bank was entitled to its order for possession: "This is a case where the bank had no knowledge of any claim by Mrs Finnegan. It dealt with her entirely through her husband's solicitor, and its going too far to say that a bank must deal directly with the spouse, and cannot rely on normal conveyancing practice between solicitors. . . . [The Bank] is in the position of a *bona fide* purchaser for value without notice . . .". An appeal to the Supreme Court was allowed. Since section 3(4) provides that "if any question arises in any proceedings as to whether a conveyance is valid . . . the burden of proving that validity shall be on the person alleging it". Thus, "[h]ere, the bank is alleging the mortgage is valid by reason of section 3(3) and accordingly the burden of proving that validity rests on the bank."A full plenary hearing in the High Court was ordered, but the case seems to have been settled before the plenary hearing came on, and before, therefore, a resolution of the issue was possible.

The fifth opportunity was presented by the litigation in *Bank of Novia Scotia v. Hogan*. In the High Court (December 21, 1992), Keane J. was faced with a plea, based upon *Chaplin v. Brammall* [1907] 1 K.B. 233 and *Turnbull v. Duvall* [1902] A.C. 429 to the effect that Mrs Hogan was someone "who required genuinely independent advice before she entered into a transaction which, from her point of view, was of no direct benefit." (p. 12). Taking the plea first on its merits, Keane J. held that Mrs Hogan had, in the event received independent legal advice (p. 13). Though *Turnbull* has come to be seen as the genesis of the "agency" approach, it and *Chaplin* were relied upon in *Yerkey v. Jones* to generate, in favour of a surety wife, a "special equity" which sounds extraordinarily similar to the plea on behalf of the wife before Keane J. However, the learned judge understood it simply as a "suggestion that a wife is always presumed to be acting under the influence of her husband in such circumstances" (p. 12) and held that such a presumption "is not borne out by other authorities" (*ibid*). Beyond this, however, the judgment of Keane J. provided little guidance on the question of which approach to the question of the enforceability by the bank of the surety wife's security would be adopted.

The matter seems to have been resolved on appeal in that case: Murphy J. distinguished *Smyth*, rejected the special equity strategy, and adopted the notice stragegy (though without reference to the ambiguity in *McKeever* or the alternative position adopted in *Gregg v. Kidd*) placing Irish law on the same footing as English law on this point – indeed, Scots law, which had earlier adopted the "actual knowledge" strategy (*Mumford v. Bank of Scotland* 1994 S.L.T. 1288), has been placed on a similar footing following the acceptance of *O'Brien* by the House of Lords on appeal from Scotland in *Smith v. Bank of Scotland* (House of Lords, unreported, 12 June 1997). In *Hogan*, Mrs Hogan, having received indepedent legal advice, deposited with the bank title deeds to her property as an unlimited security upon her husband's indebtedness. Applying the notice strategy, Murphy J. found that Mr Hogan had not exercised undue influence over Mrs Hogan, but held that he done so and had an equity in her favour arisen of which the bank had notice, then the solicitor's independent legal advice to Mrs Hogan would have afforded a defence to the bank; he also found as a fact that the bank had not exercised any undue influence over Mrs Hogan; he therefore concluded that the bank's security over Mrs Hogan's property was valid and enforceable (the case is also analysed in detail in our Equity chapter, below, 297). Murphy J. distinguished *Bank of Ireland v. Smyth* on the grounds that "cases turning on the adequacy of a consent required and alleged to have been given under [s.3 of] the Family Home Protection Act, 1976 are distinguishable from those in which it is alleged that a spouse in dealing with his or her own property did, or may have, acted under undue influence" (pp. 10-11), so that the "crucial distinction is that Mrs Hogan was dealing with property of which she was the owner whereas Mrs Smyth was being asked to give and purported to give her consent under section 3 of the Family Home Protection Act 1976 to a mortgage of the family home by her husband." (p. 10; compare the similar conclusion in the 1993 Review, 202-208). Furthermore, Murphy J. rejected the "special equity" strategy on the grounds that he did not find it "satisfying as a matter of legal logic or fully acceptable as an analysis of the rights or capabilities of women generally and married women in particular" (p. 13). This chill is but one example of the frosty reception now being accorded to this doctrine in the common law world generally (see the 1993 Review, 200-201; the 1995 Review, 235-9; and Williams, "Equitable Principles for the Protection of Vulnerable Guarantors:

Is the Principle of *Yerkey v. Jones* Still Needed ?" (1994) 8 *JCL* 67). These red herrings once exposed, the way was clear for Murphy J. to determine the proper legal analysis of the situation sketched at the outset of this section and which presented itself for resolution in *Hogan*.

At the outset of his analysis on this point, Murphy J. approved the traditional views which he derived from the speech of Lord Browne-Wilkinson in *O'Brien*, that "(i) as between the innocent party and the alleged wrongdoer the burden of proving the exercise of undue influence falls on the inncoent party. (ii) There are, however, recognised categories of relationship within which there is apresumption that the alleged wrongdoer has abused his position so that the onus is on him to prove that such was not the case. (iii) The decision in *Bank of Montreal v. Stuart* [1911] A.C. 120 determined that the relationship between husband and wife did not as a matter of law raise a presumption of undue influence by a husband over his wife." (p. 12) It is understandable that the speech of Lord Browne-Wilkinson having in this regard provided so reliable a road-map, Murphy J. chose to be guided by it again in adopting and applying to the facts of *Hogan* the notice strategy outlined in *O'Brien*. It is, perhaps, to be regretted that the other strategies and earlier Irish authorities outlined above seem not to have been before him, if only because a more complete knowledge of the options available would render more secure the coclusion reached.

Rather more unfortunate, however, is the central role which the notion of independent legal advice seems to play in the case; Murphy J. tells us that "the greater part of the argument before this court (and much of the judgment of the learned trial judge) related to the sufficiency of the advice given" (p. 7) by the solicitor on the grounds that his firm acted for the bank in other matters, and that the advice was unsatisfactory and given in the bank in the presence of the officials at a time when Mrs. Hogan was effectively committed to the transaction. "It was argued that independent legal advice should be given privately and in good time, so that a client could, without undue embarrassment, withdrawn from a transaction if that was to be the outcome of the advice given to her. or to him" (p. 8). As to the independence of the advice, in the High Court, Keane J. had held although the solicitors who had acted for the husband and wife in this case had "acted for the bank from time to time, they did not act for them in relation to these transactions." (at p. 5 of his judgment). As to the quality of the advice, Keane J. found that the solicitor present with the wife (and husband and manager) in the bank had explained to Mrs Hogan that she was under no obligation to make the deposit but that if she did so, the Bank would be entitled to sell the property in the event of a default by her husband (at pp. 6-9). Consequently, he held that the bank was not in breach of any fiduciary duties which it may have owed to Mr Hogan (p. 10). Similarly, in the Supreme Court, Murphy J. held that the "availability of appropriate indepedent legal advice to Mrs Hogan would afford the Bank a defence on a

claim by her in respect of an equity to set aside the transaction if such equity had existed" (pp. 15-16) though, since Mr Hogan had not exercised undue influence upon her, Mrs Hogan had no such equity. It was argued in the 1993 Review, 195-196 and again in the 1995 Review, 236, that the presence of independent advice is at best an unreliable guide. There may be no such advice, and yet the contract could be voluntary; or, there may be independent advice, and yet the undue influence could be so strong that such advice would be ineffective or ignored. In either such case, a search simply for independent advice would reach a different conclusion to an analysis of whether there was in truth a voluntary consent. Consequently, independent advice is not some talismanic cure for coercion; it may be an important factor to be taken into account, but it should not be used a proxy for an analysis as to whether a spouse's consent was a valid one. (Similar views are expressed by Barton J. in *McMakin v. Hibernian Bank* [1905] I.R. 296, 304-305, by Budd J. in *Gregg v. Kidd* [1956] I.R. 183,196-197, in which the advice from the solicitor may not have been independent and was certainly inadequate to enable the plaintiff to understand what he was doing (204-205), and by Black J. in *Provincial Bank of Ireland v. McKeever* [1941] I.R. 471, 484-481, in which there was no indepedent legal advice, but the presumption was nevertheless rebutted on the facts). Thus, if Mr Hogan had in fact exercised such undue influence upon Mrs Hogan, then the few short sentences from her solicitor at the bank may very well not have had any impact at all in removing the effect of such undue influence and rendering her consent a real one.

Though the effect of the decision of Murphy J. in *Hogan* can be shortly stated (*Smyth* distinguished; *Yerkey* rejected; *O'Brien* in the House adopted), there occur in the course of his judgment both a passage which is not as clear as it might be, and a question which Murphy J. seemed to leave open. The problematic passage occurs during Murphy J.'s treatment of the special equity strategy. Having referred to certain aspects of the speech of Lord Browne-Wilkinson in the House of Lords in *Barclay's Bank v. O'Brien*, Murphy J. continued that:

> notwithstandng the fact that the relationship of husband and wife has been held not to raise a presumption of undue influence some special status does appear to have been accorded to wives in a variety of decided cases. Scott L.J. [in the Court of Appeal in *Barclay's Bank v. Brien* [1993] Q.B. 109] referred to married women being treated by the law "*more tenderly*" than others and in the Australian case of *Yerkey v. Jones* (1939) 63 C.L.R. 649 Dixon J. referred to "*the invalidating tendency*" applied by the Courts in relation to transactions between a husband and a wife. The consequence appears to be that whilst the matrimonial relationship as such does not give rise to a presumption of undue influence it may be possible to identify circumstances in a particular case which

would more readily raise that presumption in favour of a wife than any outside party. I confess that I do not find the conclusions of the House of Lords in this regard satisfying as a matter of legal logic or fully acceptable as an analysis of the rights or capabilities of women generally and married women in particular. (at pp. 12-13; emphasis in original).

Clearly the tenor of the last sentence is to reject the invalidating tendency as inappropriate to the capabilities of women, but the reference to the "conclusions of the House of Lords" is puzzling. Even more so is his later comment that, the "House of Lords went on to apply the '*invalidating tendency*' and '*tender treatment*' principles to the facts of the *Barclays Bank* case . . .". However, in *Barclays Bank v. O'Brien*, it was Scott L.J. in the Court of Appeal who advocated the invalidating tendency / special equity approach; in the House of Lords, Lord Browne-Wilkinson, far from applying it to the facts, *rejected* it as unjustified in principle, inconsistent with established law on the presumption of undue influence, unsupported by authority (apart from *Yerkey v. Jones*), and unnecessary if the notice strategy is properly applied ([1994] 1 A.C. 180, 195). On his Lordship's approach in the House of Lords, if D's consent to the contract of security with P was procured by T by the exercise of equitable fraud, an equity arose in D's favour, and if P had notice of that equity, P could not enforce the security as against D. He gave undue influence and misrepresentation as examples of this equitable fraud: invalidating tendencies and special equities are nowhere to be seen in this analysis. Consequently, it seems that the House of Lords, unlike the Court of Appeal, far from adopting *Yerkey v. Jones*, in fact advocted a position on this point broadly similar to the sentiments of Murphy J. in the last sentence above. It is thererfore submitted that Murphy J. must be taken as rejecting on this point, not the conclusions of the House of Lords, but those of the Court of Appeal.

Finally, as to the question which Murphy J. seemed to leave open, towards the end of his judgment, he assumed, "without deciding, that married women in this jurisdiction may in certain circumstances enjoy as against their husbands a presumption that undue influence was excercised", allowed "that those circumstances existed in the present case" and held that "the fatal flaw in Mrs Hogan's case is that no undue influence was exercised by her husband and that she has no equity against him to have the transaction set aside and, that being so, she has no prior equity on which she can rely in order to defeat the Bank's claim". (p. 15). Cearly, what Murphy J. had in mind in the passage is the orthodox analysis of undue influence, and not the *Yerkey v. Jones* principle, as it seems that he had already rejected that princple, which anyhow turns not on the bank's notice of the husband's undue influence over the wife but upon a duty upon the bank to treat with special tenderness the surety wife by ensuring that she is at least independently advised, whether or not there was any actual or presumed undue influence, and, if there was, whether or not the

bank had notice of it. As to that question of whether married women may enjoy as against their husbands a presumption that undue influence was excercised, the orthodox analysis of undue influence already supplies an answer.

On the principles adopted by Costello J. in *O'Flanagan v. Ray-Ger* (1963-1993) Ir. Co. Law Rep. 289 (April 28, 1983), equity will give relief against undue influence actually exercised, and, in relationships where one party has great influence over the other, and there is a significant risk that this party will take advantage of this influence and coerce or victimise the other party into a contract, equity will raise a presumption that the stronger party obtained that benefit by virtue of the exercise of undue influence. In the context of the relationship between a banker and a customer, whislt in principle, a banker may be found to have exercised actual undue influence over the customer, there is no presumption of undue influence in the banker-customer relationship, though the particular facts of a particular relationship may raise the presumption. Thus, in *Lloyd's Bank v. Bundy* [1975] Q.B. 326, an old man, surety for his son's debts, relied entirely on his bank manager; the Court of Appeal held that the circumstances raised a presumption of undue influence on the part of the bank manager; whereas, in *Nat West v. Morgan* [1985] A.C. 686, the relationship between surety wife and the bank manager did not go beyond ordinary business relationship into one of reliance; thus there were no circumstances to raise the presumption; likewise in *Hogan* (to the same effet; see Keane J. in the High Court (at pp. 14-15) expressly following *Morgan*; Murphy J. on appeal (p. 16)). Similarly, in the husband-wife relationship: in principle, if a husband has actually coerced his wife, then she can plead actual undue against him; and, although, as Murphy J. himself made clear earlier his judgment in *Hogan*, the husband-wife relationship does not automatically raise the presumption, nonetheless, the individual circumstances of any given marital relationship can give rise to such a presumption. Thus, there was no question for Murphy J. to leave open. In the end, however, if, as seems likely, *Hogan* has had the effect of clarifying the law on undue influence by a third party, then it is the most significant of this year's decisions on the Law of Contract.