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Contract Law

ROBERT DUXBURY

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CONTRACT LAW

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1st edition

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PREFACE

The writing of this book stems from a desire on my part to write a text based upon many years of experience teaching the law of contract at degree level. I do so fully conscious of the fact that there are already many excellent books on the topic, some of them being of great authority. But some of these works are, in my view, too detailed for the needs of the typical undergraduate or conversion course student who will be looking for a text that covers the fundamentals of the subject in a straightforward way, and which is not excessively technical or theoretical. At the same time, they will require a work that approaches the law in a critical manner with an eye to its future development.

I have placed some emphasis on a discussion of the case law in contract. Not only is this a rich source of learning on the subject but it enables the novice student to acquire a grasp of the case law method that is one of the basic tools of the lawyer. The statutory and regulatory law that is becoming increasingly prominent in contract is also analysed in depth. Given that readers are likely to be new to the law, whether law students or, for example, business students, I have included a glossary of some of the more commonly encountered technical (and not so technical) legal terms in contract. At the end of each chapter, I have indicated further reading which I hope readers may find beneficial and of interest.

With regard to the coverage of the book, I have tried to concentrate on those topics which are common to the majority of degree courses on contract and those which, from my own experience, I know students find challenging. The familiar contours of the subject have changed in recent years not only because of the growing significance of European Union law but also as a result of a number of important decisions of the Court of Appeal and House of Lords. I have attempted to give due prominence to these developments. In dealing with case law in this book, for the sake of consistency I use the term “claimant” to refer to the party bringing proceedings whether the case was decided before or after the introduction of the Civil Procedure Rules. As readers may be aware, the rules substituted the expression “claimant” for “plaintiff”.

I would like to express my thanks to the many people who have helped me in one way or another in the preparation of this book, especially the publishing team at Sweet and Maxwell. Writing a book is a deeply anti-social activity and the greatest debt of gratitude is owed to my wife, Jenny, who has endured this (and other publishing ventures) with much greater tolerance and understanding than I have any right to expect! I would like to dedicate the book to my father, John M Duxbury, who was recently commended by the Solicitors’ Regulation Authority for being admitted to the roll of solicitors for over 70 years.

Robert Duxbury, Nottingham Law School, January 2008

GLOSSARY

Anticipatory breach A breach of contract occurring before performance is due where one party indicates to the other that they do not intend to perform their obligations under the contract. In such circumstances the innocent party has the right to “accept” the breach and sue for damages immediately or await the date of performance and hold the other party to the contract.

Appellant A party who appeals to a superior court with jurisdiction to hear appeals such as the Court of Appeal or House of Lords.

Bailment The transfer of possession, but not ownership, of goods from the owner (the “bailor”) to another party (the “bailee”) for a specific purpose, such as in a contract of hire or where goods are delivered for repair. Bailment may be contractual (a “bailment for reward”) or purely gratuitous such as where goods are lent to a friend.

Bill of exchange A bill of exchange is a form of “negotiable instrument” (see below). Such bills are defined by the Bills of Exchange Act 1882, s.3 as “an unconditional order in writing, addressed by one person [the ‘drawer’] to another [the ‘drawee’], signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed and determinable future time a sum certain in money to or to the order of a specified person [the ‘payee’], or to bearer.” Bills of exchange facilitate the transfer of an enforceable right to a sum of money from one person to another; they are also “negotiable” in that where the bill is transferred to a party who takes in good faith and for value (a “holder in due course”) they take free of any defect in title of the transferor. A cheque is a bill of exchange drawn on a bank.

Bill of lading A document effecting the transfer of title of goods shipped by sea, under which the master of the ship undertakes to deliver the goods of the shipper (“consignor”) to a party named in it (usually the “consignee”), on payment of freight. A bill of lading also embodies the terms of the contract of carriage and acts as a receipt for the goods from the master to the consignor. Although transferable by endorsement and delivery, a bill of lading is not a negotiable instrument, so that the transferee receives no better title than the transferor. The relevant law is contained in the Carriage of Goods by Sea Acts.

Charterparty A written contract for the hire of a ship by the hirer (the “charterer”) from the shipowner. The hiring may either be for a particular voyage (a “voyage charter”) or for a specified period of time (a “time charter”) and the usual purpose of the hire is for the carriage

of goods. Normally the shipowner retains possession and control of the ship subject to the charterer's instruction but in a "charterparty by way of demise" the contract operates as a lease with the charterer becoming for the time being shipowner.

c.i.f. ("Cost, insurance, freight") A type of contract for the sale of goods overseas where the seller takes responsibility for shipment by entering into a contract of carriage by sea. The seller must ensure delivery of the goods at the port of destination and insure the goods whilst in transit for the benefit of the buyer. The seller must deliver up an invoice, the bill of lading (see above) and the insurance policy. The buyer must accept the documents and pay the price on delivery. The goods are usually at the buyer's risk as from shipment. (Cf "f.o.b." below).

Claimant, plaintiff The party bringing civil proceedings, e.g. for breach of contract.

Constructive notice Knowledge that is imputed to a person even if they are ignorant of the actual facts, where the circumstances are such that a person of ordinary prudence would have discovered the facts.

Contra proferentem A rule of construction that any ambiguities in a document are construed narrowly against the drafter, commonly applied in the construction of exclusion and limitation clauses.

Conversion The tort of wrongfully dealing with another person's goods, i.e. in a manner inconsistent with the rights of the owner.

Counterclaim A claim in civil proceedings raised by a defendant against a claimant in response to that party's claim.

Damages A sum of money awarded by a court to compensate the claimant for loss or damage, e.g. as a result of a breach of contract. As a general rule, damages in contract are designed to put the innocent party in the position they would be in had the contract been properly performed.

Defendant The party against whom civil (or criminal) proceedings are brought.

Del credere agent An agent instructed to sell goods on behalf of a principal who guarantees that the principal will receive all moneys due from the buyer, usually in return for a higher commission.

Demurrage A liquidated sum payable to the charterer where a ship is detained in port beyond the number of days specified in the charterparty ("lay days").

Estoppel A rule of evidence that prevents a person from denying the truth of a statement they have made and upon which another has relied. It is usually a requirement that the person relying on the statement has altered their position on the faith of the statement.

f.o.b. ("Free on board") A type of contract for the sale of goods overseas where, in the classic case, it is the seller's duty to see that the goods are loaded on board ship, whereas it is the

buyer's responsibility to arrange for the shipping of the goods and to insure them. The risk normally passes to the buyer when the goods are loaded on board ship. (Cf "c.i.f. above).

Injunction An order of the court either prohibiting a party from doing an act (a "prohibitory" injunction) or ordering a party to carry out an act (a "mandatory" injunction). As an equitable remedy, an injunction will only be granted at the discretion of the court and will not be granted if damages would be an adequate remedy. An "interim" injunction is one granted temporarily in an emergency.

Laches Unreasonable delay or neglect in bringing proceedings to enforce a right. It may operate to debar a claim. Where there is a statutory limitation period, however, a claim can be brought at any time up to the expiry of that period.

Licence In relation to land, a permission to enter or occupy land but which, unlike a lease, does not usually confer any estate or interest in the land or any right of exclusive possession. A licence may be contractual or gratuitous.

Lien A right to retain possession of the property of another person as security for the performance of an obligation by that other person. Thus a repairer of goods may retain them until paid by the owner and, in some circumstances, an unpaid seller of goods has a lien over them.

Negotiable instrument A document containing an obligation to pay a sum of money which upon delivery to another person gives that person the right to sue upon it in their own name. Providing the transferee takes bona fide and for value, they receive a good title, free of any defects affecting the transferor's title. It is this quality that is referred to as "negotiability". Negotiable instruments include bills of exchange and promissory notes.

Promissory note A signed document containing an unconditional promise by one person to pay a sum of money to (or to the order of) a specified person or the bearer (Bills of Exchange Act 1882, s.83). The note is either payable on demand or at some fixed or determinable future time. Promissory notes are negotiable instruments (see above). A bank note is effectively a promissory note issued by a bank promising to pay the bearer the sum of money specified on the note.

Quantum meruit An action on a quantum meruit ("as much as he deserves") may be brought to recover reasonable remuneration for work done and materials provided.

Repudiation An indication by words or conduct that a party does not intend to be bound by a contract.

Rescission The setting aside of a contract either by the court (or by one of the parties) e.g. for misrepresentation. The aim of rescission is to put the parties back in the position they were in before the contract.

Respondent The party against whom an appeal is brought in an appellate court.

Restitution A legal process whereby money or property is restored to the person entitled to possession of it, with the aim of preventing unjust enrichment.

Set-off The right to deduct money already owed from a claim. Thus if A owes B £1,000 and B brings an action to recover that sum, A may “set-off” an existing debt whereby B owes A £500, so that B recovers only £500.

Specific performance An order of the court compelling the performance of a contract. The remedy is something of an exception and will not be ordered where damages are an adequate remedy; it is an equitable remedy and at the discretion of the court.

Strict liability Liability without fault. Contractual liability is said to be strict in the sense that contract-breaker is liable for breach even though there may be no fault or negligence on his part.

Tort A civil wrong entitling the victim to redress, e.g. damages or an injunction, other than a wrong that is purely a breach of contract. The most commonly encountered tort is negligence.

Ultra vires (“Beyond the powers”) An ultra vires act is one outside the powers conferred upon the body exercising it, and therefore invalid. An example is a contract entered into by a local authority in excess of its statutory powers.

Vitiating factor A factor affecting the validity of a contract, such as misrepresentation; mistake; duress and undue influence; and illegality.

Void contract A contract that is void has no legal effect at all, for example where it is entered into under an operative mistake. The transaction is null and void from the beginning (“ab initio”).

Voidable contract A voidable contract does have legal effect, but one party may have the right to avoid it, for example, where they are the victim of an actionable misrepresentation by the other party. Thus the contract is valid until avoided.

TABLE OF CASES

AEG (UK) Ltd v Logic Resource Ltd [1996] C.L.C. 265, CA (Civ Div)	7-013
A Roberts & Co v Leicestershire CC [1961] Ch. 555; [1961] 2 W.L.R. 1000, Ch D	12-048
A Schroeder Music Publishing Co Ltd v Macaulay (formerly Instone); sub nom. Macaulay (formerly Instone) v A Schroeder Music Publishing Co Ltd [1974] 1 W.L.R. 1308; [1974] 3 All E.R. 616, HL	13-033, 15-018, 15-019
A to Z Bazaars (Pty) Ltd v Minister of Agriculture, 1974 (4) SA 392	2-048
Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA [2003] UKHL 17; [2003] 2 A.C. 541; [2003] 2 W.L.R. 1060	5-009
Adams v Lindsell, 106 E.R. 250; (1818) 1 B. & Ald. 681, KB	2-042
Addis v Gramophone Co Ltd [1909] A.C. 488, HL	16-017, 16-018
Adler v Dickson (No.1) [1955] 1 Q.B. 158; [1954] 3 W.L.R. 696, CA	7-034
Ailion v Spiekermann [1976] Ch. 158; [1976] 2 W.L.R. 556, Ch D	14-037
Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd (The Strathallan); Malvern Fishing Co Ltd v Ailsa Craig Fishing Co Ltd (The Strathallan) [1983] 1 W.L.R. 964; [1983] 1 All E.R. 101, HL	7-027, 7-028
Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd [1964] 1 W.L.R. 1326; [1964] 3 All E.R. 556, PC	4-042, 4-045
Alaskan Trader, The. <i>See</i> Clea Shipping Corp v Bulk Oil International	
Albazer, The. <i>See</i> Owners of Cargo Laden on Board the Albacruz v Owners of the Albazer	
Alder v Moore [1961] 2 Q.B. 57; [1961] 2 W.L.R. 426, CA	16-048
Alderslade v Hendon Laundry Ltd [1945] K.B. 189; [1945] 1 All E.R. 244, CA	7-025, 7-026
Alec Lobb Garages Ltd v Total Oil Great Britain Ltd [1985] 1 W.L.R. 173; [1985] 1 All E.R. 303, CA (Civ Div)	13-010, 15-017
Alev, The. <i>See</i> Vantage Navigation Corp v Suhail and Saud Bahwan Building Materials	
Alexander v Rayson [1936] 1 K.B. 169; 114 A.L.R. 357, CA	14-012, 14-028
Alexander v Rolls Royce Motor Cars Ltd [1996] R.T.R. 95, CA (Civ Div)	16-019
Alfred McAlpine Construction Ltd v Panatown Ltd (No.1); sub nom. Panatown Ltd v Alfred McAlpine Construction Ltd [2001] 1 A.C. 518; [2000] 3 W.L.R. 946, HL	8-019
Al-Kishtaini v Shanshal; sub nom. Shanshal v Al-Kishtaini [2001] EWCA Civ 264; [2001] 2 All E.R. (Comm) 601; [2001] Lloyd's Rep. Bank. 174, CA (Civ Div)	1-004
Allcard v Skinner (1887) L.R. 36 Ch. D. 145, CA	13-021, 13-027, 13-028, 13-031
Allen v Rescous (1676) 2 Lev. 174	14-011
Alliance Bank Ltd v Broom, 62 E.R. 631; (1864) 2 Drew. & Sm. 289, QB	4-013
Alliance & Leicester BS v Edgestop Ltd; Alliance & Leicester BS v Dhanoa; Alliance & Leicester BS v Samra; Mercantile Credit Co Ltd v Lancaster; Alliance & Leicester BS v Hamptons [1993] 1 W.L.R. 1462; [1994] 2 All E.R. 38, Ch D	11-043
Allied Maples Group Ltd v Simmons & Simmons [1995] 1 W.L.R. 1602; [1995] 4 All E.R. 907, CA (Civ Div) ..	16-014
Allied Marine Transport v Vale do Rio Doce Navegacao SA (The Leonidas D); Vale do Rio Doce Navegacao SA v Ocean Freighters Corp [1985] 1 W.L.R. 925; [1985] 2 All E.R. 796, CA (Civ Div)	2-002, 2-033
Alpenstow Ltd v Regalian Properties Plc [1985] 1 W.L.R. 721; [1985] 2 All E.R. 545, Ch D	2-031
Amalgamated Investment & Property Co v John Walker & Sons [1977] 1 W.L.R. 164; [1976] 3 All E.R. 509, CA (Civ Div)	10-011, 12-051
Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank Ltd [1982] Q.B. 84; [1981] 3 W.L.R. 565, CA (Civ Div)	4-044
Amoco Australian Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd; sub nom. Amoco Australia Pty v Rocca Bros Motor Engineering Co Pty [1975] A.C. 561; [1975] 2 W.L.R. 779, PC	15-017

Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co (No.2) [1990] 2 Lloyd's Rep. 526, QBD (Comm).....	4-025
Anderson Ltd v Daniel [1924] 1 K.B. 138, CA.....	14-006, 14-007, 14-036
Anderton v Clwyd CC; sub nom. Cummins v Shell International Trading & Shipping Ltd; Home Office v Dorgan; Bryant v Pech; Cummins v Shell International Manning Services Ltd; Chambers v Southern Domestic Electrical Services Ltd; Dorgan v Home Office; Bryant v Mike Beer Transport Ltd [2002] EWCA Civ 933; [2002] 1 W.L.R. 3174; [2002] 3 All E.R. 813.....	12-003
Andrew Bros (Bournemouth) Ltd v Singer & Co Ltd [1934] 1 K.B. 17.....	7-023
Anglia Television Ltd v Reed [1972] 1 Q.B. 60; [1971] 3 W.L.R. 528, CA (Civ Div).....	16-004, 16-005
Anglo Continental Holidays v Typaldos (London) [1967] 2 Lloyd's Rep. 61; (1967) 111 S.J. 599, CA (Civ Div).....	7-041
Apple Corps Ltd v Apple Computer Inc [2004] EWHC 768 (Ch); [2004] 2 C.L.C. 720; [2004] I.L.Pr. 34.....	2-049
Appleby v Myers; sub nom. Appleby v Meyers (1866-67) L.R. 2 C.P. 651, Ex Chambers.....	10-022
Applegate v Moss; sub nom. Archer v Moss [1971] 1 Q.B. 406; [1971] 2 W.L.R. 541, CA (Civ Div).....	17-030
Arthorp v Neville & Co (1907) 23 T.L.R. 575.....	14-011
Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 Q.B. 374; [1961] 2 W.L.R. 170, CA.....	14-005, 14-007, 14-034
Arcos Ltd v EA Ronaasen & Son; sub nom. Ronaasen & Son v Arcos Ltd [1933] A.C. 470; (1933) 45 Ll. L. Rep. 33, HL.....	6-045, 6-052
Ardennes, The. <i>See</i> Owners of Cargo Lately Laden on Board the Ardennes v Owners of the Ardennes	
Armhouse Lee Ltd v Chappell, <i>The Times</i> , August 7, 1996, CA (Civ Div).....	14-016, 14-017
Ashbury Railway Carriage & Iron Co Ltd v Riche; sub nom. Riche v Ashbury Railway Carriage & Iron Co Ltd (1874-75) L.R. 7 H.L. 653, HL.....	5-028
Ashmore Benson Pease & Co Ltd v AV Dawson Ltd [1973] 1 W.L.R. 828; [1973] 2 All E.R. 856, CA (Civ Div).....	14-007, 14-034
Associated Japanese Bank (International) Ltd v Credit du Nord SA [1989] 1 W.L.R. 255; [1988] 3 All E.R. 902, QBD.....	12-013, 12-018
Astley v Reynolds (1731) 2 Str. 915.....	13-003
Atkinson v Denby (1862) 7 H. & N. 934.....	14-030
Atlantic Baron, The. <i>See</i> North Ocean Shipping Co v Hyundai Construction Co	
Atlantic Star, The. <i>See</i> Port Jackson Stevedoring Pty v Salmond & Spraggon (Australia) Pty	
Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [1989] Q.B. 833; [1989] 3 W.L.R. 389, QBD (Comm).....	13-004, 13-005, 13-006, 13-008, 13-009
Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago) [1976] 1 Lloyd's Rep. 250, CA (Civ Div).....	16-039
Attorney General v Blake [2001] 1 A.C. 268; [2000] 3 W.L.R. 625, HL.....	16-008, 16-009, 16-050
Attwood v Lamont [1920] 3 K.B. 571, CA (Civ Div).....	15-021, 15-022
Avery v Bowden (1855) 5 E. & B. 714.....	9-012, 10-008
Avon Finance Co v Bridger [1985] 2 All E.R. 281; (1979) 123 S.J. 705, CA (Civ Div).....	12-043, 13-037
Avon Insurance Plc v Swire Fraser Ltd [2000] 1 All E.R. (Comm) 573; [2000] C.L.C. 665, QBD (Comm).....	11-003, 11-042
Avraamides v Colwill [2006] EWCA Civ 1533; [2007] B.L.R. 76; (2006) 103(46) L.S.G. 31.....	8-007
BP Exploration Co (Libya) Ltd v Hunt (No.1) [1976] 1 W.L.R. 788; [1976] 3 All E.R. 879, QBD (Comm).....	10-027, 10-028
BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower) (No.1) [2001] 1 All E.R. (Comm) 240; [2001] 1 Lloyd's Rep. 341, CA (Civ Div).....	6-053
B&S Contracts and Design v Victor Green Publications [1984] I.C.R. 419; (1984) 81 L.S.G. 893, CA (Civ Div).....	13-006
Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 W.L.R. 509; [1992] 4 All E.R. 161, Ch D.....	12-049
Bailey v Bullock [1950] 2 All E.R. 1167; 66 T.L.R. (Pt.2) 791, KBD.....	16-018
Bainbridge v Firmstone (1838) 8 Ad. & E. 743, QB.....	4-012
Baird Textile Holdings Ltd v Marks & Spencer Plc; sub nom. Baird Textiles Holdings Ltd v Marks & Spencer Plc [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737; [2001] C.L.C. 999.....	4-044
Bairstow Eves London Central Ltd v Smith [2004] EWHC 263 (QB); [2004] 2 E.G.L.R. 25; [2004] 29 E.G. 118.....	7-069
Baker v Jones [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553, QBD.....	14-014
Baldry v Marshall [1925] 1 K.B. 260, CA.....	6-036
Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc, 1994 S.C. (H.L.) 20; 1994 S.L.T. 807, HL.....	16-026
Balfour v Balfour [1919] 2 K.B. 571, CA.....	3-013, 3-014, 3-015, 3-019
Ballett v Mingay [1943] K.B. 281, CA.....	5-021
Banco Exterior Internacional v Mann [1995] 1 All E.R. 936; [1995] 1 F.L.R. 602, CA (Civ Div).....	13-038

Bank of Credit and Commerce International SA v Aboody [1990] 1 Q.B. 923; [1989] 2 W.L.R. 759, CA (Civ Div).....	13-017, 13-018, 13-025
Bank of Credit and Commerce International SA (In Liquidation) v Ali (No.1) [2001] UKHL 8; [2002] 1 A.C. 251; [2001] 2 W.L.R. 735, HL.....	7-021
Bankers Insurance Co Ltd v South [2003] EWHC 380 (QB); [2004] Lloyd's Rep. I.R. 1; [2003] P.I.Q.R. P28.....	7-069
Bannerman v White (1861) 10 C.B. (N.S.) 844.....	6-011
Barclays Bank Plc v Coleman [2001] Q.B. 20; [2000] 3 W.L.R. 405, CA (Civ Div).....	13-027
Barclays Bank Plc v Fairclough Building Ltd (No.1) [1995] Q.B. 214; [1994] 3 W.L.R. 1057, CA (Civ Div).....	16-042
Barclays Bank Plc v O'Brien [1994] 1 A.C. 180; [1993] 3 W.L.R. 786, HL.....	13-016, 13-020, 13-022, 13-034, 13-035, 13-036, 13-037, 13-038, 13-042, 13-043, 13-044
Barclays Bank Plc v Thomson [1997] 4 All E.R. 816; [1996] 5 Bank. L.R. 402, CA (Civ Div).....	13-038
Barry v Davies (t/a Heathcote Ball & Co); sub nom. Barry v Heathcote Ball & Co (Commercial Auctions) Ltd; Heathcote Ball & Co (Commercial Auctions) Ltd v Barry, CA (Civ Div)..... [2000] 1 W.L.R. 1962; [2001] 1 All E.R. 944.....	2-016
Barton (Alexander) v Armstrong (Alexander Ewan) [1976] A.C. 104; [1975] 2 W.L.R. 1050, PC.....	13-003, 13-007, 13-009
Beale v Taylor [1967] 1 W.L.R. 1193; [1967] 3 All E.R. 253, CA (Civ Div).....	6-031
Beckett Investment Management Group Ltd v Hall [2007] EWCA Civ 613; [2007] I.R.L.R. 793; (2007) 151 S.J.L.B. 891.....	15-022
Behnke v Bede Shipping Co Ltd [1927] 1 K.B. 649; (1927) 27 Ll. L. Rep. 24, KBD.....	17-005
Behzadi v Shaftesbury Hotels Ltd [1992] Ch. 1; [1991] 2 W.L.R. 1251, CA (Civ Div).....	9-009
Bell v Lever Brothers Ltd; sub nom. Lever Bros Ltd v Bell [1932] A.C. 161, HL.....	12-004, 12-010, 12-011, 12-012, 12-013, 12-014, 12-015, 12-016, 12-017, 12-018, 12-052
Benyon v Nettlefold (1850) 3 Mac. & G. 94.....	14-016
Beresford v Royal Insurance Co Ltd [1938] A.C. 586, HL.....	14-011
Beswick v Beswick [1968] A.C. 58; [1967] 3 W.L.R. 932, HL.....	8-004, 8-005, 8-017, 8-023, 8-035, 17-005
Bettini v Gye (1875-76) L.R. 1 Q.B.D. 183, QBD.....	6-045, 6-046
Bigg v Boyd Gibbins [1971] 1 W.L.R. 913; [1971] 2 All E.R. 183, CA (Civ Div).....	2-022
Bigos v Bousted [1951] 1 All E.R. 92, KBD.....	14-032
Bilbie v Lumley (1802) 2 East. 469.....	17-023
Birch v Paramount Estates Ltd (1956) 16 E.G. 396.....	6-004
Birkmyr v Darnell (1704) 1 Salk. 27.....	5-011
Birmingham & District Land Co v London & North Western Railway Co (No.2) (1889) L.R. 40 Ch. D. 268, CA.....	4-038
Bisset v Wilkinson [1927] A.C. 177, PC.....	11-005, 11-006
Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd [1918] 2 K.B. 467; 3 A.L.R. 11, KBD.....	10-019
Blackpool and Fylde Aero Club v Blackpool BC [1990] 1 W.L.R. 1195; [1990] 3 All E.R. 25, CA (Civ Div).....	2-018, 2-019
Blake v Concannon (1870) I.R. 4 C.L. 323.....	5-019
Bliss v South East Thames RHA [1987] I.C.R. 700; [1985] I.R.L.R. 308, CA (Civ Div).....	16-018, 16-019
Bolton v Mahadeva [1972] 1 W.L.R. 1009; [1972] 2 All E.R. 1322, CA (Civ Div).....	9-004
Bolton Partners v Lambert (1889) L.R. 41 Ch. D. 295, CA.....	8-026
Boone v Eyre (1779) 1 H. Bl. 273n.....	9-004
Boulton v Jones (1871) 27 L.J. Ex. 117.....	12-029
Bowman v Association of British Travel Agents Ltd [1996] C.L.C. 451; (1995) 145 N.L.J. 1815, CA (Civ Div).....	2-008
Bowmakers Ltd v Barnet Instruments Ltd [1945] K.B. 65, CA.....	14-030
Brace v Calder [1895] 2 Q.B. 253, CA.....	16-034
Bracken v Billingham [2003] EWHC 1333 (TCC); [2004] T.C.L.R. 4; [2003] C.I.L.L. 2039.....	4-033
Bradbury v Morgan (1862) 1 H. & C. 249.....	2-061
Bramhill v Edwards [2004] EWCA Civ 403; [2004] 2 Lloyd's Rep. 653.....	6-035
Branca v Cobarro [1947] K.B. 854; [1947] 2 All E.R. 101, CA.....	2-031
Brennan v Bolt Burdon; sub nom. Brennan v Bolt Burden; Brennan v Islington LBC [2004] EWCA Civ 1017; [2005] Q.B. 303; [2004] 3 W.L.R. 1321.....	12-003, 12-015
Bridge v Campbell Discount Co Ltd; sub nom. Campbell Discount Co Ltd v Bridge [1962] A.C. 600; [1962] 2 W.L.R. 439, HL.....	16-048
Bridge v Deacons [1984] A.C. 705; [1984] 2 W.L.R. 837, PC.....	15-012
Brikom Investments Ltd v Carr; Brikom Investments Ltd v Roddy; Brikom Investments Ltd v Hickey [1979] Q.B. 467; [1979] 2 W.L.R. 737, CA (Civ Div).....	4-040
Brimnes, The. <i>See</i> Tenax Steamship Co v Owners of the Motor Vessel Brimnes	
Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH; sub nom. Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH [1983] 2 A.C. 34; [1982] 2 W.L.R. 264, HL.....	2-034, 2-049

British & Commonwealth Holdings Plc v Quadrex Holdings Inc (No.1) [1989] Q.B. 842; [1989] 3 W.L.R. 723, CA (Civ Div).....	9-009
British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd [1975] Q.B. 303; [1974] 2 W.L.R. 856, CA (Civ Div).....	7-018
British Fermentation Products Ltd v Compar Reavell Ltd [1999] 2 All E.R. (Comm) 389; [1999] B.L.R. 352, QBD (TCC)	7-046
British Motor Trade Association v Salvadori [1949] Ch. 556; [1949] 1 All E.R. 208, Ch D	8-034
British Reinforced Concrete Engineering Co Ltd v Schelff [1921] 2 Ch. 563, Ch D.....	15-013
British Road Services Ltd v Arthur V Crutchley & Co Ltd (No.1) [1968] 1 All E.R. 811; [1968] 1 Lloyd's Rep. 271, CA (Civ Div)	2-027
British Russian Gazette & Trade Outlook Ltd v Associated Newspapers Ltd; Talbot v Associated Newspapers Ltd [1933] 2 K.B. 616, CA.....	9-020
British Steel Corp v Cleveland Bridge & Engineering Co Ltd [1984] 1 All E.R. 504; [1982] Com. L.R. 54, QBD.....	3-009, 17-025
British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No.2) [1912] A.C. 673, HL	16-034, 16-035, 16-036
Brodie, Re; sub nom. Brodie v Brodie [1917] P. 271, PDAD.....	14-021
Brodie v Brodie. <i>See</i> Brodie, Re	
Brogden v Metropolitan Railway Co (1876-77) L.R. 2 App. Cas. 666, HL	2-005, 2-006, 2-029, 2-037, 2-038
Brown v KMR Services Ltd (formerly HG Poland (Agencies) Ltd); Sword Daniels v Pitel [1995] 4 All E.R. 598; [1995] 2 Lloyd's Rep. 513, CA (Civ Div).....	16-030
Bruce v Warwick (1815) 6 Taunt. 118.....	5-020
Bryen & Langley Ltd v Boston [2005] EWCA Civ 973; [2005] B.L.R. 508.....	7-072
Buckpitt v Oates [1968] 1 All E.R. 1145, Assizes.....	3-019
Bull v Pitney Bowes Ltd [1967] 1 W.L.R. 273; [1966] 3 All E.R. 384, QBD	15-008, 15-012, 15-020
Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711; [1981] 2 All E.R. 540, HL	6-050, 9-008
Burnard v Haggis, 143 E.R. 360; (1863) 14 C.B. N.S. 45, CCP.....	5-021
Butler Machine Tool Co v Ex-cell-o Corp (England) [1979] 1 W.L.R. 401; [1979] 1 All E.R. 965, CA (Civ Div).....	2-004, 2-028, 2-029, 2-030
Butterworth v Kingsway Motors Ltd [1954] 1 W.L.R. 1286; [1954] 2 All E.R. 694, Assizes	17-021
Byrne & Co v Leon Van Tien Hoven & Co (1879-80) L.R. 5 C.P.D. 344, CPD	2-055
CCC Films (London) v Impact Quadrant Films [1985] Q.B. 16; [1984] 3 W.L.R. 245, QBD.....	16-005
CIBC Mortgages Plc v Pitt [1994] 1 A.C. 200; [1993] 3 W.L.R. 802, HL	13-018, 13-027, 13-038
CTN Cash and Carry Ltd v Gallaher Ltd [1994] 4 All E.R. 714, CA (Civ Div)	13-011, 13-012
C&P Haulage v Middleton [1983] 1 W.L.R. 1461; [1983] 3 All E.R. 94, CA (Civ Div).....	16-005
Callisher v Bischoffsheim (1869-70) L.R. 5 Q.B. 449, QB.....	4-013
Canada Steamship Lines Ltd v King, The [1952] A.C. 192; [1952] 1 All E.R. 305, PC.....	7-024, 7-025, 7-027
Cannan v Bryce (1919) 3 B. & Ald. 179.....	14-033
Caparo Industries Plc v Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358, HL	11-023
Capps v Miller [1989] 1 W.L.R. 839; [1989] 2 All E.R. 333, CA (Civ Div).....	16-041
Car & Universal Finance Co Ltd v Caldwell [1965] 1 Q.B. 525; [1964] 2 W.L.R. 600, CA	11-029, 11-035, 12-027
Carlill v Carbolic Smoke Ball Co [1893] 1 Q.B. 256, CA	1-009, 2-007, 2-008, 2-010, 2-034, 3-024, 6-042
Carlisle & Cumberland Banking Co v Bragg [1911] 1 K.B. 489, CA	12-039, 12-041
Carney v Herbert [1985] A.C. 301; [1984] 3 W.L.R. 1303, PC.....	14-037
Casey's Patents, Re; sub nom. Stewart v Casey [1892] 1 Ch. 104, CA.....	4-007
Cehave NV v Bremer Handels GmbH (The Hansa Nord); sub nom. Cehave NV v Bremer Handelgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44; [1975] 3 W.L.R. 447, CA (Civ Div).....	6-050
Cehave NV v Bremer Handelgesellschaft mbH. <i>See</i> Cehave NV v Bremer Handels GmbH	
Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd; sub nom. Widnes Foundry (1925) Ltd v Cellulose Acetate Silk Co Ltd [1933] A.C. 20, HL	16-046
Central London Property Trust v High Trees House Ltd [1947] K.B. 130; [1956] 1 All E.R. 256n, KBD.....	4-037, 4-038, 4-040, 4-042, 4-044, 4-045, 4-046
Centrovincial Estates v Merchant Investors Assurance Co [1983] Com. L.R. 158, CA (Civ Div).....	2-002, 12-024
21st Century Logistic Solutions Ltd (In Liquidation) v Madysen Ltd [2004] EWHC 231 (QB); [2004] 2 Lloyd's Rep. 92; [2004] S.T.C. 1535	14-012
Champion Investments Ltd v Ahmed [2004] EWHC 1956 (QB)	12-015
Chandler v Webster [1904] 1 K.B. 493, CA	10-021, 10-022, 10-024, 10-028
Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd; France Manche SA v Balfour Beatty Construction Ltd [1993] A.C. 334; [1993] 2 W.L.R. 262, HL	14-015
Chanter v Hopkins (1838) 4 M. & W. 399	7-029
Chapelton v Barry Urban DC [1940] 1 K.B. 532, CA	7-008
Chaplin v Hicks [1911] 2 K.B. 786, CA	16-014
Chaplin v Leslie Frewin (Publishers) Ltd [1966] Ch. 71; [1966] 2 W.L.R. 40, CA	5-017

Chappell & Co Ltd v Nestlé Co Ltd [1960] A.C. 87; [1959] 3 W.L.R. 168, HL	4-011, 4-012
Chapple v Cooper (1844) 13 M. & W. 252	5-015
Charles Rickards Ltd v Oppenheim; sub nom. Rickards (Charles) v Oppenheim [1950] 1 K.B. 616; [1950] 1 All E.R. 420, CA	9-008, 9-022
Charnock v Liverpool Corp [1968] 1 W.L.R. 1498; [1968] 3 All E.R. 473, CA (Civ Div)	8-021
Charter v Sullivan [1957] 2 Q.B. 117; [1957] 2 W.L.R. 528, CA	16-012
Chater v Mortgage Agency Services Number Two Ltd; sub nom. Charter v Mortgage Agency Services; Mortgage Agency Services Number Two Ltd v Chater [2003] EWCA Civ 490; [2003] H.L.R. 61; [2004] 1 P. & C.R. 4	13-038
Cheese v Thomas [1994] 1 W.L.R. 129; [1994] 1 All E.R. 35, CA (Civ Div)	13-031
Chichester v Cobb (1866) 14 L.T. 433	4-026
Christy v Row (1808) 1 Taunt. 300	9-005, 17-026
Citibank NA v Brown Shipley & Co Ltd; Midland Bank Plc v Brown Shipley & Co Ltd [1991] 2 All E.R. 690; [1991] 1 Lloyd's Rep. 576, QBD (Comm)	12-029
City and Westminster Properties (1934) Ltd v Mudd [1959] Ch. 129; [1958] 3 W.L.R. 312, Ch D	6-005, 6-016
Clarke v Earl of Dunraven (The Satanita) [1897] A.C. 59, HL	2-062
Clarke v Newland [1991] 1 All E.R. 397, CA (Civ Div)	15-010
Clarkson Booker v Andjel [1964] 2 Q.B. 775; [1964] 3 W.L.R. 466, CA	8-028
Clay v Yates (1856) 1 H. & B. 73	14-034
Clea Shipping Corp v Bulk Oil International (The Alaskan Trader) (No.2) [1984] 1 All E.R. 129; [1983] 2 Lloyd's Rep. 645, QBD (Comm)	16-039
Clef Aquitaine Sarl v Laporte Materials (Barrow) Ltd; sub nom. Clef Aquitaine Sarl v Sovereign Chemical Industries Ltd [2001] Q.B. 488; [2000] 3 W.L.R. 1760, CA (Civ Div)	11-015
Clements v London & North Western Railway Co [1894] 2 Q.B. 482, CA	5-017
Cleveland Petroleum Co Ltd v Dartstone Ltd (No.1) [1969] 1 W.L.R. 116, CA (Civ Div)	15-017
Clifford Davis Management Ltd v WEA Records Ltd [1975] 1 W.L.R. 61; [1975] 1 All E.R. 237, CA (Civ Div)	15-019
Clifton v Palumbo [1944] 2 All E.R. 497, CA	2-021
Clore v Theatrical Properties Ltd; Clore v Westby & Co Ltd [1936] 3 All E.R. 483, CA	8-034
Cochrane v Willis (1865-66) L.R. 1 Ch. App. 58, CA in Chancery	12-009
Cohen v Roche [1927] 1 K.B. 169, KBD	17-004
Coldunell v Gallon [1986] Q.B. 1184; [1986] 2 W.L.R. 466, CA (Civ Div)	13-036
Collen v Wright, 120 E.R. 241; (1857) 8 El. & Bl. 647, Ex Chamber	8-029
Collins v Godefroy (1831) 1 B. & Ad. 950	4-018
Combe v Combe; sub nom. Coombe v Coombe [1951] 2 K.B. 215; [1951] 1 All E.R. 767, CA	4-044
Commercial Bank of Australia Ltd v Amadio (1983) 151 C.L.R. 447	13-033
Commercial Plastics Ltd v Vincent [1965] 1 Q.B. 623; [1964] 3 W.L.R. 820, CA	15-006, 15-010
Commission for the New Towns v Cooper (Great Britain) Ltd (formerly Coopind UK); sub nom. Milton Keynes Development Corp v Cooper (Great Britain) [1995] Ch. 259; [1995] 2 W.L.R. 677, CA (Civ Div)	5-008, 12-049
Commonwealth of Australia v Verwayen (1990) 170 C.L.R. 394	4-050
Compagnie Noga d'Importation et d'Exportation SA v Abacha (No.4) [2003] EWCA Civ 1100; [2003] 2 All E.R. (Comm) 915	4-023
Condor v The Barron Knights Ltd [1966] 1 W.L.R. 87; (1966) 110 S.J. 71, Assizes	10-006
Cook v Lister (1863) 13 C.B. (N.S.) 543	4-032
Cooper v Phibbs (1867) L.R. 2 H.L. 149, HL	12-009, 12-017, 12-019
Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] A.C. 1; [1997] 2 W.L.R. 898, HL	17-007
Cope v Rowlands, 150 E.R. 707; (1836) 2 M. & W. 149, Ex Ct	14-004
Corpe v Overton (1833) 10 Bing. 252	5-019
Couchman v Hill [1947] K.B. 554; [1947] 1 All E.R. 103, CA	6-004
Couldery v Bartrum (1881-82) L.R. 19 Ch. D. 394, CA	4-047
Courtney & Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd; sub nom. Courtney & Fairburn v Tolaini Bros (Hotels) [1975] 1 W.L.R. 297; [1975] 1 All E.R. 716, CA (Civ Div)	3-003, 3-004
Coutts & Co v Browne Lecky [1947] K.B. 104; [1946] 2 All E.R. 207, KBD	5-024
Couturier v Hastie, 10 E.R. 1065; (1856) 5 H.L. Cas. 673, QB	5-012, 12-006, 12-007, 12-008
Cowan v Milburn (1867) L.R. 2 Ex. 230	14-034
Coward v Motor Insurers Bureau [1963] 1 Q.B. 259; [1962] 2 W.L.R. 663, CA	3-019
Cowern v Nield [1912] 2 K.B. 419, KBD	5-018
Cox v Phillips Industries Ltd [1976] 1 W.L.R. 638; [1976] 3 All E.R. 161, QBD	16-018
Crabb v Arun DC [1976] Ch. 179; [1975] 3 W.L.R. 847, CA (Civ Div)	4-044
Craddock Bros Ltd v Hunt [1923] 2 Ch. 136, CA	12-045, 12-047
Craven Ellis v Canons Ltd [1936] 2 K.B. 403, CA	17-025

Credit Lyonnais Bank Nederland NV v Burch [1997] 1 All E.R. 144; [1996] 5 Bank. L.R. 233, CA (Civ Div).....	13-032, 13-039, 13-042, 13-044
Cremdean Properties v Nash (1977) 244 E.G. 547, CA (Civ Div).....	11-047, 11-050
Cresswell v Potter [1978] 1 W.L.R. 255, Ch D.....	13-033
Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd; sub nom. Leighton's Investment Trust Ltd v Cricklewood Property & Investment Trust Ltd [1945] A.C. 221; [1945] 1 All E.R. 252, HL.....	10-011, 10-017
Cullinane v British Rema Manufacturing Co Ltd [1954] 1 Q.B. 292; [1953] 3 W.L.R. 923, CA.....	16-004
Cumming v Ince (1847) 11 Q.B. 112.....	13-003
Cundy v Lindsay; sub nom. Lindsay v Cundy (1877-78) L.R. 3 App. Cas. 459; [1874-80] All E.R. Rep. 1149, HL.....	2-002, 12-029, 12-030, 12-032, 12-035
Currie v Misa. <i>See</i> Misa v Currie	
Curtis v Chemical Cleaning & Dyeing Co [1951] 1 K.B. 805; [1951] 1 All E.R. 631, CA.....	7-005, 7-037
Cutter v Powell (1795) 6 T.R. 320.....	9-002, 9-003
DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo Services ASA [2000] B.L.R. 530, QBD (Comm).....	13-008
D&C Builders Ltd v Rees [1966] 2 Q.B. 617; [1966] 2 W.L.R. 288, CA.....	4-030, 4-034, 4-043, 4-046
D&F Estates Ltd v Church Commissioners for England [1989] A.C. 177; [1988] 3 W.L.R. 368, HL.....	8-037
Dann v Curzon (1911) 104 L.T. 66.....	14-011
Darlington BC v Wiltshier Northern Ltd [1995] 1 W.L.R. 68; [1995] 3 All E.R. 895, CA (Civ Div).....	8-005, 8-019
Daulia Ltd v Four Millbank Nominees Ltd [1978] Ch. 231; [1978] 2 W.L.R. 621, CA (Civ Div).....	2-058
Davies v Taylor [1974] A.C. 207; [1972] 3 W.L.R. 801, HL.....	16-014
Davis Contractors v Fareham Urban DC [1956] A.C. 696; [1956] 3 W.L.R. 37, HL.....	10-003, 10-014, 10-017
De Bernardy v Harding (1835) 8 Exch. 822.....	9-006
De Francesco v Barnum (1890) L.R. 45 Ch. D. 430, Ch D.....	5-017
De la Bere v Pearson Ltd [1908] 1 K.B. 280, CA.....	4-014
De Lassalle v Guildford [1901] 2 K.B. 215, CA.....	6-015
De Mattos v Gibson, 45 E.R. 108; (1858) 4 De G. & J. 276, QB.....	8-033, 8-034
De Meza & Stuart v Apple van Straten Shena & Stone [1975] 1 Lloyd's Rep. 498, CA (Civ Div).....	16-042
De Molestina v Ponton [2002] EWHC 2413 (Comm).....	11-034
De Wutz v Hendricks (1824) 2 Bing. 314.....	14-023
Deepak Fertilisers & Petrochemicals Corp Ltd v Davy McKee (London) Ltd; sub nom. Deepak Fertilisers & Petrochemicals Corp Ltd v ICI Chemicals & Polymers Ltd; Deepak Fertilisers & Petrochemical Corp Ltd v Davy McKee (UK) London Ltd [1999] 1 All E.R. (Comm.) 69; [1999] 1 Lloyd's Rep. 387, CA (Civ Div).....	6-006
Denny Mott & Dickson Ltd v James B Fraser & Co Ltd; sub nom. James B Fraser & Co Ltd v Denny Mott & Dickson Ltd [1944] A.C. 265; 1944 S.C. (H.L.) 35, HL.....	10-008
Derry v Peek; sub nom. Peek v Derry (1889) L.R. 14 App. Cas. 337; (1889) 5 T.L.R. 625, HL.....	11-021
Diana Prosperity, The. <i>See</i> Reardon Smith Line Ltd v Hansen-Tangen	
Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 1 W.L.R. 623; [1965] 2 All E.R. 65, CA.....	6-012, 6-013
Dickinson v Dodds (1875-76) L.R. 2 Ch. D. 463, CA (Civ Div).....	2-055
Diggle v Higgs (1876-77) L.R. 2 Ex. D. 422, CA.....	14-008
Dimmock v Hallett (1866-67) L.R. 2 Ch. App. 21; (1866) 12 Jur. N.S. 953, CA in Chancery.....	11-010
Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No.2) [1992] 2 A.C. 152; [1991] 3 W.L.R. 875, HL.....	13-006, 13-009
Director General of Fair Trading v First National Bank Plc [2001] UKHL 52; [2002] 1 A.C. 481; [2001] 3 W.L.R. 1297, HL.....	7-068, 7-069, 7-071
Doleman & Sons v Ossett Corp [1912] 3 K.B. 257, CA.....	14-015
Donoghue v Stevenson; sub nom. McAlister v Stevenson [1932] A.C. 562; 1932 S.C. (H.L.) 31, HL.....	8-036
Downs v Chappell; Downs v Stephenson Smart [1997] 1 W.L.R. 426; [1996] 3 All E.R. 344, CA (Civ Div).....	11-018
Doyle v Olby (Ironmongers) Ltd [1969] 2 Q.B. 158; [1969] 2 W.L.R. 673, CA (Civ Div).....	11-038, 11-039, 11-040
Doyle v White City Stadium Ltd [1935] 1 K.B. 110, CA.....	5-017
Drew v Daniel; sub nom. Daniel v Drew [2005] EWCA Civ 507; [2005] 2 F.C.R. 365; [2005] W.T.L.R. 807.....	13-018
Duffen v FRA BO SpA (No.2); sub nom. Duffen v Frabo SpA (No.2) [2000] 1 Lloyd's Rep. 180; [2000] E.C.C. 61, CC.....	16-047
Dungate v Dungate [1965] 1 W.L.R. 1477; [1965] 3 All E.R. 818, CA.....	17-034
Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] A.C. 79, HL.....	16-046, 16-047
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] A.C. 847, HL.....	4-002, 4-009, 8-003, 8-004
Dunlop v Higgins, 9 E.R. 805; (1848) 1 H.L. Cas. 381, QB.....	2-043
Dunlop v Lambert (1839) 6 Cl. & F. 600.....	8-018
Dunmore (Countess) v Alexander (1830) 9 S. 190.....	2-048

Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd [1968] 2 Q.B. 839; [1968] 3 W.L.R. 225, QBD (Comm)	4-040
Dynamic, The. <i>See</i> Ocean Marine Navigation Ltd v Koch Carbon Inc	
EIC Services Ltd v Phipps [2004] EWCA Civ 1069; [2005] 1 W.L.R. 1377; [2005] 1 All E.R. 338	12-015
East v Maurer [1991] 1 W.L.R. 461; [1991] 2 All E.R. 733, CA (Civ Div).....	11-039
Eastes v Russ [1914] 1 Ch. 468, CA.....	15-006
Eastham v Newcastle United Football Club [1964] Ch. 413; [1963] 3 W.L.R. 574, Ch D.....	15-005
Eastwood v Kenyon (1840) 11 Ad. & E. 438	4-004, 4-016, 5-010
Eccay v Godfrey (1947) 80 Ll. L. Rep. 286, KBD	6-010
Economides v Commercial Union Assurance Co Plc [1998] Q.B. 587; [1997] 3 W.L.R. 1066, CA (Civ Div)	11-005
Edgington v Fitzmaurice (1885) L.R. 29 Ch. D. 459, CA.....	11-004, 11-007, 11-018, 11-019
Edmonds v Lawson; sub nom. Edmunds v Lawson [2000] Q.B. 501; [2000] 2 W.L.R. 1091, CA (Civ Div).....	3-022
Edwards v Carter; sub nom. Carter v Silber; Carter v Hasluck; Edwards v Earl of Lisburne [1893] A.C. 360, HL	5-019
Edwards v Skyways [1964] 1 W.L.R. 349; [1964] 1 All E.R. 494, QBD	3-021, 3-022
Eliason v Henshaw (1819) 4 Wheat. 225, Sup Ct (US)	2-040
Elpis Maritime Co v Marti Chartering Co (The Maria D) [1992] 1 A.C. 21; [1991] 3 W.L.R. 330, HL	5-009
Elton Cop Dyeing Co v Broadbent & Son (1920) 89 L.J. K.B. 186	9-020
English Hop Growers v Dering; sub nom. English Hop Growers Ltd v Dering [1928] 2 K.B. 174, CA.....	15-014
Entores Ltd v Miles Far East Corp; sub nom. Newcomb v De Roos [1955] 2 Q.B. 327; [1955] 3 W.L.R. 48, CA	2-033, 2-036, 2-049
Equitable Life Assurance Society v Hyman [2002] 1 A.C. 408; [2000] 3 W.L.R. 529, HL	6-025
Erlanger v New Sombrero Phosphate Co; sub nom. New Sombrero Phosphate Co v Erlanger (1877-78) L.R. 3 App. Cas. 1218, HL	11-034
Ernest Beck & Co v K Szymanowski & Co; sub nom. Szymonowski & Co v Beck & Co [1924] A.C. 43; (1923-24) 17 Ll. L. Rep. 97, HL	7-023
Errington v Errington and Woods [1952] 1 K.B. 290; [1952] 1 All E.R. 149, CA.....	2-057
Ertel Bieber & Co v Rio Tinto Co Ltd; Dynamit AG (Vormals Alfred Nobel Co) v Rio Tinto Co Ltd; Vereingte Koenigs v Rio Tinto Co Ltd [1918] A.C. 260, HL	14-022
Esso Petroleum Co v Customs and Excise Commissioners [1976] 1 W.L.R. 1; [1976] 1 All E.R. 117, HL	3-025
Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] A.C. 269; [1967] 2 W.L.R. 871, HL.....	15-002, 15-016, 15-017
Esso Petroleum Co Ltd v Mardon [1976] Q.B. 801; [1976] 2 W.L.R. 583, CA (Civ Div).....	6-017, 11-005, 11-023
Esso Petroleum Co Ltd v Niad Ltd [2001] EWHC 458 (Ch).....	16-009, 16-010
Eugenia, The. <i>See</i> Ocean Tramp Tankers Corp v V/O Sovfracht	
Eurymedon, The. <i>See</i> New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd	
Everet v Williams, unreported, 1725	14-011, 14-029
Evia Luck, The. <i>See</i> Dimskal Shipping Co SA v International Transport Workers Federation	
Experience Hendrix LLC v PPX Enterprises Inc [2003] EWCA Civ 323; [2003] 1 All E.R. (Comm) 830; [2003] E.M.L.R. 25.....	16-009, 16-010
Export Credits Guarantee Department v Universal Oil Products Co [1983] 1 W.L.R. 399; [1983] 2 All E.R. 205, HL.....	16-047, 16-049
Exxonmobil Sales & Supply Corp v Texaco Ltd [2003] EWHC 1964 (Comm); [2004] 1 All E.R. (Comm) 435; [2003] 2 Lloyd's Rep. 686	6-020
FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd [1916] 2 A.C. 397, HL..	10-003, 10-008
FW Moore & Co Ltd v Landauer & Co; sub nom. Arbitration Between Moore & Co Ltd and Landauer & Co Re [1921] 2 K.B. 519; (1921) 6 Ll. L. Rep. 384, CA.....	6-045, 9-002
Fairclough Building Ltd v Port Talbot BC (1993) 62 B.L.R. 82; 33 Con. L.R. 24, CA (Civ Div)	2-018
Fairline Shipping Corp v Adamson [1975] Q.B. 180; [1974] 2 W.L.R. 824, QBD.....	2-039
Falcke v Gray (1859) 4 Drew. 651	17-004
Farley v Skinner (No.2); sub nom. Skinner v Farley [2001] UKHL 49; [2002] 2 A.C. 732; [2001] 3 W.L.R. 899	16-020, 16-021, 16-022, 16-023, 16-050
Fawcett v Smethurst (1914) L.J.K.B. 473.....	5-016, 5-021
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