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CHITTY ON CONTRACTS

奇蒂论合同法

(第 30 版)

上卷

通则

[英] H. G. 比尔 主编

 商务印书馆
The Commercial Press

2012 年 · 北京

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CHITTY
ON
CONTRACTS

THIRTIETH EDITION

VOLUME I

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Twentieth Edition	(1947)	” ” ”
Twenty-first Edition	(1955)	Under the General Editorship of John Burke and Peter Allsop
Twenty-second Edition	(1961)	General Editor: John Morris
Twenty-third Edition	(1968)	General Editor: A. G. Guest
Second Impression	(1972)	” ” ”
Twenty-fourth Edition	(1977)	” ” ”
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Twenty-seventh Edition	(1994)	” ” ”
Second Impression	(1995)	” ” ”
Third Impression	(1997)	” ” ”
Fourth Impression	(1998)	” ” ”
Twenty-eighth Edition	(1999)	General Editor: H. G. Beale
Second Impression	(2001)	” ” ”
Twenty-ninth Edition	(2004)	” ” ”
Thirtieth Edition	(2008)	” ” ”

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NOTE TO READERS

Chitty on Contracts, 30th edition, consists of two volumes. Volume I sets out the *General Principles* and Volume II deals with *Specific Contracts*. Customers may choose to purchase either Volume I alone or both Volumes together.

Please note that Volume I contains Chapters 1 to 30 and an Index which relates to Volume I only.

Volume II contains Chapters 31 to 44 and an Index which relates to both Volumes I and II.

PREFACE

For the 30th edition of *Chitty on Contracts* there have been a number of changes to the editorial team. Professor Sue Arrowsmith, who contributed valuably to the chapter on the Crown, Public Authorities and the European Community, has resigned from the editorship because of the pressure of other work. Mr Donald Harris has retired from editing the chapter on damage in Volume I and the section on remedies in the chapter on sale of goods in Volume II. His contribution to the development of those chapters and to the book as a whole over many editions were enormous and will be missed very much. Mr Simon Hughes has found the pressures of practice too great to continue as co-editor of the chapter on construction contracts, which he had done a great deal to develop. We are very grateful to them all.

We are delighted that Dr Paul Mitchell of King's College London has agreed to take the place of Professor Arrowsmith and that Mr Hughes' place has been taken by Mr Vince Moran of the same Chambers. Lastly, Professor Eva Lomnicka, also of King's College London, has joined the team, taking over the chapter on credit and security from Professor Tony Guest. We welcome them all as great additions to the team. I have taken over those parts of the work previously edited by Donald Harris.

The four years since the 29th edition have seen a large number of developments. Some of the more important changes are as follows:

Volume I

Chapter 1, Introduction: the Regulatory Reform (Execution of Deeds and Documents) Order 2005 makes significant changes to the formal requirements for deeds.

Chapter 2, The Agreement: the effect of a change in a company's capacity on an offer by or to the company has been rewritten in the light of Companies Act 2006. Cases include *Datec Electronic Holdings Ltd v United Parcels Ltd* on when communications amount to offer or acceptance and *L.J. Korbetis Ltd v Transgrain Shipping BV* on the effect of a misdirected fax.

Chapter 3, Consideration: the decision of the House of Lords in *Cobbe v Yeomans Row Management Ltd* became available while the new edition was in proof and have led to important changes in the account of promissory estoppel. *Collier v P & M.J. Wright (Holdings) Ltd* discusses, not uncontroversially, when a creditor may resile from a promise to accept part payment of a debt in full satisfaction.

Chapter 4, Form: *Kinane v Mackie-Conteh* considers the application of proprietary estoppel to cases within Law of Property (Miscellaneous Provisions) Act 1989, s.2.

Chapter 5, Mistake: the section on common mistake has been rewritten to bring greater clarity and to deal with mistakes of law in the light of *Brennan v Bolt Burdon*. Other sections seek to explain apparent inconsistencies in the treatment of mistakes over the terms of the contract at common law and in the equitable rectification cases.

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Chapter 6, Misrepresentation: there are a number of cases on what amounts to a misrepresentation and on the effects of no-reliance clauses, including *IFE Fund SA v Goldman Sachs International*.

Chapter 7, Duress and Undue Influence: *Turkey v Awadh* is important on the meaning of “a transaction that calls for explanation”, and *Yorkshire Bank Plc v Tinsley* deals with the effect of undue influence on replacement mortgages.

Chapter 8, Personal Incapacity: the impact of the Mental Capacity Act 2005 on contractual capacity is explained.

Chapter 9, Corporations and Unincorporated Associations: the changes made by Companies Act 2006 are set out.

Chapter 10, The Crown, Public Authorities and the European Community: this has been re-written. Controversy over specific remedies against Crown servants, raised in *Davidson v Scottish Ministers*, has been left unresolved by *Beggs v Scottish Ministers*. The new Directive on procurement contracts is noted, particularly its potential to make contracts unenforceable.

Chapter 12, Express Terms: what were previously called “rules” of construction are now re-named “principles”, in the light of recent cases; their strength is undoubtedly in decline in the face of Lord Hoffmann’s general test, laid down in the *Investors Compensation Scheme* case, that words are to be taken to bear the meaning they would convey to a reasonable person against the relevant background of the transaction.

Chapter 14, Exemption Clauses: the role of the Unfair Contract Terms Act 1977 in consumer contracts has been largely superseded by the Unfair Terms in Consumer Contracts Regulations 1999 and, so far as business to business contracts are concerned, the trickle of decided cases suggest that where a contract is concluded between experienced businessmen representing companies of equal bargaining power, they are the best judges of what is a fair and reasonable term to be included in the contract.

Chapter 15, Unfair Terms: here the most important development is *OFT v Abbey National Plc*, the “bank charges” case.

Chapter 18, Third Parties: a number of cases, in particular *Offer-Hoare v Larkstore Ltd* and *Smithkline Beecham Plc v Apotex Europe Ltd* discuss the extent to which a promise can recover damages in respect of loss suffered by a third person. There are cases interpreting the Contracts (Rights of Third Parties) Act 1999 and an explanation of the repercussions on contracts involving third parties of the decision of the House of Lords in *OBG Ltd v Allen* on the torts of inducing breach of contract and intimidation.

Chapter 19, Assignment: the effect of prohibitions on assignment is discussed in the light of *Barbados Trust Company Ltd v Bank of Zambia*.

Chapter 22, Discharge by Agreement: *State Securities Plc v Initial Industry Ltd* on waiver is considered.

Chapter 23, Discharge by Frustration: the decision in *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* is examined.

Chapter 26, Damages: the important and controversial decision of the House of Lords in

PREFACE

Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas), that a party who is in breach may not be liable even for usual types of loss if in the circumstances it was not reasonable to think that he was accepting responsibility for the loss, appeared while the 30th edition was in proof. A new section dealing with the case has been inserted.

Chapter 27, Third Parties: this considers *Thames Valley Power Ltd v Total Gas & Power Ltd* on specific relief in a contract for the sale of unascertained goods, and *Lauritzencool AB v Lady Navigation Inc* of the availability of specific relief in respect of an obligation to render services that are not of a personal nature.

Chapter 29, Restitution: the major developments here are *Deutsche Morgan Grenfell Group Plc v IRC* on recovery of mistaken tax payments; *Sempra Metals Ltd v IRC* on the use of interest to identify an enrichment and the award of interest generally for restitutionary claims; *Niru Battery Manufacturing Co v Milestone Trading Ltd (No.2)* on recoupment, subrogation and contribution; *WWF—World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* on the characterisation of remedies for breach of contract; and *Commerzbank AG v Gareth Price-Jones* on change of position.

Chapter 30, Conflict of Laws: this contains a full discussion of Regulation (EC) 593/2008 of the European Parliament and of The Council of June 17, 2008 on the law applicable to contractual obligations (Rome I).

Volume II

Chapter 31, Agency: the chapter has been quite extensively revised, and new material on the Commercial Agents Regulations incorporated, particularly the House of Lords decision on the calculation of compensation on termination of agency in *Lonsdale v Howard & Hallam Ltd*.

Chapter 32, Arbitration: reference to over fifty cases have been incorporated, including *Premium Nafta Products Ltd v Fili Shipping Co Ltd* (construction of arbitration clauses and separability); *West Tankers Inc v RAS Riunione Adriatica de Sicurta SA* (anti-suit injunctions); and *Lesotho Highlands Development Authority v Impreglio SpA* (relationship between errors of law and serious irregularity.) It is now clear that s.68 of the Arbitration Act 1996 is the most favoured ground for attempting to challenge an award. *Stretford v Football Association Ltd* and *Sumukan Ltd v Commonwealth Secretariat* further emphasise that deployment of the Human Rights Act 1998 to attack the arbitral process is, fortunately, unlikely to be successful.

Chapter 34, Bills of Exchange and Banking: the section on commercial credits has been re-written in the light of UCP 600. Significant cases include *Architects of Wine Ltd v Barclays Bank Plc* (on Cheques Act 1957, s.4) and *Office of Fair Trading v Abbey National Plc* (on overdraft charges).

Chapter 36, Carriage by Land: here there have been a number of cases: *T Comedy (UK) Ltd v Easy Managed Transport Ltd* (incorporation of RHA Conditions, consistency with the CMR Convention, liens); *Datec Electronic Holdings Ltd v United Parcels Service Ltd* (CMR, limitation of liability, wilful misconduct); *Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd* (application of CMR, jurisdiction); and *Rosewood Trucking Limited v Balaam* (claim by one carrier against another under CMR). The Railways (Convention on International Carriage by Rail) Regulations 2005 have enacted the Vilnius Protocol to COTIF.

Chapter 37, Construction Contracts: cases include *Reinwood Ltd v L Brown & Sons Ltd* (liquidated damages) and *Melville Dundas Ltd v George Wimpey UK Ltd* (determination).

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Chapter 38, Credit and Security has been largely rewritten to take account of Consumer Credit Act 2006.

Chapter 39, Employment, deals with Employment Equality (Age) Regulations 2006. (It should be noted that if and when the Employment Bill 2007–8 is passed, provisions of the Employment Act 2002 concerning dispute resolution, and the Regulations of 2004 fleshing out those provisions, may be downgraded or repealed.)

Chapter 40, Gaming and Wagering, takes account of the fundamental changes brought about by the Gambling Act 2005, which from September 1, 2007 rendered gambling contracts legally enforceable (as a general rule).

Chapter 41, Insurance, also considers the impact of the Gambling Act 2005, and of possible reforms canvassed by the Law Commissions' Consultation Paper on misrepresentation, non-disclosure and breach of warranty by the insured. Cases include *HLB Kidsons v Lloyd's Underwriters* (notification under liability policies—the Court of Appeal's decision is pending); *Limit No.2 Limited v AXA Versicherung AG* (misrepresentation—appeal also pending); *Kosmar Villa Holidays Plc v Trustees of Syndicate 1243* (waiver of condition precedents); *Tesco Stores Ltd v Constable* (scope of liability cover); *WASA International Insurance Co Ltd v Lexington Insurance Co* (relationship between reinsurance and original insurance—appeal pending); and *Byrne v Motor Insurers Bureau* (claims against MIB).

Chapter 43, Sale of Goods: the chapter takes account of some of the many points raised in *Balmoral Group Ltd v Borealis (UK) Ltd* and of the problems arising from re-tender of repaired goods considered in *J.H. Ritchie Ltd v Lloyd Ltd*.

As usual, the publishers have taken responsibility for the tables and the index. I would like to put on record how grateful we are for this and for all their hard work on this new 30th edition of *Chitty on Contracts*.

Lastly, it cannot go unremarked that during the lifetime of the 29th edition, *Chitty on Contracts* was made available in a digital edition to subscribers of the relevant services from Westlaw. The 30th edition will also be available. To your Editors the digital format appears to work very well. We are very grateful to the staff at Sweet & Maxwell who developed the format and put the book “on-line”.

It has been our aim to deal with developments that occurred and cases that appeared by May 1, 2008. It has been possible to incorporate some subsequent developments at the proof stage. It is our aim to produce the first Annual Supplement in 2009.

Hugh Beale

Warwick, October 14, 2008

Part One
INTRODUCTION

CHAPTER 1

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1. DEFINITIONS OF CONTRACT

1-001 Competing definitions of contract. There are two main competing definitions of a contract in the common law. The first, which was adopted by the 26th edn of this work, defines a contract as a promise or set of promises which the law will enforce.¹ The competing view, which was taken by the 2nd edn of this work,² is that a “contract is an agreement giving rise to obligations which are enforced or recognised by law”.³

There are two main arguments in favour of the definition of contract in terms of promise. First, the idea of contracts as being based on agreement was introduced into English legal discussions only in the nineteenth century, in particular under the influence of Pothier’s *Treatise on Obligations*⁴ and does not accord with the raw material of the common law, in particular in relation to the requirement of consideration.⁵ For English law does not in general enforce gratuitous promises, the element of non-gratuity being expressed technically by the requirement that some consideration must move from the promisee and in lay terms that it enforces bargains rather than agreements.⁶ Moreover, it is in relation to the requirement of consideration that modern usage most readily relies on the language of promise: what is required is consideration for a party’s *promise*, not consideration for the parties’ *agreement*.⁷ Finally, one of the justifications for the enforcement of contracts is said to lie in the moral obligation of a party to perform his promise.⁸

1-002 Difficulties with “contract as promise”. However, analysis of contracts in terms of an enforceable promise or sets of enforceable promises is not entirely satisfactory. First, outside the context of consideration, in general neither courts

¹ *Chitty on Contracts*, 26th edn (1989), Vol.I, para.1; Pollock, *Principles of Contract*, 13th edn (1950), p.1; cf. Pollock, *Principles*, 1st edn (1876), p.5. The American Law Institute’s *Restatement of Contracts*, 2nd edn, para.1, adopts substantially the same definition.

² Chitty, *A Practical Treatise on the Law of Contracts* (1834), pp.1–2.

³ Treitel, *The Law of Contract*, 12th edn (2007 by Peel), para.1–001.

⁴ Pothier, *Treatise on Obligations* (trans. Evans, 1806) and see Simpson (1975) 91 L.Q.R. 247, 257–262; Atiyah, *The Rise and Fall of Freedom of Contract* (1979), p.399; Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991), Ch.6.

⁵ cf. Nicholas, *The French Law of Contract*, 2nd edn (1992), p.144.

⁶ According to the *Restatement of Contracts* at para.3, a bargain is an agreement, whereby two or more persons exchange promises, or exchange a promise for a performance. However, the word “bargain” is seldom used in any technical sense in the law of contract: Atiyah, *Essays on Contract* (1986), Essay 8, p.207; and see Eisenberg (1982) 95 H.L.R. 741. It is sometimes said that the requirement of consideration means that contracts are *exchanges*. This suggests some element of reciprocity between the parties to the contract and while this is often the case, a promise by A to do work for B can support a promise by C of payment for it: see below, para.3–005 According to Gordley at pp.137–139, the systematisation of the doctrine of consideration took place at the same time as the acceptance of civilian theories of contract and was intended to act as a control device on the ambit of contract.

⁷ See below, para.3–001.

⁸ Goodhart, *English Law and the Moral Law* (1953), p.101; Fried, *Contract as Promise* (1983); Harris (1983) 3 Int. Rev. Law & Econ. 69; Burrows (1985) C.L.P. 141. cf. Atiyah (1978) 94 L.Q.R. 193; *Promises, Morals and Law* (1981); *Essays on Contract* (1986), Essays 2 and 6; Raz in Hacker and Raz (eds), *Law, Morality and Society* (1977), Ch.12; Smith, *Contract Theory* (2004), Chs 2–4.

nor parties to contracts describe the relationships which they create in terms of promises, but rather in terms of agreements, and for the courts this is clearest in the context of the rules as to offer and acceptance which when satisfied form that agreement.⁹ Moreover, as will be described later, the doctrine of consideration to which the “promise theory” is so closely related, is somewhat under siege: from the legislature, since the enactment of the Contracts (Rights of Third Parties) Act 1999 has limited its traditional domain,¹⁰ and from the courts, notably in the decision in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*¹¹ Secondly, definition of contracts in terms of sets of promises does not give full force to the interrelationship of the obligations of the parties which exists in many contracts,¹² an interrelationship which can be seen particularly in the availability of the remedy of termination for substantial failure in performance, by which an injured party may terminate his own obligations by reason of the failure of the other party to perform his side of the bargain.¹³

Difficulties with “contract as agreement”. However, an understanding of modern contracts as agreements does not fit easily with two recognised types of contract. First, in the case of a unilateral contract¹⁴ where A promises to do something if B does something else, the performance by B of the condition is enough for A to be bound. Here, analysis in terms of doing something of value in return for a promise fits more naturally than does the construction of an acceptance by B’s performance of the condition of A’s promise.¹⁵ Secondly, promises contained in deeds¹⁶ are enforceable by the person in whose favour they are made, whether or not that person is aware of them¹⁷ and so while a deed may give contractual force to an agreement, agreement is unnecessary for the enforcement of the promises which it contains. And, for Pollock, writing in 1885, the position of contracts under seal made it difficult for him to accept that “proposal

1-003

⁹ See below, Ch.2.

¹⁰ And see The Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties*, Law Com. No.242 (1996), para.6.8 and below, Ch.18.

¹¹ *William v Roffey Bros Nicholls (Contractors) Ltd* [1991] 1 Q.B. 1 and see below, para.3-068.

¹² cf. Atiyah, *An Introduction to the Law of Contract*, 5th edn (1995), pp.38-39.

¹³ See below, paras 24-034—24-046. This is not to say that the availability of this remedy cannot be expressed in terms of independent or dependent promises, but the term “promise” here is used synonymously with that of obligation and can apply to obligations imposed on a contractor by law, which are not a matter of “promise” at all. Thus, a buyer of goods can terminate the contract, and thereby extinguish his own obligation to pay the price, for breach of the term that they are of satisfactory quality, a term imposed by s.14 of the Sale of Goods Act 1979 on sellers selling goods in the course of business (and not capable of exclusion as against a buyer dealing as consumer: Unfair Contract Terms Act 1977 s.6(2)) and see Vol.II, paras 43-104 et seq.

¹⁴ See below, para.1-079.

¹⁵ There is some doubt as to whether an offeree of a unilateral offer must be aware of that offer on performance of the condition for a contract to arise: see below, para.2-039. If the offeree need not be so aware, then no agreement can be constructed from performance of the condition. It is clear that the offeree of a unilateral offer does not in general have to communicate his acceptance to the offeror before he fulfills the condition and the contract arises: *Carlill v Carbolic Smoke Ball Co* [1893] 1 Q.B. 256, and see below, para.2-045.

¹⁶ After the abolition by the Law of Property (Miscellaneous Provisions) Act 1989 s.1(1) of the requirement of sealing for the validity of deeds made by individuals, it is more appropriate to refer to promises in deeds rather than the former “promises under seal”: see below, paras 1-085 et seq.

¹⁷ *Xenos v Wickham* (1866) L.R. 2 H.L. 296, 312; *Macedo v Stroud* [1922] 2 A.C. 330.

and acceptance [form] part of the general conception of contract”.¹⁸ For other writers, however, it has led instead to a denial that the binding force of a promise in a deed depends on contract at all.¹⁹ Certainly, although it is true that the action to enforce promises made under seal, the action of covenant, was traditionally classified as arising *ex contractu*,²⁰ this classification cannot be treated as conclusive as to whether promises in deeds should be considered contractual, given that at the time other actions which are clearly not so considered were also included within this category (notably, actions for money had and received, which would now be understood as restitutionary²¹ and actions for detinue whose function before their abolition was clearly proprietary).²²

1-004 Actual agreement not required. Moreover, even though it is true that the existence of an agreement is in the vast majority of cases a condition for the existence of a contract not contained in a deed, this statement ought to be treated with some caution. First, the existence of an agreement is not an issue merely of fact, to be found by a psychological investigation of the parties at the time of its alleged origin: English law takes an “objective” rather than a “subjective” view of the existence of agreement²³ and so its starting-point is the manifestation of mutual assent by two or more persons to one another²⁴:

“Agreement is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done.”²⁵

Moreover, for reasons of commercial convenience, the common law regulates what is to be treated as a manifestation of assent capable of giving rise to a contract in its rules relating to offer and acceptance.²⁶ For example, a posted acceptance of an offer is said to conclude a contract on posting, rather than on communication to the offeror, and so an acceptance lost in the post will bind the offeror.²⁷ Similarly, if A sends an offer to B by post, and then changes his mind and sends a letter revoking his offer, but B posts an acceptance of the offer after A posted his letter of revocation, but before B received it, there may be a

¹⁸ Pollock, *Principles of Contract at Law and in Equity*, 4th edn (1885), p.9 and cf. p.5.

¹⁹ Treitel, *The Law of Contract*, 12th edn (2007 by Peel), para.3–164.

²⁰ Bacon, *A New Abridgment of the Law*, 7th edn (1832), Vol.I, p.55 included debt, detinue, account, covenant, assumpsit, quantum meruit, *quantum valebat* and annuity in his treatment of actions *ex contractu*. cf. Chitty and Chitty, *A Treatise on the Parties to Actions and on Pleading*, 6th edn (1836), pp.98–125.

²¹ See below, para.29–006; Birks, *An Introduction to the Law of Restitution* (1985), pp.29–39.

²² Technically, detinue protected the plaintiff’s right to possession of personal property. For further discussion of the classification of actions at common law, see below, para.1–118. Detinue was abolished by the Torts (Interference with Goods) Act 1977 s.2.

²³ Howarth (1984) 100 L.Q.R. 265 and 528; Vorster (1987) 103 L.Q.R. 274; Goddard (1987) 7 L.S. 263; de Moor (1990) 106 L.Q.R. 632 and see *The Hannah Blumenthal* [1983] 1 A.C. 854; *The Leonidas D.* [1985] 1 W.L.R. 925; Beatson (1986) 102 L.Q.R. 19; Atiyah (1986) 102 L.Q.R. 363 and below, para.2–002.

²⁴ *Restatement of Contracts* at para.3.

²⁵ Furmston, *Cheshire, Fifoot and Furmston’s Law of Contract*, 15th edn (2007), p.38.

²⁶ See below, paras 2–002 et seq.

²⁷ *Household Fire Insurance Co v Grant* (1879) 3 Ex. D. 216, overruling *British and American Telegraph Co Ltd v Colson* (1871) L.R. 6 Ex. 108. See below, para.2–046.

contract, though the parties were never *ad idem*.²⁸ Another example of common law regulation of what constitutes an agreement may be found in the general rule that silence in an offeree cannot be treated as acceptance.²⁹

Agreement and consideration not sufficient. Secondly, the presence of an agreement supported by consideration is not always sufficient to establish the existence of a contract. This is notably the case where the parties agree in circumstances in which it is considered inappropriate for the law to impose legal obligations, for example, in a social or domestic context, and is justified on the basis that the parties cannot be considered to have intended to create a legal relationship.³⁰ However, the courts have used the requirement that the parties must possess an intention to create legal relations to exclude other types of non-gratuitous agreement from the domain of contract.³¹ Furthermore, even if a transaction fulfils these three conditions of agreement, consideration and an intention to create legal relations, it may be defeated by the presence of other factors such as the absence of a particular form,³² mistake,³³ misrepresentation,³⁴ duress,³⁵ undue influence,³⁶ incapacity³⁷ or illegality.³⁸ Some of these factors will render the contract void,³⁹ others voidable,⁴⁰ and others still will render it unenforceable against one or both contracting parties.⁴¹ 1-005

Enforcement of agreements under other rules. Thirdly, even though contracts are in general to be defined as agreements, this does not mean that all enforceable agreements (or enforceable promises) are contracts. This is particularly noticeable in relation to promissory and proprietary estoppel and constructive trust. In the case of promissory estoppel, A may be prevented from going back on a promise not to rely on his legal rights against B, subject to the condition that B has relied on A's promise (possibly, to B's detriment).⁴² B does not need to furnish consideration for A's promise for it to be enforceable under this doctrine and although the requirement of reliance by B suggests some element of acceptance on the latter's part of the benefit of the promise, there is no need for this to be communicated to or known by A.⁴³ The doctrines of proprietary estoppel and constructive trust may also enforce promises or agreements, even though these elements form merely part of the factual circumstances 1-006

²⁸ *Byrne v Van Tienhoven* (1880) 5 C.P.D. 344; below, para.2-089.

²⁹ *Felthouse v Bindley* (1862) 11 C.B. (N.S.) 869, affirmed (1863) 1 N.R. 401 and see below, paras 2-068 et seq.

³⁰ See below, paras 2-168—2-174.

³¹ See below, paras 2-178—2-188.

³² See below, Ch.4.

³³ See below, Ch.5.

³⁴ See below, Ch.6.

³⁵ See below, paras 7-001—7-055.

³⁶ See below, paras 7-056—7-125.

³⁷ See below, Chs 8 and 9.

³⁸ See below, Ch.17.

³⁹ See below, para.1-080.

⁴⁰ See below, para.1-082.

⁴¹ See below, para.1-084.

⁴² See below, paras 3-128 et seq.

⁴³ See below, para.3-093.