BAD BARGAINS

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Freedom of contract is a fundamental principle of English law.[1] In *Prime Sight Ltd v Lavarello,* Lord Toulson observed that "[p]arties are ordinarily free to contract on whatever terms they choose and the court's role is to enforce them".[2] This is an attractive feature of English law. Business people choose English law because it is certain, holds parties to their bargains, and affords full respect to the principle of party autonomy.[3]

Parties should generally be held to their contracts, regardless of whether they are good or bad. However, contract doctrine comes into sharper focus when considering bad bargains. Where a contract is "good" for both parties there is often no need to resort to legal principles; the law of contract is much more important where a bargain is "bad" for one party which seeks to ameliorate its position. Yet a bargain which is bad for one party will generally be good for the other. Mere sympathy for the party which finds itself with a disadvantageous contract should not distort the result of a case and deprive the other party of the fruits of a good deal, especially in the commercial field.[4]

Consideration of the impact of bad bargains on the law of England and Wales is timely. With Brexit on the horizon, the number of deals which unexpectedly become very bad is likely to be substantial. Indeed, whether the United Kingdom ultimately leaves the European Union or not, the uncertainty generated by the decision of the 2016 referendum has already had a significant impact on a number of commercial contracts. Litigation has begun to trickle through to the commercial courts in London,[5] and that trickle is likely to flow more freely in the future.

Nevertheless, this is not another paper on Brexit. The prospect of Brexit emphasises the *current* nature of this *legal problem*, but previous financial crashes, for instance, have had much the same effect.[6] Yet the uncertainty generated by Brexit, and the attempts by various jurisdictions to tempt businesses to choose legal systems other than England to govern their

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[1] *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848 (Lord Diplock); *Printing and Numerical Registering Company v Sampson* (1874-75) L.R. 19 Eq. 462, 465 (Sir George Jessel MR).

[2] [2013] UKPC 22; [2014] A.C. 436 [47].

[3] See eg The Law Society of England and Wales, *England and Wales: The Jurisdiction of Choice https://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf*.

[4] This article is concerned with "commercial contracts", conscious of the difficulties inherent in defining its scope: see *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 [168] (Lord Mance). Consumer contracts and employment contracts, for example, will not be discussed.

[5] Eg *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), considered below.

[6] On upheavals in energy markets having a profound effect on long-term projects, see eg C Parker and S Chapman, 'Escaping from a Bad Bargain: Suspending, Modifying or Terminating Performance of Long-term Energy Contracts' [2010] IELR 243.

contracts and disputes, highlight the need to be clear about the advantages to be gained from choosing English law.[7] A respected and reliable judiciary is important, as is the emphasis placed upon legal certainty, party autonomy and freedom of contract.[8]

A clear way of showing that English law respects freedom of contract is to hold parties to contracts freely entered into. This applies even if the contract is a "bad bargain" for one party. Courts often say that they are cautious about allowing parties to escape bad deals,[9] and on the whole they are, but a wish to protect some parties who find themselves lumbered with a bad bargain has introduced a degree of uncertainty into substantive doctrine. This article will focus upon some recent decisions which illustrate the problems that can arise.

The term "bad bargain" is not a term of art, and encompasses a range of different situations, which will be discussed in Part I. It is helpful to understand some of the different situations where one party has a practical incentive to seek to avoid performing its agreement; different arguments may be run by a contracting party depending on the nature of the "bad bargain". However, the general approach of the courts should be to hold parties to bad bargains (and indeed all contracts), and the importance of this will be discussed in Part II. Part III will then consider the doctrines used to determine the content of a bargain, and how these may be manipulated to rescue a party from a bad bargain; however, the contractual language chosen by the parties should be afforded the utmost respect by the courts. Part IV will highlight recent difficulties within the "vitiating factors" of misrepresentation and duress, and argue that the scope of both doctrines should be restricted in order to limit the ability of a party to escape its own bad bargain. Part V will analyse recent developments in the law of frustration, which is rightly very narrow in order to hold parties to their agreements.

I What does "bad bargain" mean?

The term "bad bargain" has been used in a variety of ways. In all situations, one party (at least) is unhappy with the consequences of the contract entered into. But that covers a very broad range of circumstances, and it is useful to consider the different ways in which a bargain may be considered to be "bad".

Indeed, both "bad" and "bargain" are potentially ambiguous. As regards the latter, for instance, *Goode* states that a "'bargain' is no bargain if the quality is no greater than reflected by the price".[10] *Goode* uses "bargain" here not in the sense of "contract", but rather to mean a "good deal". By contrast, this paper will use "bargain" as synonymous with "contract". In the situation *Goode* describes – where the quality is less than the price – the contract is very good for the seller and bad for the purchaser. But it is nonetheless a contract. That is because there

[7] According to *The Commercial Court Report 2017-2018* (at p.9) "international cases account for 70% of the Court's business": https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf

[8] "International commerce on a large scale is red in tooth and claw": *The Sine Nomine* [2002] 1 Lloyd's Rep. 805 [9].

[9] See recently *Canary Wharf v EMA* (n 5) [39] (Marcus Smith J).

[10] E McKendrick, *Goode on Commercial Law* 5th ed (LexisNexis, 2016) 11.72

is consideration provided to support the promises made. The doctrine of consideration often comes under attack,[11] but it is fundamental to the idea of contract as a bargain.[12]

There are a number of different ways a bargain can be "bad". The term "bad bargain" is perhaps most commonly used in the sense of "losing contracts". For instance, in *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd,* Teare J said:[13]

> "In some cases a contract can be shown to be a bad bargain. In other cases it may not be possible to show one way or the other whether the likely gross profits would at least equal the expenditure."

Where the money spent by one party in reliance on the contract exceeds the gross profits that would be made from the contract, that bargain can generally be characterised as "bad" for that party. Unless it deliberately entered into such a contract as a "loss leader", it is clear why the party on the wrong end of the bargain would hope to escape it. This may be by arguing that no contract was really formed,[14] or that its consent to the contract was impaired,[15] for example.[16]

However, some contracts may not be "losing contracts" but simply not as advantageous as they could have been. They may be considered to be "bad" in the sense that they are unfavourable when compared to other contracts that could have been entered into. The "opportunity cost" of entering into a particular contract renders it bad, and parties may regret concluding such agreements.[17] Again, parties may seek to escape the contract entirely. But since those contracts might be profitable – even if not as profitable as hoped – parties may seek to interpret the contract, or imply terms, or rectify the written document, in a way that makes the contract more profitable. Courts are rightly wary of allowing such attempts to succeed. For example, in *Wood v Sureterm Direct Ltd*, Christopher Clarke LJ said:[18]

> "Businessmen sometimes make bad or poor bargains for a number of different reasons such as a weak negotiating position, poor negotiating or drafting skills, inadequate advice or inadvertence. If they do so it is not the function of the court to improve their

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[11] See, in the context of variation of contracts, the recent comments of Lord Sumption in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24; [2019] AC 119 [18].

[12] Although there are exceptions, most notably concerning letters of credit: see eg *Taurus Petroleum Ltd v State Oil MarketingCompany of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, [2018] AC 690 [25] (Lord Clarke), [95] and [100] (Lord Mance). Promises may also be binding even if not made for consideration where made by deed: A Burrows, *A Restatement of the English Law of Contract* (OUP, 2016) s.2.

[13] [2010] EWHC 2026 (Comm), [2011] 2 All E.R. (Comm) 155 [47]. See similarly *Grange v Quinn* [2013] EWCA Civ 24, [2013] 1 P. & C.R. 18 [102].

[14] Cf *Wells v Devani* [2019] UKSC 4, [2019] 2 WLR 617.

[15] See Part IV below

[16] Interestingly, much attention has been paid to losing contracts in the context of remedies for breach of contract. Claims have arisen where one party has (unusually) breached a good deal and is sued by the person who has made a bad bargain, but space precludes full consideration of this issue. See generally *Omak Maritime* (above n 13)*; Khan v Malik* [2011] EWHC 1319 (Ch); H Beale (ed) *Chitty on Contracts* 33rd ed (Sweet & Maxwell, 2018) [26-027]-[26-031]*;* J Edelman (ed) *McGregor on Damages* 20th ed (Sweet & Maxwell, 2017) [4-025]-[4-049]. This article will focus on steps the party on the "wrong" side of a bad bargain can take in the more usual scenario that arises when the counterparty has not breached the agreement.

[17] Regret alone is no reason for unwinding a transaction: cf *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 [35] (Lord Walker) citing *Breadner v Granville-Grossman* [2001] Ch 523, 543 (Park J).

[18] [2015] EWCA Civ 839 [30], upheld: [2017] UKSC 24; [2017] A.C. 1173 (see eg [11]). See too *Progress Property v Moorgarth Group* [2010] UKSC 55; [2011] 1 W.L.R. 1 [46] (Lord Mance); *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619 [77] (Lord Hodge).

> bargain or make it more reasonable by a process of interpretation which amounts to rewriting it."

Unfortunately, such strong rhetoric is not always mirrored in the outcomes of decided cases. As a result, it can be difficult to know whether a bargain is "bad" until the court has determined the proper meaning of the contract. This will be examined further in Part III.

Not all bad bargains are "bad" from the outset. For example, the agreement may be a "zero-sum" contract that will inevitably be good for one party and bad for the other, such as a swap agreement which effectively bets on the interest rate going up or down.[19] Whether the bargain becomes good or bad depends on subsequent events. Both parties are aware when entering into the contract that the deal may become a bad bargain and consciously take that risk.

On the other hand, some contracts which may appear perfectly sensible and lucrative at the outset may unexpectedly and perhaps unforeseeably turn into bad bargains. This might be due to a variety of reasons, including work of unexpectedly poor quality from the counterparty[20] or even a contracting party's own conduct, such as not acting as promptly as it should have done.[21] More common, however, are bargains which become bad because of external circumstances. A good example is provided by the facts of the recent decision of the Supreme Court of Canada in *Churchill Falls (Labrador) Corp v Hydro-Québec*.[22] In 1969 Hydro-Québec undertook to purchase electricity from Churchill Falls for a fixed price over a 65-year period. Since the contract was entered into there have been significant changes in the electricity market: importantly, electricity is no longer viewed exclusively as a public good but rather as a source of profits. Such changes meant that this contract became extremely advantageous for Hydro-Québec, which was able to purchase electricity at low prices. Conversely, Churchill Falls found itself stuck with a very bad deal. It attempted to argue that implied obligations of good faith meant that the contract price should be renegotiated. This was rejected by a majority of the Supreme Court of Canada, and it is suggested that a similar result should be reached in this jurisdiction.[23]

It is also important to consider cases where it is not clear how the contract should be interpreted to cover unforeseeable events which were not in the contemplation of parties at the time the contract was concluded. The express terms of the contract – in particular hardship clauses and *force majeure* clauses – will often be very broad such that the focus of litigation should be upon the interpretation of those terms. But where the unexpected event is not covered by the language of the contract, it is suggested that the very strong presumption should be that the loss lies where it falls, and again courts should be wary about rescuing parties from what has turned out to be a bad bargain.[24]

There is another, important, sense in which bargains may be "bad" – or even "toxic" – and that is where the contracts are tainted by illegality in some way. Although it is no longer

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[19] Eg *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355; [2018] 1 W.L.R. 3529.
[20] *Royal Devon and Exeter NHS v ATOS* [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm) 535.
[21] Eg *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] A.C. 1173.
[22] 2018 SCC 46.
[23] See Section III.B below.
[24] Eg *Pluczenik Diamond Co NV v W Nagel (A Firm)* [2018] EWCA Civ 2640. [2019] 2 All ER 194 [31] (Leggatt LJ).

the case that courts can simply refuse to have anything to do with illegal contracts,[25] courts are still sensibly reluctant to enforce such agreements. A party who tries to escape a toxic bargain before it is performed should, generally, be allowed to do so (in contrast to the position as regards lawful agreements):[26] the policy of the law should be to discourage illegal behaviour. However, the recent decision of the Supreme Court in *Patel v Mirza* suggests that a party may be able to withdraw from an illegal contract even after the time for performance if it has become a bad bargain.[27] This is problematic, and sits uneasily with the desire to prevent parties from escaping unilaterally from a bad bargain.[28] Space precludes further discussion of this issue; if the result in *Patel v Mirza* is to be supported it must depend upon wider considerations of public policy concerning illegal conduct that are not relevant to the issues considered below.[29]

II Why hold parties to "bad bargains"?

In *Charter Reinsurance Co Ltd (In Liquidation) v Fagan* Lord Mustill said:[30]

> "Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms … In the end … the parties must be held to their bargain"

It is important that parties be held to their bargains, even if bad. This helps to generate (often artificial) trust in the system of contract law and encourage parties to contract since their agreements will be enforced. Such an approach is crucial for commerce and trade to flourish.[31]

Moreover, judges may be ill-equipped to decide whether a bargain is "bad",[32] and so do not distinguish between different types of contracts in this way. Indeed, English law only requires that consideration be "sufficient" but not "adequate";[33] courts will not enquire into the adequacy of consideration to determine whether a bargain was "fair".[34] In *Skanska Rasleigh Weatherfoil Ltd v Somerfield Stores Ltd* Neuberger LJ sensibly observed that:

> "Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to

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[25] *Saunders v Edwards* [1987] 1 WLR 1116, 1134 (Bingham LJ).
[26] Cf *Tribe v Tribe* [1996] Ch 107.
[27] [2016] UKSC 42; [2017] A.C. 467.
[28] See eg P Davies, 'Illegality in Equity' in P Davies, S Douglas and J Goudkamp, *Defences in Equity* (Hart Publishing, 2018) 255-258.
[29] See generally S Green and A Bogg, *Illegality After Patel v Mirza* (Hart Publishing, 2018).
[30] [1997] AC 313, 388.
[31] G Leggatt, "Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law" [2019] JBL 104, 104; N McBride, *The Humanity of Private Law* (Hart, 2019) 182-194. See too *Vallejo v Wheeler* (1774) 1 Cowp 143, 153 (Lord Mansfield).
[32] It may be easier where a losing contract is at issue, but even this might not be straightforward: see eg the different views expressed in *Grange v Quinn* (n 13).
[33] Eg *Bainbridge v Firmstone* (1838) 1 P & D 2.
[34] See generally JL Barton, "The Enforcement of Hard Bargains" (1987) 103 LQR 118.

themselves overconfidently the role of arbiter of commercial reasonableness or likelihood."[35]

A blanket rule that bargains – good or bad – should be enforced according to their terms is therefore attractive to judges.[36] It also probably accords with most parties' expectations. Contracts are entered into in order to allocate the risk of future events between the parties. It is not for the court to reallocate the risks entered into by commercial actors. That would undermine trust in the system and party autonomy.

It is helpful to remember that contracts may well be unfair. As Lord Sumption has put it, "fairness has nothing to do with commercial contracts" since "[c]ommercial parties can be most unfair and entirely unreasonable, if they can get away with it".[37] This reflects the traditional adversarial view of contracting: each party sets out to achieve the best deal for itself, at the expense of the other side.

Such an approach chimes easily with the Latin maxim of *caveat emptor,* or "buyer beware".[38] This maxim is still at the root of much of commercial law, although it is not enforced as strictly as it once was.[39] The advantage of putting the risk on the buyer[40] is that the parties know exactly where they stand: the seller is entitled to act in a self-interested way, and the buyer must make inquiries about any issues it may be concerned about.[41] This encourages contracting parties to take responsibility for their agreements; the court should not rescue parties from their own "commercial fecklessness"[42] by making a bargain reasonable when the parties themselves have not acted reasonably. Commercial actors should take care when entering into contracts, and give careful thought to the written documents. A powerful way to emphasise the importance of this message is to make it difficult for parties to escape the consequences of the contracts they have entered into.

A robust approach has sometimes been criticised as leading to instances of individual unfairness, when it would be preferable for courts to "delve into a pool of shared morality" in refusing to countenance unconscionable results.[43] But such views should be treated with caution. As Ahdar has commented,[44]

"An ostensibly unjust rule can be worked around. What cannot be so readily accommodated is the introduction of an unpredictable legal outcome, one determined

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[35] [2006] EWCA Civ 1732 [22].
[36] Although that does not necessarily mean that the contract should be specifically enforced: see eg M. Chen-Wishart, 'Specific Performance and Change of Mind' in G. Virgo and S. Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP, 2017).
[37] Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' [2017] OUCLJ 301, 310. See too *Arnold* (n 18) [46] (Lord Neuberger). The position is not the same as regards consumer contracts: see eg Consumer Rights Act 2015.
[38] For further discussion see eg W Hamilton, 'The Ancient Maxim Caveat Emptor' (1931) 40 Yale LJ 1133; A Weinberger, 'Let the Buyer be Well Informed? – Doubting the Demise of Caveat Emptor' (1996) 55 Maryland LR 387, 391.
[39] Eg Sale of Goods Act 1979 s1; see too Consumer Rights Act 2015 s.18(1). A Weinberger, 'Let the Buyer be Well Informed? – Doubting the Demise of Caveat Emptor' (1996) 55 Maryland LR 387, 404.
[40] Or, beyond the sale of goods, the party "taking" or "buying" contractual services, for example.
[41] H Beale *Mistake and Non-disclosure of Facts: Models for English Contract Law,* (OUP, 2012) 106: "If you don't know, ask. If you didn't ask, don't complain".
[42] M Hogg, Fundamental issues for reform of the law of contractual interpretation (2011) 15 Edin LR 406, 420.
[43] I Samet, 'Equity as a Vehicle for Law Reform: The Case of Unilateral Mistake' [2016] CJCCL 537, 556.
[44] R Ahdar, "Contract Doctrine, Predictability and the Nebulous Exception" [2014] CLJ 39, 60.

> afresh on a case-by-case basis by non-commercial actors (courts) applying nebulous standards. The fact that the successful invocation of the exception is as rare, if not as elusive, as sightings of the Tasmanian Tiger, leads one to further question the point of the exercise. The "never say never" mindset is a pernicious one in commercial and contract law."

There is great merit in providing clear and certain rules in the commercial context. The commercial law of England and Wales is more international in its outlook than many other legal systems.[45] A large proportion of the disputes before the commercial courts in London involve parties with little relationship to the jurisdiction, beyond a choice of law clause.[46] It is perhaps significant that England is such a popular jurisdiction and does not contain a broad doctrine of good faith. This may in fact be a competitive advantage[47] that is not lightly to be discarded;[48] the absence of good faith is often perceived to increase commercial certainty[49] and the respect afforded to freedom of contract, which is highly desirable for many commercial actors. Indeed, the rise of good faith has even been viewed as dangerous to the stability of English commercial law.[50] In any event, it is unclear whether in large-scale commercial disputes there is a "pool of shared morality" to which reference can be made. That sort of concept may be appropriate in a jurisdiction with a strong mutual cultural background, such as France and Germany, so that in practice people do have a fair idea how the standard will be applied. But in international trade – to which English contract law often speaks – such a strong common legal cultural background is frequently missing, so the need for more hard-edged rules becomes greater.[51]

III Determining the meaning of the bargain

A Interpretation

Taking a signed, written contract at face value, or in accordance with its "plain meaning",[52] the terms may well suggest that one of the parties has made a bad bargain. But

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[45] Eg *James Buchanan & Co. Ltd. Respondents v Babco Forwarding & Shipping (U.K.) Ltd* [1978] A.C. 141, 162 (Lord Salmon); *The Commercial Court Report 2017-2018* (n7) at 9.

[46] "Some 70% of the cases that come before the Commercial Court, which is now part of the Business and Property Courts, have at least one overseas party": *Shagang Shipping Co Ltd (In Liquidation) v HNA Group Co Ltd* [2018] EWCA Civ 1732, [2019] 1 Lloyd's Rep. 150 [1].

[47] Leggatt LJ clearly took a different view, regretting the fact that English law "would appear to be swimming against the tide" in refusing to recognise a general obligation of good faith (*Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB); [2013] 1 All E.R. (Comm) 1321 [124]). See too *Bhasin v Hrynew* 2014 SCC 71, [2014] 3 S.C.R. 494 [36]; J Tarr, "A Growing Good Faith in Contracts" [2015] JBL 410.

[48] Cf J Hobhouse, "International Conventions and Commercial Law: The Pursuit of Uniformity" (1990) 106 LQR 530, 535.

[49] Eg *Manifest Shipping Co Ltd v Uni-Polaris Ins Co Ltd (The Star Sea)* [2001] UKHL 1, [2003] 1 AC 469 [45] (Lord Hobhouse).

[50] See Section III.B below.

[51] For a parallel argument in the constitutional context, see RH Fallon Jr "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) Columbia LR 1, 49, and 52.

[52] It has been suggested that this term is problematic: see eg L Solan, *The Language of Judges* (Chicago, University of Chicago Press, 1993) especially ch 4; A Corbin, *Corbin on Contracts* (St Paul, MN, West Publishing, 1960) vol 3, especially §535 and §542. But compare R Lord, *Williston on Contracts* (4th edn, Rochester, Lawyers Co-operative Publishing Company, 1999) §602; E Farnsworth, *Contracts* (4th edn, New York, Aspen Publishers, 2004) §7.7. The term also continues to be invoked judicially: eg *Charter Reinsurance*

that party might argue that background factors should be taken into account and the contract interpreted in a way that means it has not made a bad bargain at all. The approach that should be taken to interpretation is both vitally important, since often arises in commercial disputes, and deeply controversial.[53]

The court's task is simply to interpret the agreement reached. There is no jurisdiction to improve the parties' bargain through the interpretative process.[54] However, contracts are not interpreted "literally" and contextual factors influence the interpretative exercise. But the language chosen by the parties should be respected, and express language can only be "bended"[55] so far. Beyond breaking point, it is necessary to argue that a contract should be rectified (rather than interpreted).[56] The very strong presumption must be that the parties intended to be bound by the objective meaning of the document they signed.[57] Interpretation should not become an "easy option" to escape the consequences of one's own error.[58]

Nevertheless, courts do sometimes twist the meaning of express language and rescue a party from (what would otherwise have been) a bad bargain. Although courts have justified this on the basis that the interpretation reached represents the true bargain agreed by the parties, this is only by doing "violence"[59] to the words deliberately chosen by the parties in a formal written instrument.[60] This is problematic. Greater emphasis should be placed upon the text of a written contract than the context, since the text is controlled by the parties themselves. Commercial contracts are intended to be read by businessmen and, often, lawyers; the particular context of commercial contracts means that recourse to background material and departure from clear language should occur far less frequently than for everyday utterances.[61] The relevant background for commercial contracts between sophisticated commercial actors should sensibly be limited to the identity of the parties, the nature and purpose of the transaction, and the market in which the transaction took place.[62] This restricts the temptation that courts might have to improve the contract and rescue one party from a bad bargain.

Co Ltd v Fagan [1997] AC 313, 384; *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3, [2013] 1 WLR 366; *Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] EWCA Civ 188 [71]. See too *Arnold* (n 18) [15]; *Royal Devon and Exeter NHS Foundation Trust v Atos IT Services UK Ltd* (n 20) [45].

[53] Compare eg Sumption, 'A Question of Taste' (n 37) and Lord Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553.

[54] See recently *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556 [18] (Lewison LJ); *NHS Commissioning Board v Silovsky* [2017] EWCA Civ 1389 [40] (Gross LJ); *Aquila Wsa Aviation Opportunities II Limited v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm) [66] (Cockerill J).

[55] *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 368 (Staughton LJ).

[56] R Buxton, '"Construction" and rectification after *Chartbrook*' [2010] CLJ 253; P Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" [2016] CLJ 62.

[57] G Leggatt, 'Making sense of contracts: the rational choice theory' (2015) 131 LQR 454, 474.

[58] The mistake lying either in drafting the clause, or signing the document without checking the language carefully.

[59] Eg *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 904 (Lord Lloyd).

[60] It is usual for commercial contracts to be concluded in writing, but some substantial contracts are concluded orally: see eg *Blue v Ashley* [2017] EWHC 1928 (Comm), *Al Nehayan v Kent* [2018] EWHC 333 (Comm).

[61] J Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (CUP, 2013) 228-236; K Lewison, *The Interpretation of Contracts* (6th edn, London, Sweet & Maxwell, 2017) 1.03; R Buxton, '"Construction" and rectification' (n000) 261. Cf Hoffmann 'Language and Lawyers' (n 53).

[62] R Calnan, *Principles of Contractual Interpretation* (2nd ed, OUP, 2017) 77.

Somewhat surprisingly, courts have sometimes been prepared to save a much stronger party from the adverse consequences of its own bad drafting. This is apparent in some of the leading decisions of the House of Lords, including *Investors Compensation Scheme Ltd v West Bromwich Building Society*[63] and *Chartbrook Ltd v Persimmon Homes Ltd*.[64] In the latter, Lord Hoffmann suggested that there is "not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed" in the interpretative process.[65] So emboldened, the House of Lords felt able to depart from the plain meaning of an overage clause on the basis that it did not make commercial sense. But the decisions of the lower courts illustrate that this conclusion is not obvious; Briggs J at first instance and the majority of the Court of Appeal had been prepared to find that the plain meaning of the term was not nonsensical, and that Persimmon – by far the larger and more experienced commercial entity which had drafted the contract – had simply made a bad bargain. As Rimer LJ put it in the Court of Appeal:[66]

> "Perhaps the most that can be said is that … the contractual terms seem improbable ones for Persimmon to have signed up to. If so, the explanation is either (i) that it made a bad bargain, or (ii) that it may have made a sensible one but the written agreement recorded it wrongly. If the former, Persimmon is stuck with its bargain, and it is not the court's function to reform it. If the latter, Persimmon may have a claim to have the agreement rectified."

Chartbrook represents the high water-mark for departing from the plain meaning of the language chosen in a commercial contract.[67] Lord Sumption has observed that since *Chartbrook* "the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive" albeit in "muffled tones".[68] For instance, in *Rainy Sky SA v Kookmin Bank*,[69] Lord Clarke, in the Supreme Court, stated that "[w]here the parties have used unambiguous language, the court must apply it".[70] And in *Arnold v Britton* Lord Neuberger emphasised that 'commercial common sense … should not be invoked to undervalue the importance of the language in the provision which is to be construed'.[71] His Lordship also pointed out that 'commercial common sense is not to be invoked retrospectively';[72] the fact that a contract has turned out badly for one party is not a reason to depart from the contractual language over which the parties had control.[73]

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[63] [1998] 1 WLR 896.
[64] [2009] UKHL 38, [2009] 1 AC 1101.
[65] [2009] UKHL 38, [2009] 1 AC 1101 [25].
[66] [2008] EWCA Civ 183; [2008] 2 All E.R. (Comm) 387 [188].
[67] For an overview of Lord Hoffmann's influence on this area of the law, see P Davies, "The Meaning of Commercial Contracts" in P Davies and J Pila (eds) *The Jurisprudence of Lord Hoffmann* (Hart, 2015).
[68] Lord Sumption, 'A Question of Taste' (n 37) 313. See similarly Sir Geoffrey Vos, 'Contractual Interpretation: Do judges sometimes say one thing and do another?' (Canterbury University, Christchurch, 18 October 2017), who further doubted whether *ICS* would be decided in the same way today.
[69] [2011] UKSC 50, [2011] 1 W.L.R. 2900.
[70] Ibid, [23]. For an interesting split between the majority of the Court of Appeal, which thought the relevant contract was clear and a "classic case of one party making a bad bargain", and the minority view that the contract was ambiguous such that commercial sense could be used, see *Grove Developments Ltd v Balfour Beatty Regional Construction Ltd* [2016] EWCA Civ 990; [2017] 1 W.L.R. 1893.
[71] [2015] UKSC 36; [2015] A.C. 1619 [17]. See too *Skanska* (n 35); *Pease v Henderson Administration Ltd* [2019] EWCA Civ 158 [62] (Nugee J); *Bates v Post Office* [2019] EWHC 606 (QB) [626] (Fraser J).
[72] [2015] UKSC 36; [2015] A.C. 1619, [19]. See too [77] (Lord Hodge).
[73] See too *Wood v Capita Insurance Services Ltd* (n 21) [28].

Arnold v Britton concerned the interpretation of a service charge clause in leases of holiday chalets. The natural meaning of this clause was that the service charge was £90 in the first year, rising by 10 per cent each year thereafter. This was enforced by the Supreme Court, even though the effect of compound interest meant that after 25 years the service charge would rise to just over £550,000. The majority of the Supreme Court was not prepared to twist the words to adjust the contract to produce a "fairer" result. Lord Neuberger, who gave the leading judgment, said:[74]

> a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

The tenor of the leading judgment of Lord Neuberger in *Arnold v Britton* stands in stark contrast to the much more flexible approach of Lord Hoffmann in *Chartbrook.*[75]

However, as Lord Sumption recognised,[76] the courts have not been clear about the shift in approach away from the very "liberal" approach regarding interpretation shown in *Chartbrook* towards the more "restrained" approach of *Arnold v Britton*. For example, in *Wood v Capita Insurance Services Ltd* Lord Hodge expressed the view that "[t]he recent history of the common law of contractual interpretation is one of continuity rather than change".[77] This may well have been partly motivated by a desire to show that "[o]ne of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation".[78] Nevertheless, in the lower courts the emphasis appears to have shifted towards the natural meaning of the words chosen, placing less weight upon the background material.[79] Admittedly, the law is not yet entirely stable, and in *Wells v Devani* Lord Briggs recently said that "the context in which the words are used, and the conduct of the parties at the time when the contract is made, tells you as much, or even more, about the essential terms of the bargain than do the words themselves".[80] These remarks chime much better with the approach adopted in *Chartbrook* than in *Arnold v Britton*. But it is suggested that the context of these remarks is, in turn, important: *Wells v*

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[74] Ibid, [20].
[75] Lord Carnwath's dissenting judgment in *Arnold* struck a similar to chord to Lord Hoffmann's approach.
[76] See n 68 above.
[77] [2017] UKSC 24, [2017] A.C. 1173 [15].
[78] ibid.
[79] Indeed, the actual decision in *Wood v Capita* confirms that direction of travel. See too eg *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396; [2017] 1 All E.R. (Comm) 601 [58] (Beatson LJ); *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128; [2016] 1 C.L.C. 573 [29] (Briggs LJ); *Mears Ltd* [104] (Waksman J). See too *Krys v KBC Partners LP* [2015] UKPC 46; *Royal Devon and Exeter NHS v ATOS* (n 20); *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* (n 54); *Teva Pharma – Produtos Farmaceuticos LDA & ANR v Astrazeneca-Produtos Farmaceuticos LAD & ANR* [2017] EWCA Civ 2135; *Silovsky* (n 54) .
[80] *Wells* (n 14) [59].

Devani did not concern a written contract, let alone a detailed agreement drafted by lawyers which is typical in commercial litigation.[81] Greater resort to context may be necessary in the context of an oral agreement than is appropriate for formal written instruments.

It is to be hoped that courts will consistently follow the lead set by the Supreme Court in *Arnold v Britton.* Inconsistency and uncertainty surrounding the interpretative process only encourages parties to appeal in the hope of escaping a bad bargain. This is inappropriate, expensive, and prolongs litigation. Yet apparently speculative appeals have often been successful in the past. Perhaps that was because the principles were not clear, or at least not easy to implement, and it may be that the guidance provided by *Arnold v Britton* is much more straightforward for lower courts to apply. In any event, the number of appeals in this area should be greatly reduced. In *Wood v Capita Insurance Services Ltd*, the Supreme Court explicitly asked counsel not to refer to the "well-known authorities on contractual interpretation".[82] But it is somewhat unsatisfactory for the Supreme Court regularly to hear appeals of no wider public importance than the facts of the case itself[83] where the law is not in dispute.[84] Courts should be reluctant to grant permission to appeal where a judge has followed the approach set out in *Arnold v Britton.*[85]

B Implied Terms

The broad approach of Lord Hoffmann to interpretation was mirrored in his judgment in *Attorney-General of Belize v Belize Telecom Ltd*[86] regarding terms implied in fact.[87] Lord Hoffmann, giving the advice of the Privy Council, appeared to subsume implication within interpretation.[88] This has since been deprecated by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd.*[89] The latter decision is welcome.

In *Belize,* Lord Hoffmann analysed the law of implied terms and concluded that "[t]here is only one question: is that what the instrument, read as a whole against the relevant

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[81] P Davies, 'Interpretation and Implication in the Supreme Court' [2019] CLJ 267.
[82] (n 21) [8].
[83] See eg *Arnold* (n 18) [108] (Lord Carnwath): "…little direct help is to be gained from authorities on other contracts in other contexts. As Tolstoy said of unhappy families, every ill-drafted contract is ill-drafted "in its own way"."
[84] *Royal Devon and Exeter NHS v ATOS* (n 20) [45] (Jackson LJ): "We are lucky enough to live in an age when there is a galaxy of high appellate guidance on how to interpret contracts. Each new pronouncement helpfully re-explains what the previous decisions meant."
[85] Cf *Teva Pharma* (n 79) [44]. Compare the Canadian approach which considers interpretation to involve issues of mixed fact and law: *Sattva Capital Corporation v Creston Moly Corporation* 2014 SCC 53; (2014) 373 D.L.R. (4th) 393 [50] (Rothstein J).
[86] [2009] UKPC 10; [2009] 2 All ER (Comm) 1; for criticism see P Davies, "Recent Developments in the Law of Implied Terms" [2010] LMCLQ 140.
[87] Terms implied in law raise different issues, and give more leeway to the courts: see eg *Crossley v Faithful & Gould Holdings Ltd* [2004] EWCA Civ 293; [2004] 4 All E.R. 447 at [33]-[46]. Courts are rightly wary of implying terms at law; for general discussion, see E Peden, "Policy concerns behind implication of terms in law" (2001) 17 LQR 459.
[88] The groundwork for this assimilation had already been laid: see, eg, *Equitable Life v Hyman* [2002] 1 AC 408, [2000] 3 WLR 529; A Kramer, "Implication in fact as an instance of contractual interpretation" (2004) 63 CLJ 384.
[89] [2015] UKSC 72, [2016] AC 742. See too *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, [33]–[35] Lord Hodge; cf [41]–[44] (Lord Mance).

background, would reasonably be understood to mean?"[90] This single question approach suggests that reasonableness is crucial when deciding whether to imply a term.[91] However, it is important to note that his Lordship also acknowledged that the court cannot improve upon the bargain made by the parties, or "introduce terms to make it fairer or more reasonable".[92] This point is important, but it was possible to read *Belize* as allowing courts to imply terms more readily into contracts where it would be "reasonable" to do so – rather than strictly necessary – with the consequent effect of rescuing parties from bad bargains.[93] This should be resisted. It is useful to recall the words of Sir Thomas Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd*:[94]

> "… the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong".

The Supreme Court in *Marks and Spencer* emphasised that a term will only be implied where necessary to do so. This is more restrictive than the general approach taken to interpretation. In this way, a court's ability to improve a bad bargain is restricted: a term cannot be implied in fact just because it is reasonable, but only because it must reflect the parties' intentions. Terms are implied in order to reflect the parties' bargain rather than improve it.[95]

This approach should also be applied when considering implied terms of good faith. Such terms often have the effect of rescuing one party from a bargain that, if performed strictly according to its express terms, would prove bad for that party. Implied duties of good faith are increasingly recognised, and this may reflect something of a shift in the nature of contracts that trouble the High Court, away from "spot" contracts towards long-term "relational" contracts.[96] Where there are express obligations to act in good faith, courts should strive to give effect to them. But the extent to which non-express obligations of good faith should be introduced into contracts, and what the content of such obligations would be, remain troublesome.[97]

In principle, it is suggested that duties of good faith should only be part of a contract if particular terms can be implied into a contract using the standard tests. Some contracts may

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[90] [2015] UKSC 72, [2016] AC 742 [21].
[91] This was expressly recognised by Teare J in *Inta Navigation Ltd v Ranch Investments Ltd* [2009] EWHC 1216 (Comm), [2010] 1 Lloyd's Rep. 74 [43].
[92] [2009] UKPC 10; [2009] 2 All ER (Comm) 1, [16]. Lord Hoffmann also acknowledged that, usually, if a term is unexpressed it is not to be implied: ibid, [17].
[93] The approach in *Belize* was therefore rejected in Singapore before the UK Supreme Court followed suit in *Marks & Spencer*: see eg *Foo Jong Peng v Phua Kiah Mai* [2012] SGCA 55, [2012] 4 SLR 1267 [34]-[36] *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43.
[94] [1995] EMLR 472, 481. Cf Lord Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553, 563.
[95] *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 [7] (Lord Hughes); *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525; [2019] 1 All E.R. (Comm) 955 [12]-[13] (Asplin LJ).
[96] Sir George Leggatt, 'Negotiation in Good Faith' (n 31) 105.
[97] For instance, in the recent decision of the Court of Appeal in *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 [2019] EWCA Civ 718 Males LJ and Leggatt LJ expressed different views. For an overview of the foundations of good faith, see P Davies, 'The Basis of Contractual Duties of Good Faith' [2019] Journal of Commonwealth Law 1.

contain an obligation of good faith due to the type of contract at issue,[98] but generally the usual tests for implication in fact need to be satisfied. In the context of a detailed contract between commercial parties there may not be much scope to introduce terms of good faith.[99] In *Myers v Kestrel Acquisitions Ltd*, Sir William Blackburne observed that when considering whether to imply a term of good faith "the court has no power to introduce terms to make the instrument it is asked to construe fairer or more reasonable and that the most usual inference, if the instrument does not expressly provide for what is to happen when some event occurs, is that nothing is to happen and that where the event causes loss, the loss lies where it falls".[100] Sceptical views concerning good faith have also been voiced in the Court of Appeal. For example, in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* Moore-Bick LJ said:[101]

> "There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction, against which the Supreme Court warned in *Arnold v Britton*."

A contracting party may try to manipulate notions of good faith to escape the consequences of a bad bargain and force its counterparty not to act exclusively in its own self-interest. A good example of this is the *Hydro-Québec* case.[102] That was a classic instance of a bad bargain, which escalated all the way up to the Supreme Court of Canada on the basis that there may have been obligations imposed upon the parties as a result of the contract being long-term in nature. English law should be wary of similar developments. It is already possible to see a "hardening"[103] of an implied obligation of good faith from being a term implied in fact[104] to a term implied at law into all "relational" contracts,[105] despite there being no clearly defined category of "relational contracts".[106] In the *Hydro-Québec* case the judges differed about whether the contract was relational or not,[107] which highlights that it is not a stable concept to use as a nominate category. In the difficult case of *Bates v Post Office Ltd* Fraser J surprisingly held that "the concept of relational contracts is an established one in English law".[108] But none of the cases cited by the judge in support of this conclusion makes it clear what the boundaries of a relational contract are. Fraser J also considered a number of "characteristics" as relevant to whether a contract should be characterised as relational or not,[109] but none clearly defines the contours of this category and the boundaries remain very

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[98] In the employment context see eg *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1998] AC 20.
[99] *Greenclose v National Westminster Bank plc* [2014] EWHC 1156 (Ch) [145] (Andrews J); *Lomas v JFB Firth Rixon* [2012] EWCA Civ 419 at [46]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [77]-[95].
[100] [2015] EWHC 916 (Ch); [2016] 1 B.C.L.C. 719 [50].
[101] [2016] EWCA Civ 789; [2017] 1 All E.R. (Comm) 483 [45].
[102] (n 22).
[103] G Leggatt, "Contractual Duties of Good Faith", (Lecture to the Commercial Bar Association, 18 October 2016) [50].
[104] *Yam Seng* (n 47), in which Leggatt J relied exclusively upon terms implied in fact.
[105] See eg *Bates v Post Office Ltd* [2019] EWHC 606 (QB); *Al Nehayan* (n 60); *Bhasin* (n 47) [74].
[106] Cf H Collins, "Is a Relational Contract a Legal Concepts?" in S Degeling, J Edelman and J Goudkamp (eds) *Contract in Commercial Law* (Lawbook Co, 2016).
[107] Compare eg [70] and [154].
[108] [2019] EWHC 606 (QB) [705].
[109] Ibid [725].

unclear.[110] The dangers of uncertainty and inconsistent decisions in this area are high. English law should be cautious about adopting a category of "relational contracts" into which terms of good faith are presumptively implied.

Courts should not readily resort to ill-defined categories of contracts or notions of good faith to provide an escape route from bad bargains. It is better to focus upon the particular duties at issue in a given case. The normal tests for implied terms should be satisfied in order to ensure that the obligations which might fall within the "good faith" umbrella are truly part of the bargain between the parties, rather than externally imposed in an *ad hoc* manner to reallocate the risks between the parties. Indeed, this approach largely accords with practice of the courts. Although reference is often made to duties of good faith, in substance more precise duties are invariably identified, which could be implied on the basis of the usual tests.[111]

C Rectification

Parties may claim that the proper interpretation of the contract does not represent their actual agreement and therefore ask the court to rectify the written instrument. The equitable remedy of rectification can only be granted if a mistake has been made in the recording of the agreement. Parties may strain to establish a mistake in order to escape from a bad bargain.

It is important that courts keep the remedy of rectification within narrow confines. Parties should generally be held to their signed, written contracts: this reinforces the important message that parties should take care to check that those documents accurately record their bargain. However, where both parties share a common mistake then rectification may be ordered to reflect their common continuing intention.

Unfortunately, the approach taken by the courts to common mistake rectification has recently been in a state of flux. In *Chartbrook*, for example, the trial judge found as a matter of fact that one party was not mistaken. Yet in the Supreme Court, Lord Hoffmann, in *obiter dicta*, found that a reasonable person would think that party was mistaken, and would have granted rectification for common mistake. That made rectification easier to establish, since a court was able to find a common mistake where both parties were not actually labouring under a mistake. That approach to rectification was accepted by the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd.*[112] But an objective approach to finding a mistake led to undesirable results: decisions such as *Chartbrook* and *Daventry* allowed the stronger party which drafted the agreement to escape what would otherwise have been a bad bargain. Conversely, rectification deprived the weaker party of the good bargain it thought it had entered into.[113]

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[110] For further criticism, see P Davies, 'Excluding Good Faith and Restricting Discretion' in P Davies and M Raczynska (eds) *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart, 2020).
[111] See eg *Al Nehayan v Kent* (n 60); *Yam Seng Pte Ltd v ITC Ltd* [2013] EWHC 111 (QB); S Whittaker, 'Good Faith, Implied Terms and Commercial Contracts' [2013] 129 LQR 463; E Granger, 'Sweating Over an Implied Duty of Good Faith' [2013] LMCLQ 418.
[112] [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.
[113] See eg P Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" [2016] CLJ 62; *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 (noted P Davies, "Interpretation and Rectification in Australia" [2017] CLJ 483).

Happily, the Court of Appeal in *FSHC Group Holdings Ltd v Barclays Bank Plc* has recently re-established traditional orthodoxy.[114] The claimant was a parent company which entered into a private equity financing transaction in 2012 that required it to provide security over a shareholder loan. In 2016, it spotted that the relevant security documentation had either never been provided or could not be located. It therefore entered into Accession Deeds with the defendant bank to provide that security. By mistake, much more onerous obligations were undertaken by the claimant than was required, and it successfully brought a claim to rectify the deeds by deleting the additional obligations that were not necessary. The Court of Appeal had to determine whether the approach of Lord Hoffmann in *Chartbrook* should be applied. In an excellent judgment, Leggatt LJ held that an objective approach to finding a mistake was unsatisfactory for reasons of principle, policy and precedent.[115] For a contract to be rectified on the basis of common mistake, both parties must actually be mistaken.

It is to be hoped that the decision in *FSHC* will be followed.[116] Where one party carefully read the language presented by the other side, understood it, and agreed to enter into the contract, it would be unfair to grant rectification.[117] It would be very harsh to rectify the contract and lumber a party with a contract they did not intend to enter into, just because a reasonable person would think they made a mistake when in fact they did not. Yet that would be the outcome under both *Chartbrook* and *Daventry*. Such unsatisfactory results should be avoided by applying *FSHC.* Indeed, Leggatt LJ explicitly said that "[a]s a matter of policy, rectification should be difficult to prove"[118]. By narrowing the scope of rectification for common mistake, it is less likely that the parties will be able to exploit the doctrine to escape their own bad bargains.[119]

Another positive effect of the decision in *FSHC* is that it clarifies the boundary between rectification for common mistake and rectification on the basis of unilateral mistake which had been blurred under the approach taken in *Chartbrook* and *Daventry*. Unilateral mistake rectification requires only that the claimant makes a mistake and "has the result of imposing on the defendant a contract which he did not, and did not intend to, make and relieving the claimant from a contract which he did, albeit did not intend to, make".[120] Unilateral mistake rectification should not often be granted. It is a "drastic" remedy.[121] The English Court of Appeal has consistently demanded that the defendant must actually know of

[114] [2019] EWCA Civ 1361.
[115] ibid [139]-[176]. See too P Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" [2016] CLJ 62, 74-76.
[116] The decision of the Court of Appeal was handed down after this article had been submitted, and at the time of writing it is understood that permission to appeal to the Supreme Court will be sought.
[117] Unless unilateral mistake rectification can be established: see below.
[118] [2019] EWCA Civ 1361 [174] (emphasis in original).
[119] At first instance Henry Carr J rightly said that "The [rectification] jurisdiction cannot be exercised to relieve a party of the consequences of a bad bargain": *FSHC Group Holdings Ltd v Barclays Bank Plc* [2018] EWHC 1558 (Ch) [16].
[120] *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77, [2005] BLR 135 [75] (Blackburne J).
[121] *Agip SpA v Navigazione Alta Italia SpA, (The Nai Genova)* [1984] 1 Lloyd's Rep 353, 365 (Slade LJ). *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77, [2005] B.L.R. 135 [75]. See also eg *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555; *Littman v Aspen Oil (Broking) Ltd.* [2005] EWCA Civ 1579, [2006] 2 P & CR 2.

the mistake, or at least recklessly turn a blind eye to the mistake, in order for his conscience to be affected and equitable relief justified.[122]

Professor McLauchlan has proposed a broader test for unilateral mistake rectification, such that it be granted where the defendant ought to have been aware of the mistake, and the claimant was led reasonably to believe that the defendant was agreeing to the claimant's interpretation of the bargain.[123] This would make unilateral mistake rectification much easier to establish. But it undermines the primacy of the final, written document: a party could properly read and understand the terms of the document without making a mistake or acting dishonestly, and yet still be saddled with a contract to which it did not actually agree simply because that person ought to have known that the other party was making a mistake.[124] It is suggested that this is unfair and makes it too easy for the claimant to escape its own bad bargain.

IV Escaping bad bargains

Where a party finds itself subject to a bad bargain, it will naturally consider whether it is possible to escape from the contract altogether. It may be possible to rescind the contract due to some vitiation of consent in the formation of the agreement. This is rightly taken very seriously by English courts. As Leggatt LJ recently pointed out in *First Tower Trustees Ltd v CDS (Superstores International) Ltd*, "[t]he importance which English law attached to the freedom of parties to contract on whatever terms they choose depends crucially on the assumption that their consent to the terms of the contract has been obtained fairly".[125] It has even been said that "most bad bargains can be explained as the result of mistake, strong pressure to accede to demands, or misrepresentations about the content of the deal".[126]

The focus in this section will be upon the vitiating factors of misrepresentation and duress, which have recently been the subject of important and controversial decisions. The primary remedy available to the claimant is rescission. It is important to appreciate that the courts will not prevent a party from rescinding a contract just because its motive is to escape a bad bargain: even though a claimant may only want to rescind the agreement in order to take advantage of a falling market, the court will not stop this if the elements of duress or misrepresentation have been established.[127] Nevertheless, it is important to bear in mind that the recent broadening of the scope of misrepresentation and duress, for example, make it easier to escape contracts. This has proven particularly significant in the context of compromise agreements which one party later regrets.

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[122] *A Roberts & Co Ltd. v Leicestershire CC* [1961] Ch 555; *Thomas Bates v Wyndham's* [1981] 1 All ER 1077; *Commission for New Towns v Cooper* [1995] Ch 259. This corresponds with the test of dishonesty favoured by Etherton LJ in *Daventry* (n 112) [97].

[123] D McLauchlan, "The "drastic" remedy of rectification for unilateral mistake" (2008) 124 LQR 608.

[124] See eg *Fraser v Houston* (2006) 51 BCLR (4th) 82 at [42]; D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* 2nd ed (London: Sweet & Maxwell, 2015) para. 4-22

[125] [2018] EWCA Civ 1396, [2019] 1 W.L.R. 637 [104].

[126] H Collins *Regulating Contracts* (OUP, 1999) 256

[127] Cf *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470 (regarding termination rather than rescission). In the context of misrepresentation, there is a narrow exception under s2(2) of the Misrepresentation Act 1967.

A Misrepresentation

Where a defendant has made a false representation of fact or law to the claimant which induced the latter to hold a mistaken belief, then the claimant should be entitled to rescind the contract (subject to any defences). But if the claimant is not mistaken about the veracity of the defendant's representation then there is no induced mistake and there should be no remedy in misrepresentation: the claimant will have consciously entered into the contract without labouring under any mistake that might be said to "vitiate" its intention. As a result, rescission for misrepresentation should not be available, and a party should be held to the (bad) bargain it concluded.

This has long been the orthodox position.[128] However, it no longer seems to represent an accurate statement of the law. In *Zurich Insurance Co plc v Hayward*[129] the Supreme Court held that even if the claimant was not mistaken about the truth of the representation, a contract might still be rescinded for misrepresentation.

Mr Hayward injured his back in a work accident. His employer admitted liability but Hayward overstated his injuries and sought a large damages award of over £400,000. Zurich Insurance – the employer's insurer – correctly believed Hayward to be exaggerating the consequences of the accident. In particular, it obtained a video of Hayward, post-injury, engaged in heavy lifting inconsistent with his apparent condition. The video called into question Hayward's case on the quantum of damages. Nevertheless, after further negotiations, Zurich Insurance decided to settle for around £135,000.

Some time later, Hayward's neighbours came forward with evidence that Hayward had grossly and intentionally inflated the value of his claim, which was in reality around £15,000. That encouraged the insurer to reopen the case. Hayward argued that the settlement agreement could not be rescinded for misrepresentation because Zurich Insurance had never believed his exaggerations. At first instance, HHJ Moloney QC thought that it was an "interesting (and apparently unresolved) question of principle" whether the insurer had to believe in the truth of Hayward's representations.[130] The judge held that this was not necessary and set aside the agreed settlement. The Court of Appeal disagreed, but the Supreme Court restored the order of HHJ Moloney QC. Even though the insurer did not believe Hayward and merely thought there was a possibility that the judge at trial would accept his claims,[131] the Supreme Court was satisfied that the exaggerations regarding Hayward's injuries had caused the insurer to settle for £135,000 rather than closer to £15,000. The settlement could therefore be rescinded even though the misrepresentation had not been believed by the insurer.

Lord Clarke found it "difficult to envisage any circumstances in which mere suspicion that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established".[132] His Lordship left open the question of whether a claim in misrepresentation could succeed even where the representee was not merely suspicious but

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[128] For further discussion, see P Davies and W Day, 'A Mistaken Turn in the Law of Misrepresentation' [2019] LMCLQ 390.
[129] [2016] UKSC 48, [2017] AC 142.
[130] *Zurich Insurance Co plc v Hayward* (6 September 2013) [2.5].
[131] [2016] UKSC 48, [2017] AC 142 [19] and [32] (Lord Clarke) [71] (Lord Toulson).
[132] ibid [48].

knew of the falsity of the statement made.[133] Lord Clarke thought that the facts of *Zurich* did not require him to answer that question as the insurer had not known the true extent of Hayward's embellishments.[134] However, in fact the case *did* require an answer to that question: the insurer knew that Hayward was lying,[135] and to say that it did not know of the extent of Hayward's lies is a distinction without a difference.

Unfortunately, the Supreme Court did not clearly distinguish between a claim to rescind a contract for misrepresentation and claim in the tort of deceit for damages, which led to a degree of confusion.[136] The gist of deceit is that the defendant has committed a wrong by consciously lying, and thereby causing damage to, the claimant.[137] The claimant's belief in the lie has never been a freestanding requirement for deceit,[138] although such a belief can inform the question of whether the lie has caused loss.[139] But in *Zurich* the insurers could not sue Hayward for deceit because of the terms of the settlement agreement. Rather, it had to rescind that agreement for misrepresentation and then recover the money already paid to Hayward. Yet cases on rescission for misrepresentation have consistently held that the claimant should believe the representation, and the Supreme Court should have focussed on such authorities rather than those involving deceit. For instance, in *Attwood v Small*, Lord Brougham held that "the representation so made must have had the effect of deceiving the purchaser; and moreover, the purchaser must have trusted to that representation".[140] Until the decision of the Supreme Court in *Zurich*, the mistake-based approach to misrepresentation was entirely orthodox.[141] As Briggs LJ put it in the Court of Appeal in *Zurich*:[142]

> "the authorities on rescission for misrepresentation speak with one voice. For a misstatement to be the basis for a claim to rescind a contract, the claimant must have

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[133] ibid [43]-[45].
[134] ibid [44].
[135] At first instance, it was found that "neither" of the witnesses for Zurich Insurance "can be said to have believed the representations complained of to be true": *Zurich Insurance Co plc v Hayward* (6 September 2013) [2.6] (HHJ Moloney QC).
[136] See, eg, [2016] UKSC 48, [2017] AC 142 [23] (Lord Clarke) and [58] (Lord Toulson).
[137] See, eg, M Jones (ed) *Clerk & Lindsell on Torts* 22nd ed (London, Sweet & Maxwell, 2017) [18.01]; P MacDonald Eggers, *Deceit: the Lie of the Law* (Informa, London, 2009) [1.10]. Cf R Stevens, *Torts and Rights* (OUP, Oxford, 2007), 8, 89; J Murphy, "Misleading Appearances in the Tort of Deceit" (2016) 75 CLJ 301, 316-323.
[138] *Clerk & Lindsell* (n 137) [18.05] – [18.38]; WE Peel and J Goudkamp, *Winfield & Jolowicz on Tort* 19th ed (Sweet & Maxwell, London, 2014) [12.004]. Cf M Hemsworth, "English Insurance Law" [2016] LMCLQ International Maritime and Commercial Law Yearbook 45, 53-54.
[139] See *Clerk & Lindsell* (n 137) [18.34] – [18.38].
[140] (1838) 6 Cl & F 232, 448. See too, eg, 335-336, 338 (Earl of Devon) 352, 393-394 (Lord Cottenham LC) 395-397 (Lord Lyndhurst) 502-503 (Lord Wynford). In *Redgrave v Hurd* the Court of Appeal pointed out that the fact that the claimants in *Attwood* were not mistaken was one of the grounds on which the House of Lords rejected the misrepresentation claim: (1881) 20 Ch D 1, 15-17 (Sir George Jessel MR). See too the emphasis on the claimant's belief at 21-22 (Sir George Jessel MR) and 23 (Baggallay LJ). See too eg *Vigers v Pike* (1842) 8 Cl & F 562, 8 ER 220 (HL) 253 (Lord Cottenham); *Reynell v Sprye* (1852) 1 De GM & G 660 (Ch) 691 (Lord Cranworth); *Jennings v Broughton* (1853) 17 Beav 234, 51 ER 1023 (Ch) 1027; *Edwards v M'Leay* (1818) 2 Swanston 287, 289.
[141] See eg *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919 [2], [6], [10] and [18] (Lord Nicholls); *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*, [2006] EWCA Civ 386, [2006] 1 CLC 582 [40] (Moore-Bick LJ); K Loi "Pre-contractual misrepresentations: mistaken belief induced by mis-statements" [2017] JBL 598.
[142] [2015] EWCA Civ 327 [28].

given some credit to its truth, and been induced into making the contract by a perception that it was true rather than false."

By departing from the requirement of an induced mistake, the Supreme Court undermined the finality of settlement agreements. This stands in stark contrast to the approach adopted in the Court of Appeal, where Underhill LJ rightly observed that "there is a wider principle at stake, that parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later".[143] The Supreme Court did not engage with such considerations. But parties should not be able to wait and see whether or not the bargain made is a good one; they should only be able to rescind for misrepresentation if they have in fact been misled.[144] The difficulties that flow from the decision in *Zurich* may be particularly acute where the consideration provided under the compromise agreement is an asset whose value can fluctuate substantially, such as shares. It goes against the usual instincts of contract law to allow a party which knows of the misrepresentation to bide its time to find out whether the asset goes up or down in value, and only to decide to rescind the contract at a much later date when it turns out that the bargain made was disadvantageous. Yet this is effectively what *Zurich* permits.

Zurich makes it especially difficult to settle claims of fraud conclusively, but it is important to remember that rescission is not limited to fraudulent misrepresentation; an innocent misrepresentation will do. Accordingly, all that a settling party need now show in order to reopen the litigation, when it feels that it has improved its case, is that the other side overstated the strength of their case in some way and that such statement influenced the settlement sum originally agreed. It is suggested that this is a very low hurdle that parties will be able to clear in most cases. Unsurprisingly, the insurance industry has warmly welcomed *Zurich*:[145] because settlement can be undone with relative ease, settling now presents little risk that can backfire on insurers – or indeed anyone else who ends up regretting a settlement.[146]

The decision in *Zurich* is likely to make claims in misrepresentation more complicated. For instance, in *Holyoake v Candy*[147] the claimant was "not for one moment taken in" by the defendant's lies.[148] The denial of rescission should therefore have been straightforward: as the judge said, "it is difficult to see how he can say that he has been induced to enter into a contract by a lie if he knows that it is untrue".[149] But Nugee J could not simply leave the matter there, and had to go further as a result of *Zurich*.[150] This is unfortunate. If *Zurich* is not to be departed from, then it should be confined to its particular facts and limited to the context of fraud where a third party might be misled. Where a party enters into a contract "with his eyes open about the probable untruth of the statement" as a

[143] [2015] EWCA Civ 327 [25].
[144] D Foskett (ed), *Foskett on Compromise* 8th edn (Sweet & Maxwell, London, 2015) [4.37] and [4.50].
[145] PJ Rawlings and JP Lowry, "Insurance Fraud and the Role of Civil Law" (2016) 79 MLR 525, 537.
[146] Cf *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108.
[147] [2017] EWHC 3397 (Ch).
[148] ibid [388].
[149] ibid [388].
[150] Nugee J distinguished *Zurich* on the basis that it involved three parties (including the court) rather than only the two parties to the contract. The judge also relied upon the suggestion that the insurer in Zurich did not know Hayward was lying, but this is inconsistent with the findings of fact of the trial judge.

"form of risk management",[151] it should not be able later to escape that contract when those risks later disappear. The approach of the Supreme Court in *Zurich* makes it too easy for a party to escape a bad bargain.[152]

B Duress

Rescission may also be available where a contract has been entered into as a result of duress. Duress may be established when one party exerts illegitimate pressure on another. Such pressure might be economic in nature;[153] many cases concern threats to breach a contract, which may well be made by parties that find themselves stuck with a bad bargain. Courts are sensibly astute to prevent a party escaping a bad bargain by threatening to breach its contract where that leaves the other party with no reasonable practical alternative but to succumb to the threat, and thereby find itself stuck with a less advantageous agreement than before.

A good example is *Atlas Express Ltd v Kafco*.[154] Kafco, a small company, secured a large contract to supply goods to Woolworths' shops. Kafco contracted with Atlas, a national road carrier, to distribute the goods to Woolworths' shops at an agreed price per carton. Because Atlas had underestimated the size of the cartons, the contract price was uneconomically low. Atlas had entered into a bad bargain. After the first delivery, Atlas realised this, and sent an empty vehicle to Kafco's premises. The driver carried a document amending the contract so as to provide better terms for Atlas. The driver's instructions were to take the vehicle away unloaded unless the amended agreement was signed. It was essential to Kafco's commercial survival that it should meet the delivery dates for Woolworths. If Kafco had not done so, Woolworths would have cancelled the contract and sued for loss of profit. This would have been catastrophic for Kafco, given the value of its contract with Woolworths. Kafco therefore signed the amendment. In turn, this was a bad deal for Kafco, so Kafco sought to set aside the amendment on the ground of duress.

Tucker J held that Kafco was not bound by the amendment. Kafco's signature was procured by economic duress, which meant that it could rescind the agreement. A party should not be able to use unlawful means – such as threatening to breach its contract – in order to escape from a bad bargain.

A more difficult issue arises where it is the party that has made a bad bargain which claims that a contract is voidable for economic duress, but the threat made was not unlawful. In *CTN Cash and Carry Ltd v Gallaher Ltd*[155] the Court of Appeal recognised the possibility of lawful means duress, but Steyn LJ also said that "in a purely commercial context, it might be a relatively rare case in which "lawful-act duress" can be established".[156] There appears to

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[151] [2015] EWCA Civ 327 [32] (Briggs LJ).
[152] Compare the approach taken to damages in lieu of rescission under s2(2) of the Misrepresentation Act 1967: see eg *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932.
[153] Threats of physical harm are also able to ground claims in duress, and, although rare in the commercial sphere, still sometimes arise: *Al Nehayan* (n 60) [214]-[216].
[154] [1989] QB 833.
[155] [1994] 4 All E.R. 714.
[156] Ibid, 719.

be no decision where lawful act duress forms part of the *ratio decidendi*.[157] Nevertheless, at first instance in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* Warren J held that "the proposition is established".[158] The Court of Appeal has recently allowed the appeal in that case and taken a more restrictive approach to lawful act duress.

Times Travel, the claimant, is a travel agent whose business focussed on selling airline tickets to the British Pakistani community. The defendant, as the flagcarrier of Pakistan, offered the only direct flights between the UK and Pakistan. It changed the way it calculated the commission due to its travel agents, and demanded that the claimant sign new agreements under which it would give up its contractual rights to commission that had already accrued. If these new agreements were not signed, the claimant would not be allowed to sell the defendant's tickets at all. This, inevitably, would have put the claimant out of business, but the threat was not in itself unlawful: the defendant could choose with whom it wished to contract.

The trial judge held that the claimant entered into these new contracts as a result of illegitimate pressure, since it had no time to adjust to losing its ability to sell the defendant's tickets and had no practical alternative but to take the new offer. By contrast, the Court of Appeal emphasised that the airline had simply threatened that it would exercise its lawful right not to allocate tickets to the claimant in the future. This was not a wrongful act, and the contract was not set aside for duress. That conclusion is surely right. It is important not to undermine the finality of settlement agreements or allow a claimant to escape a bad bargain. David Richards LJ stressed the need for "clarity and certainty"[159] in contract, and insisted that the fact that there is inequality of bargaining power or the exploitation of a monopoly position is no reason to set aside an agreement.[160]

A party should be able to threaten not to renew a contract or not to enter into a contract without this being considered to represent illegitimate pressure for the purposes of duress.[161] This is especially important between commercial actors who operate on the basis that they are entitled to act in an entirely self-interested manner. Each contracting party has a choice whether to contract on given terms or not: one party may drive a very hard bargain, but if it is ultimately not as good as what the other side hoped for then that party must make a final choice whether to contract on those terms or simply walk away. If the contract is concluded, it should not be held to be voidable for duress where the other side threatened to do something it was entitled to do.

However, the Court of Appeal in *Times Travel* did not totally reject the notion of "lawful act duress". Given what a strong constitution of the same court had previously said in *CTN Cash and Carry*, this is perhaps unsurprising. But it is suggested that a bolder approach would have been preferable in order to place the law on a more stable footing.[162] Somewhat

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[157] In *Candy v Hoyloake* (n 147) Nugee J said (at [399]): "[counsel] told me that there had been no reported case in the 23 years since that decision in which lawful act duress had been established in a commercial context."
[158] [2017] EWHC 1367 (Ch). See P Davies and W Day, "'Lawful Act' Duress" (2018) 134 LQR 5.
[159] [2019] EWCA Civ 828 [42]
[160] Ibid [41], [103], [107].
[161] See eg Commonwealth authorities such as *Smith v William Charlick Ltd* (1924) 34 CLR 38; *Morton Construction v City of Hamilton* (1961) 31 DLR (2d) 323. Cf *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40.
[162] See Ahdar, 'Contract doctrine' (n 44) 44-47.

oddly, in *Times Travel* David Richards LJ thought it "critical for the decision [in *CTN Cash and Carry*] that the defendant acted in good faith"[163] and went on to find that that case "can be taken to establish that where A uses lawful pressure to induce B to concede a demand to which A does not bona fide believe itself to be entitled, B's agreement is voidable on grounds of economic duress".[164] This is problematic. In *CTN Cash and Carry* the defendant did not act in bad faith, so that cannot be part of the ratio of the decision. Just because duress was not established where the defendant did act in good faith does not necessarily mean that the claim would have succeeded had the defendant not acted in good faith. It is not clear how important the fact that the defendant acted in good faith really was in *CTN Cash and Carry*. In any event, in *Times Travel* it was not established that the defendant acted in bad faith, so this dictum of David Richards LJ is strictly obiter. It is suggested that bad faith is a difficult concept to employ here, and should be jettisoned in the context of duress.[165] It may be relevant when establishing the criminal offence of blackmail, but blackmail is an example of *unlawful* act duress, albeit that the threat itself is the unlawful element rather than the threatened conduct.[166] Blackmail should not be elided with lawful act duress or used to justify its existence. In *Times Travel,* David Richards LJ rightly noted that "[t]here is little or no support in other authorities for the extension of lawful act duress in a commercial context to cover a demand which is made in good faith but unreasonably".[167] But the law would be clearer if it abandoned so-called 'lawful act' duress entirely. A party which succumbs to lawful threats and enters into a bad bargain should not be able to escape the agreement by reference to its lack of bargaining power and practical choice.

V Frustration

Where a bargain struck under a contract turns out to be bad as a result of an external event, one party might argue that the contract has been frustrated. Frustration kills off a contract automatically.[168] However, frustration is a very narrow doctrine indeed. Frustration arises where there is a change of circumstances which would, in the words of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*, make performance 'a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do'.[169]

Judges have, at times, expressly referred to the need to ensure that frustration not be expanded simply to alleviate the consequences of having entered into a bad bargain.[170] For

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[163] [2019] EWCA Civ 828 [61].
[164] ibid [62].
[165] The suggestion (ibid [106]) that "there is a sharp distinction" between demands made in good faith and bad faith seems optimistic: see above.
[166] Cf *Al Nehayan* (n 60) [188] (Leggatt LJ); cp *Times Travel* [104].
[167] [2019] EWCA Civ 828 [72].
[168] *Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, 505 (Lord Sumner): "Frustration brings the contract to an end forthwith, without more and automatically"; cited with approval in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1 (Bingham LJ).
[169] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728 (Lord Radcliffe). This was supported by Marcus Smith J in *EMA v Canary Wharf* (n 5) [25]-[27], but remains controversial. It is suggested that the better view may be that there is an implied term that if a common basic assumption should fail, the contract will be killed off: JC Smith, 'Contract, Mistake, Frustration and Implied Terms' (1994) 110 LQR 400.
[170] Eg *EMA v Canary Wharf* (n 5) [38]

instance, in *The Nema* Lord Roskill said it was important that judges decide issues regarding frustration "always remembering that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains".[171] This is especially important where the parties could have included a hardship or force majeure clause. And because commercial parties often insert wide-ranging hardship and force majeure clauses into their agreements, very few contracts are frustrated.[172] As a result, disputes tend to turn upon the proper interpretation of those express terms.[173] Where the risk of the occurrence of a supervening event is provided for in the contract, there is no scope for frustration to operate.[174]

In any event, it is clear that a party is not excused from performing his contract merely on the ground that performance turns out to be unexpectedly burdensome or difficult.[175] For instance, in *Davis Contractors Ltd v Fareham Urban District Council*,[176] a contract to build houses for £92,000 within a period of eight months ran into significant difficulties due to an unexpected shortage of skilled labour and building materials. The project ultimately took 22 months to complete and cost £17,000 more than estimated. That was very bad luck for the contractor, but it was clear that the contract was not frustrated. The contract had simply become more difficult to perform.[177] It is worth noting that in *Davis* the contractor tried to negotiate for a term in the contract dealing with a possible shortage of labour, but failed to obtain the counterparty's agreement and no such term was in the final agreement. The contractor nevertheless agreed to enter into the contract without such protection, and had to bear the consequences of that. The House of Lords was careful not to allow the contractor to escape a bad bargain, and not to impose upon the local authority a term to which it did not agree.

A very recent decision to similar effect is *European Medicines Agency v Canary Wharf*.[178] The European Medicines Agency ("EMA") signed a 25-year lease for a substantial property in London in 2011. Given the decision of the referendum to leave the European Union in 2016, it decided to move its operations to Amsterdam. The landlord ("CW") successfully brought proceedings for a declaration that the lease would not be frustrated by Brexit. Significantly, there was no break clause in the lease. EMA had tried to negotiate for such a clause but CW managed to resist, partly by offering significant inducements in return. The contract therefore reflected the final allocation of risk agreed by the parties.[179] Each side was aware that external events might make that a bad deal for one or the other, but those were the risks that each party consciously ran. In a very long and detailed judgment which canvassed a wide range of arguments, Marcus Smith J sensibly refused to rescue EMA from what turned out to be a bad bargain as a result of its committing to a lease for such a long

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[171] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752.
[172] Cf *Unidroit Principles of International Commercial Contracts* (4th ed. 2016) Art 6.2.2; *Code civil* (France), art. 1195.
[173] See Section III.A above.
[174] *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1.
[175] Eg *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, HL.
[176] [1956] AC 696.
[177] For a more recent application of the same principle, see *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2009] 2 All ER (Comm) 25.
[178] [2019] EWHC 335 (Ch).
[179] Ibid [218, [223]-[226], [249].

period of time without a break clause.[180] Where the contract is deliberately expressed to be of a finite duration, it is not for the courts to alter the parties' bargain. Given the very many different types of force majeure and hardship clauses, and significant differences in their drafting, there are good reasons why courts would not want to guess what sort of hardship clause would be reasonable and instead leave it to the parties to negotiate for such a provision if desired. A parallel might be drawn between the EMA case and the recent decision of the Supreme Court of Canada in *Churchill Falls (Labrador) Corp v Hydro-Québec.*[181] The contract was clearly not frustrated just because electricity prices soared, and it was not for the court to add in a renegotiation clause to improve the bargain for one party when the parties had consciously chosen to bind themselves for a fixed period.

The EMA decision is important, because it seems probable that Brexit will lead to a number of claims that a contract has been frustrated.[182] But it is suggested that few of those claims are likely to succeed. The performance of the majority of commercial contracts will not be rendered impossible by Brexit, but simply more expensive. If there is some other means of performing the obligations (albeit more costly), it is very unlikely that a contract will be frustrated.[183] And in the majority of cases, the presence, or indeed deliberate absence, of a hardship or force majeure clause will be crucial.

V Conclusion

Business people make commercial decisions for a range of reasons, and it is easy to exaggerate the importance of contract law. But the framework of their decision-making process is set against the background of the law of contract, which is of greater importance once a bargain becomes bad for one party. A party which appears to be on the wrong side of a bad bargain might sensibly investigate what steps it could take to improve its situation.

The legal avenues that could potentially avail such a party will depend to some extent upon the type of "bad bargain" at issue. It has not been possible in the confines of this one article to consider all types of bad bargains and all the doctrines that might assist a party. Rather, important recent developments in particular areas have been analysed. Those cases have tended to concern contracts which were deliberately entered into by one party which seeks to avoid the bad consequences of the bargain, even though it was aware when entering into the contract of the risks that ultimately eventuated. For example, in *Arnold v Britton* the meaning of the relevant clause was clear; in *Zurich* the insurer knew that Hayward was lying but settled anyway; in *Times Travel* the claimant knew it was not entering into as advantageous an agreement as it previously enjoyed; and in *EMA v Canary Wharf* the EMA knew that by not insisting upon a break clause there was the possibility that it would be stuck with a lease it no longer wanted. By not allowing the claimants to escape bad bargains, the courts better protect the parties' autonomy in these cases: the claimants knew the risks

[180] Moreover, the relocation of EMA was not inevitable, such that any claim for frustration would also fail for being self-induced: ibid [201]-[207].
[181] See n22 above.
[182] C MacMillan, 'The Impact of Brexit upon English Contract Law' [2017] KLJ 420; Financial Markets Law Committee, *U.K. Withdrawal from the E.U.: Issues of Legal Uncertainty Arising in the Context of the Robustness of Financial Contracts* (August, 2018).
[183] Eg *The Super Servant Two* (n 168). See too *Pluczenik* (n 24) [31].

involved in entering into the contracts, and the court should not reallocate those risks.[184] Such intrusion into the fundamental principle of freedom of contract would be inappropriate and risk damaging the hard-earned reputation of English commercial law. The results in these cases – apart from *Zurich* – seem correct, although courts unfortunately continue to vacillate as regards the appropriate approach to interpretation, and the cases leave too much room for lawful act duress and frustration to operate in the future. There is much to be said in favour of a robust approach that would ensure that hard-edged rules are applied strictly to commercial contracts, rather than made more blurry in order to save parties from their own bad bargains.

[184] "The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language": *Arnold* (n 18) [19] (Lord Neuberger).