The Role of Equity in the Law of Contract

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1. Introduction

The interaction of contract law and Equity is a complex subject which can be approached from a number of perspectives. For the purposes of my lecture this evening I will be highlighting three of these: first, the moral visions which Equity and the law of contract draw on, respectively; secondly, the different functions they fulfil within the legal system as a whole; and thirdly the perspective given by consideration of equitable remedies in respect of contracts.

For contract law, the primary moral vision to which it gives expression is that of promise-keeping.[1] However, there is also a strand involving protection in relation to detrimental reliance, as Patrick Atiyah has emphasised.[2]

The morality of promise-keeping focuses on the subjective consent of the promise-maker to be bound to act in a particular way. In the history of contract law it is associated with the reception in English law of what is known as 'will theory' from the 1820s. Borrowed from the French writer Pothier, the idea is that contracts are formed by a meeting of wills.[3] If a person has knowingly and deliberately promised to do something, it seems just to hold them to that promise. I will develop this point in what follows.

However, this idea is in tension to a degree with the function that contract law fulfils. It is in essence a facilitative regime that enables people to plan their affairs with a reasonable level of certainty. There is a forward-looking and a backward-looking aspect to this. 'In the forward-looking perspective … people are buying and selling, making commitments for the future, planning for possible gains and possible setbacks, and transferring property or arranging for its future transfer'.[4] The law should help them to do this.

It also has to be backward looking so that when disputes arise they can be resolved with a minimum of difficulty. The forward-looking rules 'must generally hold up if there is ever an ex post dispute', in circumstances where subsequent litigation 'is likely to involve disputed facts, moral ambiguity, and conflicting memories and points of view'.[5] As Steve Hedley points out, 'Practical certainty and

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1 A well-known example in the literature is C. Fried, *Contract as Promise* (2nd edn, 2015 OUP).

2 P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979 OUP).

3 W. Swain, 'The Law of Contract, Interpretation and the "Great Object" [2026] CLJ 255, 269-273.

4 See S. Hedley, 'Unjust Enrichment' in W. Swain and S. Peari (eds), *Rethinking Unjust Enrichment* (2023), 276.

5 Ibid.

security of transaction strongly urge that, *ex ante*, it must be relatively easy to transact, to minimize any risk that the transaction will subsequently be thought improper or unjust' and 'The grounds for upsetting transactions must be relatively narrow'; he calls this 'the primacy of the *ex ante*'.[6]

Given the scope for argument and difficulties of evidence about what a person subjectively understood their promise to mean, the functional aspect of contract law requires a simpler approach to interpretation, in particular. The requirement of practical certainty in the operation of the relevant rules underlies the objective approach to interpretation of contracts. So does the strand of thinking based on protection in relation to detrimental reliance.

The moral vision underlying Equity is broader. It draws on the idea of unconscionability in dealings between people. This includes the unconscionability of breaking a promise but also covers wider social values associated with background ideas of fairness and justice in interpersonal dealings. For example, it is associated with the idea that a person should not trick another, take unfair advantage of them or lead them on to act unknowingly to their detriment.

The more disparate moral foundations of Equity imply that there is scope for it to operate by accommodating a range of normative considerations, varying according to context. And this is what we see happening in practice in its interactions with contract law. Sometimes Equity draws on the morality of promise-keeping. Sometimes it gives effect to normative considerations which are in tension with that, or which go beyond and supplement it. Accordingly, it is vain to look for a single overarching principle to explain all forms of such interactions.

The functional perspective in relation to Equity is different as well. Two points can be made about this. First, given the clarity required in the forward-looking rules to enable practical planning, they tend to operate in ways which are relatively broad-brush, bright line and lacking in moral refinement. As Hedley says, '*ex ante* the law largely goes by rather crude and external criteria – whether certain documents were made and formally assented to, whether certain words were spoken'.[7] The relative crudeness of the *ex ante* rules means that in some circumstances their strict application could lead to what may be perceived to be unjust results, judged by the wider values underlying unconscionability. Equity is a body of doctrine that operates to avoid these effects. It tends to operate by reference to flexible standards rather than strict rules, and for that reason tends to have a backward-looking or *ex post* aspect which takes account of all the circumstances that have arisen after the underlying transaction was entered into.

This reflects an insight from Aristotle about how the application of clear rules laid down in advance can come adrift from a sense of what justice requires in a given situation.[8] Aristotle wrote that 'the very nature of what is equitable [is] a correction of law, where it is deficient owing to its universality'.[9] This idea was captured in the classic statement by Lord Ellesmere in the *Earl of Oxford's* case.[10] Lord Ellesmere explained that men's actions are infinitely diverse and observed that 'it is impossible to make any general Law which will aptly meet with every particular Act, and

[6] Ibid.
[7] Ibid.
[8] Aristotle, *Nicomachean Ethics* (R. Crisp (ed., tr.), rev ed. 2014, CUP) Book V ch 10; Richard A Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (1961 Stanford University Press), Ch. 10.
[9] Aristotle, (n 8), 98 (Book V ch 10, paras 27-28).
[10] (1615) 1 Ch Rep. 1, 6-7; 21 ER 485, 486.

not fail in some circumstances'. He noted that Equity exists 'to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law'.

Modern scholars have pointed out how this mollifying effect of Equity in light of a wider concept of justice helps to secure the overall legitimacy of the law. Equity is a sort of safety valve which makes it easier to sustain and enforce in the majority of situations the clear bright-line rules which serve the *ex ante* function of the law.[11]

The second functional point about Equity's role in modifying the clear *ex ante* rules of contract law (and other rules of law) is that it has to be kept within fairly strict bounds, since otherwise the departures it permits from the enforcement of those rules would overwhelm the rules themselves and inappropriately undermine their proper function. As Hedley puts it, 'Any legal system will recognize *some* cases where a properly conducted transaction will not settle the parties' legal rights in quite the way it was meant to; but it will always insist that a strong case be made out before the transaction is disrupted'.[12] He adds, 'Legal transactions or their effects may be questioned *ex post* on a variety of grounds, but the courts are rightly careful to make sure that these grounds are sufficiently narrow to facilitate *ex ante* planning'.[13]

Hedley emphasises that the rules of a core legal institution such as contract may be 'clearly productive of injustice in some instances, but the injustice is not one that can sensibly be addressed through the core institution itself'.[14] This means that the rules of Equity operate around the fringes of the general law of contract and only at points where the normative justification for a departure from the straightforward application of that law is particularly strong. The doctrines of Equity have developed in pockets to address a range of disparate situations where that is the case. In the interests of legal certainty from an *ex ante* perspective English law has eschewed general doctrines of good faith or abuse of rights which are features of civilian systems.

The American scholar Henry Smith describes Equity as a form of 'meta-law' and puts it this way:

> '… all legal systems have to address different audiences, combine elements of formalism and contextualism, achieve some generality without exploitation and unfairness, and keep things humming while being ready for the unexpected. Meta-law should be part of the toolkit for addressing these questions, and the fragments of equity can be reassembled to do the job.'[15]

The conceptual framework I have set out so far is relevant to the substantive rights created by contracts. I also want to emphasise that it is relevant from the perspective provided by consideration of remedies which Equity provides in relation to contract. Here, Equity supplements the contract rights which exist at common law, not this time to moderate their application but rather to enforce them with more powerful effect through specific performance and injunctive

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[11] See, e.g., Irit Samet, *Equity: Conscience Goes to Market* (2018); B. McFarlane, 'Equity and the Justification of Private Rights' in S. Degeling, M. Crawford and N. Tiverios (eds), *Justifying Private Rights* (2020).
[12] Hedley, (n 4), 276.
[13] Hedley, (n 4), 277.
[14] Hedley, (n 4), 281. His essay focuses on how the law of restitution operates, but he draws a parallel with the way in which Equity operates.
[15] H. Smith, 'Equity as Meta-Law' (2021) 130 Yale LJ 1050, 1135.

relief where justice requires this. The orders are backed up by the penal powers of the court in relation to contempt of court. However, precisely because of the powerful effect of those orders, Equity again is careful to operate having regard to all the circumstances that have arisen down to the time of the court proceedings. Such orders will not be granted if their practical effect will be to give the party in whose favour they operate something beyond the contract rights to which they refer.

In this context also, therefore, Equity is concerned to work overall justice looking at things *ex post*. Equity recognises that the contract terms agreed by the parties *ex ante* cannot be taken to have addressed all the factual permutations which might arise and be relevant to a just outcome. Equity looks beyond the normative horizon established by the contract itself and works justice according to the wider moral vision according to which it operates.

2. Equity and Contract as Categories

Equity and contract are legal categories. Both terms describe groups of laws which share a unifying feature. However, they are different kinds of legal category.[16] The unifying feature of the laws typically described as equitable is of a different kind from the unifying feature of the law of contract.[17]

The equitable rules and principles are united by their shared distinctive history rather than a single normative idea.[18] Maitland said that Equity 'is a collection of appendixes between which there is no very close connection'.[19] It is therefore 'not at all surprising … [that] Equity is concerned to implement multiple normative principles'.[20] The origins of Equity as a legal category lie in the division between the common law in its narrow technical sense and Equity. Equity was born in the fourteenth century and developed out of the jurisdiction of the Lord Chancellors to issue specific forms of remedy.[21] This jurisdiction came to be exercised according to general principles which in turn came to imply certain substantive rights in the areas around the fringe of the common law where those principles found application.

For this reason, it cannot be suggested that there is only one way in which Equity relates to contract. The flexibility of equitable doctrine and the generality of its moral foundations - and, it may be added, the extremely broad scope of contract law as a central legal institution by which people order their affairs - means that Equity has the potential to intervene to correct the effects of application of standard rules of contract law in a number of different and unrelated contexts

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[16] A point made by R. Stevens, in 'Equity and Contract' (presentation at conference on 'Chitty at 200 – Contract Law: Past, Present and Future', UCL, June 2026).
[17] On distinguishing legal categories by their unifying feature, see R. Stevens, *The Laws of Restitution* (2023, OUP), 22.
[18] For example, Lionel Smith has explained that "it is impossible to posit a single normative idea that underlies all of Equity". L. Smith, 'Equity is not a Single Thing' in D. Klimchuk, I. Samet and H. E. Smith (eds.), *Philosophical Foundations of the Law of Equity* (2020, OUP), 146.
[19] F.W. Maitland, *Equity; Also, the Forms of Action at Common Law: Two Courses of Lectures* (A.H. Chaytor and W.J. Whittaker (eds.), 1929, CUP), 19.
[20] L. Smith (n 18), 146.
[21] See Maitland (n 19), 1: 'Equity now is that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would be administered only by those courts which would be known as the Courts of Equity'.

and for a number of different normative reasons. As I will show, in some contexts Equity does this by linking results back to the moral foundation of contract law where departure from that foundation is unjustified. This is the focus of my lecture.

The law of contract, on the other hand, is a conceptual category.[22] It is united by its focus on a single subject: contracts. Treitel provides a helpful definition of a contract as:

> "an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties."[23]

The fact that contract and Equity are different kinds of category has important consequences for understanding the relationship between the two. They are capable of overlapping and are not mutually exclusive categories. A law can have been developed in the Courts of Chancery and relate to agreements giving rise to obligations.

It is necessary to identify those specific areas where contract and Equity overlap so that the interface between them can be analysed.[24] This could include, for example, an analysis of the interactions between contracts and fiduciary obligations. Fiduciary obligations form part of the law of Equity but they do not form part of the law of contract. As I have explained elsewhere, "Equity imposes fiduciary obligations for reasons which are normatively independent of contract".[25]

3. The Role of Equity in Relation to Contract

In light of this discussion, I can focus on the role of Equity in the law of contract. Equity operates as a targeted and specific set of corrective principles in relation to the law of contract as it exists in the common law and as supplemented by statute, for example by formalities requirements stipulated by statute. Time does not allow me to present a comprehensive account. Textbooks exist for that. Instead, I will refer to four particular cases: (i) rectification for common mistake; (ii) fraud on a power; (iii) relief from forfeiture; and (iv) and specific performance.

One strand in the interaction of Equity and the law of contract is that Equity can have the function of bringing the operation of the law of contract into line with its normative foundation in the agreement of the parties in circumstances where contract law, through the application of clear *ex ante* rules, produces results which unjustifiably depart from that foundation. Rectification is a good example of this.

The rules of contract law are best understood as the result of a compromise between the normative foundation of contract in promise and various other considerations which aim to make the law workable and effective in practice. As a result, in certain circumstances, strict reliance on those rules leads to consequences which are inconsistent with the law of contract's underlying

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[22] Stevens (n 16).

[23] E. Peel, *Treitel on the Law of Contract*, 16th ed. (2025, Sweet & Maxwell), [1-001].

[24] I have previously considered this topic: P. Sales, 'The Interface between Contract and Equity' (Lehane Memorial Lecture, Sydney, 28 August 2019); P. Sales, "Proprietary Estoppel: Great Expectations and Detrimental Reliance" in N. Mrockova, A. Nair and L. Rostill (eds.), *Modern Studies in Property Law, Volume 12* (2025, Hart Publishing).

[25] P. Sales, 'The Interface between Contract and Equity' (n 24), 15.

foundation in the parties' agreement. In some circumstances, the approach of contract law is justifiable, bearing in mind the importance of the facilitative *ex ante* nature of its rules; in others, it is not. Equity steps in as a corrective when the common law's departure from contract law's foundation in the agreement of the parties cannot be justified. In those circumstances, Equity replaces the result at common law with a result which is consistent with that fundamental normative foundation. This is an example of Equity's legitimation function of keeping the results in cases broadly in line with the demands of accepted morality.[26]

To explain this further I will first develop my discussion of the normative foundations of contract law. Then I will examine the four types of equitable intervention I have mentioned. My aim is to show that the interaction between contract law and Equity allows for the creation of a system of law that is both practically workable and consistent with the underlying normative justification for the recognition of binding contractual obligations.

4. The Moral Foundations of Contract Law

There has been much discussion in the academic literature of the moral foundations of contract law.[27] For present purposes, I highlight two aspects of that discussion. The first is that free consent of the parties to the contract is the foundation and justification for contractual obligations.[28] Some theorists emphasise the promissory aspect of contract and others place greater weight on a contract being an agreement between the parties.[29] But the differences between these views 'is not generally significant when evaluating general theories of contract'.[30] The key point is that it is justifiable to hold parties to contractual obligations because the parties have agreed to undertake those obligations. This justification is rooted in the intentions of the parties, which appears to imply a subjective approach to identifying when contractual obligations arise.

The second point, however, is that the law of contract does not fully reflect this normative foundation. The rules of contract law are a compromise between its normative foundation in the agreement of the parties and other considerations.[31] The reasons for this are both historical and practical.

The law of contract developed out of the historical forms of action. These were distinct and were not treated as being united by any single normative foundation.[32] In the nineteenth century an effort was made to do just that and to conceive of contract law as a science. The judiciary and the treatise writers increasingly sought to give coherence to the body of law comprised in the disparate

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[26] I. Samet, *Equity: Conscience Goes to Market* (2018), ch 1.
[27] See, for example, S. Smith, *Contract Theory* (2004, OUP); C. Fried, *Contract as Promise* (2nd ed. 2015, OUP); M. Chen-Wishart and P. Saprai (eds.), *Research Handbook on the Philosophy of Contract Law* (2025, Edward Elgar Publishing). Cf J. Morgan, *Contract Law Minimalism* (2013, CUP), Chapter 1 for an argument that contract law does not have a moral foundation.
[28] P. Sales, "Contractual Interpretation: Antinomies and Boundaries" in E. Peel and R. Probert (eds.), *Shaping the Law of Obligations* (2023, OUP), 153. Leading discussions of this include S. Smith (n 27) and Fried (n 1).
[29] For a range of views, see the chapters in Part 1: Theoretical Approaches in G. Klass, G Letsas and P. Saprai (eds.), *Philosophical Foundations of Contract Law* (2014, OUP).
[30] L. Smith (n 18), 57.
[31] J. Wightman, *Contract: A Critical Commentary* (1996, Pluto Press), 75-78.
[32] D. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999, OUP), 215

forms of action. Coherence grew from the adoption of Pothier's will theory,[33] which focused on the meeting of the parties' minds.[34]

However, difficulties arose because the judiciary attempted to transpose the will theory onto the existing rules of the common law. They sought to use will theory to explain the law of contract as it was, rather than reforming the law to fit theory more accurately.[35] This could be justified in terms of trying to mould doctrine so as to produce a reasonable degree of 'fit' with existing law and the expectations of the parties based on that law. But as a result contract law contains rules, such as the requirement for consideration, which predate the adoption of the will theory and are inconsistent with it.

A second obstacle to the wholesale adoption of the will theory was practical. As Ibbetson has explained:

> 'All too often it might occur that what appeared to be a perfect agreement concealed a more ragged mixture of things on which the parties agreed, things on which they disagreed, and things to which one or both of them had given no thought.'[36]

It was not possible to create a workable law of contract which rested solely on the true subjective agreement of the parties. Such a law of contract would result in many attempts to contract failing for a lack of agreement. The *ex ante* facilitative function of contract law would be badly undermined. Instead, to minimise problems of evidential uncertainty, contract law imposes formalities requirements in various contexts and operates with an objective approach to interpretation of contractual obligations.[37]

Accordingly, for historical and practical reasons the law of contract does not map precisely onto the primary moral foundation for treating contractual obligations as binding in law, which is the subjective consent of the parties. Contract doctrine may result in departures from that foundation in particular cases. Equity steps in to correct this in certain limited cases where the justification for such departure is very weak. Rectification is an example of this.

5. Rectification for Common Mistake

My first case study is the equitable remedy of rectification of a document recording a contract on the basis that there has been a common mistake. In *Chartbrook Ltd v Persimmon Homes Ltd*[38] Lord Hoffmann controversially stated, obiter, that rectification for a common mistake could be ordered when a reasonable person would consider the parties to be mistaken about the terms of the contract, even if one of the parties was not actually making a mistake.[39] That statement was

[33] Pothier's book *Le Traité des obligations* was translated into English in 1806. See W. D. Evans*, A Treatise on the Law of Obligations or Contract by M, Pothier* (1806, A. Strahan).
[34] Ibbetson (n 32), 220; W. Swain (n 3).
[35] Ibbetson (n 32), 221.
[36] Ibid., 221. See, to similar effect, *Barton v Morris* [2023] UKSC 3, [127]-[128] (Lord Leggatt).
[37] *Arnold v Britton* [2015] UKSC 35, [15] (Lord Neuberger); and see Sales (n 25). It is notable that even civilian legal systems which are more closely aligned with Pothier's theory resort to an objective approach to interpretation if the actual agreement of the parties cannot be discerned: see e.g. Art 1188 of the French *Code Civil.*
[38] [2009] UKHL 38, [2009] 1 AC 1101.
[39] Ibid., [60].

followed, albeit without any argument, by the Court of Appeal in *Daventry District Council v Daventry & District Housing Association Ltd*.[40]

However, the law did not rest there. In the *FSHC Group Holdings* case the Court of Appeal clarified the position.[41] Leggatt LJ referred to the two situations where rectification could be ordered on the ground of common mistake, saying that it has to be shown:

> '(1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record.'[42]

In the first scenario, the question for the court is whether the objective meaning of the prior concluded contract is the same as the objective meaning of the document purporting to give effect to that contract.[43] In the second, the question is whether the objective meaning of the document recording the parties' common intention accurately expresses the actual subjective common intention of the parties.[44] This approach to common mistake rectification has been endorsed by the Supreme Court and the Privy Council.[45]

The first scenario is straightforward. It is an example of equitable relief to give effect to the contractual rights which the parties objectively intended should be recorded in the text of their agreement. The second scenario is an example of the corrective function of Equity, departing from the common law of contract in a limited and highly targeted way.

At common law, an objective approach to contractual interpretation applies, as Lord Neuberger explained in the leading case of *Arnold v Britton*:

> 'when interpreting a contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean".'[46]

The court is concerned with what a reasonable party would understand the parties to have intended, *not* with what the parties actually intended. This makes it easier to uphold contracts and to work out what the content of a contractual obligation is, but is clearly a departure from the moral foundation of contract as located in the actual agreement or consent of the parties. The departure is justified in most cases[47] but inevitably comes with the concomitant risk that a party may be held to a contract which they did not actually intend to make.

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[40] [2011] EWCA Civ 1153, [2012] 1 WLR 1333.
[41] *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365.
[42] Ibid., [176].
[43] Ibid., [141].
[44] Ibid., [146].
[45] *National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passeneger Transport Executive T/A Nexus* [2024] UKSC 37, [2025] AC 1222, [31]; *Porter v Stokes* [2023] UKPC 11, [2023] 3 WLUK 519, [43].
[46] *Arnold v Britton* [2015] UKSC 35, [2016] AC 76, [15] (Lord Neuberger) citing *Chartbrook* (n 38), [14] (Lord Hoffmann).
[47] It is one of the greatest strengths of English commercial law that it operates in this way: G. Leggatt, "Making Sense of Contracts: The Rational Choice Theory" (2015) 131 LQR 454, 475.

Two important justifications for this objective approach to interpretation should be emphasised. The first was famously stated by Blackburn J in *Smith v Hughes*:

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.'[48]

The objective approach protects reasonable reliance on the conduct and words of the other party. In this way it promotes predictability within the law and assists parties to plan their affairs.[49]

The second justification for the objective approach is that 'it facilitates contractual ventures by giving content to contractual obligations even in circumstances which the parties did not specifically envisage'.[50] If the common law was concerned only with enforcing the actual common intentions of the parties, judged subjectively, then in many, if not most cases, the court would have to conclude that there was no enforceable agreement, either because the parties each had different intentions relating to the situation in question or because the parties had no intention relating to that situation.[51] Apparent contracts would be rendered precarious. Such an approach would greatly reduce the utility of contract law as a tool for people to use in planning their affairs.

However, Equity's intervention in the second scenario of common mistake rectification is justified. In circumstances where this type of rectification is available, it has been shown that the parties did have an actual common intention as to how their contract should be applied in the situation which has arisen and that this actual common intention is different from the objective meaning of their contract. There is then no good reason to hold the parties to the objective meaning of their contract, instead of their actual agreement: the justifications for the objective approach to interpretation 'lose their force' in these circumstances.[52] In such a case there is no need to follow that approach to protect either party's reasonable reliance. The parties have a shared understanding and there is no risk of one party having gained a reasonable, but incorrect, understanding from the other party's conduct or words. Secondly, there is no need for the law of contract to give content to the parties' agreement in these circumstances. The parties had made an actual agreement about the situation which arose. In these circumstances, to apply the usual common law objective approach would involve an unjustifiable departure from the foundation of contract law in the parties' agreement.

Rectification responds to this by realigning the outcome with the parties' actual agreement. As Leggatt LJ explained in *FSHC*:

> 'The effect of rectification is not merely to prevent a party from enforcing the written terms of a contract: it is to alter those terms so as to establish legal rights and obligations which differ from those recorded in the original contractual document.'[53]

[48] (1871) LR 6 QB 597, 607.
[49] Sales (n 28), 153-154.
[50] Leggatt (n 47), 474.
[51] *Summit Investment Inc v British Steel Corp (The Sounion)* [1987] 1 Lloyd's Rep 230, 233 (Sir John Donaldson MR).
[52] *FSHC* (n 41), [151] (Leggatt LJ).
[53] *FSHC* (n 41), [77].

Lord Wright observed in *Inland Revenue Commissioners v Raphael* that the terms are altered 'in order to give effect to the real intention' of the parties.[54] Rectification is concerned with giving effect to the parties' actual agreement, not merely with disabling one party from relying on the written text of the contract. In the very specific circumstances of the second scenario it brings the written text into line with the parties' subjective understanding of what they have agreed.

In those specific circumstances, the usual justifications for applying the objective approach to determine the meaning of a contract fall away, and to follow that approach would lead to results which unjustifiably depart from the basis of contract law in the parties' actual agreement. Accordingly, Equity applies an interpretation which reflects that actual agreement, tying the content of their obligations back to the most basic moral foundation of contract law.

6. *Fraud on a Power*[55]

I now turn from an equitable remedy (rectification) to two types of equitable protections.[56] The first is the doctrine of fraud on a power. Under this doctrine, Equity renders void an exercise of a discretionary power, which is within the ostensible scope of that power, on the grounds that the power has been exercised for an improper purpose. This doctrine is an element of Equity's control of the use of fiduciary powers.[57] It applies to contractual discretions where the contract also creates a fiduciary relationship.[58]

Although at first sight this doctrine appears to contradict or undermine the contractual term which confers the discretion, on proper analysis it is an example of Equity acting to ensure that the discretion is used according to what the parties intended, using intention this time in an objective sense. Equity requires that the contractual power is used for a proper purpose. What constitutes a proper purpose for the exercise of the power is determined by reference to the intention, judged objectively, of the donor of the power.[59] In the case of a power conferred by contract, this means the contractual parties acting together to make their agreement.

Analysing the position in this way, the question arises whether in this context Equity is now really supplementing contract law at all, as distinct from directly reflecting it. The traditional view is that fraud on a power operates to bring the restrictions on the exercise of fiduciary powers incorporated into a contract into line with the parties' agreement in circumstances where this result cannot be achieved by the common law approach to interpretation and the implication of terms. On this

[54] *Inland Revenue Commissioners v Raphael* [1935] AC 96, 143 (Lord Wright).
[55] I have previously discussed this point at greater length: P Sales, 'Use of Powers for Proper Purposes in Private Law' (2020) 136 LQR 384.
[56] These are the categories used in S. Elliott KC (ed.), *Snell's Equity* (35th ed 2025, Sweet & Maxwell).
[57] I have previously argued that the restrictions on the exercises of purely contractual discretions can be justified in a similar way: P.S. Davies and P. Sales, 'Controlling Contract Discretions: *Wednesbury* Reasonableness, Good Faith and Proper Purposes' (2024) 140 LQR 106.
[58] For discussion of how and when a contract can give rise to a fiduciary relationship see Sales, 'The Interface between Contract and Equity' (n 24): a contract does not directly create a fiduciary relationship; instead, it may create a relationship which is then characterised by Equity as fiduciary.
[59] *Grand View Private Trust Co Ltd v Wen-Young Wong* [2022] UKPC 47, [2022] 12 WLUK 83, [61].

view, the doctrine of fraud on a power operates as a corrective to the common law of contract and instead aligns the position with the moral foundation of contract in the parties' agreement.

There used to be much to be said for this view. In the nineteenth century, the courts' approach to interpretation focused on the plain or literal meaning of the words used by the donor of a power or the parties to a contract.[60] This was based on artificial rules: certain words were conclusively presumed to have certain meanings, and these presumed meanings could not be displaced by reference to context or background.[61] While this approach was said to give effect to the parties' intention, it did not, in fact, give effect to that. As Ibbetson has explained, such supposed intention of the parties was a 'veneer' covering 'the complex rules of construction'.[62]

In the context of discretionary powers, the consequence of this approach was that a common law court could not rely on the purpose for which a discretionary power was granted in order to restrict the scope of the power. Only the literal meaning of the words creating the power affected its scope. Therefore, any exercise of the power which fell within this literal meaning was a valid *intra vires* exercise of the power. In this context, Equity developed the fraud on a power doctrine as a control on the exercise of discretionary powers which arose in a fiduciary relationship. This doctrine was based on a more sophisticated understanding of the donor's intention or the parties' bargain, which considered not only the literal words used to create the power, but also the context in and the purpose for which the power was created. The doctrine was a further example of equitable intervention to align outcomes with the intentions of the parties.

However, the law on interpretation of trust instruments and contracts has evolved significantly since this doctrine of fraud developed. The law on interpretation of contracts has discarded 'almost all the old intellectual baggage of "legal" interpretation'.[63] An important consequence of this change is that the purpose of a contractual clause now plays an important role in the interpretation of the clause in question.[64] As a result, courts now rely on the purpose for which a discretionary power was created to restrict the scope of the power as a matter of interpretation.

Due to these developments in the law regarding interpretation, it is open to doubt whether there is now any proper role for a distinct equitable doctrine of fraud on a power. The equitable doctrine appears to add nothing to the common law as the approach to interpretation of powers at common law is in essence the same. They are both directed towards the same object, namely determining the actual intentions of the donor or contractual parties, judged objectively, and depend upon the same evidence.

This point can be illustrated by analysing the decision of the Supreme Court in *Eclairs Group Ltd v JKX Oil and Gas Plc*.[65] It concerned a power of the directors of a company, arising from the articles of association, to restrict the exercise of rights attaching to shares in certain circumstances. This was a fiduciary power created by a contract. The directors used the power to block what they saw

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[60] P.S. Davies, *JC Smith's The Law of Contract* (3rd ed 2021, OUP), 167. The interpretation of equitable instruments was similarly strict: *Snell's Equity* (n 56), [10-017]. For discussion of the history of contractual interpretation and the shifting emphasis given to text and subjective intention of the parties, see Swain (n 3).
[61] L. Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553, 564-567.
[62] Ibbetson (n 32), 224.
[63] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann).
[64] *Arnold* (n 37), [15] (Lord Neuberger).
[65] [2015] UKSC 71; [2016] 3 All E.R. 641.

as an attempt by minority shareholders to take control of the company. The Supreme Court held that the directors acted for an improper purpose by doing this, with the result that the restriction imposed on the voting rights attached to the shares was invalid. Lord Sumption relied on the doctrine of fraud on a power, or the 'proper purpose rule' as he called it,[66] to control exercises of a power which are within 'the scope of the instrument creating it as a matter of construction or implication … but are done for an improper reason'.[67]

But one might think that ordinary interpretation of the power according to the modern approach would mean that such an exercise of the power could not be within the scope of the instrument as a matter of construction. Lord Sumption took the same approach to determining the purpose of the power as a court takes when determining the purpose of a clause as part of the ordinary process of interpretation. He said:

> "Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context."[68]

These factors are the same as those to which a court would have regard when identifying the purpose of a clause to interpret it. The approach to interpretation under the common law has changed so as to become more realistic,[69] which means that it is now equivalent to Equity's approach in this area. Whereas previously Equity intervened because the strict legal approach in contract law departed unjustifiably from a proper view of the intention of the parties, now both are aligned with that intention. Conversely, therefore, it is difficult to justify a separate equitable doctrine of fraud on a purpose.

7. Relief from forfeiture

My second example of a protective doctrine is relief from forfeiture. This doctrine prevents party A from using a contractual term intended to secure performance of party B's primary contractual obligation (a forfeiture provision) to impose an unjustifiable detriment on party B for party A's benefit.[70] As explained in the *Manchester Ship Canal* case, there are two main conditions on the court's jurisdiction to grant relief from forfeiture: (i) 'the forfeiture provision in question should have been conferred by way of security for the enforcement of some lesser primary obligation such as, but not limited to, the payment of money';[71] and (ii) the forfeiture clause must have the effect of denying the party seeking the relief a proprietary or possessory right.[72] If these two conditions are satisfied, the court then has a discretion as to whether to grant relief from forfeiture.

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66 Ibid., [15].
67 Ibid., [15].
68 Ibid., [80].
69 Davies and Sales (n 57).
70 *Snell's Equity* (n 56), [13-025].
71 *The Manchester Ship Canal Company Ltd v Vauxhall Motors Ltd (formerly General Motors UK Ltd)* [2019] UKSC 46, [2020] AC 1161, [4], [18] (Lord Briggs).
72 Ibid., [49]-[51] (Lord Briggs).

At first sight, this doctrine appears to undermine the parties' contract. For example, Sarah Worthington has said that 'the whole tenor of this mode of equitable intervention is to override the legitimate agreement of the competent contracting parties'.[73]

However, against this, it can be argued that relief from forfeiture can be rationalised in a similar way to fraud on a power. It may be said that relief from forfeiture does not override the legitimate agreement of the parties, but rather it gives effect to that agreement as properly understood, having regard to the parties' reasons for conferring the security interest in the first place. The purpose for which the property may be taken is in order to secure other obligations, and if it is taken for some other purpose that goes outside what the parties contemplated or intended should happen. The effect of denying a property or possessory right supports that view.

Again, as with fraud on a power, a question arises as to how far relief from forfeiture should be taken to be a doctrine distinct from the contract, as properly interpreted according to the modern approach. Here also we should be alert to the way in which changes in legal ideas may affect the coherence of the interaction of Equity and contract law. If both are now aligned to uphold the same moral foundation of the agreement of the parties, why should they lead to different results?

In *The Manchester Ship Canal* case*,* Lord Briggs explained that:

> 'Relief from forfeiture is one of those equitable remedies which plays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred'.[74]

This provides a justification of relief from forfeiture which is rooted in the parties' agreement. How can the purpose for which a right has been conferred be determined apart from by reference to the parties' agreement which conferred the right? The justification for this equitable interference is that a party is attempting to use a right in a way which is outside the scope of the parties' agreement.

The academic discussion of relief from forfeiture also provides support for this view. For example, Tiverios and McFarlane have described the ascertainment of the purpose of a forfeiture term as being determined by 'the parties' intentions, as objectively manifested'.[75] On that approach, it may be that relief from forfeiture should be viewed as being the consequence of the proper interpretation of the forfeiture provision in its context.

The approach is the same as that taken when the court is identifying the purpose of a term when interpreting the contract. The decision of Hamblen J in *Celestial Aviation Trading 71 Ltd v Paramount Airways Private Ltd* provides a good illustration of this.[76] In that case, the claimant leased three aircraft to the defendants under three separate contracts. The defendant failed to pay the rent for the aircraft. The claimant sought to terminate the contract and reclaim possession of the aircraft.

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[73] S. Worthington, "What is left of Equity's relief against forfeiture?" in E. Bant and M. Harding (eds.), *Exploring Private Law* (CUP, 2010), 252.
[74] *The Manchester Ship Canal Case* (n 71), [2]. See to similar effect *Shiloh Spinners Ltd v Harding* [1973] AC 691, 723-724 (Lord Wilberforce).
[75] N. Tiverios and B. McFarlane, "Controlling Private Punishment in Three Dimensions: Penalties and Forfeiture in England and Wales" in E. Bant and others (eds.), *Punishment and Private Law* (2021, Hart Publishing), 368.
[76] [2010] EWHC 185 (Comm), [2011] 1 All E.R. (Comm) 259.

In response to this, the defendant contended that it was entitled to relief from forfeiture and so the claimant should not be able to reclaim the aircraft.

Hamblen J concluded that the defendant was not entitled to relief from forfeiture as the purpose of the termination provision was not the provision of security for the defendant's obligation to pay rent.[77] In reaching this conclusion, Hamblen J relied on two features of the contracts. First, he highlighted that, as the contracts were not hire/purchase agreements, the claimant had an ongoing interest in the aircraft.[78] From this, he concluded that one of the purposes of the termination provisions was securing the claimant's ability to have the aircraft returned when the defendant was in default.[79] Secondly, he relied on the fact that other terms in the leases were concerned with the provision of security for the defendant's obligations.[80] This made it unlikely that the purpose of the termination clause was the provision of security.

Since the same approach is taken to the ascertainment of the purpose of a provision for the doctrine of relief from forfeiture as in ordinary interpretation, with the same object of aligning outcomes with what the parties intended, we again may be dealing with a situation in which Equity no longer relies on a distinct moral foundation than the general law of contract. If that is the case, the justification for a distinct equitable doctrine applicable on the periphery of contract has been eroded.

8. Specific Performance

My final case study is the remedy of specific performance. When a court orders specific performance, it orders the defendant to comply with its primary obligations in the contract. A court order is backed up by the court's penal power under the contempt jurisdiction. The court order is distinct from the contract and creates a new jural relationship. The court imposes on the defendant a new and additional obligation to perform the relevant obligations in the contract, this time owed to the court.[81] Since this new obligation carries with it the sanction of fine or imprisonment, specific performance has been described as having a 'drastic character' and it is not available in most cases.[82] It is regarded is as an 'exceptional remedy', as Lord Hoffmann described it in the *Argyll Stores* case.[83]

There are many restrictions on the availability of specific performance.[84] However, for the purposes of this lecture, it suffices to highlight two. First, specific performance is not awarded when damages would be an adequate remedy for the breach of contract.[85] Secondly, the courts refuse to grant specific performance of contracts of personal service (such as employment

[77] Ibid., [64].
[78] Ibid., [63]-[64].
[79] Ibid., [63]-[64].
[80] Ibid., [64].
[81] S. Smith, *Rights, Wrongs and Injustices: The Structure of Remedial Law* (2019, OUP), 162-63.
[82] Peel (n 23), [21-018].
[83] *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 11 (Lord Hoffmann).
[84] Peel (n 23), [21-018].
[85] *Argyll Stores* (n 83), 11 (Lord Hoffmann); *Cavendish Square Holding EV v Makdessi* [2015] UKSC 67, [2016] A.C. 1172 [30] (Lord Neuberger and Lord Sumption).

contracts).[86] I refer to these two restrictions on the availability of specific performance to illustrate its function.[87]

An important point is that a court will be careful not to grant a mandatory injunction or specific performance where to do so would 'deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make', to quote Lord Westbury in the *Isenberg* case in 1863.[88] In other words, a court will be astute not to grant a remedy that may in practice give the claimant more than what they were entitled to expect if the obligation owed to them had been fulfilled. As Lord Hoffmann said in *Argyll Stores*, 'the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust'.[89] In other words, in the exercise of discretion in granting specific performance or a mandatory injunction, Equity requires the court to orientate itself by reference to securing the equivalent in money terms of what the defaulting party promised, but no more than that.

Like rectification, specific performance corrects the outcome at common law when this outcome unjustifiably departs from the moral basis of contract in promise.

At common law, the standard remedy for breach of contract is an award of damages to compensate the party not in breach for their loss. The aim of this award is to put the party not in breach 'in the same situation … as if the contract had been performed'.[90] However, this approach is in fact a departure from the basis of contract in the agreement of the parties. It does not properly give effect to the parties' agreement or expectations.[91] Parties enter contracts to acquire a right to performance, not to acquire a right to performance or damages.[92]

That said, this common law departure from the moral basis of contract is, in general, justifiable. The common law awards damages instead of compelling the promisor to perform their obligations because this approach avoids the risk of undermining the promisor's autonomy which is inherent in compelling performance.[93] As Andrew Burrows has explained, 'ordering people to stick to their promises is more coercive of their behaviour than requiring them to pay damages'.[94] Depending on the circumstances, such coerced performance may have an unduly severe detrimental impact

[86] *Rigby v Connol* (1880) 14 ChD 482, 487 (Sir George Jessel MR).
[87] My explanation of specific performance can account for all the restrictions on specific performance but for reasons of time and simplicity I cannot make this argument fully.
[88] *Isenberg v East India House Estate Co Ltd* (1863) 3 De G.J. & S. 263, 273; cited in *Argyll Stores* (n 83) at p 15.
[89] *Argyll Stores* (n 83), p 15.
[90] *Robinson v Harman* (1848) 1 Ex 850, 855 (Parke B).
[91] Specific performance is the remedy "which most closely fulfils [a party's] expectations": A. Burrows, *Remedies for Torts, Breaches of Contract, and Equitable Wrongs* (4th ed. 2019, OUP), 412.
[92] M. Chen-Wishart, "Specific Performance and Change of Mind" in G. Virgo and S. Worthington (eds.) *Commercial Remedies: Resolving Controversies* (CUP, 2017), 98 ('when I order a pizza, I want the pizza and not damages for not getting the pizza').
[93] For a more developed version of this argument, see Chen-Wishart (n 92).
[94] Burrows (n 91), 413.

on the promisor,[95] while in general damages adequately protect the promisee's interest, enabling them to obtain substitute performance from a third party.

But it is recognised that there are cases in which damages are not an adequate remedy, because they do not sufficiently protect the interest of the promisee in the performance of the contract, and that justifies a grant of specific performance. Equity corrects the deficiency of the common law to ensure the contract achieves what the parties intended. Nonetheless, even then wider normative considerations to which Equity is sensitive may require that no such order is made. These may take the form of a particularly acute version of the considerations which have led to specific performance not being the primary remedy for breach of contract. So, for example, in contracts for personal services, specific performance is refused because specific performance would turn 'contracts of services into contracts of slavery'.[96] The importance of respecting the promisor's autonomy outweighs the need to protect the interest of the promisee in performance. The same is true in relation to mandatory orders to compel someone to operate a business, as *Argyll Stores* demonstrates. In addition, the threat to the defendant may be so great that in practice the claimant will be able to extort more than was properly due to them.

What is striking is how Equity tracks the moral foundation of contract law both when deciding to grant specific performance and when refusing it. In the case of refusal, the moral reasons for enforcing the contract provide the normative baseline which has to be outweighed by other normative factors to justify denial.

If damages are not an adequate remedy and there are no special factors in play such as in relation to a contract for personal services, but say for delivery of a specific asset, compelling performance does not unduly interfere with the autonomy of the promisor and is the only way to protect the interest of the promisee in performance. *Gregor Fisken Ltd v Carl* provides a good example of this.[97] The claimant entered into an agreement to purchase a Ferrari GTO 250 from the defendant for US$44 million. As you may guess from the price, Ferrari GTO 250's are very rare – only 36 were ever manufactured. At the time of contracting, the Ferrari did not have its original gearbox. However, the defendant agreed to use his best efforts to find the original gearbox and deliver it to the claimant. The defendant subsequently found the gearbox, but he refused to deliver it to the claimant. Specific performance was ordered.

In these circumstances, the need to respect the defendant's autonomy does not justify departing from the requirements of the moral basis of contract. This is for two reasons. First, not compelling performance has a significant impact on the claimant. Damages are of little use to the claimant. There was only one original gearbox for this car and there was no possibility of the claimant obtaining a good substitute for it. Secondly, compelling performance did not significantly interfere with the defendant's autonomy. The defendant was only required to deliver the gearbox to the claimant. This was a single act which did not require significant ongoing effort. To leave the

[95] Chen-Wishart (n 92), 117 ('coerced performance of some regretted promises may unduly compromise an individual's integrity, authenticity and self-respect').
[96] *De Francesco v Barnum* (1890) 45 Ch D 430, 438 (Fry LJ).
[97] [2021] EWCA Civ 792, [2021] 4 WLR 91.

claimant with his claim to damages at common law would have departed unjustifiably from the moral foundation of contract, and Equity intervened to realign the outcome with that foundation.

9. Conclusion

The interactions between the law of contract and Equity are complex and varied. This is, in part, because the law of contract and Equity are not mutually exclusive categories: they overlap to a significant extent. Although Equity is responsive to a wider range of normative considerations than contract law in its common law and statutory instantiation, it remains highly attuned to the moral foundations of contract law. In certain situations Equity operates to restore contract law to those foundations. In those cases Equity brings the effects of the law of contract into line with the requirements of morality when the common law unjustifiably departs from these requirements. In other situations, the moral foundations of contract law still play a significant role in providing a normative baseline which has to be outweighed by other compelling moral considerations if Equity is to be persuaded not to adhere to those foundations. Equity and contract law are different legal categories, but the morality of promise-keeping plays a major role in informing the operation of both of them.

This perspective also provides a vantage point from which certain equitable doctrines can be brought into question. If changes in the common law of contract, in particular in relation to the practice of interpretation, mean that the common law of contract is better aligned now with its moral foundations than it was in the past, then it becomes doubtful whether doctrines of Equity which performed that function previously can continue to be justified. The equitable doctrine of fraud on a power may be an example of this. Just as Equity and contract law are forms of legal tradition that change over time, so also we should be alert to the ways in which the interactions between them may change over time.

Equity plays a role which is of great importance to the law of contract. It is the interactions between the common law and Equity which allow English contract law both to provide the certainty which commercial parties prize and to respect the moral basis of contract in the parties' agreement.