to the court for an injunction restraining the sellers (who were the defendants in the case) from drawing under a credit established by the buyer's bankers. The Court of Appeal refused to grant this injunction and Jenkins, LJ said: 'The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the banker an absolute obligation to pay . . .'. Sellers, LJ said that there could well be exceptions where the court could exercise a jurisdiction to grant an injunction, as where there was a fraudulent transaction. However, in other situations the binding nature of the banker's commercial credit is an exception to the doctrine of privity of contract.

There have been similar developments making performance bonds enforceable by commercial custom so that where a bank guarantees performance of an export contract by the supplier a claim may be made against the bank if the contract is not performed. The leading authority for this is *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd* [1978] 1 All ER 976.

There is no reason why the right of exporters to sue the relevant bank should not be contained in the contract between B and his banker providing the credit under the Contracts (Rights of Third Parties) Act 1999. However, the rule that the bank always pays (fraud apart) is such a part of international commerce that the case law rules may well be felt sufficient in themselves.

Assignment

If A owes B £10 B may assign the right to receive the money to C and provided that assignment is a legal assignment (as distinct from an equitable one) C may sue A without the assistance of B as a party to the claim. The matter of assignment is considered more fully in Chapter 22.

Land law – generally

The position in land law is that benefits and liabilities attached to or imposed on land may in certain circumstances follow the land into the hands of other owners.

Smith and Snipes Hall Farm Ltd v *River Douglas Catchment Board*, 1949 – Exceptions to the privity rule: passing of benefits (**90**)

Tulk v *Moxhay*, 1848 – The passing of burdens (**91**)

Land law – leases

The rule of privity of contract had an unfortunate effect on leases of land in the sense that if the original tenant under the lease assigned his tenancy to another tenant with the landlord's consent the original tenant, being in privity with the landlord, could not get rid of the duties under the lease. If, therefore, the person to whom the lease was assigned did not, for example, pay the rent the original assignee could be required to do so and this remained the case where there were further assignments to other assignees. The Landlord and Tenant (Covenants) Act 1995 abolished this liability in the original tenant so that the landlord will only be able to sue the tenant for the time being unless there is an authorised guarantee agreement in force. Under the Act a landlord may require an assigning tenant to enter into a guarantee with the landlord as a condition of the landlord giving his assent to the lease being assigned. Under such an agreement the outgoing tenant would guarantee the performance of the terms of the lease, e.g. payment of rent by his immediate (but not subsequent) assignee. The rules relating to leases are, as we have seen, contained in the Landlord and Tenant (Covenants) Act 1995 which applies to the exclusion of the Contracts (Rights of Third Parties) Act 1999.

Privity and claims against insolvent businesses

If an employee is injured by his employer's negligence and the employer is, for example, a company that goes into liquidation, the Third Parties (Rights Against Insurers) Act 1930 allows the injured employee to make a claim against the company's insurers directly, thus avoiding a proof in the company's liquidation which might only produce a small payment covering only part of the claim.

However, the claim against the insurer is not straightforward since the insurer is only liable to indemnify the company, so that the victim must sue the company to establish its liability before the insurance company is obliged to pay. This may mean an action at law to restore the company to the register if it has been struck off on liquidation and another action to establish its liability. It may then be necessary to bring a legal action against the insurance company if it fails to pay for some reason. The Law Commission published a consultation paper in the spring of 1998 suggesting legislative changes to enable claims to be dealt with in one set of proceedings. As yet, there is no legislation.

Consideration viewed in relation to the discharge or variation of a contract

All that has so far been said in regard to consideration relates to the *formation* of a contract. As we have seen, there must be consideration in order to bring a contract into existence, deeds apart. The rules are rather different where a contract is to be *discharged* or *varied*. There are a number of ways in which a contract may be discharged, all of which will be dealt with later. However, the one with which we are now concerned is *discharge by agreement* under which contract A is to be discharged or varied by a new contract, B, the question being to what extent does contract B require consideration? The attitude of the common law is different from that of equity, as we shall see.

Common law – the rule of accord and satisfaction

At common law if A owes B £10 and wishes to discharge that obligation by paying B £9, he must:

(*a*) obtain the agreement (accord) of B; and
(*b*) provide B with some consideration (satisfaction) for giving up his right to £10 unless the release is by deed.

This is the common-law rule of accord and satisfaction. The rule is an ancient one and an early example of it is to be found in the judgment of Brian, CJ in *Pinnel*'s Case (1602) 5 Co Rep, 117a. Pinnel sued Cole in debt for what would now be £8.50 which was due on a bond on 11 November 1600. Cole's defence was that at Pinnel's request he had paid him £5.12 on 1 October and that Pinnel had accepted this payment in full satisfaction of the original debt. Although the court found for Pinnel on a technical point of pleading, it was said that:

(*a*) payment of a lesser sum on the due day in satisfaction of a greater sum cannot be any satisfaction for the whole; but
(*b*) payment of a smaller sum at the creditor's request before the due day is good consideration for a promise to forgo the balance for it is a benefit to the creditor to be paid before he was entitled to payment and a corresponding detriment to the debtor to pay early.

The first branch of the rule in *Pinnel*'s Case was much criticised but was eventually approved by the House of Lords, and the doctrine then hardened because of the system of binding precedent.

Exceptions to the rule

The practical effect of the rule is considerably reduced under common law by the following exceptions which have been made to it:

(a) Where there is a dispute as to the sum owed. If the creditor accepts less than he thinks is owed to him the debt will be discharged. For example, A says that B owes him £11. B says it is only £9. A agrees to take £10. Then, even if it can be proved that A was owed £11, he cannot recover the £1. He has compromised his claim.

(b) Where the creditor agrees to take something different in kind, e.g. a chattel, the debt is discharged by substituted performance. Thus, if A gives B a watch worth £5 and B is agreeable to taking it, then the debt of £10 will be discharged. The legal theory here seems to be that the article given may be worth more than the balance of the debt and the court is not prepared to be a valuer. In this connection it should be noted that a cheque for a smaller sum no longer constitutes substituted performance.

(c) The payment of a smaller sum before the larger is due gives the debtor a good discharge. This is the second branch of the rule in *Pinnel*'s Case.

(d) If a debtor makes an arrangement with his creditors to compound his debts, e.g. by paying them 85p in the £1, he is satisfying a debt for a larger sum by the payment of a smaller sum. Nevertheless, it is a good discharge, the consideration being the agreement by the creditors with each other and with the debtor not to insist on their full rights.

(e) Payment of a smaller sum by a third party operates as a good discharge.

Foakes* v *Beer, 1884 – *Pinnel's* Case: House of Lords approves (**92**)

D & C Builders* v *Rees, 1965 – Cheque not substituted performance: extinguishing rights (**93**)

Good* v *Cheesman, 1831 – Compositions with creditors (**94**)

Welby* v *Drake, 1825 – Payments by third parties (**95**)

Equity – the rule of promissory estoppel

There has always been some dissatisfaction with the common-law rule of accord and satisfaction. After all, if A owes B £10 and B agrees to take £9, as he must before there can be any question of discharging the obligation of A to pay £10, why should B be allowed afterwards to break his promise to take £9 and succeed in an action against A simply because A gave him no consideration?

It was to deal with this sort of situation that the equitable doctrine of promissory estoppel was propounded, first by Lord Cairns in *Hughes* v *Metropolitan Railway* (1877) 2 App Cas 439 and later by Denning, J (as he then was) in the *High Trees* case (1947) (see below) and later by the House of Lords in *Tool Metal Manufacturing Co Ltd* v *Tungsten Electric Co Ltd* (1955) (see below).

The doctrine of estoppel is basically a rule of evidence under which the court, surprisingly enough, is not prepared to listen to the truth.

It occurs at common law out of physical conduct. Suppose A and B go into a wholesaler's premises and A asks for goods on credit. The wholesaler, who knows that B is creditworthy, but has no knowledge of A, is not prepared to give credit until A says, 'Do not worry, you will be paid, B is my partner'. If B says nothing and A receives the goods on credit and does not pay, then B could be sued for the price, even though he can produce evidence that he was not in fact A's partner. This evidence will not be admitted because the wholesaler relied on a situation of partnership created by B's conduct and the statement is concerned with *existing fact* which is essential at common law (see *Jorden* v *Money* (1854) 5 HL Cas 185). A statement about *future conduct* is not enough at common law.

Promissory estoppel in equity is very little different except that the equitable estoppel arises from a *promise* and not from *conduct*. The common law does not recognise an estoppel arising out of a promise, or a statement about *future conduct*, but equity does.

Ingredients of promissory estoppel

The doctrine of promissory estoppel has the following ingredients:

(a) It arises from a promise made with the intention that it should be acted upon. The promise must be clear and unambiguous to the effect that strict legal rights will not be enforced. It must also be unconscionable to allow the promise to be disregarded. It is difficult to say when this might be the case. However, the courts may very well, in practice, decide (i) that it is unconscionable, in equity, to revoke any agreement modifying an obligation unless it is done quickly and before any action has been taken on it so that if a tenant actually pays a lower rent under a promise that he may do so it will not be possible to recover the rent forgiven though the payment of the full rent can be required for the future if the landlord gives reasonable notice (see the *High Trees* case below) or (ii) unless the promise to modify was extorted under duress as in *D & C Builders* v *Rees* (1965).

(b) It was once thought that the person who had received the promise must do something to show that he had relied on it. If A, a landlord, said B could pay only half his usual rent while he was unemployed, it was thought that B would have to show, for example, that he had spent what should have been the rent money on travelling expenses to find work in the district. Reliance upon the promise in this way is not, it would appear, a necessary requirement. All that would seem to be necessary is that the debtor has made the part-payment; he need not do anything else.

(c) It relates only to variation of a contract by agreement and does not affect the requirement of consideration on formation of contract.

(d) So far as the rule has been developed in cases, it *merely* suspends rights but does not totally discharge them because it does not preclude enforcement of the original contract after reasonable notice has been given. Thus it does not create a binding variation for the future (see *Tool Metal Manufacturing Co Ltd* v *Tungsten Electric Co Ltd* below).

(e) The promise must be freely given and not extorted by threats (see *D & C Builders* v *Rees* (1965) above).

(f) Of considerable importance is a *dictum* by Lord Denning in *D & C Builders* v *Rees* (1965) (see above) that the rule could be developed to the point at which it operated, not merely to suspend rights, but to preclude enforcement of them. If this point is reached, then if A owes £10 and B agrees to take £9, A will be discharged from his obligation to pay £10 without the need for consideration.

Such a situation would involve a virtual overruling of *Foakes* v *Beer* (1884) (see above) and would put an end to the first branch of the rule in *Pinnel's* Case which is that payment of a lesser sum on the day due in satisfaction of a greater sum cannot be any satisfaction for the whole. Although in the past a number of *dicta* by Lord Denning have been incorporated into the *ratio* of subsequent decisions, the position outlined here has not yet been reached.

The High Trees case, 1947 – The rule of promissory estoppel (**96**)

Tool Metal Manufacturing Co Ltd v ***Tungsten Electric Co Ltd***, 1955 – Promissory estoppel merely suspends rights (**97**)

Alan v ***El Nasr***, 1972 – No need for reliance on promise (**98**)

Combe v ***Combe***, 1951 – Rule not applicable to formation of contract (**99**)

Discharge of contract by performance – relevance of the *High Trees* case

The rule of equitable estoppel has relevance in discharge of a contract by performance (see Chapter 17). Although the agreed date of delivery must usually be complied with in a contract of sale, the buyer may waive the condition relating to the date of delivery and accept a later date. Such a waiver may be binding on him whether made with or without consideration. It was held by Lord Denning in *Charles Rickards Ltd* v *Oppenhaim*, 1950 (see Chapter 17) that the binding nature of a waiver without consideration might be based on the *High Trees* case (i.e. a promissory estoppel to accept a later delivery date). Alternatively, the seller may rely on s 11(2) of the Sale of Goods Act 1979, which states: 'Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive that condition.'

Equitable estoppel – other applications

The principle of equity on which promissory estoppel is based is one of general application and may be applied whenever the court feels it is necessary in the interests of justice to do so.

Durham Fancy Goods v ***Michael Jackson (Fancy Goods) Ltd***, 1968 – Equitable estoppel: use other than in discharge or variation of contract (**100**)

Intention to create legal relations

The law will not necessarily recognise the existence of a contract enforceable in a court of law simply because of the presence of mutual promises. It is necessary to establish also that both parties made the agreement with the intention of creating legal relations so that if the agreement was broken the party offended would be able to exercise legally enforceable remedies. The subject can be considered under two headings as follows.

Cases where the parties have not expressly denied their intention to create legal relations

Advertisements

Most advertisements are statements of opinion and as such are not actionable. Thus, unless the advertisement makes false statements of specific verifiable facts, which is rare, the court will not enforce the claims made for the product on a contractual basis. However, where a company deposits money in the bank against possible claims, the court is likely to hold that legal relations were contemplated (*Carlill* v *Carbolic Smoke Ball Co* (1893)), though a deposit is not essential (*Wood* v *Lectric Ltd* (1932) – see Chapter 9).

Family agreements

Many of these cannot be imagined to be the subject of litigation but some may be. The question is basically one of construction and the court looks at the words and the surrounding circumstances. The two basic divisions of family agreements are set out below.

(a) Husband and wife. With regard to agreements between husband and wife, it is difficult to draw precise conclusions. However, the following situations have appeared in decided cases.

(i) Where husband and wife were living together in amity when the agreement was made, the agreement is not enforceable as a contract because legal proceedings are an inappropriate method of settling purely domestic disputes.
(ii) Where husband and wife were living together but not in amity or were separated altogether when the agreement was made, the court may enforce it.
(iii) If the words used by the parties are uncertain, the agreement will not be enforced – the uncertainty leading to the conclusion that there was no intention to create legal relations. Thus in *Gould* v *Gould* [1969] 3 All ER 728 a contractual intention was negatived where a husband on leaving his wife undertook to pay her £15 per week 'so long as I can manage it'. The uncertainty of this term ruled out a legally binding agreement.

Agreements of a non-domestic nature made between husband and wife are enforceable, e.g. in *Pearce* v *Merriman* [1904] 1 KB 80 it was held that a husband may be his wife's tenant and as such could be made to pay the rent.

(b) Other family and personal relationships. The question of intention to create legal relations arises for consideration here as well but it seems that the less close the relationship between the parties the more likely it is that the court *will presume* that legal relations were intended. However, in these cases also uncertainty as to the terms of the agreement normally leads to the conclusion that there was no contractual intention.

Other cases

There may well be other areas where intention to create legal relations is doubtful but which have not been the subject of cases in court. Again, the matter is one of fact for the court. However, in the case of clubs and societies many of the relationships which exist and promises which are made are enforceable only as moral obligations. They are merely *social agreements*. For example, the decision in *Lens* v *Devonshire Club, The Times*, 4 December 1914, would suggest that if a person competes for a prize at a local golf club and is the winner, he or she may not be able to sue for the prize which has been won if it is not otherwise forthcoming.

However, in *Peck* v *Lateu* (1973) *The Times*, 18 January, two ladies attended bingo sessions together and had an arrangement to pool their winnings. One of them won an additional

'Bonanza' prize of £1,107 and claimed it was not covered by the sharing arrangements. Pennycuick, VC held that there was an intention to create legal relations and to share all prizes won. The claimant was entitled to a share in the prize.

It should also be borne in mind that quotations and estimates may be passed from one person to another without any intention that they should be legally binding *at that stage*.

Balfour v *Balfour*, 1919 – Husband and wife living in amity (**101**)
Merritt v *Merritt*, 1970 – Effect of separation (**102**)
Simpkins v *Pays*, 1955 – Intention in family relationships (**103**)
Jones v *Padavatton*, 1969 – Family relationships and uncertainty (**104**)

Cases where the parties expressly deny any intention to create legal relations

By contrast with family arrangements, agreements of a commercial nature are *presumed* to be made with contractual intent. Furthermore, the test applied by the court is an *objective* one so that a person cannot escape liability simply because *he did not* have a contractual intention. The presumption is a strong one and it was held in *Edwards* v *Skyways Ltd* [1964] 1 All ER 494 that the use of the words *ex gratia* in regard to an airline pilot's contractual redundancy payment did not displace the presumption, so that the airline had to make the payments and did not have a discretion whether to make them or not.

However, the Court of Appeal has held more recently that a court need not necessarily presume intention to create legal relations just because the parties are in business.

Kleinwort Benson Ltd v *Malaysian Mining Corporation, Berhad*, 1989 – Business contracts: intention usually but not always assumed (**105**)

Some agreements where the court would normally assume an intention to create legal relations may be expressly taken outside the scope of the law by the parties agreeing to rely on each other's honour. This is a practice which appears to be allowable to pools companies who are especially subject to fraudulent entries but should not be allowed to spread into other areas of *standardised* contracts, i.e. contracts where the consumer has no choice of supplier as where he requires electrical services laid on which can only be provided by a monopoly corporation.

There is no such objection where business persons reach agreements at arm's length, and if the parties expressly declare, or clearly indicate, that they do not wish to assume contractual obligations, then the law accepts and implements their decision.

Jones v *Vernon's Pools Ltd*, 1938 – Business agreements: contractual intent may be excluded (**106**)
Rose and Frank Co v *Crompton (JR) & Bros Ltd* 1925 – An honourable pledge clause (**107**)

Statutory provisions

Sometimes an Act of Parliament renders an agreement unenforceable. Thus under s 1 of the Law Reform (Miscellaneous Provisions) Act 1970, a contract of engagement, which is, in

effect, an agreement to marry, is not enforceable at law since there is a statutory presumption that there was no intention to create legal relations. Thus actions for breach of promise are no longer possible.

In addition, under s 29 of the Post Office Act 1969, the acceptance of ordinary letters and packets for transmission does not give rise to a contract between the Post Office and the sender.

Finally, under s 179 of the Trade Union and Labour Relations (Consolidation) Act 1992, collective agreements between trade unions and employers (or employers' associations) concerning industrial conditions such as hours, wages, holidays, procedures in disputes and so on, are presumed *not* to be intended to be legally enforceable unless they are in writing and contain a provision to that effect.

However, under s 70A and Sch A1 of the 1992 Act, as inserted by the Employment Relations Act 1999, arrangements between an employer and a trade union in regard to recognition for the purposes of collective bargaining have effect as legally binding agreements, specific performance being the only remedy for breach.

11

MAKING THE CONTRACT III

In this chapter we shall conclude the study of those elements of contract law which go to making a *mere agreement* into *a binding contract. Formalities* (*or the need for writing*) and the requirement that the parties must have capacity in law to make the contract are considered here.

Formalities

In most cases a contract made orally (or by parol, which is an alternative expression) is usually just as effective as a written one. Exceptionally, however, written formalities are required as follows.

Contracts which must be made by deed

A lease of *more* than three years should be made by deed otherwise no legal estate is created (see ss 52 and 54 of the Law of Property Act 1925). If there is no deed then there is in equity a contract for a lease. This is an estate contract under s 2(3) of the Law of Property Act 1925. It is enforceable against third parties who acquire the freehold from the landlord only if it has been registered at the Land Registry. Registration gives notice to the whole world. Failure to register makes the contract void against a later purchaser of the freehold from the landlord for a consideration, even though in fact the purchaser *knows* the lease exists (Law of Property Act 1925, s 199(1)). The purchaser could turn out the tenant if the lease was not registered. However, where it is registered the tenant is protected.

It should be noted, however, that the Court of Appeal decided in *Crago* v *Julian* [1992] 1 All ER 744 that a distinction must be made between the *creation* of a lease and its *assignment*. If tenant A wishes, say, to sell his lease to B, the assignment from A to B must be by deed, even though the original lease given to A was oral and for three years or less. This arises from ss 52 and 53 of the Law of Property Act 1925, which deal with the transfer of interests in land.

As regards the form of a deed, the Law of Property (Miscellaneous Provisions) Act 1989 is now relevant and was considered in Chapter 9.

Estoppel and deeds

Because the deed is the most formal and considered form of contract making the deed is subject to the rule of estoppel that says that a party who executes a deed, i.e. signs it, cannot say in a

court of law that the deed is not true as to the facts stated in it. Thus, although a deed was not signed in the presence of a witness, although it was signed by a witness, the Court of Appeal ruled that a person who had agreed by the deed to be personally liable for a debt owed by a bank of which he was a director could not deny his liability because he had signed the deed even though not in the presence of the witness as the law requires (see *Shah* v *Shah* [2002] QB 35).

Comment A deed requires attestation and the form required to satisfy this requirement is 'signed as a deed by AB in the presence of CD'. So, because the deed says that *as a fact* it must be regarded as correct even if it is not.

Contracts which must be in writing

For example, the following simple contracts are required by statute to be in writing, otherwise they are affected in various ways:

(a) By reason of amendments to the Consumer Credit Act 1974 made by the Consumer Credit Act 2006, all consumer credit agreements of any amount are covered by the legislation, although there is an exemption for lending over £25,000 to large businesses. The amount refers to the credit provided. If these agreements are not in appropriate written form they cannot be enforced by the dealer, unless the court thinks it is fair in the circumstances to allow him to enforce the contract.

(b) Contracts of marine insurance, which must be embodied in a written policy, otherwise the contract is not effective, being inadmissible in evidence unless embodied in a written policy signed on behalf of the insurer (Marine Insurance Act 1906, s 22).

(c) Contracts for the sale or other disposition of land are required by statute to be in writing, otherwise they are invalid, i.e. there is no contract. Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 provides that a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each contract. The document must be signed by each party. As regards the requirement that the parties must sign a copy of the agreement, it was held by the Court of Appeal in *Firstpost Homes* v *Johnson* [1995] 4 All ER 355 that the word 'signed' in the 1989 Act meant that the parties must sign their names in their own hand. A typed signature was not enough even though earlier cases on the requirements of writing under previously applicable legislation had decided that a typed signature was acceptable.

There are some exceptions to the above requirements as follows:

(i) leases for three years or less where the tenant takes possession can be granted orally;
(ii) sales at public auctions are excluded and the contract is regarded as made when the auctioneer's hammer falls. There is thus no requirement of writing at all at auction sales;
(iii) section 2(5) of the 1989 Act provides that the requirements of the Act do not prevent the creation of implied trusts over land where these arise orally. Thus, in *Yaxley* v *Gotts* [1999] EGCS 92 there was an oral agreement between the freehold purchaser of a property and a builder that if the builder would convert the property into flats the freeholder would grant him a long lease of the ground floor flat. The builder carried out the work supplying services and materials. The freehold owner then refused to grant him a lease of the flat and claimed that the agreement for it was unenforceable since it was not in writing. The Court of Appeal said that the circumstances had created a constructive trust over the flat in favour of the builder and since such trusts do not require writing and s 2(5) provides for this in the context of the case, the builder could enforce the oral trusts. The court granted him a 99-year lease.

Since the document must now contain all the terms agreed by the parties and be signed by both parties, solicitors and conveyancers are no longer at risk that pre-contract correspondence signed by only one party might amount to a contract itself as was a possibility before. The practice of heading correspondence 'subject to contract' can now be brought to an end but some lawyers may advise its retention in case a judicial interpretation reveals an unexpected trap in its omission. Also, there should not be a problem as to whether the parties to a sale or other disposition of land intended legal relations because there will be a formal contract.

Contracts which must be evidenced in writing

Here we are concerned with contracts of guarantee where the Statute of Frauds 1677 requires writing which, though not essential to the formation of the contract, is needed as evidence if a dispute about it comes before a court. The court will not enforce the guarantee in the absence of written evidence.

The provision in the Statute of Frauds applies to guarantees and not to indemnities. It is therefore necessary to distinguish between these two. In a contract of indemnity the person giving the indemnity makes himself primarily liable by using such words as 'I will see that you are paid'.

In a contract of guarantee the guarantor expects the person he has guaranteed to carry out his obligations and the substance of the wording would be: 'If he does not pay you, I will'. An indemnity does not require writing because it does not come within the Statute of Frauds: a guarantee requires a memorandum.

An additional distinction is that it is an essential feature of a guarantee that the person giving it is totally unconnected with the contract except by reason of his promise to pay the debt. Thus a *del credere* agent who, for an extra commission, promises to make good losses incurred by his principal in respect of the unpaid debts of third parties introduced by the agent, may use the guarantee form 'if they do not pay you I will' but no writing is required. Such a promise is enforceable even if made orally because even where a person does promise to be liable for the debt of another that promise is not within the Statute of Frauds where it is, as here, an incident of a wider transaction, i.e. agency.

Mountstephen v *Lakeman*, 1871 – Guarantee and indemnity distinguished (**108**)

The memorandum in writing to satisfy the court need not exist when the contract is made but must be in existence when an action, if any, is brought for breach of the guarantee. A guarantee cannot be proved orally – writing is required as evidence. The memorandum must identify the parties, normally by containing their names. The material terms must be included, e.g. that it is a guarantee of a bank overdraft facility limited to £50,000. The memorandum must also contain the signature of the party to be charged or his agent properly authorised to sign. However, the law is not strict on this point and initials or a printed signature will do (contrast the position under the Law of Property (Miscellaneous Provisions) Act 1989, above). The 'party to be charged' is the proposed defendant and there may be cases where one party has a sufficient memorandum to commence an action whereas the other may not since the memorandum does not contain the other party's signature. This could happen where the memorandum was in a letter written by Bloggs to Snooks. The letter would presumably be signed by Bloggs but not by Snooks. It would therefore be a good memorandum for an action by Snooks but not by Bloggs. Section 3 of the Mercantile Law Amendment Act 1856 dispenses with the need to set out the consideration in the memorandum but it must exist. It is normally the extension of credit by A to B in consideration of C's guarantee of B's liability if B fails to pay.