Chapter 5 p 198

The 'authoritative guidance' from the Supreme Court on the relationship between *Foakes v Beer* and *Williams v Roffey Bros* did not, in the event, materialise. The Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UK SC 24, [2018] 2 WLR 1603, having decided the appeal on another ground, found it unnecessary to decide whether or not consideration had been supplied on the facts of the case. The decision of the Supreme Court not to decide the point rested on three principal grounds. First, the point was a 'difficult' one which required the careful re-consideration of long-standing authority. Second, given that the decision which was possibly 'ripe for re-examination' was the decision of the House of Lords in *Foakes v Beer* any such re-consideration of long-standing authority should be undertaken by an enlarged panel. No such panel had been convened in this instance. The panel was a panel 5 justices and ideally one would wish to have a panel of 7 if a decision is to be taken to depart from such long-standing authority. Third, any consideration of the issue by the Supreme Court would have been obiter and it was, in the view of the court, undesirable for a review of *Foakes v Beer* to be conducted entirely by way of obiter dicta. The resolution of the issue must therefore await another day and, this being the case, the decision of the House of Lords in *Foakes v Beer* remains good law.

Chapter 9: pp 328-331

In *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA 1371 one of the issues before the court was whether an exclusion clause, contained in clause 11 of the contract, had been incorporated into the contract. The Court of Appeal held that the clause had been validly incorporated. The exclusion clause was held to be neither onerous nor unusual and so did not fall within the more demanding rules applicable to the incorporation of such terms into a contract. The mere fact that the clause in question is a limitation or exclusion clause does not of itself mean that it is onerous or unusual (see, for example, *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 70 (TCC), [2007] BLR 135 and *Circle Freight International Ltd (t/a Mogul Air) v Medeast Gulf Exports Ltd (t/a Gulf Exports)* [1988] 2 Lloyd's Rep 427 which demonstrate that a clause which limits liability to the contract price or which excludes liability for indirect or consequential loss may be neither onerous nor unusual). However, even if it had been onerous or unusual, the Court of Appeal would have concluded that sufficient steps had been taken to draw the clause fairly and reasonably to the attention of the claimant. Clause 11 was not 'buried away in the middle of a raft of small print' and its potentially wide-ranging effect was expressly drawn to the claimant's attention by virtue of the warning in the opening statement of the defendant's standard terms of business. It was also the case that over a year had passed between the sending of the quotation to the claimant with the relevant standard terms and conditions and the decision to enter into a contract so that the claimant had had plenty of time in which to consider the terms. The Court of Appeal also held that the enactment of the Unfair Contract Terms Act 1977 had not altered the common law rules in relation to the incorporation of terms into a contract. Thus Coulson LJ observed that the incorporation of a term at common law and the reasonableness of a term under UCTA are 'separate' and 'distinct' issues, albeit there 'may be some overlap in the matters that fall to be considered under each principle.'

Chapter 10 pp 354-356

Although it is difficult post *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* to imply a term into a contract as a matter of fact, it is not impossible. In *J N Hipwell & Son v Szurek* [2018] EWCA Civ 674 a term was implied into a lease 'that the electrical installation which serves the Premises (including all wires, ducts, cables conduits or other channels through which electricity is conveyed) is safe and subject of a current Electrical Safety Certificate.' The lease was held to contain a 'plain and obvious gap' in that no express provision had been made as regards the exterior of the premises themselves nor as to its plumbing or electrical installation and supply. In order to ensure that the lease did not lack commercial or practical coherence, or, as a matter of business necessity, it was held that the obvious gap should be plugged by implying a covenant on the part of the appellant as landlord to the effect that the electrical installation and other service media provided had been safely installed and continued to be covered by any requisite certificate.

On the other hand in *Al Jaber v Al Ibrahim* [2018] EWCA Civ 1690 the Court of Appeal declined to imply a term into a contract of loan that the debtor pay interest to the creditor. In 2001 the claimant orally agreed to lend US$30 million to the defendant in connection with the launch of a broadcasting service in the Middle East. Nothing was said at the time about whether or not the loan would bear interest. The claim form in which repayment was claimed together with interest was issued in 2015. The Court of Appeal declined to imply a term that the defendant pay interest for a number of reasons. First, it has been clear law since 1812 that interest on a loan cannot be recovered unless there is express provision to that effect in the contract between the creditor and the debtor or an obligation to pay interest can be inferred from a trade usage, custom or the special circumstances of the case. So there was no term implied in law. Second, in so far as there was claimed to be a term implied in fact, the claim was not supported by the evidence. The claimant's case on interest had 'emerged gradually and uncertainly.' The claimant himself had overlooked the fact that he made the loan for a number of years. While he may have expected some benefit from the loan it was not clear what form that benefit was expected to take (for example, he could have taken an equity share in the business which was being developed). In response to the claimant's submission that it was a matter of commercial common sense that a large loan of this type would bear interest, Simon LJ pointed out that the loan could have operated in a number of ways to the parties' mutual benefit without provision for interest in favour of the claimants. It was therefore held that an implied term for the payment of interest was not necessary to give business efficacy to the agreement, nor so obvious that it went without saying nor such that the loan would lack commercial or practical consequence without the term.

In *Ukraine v The Law Debenture Trust Corporation plc* [2018] EWCA Civ 2026, [205] the Court of Appeal held that the court 'must proceed with caution' when considering whether or not to imply a term into a contract (and that caution was particularly evident on the facts of the case where the court declined to imply a term into a debt obligation in the form of tradeable Eurobonds). The question to be answered by the court is not whether the implied terms create a commercially coherent result but whether the terms are so necessary or obvious that, without such terms, the contract would lack commercial or practical coherence. The Court of Appeal also confirmed that the exercise relating to the implication of terms is not to be classified as part of the exercise of interpretation, or construction, of the terms of the contract and is a separate exercise. It was also held that there is no general rule to the effect that the courts will imply into a contract a term which prohibits one party from preventing the performance of another. Any implied term of co-

operation or prevention from performance can only be given shape in the light of the express terms which set out the obligations of the parties.

Finally, in *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525 the issue before the Court of Appeal was whether to imply into an agreement between the parties that a loan of £336,000 paid by BGC to Mr Bou-Simon would become repayable in full where Mr Bou-Simon failed to serve the full term of the initial period of the contract between the parties. The judge at first instance found that there was no express term of the contract to this effect but implied a term into the contract to that effect. The Court of Appeal held that he had been wrong to do so.

Asplin LJ stated that the error committed by the judge at first instance was that he implied a term 'in order to reflect the merits of the situation as they now appear.' But that was to apply the wrong test. Asplin LJ stated that the focus of the court's attention must be on the terms of the agreement and the surrounding circumstances at the time at which the contract was made. It was not appropriate for a court to apply hindsight and to seek to imply a term into a commercial contract merely because it appeared to be fair or because it is believed that the parties would have agreed to it if it had been suggested to them. The test is one of necessity, no more and no less.

It was also held that the judge had taken the wrong starting point for his inquiry. He should have commenced his analysis with the express terms of the contract. It is only after the process of giving a meaning to the express terms of the contract is complete that the court should give consideration to the possibility of implying a term into the contract. As Asplin LJ pointed out, 'until one has determined what the parties have expressly agreed, it is difficult to decide whether a term should be implied and, if so, what the term should be.'

The agreement between the parties was held to be 'about a loan to be made to a partner' and it took the form of a limited recourse loan which was to be paid off from net partnership distributions and any outstanding amount was to be written off only if the four year initial period had been served. The claimant, BGC, appeared to have assumed that the defendant, Mr Bou-Simon, had become a partner but in fact he had never signed the relevant documentation and so never became a partner. So the circumstances which had arisen were held by the Court of Appeal not to be within the scope of the agreement at all. The Court of Appeal held that the reasonable reader, taking into account all of the express terms of the contract and the surrounding circumstances at the time it was executed and applying commercial common sense, would not consider the implied term either so obvious that it went without saying or to be necessary for business efficacy in the sense that the contract would lack commercial or practical coherence without it. It was not necessary to give business efficacy to such a contract to imply a term for repayment to deal with circumstances not just omitted from the express terms but which were outwith the scope of the agreement altogether. The contract was held to lack neither commercial nor practical coherence which the implied term was required to remedy. There was nothing uncommercial or absurd about a limited recourse loan. The agreement was drafted on the basis that the defendant would become a partner. In those circumstances the loan was to be recouped from his partnership distributions and any remainder would be written off only if he had served the four year term as a partner. The circumstances which did arise where not within the scope of the agreement. The claimant might have had a claimant in restitution but that had never been pleaded.

Chapter 13 pp 428-434

In *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA 1371 the defendant sought to rely on the following clause (clause 11) by way of defence to the claims brought against it by the claimant.

We exclude all liability, loss, damage or expense consequential or otherwise caused to your property, goods, persons or the like, directly or indirectly resulting from our negligence or delay or failure or malfunction of the systems or components provided by HFS for whatever reason. In the case of faulty components, we include only for the replacement, free of charge, of those defective parts. As an alternative to our basic tender, we can provide insurance to cover the above risks. Please ask for the extra cost of the provision of this cover if required.

The claim arose from a fire in which the claimant alleged it had suffered property damage and business interruption losses in excess of £6 million. The claimant alleged that these losses had been caused by a failure of a fire suppression system supplied and installed by the defendant some ten years before the fire occurred. The Court of Appeal held that the defendant was entitled to rely on clause 11 for the purpose of excluding liability towards the claimant. There were two issues in dispute before the Court of Appeal.

The Court of Appeal held that the clause was not unreasonable under the Unfair Contract Terms Act 1977. In reaching this conclusion the Court of Appeal emphasised the narrow limits within which appellate courts will review the conclusion of a first instance judge on the reasonableness or unreasonableness of an exclusion or limitation clause. In the present case, in concluding that the clause was reasonable, the court attached particular weight to three factors. The first was the fact that the parties were of roughly equal bargaining power. The fact that the term had been freely agreed by parties of broadly equal size and status has been held to be an important factor in a number of cases. As Gross LJ observed, 'at least in the case of commercial contracts between parties of broadly equal bargaining power, considerations of party autonomy and freedom of contract remain potent.' Coulson LJ made a similar point when he stated that 'the trend in the UCTA cases decided in recent years has been towards upholding terms freely agreed, particularly if the other party could have contracted elsewhere and has, or was warned to obtain, effective insurance cover.' The latter statement takes us on to the second factor which was the insurance position, in particular the ease with which the parties could obtain insurance in respect of the losses which had been caused. In fact, the claimant was in the best position to take out insurance against the losses in question given that it was conducting a business which was potentially hazardous in nature and it was in the best place to assess the impact of any fire on its business. Here both parties were insured and the defendant had offered the claimant the option of additional insurance cover in return for the offer of increased liability, which offer had not been taken up by the claimant. Third, this was 'a relatively low value contract' where the potential liability was very high and, as demonstrated by the facts, liability could arise sometime after performance of the contract. In such a context it was not unreasonable for the defendant to seek to place a limit on its liability, particularly in a context where the claimant could have gone elsewhere and entered into a contract with another supplier which did not contain a clause such as clause 11.

Finally, the fact that the defendant was said by the claimant to be attempting to exclude liability in respect of a 'core obligation' under the contract did not render the clause unreasonable. Gross LJ held that this submission begged the question given that the 'core' obligations of the defendant could only be ascertained when regard was had to the contract as a whole. It was therefore not permissible when seeking to identify the 'core' obligations of the defendant to leave clause 11 'out of account'. In the light of these

factors the Court of Appeal held that the judge at first instance had been entitled to conclude that clause 11 was reasonable.
It is important to underline the importance of the facts of the individual case when considering whether or not a clause is reasonable. The decision in *Goodlife* can be contrasted with the decision of the Court of Appeal in *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637 where a no reliance clause was held to be unreasonable. There the parties were of roughly equal bargaining power and had access to legal advice but that was not enough to uphold the validity of the clause given the importance which the Court of Appeal attached to the importance of pre-contract enquiries in conveyancing transactions. But there is a point of similarity between the two cases, namely the limited role of appellate courts in relation to the assessment of the reasonableness or otherwise of a clause. In both cases the Court of Appeal declined to interfere with the finding made by the first instance judge and this highlights the importance of making sure that the best case possible is presented at the first instance hearing, given the relatively low standard of review conducted by appellate courts.

Chapter 15: pp 504-506
Clause 3.1 of the contract between Health & Case Management Ltd ('HCML') and The Physiotherapy Network Ltd ('TPN') provided that 'HCML shall act in good faith towards TPN at all times'(*Health & Case Management Ltd* v *The Physiotherapy Network Ltd* [2018] EWHC 869 (QB)). There was no issue between the parties as the enforceability of this term and it has been noted in some quarters that the case is of interest because it demonstrates the advantages that can be obtained by including an express duty of good faith in a contract. On the other hand, one of the difficulties with the insertion of a good faith clause is that the meaning of such a term is not clear and will depends very much on the facts of the individual case.
It is therefore not surprising to learn that the issue between the parties in the present case was one that related to the meaning of the term and whether it had been breached by HCML. Even here there was a substantial amount of agreement between the parties. Thus it was agreed that good faith has been held to mean 'playing fair', 'coming clean' or 'putting one's cards on the table', that it has been held to require faithfulness to the agreed common purpose and consistency with the justified expectations of the parties to the contract, that its precise meaning is context-sensitive, that it has a core meaning of honesty, that it amounts to an obligation to eschew bad faith and that a party subject to a good faith duty of this type is not required to subordinate its own interests so long as the pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by expressed contractual terms so that such enjoyment is rendered worthless or nugatory.
On the facts of the case it was held that HMCL had breached this term in setting up another company, sending referrals to that company instead of to TPN and making use of TPN's data in setting up a new system. Nicklin J found that HMCL had failed to adhere to the spirit of the contract, to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties. While there was no contractual obligation on HMCL to make referrals, there was held to be an expectation by both parties that HMCL would do so. The covert use of TPN's data in setting up the new company was 'probably sufficient in itself' to amount to a breach of clause 3.1. In setting up the rival network (which was at

the time hidden from TPN although use was being made of TPN's data) when HMCL knew and intended that, once established, TPN would be cut out of the picture, while, at the same time, continuing to benefit from a commercial relationship that (in all probability) would have terminated had TPN known HMCL's true intentions was held to be 'opportunistic, underhand and exploitative' and clearly a breach of clause 3.1.

Chapter 16 p 542

In *Triple Seven MSN 27521 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm) the parties entered into two lease agreements on 20 June 2016 for a period of 5 years in respect of two aircraft which it was understood would be used by the defendant to transport passengers from West Africa to Saudi Arabia for the Hajj and Umrah pilgrimages. However the defendant was excluded from the 2016 Hajj airlift by the General Authority of Civil Aviation of Saudi Arabia because it did not meet Saudi economic, security and safety requirements. The letter excluding the defendant was sent by the authorities on 15 June 2016 but was not received by the defendant until after it had signed the lease agreements on 20 June. In these circumstances the defendant claimed that the lease agreements were void for common mistake so that it was not liable to the claimant for breach of contract in failing to take delivery of the aircraft. Mr Peter MacDonald Eggers QC, sitting as a Deputy Judge of the High Court, held that the defendant was not entitled to invoke common mistake on these facts and that it was liable in damages to the claimant.

After considering the relevant case law, the Deputy Judge concluded that the 'elements of a common mistake which has the effect of rendering the contract based on that common mistake void' are (i) there must have been, at the time of the conclusion of the contract, an assumption as to the existence of a state of affairs substantially shared between the parties, (ii) the assumption itself must have been fundamental to the contract, (iii) that assumption must have been wrong at the time of the conclusion of the contract, (iv) by reason of that assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract (alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption so that there must be a fundamental difference between the assumed and the actual state of affairs), (v) the parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common mistake was wrong and (vi) the contract must not have made provision in the event that the common assumption was wrong.

Applying these principles to the facts of the case it was held that there had been a mistake as to an existing state of affairs (given that the decision not to give the defendant approval had been made 5 days before the leases were entered into). But the mistaken assumption shared by the parties was held not to be sufficiently fundamental to lead to the conclusion that the leases were void. This was so for a number of reasons. First, the lease agreements were for a period of 5 years and the decision not to give approval related only to the 2016 Hajj airlift (so that there remained some 90-95% of the lease period to be performed). Second, even removing the profit from the 2016-2017 year, there remained a substantial profit to be earned under the contract. Third, the profit from the 2016-2017 year was not sufficiently important as to be fundamental to the performance of the lease agreements as a whole. Fourth, there was no evidence that the failure to obtain approval for the 2016 Hajj airlift would result in approval being denied for subsequent years. Fifth, it was therefore possible for the parties to perform the lease

agreements even without the defendant's participation in the 2016 Hajj airlift. In other words, the lease agreements were not rendered fundamentally or essentially or radically different by reason of the mistaken assumption as to the 2016 Hajj airlift.
However, even if the shared assumption had been sufficiently fundamental, the Deputy Judge would still have concluded that the agreements should not be declared void for common mistake because the terms of the lease agreements allocated the risk of not getting regulatory approval to the defendant. The defendant's obligations under the leases were stated to be 'absolute and unconditional, irrespective of any contingency or circumstance whatsoever' and the definition of an 'Event of Default' included any failure by the defendant to obtain any consent, authorisation, licence, certificate or approval of or registration with or declaration to any government entity required in connection with the operative documents, including without limitation, any airline licence or air transport licence required by the defendant. Thus the very matter which failed to materialise was contemplated by the terms of the lease and responsibility for it allocated to the defendant. This being the case, the leases could not be declared void for common mistake.

Chapter 17 p 614
In *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637 the parties entered into a lease and an agreement for lease of four Bays in a property. In each case, unknown to the tenant, but known to the landlord or its agents, the Bays were so contaminated with asbestos that they were dangerous to enter. Prior to entry into the agreements the landlord provided the tenant with information which indicated that there were no problems with asbestos in the property. The tenant also in its pre-contract enquiries asked for details of any actual, alleged or potential environmental problems (including actual or suspected contamination) relating to the property. The answer given on behalf of the landlord was that it had not been notified of any such breaches or environmental problems relating to the property but that the tenant must satisfy itself on the matter. In the weeks immediately before entry into the lease the landlord's agents received a copy of a report which indicated that there was some asbestos in the Bays but this information was not passed on to the tenant and the landlord also received an email from a specialist firm reporting the existence of a health and safety risk caused by asbestos near to the loading bay which was also not passed on to the tenant.
The representations given on behalf of the landlord were held by the trial judge to be false and to amount to misrepresentations. There was no appeal against that finding. The issue for the Court of Appeal was whether the landlord had effectively excluded liability in respect of these misrepresentations. The landlord relied upon clause 5.8 which provided as follows:
The tenant acknowledges that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord.
The Court of Appeal held that this clause fell within the scope of section 3 of the Misrepresentation Act 1967 and, further, that it failed to pass the reasonableness test. The conclusion that a no reliance clause of this type falls within the scope of section 3 is one of some commercial significance. While the Court of Appeal accepted that the parties to a contract are free at common law to define for themselves their primary rights and obligations under a contract, the position at common law was held not to be the end of the matter. It was also necessary to consider the proper interpretation of section 3 of the 1967 Act and here the freedom of the parties to define for themselves the obligations which they were assuming to one another did not carry the same weight.

It should be noted that Leggatt LJ at [94] questioned whether a clause which states that a party 'acknowledges' that it has not entered into a contract in reliance on any representation made by the other party clearly expresses an intention that a party has given up the right to assert that it was entered into a contract as a result of a misrepresentation (although he noted that a contrary conclusion had been reached by the Court of Appeal in *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 CLC 705, [170] and so did not press the point further).

In relation to the interpretation of section 3, Lewison LJ stated at [51] that it 'must be interpreted so as to give effect to its evident policy' which was 'to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so' and further that 'how they seek to avoid that liability is subsidiary' (see *Cremdean Properties v Nash* [1977] 2 EGLR 80 and *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123). To conclude otherwise would enable a person responsible for drafting a contract to evade the clutches of the Act and, as Leggatt LJ observed (at [99]), 'no rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term.'

From this it would appear to follow that whether the clause takes the form of a 'no-reliance' provision or a clause which purports to define the 'basis' on which the parties have entered into the contract, it will fall within the scope of section 3 and be subject to the reasonableness test. So, while a contractual estoppel may be valid as a matter of contract between the parties, it may nevertheless amount to an exclusion of liability for misrepresentation and so be subject to the reasonableness test under section 3. The justification offered by Leggatt LJ for this conclusion (at 104]) is that English law attaches importance to the freedom of parties to a contract to agree on the terms of their contract but it does so on the basis that 'their consent to the terms of the contract has been obtained fairly' and that is not the case where the consent of one party has been induced by a misrepresentation made by the other contracting party. Thus it would appear that the ability to avoid the reach of section 3 by mere drafting devices is very limited. Parties who wish to exclude or restrict liability in respect of misrepresentation would be well advised to use clear words to this effect given that the clause will very likely be subject to the reasonableness test in any event and the clarity with which the clause is drafted may be a factor which points in favour of the clause being upheld as reasonable.

When considering the reasonableness of clause 5.8 Lewison LJ recognised that whether or not a clause passes the test of reasonableness is an evaluative judgment for the trial judge (see *George Mitchell (Chesterhall Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803) and that appellate courts should be slow to intervene in this process. There was found to be no basis on which it could be said that the judge had misdirected himself in law or taken into account irrelevant factors. A factor to which particular importance was attached was the significance of pre-contract enquiries in the field of conveyancing. The problem with clause 5.8 was that it was too all-embracing. What the parties should have done was to carve out from the no-reliance provision statements or representations made in writing by the landlord's solicitors in response to written inquiries from the tenant's solicitors. This was sufficient to enable another clause in the agreement between the parties to pass the reasonableness test (at least in the opinion of the first instance judge). The absence of an equivalent provision in clause 5.8 was held to be fatal to the claim that the clause was reasonable and this was so notwithstanding the fact that both parties were substantial commercial concerns who were represented by competent solicitors.

No reliance clauses are also heavily used in finance and investment contracts. But here they may have a greater chance of passing the reasonableness test given the observation by Lewison LJ (at [67]) that 'it will always be open to a contracting party seeking to rely on such a clause to establish that it was reasonable; and in cases involving the sale of complex financial products to sophisticated investors it may well be.'

Chapter 18 p 620
In *Holyoake v Candy* [2017] EWHC 3397 (Ch), [233] Nugee J held that, to constitute duress to the person, the threat must be one that relates to physical wellbeing and not to economic wellbeing. A threat to inflict financial ruin on a party will therefore be regarded as a potential case of economic duress and not as duress to the person. The point is one of some importance because the test for causation is more relaxed in the context of duress to the person than is it in the case of economic duress (the duress need only be a cause of the decision to enter into the contract in the case of duress to the person, whereas in a case of economic duress it must be the but for cause). But a party can only take advantage of that more relaxed test where the threat is one that relates to his physical well-being (or the physical well-being of members of his family).

Chapter 18 pp 643-644
In *Holyoake v Candy* [2017] EWHC 3397 (Ch), [236] it was held not to amount to economic duress for a creditor who believes that he has an accrued cause of action against a debtor to threaten to bring proceedings, even if the result is likely to be disastrous for the debtor, and even if the creditor spells out in strong language why it will be disastrous for the debtor for him to do so. But, at the same time, the courts have been careful not to exclude entirely the possibility that there may be a case of lawful act duress. But the circumstances in which it may exist, at least in a commercial context, are likely to be 'limited and rare' (see *Flying Music Co Ltd v Theater Entertainment SA* [2017] EWHC 3192 (QB), [84] *Al Nehayan v Kent* [2018] EWHC 333 (Comm), [182] – [188] and *Ukraine v The Law Debenture Trust Corporation plc* [2018] EWCA Civ 2026, [157]). However, to the extent that it exists at all, lawful act duress is very much the exception, not the rule. This being the case, although a refusal to contract or to waive existing contractual obligations may have serious consequences for the victim and may 'coerce his will', such threats should not, apart from the most exceptional case, constitute duress because no wrongful threat has been made by the more powerful party.

Chapter 23: pp 894-897
In *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 WLR 1353 the claimant, One Step (Support) Ltd, sought to recover damages for breach by the defendants of restrictive covenants not to compete with the claimant, solicit its clients or use its confidential information assessed by reference to the amount which would notionally have been agreed by the parties, acting reasonably, as the price for releasing the defendants from the obligations which they had undertaken (referred to in the judgment of the court as 'negotiating damages'). The defendants were a former director and manager of the claimant and the agreement was entered into on the sale of the business by the defendants to the claimant. The Supreme Court held that the claimant was not entitled to damages assessed on this basis and was confined to damages for such losses as it could prove that it had suffered as a result of the defendants' breaches. There are two points of importance to note from this decision of the Supreme Court. The first is the emphasis on the general rule that damages for breach of contract seek to

compensate the claimant for the loss which it has suffered as a result of the breach. The second is the analysis of the exceptional circumstances in which a claimant may be able to recover negotiating damages or an account of profits in respect of a breach of contract.

In relation to the general rule, the Supreme Court affirmed that damages for breach of contract are 'intended to compensate the claimant for loss or damage' resulting from the breach so that in the case where the claimant's interest in the performance of the contract is purely economic and it cannot establish that it has suffered any loss then in such a situation it 'cannot be awarded more than nominal damages.' The emphasis of the claimant must therefore be on establishing that it has suffered loss. While this may be difficult in certain cases, the problem must be addressed by the claimant head-on by bringing before the court the best evidence that it can of the loss that it has suffered. The Supreme Court stated that the court can be expected to be 'tolerant of imprecision where the loss is incapable of precise measurement' but the difficulty of measuring the loss does not of itself justify the court in seeking to award damages on a different basis, namely by reference to the gain made by the defendant. The court must do the best that it can to identify and measure the loss which has been sustained by the claimant. Thus the response of the court to the claim brought by the claimant was that it had to seek to prove the loss that it had sustained as a result of the defendants' breaches. It was not entitled to recover negotiating damages.

In concluding that the claimant was not entitled to recover negotiating damages the Supreme Court has narrowed the availability of negotiating damages in English law to a relatively small group of cases. The first is where the defendant wrongfully makes use of property (including intellectual property) which belongs to the claimant. In such a case the defendant cannot be heard to say that the claimant has suffered no loss because he would not have used the property in the time in which it was in the possession of the defendant. The defendant in such a case has deprived the claimant of the right to control the use of his property and for that the claimant is entitled to demand that the defendant pay a reasonable fee for the use of his property. The second case is where the court in the exercise of its discretion decides to award the claimant damages in substitution for specific performance or an injunction. In such a case damages are awarded as a monetary substitute for what is lost by the claimant as a result of the decision of the court not to grant him a specific performance order or an injunction. In these two cases it can be seen that the award of negotiating damages has the effect of protecting a claimant's interest in his own property or of compensating him for the decision not to grant him a specific performance order or an injunction.

Where the claim brought is one for damages for breach of a commercial contract which does not involve the right to control property and there is no claim for specific performance or an injunction it is unlikely that the courts will award negotiating damages. Lord Reed was, however, careful not to say 'never' to the availability of negotiating damages in such a context. Thus he stated that

Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset. That may be the position where the breach of contract results in the loss of a valuable asset created or protected by the right which was infringed. The rationale is that the claimant has in substance been deprived of

a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

The difficulty lies in discerning when a breach of contract will result 'in the loss of a valuable asset created or protected by the right which was infringed.' Examples given by Lord Reed of cases which he believed fell within this category were 'the breach of a restrictive covenant over land, an intellectual property agreement or a confidentiality agreement.' It is likely that the courts will be very slow to award negotiating damages in a breach of contract case outside these categories and that they are unlikely to view a mere contractual right as a 'valuable asset' which requires protection by the award of negotiating damages.

Finally it is worth noting that the Supreme Court adopted an extremely restrictive interpretation of the decision of the House of Lords in *A-G v Blake* [2001] 1 AC 268. Lord Reed stated that 'common law damages for breach of contract cannot be awarded merely for the purpose of depriving the defendant of profits made as a result of the breach, other than in exceptional circumstances, following *Attorney-General v Blake*.' It is therefore very unlikely that the courts will in future require a defendant to account for the profit which it has made from a breach of a commercial contract.