

## EXPECTATIONS IN CONTRACTUAL NEGOTIATIONS

D. W. GREIG\*

It is not possible to proceed far in the Law of Contract without being confronted with propositions based upon or derived from the intentions of one or other, or even of both, of the parties. To take some examples:

1. In order to be binding as a contract, an agreement requires an intention to create legal relations.
2. The test of whether a statement is an offer or an invitation to treat is one of intention: did the person making the statement intend that it should be converted into a contract by an act of acceptance?
3. Whether a statement made by a party to a contract constitutes a term in that contract depends upon whether that party intended it to be.
4. In a situation where the terms of the contract appear to be ambiguous, the court should interpret them in order to give effect to the intentions of the parties.

As soon as the attempt is made to analyse such statements, it will be apparent that, to a greater or lesser extent, their application depends upon a fictional rather than an actual intention. In situations 1 and 2 the courts will be greatly influenced by a number of suppositions which will often have little to do with any actual intention (or at least not an intention that is shared or of which the other party is aware). For instance, in a commercial transaction the courts will act on the basis that, however unclear the terms in which the intention is expressed, the parties did intend to create legally enforceable obligations. In the domestic situation, on the other hand, a degree of certainty will be necessary to persuade the court that such an intention was present.

Similarly, when dealing with the distinction between offers and invitations to treat, the legal profession has for long accepted certain axioms with little regard for their lack of logical justification. It may be reasonable to start from an assumption that advertisements in circulars do not constitute offers capable of being accepted by "all the world" (otherwise the merchant would be open to demands far exceeding the supply of

\* Professor of Law, Australian National University.

goods available to him<sup>1</sup>), but the same factor can hardly be relevant to sales of goods in shop windows or on supermarket shelves. Nevertheless the dogma that such displays amount only to invitations to treat is based upon an intention attributed to the trader, and which, presumably, is supposed to be apparent to, or perhaps even shared by, the would-be customer.

When it comes to cases in category 3, the courts are less coy about admitting that their reliance upon intention is based upon appearances rather than reality. As Gillard J. said in *Blakney v. J.J. Savage & Sons Pty. Ltd.*,<sup>2</sup> citing the judgment of Denning L.J. in *Oscar Chess Ltd. v. Williams*<sup>3</sup>

“To find a warranty exists, the court must be satisfied on the whole of the evidence that the parties intended that any statement made should constitute the giving of a warranty to impose contractual responsibility on the person making the statement. Since such intention must be determined objectively, the . . . court is not bound to discover what was actually in the mind of either party when the statement was made.”

In situation 4 a court will, domestic situations apart, usually make the underlying assumption that the parties intended legal relations, so that it is prepared to go to considerable lengths to ascertain the contractual intent of the parties. In the words of Lord Wright<sup>4</sup>

“The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation.”

The objective test of intention requires the situation to be judged by the words and conduct of the parties, an approach that is but another manifestation of that most self-righteous of beings, the reasonable man. In ascertaining the parties' intention recourse may be had to various tools. Was there an offer and how was it accepted? In answering these questions a variety of assumptions are made about what the law should require and how individuals should conduct themselves in relation to its rules. In writing on the jurisprudential foundation of the law, Salmond<sup>5</sup> wrote that the law was the law because it was the law and for no other reason known to the law. In relation to the law of contract one is tempted to say that it

<sup>1</sup> A factor which is hardly determinative: it would have been open to judges less hostile to regarding such communications as offers to have implied a term into the circulars that the merchant was only offering to satisfy customers' orders to the limit of his supplies.

<sup>2</sup> [1973] V.R. 385 at 391.

<sup>3</sup> [1957] 1 All E.R. 325 at 328.

<sup>4</sup> *Scammell (G) and Nephew, Ltd. v. H.C. and J.G. Ouston* [1941] A.C. 251 at 268.

<sup>5</sup> *Jurisprudence*, 11th ed. (1957), p. 137.

is the law because lawyers, and more particularly judges, believe it is the law and because it conforms to a certain view of society and the way in which individuals operate within it.

Without wishing to belabour an obvious point, certain periods have seen the emergence to an influential position of particular interest groups. In the nineteenth century successive *Factors Acts* in England were the attempt of the commercial community to protect transactions at the expense of property. The need for the later of those Acts was in part brought about by the attitude of the judiciary who sought to protect property by interpreting such legislation restrictively. Indeed the courts continue to show considerable hesitation in applying the concept of ostensible ownership or authority to protect an innocent party to a transaction at the expense of the rights of the original owner: see *Moorgate Mercantile Co. Ltd. v. Twitchings*.<sup>6</sup>

Nevertheless, in the present century it is probably true to say that the courts have made a more conscious effort to satisfy some of the demands of the mercantile community. As far as the position in England is concerned, 1932 probably marks something of a dividing line. The previous year *Hillas (W.N.) and Co. Ltd. v. Arcos Ltd.* had been heard in the Court of Appeal.<sup>7</sup> Having found himself in a minority in *May and Butcher Ltd. v. The King*,<sup>8</sup> Scrutton L.J. expressed his continuing disapproval of that decision<sup>9</sup>

“I am afraid I remain quite impenitent. I think I was right and that nine out of ten business men would agree with me. But of course I recognize that I am bound as a Judge to follow the principles laid down by the House of Lords. But I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the Courts and being decided by commercial arbitrators with infrequent reference to the Courts.”

Perhaps because of this warning, when *Hillas v. Arcos* reached the House of Lords,<sup>10</sup> Lord Tomlin made his famous statement<sup>11</sup> that

“the problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.”

<sup>6</sup> [1977] A.C. 890. Similarly, the passing of the *Trade Practices Act 1974* (Cth) and the subsequent amendments in 1977 demonstrate the interplay of a variety of interests in the subject matter of the legislation.

<sup>7</sup> (1931) 36 Com. Cas. 353.

<sup>8</sup> The Court of Appeal judgments were not reported; the House of Lords decision (1929) appeared later in [1934] 2 K.B. 17n.

<sup>9</sup> (1931) 36 Com. Cas. at 367-8.

<sup>10</sup> (1932) 38 Com. Cas. 23.

<sup>11</sup> *Ibid.* 29, Lords Warrington and Macmillan concurred, at 33.

As for *May and Butcher Ltd. v. R.*, that case did not "afford any assistance in determining the present case".<sup>12</sup> Or as Lord Wright put it<sup>13</sup>

"The document . . . cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects".

While this was a change of attitude and a welcome one at that, it was nevertheless a patronising attempt to bridge some of the gulf between the legal world and the world of commerce.

It is in many ways an uneasy relationship as will be demonstrated,<sup>14</sup> but, before pursuing that issue, it is worth returning to the question of the influence of Parliament, or more accurately those interests which have exercised influence over the legislature. Whatever may have been the conflict between the courts and Parliament over the protection of property or of transactions, the law (or at least the lawyers who created it) made common cause with the commercial community over relations between merchants and their customers. The doctrine of *caveat emptor* was a long time dying and, in the more specific matter of the negotiation of contracts, vestiges of the doctrine still survive.

The question of who is the offeror in relation to goods advertised for sale in a shop provides a fascinating illustration of the way the legal mind operates in a manner which the layman often finds totally unreal. For example, the origin of the rule that goods marked with a price-tag do not constitute an offer seems to have been the exchange between counsel for the plaintiff and the trial judge, Baron Parke, in *Timothy v. Simpson*.<sup>15</sup> The plaintiff and his clerk saw some items of linen in the defendant's shop window, including a dress priced at 5s 11d. The plaintiff sent his clerk into the shop to purchase the item. The clerk asked for the dress and gave the shop assistant a sovereign, out of which to take the 5s 11d. However, the assistant said that the dress was 7s 6d. The plaintiff then entered the shop and said that raising the price was an imposition. One of the assistants said "I suppose we must let him have it", but another said, "Don't let him have it; he is only a Jew; turn him out." In the struggle that followed to evict the plaintiff several blows were struck, a policeman was called and the plaintiff was taken into custody. This was an action for

<sup>12</sup> *Ibid.* 32.

<sup>13</sup> *Ibid.* 36-7.

<sup>14</sup> Below, p. 196; and see the disquiet later expressed by P. Devlin, "The Relation between Commercial Law and Commercial Practice" (1951) 14 *Mod. L.R.* 249.

<sup>15</sup> (1834) 6 *Car. & P.* 499.

assault and false imprisonment, but, in the course of his address to the court on the plaintiff's behalf, counsel said,<sup>16</sup> "If a man advertises goods at a certain price, I have a right to go into his shop and demand the article at the price marked", to which Baron Parke replied,<sup>17</sup> "No; if you do, he has a right to turn you out. The plaintiff was a trespasser in continuing in the house."

This "leading" authority was cited by Pollock<sup>18</sup> and by Cheshire and Fifoot,<sup>19</sup> the former refraining from mentioning the then recent case of *Wiles v. Maddison*,<sup>20</sup> the latter relegating it to a brief footnote reference. Chitty<sup>21</sup> needed no direct authority other than *Grainger v. Gough*,<sup>22</sup> a case dealing with liability to taxation and only incidentally raising a question concerned with price lists sent out by a wine merchant, for the statement, "A price list is in fact merely an invitation to do business, like the price tickets exhibited on goods displayed in shop windows." A similar statement appeared in Sutton and Shannon.<sup>23</sup>

In contrast, *Wiles v. Maddison* was a prosecution for breach of a wartime regulation—the *Meat (Maximum Retail Prices) Order 1940*, article 4—that no person "shall sell or offer or expose for sale . . . any meat at a price exceeding the price applicable under this Order". The appellant had cut, wrapped and put an invoice on a number of pieces of meat to be delivered the next day to various customers. An inspector discovered that the price marked on each piece exceeded the maximum permitted under the Order. The Divisional Court held that the appellant could not be convicted of an offence because he had yet to offer a package to the customer concerned. However, in the course of giving judgment, Viscount Caldecote L.C.J. observed<sup>24</sup> that a person might "be convicted of making an offer of an article of food at too high a price by putting it in his shop window to be sold at an excessive price", and Tucker J. expressed his general agreement.

Although *Wiles v. Maddison* was cited in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*,<sup>24a</sup> its significance was totally ignored. The reason is not hard to understand. For the defendants to be convicted of an offence under s. 18 of the *Pharmacy and Poisons Act 1933* (U.K.), it had to be shown that a sale of a proprietary medicine, which contained two substances included in a Poison List in the Act, had not been "effected by, or under the supervision of, a registered pharmacist"

<sup>16</sup> *Ibid.* 500.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Principles of Contract* 12th ed. (1946), p. 14, fn. 40.

<sup>19</sup> *Law of Contract* 3rd ed. (1952), pp. 26-7.

<sup>20</sup> [1943] 1 All E.R. 315.

<sup>21</sup> *Law of Contracts* 20th ed. (1947), p. 19.

<sup>22</sup> [1896] A.C. 325.

<sup>23</sup> *On Contracts* 4th ed. (1949), p. 24.

<sup>24</sup> [1943] 1 All E.R. 315, 317.

<sup>24a</sup> [1952] 2 Q.B. 795; [1953] 1 Q.B. 401.

as required by the Act. The defendants' premises were laid-out as a self-service store and the duty pharmacist was positioned by the two cash desks. In order to establish that an offence had been committed, therefore, the prosecutor had to argue not only that the goods on display constituted an offer, but that an acceptance had taken place before the customer reached the cash desk. It was the absurdity of the latter proposition which greatly re-inforced the view of Lord Goddard C.J.<sup>25</sup> and of the Court of Appeal<sup>26</sup> that the display did not constitute an offer. In the opinion of the Chief Justice,<sup>27</sup> it was "a well-established principle that the mere exposure of goods for sale by a shopkeeper indicates to the public that he is willing to treat but does not amount to an offer to sell". This view of the law was endorsed by the Court of Appeal.

It has already been suggested that there was a dearth of authority on the point. Hence the fact that the principle was "well-established" appeared to depend more upon legal mythology. That its logic would not necessarily appeal to laymen was ignored, though Lord Parker C.J. did at least acknowledge the discrepancy between the law and normal expectations in *Fisher v. Bell*.<sup>28</sup> The defendant had been prosecuted under s. 1 of the *Restriction of Offensive Weapons Act 1959* (U.K.), it being alleged that he had offered for sale a "flick knife". A knife which satisfied the statutory description of such a weapon had been displayed by the defendant in his shop window alongside a notice, "Ejector knife—4s". The Divisional Court held that no offence had been committed. In the words of Lord Parker C.J.<sup>29</sup>

"I confess that I think most lay people and, indeed, I myself when I first read the papers, would be inclined to the view that to say that if a knife was displayed in a window like that with a price attached to it was not offering it for sale was just nonsense. In ordinary language it is there inviting people to buy it, and it is for sale; but any statute must of course be looked at in the light of the general law of the country. Parliament in its wisdom in passing an Act must be taken to know the general law. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat."

Two points need to be made about this line of authority. First, it was an extremely tenuous one until Lord Goddard C.J. accepted the principle as *already* "well-established". On the facts of the *Boots* case the same conclusion could have been reached in the defendants' favour even if the display had been regarded as an offer. The placing of the goods by the customer into the basket she was carrying could hardly constitute an act

<sup>25</sup> [1952] 2 Q.B. 795, 802.

<sup>26</sup> [1953] 1 Q.B. 401, 406-8.

<sup>27</sup> [1952] 2 Q.B. 795, 801.

<sup>28</sup> [1961] 1 Q.B. 394.

<sup>29</sup> *Ibid.* 399. See also *Partridge v. Crittenden* [1968] 2 All E.R. 421, 424.

of acceptance because an acceptance normally has to be communicated. The appropriate person to receive notice of acceptance on behalf of the defendants was the person on the cash desk. It was open to the registered pharmacist to intervene, if necessary, to revoke the offer before the moment the customer presented the goods for payment. Certainly there could be no doubt that conclusion of the contract would have been under the pharmacist's supervision.

Secondly, it is not an adequate answer that this particular rule is the law because lawyers think that it is if the law is out of harmony with normal expectations. The normal reaction of a person who, seeing goods displayed at a particular price in a shop window, enters the shop to buy them at the price given, but is then told that the price is now so much higher, is that he has been cheated. That this reaction is not at all unreasonable and that society has an interest in traders abiding by their apparent promises are demonstrated by legislative intervention on behalf of the would-be customer. In Britain the position is governed by s. 11 of the *Trade Descriptions Act* 1968. In Australia, s. 53 of the *Trade Practices Act* 1974 (Cth.) provides

"A corporation shall not, in trade or commerce, in connexion with the supply or possible supply of goods or services or in connexion with the promotion by any means of the supply or use of goods or services—

(e) make a false or misleading statement with respect to the price of goods or services;"

and section 56(2) provides

"A corporation that has, in trade or commerce, advertised goods or services for supply at a special price shall offer such goods or services for supply at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the corporation carries on business and the nature of the advertisement."

### EXPECTATIONS RATHER THAN INTENTIONS

It is perhaps time that some comment was made about the use of "expectations" in the title of this article. It has already been suggested that "intention" is often a legal fiction which in certain situations can lead to a totally unsatisfactory view of the law. In relation to the distinction just considered between an offer and an invitation to treat, the distinction is said to be based upon the intention of the person issuing the offer/invitation: is it intended that it should be converted into a contract by a simple act of acceptance? Such a test is, however, unreal. If one asks oneself what are the *expectations* of the parties, the majority of customers would believe that they were entitled to buy goods at the advertised or marked price. In the case of the shop-keeper (in the days before legislative interference), he might well have been aware of his probable contractual

position of being able to refuse to supply the displayed goods, but he would also have expected a fairly hostile reaction from a good many of his customers. Why should the courts not recognize the expectations of the community in an appropriate rule of contract law that displayed goods with prices marked can constitute offers which a customer can accept?

The reference in particular decisions to the "intentions of the parties" is sometimes a useful tool. However, followed slavishly it can lead to absurdity. A genuine attempt to understand the expectations of the parties would not suffer from the same inflexibility. In *Esso Petroleum Ltd. v. Commissioners of Customs and Excise*,<sup>30</sup> the House of Lords was called upon to consider the legal nature of a series of transactions whereby motorists purchasing petrol from the appellants' garages received coins bearing the features of a member of the English squad of players being sent to the world soccer cup finals in Mexico in 1970. A variety of advertisements appeared in the Press and on television: "Going free, at your Esso Action Station now"; "We are giving you a coin with every four gallons of Esso petrol you buy"; and large posters containing similar wording were displayed at some 4900 petrol stations. The respondents claimed that purchase tax was payable on the transactions in respect of the coins on the ground that they had been "produced in quantity for general sale" under the *Purchase Tax Act 1963* (U.K.). A majority of their Lordships held that, even if the transactions constituted binding contracts, they were not sales because the consideration for each transfer of a coin was not the payment of a price, but the entering into by a customer of a collateral contract to purchase a quantity of Esso petrol. However, there was a sharp divergence of opinion on the question of whether there was a contract (i.e., a legally binding agreement) to acquire the coins. Viscount Dilhorne and Lord Russell agreed with the Court of Appeal<sup>31</sup> that there had been no intention to create legal relations. In the words of the former<sup>32</sup>

"True it is that Esso are engaged in business. True it is that they hope to promote the sale of their petrol, but it does not seem to me necessarily to follow or to be inferred that there was any intention on their part that their dealers should enter into legally binding contracts with regard to the coins; or any intention on the part of the dealers to enter into any such contract or any intention on the part of the purchaser of four gallons of petrol to do so."

The fact that the coins were of negligible intrinsic value was obviously influential in the minds of those who could not imagine legal proceedings being brought if a garage failed to make a "gift" of a coin as promised.

<sup>30</sup> [1976] 1 All E.R. 117.

<sup>31</sup> [1975] 1 W.L.R. 406.

<sup>32</sup> [1976] 1 All E.R. 117, 120.

To a majority of the House of Lords, however, there was a contractual obligation created by the arrangement. This view was well expressed in the judgment of Lord Simon<sup>33</sup>

“I am, however, . . . not prepared to accept that the promotion material put out by Esso was not envisaged by them as creating legal relations between the garage proprietors who adopted it and the motorists who yielded to its blandishments. In the first place, Esso and the garage proprietors put the material out for their commercial advantage, and designed it to attract the custom of motorists. The whole transaction took place in a setting of business relations. In the second place, it seems to me in general undesirable to allow a commercial promoter to claim that what he has done is a mere puff, not intended to create legal relations. (cf. *Carlill v. Carbolic Smoke Ball Co.*) The coins may have been themselves of little intrinsic value; but all the evidence suggests that Esso contemplated that they would be attractive to motorists and that there would be a large commercial advantage to themselves from the scheme, an advantage in which the garage proprietors also would share. Thirdly, I think that authority supports the view that legal relations were envisaged.”

Then, having cited with approval *Rose and Frank Co. v. J. R. Crompton & Bros. Ltd.*<sup>34</sup> and *Edwards v. Skyways Ltd.*,<sup>35</sup> his Lordship continued<sup>36</sup>

“And I would venture to add that it begs the question to assert that no motorist who bought petrol in consequence of seeing the promotion material prominently displayed in the garage forecourt would be likely to bring an action in the county court if he were refused a coin. He might be a suburb[an] Hampden who was not prepared to forego what he conceived to be his rights or to allow a tradesman to go back on his word.”

The difficulty with either view is that it ascribes a specific intention to both sides of an enormous number of contracts entered into in quite different circumstances. The judgment of Lord Denning M.R. in the Court of Appeal at least had the merit of recognising that different situations might have arisen. He said<sup>37</sup>

“If it be thought necessary to go through a legal analysis I should have thought it was this: when a motorist drives up to a garage, he is met with an invitation to treat. The garage stands there open for business with its pumps ready and all these notices or posters stuck about the forecourt. Many a motorist does not read them. He drives up to a pump and asks the attendant for four gallons of petrol. That is an offer to buy four gallons of petrol at the stated price. The attendant works the pump and delivers four gallons. That is an acceptance of the offer. The contract is complete. The motorist is bound to pay the price of the petrol and does so. The motorist does not ask for one of the World

<sup>33</sup> *Ibid.* 121.

<sup>34</sup> [1923] 2 K.B. 261, 288, 293.

<sup>35</sup> [1964] 1 All E.R. 494, 500.

<sup>36</sup> [1976] 1 All E.R. 117, 122.

<sup>37</sup> [1975] 1 W.L.R. 406, 408-9.

Cup coins. He knows nothing of them. But the attendant hands him one. That is a pure gift unalloyed by any taint of sale.

Next take the motorist who has seen the poster and read all about the coins beforehand. His children have pressed him to stop at the garage and buy petrol there. The posters then were clearly an inducement which led him to buy petrol. In law it was a representation inducing the contract of purchase. But it was no part of the contract itself. It was a representation inducing it. The petrol was the same price in any case with or without inducement. The representation was not a representation of existing fact so as to come within the *Misrepresentation Act 1967*. It was a representation as to the future, saying 'One coin (will be) given away with every four gallons of petrol.' That representation would, in law, be binding if both parties intended that it should create legal relations between them. Their intention is to be ascertained by looking at it objectively, as a bystander would do. The test is: would it be reasonably understood by reasonable people that it was a promise binding in law?

I must say I do not think reasonable people would regard the representation as a promise binding in law. It was just an advertising stunt to induce people to buy petrol and to buy it at the current price. It gave the motorist the hope and expectation that he would receive a coin with every four gallons of petrol, but it did not give him the contractual right to a coin. If the proprietor ran out of coins and, when asked for one, said 'I am sorry, I have no more left', the motorist would not have a cause for action for damages."

While placing too great an emphasis upon the question of intention and thus reaching the less satisfactory of the two possible conclusions, Lord Denning was at least attempting a more realistic approach. Some of the expressions of opinion in which it was pointed out that the value of the coins was so small that there had been no increase of price to cover their cost seem to disregard altogether the motives and expectations of the appellants and of their client garages. It was at least recognised that the appellants intended the scheme to promote sales. For various reasons it was seen as a preferable alternative to that of cutting petrol prices or of offering trading stamps (which would have had a calculable monetary value). Given the expectation of the appellants that motorists would change their petrol buying habits in order to obtain the coins, and the expectation certainly of those persuaded to change their habits that they would receive a coin for each four gallons of petrol purchased, the conclusion that there was no intention to create legal relations is unacceptable.

#### PROBLEMS IN RELATION TO CONTRACTS IN, OR REQUIRED TO BE EVIDENCED BY, WRITING

A fruitful area (if that is the right expression!) for thwarted expectations is in cases where a written agreement or memorandum of an oral agreement is signed although it contains terminology which enables one of the parties later to challenge the efficacy of the document.

The classic statement of the law from an Australian point of view is that of Dixon C.J., McTiernan and Kitto JJ. in *Masters v. Cameron*<sup>38</sup>

“Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes.

[1.] It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.

[2.] Or . . . it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

[3.] Or . . . the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.”

While contracts in categories 1 and 2 were enforceable, those in category 3 were not because “the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own”.<sup>39</sup>

But how is a selection to be made of the appropriate category? According to the High Court, the “question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape. . . . Nor is any formula, such as ‘subject to contract’, so intractable as always and necessarily to produce that result”.<sup>40</sup> Nevertheless, the use of such an expression prima facie creates an overriding condition, “so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract”.<sup>41</sup>

It must be admitted that the variety of phrases used which, it is alleged by one party, render the bargain as yet incomplete does not make it an easy matter for a court to identify the intentions of the parties in the context of the three categories suggested in *Masters v. Cameron*. In *Godecke v. Kirwan*,<sup>42</sup> for example, a document headed “Offer and Acceptance” had been signed by the appellant purchaser and by the respondent vendor’s agents. Amongst the terms set out in the document were the following clauses

<sup>38</sup> (1954) 91 C.L.R. 353, 360 (numbering supplied).

<sup>39</sup> *Ibid.* 361.

<sup>40</sup> *Ibid.* 362.

<sup>41</sup> *Ibid.* 363.

<sup>42</sup> (1973) 129 C.L.R. 629.

"3. Possession shall be given and taken on settlement upon signing and execution of a formal contract of sale within 28 days of acceptance of this offer.

6. If required by the Vendor/s I/we shall execute a further agreement to be prepared at my costs by his appointed Solicitors containing the foregoing and such other covenants and conditions as they may reasonably require."

Virtue J. of the Supreme Court of Western Australia held that, as it was contemplated that there should be a subsequent formal contract and that fresh terms could be incorporated in such a contract at the behest of the vendor's solicitors, the situation fell within the third category in *Masters v. Cameron* so that there was no concluded bargain.

The High Court reversed this decision. There was no doubt that the subsequent execution of a formal contract was not, on the terms of the document, regarded as a condition precedent to the obligation to give and take possession or to pay the purchase price. For example, not only was the document headed "Offer and Acceptance" but also it required immediate payment of \$8000 and referred to the fact that the appellant had "this day purchased" the property in question. The agreement was, therefore, more appropriately classified under category 2 in line with the decision in *Niesmann v. Collingridge*.<sup>43</sup>

As far as clause 6 was concerned, the fact that the formal agreement might contain additional terms was not destructive of the enforceability of the existing arrangement. While the negotiation of further terms might suggest that the contract had not yet been finalised (*May and Butcher Ltd. v. R.*;<sup>44</sup> *Rossiter v. Miller*<sup>45</sup>), where the stipulation of the terms was at the discretion of a nominated person (even one of the parties), it was possible to regard the contract as binding. The crucial question appeared to be whether the discretion was subject to reasonable restraint. In this case the discretion was limited by express reference to the test of what was reasonable by virtue of clause 6 itself (see *Sweet and Maxwell Ltd. v. Universal News Services Ltd.*<sup>46</sup>) and also by the fact that any new terms must be consistent with the existing arrangements between the parties set out in the "Offer and Acceptance". Even if the discretion was not expressly limited, however, it might be possible to view it in terms of what was reasonable (see *Powell & Berry v. Jones & Jones*<sup>47</sup>).

While this decision may be justified on the basis that it was the intention of the parties to contract or that it was their expectation that they were entering into a binding arrangement, there are situations in which the

<sup>43</sup> (1921) 29 C.L.R. 177.

<sup>44</sup> [1934] 2 K.B. 17n.

<sup>45</sup> (1878) 3 App. Cas. 1124.

<sup>46</sup> [1964] 2 Q.B. 699.

<sup>47</sup> [1968] S.A.S.R. 394.

reference to presumed intention might well defeat the parties' expectations. The existence of the Statute of Frauds gives rise to obvious problems in striking a balance between the need to apply the letter of the legislation and the objective of preventing it being used as a vehicle for the avoidance of bargains.

One can only suppose from the reluctance of the Australian States to repeal the various equivalent statutory provisions (only the A.C.T. and Queensland have dared dispense with the section of the sale of goods legislation requiring a written note or memorandum of a contract with respect to goods to the value of \$20 or more in order to enable a party to enforce that contract as long as it remains executory) that they are still seen as providing protection against fraud or other unconscionable conduct. Nevertheless, a number of obvious arguments can be presented against the continued existence of the remaining vestiges of the *Statute of Frauds*:

1. The Sale of Goods provision has been abolished in a number of jurisdictions with no apparent disadvantage; indeed, the step was taken in England nearly a quarter of a century ago;
2. Even in relation to sales or other dispositions of land, the absence of a requirement of writing to evidence the contract has not been especially disadvantageous to parties negotiating such contracts in Scotland;
3. Although it has been accepted that a contract that needs to be evidenced in writing may be *terminated* by verbal agreement, there has been a reluctance to allow a verbal arrangement to *modify* the terms of the contract. The reason for this hesitation is logical enough. If the written note or memorandum should incorporate expressly or by implication all the terms of the contract, the Statute would no longer be satisfied if additional terms could be orally arranged later to add to the pre-existing, properly evidenced contract. Given that such verbal understandings are commonplace, however, the reasonable expectations of the parties might well be disappointed.
4. As far as the direct application of the Statute is concerned (i.e. in relation to the original formation of the contract), the law has attempted in a number of ways to limit its operation. The doctrine of part performance was equity's means of circumventing the Statute if a party had acted in a manner explicable only on the basis that some such contract already existed between the parties.

(a) *The doctrine of part performance*

The scope of this rule is dependent upon three factors in particular:

- (i) the nature of the acts;

- (ii) the degree of likelihood required that a contract exists; and
- (iii) whether it is just the existence of a contract, or whether the contract to which the activities point must be one relating to land.

Some cherished beliefs may need to be reconsidered in the light of the judgments of the House of Lords in *Steadman v. Steadman*.<sup>48</sup> Outside the magistrates' court just prior to the hearing of one of the parties' disputes over maintenance, H and W orally entered into what was referred to as a "package deal", the terms of which were as follows: (a) W would transfer her interest in the matrimonial home, in which H was still living, to H for £1500; (b) that the existing maintenance order of £2 weekly in W's favour would be discharged; (c) that the £2.50 order in their child's favour would continue; (d) that the arrears of maintenance (amounting to £194) would be remitted save as to £100 which H undertook to pay by the end of the month. Before the magistrates the parties acknowledged the existence of this arrangement, but the magistrates only had jurisdiction to make orders with respect to maintenance, which they did in relation to (b) and (d). H paid the £100 and his solicitors sent W's solicitors a conveyance for her to execute transferring her interest in the house to him. This she refused to do.

The first issue ((i) above) necessarily raised on these facts is the nature of the acts relied upon by the party seeking to enforce the arrangement. In his dissenting judgment in the Court of Appeal Edmund Davies L.J. refused to accept that the payment of the £100 could constitute such an act, relying upon the following passage from *Cheshire and Fifoot*<sup>49</sup>

"The first point to notice is that payment, even of the full purchase price, is not sufficient. The mere payment of money may be explained on a number of grounds, and there is certainly nothing in it to connect it inevitably with a contract for the sale of land by the payee to the payer."

Edmund Davies L.J. continued by commenting that, if payment by H of the entire price of £1500 would not of itself suffice, it "surely cannot then be the law that payment of £100 under another term serves to render enforceable this oral contract".<sup>50</sup>

However, both Roskill and Scarman L.JJ. were prepared to accept that the payment of the £100 was in the circumstances a sufficient act of part performance. The latter distinguished it from a payment of part or all of the purchase money on the ground that the purchase money would be repayable if the contract could not be enforced, whereas the £100 was a sum which W could keep.

<sup>48</sup> [1976] A.C. 536.

<sup>49</sup> *Law of Contract* 8th ed. (1972), p. 194 (cited [1973] 3 All E.R. 977, 986). The same passage appeared in the 3rd Australian ed. (1974), p. 209.

<sup>50</sup> [1973] 3 All E.R. 977, 987.

On appeal their Lordships (Lord Morris dissenting) held that the payment of the £100 was, taken in conjunction with the other circumstances, sufficient. In the words of Lord Simon<sup>51</sup>

“the payment of £100 would, standing by itself, have been equivocal: it would not even marginally have been more suggestive of performance of a contractual term than otherwise. But taken together with the other acts and forbearances of the husband in relation to the summary matrimonial proceedings it becomes strongly indicative of a bargain.”

However, there were a number of suggestions that it was about time that a more fundamental look was taken at one of the law's (or should one say, more correctly, one of equity's) unthinking beliefs. Lord Reid had this to say<sup>52</sup>

“Normally the consideration for the purchase of land is a sum of money and there are statements that a sum of money can never be treated as part performance. Such statements would be reasonable if the person pleading the statute tendered repayment of any part of the price which he had received and was able thus to make *restitutio in integrum*. That would remove any ‘fraud’ or any equity on which the purchaser could properly rely. But to make a general rule that payment of money can never be part performance would seem to me to defeat the whole purpose of the doctrine and I do not think that we are compelled by authority to do that.”

Support for Lord Reid was expressed by Viscount Dilhorne<sup>53</sup> and by Lord Simon.<sup>54</sup> Lord Salmon, having given a number of examples where it would be quite unconscionable for a contract not to be enforced following payment of the purchase price but no (other) act of part performance, concluded by saying<sup>55</sup>

“If the proposition that payment in part or even in full can never be part performance is correct, which, in my view, it is not, then the circumstances surrounding the payment must be irrelevant. . . . This House is . . . not bound to accept the proposition and, for my part, I am unable to do so. I believe that the analysis of the proposition which I have attempted demonstrates that the proposition is fundamentally unsound and would lead to grave injustice.”

As Walton J. has stated more recently of *Steadman v. Steadman in Re Gonin*<sup>56</sup>

“The ratio decidendi of that case I take to be a clear affirmation, overruling many existing statements in the books to the contrary effect, that payment of money may in special circumstances amount to a sufficient act of part performance to call the equitable doctrine into

<sup>51</sup> [1976] A.C. 536, 564.

<sup>52</sup> *Ibid.* 541.

<sup>53</sup> *Ibid.* 555.

<sup>54</sup> *Ibid.* 565.

<sup>55</sup> *Ibid.* 571-2.

<sup>56</sup> [1977] 2 All E.R. 720, 731.

play. If one may respectfully say so, from this point of view it is a very salutary decision.”

If one tests the conclusion of the majority of the Court of Appeal and of the House of Lords against the expectations of the parties, there would seem to be no basis for contesting the judges' refusal to be bound by existing dogma. The approach shows a refreshing respect for such expectations. To quote the words of Roskill L.J. in the Court of Appeal<sup>57</sup>

“I confess that I arrive at this conclusion without reluctance, for it seems to me to accord with good sense and to avoid technicality. If a layman were asked, ‘Why did the husband pay the £100 to the wife?’ the reply would be, ‘As a first step to the performance of the oral agreement of 2nd March 1972 of which one term was that he should make that payment in addition to paying the £1,500 for his wife's interest in the house.’ If a layman would give that answer, I do not think the court should return a different answer unless compelled by authority to do so, and for my part I do not think that authority does so compel.”

It is less easy to identify separately factors (ii) and (iii).<sup>58</sup> In relation to both, the opinions expressed in *Steadman v. Steadman* are more equivocal. Partly this is due to the fact that statements made by members of the House of Lords in the leading authority of *Maddison v. Alderson*<sup>59</sup> were themselves not entirely consistent; partly to some shift in emphasis that had already taken place between 1883 and 1974; and partly to some difference of opinion amongst their Lordships.

However, to take as far as possible the issue first of the degree of likelihood that a contract does exist (i.e., factor (ii)), one of the more frequently quoted pronouncements from Lord Selborne's judgment in *Maddison v. Alderson* is the passage where he said<sup>60</sup> that all “the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged”. The difficulty with interpreting this passage is to decide what degree of emphasis to give to the word “unequivocally”. For example, it would not be unreasonable in purely semantic terms to regard it as synonymous with “referable to the alleged contract and no other”. Indeed, at one time it was so regarded. In Lord Simon's words in *Steadman*<sup>61</sup>

“The first view was apparently held at one time—in logical consistency with the principle that the doctrine of part performance should not be allowed to undermine the statutory insistence that the contract must not be proved by oral testimony. It would seem, indeed, to be a reflection of the tendency to regard the doctrine of part performance as a rule of evidence. But it must often have led to a failure of justice, to

<sup>57</sup> [1973] 3 All E.R. 977, 992.

<sup>58</sup> Above p. 178.

<sup>59</sup> (1883) 8 App. Cas. 467.

<sup>60</sup> *Ibid.* 479.

<sup>61</sup> [1976] A.C. 536, 563.

Equity helplessly standing by while the statute was used as an engine of fraud; since, as Snell<sup>61a</sup> puts it: 'Few acts of part performance are so eloquent as to point to one particular contract alone.' This idea is therefore now to be regarded as 'long exploded', to use Upjohn L.J.'s expression in *Kingswood Estate Co. Ltd. v. Anderson*.<sup>62</sup>

To be fair to Lord Selborne, the Lord Chancellor himself may not have been going as far as his words might suggest. In an earlier passage, having pointed out that the defendant, in proceedings where an act of part performance is alleged, was "really 'charged' upon the equities resulting from acts done in execution of the contract, and not . . . upon the contract itself" he went on<sup>63</sup>

"it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the statute. . . ."

In *Steadman v. Steadman*, Lords Reid and Simon made clear their acceptance of a lesser standard of proof. The latter, after remarking that "the general standard of proof in civil proceedings is proof on a balance of probabilities",<sup>64</sup> went on to cite *Wakeham v. Mackenzie*<sup>65</sup> as correctly based upon the proposition that "the facts relied on to prove acts of part performance must be established merely on a balance of probability".<sup>66</sup> Similarly, in Lord Reid's view,

"unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not."<sup>67</sup>

Viscount Dilhorne's position is less clear, although his reference to *Kingswood Estate Co. Ltd. v. Anderson*,<sup>68</sup> in which "Upjohn L.J. rejected the contention that the acts of part performance had to be referable to no other title than that alleged",<sup>69</sup> suggests his general agreement with Lords Reid and Simon. In a later comment,<sup>70</sup> his Lordship used the ambivalent expression "point to" as the equivalent of "unequivocal".

<sup>61a</sup> *Principles of Equity* 27th ed. (1973), p. 587.

<sup>62</sup> [1963] 2 Q.B. 169, 189.

<sup>63</sup> (1883) 8 App. Cas. 467, 475-6.

<sup>64</sup> [1976] A.C. 536, 563-4.

<sup>65</sup> [1968] 2 All E.R. 783.

<sup>66</sup> [1976] A.C. 536, 564.

<sup>67</sup> *Ibid.* 541-2.

<sup>68</sup> [1963] 2 Q.B. 169.

<sup>69</sup> [1976] A.C. 536, 553.

<sup>70</sup> *Ibid.* 536 (see below p. 182).

On the other hand, Lord Morris in his dissenting judgment seemed anxious to resurrect the former, stricter interpretation of "unequivocally". "The acts of part performance must be such that they point unmistakably and can only point to the existence of some contract such as the oral contract alleged".<sup>71</sup> Similarly, Lord Salmon preferred to accept the principles laid down in *Maddison v. Alderson* which he regarded as "highly persuasive authority" that he was not prepared to reject.<sup>72</sup>

When it came to factor (iii) there was a similar divergence of views. However, whether the act of part performance points to some such contract or to the actual agreement and whether it must also point to that aspect of the contract which concerns a disposition in land are matters which are both in general, and specifically in the context of the facts of *Steadman's* case, more important.

On the theoretical level, the significance of the use of a word like "unequivocally" would be greatly reduced if the reference is to some such contract as that alleged, irrespective of whether the act itself provided the necessary nexus with a disposition of land. This seems to have been Viscount Dilhorne's approach. He rejected the contention that in all cases the act of part performance must be referable to a disposition of an interest in land. Most of the reported cases related to what his Lordship referred to as "single-term contracts for the disposition of land",<sup>73</sup> so it was not surprising that they contained dicta requiring a nexus between the act and the nature of such a contract. But, in this case, the contract contained a number of elements. Although the transfer of the interest in the house was clearly an essential element, provided there was part performance of an aspect of the agreement, it was not necessary that there should be a direct connection between the act of part performance and the transfer of title. As to the emphasis to be placed on the word unequivocal, his Lordship thought that "it does not mean any more than that the acts of part performance which are alleged to have taken place must point to the existence of some such contract as alleged".<sup>74</sup> In other words, the reference had to be to a contract such as that alleged and not necessarily to one relating to a disposition of land.

Lord Simon was also in agreement with this view of the law. Having pointed out that "where, as so often, the only term to be performed by

<sup>71</sup> *Ibid.* 546.

<sup>72</sup> *Ibid.* 568. As for *Kingswood Estate Co. Ltd. v. Anderson*, that decision "exploded only the idea which had been expressed in some of the older authorities that, in order to take a case out of the statute, the act of part performance had to show not only the existence of a contract concerning land but also the very terms of the contract upon which the party seeking to enforce it relied" (p. 569).

<sup>73</sup> *Ibid.* 554.

<sup>74</sup> *Ibid.* 556. Or, in Lord Reid's words (p. 541)

"You must first look at the alleged acts of part performance to see whether these prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract" (emphasis supplied).

the defendant is the transfer of the interest in land, the fulfilment of the other conditions stipulated by Equity will generally involve that the effective act of part performance indicates the land concerned", his Lordship continued<sup>75</sup>

"In *Wakeham v. Mackenzie* . . . a woman agreed to surrender her rent-restricted flat and keep house for an elderly widower in consideration of his oral promise to leave her his house by will: her action was held to be sufficient part performance to make the widower's oral promise binding on his personal representative. The case must be compared with *Maddison v. Alderson* . . . where the only material distinction was that the woman had no house of her own to give up. This distinction might be sufficient to justify the inference in the later case that the housekeeper's actions implied a quid pro quo, a bargain, which had not been a justifiable inference in the earlier case . . . ; but they could hardly be said to have indicated a bargain a term of which related to the widower's house."

It is true that he did regard it as unnecessary to decide the point in the present case because of the existence of factors which did identify the land in question (e.g., "procuring his solicitor to carry out the obligation which, under the bargain, the husband had assumed of drafting the conveyance and sending it to the wife"<sup>76</sup>). However, his Lordship's sympathies were apparent in the following passage<sup>77</sup>

"Other acts of part performance by the husband proved that there had been *some* contract with the wife, though without specifically indicating those terms which concerned the house. The consent to the justices' orders and the payment of £100 are, in my view, only reasonably intelligible on the hypothesis that the issues raised by the cross-summons in the magistrates' court had been settled by agreement. As for the other limb of Upjohn L.J.'s formulation of the rule, the husband's acts were consistent with the contract alleged by him."

There would appear to be little doubt, therefore, that the majority of the House of Lords were in substantial agreement with Roskill L.J.<sup>78</sup> and Scarman L.J.<sup>79</sup> in the Court of Appeal. On the other hand, Lord Salmon in the House of Lords was not prepared to overthrow the authority of *Maddison v. Alderson* on this issue, agreeing with Edmund Davies L.J. in the Court of Appeal and with the dissenting judgment of Lord Morris. Nevertheless, the fact remains that the majority opinion, which formed part of the ratio of the decision of the Court of Appeal and of the judgments of two of their Lordships, was in favour of this further narrowing of the operation of the Statute of Frauds in the interests of serving the expectations of the parties.

<sup>75</sup> *Ibid.* 562-3.

<sup>76</sup> *Ibid.* 563.

<sup>77</sup> *Ibid.*

<sup>78</sup> [1973] 3 All E.R. 977, 992.

<sup>79</sup> *Ibid.* 994.

The question whether such departures from established dogma will strike a responsive chord in Australia could probably, given the generally conservative attitudes of the judiciary, be answered without reference to recent authority. However, the issue was first raised in *Millett v. Regent*.<sup>80</sup> The defendants were the parents of the female plaintiff; the other plaintiff was her husband. The defendants had purchased for \$4,500 a small house in poor condition. They had contributed \$1,000 themselves and had raised \$3,500 from a Bank. They then proposed that the plaintiffs should live in the house and pay off the loan. It was agreed that if the plaintiffs did so and also repaid the defendants' contribution of \$1,000, the defendants would transfer title into their names. During the ensuing two or three years, various renovations were made with the father's assistance, and, when it was decided by the plaintiffs that they would like to extend the house, the Bank proposed making a larger loan to the plaintiffs to allow them to pay off the earlier mortgage to the parents as well. The father helped with the extensions by cash contributions and by providing second hand materials. About this time the plaintiffs learnt that the defendants had changed their mind about transferring title in the house to the plaintiffs.

On factor (i), the nature of the acts amounting to part performance, there was no reference to the payment of money discussions in *Steadman v. Steadman*. However, the N.S.W. Appeal Court did become involved in an issue which their Lordships would almost certainly have regarded as having an obvious solution. The present Court was called upon to consider the argument, advanced on behalf of the defendants, that acts related to the contract and its performance were not sufficient to constitute part performance unless they were *required* to be performed under the contract. While this contention was rejected by all three members of the Court, differing views were expressed on the relationship required between the acts and the contract itself. Mahoney J.A. expressed the dilemma as follows<sup>81</sup>

"In the context of a contract for the sale of land, an act may be done either to discharge a positive obligation under the contract that the act be done; or pursuant to a term in the contract that the act may, but need not be done; or without reference to any particular term of the contract."

Only Hutley J.A. was prepared to hold that acts in the third category were sufficient

"If, in reliance upon an oral contract, acts are done which unequivocally point to a contract, even though those acts are neither required by the contract nor are expressly authorized by the contract, if other conditions are fulfilled, the doctrine should be applicable."<sup>82</sup>

<sup>80</sup> [1975] 1 N.S.W.L.R. 62.

<sup>81</sup> *Ibid.* 75.

<sup>82</sup> *Ibid.* 66.

The other members of the Court, though more cautious, seemed prepared to admit that matters in the second category would be acceptable. In the words of Glass J.A.<sup>83</sup>

“In my opinion, the manner in which the doctrine has been consistently expounded demands that acts done in consequence of the unwritten agreement, but not in execution of it, are excluded from consideration. But whether acts done in execution of the agreement are confined to those required by it or extend to those authorized by it is less clear. . . . But the wider view seems to be more consonant with principle and I propose to follow judicial pronouncements to that effect.”

Whatever approach was adopted, however, there were sufficient acts in this case required or authorised under the oral contract to allow a decree of specific performance to be granted. What is unsatisfactory is of course that various acts that will undoubtedly add to a purchaser's expectations would be excluded from consideration as part performance if the widest view is not accepted. Only Hutley J.A. was prepared to accept that alterations effected at the purchaser's cost but outside the terms of any contract between the parties could amount to a sufficient act of part performance.

On factor (ii), the degree of likelihood that a contract exists, there was a reluctance to become involved in a detailed examination of the significance of Lord Selborne's “unequivocal” test. For example, Hutley J.A. commented that it was not “necessary to decide whether the acts of part performance relied on have to point unequivocally to the kind of contract alleged”; nor was it necessary “to consider whether *Steadman v. Steadman* can be squared with Australian authority”.<sup>84</sup> In contrast, Glass J.A. had no doubt that *Steadman v. Steadman* was a new departure and one that the N.S.W. Appeal Court was not at liberty to follow<sup>85</sup>

“According to the classic formulation the degree of proof required was such that the acts ‘must be unequivocally and of their own nature referable to some such agreement as that alleged’: *Maddison v. Alderson*. The High Court has indorsed this description of the test in *McBride v. Sandland*, *Cooney v. Burns*. I can discern no difference in sense when the requirement is described as ‘acts consistent only with some such contract subsisting’: *J.C. Williamson v. Lukey and*

<sup>83</sup> *Ibid.* 71.

<sup>84</sup> *Ibid.* 65. Similarly Mahoney J.A., having mentioned *McBride v. Sandland* (1918) 25 C.L.R. 69 and *Cooney v. Burns* (1922) 30 C.L.R. 216, observed ([1975] 1 N.S.W.L.R. at 73) that

“Whether the principles enunciated by the House of Lords in *Steadman v. Steadman* are inconsistent with the principals as enunciated by the High Court of Australia, it is necessary for the purposes of this case, to determine.”

However, his Honour did go on to state (p. 74) that

“The term ‘unequivocally’, and the similar terms which have been used in this regard in other cases, do no more than indicate that, in being satisfied that such a contract was made, the Court will require evidence of the appropriate degree of cogency to establish that, e.g., the appropriate basis for the intervention of equity against the statute requiring the contract to be in writing is made out.”

<sup>85</sup> *Ibid.* 71-2.

*Mulholland*<sup>86</sup> or 'acts not being reasonably explicable except upon the footing' of some such agreement: *Pejovic v. Malinic*.<sup>87</sup> I do not think that we are at liberty to apply the revised statement of principle promulgated by the House of Lords in *Steadman v. Steadman* to the effect that it is sufficient if the explanation of the acts by a contract of the kind alleged is more probable than not. I propose to measure the sufficiency of the evidence by asking whether the acts of part performance admit of any other reasonable explanation, except that the defendants agreed to transfer to the plaintiffs an interest in the premises."

Issue (iii), whether the act of part performance need identify a contract relating specifically to land, was not dealt with directly. However, from the tenor of the judgments and from the importance attributed to earlier formulations of the law in *Maddison v. Alderson* and in two High Court decisions, *McBride v. Sandland* and *Cooney v. Burns*, it seems unlikely that there was any disposition to adopt such heresy.

When this case went on appeal,<sup>88</sup> the High Court was content to affirm the Appeal Court's decision with the minimum of comment. In the only judgment, Gibbs J. prefaced his conclusions by the following observation<sup>89</sup>

"It may be said immediately that if the reasoning of their Lordships in the recent case of *Steadman v. Steadman* . . . is accepted, the appellants' arguments must fail. However, it is unnecessary for the present decision to consider the questions that are raised by that case."

On the issues of substance, the High Court approach was deliberately cautious. No guidance at all was given on the difference of opinion in the Court of Appeal over the relationship between the acts and whether they had to be in pursuance of the contract or only related to its performance. In the words of Gibbs J.<sup>90</sup>

"in the present case the circumstances under which possession was given indicate contract, to echo the words in *McBride v. Sandland*, and the possession was unequivocally referable to some such contract as that alleged. The taking of possession was pursuant to the contract. It is true that the contract did not require the respondents to take possession, but if it were necessary that the acts of part performance should have been done in compliance with a requirement of the contract, the utility of the equitable doctrine would be reduced to vanishing point, and many cases which have proceeded on the opposite view would have been wrongly decided. The Judicial Committee, in *White v. Neaylon*<sup>91</sup> . . . indeed appears to have held that the effecting of improvements on property which were neither required nor permitted by the contract may be acts of part performance; but however that may be, it is clear

<sup>86</sup> (1931) 45 C.L.R. 282, 297.

<sup>87</sup> (1960) 60 S.R. (N.S.W.) 184, 190.

<sup>88</sup> *Sub nom. Regent v. Millett* (1976) 10 A.L.R. 496.

<sup>89</sup> *Ibid.* 499.

<sup>90</sup> *Ibid.* 499-500.

<sup>91</sup> (1886) 11 App. Cas. 171.

that if a vendor permits a purchaser to take the possession to which a contract of sale entitles him, the giving and taking of that possession will amount to part performance, notwithstanding that under the contract the purchaser was entitled rather than bound to take possession.”

Such reticence in the face of the judgment of Hutley J.A. and of *White v. Neaylon*, which was an appeal to the Privy Council from South Australia,<sup>92</sup> was perverse.

On factor (ii), the Lord Selborne test was accepted, presumably on the basis that it did not affect the outcome of the present decision. “It is enough”, said Gibbs J.,<sup>93</sup> “that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged”.

In answering the question, where does this leave the law?, one must acknowledge that the prospects do not look bright for anyone who saw in *Steadman's* case evidence of a welcome change in judicial attitudes. *Maddison v. Alderson* has been revisited recently in both England and Australia.

In *Re Gonin*,<sup>94</sup> the plaintiff had left home in 1940 to work for the Air Ministry. However, in 1944, at her parents' request, she returned home to look after them. She carried out this task until her mother's death in 1968. She alleged that she had done all this on the basis of the parents' promise that the house was to be hers. There were obvious difficulties arising from the uncertainties of the arrangement, including the fact that part of the house was sold during the mother's lifetime. However, the conclusion reached by Walton J. was that, even if there had been an oral contract, there had not been any act of part performance to render it enforceable. This conclusion he supported by the following explanation of *Steadman v. Steadman*<sup>95</sup>

“Two of their Lordships, Lord Reid and Viscount Dilhorne, . . . held that, contrary to long established equitable jurisprudence, the act of part performance did not, in itself, have to be referable to some contract concerning land. Two of their Lordships, Lords Morris (who dissented in the result) and Salmon, thought the traditional equitable view was correct, whilst Lord Simon thought that it was unnecessary to determine that point in the case before them. In these circumstances I think I am free to follow the traditional equitable jurisprudence, which I find admirably stated in the speech of Lord Salmon. After all, the doctrine of part performance is one which enables the court to disregard the express provisions of an Act of Parliament and it would appear that it ought to be a somewhat narrow doctrine accordingly. There is so far as

<sup>92</sup> In this case it was said by the Judicial Committee (pp. 174-5)

“Their Lordships understand it to have been hardly argued at the bar, and if argued it certainly could not be maintained, that the works done by John [Neaylon on the land] would not be sufficient to take the case out of the Statute of Frauds”.

<sup>93</sup> (1976) 10 A.L.R. 496, 499.

<sup>94</sup> [1977] 2 All E.R. 720.

<sup>95</sup> *Ibid.* 731.

as I am aware no prior trace of any wider scope for the doctrine, unless it be in *Wakeham v. Mackenzie*, which purported to follow *Kingswood Estate Co. Ltd. v. Anderson*, which I venture to think the learned judge misunderstood. This latter case is fully explained by Lord Salmon in his speech to which I have already alluded and is indeed fully in the mainstream of settled equitable jurisprudence. Anyway, I do not think that there can be any doubt whatsoever but that the learned judge's alternative ground in *Wakeham v. Mackenzie*, namely that the conduct of a stranger in giving up a council tenancy and moving into the house of somebody else pointed irresistibly to the fact that there was some contract in relation to the secured occupation of that house by the stranger so moving in, is undeniably correct."

This pronouncement is scarcely an honest interpretation of a decision in which two members of the House of Lords were of a contrary view to the deduction made by Walton J.; moreover, as has already been explained, Lord Simon went further than a bald statement that there was no need to decide the point. In short, a judge of the Chancery Division was not going to relinquish a cardinal tenet of his legal upbringing if he could possibly avoid doing so.

In *Ogilvie v. Ryan*,<sup>96</sup> the defendant was being sued for possession of a house. She had lived in a cottage for most of the period with her mother, from 1939 until 1970. She had worked as a cleaner in an adjoining cinema and in the house of O, a director of the company which owned both the cinema and the cottage. In 1955, after his wife's death, O came to live in the cottage, paying for his board. From 1962, when the mother died, the defendant and O lived as man and wife. In 1969 the company contracted to sell the cinema and cottage for redevelopment. O proposed that he should purchase a house. If she would live with him and look after him for the rest of his life, she would have the house for as long as she lived. When O died in 1972 he made no mention of the defendant in his will. When the executor of O's estate sought to recover possession of the house, Holland J. held that there was a constructive trust in the defendant's favour entitling her to occupy the house for the rest of her life.<sup>97</sup> While such an interest does not suffer from the difficulties raised in relation to the enforcement of a contract by the *Statute of Frauds*, it does need to be supported by clear evidence of a common intention (actual or to be implied) to create such an interest.

However, in *Ogilvie v. Ryan*, it had also been argued that the defendant had a contractual right to remain in possession of the house. Enforcement of this oral arrangement depended upon there being a sufficient act of part performance. Holland J. explained that, as trial judge in *Millett v. Regent*, he had applied *Kingswood Estate Co. Ltd. v. Anderson* and

<sup>96</sup> [1976] 2 N.S.W.L.R. 504.

<sup>97</sup> A proposition subsequently approved by the N.S.W. Court of Appeal in *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685.

*Wakeham v. Mackenzie* even before the House of Lords decision in *Steadman v. Steadman*. Indeed, if *Wakeham v. Mackenzie* represented the law in New South Wales it would be conclusive on the present facts. In that case, it will be recalled, a woman gave up her rent-restricted flat in which she had a protected tenancy to keep house for an elderly widower in consideration for his verbal promise to leave her the house in his will: Stamp J. held that her action was a sufficient act of part performance. If it was necessary to distinguish *Maddison v. Alderson*, the giving up of an interest in her previous accommodation was sufficient.<sup>98</sup>

However, in Holland J.'s view, the opinions expressed in the N.S.W. Court of Appeal and by the High Court were inconsistent with the application of the English authorities. The effect of the hearings on appeal in *Millett's* case was to affirm that the narrow test of requiring an unequivocal reference was authoritative. Hence, in his Honour's words<sup>99</sup>

"it cannot be postulated of the defendant's acts that they were unequivocally referable to or indicative of a promise to give her an interest in the deceased's property. Her change of residence is not of the same significance as an owner letting another into possession of his land. It is as consistent with her voluntarily continuing her existing association with the deceased as it is with his having promised her continuing rights of occupation of the property after his death. Her performance of services for him without pay are explicable on the grounds of love and affection, and an expectation on her part that she would be rewarded in some way on his death; but not necessarily by receiving an interest in his property which, though an appropriate reward, could not be said more probably to be anticipated than a monetary reward."

Without wishing to belabour the point further, it is worth mentioning that, though Holland J. is probably correct in his interpretation of the views of the superior courts in *Millett's* case, both the Court of Appeal and the High Court left open whether they might nevertheless be prepared to be persuaded by *Steadman v. Steadman*. While the latter decision certainly gives a good deal more room to manoeuvre in curtailing unconscionable reliance upon the *Statute of Frauds*, it does open up the possibility of a variety of activities rendering oral agreements enforceable. Although some of their Lordships, even amongst the majority, would probably deny that such was their intention, it is conceivable that the following situation would be covered by some of the expressions of opinion in *Steadman*: P and V agree terms for the purchase of V's house. As part of their agreement P pays a sizeable sum by cheque to V himself. V gives P a receipt which refers to the purchase of the house, but is not a sufficient note or memorandum to satisfy the Statute. Is the contract enforceable? Lord Salmon certainly believed that such an arrangement would be enforceable if V was

<sup>98</sup> See *Steadman v. Steadman* [1976] A.C. 536, 562 per Lord Simon, quoted above p. 183.

<sup>99</sup> [1976] 2 N.S.W.L.R. 504, 524.

unable to repay the purchase money,<sup>100</sup> but is there any good reason for limiting the principle to cases where V is unable to repay the money to P?

(b) *Written memorandum "subject to contract"*

It may be that solicitors would not worry unduly about this situation because they would be unlikely to pay monies to the vendor himself, but could the same principle not be applied to payments made between agents? Of course, solicitors are usually careful enough to avoid committing themselves by the use of such expressions as "subject to contract". But even this precaution has its pitfalls because often the solicitor will be employed *after* the parties have reached some sort of agreement.

In *Griffiths v. Young*,<sup>101</sup> the defendant, V, asked P, the plaintiff, to guarantee the former's bank overdraft. This P was prepared to do if V would agree to sell him a certain piece of land so that, if P was called upon to honour the guarantee, he would be able to set off the sum involved against the unpaid purchase price. After they reached agreement, they instructed their respective solicitors. P's solicitors wrote a letter to V's solicitors in which they set out the terms of the agreement in full, but expressed the price to be "subject to contract". That letter was acknowledged by return by V's solicitors. V contacted P in an attempt to expedite matters. P's solicitors telephoned V's solicitors who wrote a letter confirming the terms of the contract. The guarantee was given by P, but V refused to take any steps towards completing the contract of sale. The Court of Appeal held that two initial letters between the solicitors constituted a sufficient note or memorandum of the contract. The words "subject to contract" amounted to no more than a suspensive condition which had been waived by the later telephone conversation. It would seem to follow from this decision that the parties themselves, unaware of the niceties of legal phraseology, could equally well have waived the "subject to contract" clause, by, for example, reaffirming their existing commitments.

Certainly *Griffiths v. Young* gives warning that, to be effective, it might be necessary to repeat the suspensive words in every communication whether verbal or written. Despite the adverse reaction to *Law v. Jones*,<sup>102</sup> it appears to be an inevitable result of *Griffiths v. Young*. In *Law v. Jones*, on 17 February, the defendant, V, agreed to sell a cottage to P for £6,500. The next day V's solicitors wrote a letter as follows

"We understand you act for Mr J. Law . . . in connection with his proposed purchase of the above property . . . for £6,500 subject to contract. We have been instructed on behalf of the vendor and we are obtaining his title deeds and shall submit a contract to you as soon as possible."

<sup>100</sup> [1976] A.C. 536, 571.

<sup>101</sup> [1970] 1 Ch. 675.

<sup>102</sup> [1974] 1 Ch. 112.

A week later they sent a draft contract setting out the terms "for your approval". On 7 March this letter was acknowledged and preliminary enquiries were enclosed. This letter was itself acknowledged. At this stage V requested a further £1,000 for the property and, on 13 March, P and V agreed to a new price of £7,000. A assured P that, on this occasion, his word was his bond. V's solicitors accordingly wrote as follows to P's solicitors

"Further to our letter of March 10 we herewith enclose our replies to your preliminary inquiries. We understand that an increase in the consideration has been mutually agreed and we shall therefore be obliged if you would amend the contract in your possession to read a purchase price of £7,000."

Matters proceeded between the solicitors and a completion date was agreed, but contracts were never exchanged. V wrote to P saying that, because of the increase in house prices, he had decided to put the cottage up for auction. A majority of the Court of Appeal (Buckley and Orr L.JJ.; Russell L.J. dissenting) held that P was entitled to a decree of specific performance.

The basis of this decision appears to depend upon these propositions:

1. that the written text of a contract (as yet unexecuted, but setting out the terms agreed by the parties), that is later amended by agreement between the parties and in its amended form is then acknowledged by the agent of the party against which it is sought to enforce the agreement, can constitute a sufficient note or memorandum of the contract;
2. that the effect of making the initial written communications "subject to contract" could have no effect upon the binding nature of the original verbal agreement; and
3. that the intervening firm commitment to perform the modified contract by the parties themselves operated to eliminate any qualifying effect which the words "subject to contract" may have had;
4. so that the defendant's solicitors' letter of 17 March, in referring to the amended price having been mutually agreed and to the contract already being in existence, was sufficient to constitute the draft contract a sufficient memorandum to satisfy the Statute of Frauds.

The above decision was handed down on 10 April 1973; on 20 November of the same year, in *Tiverton Estates Ltd. v. Wearwell Ltd.*,<sup>108</sup> a differently constituted Court of Appeal in effect held that *Law v. Jones* had not been correctly decided by refusing to follow it on the basis that it was inconsistent with earlier decisions of the Court. V (the plaintiff company) was seeking to have a caution removed from its leasehold title at the Land Registry. The caution had been entered by P, the defendant

<sup>108</sup> [1975] 1 Ch. 146.

company, which claimed to have an enforceable contract for the purchase of V's interest. P alleged that an oral agreement had been made for the purchase of the leasehold, and that the following later correspondence amounted to the necessary memorandum of that transaction:

(1) From P's solicitors to V's solicitors,

"We understand that you act for the vendor in respect of the proposed sale of the above-mentioned property to our clients Wearwell Ltd. at £190,000 leasehold subject to contract. We look forward to receiving the draft contract for approval together with copy of the lease at an early date."

(2) From V to P,

"This is to confirm my telephone conversation with you this morning when you agreed that the completion of the purchase of the property can take place as soon as possible."

(3) From V's solicitors to P's solicitors,

"We refer to your letter dated the July 4, upon which we have taken our clients' instructions. We now send you draft contract for approval, together with a spare copy for your use, together with a copy of the lease dated October 30, 1934, and photocopy entries on our client's land certificate. We await hearing from you."

Ten days later V decided not to proceed with the sale. P's solicitors claimed that there was ample evidence that a contract had been concluded, and therefore lodged a caution against V's title. In their view, letter (3) and the accompanying draft formal contract constituted the necessary memorandum.

According to Lord Denning M.R. there were two lines of authority.

(i) "in order to satisfy the statute, the writing must contain, not only the terms of the contract, *but also* an express or implied recognition that a contract was entered into"<sup>104</sup>

(relying principally upon *Thirkell v. Cambi*<sup>105</sup>)

(ii) "it is *not necessary* that the writing should acknowledge the *existence* of a contract. It is sufficient if the contract is by word of mouth and that the *terms* can be found set out in writing without any recognition whatsoever that any contract was ever made"<sup>106</sup>

(a proposition supported by *Law v. Jones*).

Lord Denning's concern for the profession was expressed with characteristic eloquence. In his Lordship's view *Law v. Jones* had "caused consternation amongst the solicitors in this country", because to their minds "it virtually repealed the Statute of Frauds".<sup>107</sup> Later in his judgment he explained<sup>108</sup>

<sup>104</sup> Ibid. 156-7.

<sup>105</sup> [1919] 2 K.B. 590.

<sup>106</sup> [1975] 1 Ch. 146, 157.

<sup>107</sup> Ibid. 153-4.

<sup>108</sup> Ibid. 159-60.

"*Law v. Jones* has sounded an alarm bell in the offices of every solicitor in the land. And no wonder. It is everyday practice for a solicitor, who is instructed in a sale of land, to start the correspondence with a letter 'subject to contract' setting out the terms or enclosing a draft. He does it in the confidence that it protects his client. It means that the client is not bound by what has taken place in conversation. The reason is that, for over a hundred years, the courts have held that the effect of the words 'subject to contract' is that the matter remains in negotiation until a formal contract is executed: see *Eccles v. Bryant and Pollock*. . . .<sup>109</sup> But *Law v. Jones* has taken away all protection from the client. The plaintiff can now assert an oral contract in conversation with the defendant *before* the solicitor wrote the letter and then rely on the letter as a writing to satisfy the statute, even though it was expressly 'subject to contract': or, alternatively, the plaintiff can assert that *after* the solicitor wrote the letter, he met the defendant and in conversation orally agreed to waive the words 'subject to contract'. If this is right, it means that the client is exposed to the full blast of 'frauds and perjuries' attendant on oral testimony. Even without fraud and perjury, he is exposed to honest difference of recollections leading to law suits, from which it was the very object of the statute to save him."

Before considering what implications these decisions might have in an Australian context, the summary of the case law would not be complete without a reference to the recent refusal by Buckley and Orr L.JJ. in *Daulia Ltd. v. Four Millbank Nominees Ltd.*<sup>110</sup> to recant their (alleged) heresy. The plaintiff company, P, was anxious to buy certain properties from V, the defendant company. On 21 December 1976, the parties agreed terms and also agreed to exchange contracts the next day. When P arrived to do so at the appointed time, its representatives discovered that V had found an alternative purchaser. P alleged that V had promised that if P obtained a banker's draft for the deposit, came as arranged to V's office and there tendered the draft together with P's part of the contract duly executed, V would complete the written contract for the sale of the properties. By failing to carry out its side of the bargain, P further alleged, V had been in breach of the oral contract. In an action for damages, the Court of Appeal held that the action had rightly been struck out on the ground that the contract was in effect one for the disposition of an interest in land for which there was no note or memorandum in writing.

A number of points of interest were raised by this case:

1. It provides one of those rare examples of that academics' delight—a unilateral contract. The Court had no doubt that, if the facts alleged were proved, V would have been under an obligation to enter into the written contract for the sale of the properties.
2. It throws a side-light on that still uncertain area of law, the question whether a person who advertises a sale without reserve may be liable in

<sup>109</sup> [1948] Ch. 93.

<sup>110</sup> [1978] 2 All E.R. 557.

damages to the highest bidder if the property is withdrawn or bought in on behalf of the seller. The general tenor of the judgments was that, though an action may be maintainable against an auctioneer (i.e., an agent) on a collateral undertaking on the basis of *Warlow v. Harrison*,<sup>111</sup> the suggestion in *Johnston v. Boyes*<sup>112</sup> that the vendor (i.e., the principal) might similarly be liable was disapproved. While *Warlow v. Harrison* might provide some support for P's case, it was clearly distinguishable.

3. The Court supported its instinctive reaction that to enforce such a contract as the oral agreement in this case would certainly allow a new and major exception to the Statute by reference to a number of persuasive American authorities.<sup>113</sup> In the words of the *American Jurist*<sup>114</sup>

"The general rule is that an oral agreement to reduce to writing a contract which is within the scope of the operation of the Statute of Frauds or to sign an agreement which the Statute of Frauds requires to be in writing is . . . unenforceable."

4. Nor could it be claimed that there was an act of part performance, because the acts bringing into being the obligations under the unilateral contract appeared to be in contemplation, rather than in performance, of a contract. The acts certainly did not "prove that there must have been a contract" to quote Lord Reid's words in *Steadman v. Steadman*.<sup>115</sup>

However, to turn to the references in the judgment of Buckley L.J. (with which Orr L.J. agreed) to *Law v. Jones* and *Tiverton Estates Ltd. v. Wearwell Ltd.*, one of the arguments which had appealed to the members of the Court in the latter case was that the Statute required a note or memorandum "thereof", a fact which strongly suggested that there must be some "recognition" of the contract in that written document. However, in the opinion of Buckley L.J., this approach could not be reconciled with the "written offer" cases<sup>116</sup> in which the principal memorandum was patently a pre-contractual document. In his Lordship's words,<sup>117</sup> "I am unable to understand how, outside of the world of the White Queen, a document written at a time when *ex hypothesi* no contract exists can acknowledge the existence of a contract made at a later date." In general, he saw no reason to differ from what Lord Denning M.R. had said in the *Tiverton* case, but he could not accept the latter's view of *Law v. Jones*<sup>118</sup>

<sup>111</sup> (1859) 1 E. & E. 309.

<sup>112</sup> [1899] 2 Ch. 73, 77.

<sup>113</sup> *McLachlan v. Village of Whitehall* 99 N.Y.S. 721 (1906); *Sarkisian v. Teale* 88 N.E. 333 (1909), *Union Car Advertising Co. Inc. v. Boston Elevated Rly. Co.* 26 F. 2d 755 (1928).

<sup>114</sup> 2nd ed. (1974) Vol. 12, p. 568.

<sup>115</sup> [1976] A.C. 536, 541.

<sup>116</sup> *Reuss v. Picksley* (1866) L.R. 1 Exch. 342; *Mercantile Bank of Sydney v. Taylor* [1893] A.C. 317, 321.

<sup>117</sup> [1978] 2 All E.R. 557, 570.

<sup>118</sup> *Ibid.*

"*Law v. Jones* did not decide that a letter written 'subject to contract' or forming part of a correspondence conducted subject to a 'subject to contract' stipulation can constitute a note or memorandum of an oral agreement to which it relates sufficient to satisfy the Statute of Frauds, at any rate so long as the 'subject to contract' stipulation remains operative. What it did decide was that, if the parties subsequently enter into a new and distinct oral agreement, the facts may be such that the earlier letter may form part of a sufficient note or memorandum of the later oral agreement notwithstanding that it was 'subject to contract' in relation to the earlier bargain. It also, of course, decided the quite different point that a written note or memorandum to satisfy the statute need not acknowledge the existence of the contract, although it must record all its essential terms. In that respect *Law v. Jones* and *Tiverton Estates Ltd. v. Wearwell Ltd.* are undoubtedly in conflict."

It is not the intention of this article to seek to reconcile these various pronouncements. For the purposes of the general thesis here presented, however, it is necessary to try to identify the expectations of the parties involved. The solicitors' position would appear to be straightforward enough. The use of "subject to contract" was designed to prevent their communications creating a legally binding contract. It is now the practice in some Australian jurisdictions to use phrases which attempt to prevent legal relations arising until exchange of contracts, e.g., "it is intended that no legal obligations will arise until contracts are exchanged". Though to some extent it will depend upon the words used, it is doubtful whether such phraseology provides much added protection. True, either of the solicitors involved could claim that their subsequent correspondence was covered by the initial statement. However, if there is already an existing contract between their clients or a subsequent commitment is entered into between the clients to perform the contract, it would be safer to employ a specific disavowal with each communication containing or referring to the terms of the contract.

Lord Denning M.R. made great play in *Tiverton Estates* of the difficulties facing solicitors and lamented that *Law v. Jones* had taken away all protection from the client. However, if one looks at the position from the stand-point of the clients, their expectations may be rather different from those of their legal advisers. In a substantial commercial transaction such as that in the *Tiverton* case, it is likely that the oral arrangement was no more than an agreement to enter into a contract in more substantial terms. In *Clifton v. Palumbo*,<sup>119</sup> the parties had been negotiating for the sale of an estate. It was held that, because of the size and diversity of the estate, a letter in which the vendor stated that he was "prepared to offer" the estate to the purchaser for £600,000 did not constitute an offer, but was only a further step in the negotiations. As

<sup>119</sup> [1944] 2 All E.R. 497.

Lord Greene M.R. pointed out,<sup>120</sup> when "parties are beginning to negotiate a transaction of this magnitude it is common experience—and, indeed, it is only business—to find that the first thing they begin to think about is the price, because it is quite useless making elaborate investigations and conducting complicated negotiations if it is going to turn out in the end that their views as to price do not agree". Once agreement was reached on price, however, what was the position? Lord Greene continued<sup>121</sup>

"There is nothing in the world to prevent an owner . . . contracting to sell . . . to a purchaser, who is prepared to spend so large a sum of money, on terms, written out on a half sheet of note-paper, of the most informal description, and even, if he likes, on unfavourable conditions; but I think it is legitimate, in approaching the construction of a document of this kind . . . to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description . . . is remote."

On the other hand, in ordinary transactions, the major matters can easily be covered by the initial agreement between the principals. Where there is evidence of a deliberate decision by the parties to proceed with the contract, is there any reason why that should not be respected? In *Griffiths v. Young*, there was held to be a waiver of the "subject to contract" limitation by the solicitors acting on their client's instructions to hasten the transaction. In *Law v. Jones*, the client had given the purchaser his solemn assurance that no further attempt would be made to increase the price and that he would keep his word to go through with the transaction. Would not the disinterested lay bystander agree with the observation of Buckley L.J. in *Law v. Jones*<sup>122</sup> that the purpose of the statute "is to avoid parties being held to contracts the terms of which they have not agreed, not to facilitate the escape of a party from a contract the terms of which he has agreed"?

## BUSINESS CONTRACTS AND CONFLICTING CONTRACTUAL DOCUMENTS

Reference has already been made to the difficulties encountered by the courts in dealing with business contracts, the substance of which is often expressed in the briefest form. There is obviously a gulf between what the law regards as desirable in the interests of certainty and what businessmen regard as necessary in the interests of flexibility. Recent research in America<sup>123</sup> and England<sup>124</sup> has pointed to a number of respects in which the business community operates with little regard for legal rules:

<sup>120</sup> *Ibid.* 499.

<sup>121</sup> *Ibid.*

<sup>122</sup> [1974] Ch. at 127.

<sup>123</sup> S. Macaulay, "Non-contractual Relations in Business" (1963) 28 *Am. Soc. Rev.* 55, reprinted in abridged form in Aubert (ed.), *Sociology of Law* (1969), pp. 194-209.

<sup>124</sup> Beale and Dugdale, "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 *Brit. Jo. of Law and Soc.* 45.

1. The use of various documents (order forms and the like) does mean that the basic features of an agreement do appear in writing, i.e., the goods, the price and the time of delivery. It seems likely that, if the research has general validity, most businessmen's agreements would satisfy the requirements of the *Statute of Frauds* in those jurisdictions where it still operates in relation to sales of goods. This tentative conclusion is strongly supported by the more specific, though earlier, findings in a survey entitled "The Statute of Frauds and the Business Community: A Re-Appraisal in Light of Prevailing Practices" conducted by the Yale Law Journal.<sup>125</sup>

2. The lack of definition of various 'secondary' terms, e.g., those which might in a professionally drafted contract deal with consequences of a failure to perform may be ascribed to two factors in particular:

(i) In the English sample taken from engineering manufacturers in the Bristol district, there was a good deal of personal contact between the representatives of the parties so that there was a feeling amongst those surveyed that any matters arising at a later stage could be dealt with informally. It is worth remarking that informal amendments unsupported by consideration create difficulties which the Courts have not found easy to resolve. One only needs to mention the *High Trees* doctrine in this context. Denning J. made it clear in *Central London Property Trust Ltd. v. High Trees House Ltd.*<sup>126</sup> that he was dealing with situations where a promise is held to be binding on the party making it even though it might be difficult to find any consideration for it. Hence the generally unreceptive reactions of the Australian courts would leave a gap in dealing with businessmen's arrangements where allowances are made for difficulties that would not justify non-performance of the contract (e.g., under the doctrine of frustration). Similarly, it has already been pointed out that the *Statute of Frauds* also raises difficulties in relation to amendments to contracts required by its provisions to be evidenced in writing. Both Macaulay and Beale and Dugdale<sup>127</sup> comment that, though the contracts they surveyed were usually evidenced by a printed document, the same was not the case with subsequent variations which were often arranged by telephone. In such circumstances, therefore, the probable consequence is that not only is the variation unenforceable, but that the original contract remains enforceable according to its terms.<sup>128</sup>

(ii) The Bristol research revealed that, among the manufacturers surveyed and their clients, there were a number of understandings as to what should happen in certain eventualities. One particular example

<sup>125</sup> (1957) 66 *Yale L.J.* 1038-71.

<sup>126</sup> [1947] 1 K.B. 130, 134.

<sup>127</sup> See fns. 124 and 125.

<sup>128</sup> *McKay v. Gillespie* (1885) 11 V.L.R. 835; *United Dominions Corp. (Jamaica) Ltd. v. Shoucair* [1969] 1 A.C. 340.

was that, though compensation might be claimable it would rarely be regarded as appropriate to include consequential losses. Also the form of compensation was largely on an ad hoc basis. A defaulting seller would be prepared to arrange the speedier carriage of replacement goods or might not enforce a price escalation clause on later consignments. These "unwritten laws" would probably not be precise enough to incorporate into the contract under the normal legal rules for establishing a trade usage, or a prior course of dealings, but they obviously were an important feature of the parties' arrangements.

In practice, of course, business dealings tend to involve a series of independent transactions, and the parties would not normally wish to jeopardise their future working relationship by talking about their contractual rights and obligations, let alone by having recourse to arbitration or the courts to enforce them. Nevertheless it is not satisfactory that the law should be out of touch with the practices of the business community which certain of its rules were once designed (with the reception of the Law Merchant) to serve.

One problem in particular which Beale and Dugdale did reveal was the prevalence of the practice whereby

"each party attempted to get its 'back of order' conditions accepted by the other. . . . Typically the seller would issue to the purchaser a quotation form backed with his standard conditions, and the seller would then acknowledge the order and in doing so refer again to his conditions. This stage would normally complete the exchange. Inevitably the seller's and buyer's conditions would conflict and indeed this was contemplated for most forms contained a condition to the effect that in the case of a conflict that set of conditions would override the other."<sup>129</sup>

In so far as it is possible to talk in terms of the expectations of the parties in such circumstances, there would appear to be four possible inferences:

1. There are obviously some firms that will be organised sufficiently to try to impose their contractual terms on the other party whatever the circumstances, e.g., by rejecting other terms on receipt or/and by continuing to insist upon the operation of their own terms even up to the time of performance.
2. There are probably those who operate in ignorance of, or without paying any regard to, their legal position.
3. Some will be aware that there is a danger that the other parties' terms might prevail and simply "hope for the best".
4. Some may even realise that there is a degree of uncertainty and hope that their good relations with the other party will lead to the satisfactory resolution of any difficulties. Only as a last resort would

<sup>129</sup> *Op. cit.* pp. 49-50.

they regard the invocation of legal technicalities as a means of settling any subsequent disagreement.

There would seem to be two alternative ways of dealing with conflicting documents. In the first place it could be argued that the later in time should prevail unless the party which introduced the earlier document continues to insist upon it. If the 'later' party also continues to insist upon his document, a court might be forced ultimately to conclude that there was in fact no contract. However, the 'later in time' approach is certainly justifiable in categories 1 and 3 above, and it might be argued that those in category 2 deserve no better! On the other hand, the same may not be true of category 4, nor, as has been explained, if both parties are in category 1; nor is it necessarily fair in category 2 if the courts are genuinely trying to ascertain the contractual intentions of the parties.

The other possibility is that the courts should take a broader view and attempt to ascertain the "shared expectations" of the parties. This approach would require that both documents should be taken into account and the attempt made to read them together. Support for it may be found in Anson's *Law of Contracts*.<sup>130</sup> It would be an appropriate means of resolving those cases mentioned above in which the other approach is unsuitable.

Hitherto the English courts have adopted the first approach, relying upon traditional notions of offer and acceptance, i.e., if the "acceptance" is in a form which contains terms different from those on the offeror's form, then it operates as a counter-offer which terminates the original offer. Any further activity in relation to the contract by the original offeror, if it does not expressly revive the original form (when the activity would amount to a new counter-offer), will amount to a tacit acceptance of the terms contained in the counter-offer.

In *British Road Services Ltd. v. A. V. Crutchley & Co. Ltd.*,<sup>131</sup> B.R.S. brought a consignment of whiskey, worth £9,126, to the defendants' warehouse in Liverpool pending its transhipment by the defendants to the docks. It was unloaded onto a trailer that was left, attached to a tractor unit, in the warehouse for the night. During the night thieves broke in and drove off with the whiskey. B.R.S. indemnified the consignors and then claimed to recover that amount from the defendants. The defendants sought to rely upon their conditions which limited their liability. The B.R.S. delivery note contained a clause that all goods were to be carried on the B.R.S. conditions of carriage. This note was then handed to the defendants who would stamp it "Received under A.V.C. conditions". The consequence of this practice was explained by Lord Pearson in the Court of Appeal as follows<sup>132</sup>

<sup>130</sup> 24th ed. (1975), pp. 37-8.

<sup>131</sup> [1968] 1 All E.R. 811.

<sup>132</sup> *Ibid.* 816-7.

"The delivery note, thus converted into a receipt note, would be handed back to the plaintiffs' driver and he would bring his load into the warehouse as instructed by the warehouse foreman. If this had only happened once, there would have been a doubt whether the plaintiffs' driver was their agent to accept the defendants' special contractual terms. This, however, happened frequently and regularly over many years at this and other warehouses of the defendants. Also the defendants' invoices contained the words: 'All goods are handled subject to conditions of carriage copies of which can be obtained on application.' It may perhaps be material to add that the defendants' conditions of carriage were not peculiar to them, but were the conditions of carriage of Road Haulage Association, Ltd. At any rate, I agree with the decision of the judge that the plaintiffs' conditions were not, and the defendants' conditions were, incorporated into the contract between these parties."

In *A. Davies & Co. (Shopfitters) Ltd. v. William Old Ltd.*,<sup>133</sup> the defendant was a building contractor. Certain work on the erection of a new store was to be done by sub-contractors nominated by the architect. The architect instructed the contractors to accept the plaintiff's tender. The contractors issued the instructions accepting this tender on a form which stated on its face that the order was subject to the terms and conditions overleaf. One of these terms stated that the contractor was only to pay for work done by the sub-contractor once he had received payment from the employer. The judge (Blain J.) held that the latter document amounted to a counter-offer which the sub-contractor accepted by commencing to do the work specified. The terms contained in the original tender were therefore inapplicable.

The most recent decision, *Butler Machine Tool Co. Ltd. v. Ex-cell-o Corp. (England) Ltd.*,<sup>134</sup> is much stronger authority for the first approach because it contains an express rejection of the second alternative suggested in *Anson*. Unfortunately, the case was reported only briefly. The facts were that S quoted a price of £75,535 for machinery, subject to terms, including a price variation clause, which the document stated were to prevail over any conditions in the buyer's order. B subsequently ordered the machine on his own terms and conditions which contained no price variation clause. S acknowledged this order on the part of B's form provided for this purpose. However, S also included a covering letter relating the form to their earlier quotation. After delivery of the machine S claimed an extra £2,892 on the basis of the price escalation clause. The decision of Theisger J. in S's favour was reversed on appeal. Lord Denning M.R. is reported as saying<sup>135</sup>

"the judge had been influenced by the passage, 'battle of forms', in *Anson's Law of Contracts*, 24th ed. (1975) pp. 37-8, which suggested that the old view of offer and counter offer should be discarded.

<sup>133</sup> (1969) 47 *Knights' L.G.R.* 395.

<sup>134</sup> (1977) 121 *So. Jo.* 406; [1979] 1 *All E.R.* 965.

<sup>135</sup> *Ibid.*

Thesiger J. had accepted that suggestion, so that the terms of the offer with the price variation clause continued. The passage in Anson went much too far; . . . The buyers' order of 27 May 1969 was not an acceptance of the offer of 23 May but a counter offer which was tantamount to a rejection: *Hyde v. Wrench* (1840) 3 Beav. 334; 'the counter-offer kills the original offer', per Megaw J. in *Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.* [1963] 1 W.L.R. 333, 337. The contract had been concluded by the acknowledgment on the buyers' terms and conditions. The passage in Anson did not accurately state the law or correspond to commercial reality."

The report is too brief to be quite sure why Lord Denning was so hostile to the suggestion advanced by A. G. Guest, the current editor of Anson. The criticism that it did not accurately state the law was not altogether certain at the time when the 1975 edition was prepared. The *B.R.S.* case was based upon the "cancellation" of the offer by the defendants' receipt stamp. There was no subsequent event upon which the plaintiffs could rely. Nor was Blain J. faced with a subsequent event which might have resurrected the original tender. True, the tenderer had written a later letter which referred to the original tender. However, as it also referred to the work as having already commenced, it was possible to infer that the counter-offer had already been accepted so that it was too late to modify the contract by reference to the terms of the tender. It was the *Butler Machine Tool* case which took the principle a stage further by holding that, once the original offer had been rejected by the counter-offer, the later communication from the original offeror did not revivify the terms of that offer. Presumably, in order to operate as a rejection of the counter-offer and to reinstate the original offer a clearer statement would be required, e.g., "While we accept your order, we do so only on the terms set out in our quotation of [whatever the date may have been]."

As for the other branch of Lord Denning's criticism, that Guest's view did not "correspond to commercial reality", one might reasonably retort that the learned Master of the Rolls was ignoring available evidence of that reality. There could come a situation where the parties' insistence on their own terms might lead to the conclusion that no contract had been reached. But what if the (or, should one say, some such) contract had actually been performed by the parties? Lord Denning's view apparently is that there is no difficulty in deciding which terms governed the agreement carried out. Yet it is worth recalling an earlier case before the Court of Appeal, *Mack and Edwards (Sales) Ltd. v. McPhail Bros.*, also reported only in the Solicitors' Journal.<sup>136</sup> The parties continued their dispute as to whose price should prevail long after the goods had been purchased by the defendant retailer and resold to its customers. In this case, Lord Denning M.R. had said<sup>137</sup>

<sup>136</sup> (1968) 112 So. Jo. 211.

<sup>137</sup> *Ibid.*

"If the contract had been wholly executory and the goods not delivered, there would be no contract. But when the goods had been delivered there was in law a necessary implication from the conduct of the parties that a reasonable price was to be paid."

One may well ask how this case differs so markedly from *Butler v. Ex-cell-o* where the Court and Lord Denning arbitrarily imposed one party's view of the price on the other party.

While it might well be desirable to have an alternative principle based upon what is reasonable for application in certain types of situation, the difficulty is that such an approach requires the courts to play the role of draftsman. In America this construction is made possible by virtue of the *Uniform Commercial Code*, section 2-207(3) of which provides

"Conduct by both parties which recognises the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such a case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

However, it has been admitted by the courts that they have only, in effect, been able to make a contract for the parties because of this provision. The offer/counter-offer/acceptance analysis was acknowledged as being the solution available at common law.<sup>138</sup>

It would be surprising if a court in England or Australia felt able to provide a similar solution in the absence of statutory intervention. Nevertheless, the present situation is patently unsatisfactory. As long as the contract remains executory, the consequence of there being a form containing the terms of an offer, followed by a form containing different terms constituting an alleged acceptance, is that there is no contract.<sup>139</sup> If the contract is executed, then much depends upon whose form was the last in time. If the counter-offeree (the original offeror) performs, he will be taken to have accepted the terms contained in the counter-offer. If the counter-offeror performs, the receipt of the benefit of performance by the counter-offeree will be taken as the acceptance of the terms in the counter-offer. If it is unsatisfactory in the case of an unexecuted agreement that

<sup>138</sup> *Dorton v. Collins & Aikman Corp.* 453 F. 2d 1161, 1166 (1972); *Itoh (C.) & Co. (America) Inc. v. Jordan International Co.* 552 F. 2d 1228, 1234 (1977).

<sup>139</sup> It is not intended here to deal with the problems arising from a situation where the order forms are sent in *confirmation* of an existing oral contract. Presumably, rather than impose one set of terms on the parties, a court would prefer to regard the forms as failing to effect a variation of the pre-existing agreement. It would be more difficult to estimate the reaction where the oral contract requires a note or memorandum under the Statute of Frauds to render it enforceable and the only documents are the inconsistent order forms. Under U.S.C. section 2-201 all that is required is that there should be "some writing *sufficient to indicate* that a contract for sale has been made between the parties", and section 2-207(1), by referring to a "written confirmation" as well as to an "expression of acceptance", appears to apply to situations where there is a pre-existing oral agreement. Under the Sale of Goods legislation in Australia, it is necessary that there should be "some note or memorandum in writing of the contract".

the courts should hold that no contract exists, it is equally undesirable that one set of terms should inevitably prevail in all circumstances if the incomplete contract is actually performed. As White and Summers have commented in relation to Section 2-207<sup>140</sup>

“The law as to terms must be sophisticated enough to nullify the efforts of fine-print lawyers, it must be sufficiently reliance-oriented to protect the legitimate expectations of the parties, and it must be fair and even handed. It must not give one side the whole loaf. . . .”

### CONCLUSIONS

An admonition that the law and the lawyers who practise it should take more account of the expectations of those who become involved in the operation of its rules may seem trite. Nevertheless we are all guilty of seeing legal rules as self-justifying; the judge, the practitioner, even academics tend to regard certain principles from a particular perspective. When the layman asks the question why, our answer is framed in terms that have been learnt rather than thought out for ourselves. The fact that a display in a shop constitutes an invitation to treat, not an offer which the customer can accept, is a typical illustration of a situation where the layman may not find our answer convincing.

Where a decision does challenge the axioms of the past, there is bound to be a reaction from those to whom change is unwelcome. *Steadman v. Steadman* is an attempt to bring the legal concept of part performance closer to the layman's conception of what is involved in partially performing his contract. It would seem amazing to our inquisitive acquaintance that the payment of the purchase price in full would not constitute part performance nor would a variety of other acts that did not satisfy the traditional test of identifying a contract concerning a disposition of land.

In the case of “subject to contract” or other similar phrases, is it really the role of the courts to protect a person from having to perform a contract which he has patently entered into and in respect of which sufficient writing exists to render the arrangement enforceable? How can it be said that negotiations are “subject to contract” or “there is no intention to enter into legal obligations” when there is already a contract in existence?

Finally, the conflicting documents cases have presented the English courts with a situation which was for them novel. With a characteristic lack of imagination the answer to the problem was sought in the “elementary” principles of offer and acceptance. That the variation in possible expectations might make the solution thus provided appropriate only in some cases and unsuitable in others is conveniently ignored.

<sup>140</sup> *Uniform Commercial Code* (1972), p. 25.