

ARTICLES

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ILLUSORY, VAGUE AND UNCERTAIN CONTRACTUAL TERMS

One of the main functions of the law of contract is to render articulate and legally distinct those contractual terms which the parties have not formulated with sufficient care and clarity. The courts have carried out this task with great patience, fulfilling Lord Tomlin's well-known postulate that "the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains".¹ If any definite meaning can be extracted from the parties' dealings, judges will not be deterred by mere difficulties of interpretation.² If an agreement is intelligible in its main features, it will be protected by the courts even if it is of an unfamiliar type, leaves in doubt details as to the manner of performance and fails to anticipate problems which are likely to lead to controversy and litigation.³ However, occasionally the parties' description of their contractual intention is meaningless,⁴ or so unclear that no amount of judicial ingenuity will succeed in determining what was intended,⁵ or capable of several meanings, none of which has any claim to be preferred to the others.⁶ In such cases the parties are likely to find their hopes of judicial protection disappointed since no court can enforce a contract which it cannot interpret.⁷

Problems of vagueness usually arise in relation to contractual terms, although occasionally one also encounters the defence that the parties to a contract are not sufficiently clearly defined.⁸

Although textbooks tend to pay scant attention to the subject, academic interest in the problems of uncertainty is increasing.⁹ These problems are of very great practical importance: indeed, few other areas of the law of contract have attracted as much litigation. As Herron C.J. observed in *Stocks and*

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1. *Hillas & Co. v. Arcos Ltd.* [1932] All E.R. 494, 499.

2. See *Cohen v. Mason* [1961] Qd. R. 518; *Life Insurance Co. of Australia Ltd. v. Phillips* (1925) 36 C.L.R. 60.

3. *LeRoy v. Herrenschmidt* (1876) 2 V.L.R. (Eq.) 189, in particular 194 *per* Molesworth J.

4. An example was the clause "the usual conditions of acceptance apply" in *Nicolene Ltd. v. Simmonds* [1953] 1 Q.B. 543, which had no ascertainable meaning in the circumstances of the case.

5. See *Willesden v. Webb* [1937] Q.W.N. 8.

6. In *Scammell v. Ouston* [1941] A.C. 251, 255, Lord Maugham said of such cases that the *consensus ad idem* would be "a matter of mere conjecture".

7. *Duggan v. Barnes* [1923] V.L.R. 27, 29; see also *Rudd v. Commissioner of Stamp Duties* (1937) 37 S.R. (N.S.W.) 366, 381 *per* Davidson J.

8. In *Tonelli v. Komirra Pty. Ltd.* [1972] V.R. 737 a contract for the sale of land to the plaintiff "and his nominees" was claimed to be too vague and uncertain because it supposedly attempted to turn the "nominees" into parties without identifying them. Smith J. resolved the problem by interpreting the contract as making the plaintiff the only purchaser and giving him the right to call for conveyance to his nominees. Uncertainty as to parties has given rise to great difficulties, particularly in relation to the admissibility of parole evidence: see Lücke, (1967) 3 *Ad. L.R.* 102.

9. See Ellinghaus, (1971) 45 *A.L.J.* 4, 72; (1972) 4 *Ad. L.R.* 365; Howard, (1974) 4 *U.Tas. L.R.* 258; (1973) 51 *Can. Bar Rev.* 668; Winterton, (1969) 9 *U.W.A.L.R.* 83; Samek, (1970) 48 *Can. Bar Rev.* 203; Nicholas, (1974) 48 *Tul. L.R.* 946; Sutton, [1977] *Qld. Law Soc. J.* 5.

*Holdings (Constructors) Pty. Ltd. v. Arrowsmith*¹⁰ the problem of uncertainty is one "as to which there is much room for a difference of opinion, for it raises one of the most contentious aspects of the law of contract".

ILLUSORY PROMISES

Illusory Promises Explained

A sharp distinction must be drawn between undertakings which are vague, uncertain or ambiguous and undertakings which are illusory. The essence of an "illusory promise" is that it combines words of promise with "words which show that the promisor is to have a discretion or option whether he will carry out that which purports to be a promise . . ." ¹¹ For example, if a promise is made in the morning to purchase a quantity of tobacco, provided the promisor shall, prior to four o'clock that afternoon, have notified the other party of his continuing willingness to buy, the promise will become a binding contract upon such notice being given; however, it is not a legally effective promise when first pronounced, since at that time it binds the "promisor" to nothing.¹² Similarly, a promise to pay, "if I should still wish to pay on the due date", is not just too vague; it is illusory and incapable of having any binding force.¹³

Being unenforceable, an illusory promise cannot constitute consideration for a counter-promise. The counter-promise would therefore also be unenforceable, even though it may not itself be couched in illusory terms. Thus, either party can freely repudiate a contract which is illusory on one side. Where the illusory term is only one of several terms, it may be possible to save the contract by severance. An illusory option of renewal in a lease, for example, will not normally invalidate the whole lease since its severance should not present undue difficulties.

A promise is illusory if it allows the promisor to choose freely whether or not he will perform the promise. Distinct from this are promises which purport to invest the promisor with a discretion as to the manner of performance, or even with a right to choose which of several performances he will render. In *Lindsay v. Stevenson & Sons Ltd.*¹⁴ damages were awarded for the breach of the promisor's undertaking to do "a considerable portion of [my] business" with the promisees. The court interpreted the promise as implying that at least half the total business had to be conducted with the promisees. It is obvious that the promise vested a wide discretion in the promisor as to which business he would choose to conduct with the promisees. It is well settled that the existence of such a discretion alone does not render a contract too vague. In *Thorby v. Goldberg*¹⁵ Kitto J. stated: ". . . an agreement is not void for uncertainty because it leaves one party or group of parties a latitude of choice as to the manner in which agreed stipulations shall be carried into effect, nor does it for that reason fall short of being a concluded contract."¹⁶ In this case, company directors and shareholders committed themselves contractually to a plan for reorganising the structure of the company for clearly defined purposes. The High Court held that the contract

10. (1964) 64 S.R. (N.S.W.) 211, 217.

11. *Ikin v. Cox Bros. (Aust.) Ltd.* (1930) 25 Tas. L.R. 1, 5 *et seq.* per Clark J., citing Vaughan Williams L.J.; see also *Placer Developments Ltd. v. Cth.* (1969) 43 A.L.J.R. 265, 272 per Windeyer J.

12. *Cooke v. Oxley* (1790) 3 T.R. 653.

13. *Stevenson v. Ellis* (1912) 29 W.N. (N.S.W.) 52.

14. (1891) 17 V.L.R. 112.

15. (1965) 112 C.L.R. 597.

16. *Id.*, 605; see also *Head v. Kelk* (1963) 63 S.R. (N.S.W.) 340, 345 *et seq.* per Herron J.

was enforceable, although it left to the directors considerable discretion as to the methods they would use in achieving the desired aim. Menzies J. stated the law as follows: "It is an objection to a contract if one party is left to choose whether he will perform it but it is an entirely different matter if there is an obligation to do a specified thing of a general description but it is left to the party who is to perform it to choose the particular thing that he will do in performance of it."¹⁷

The unconditional discretion not to perform, which is the hallmark of the illusory promise, is often concealed and becomes apparent only upon careful reading of the contract.¹⁸ A surprisingly large number of contracts are meant to be fully binding but are nevertheless rendered illusory by the character of their stipulations.¹⁹ Exclusion clauses are sometimes so sweeping as to empty the "undertakings" of one of the parties of all promissory content.²⁰ In *MacRobertson Miller Airline Services v. Commissioner of State Taxation (W.A.)*²¹ an airline ticket purported to give the carrier the right "at any time to abandon any flight" and "to cancel any ticket or booking". Barwick C.J. analysed the arrangement as follows: "The exemption of the ticket in this case fully occupies the whole area of possible obligation, leaving no room for the existence of a contract of carriage."²²

Terms "To be Agreed"

Parties are sometimes held up on the brink of total accord by some minor point of disagreement. In their eagerness to complete the arrangement, they may draw up and sign a "final" document which reflects the wide area of their agreement and purports to deal with the outstanding matter by leaving it "to be agreed". A simple example would be a promise to pay \$1,000 with interest at a rate "to be agreed". *Prima facie*, such an "undertaking" is illusory, since the promisor can avoid performance simply by refusing to negotiate and agree upon a rate of interest. In special cases the courts have been prepared to find implied a promise to negotiate;²³ though a sufficient consideration, such a promise would not significantly improve the standing of the incomplete undertaking, since an obligation to negotiate does not imply an obligation to agree to any particular proposition. Damages for the breach of an undertaking to negotiate would normally be nominal.²⁴

Illusoriness is more difficult to overcome than vagueness. Where parties agree upon the price of goods or services, the contract will not be considered too vague merely because there is no provision for time and place of payment; such details will be supplied by appropriate implied terms (payment to be made at the creditor's place of business and within a reasonable time²⁵) which

17. (1965) 112 C.L.R. 597, 613.

18. See *Streich v. General Motors Corporation* 126 N.E. (2d) 389 (1955).

19. For examples, see *Beattie v. Fine* [1925] V.L.R. 363; *Re Apps & Hurley* [1949] V.L.R. 7. In the latter case Barrie J. stated that the parties had meant their (in fact illusory) contract to be binding: *id.*, 12.

20. See *Suisse Atlantique Société D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 432 *per* Lord Wilberforce.

21. (1975) 133 C.L.R. 125.

22. *Id.*, 133. The High Court made it clear that, in such a case, the actual rendering of the service by the carrier would bring into being a unilateral contract entitling the carrier to the agreed remuneration.

23. See, for instance, *Cumming & Co. Ltd. v. Hasell* (1920) 28 C.L.R. 508. See also *Hillas v. Arcos* [1932] All E.R. 494, 505 *per* Lord Wright.

24. *Ibid.* For a judicial attempt to give real substance to the obligation to negotiate, see *Smith v. Morgan* [1971] 2 All E.R. 1500.

25. See *Chitty on Contracts* (23rd ed., 1968) I, 1134, 1143.

overcome any defence based on vagueness and uncertainty. However, had the parties added the words: “. . . terms of payment to be agreed”, these implications could not have been made since they would have conflicted with an express provision in the contract.²⁶

Illusory Terms and the Contractual Intent: A Problem of Reconciliation

Illusory terms may simply be an indication that the parties are still negotiating and that their contract is still a thing of the future. But when such terms, as is often the case, go hand in hand with an agreed *animus contrahendi*, the problem arises whether there is any way in which the use of illusory language and the existence of an intention to contract can be reconciled.

It must be remembered that, in the case of agreements which are not in writing, the literal meaning of the language used is subordinated to the real intention of the parties.²⁷ There is therefore room for the finding that a promise, though formulated in illusory terms, did not, in the eyes of the law, have an illusory meaning. Although decided examples are not easy to find²⁸ the courts are likely to take this course where a promisor uses illusory language knowing that his words will be misunderstood and that firm contractual expectations will be engendered. In written contracts the literal meaning of the words used is dominant and proper protection for a trusting promisee will be more difficult to achieve.²⁹

Parties may intend to negotiate further and may nevertheless already have reached complete agreement: provision may exist for the contingency that their further negotiations will come to nothing. Occasionally such provision is made expressly as in *Re Harlou Pty. Ltd.*³⁰ The sale of certain shares was contemplated to be “at a price to be agreed . . . but at not less than one pound per share”. The obvious construction of this clause was that one pound was to be the price if agreement could not be reached. There was greater doubt in *Prior v. Payne*³¹ as to the adoption of such an interpretation. A contract for the sale of a dairying business provided that the price was “to be based on valuation by Mr. W. or mutually agreed”. It was argued that one can only base a price on a valuation by further agreement so that both branches of the clause envisaged future agreement. Conceding that an ambiguity existed, the High Court construed the clause as meaning that the result of the valuation should constitute the price. In so doing the court was undoubtedly guided by the rule of construction that a meaning which renders a contract effective is to be preferred to one which would make it futile and illusory. This rule, however, is intended to fulfil, not to falsify the intention of the parties and is therefore applicable only when there is convincing evidence that the parties meant the arrangement to be a fully binding contract. The decision of the High Court makes this abundantly clear, since it stresses the fact that the parties had amply manifested their *animus contrahendi*. The agreement had

26. *Re Apps & Hurley* [1949] V.L.R. 7.

27. *Maskelyne v. Stollery* (1899) 16 T.L.R. 97; *Kelly v. Elliott* [1960] S.A.S.R. 222.

28. *Ikin v. Cox Bros. (Aust.) Ltd.* (1930) 25 Tas. L.R. 1 comes fairly close to providing an illustration.

29. See *Streich v. General Motors Corporation* 126 N.E. (2d) 389 (1955). An attempt to provide some protection for the promisee in such circumstances is now being made in the United Kingdom: see Unfair Contract Terms Bill, 1977, s.3(2)(b).

30. [1950] V.L.R. 449.

31. (1949) 23 A.L.J. 298.

initially been in the form of an option and, as was pointed out, the actual payment of the option money showed the parties' contractual intent. Williams J. stated the principle applicable to such cases as follows: ". . . the parties intended to make a concluded agreement and in such a case the Court [seeks] to give effect to their intention if the Court [can] spell out the agreement from the words which they [have] used with reasonable certainty."³²

It has been argued that the parties' belief that they had made a contract³³ is little more than wishful thinking when the agreed terms are in fact illusory or too vague.³⁴ Although this is true in a sense, it is also true that the more decisively the parties have demonstrated their *animus contrahendi*, the easier it will be to persuade the courts that the contract must be so construed as to avoid uncertainty or illusory content.³⁵

Occasionally the courts may be persuaded to save an apparently illusory contract by implying appropriate terms. In *Beattie v. Fine*³⁶ a lease purported to extend an option of renewal to the lessee for a further term "at a rental to be agreed upon by the lessor". The lessor sought to save what was *prima facie* an illusory option by suggesting that a term should be implied to the effect that, in the absence of agreement, the original rental (or, alternatively, a reasonable rental) should be payable. Cussen J. could see no basis for such an implication. His Honour may well have considered the argument untenable because he regarded any such implication as inconsistent with the express terms of the contract ("rental to be agreed") and therefore barred by one of the first principles of construction.

The demands of justice have forced the courts to admit such arguments in special cases. The best-known example is *Foley v. Classique Coaches*.³⁷ A contract for the supply of petrol provided that a firm of motor coach proprietors, the defendants, were to purchase all the petrol required for their business from the plaintiff "at a price to be agreed by the parties in writing and from time to time". The trial judge decided to render this apparently illusory agreement effective by implying a term that, if the parties failed to agree, a reasonable price should be paid. Several factors seem to have induced the Court of Appeal to approve this bold construction: the contract was clearly stamped and bore all the signs of a legally binding agreement; it contained an arbitration clause to resolve disputes; the plaintiff had insisted on its being signed before allowing another contract for the sale of some land owned by him to the defendants to become effective, and petrol had in fact been supplied under the agreement for three years. These factors amounted to such a convincing demonstration of a positive intention to make a binding contract that they were allowed to override such a formidable obstacle as an express clause reserving agreement about one of the essentials of the contract, *i.e.* the price, for future agreement. *Foley v. Classique Coaches Ltd.* is a leading case and sound law,³⁸ and seems certain to be accepted in Australia when the occasion arises.

32. *Id.*, 299.

33. For a discussion of this factor, see *Foley v. Classique Coaches* [1934] All E.R. 88, 91 *per* Scrutton L.J.

34. See *Goodwin v. Temple* [1957] Q.S.R. 376, 379.

35. See *Sidney Eastman Pty. Ltd. v. Southern* (1963) 80 W.N. (N.S.W.) 548.

36. [1925] V.L.R. 363.

37. [1934] All E.R. 88.

38. It was applied in *National Coal Board v. Galley* [1958] 1 All E.R. 91.

VAGUENESS AND UNCERTAINTY: SOME PROBLEMS OF PRINCIPLE *Vagueness and Ambiguity Distinguished*

In *Bailes v. Modern Amusement Pty. Ltd.*³⁹ Sholl J. made reference to terms which might reasonably bear two or more distinct meanings. Such terms, so his Honour thought, would render a contract too vague and therefore unenforceable if a common intention to adopt one of these meanings could not be attributed to the parties. This suggestion accords with pronouncements of high authority in England.⁴⁰ It indicates that the difference between ambiguity and vagueness is one of degree rather than of kind. A possible difference of legal significance is suggested by *Egan v. Caveny*.⁴¹ A contract for the sale of part of a tract of land provided that a mortgage over the whole was to be allotted as between the sold and the unsold parts of the land. The contract failed to make it clear whether the allotment was to be based on value or acreage. McArthur J. held that the defendant could not rely upon this ambiguity as a defence since the plaintiff had stated that he was willing to adopt the meaning most favourable to the defendant. This introduces the concept of waiver into the context of ambiguity; it seems unlikely that this concept could be applied in a similar way to cases of vagueness.

Is There a Test of Insufficiency?

The unenforceability of vague and uncertain contracts is more a matter of stark fact than the result of a judicially created rule. Nevertheless, in borderline cases the judges have to determine just how far they should go in "saving" agreements by implication of terms and benign interpretation. Judicial attempts at formulating rules to indicate where the line should be drawn tend to be in the most general terms. In *Thorby v. Goldberg*⁴² Menzies J. stated (quoting Sugerman J.): ". . . there is no binding contract where the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention." One might be tempted to infer that the quest for a general test of vagueness can only lead to results which are themselves too vague to be useful. However, it does seem possible to go at least a little further than Menzies J. did in formulating rules. The problem of uncertainty appears to arise at two different levels to which different tests are applicable.

In some cases it is the contract as a whole which is under attack for vagueness.⁴³ In such cases the law will not normally regard the contract as uncertain if the main performances postulated by the contract have been sufficiently clearly specified. This cannot be expressed more succinctly than in the terms of the Roman law: the *essentialia negotii* (the essentials of the contract), such as the goods to be sold and the price in contracts of sale, must have been agreed. In *May and Butcher v. R.*⁴⁴ Lord Warrington referred to the "well known and elementary principle of the law of contract . . . that, unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation". If the parties have agreed upon the essentials, the law will supply, by appropriate implications, the necessary "machinery", the "subsidiary means of carrying out the contract". In *Stocks & Holdings v.*

39. [1964] V.R. 436, 441.

40. See *Scammell v. Ouston* [1941] A.C. 251, 255 *et seq.* per Viscount Maugham.

41. [1921] V.L.R. 37.

42. (1964) 112 C.L.R. 597, 607.

43. See *e.g.*, *Hillas v. Arcos* [1932] All E.R. 494.

44. [1934] 2 K.B. 17, 22.

*Arrowsmith*⁴⁵ Herron C.J. made this point as follows: “. . . because performance of an agreement introduces complexities or machinery provisions, courts should not be astute to hold that there is no enforceable contract. Many a commercial transaction . . . may . . . have implied in it some method of determination of these complexities otherwise than by a future agreement between the parties. In such a case the document will be regarded as *certum reddi potest*.”⁴⁶ What is essential and what is subsidiary must depend upon the circumstances of each case,⁴⁷ in particular upon the commercial type, if any, to which the agreement belongs, upon the parties’ intentions and upon the overall purpose or purposes of the contract.

In other (and probably more numerous) cases, the charge of vagueness is laid against a particular provision in a contract, rather than against the contract as a whole. In such cases a party wishing to defeat the contract is faced with a twofold task: he has to persuade the court (1) that the particular clause is so uncertain as to be ineffective, and (2) (if he wishes to defeat a part or parts of the contract other than the allegedly ineffective clause) that it is not possible to sever it and thus save the rest of the contract. The problem of severance is just as significant in the context of vagueness as it is in the context of illegality.⁴⁸ If one were to ask simply, in cases belonging to this second category, whether the “essentials of the contract” had been defined and agreed, the answer would often be affirmative, since the term affected by vagueness need not be concerned with the core of the contract. For example, in *Nicolene Ltd. v. Simmonds*⁴⁹ one of the parties had sought to introduce into the contract the term “that the usual conditions of acceptance apply”, a term which seemed to the Court completely meaningless. The goods to be sold and the price to be paid, *i.e.* the essentials of the contract, were fully agreed. Whether the dubious clause is too vague to be contractually effectual must be decided by application of some other test.

In *Hammond v. Vam Ltd.*⁵⁰ the Court of Appeal of N.S.W. drew a distinction between terms which give rise to difficulty of ascertainment or application (which must be overcome by construction) and terms which suffer from linguistic or semantic uncertainty, from “uncertainty of concept”. According to Lord Keith of Avonholm⁵¹ construction fails in such situations and the term will have to be regarded as *pro non scripto*. With respect, the failure of an individual term for vagueness raises the additional issue of severance: it is only when the rules of severance are satisfied that the term can be treated as never written. The test of vagueness which decides the fate of individual terms as such, appears to be that a term is ineffectual when it suffers from

45. (1964) 64 S.R. (N.S.W.) 211.

46. *Id.*, 218. A good example is the “open” contract for the sale of land, *i.e.*, a contract which settles nothing more than the land to be transferred and the price to be paid. Such agreements are legally enforceable: “. . . while the due course of completion of a contract for the sale of land is a matter of some complexity, involving the doing of a number of things by both parties, it is very well settled that an informal or ‘open’ contract, not dealing expressly with any of these matters of detail, may be made and be binding. In such a case law and equity fill in the details, so to speak, providing by way of implication for whatever is necessary to effectuate due performance.” *Cavallari v. Premier Refrigeration Co. Pty. Ltd.* (1952) 85 C.L.R. 20, 25 *per* Dixon C.J., McTiernan, Fullagar and Kitto JJ.

47. *Re Rogers to Clifford* (1915) 11 Tas. L.R. 1, 4 *per* Crisp J.

48. See *Life Insurance Co. of Australia Ltd. v. Phillips* (1925) 36 C.L.R. 60; *Whitlock v. Brew* (1968) 42 A.L.J.R. 271.

49. [1953] 1 Q.B. 543.

50. [1972] 2 N.S.W.L.R. 16, 18.

51. *Fawcett Properties Ltd., v. Buckingham County Council* [1961] A.C. 636, 670.

conceptual confusion or vacuity to such a degree that its application to particular situations becomes a matter of unguided speculation.

It is significant that the courts rarely enunciate tests of vagueness without the most emphatic insistence that a definite meaning must be wrested from unclear terms whenever doing so is even remotely possible. In *Hammond v. Vam Ltd.*⁵² Sugerman P. gave expression to this attitude as follows: "The courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it. Their duty is to put a fair meaning upon it, unless this is utterly impossible, and not, as has been said 'to repose on the easy pillow of saying that the whole is void for uncertainty'."⁵³

The plaintiffs in *Hammond's* case, holders of an authority to prospect under the Mining Act of N.S.W., agreed to these prospecting rights being exercised by the defendants, in consideration of payment of \$1,000 "and . . . an interest equal to four per centum in any and all mining operations conducted in the area or any part thereof resulting from the interest therein of Vam (the plaintiff) by virtue of this agreement". This second part of the consideration clause was attacked by the plaintiff, who sought a declaration that the contract was void for uncertainty and argued⁵⁴ that "four per centum" was meaningful only if it referred to something specific and that the contract did not indicate clearly enough to what it referred. The Court of Appeal considered that a sufficiently definite meaning could be established by the ordinary processes of construction. As Sugerman P. explained,⁵⁵ the clause required that the plaintiffs be paid 4% of the net profits from mining operations, whether such operations be carried out by the defendants themselves or by others with the defendants' permission. The learned President acknowledged that this formula did not resolve all possible future problems: "Peripheral questions may remain, but these can be no more than questions of construction capable of resolution—possibly with the assistance of expert . . . opinion; these are ordinary functions of the courts."⁵⁶

It is probably best to acknowledge frankly that vagueness is to some extent a matter of discretion and good sense and is therefore not capable of being subjected to hard and fast rules. Not just the words used, but all the circumstances are important, particularly the interests and expectations likely to be defeated by a finding of uncertainty. In *Hammond's* case⁵⁷ Sugerman P. suggested that vague and thus ineffective words used to describe a condition precedent might be held sufficiently definite if they were attached to a condition subsequent, since a finding of vagueness in such a case would defeat a vested interest. Even such a seemingly fortuitous factor as the choice of remedy may decide whether a case falls on one or the other side of the line. Damages may occasionally be awarded for the breach of undertakings which would be too vague to warrant specific performance⁵⁸ or the granting of an injunction.⁵⁹ The courts may be willing to "use the broad axe" in awarding

52. [1972] 2 N.S.W.L.R. 16.

53. *Id.*, 18.

54. *Id.*, 20.

55. *Id.*, 20 *et seq.*

56. *Id.*, 21.

57. *Id.*, 18.

58. This possibility seems to have been recognized in *Egel v. Drogemuller* [1936] S.A.S.R. 407, 412 *per* Murray C.J. and in *Duggan v. Barnes* [1923] V.L.R. 27. But see *Cunningham v. Gundry* (1876) 2 V.L.R. 197.

59. See, for example, *Heidke v. Sydney City Council* (1952) 52 S.R. (N.S.W.) 143, 145, *et seq.* (Council allows "use of wickets" without specifying which wickets may be used).

damages in situations in which there appears to be no room for any equitable decrees. In *Lindsay v. Stephenson & Sons Ltd.*⁶⁰ for example, specific performance would obviously have been out of the question; it is submitted that the contract would also have been too vague for any injunction restraining the defendants from committing a breach.

Vagueness of Terms and Extrinsic Evidence

Once a contract has been reduced to writing, extrinsic evidence is not normally admissible to contradict, qualify or add to the written terms. However, when the contract is in danger of failing altogether, due to vagueness or to ambiguity which cannot be resolved by application of a rule of construction, extrinsic evidence, even direct evidence of intention, should be freely admitted in order to save the contract. Support for such a liberal approach can be found in *Kell v. Harris*.⁶¹ A lease contained the clause: "Briars and noxious weeds to be kept down." The lease did not say which party was to keep down the weeds, but it was admitted that it was intended that the lessee should do it. Street J. said⁶² that, when there was actual consensus about this matter, neither party could base a defence on the vagueness of the uncertain words in the document, and that he would not allow a defendant in a suit for specific performance to say: "We are both agreed as to our obligations under the contract, but if its terms are looked at it will be seen that there is some degree of ambiguity in the way in which we have expressed ourselves, and therefore, notwithstanding our *consensus ad idem*, I ask the Court to refuse to enforce the agreement." The decision is concerned with ambiguity more than vagueness, but there appears to be no real distinction between vagueness and ambiguity in this respect. Certainly, Street J. seems to have thought that there was not. The decision accords with the leading case of *Raffles v. Wichelhaus*⁶³ and lends support to the suggestion that there is no real difference of principle between cases of latent and cases of patent ambiguity.⁶⁴

The Legal Consequences of Vagueness

Although it is self-evident that a judge cannot enforce a contract when he cannot understand its terms, courts have tended to rationalize their attitude towards such contracts by pronouncing them "void".⁶⁵ One need not quarrel with this where the terms are completely incomprehensible or affected by fundamental and irreparable ambiguities.⁶⁶ However, contracts which, though vague and unenforceable when made, are not affected by such extremes of ambiguity or vagueness, should not be described as void: *they are ineffective for the time being, but capable of being rendered wholly effective by events subsequent to their conclusion.*⁶⁷ If a contract with uncertain

60. See *supra*, at n.14.

61. (1915) 15 S.R. (N.S.W.) 473.

62. *Id.*, 479.

63. (1864) 2 H. & C. 906.

64. See *Chitty on Contracts* (23rd ed., 1968) I, 662. See also the analysis of vagueness and extrinsic evidence by Sutton, *supra*, n.9, 6 *et seq.*

65. The supposed rule that a contract is void when its terms are too vague to be enforceable is reiterated in numerous cases; for example, see *Duggan v. Barnes* [1923] V.L.R. 27, 29; *Upper Hunter C.D.C. v. Australian Chilling and Freezing Co. Ltd.* (1968) 41 A.L.J.R. 348; *Hammond v. Vam Ltd.* [1972] 2 N.S.W.L.R. 16, 17 *et seq.*

66. *Raffles v. Wichelhaus* (1864) 2 H. & C. 906.

67. Sutton seems to consider that judicial *dicta* pronouncing vague contracts void must be taken literally: *supra*, n.9, 10. However, the view that vagueness can be cured by subsequent events is supported by recent Australian authority: see *Bradford v. Zahra* (1976) Q.W.N. No. 20. It is submitted, with respect, that

terms were void in the strict sense, then nothing short of conclusion *de novo* with improved terms could produce a valid bargain. However, since the decision of the House of Lords in *Hillas v. Arcos*⁶⁸ it has been clear that initial vagueness can be cured if conduct of the parties subsequent to the original conclusion supplies reliable additional evidence of the true meaning of the agreement.

In that case the plaintiffs agreed to buy a quantity of Russian timber in 1930, described as "22,000 standards of softwood goods of fair specification" and were given an option "for the purchase of 100,000 standards for delivery during 1931". The 1930 timber was in fact delivered, but the defendants repudiated the option and the question arose whether it was too vague to be enforceable. The defendants argued that even if "100,000 standards" was read as "100,000 standards of softwood goods of fair specification", this still did not define the subject matter sufficiently.⁶⁹ This argument was adopted by the Court of Appeal, but was rejected by the House of Lords where the clause was read as meaning goods distributed over kinds, qualities, and sizes in fair proportions having regard to the output of the season. Damages for breach of the option were thus awarded. Lord Wright⁷⁰ emphasized that the contract had in fact been carried out in 1930 and that the parties then experienced no difficulty in applying its terms to the various deliveries. The parties' conduct subsequent to the initial conclusion thus assisted the court in the task of understanding the terms of the contract. This important feature of the case was stressed by Scrutton L.J. in *Foley v. Classique Coaches*.⁷¹ ". . . there seems to be considerable vagueness about the agreement, but the parties managed to perform the contract so far as it related to 22,000 standards, and so the House thought there was an agreement as to the option which the parties would be able to perform in spite of the lack of details."⁷²

An even more impressive instance of the rule that subsequent events can render contracts sufficiently certain has made its appearance in Australia in *Sinclair v. Schildt*.⁷³ The defendant, to whom the plaintiffs were indebted, agreed to sell the plaintiffs' café as a going concern, to apply the proceeds in satisfaction of his claim and to pay the plaintiffs "a substantial sum" out of the proceeds. In pursuance of this arrangement the plaintiffs assigned their lease of the business premises to the purchaser of the business. The Supreme Court of Western Australia considered that the defendant should be held to his promise despite its vagueness and ordered specific performance. Burnside A.-C.J. met the defence of vagueness as follows: ". . . it is clear from the authorities that when the contract has been partly executed . . . the court will strain its powers to enforce a complete performance."⁷⁴ Rooth J. stated: ". . . we have a contract concerning land wholly executed by the

67. (Continued)

Sutton's criticism of that decision is not well-founded: see Sutton, *supra*, n.9, 9 *et seq.* See also *Sykes (Wessex) Ltd. v. Fine Fare Ltd.* [1967] 1 Lloyd's Rep. 53, 57 *et seq.* per Lord Denning M.R.

68. [1932] All E.R. 494. It is submitted that this interpretation of *Hillas v. Arcos* is compatible with *Schuler (L.)A.G. v. Wickman Machine Tool Sales Ltd.* [1974] A.C. 235, since evidence of events subsequent to the conclusion of the contract in cases such as *Hillas v. Arcos* would be admitted to save the contract, not just to assist with the construction of individual terms.

69. A further difficulty was whether the price had been sufficiently defined.

70. *Id.*, 505.

71. [1934] All E.R. 88.

72. *Id.*, 91.

73. (1914) 16 W.A.L.R. 100.

74. *Id.*, 106.

plaintiffs . . . I do not think the consideration vague or uncertain, but even if so, the Court should . . . struggle against such vagueness in order to do justice to the plaintiff.”⁷⁵ There can be no doubt that the liability enforced in this case was based on the original contract as rendered sufficiently certain by partial implementation. This is not made quite so clear in corresponding English cases. In *British Bank for Foreign Trade v. Novinex, Ltd.*⁷⁶ Denning J. formulated the principle as follows:

“The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price ‘to be agreed’, or to perform services on terms ‘to be agreed’, then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid.”⁷⁷

Whether an agreement, which is too vague to be enforceable when it is concluded, can be called “void”, is not a mere quarrel about words and labels: the live issue which lies behind this terminological problem becomes apparent in cases such as *Shiels v. Drysdale*.⁷⁸ A trustee in bankruptcy sought to have a transfer of land to the insolvent’s daughter set aside under the Insolvency Statute 1871 (Vic.) on the ground that it had been made within two years of sequestration and without consideration. The daughter alleged that the land had been conveyed in consideration of her providing her father with washing, cooking and other necessary services. Molesworth J. found for the trustee on the ground, *inter alia*, that the suggested agreement was “void for uncertainty”.⁷⁹ If the interpretation of *Hillas v. Arcos* which has been advanced here is accepted, the learned judge’s reasoning cannot be supported since acts of performance which had taken place, *i.e.* the transfer of the land and the rendering of some of the services, would have removed the uncertainty and rendered the contract enforceable and fully valid.

VAGUENESS AND UNCERTAINTY: INCORPORATION OF EXTRINSIC STANDARDS

Incorporation by Reference: Value and Other Sufficiently Definite Standards

A contractual term which calls for payment of a specific sum of money can be understood, applied and enforced without reference to further circumstances extrinsic to the contract. On the other hand, a term calling

75. *Id.*, 110.

76. [1949] 1 K.B. 623.

77. *Id.*, 629 *et seq.* Although this *dictum* relates to illusory contracts, it would, *a fortiori*, also apply to vagueness.

78. (1880) 6 V.L.R. (Eq.) 126.

79. *Id.*, 130.

for payment of the indebtedness of a third party cannot be applied without first ascertaining how much the third party owes: the obligation is defined by reference to a fact or standard outside the four corners of the contract. Almost all the terms of a contract can be settled by reference to matters extrinsic to the document being signed. A statement that "the terms . . . [are to] be those of the Real Estate Institute of N.S.W. copyright contract No. 53625 of 1953 . . ." ⁸⁰ is capable of constituting a perfectly valid contract for the sale of land, provided that the subject matter and the price are not in doubt.

Problems of uncertainty can arise in such cases however, when the extrinsic facts or standards referred to do not exist or are themselves lacking in certainty. The reference may give rise to difficulties of identification, but the courts will seek to resolve such difficulties whenever possible. There is, for example, no reason why a reference to the "usual agreement" should not be sufficient, providing an agreement exists which can fairly be so described.⁸¹ It is even permissible to leave the terms indeterminate at the time of contracting to the extent of giving one party the right to nominate which of several types of contract will be adopted.⁸²

The courts have shown great patience in resolving the problems created by such obscure references, even where the remedy sought was specific performance. In *Trustees Executors and Agency Co. Ltd. v. Peters*⁸³ the purchaser of some land sought specific performance of an option for the sale of the said land. The option agreement stated the price, identified the land and stated further that "such sale shall be on and subject to such of the usual terms and conditions of sale of the Real Estate Institute of New South Wales as shall be applicable to sales of land of like tenure under like circumstances". Had the parties attached the document in question, crossing out such terms as they considered inapplicable, the court's task would have been easy. This, however, they had not done and the court was faced with the twofold problem of selecting one of the four standard contracts currently used by the Real Estate Institute and of determining which of the terms in the chosen document should be deleted as "inapplicable". The High Court (McTiernan, Kitto and Menzies JJ.) ordered specific performance, accepting the plaintiff's argument that the final terms were sufficiently clearly defined in the original undertaking. *De facto* this undoubtedly involved the exercise of some degree of judicial discretion, but in the strict view of the law it constituted merely an application—albeit a generous one—of the maxim *certum est quod certum reddi potest*.

Perhaps the most common instance of incorporation of a standard outside the contract is the specification of price or remuneration in terms of value. Contracts of sale or for services in such terms were not recognized as valid in the Roman Law which insisted on *certum pretium* being agreed by the parties, and a similarly rigid rule was applied by the early common law courts.⁸⁴ But when *assumpsit* superseded the older forms of action, it became settled that promises to pay whatever goods to be sold or services to

80. See *Sidney Eastman Pty. Ltd. v. Southern* (1963) 80 W.N. (N.S.W.) 548.

81. *Allcars Pty. Ltd. v. Tweedle* [1937] V.L.R. 35 (reference to "your usual hiring agreement" when there was nothing that could be thus described); *Myam Pty. Ltd. v. Teskera* [1971] V.R. 725 (reference to "registrable charge in the form commonly employed" by specified brewery when there was no such form).

82. *Ibid.*

83. (1960) 102 C.L.R. 537.

84. The history of this subject was sketched by Windeyer J. in *Hall v. Busst* (1960) 104 C.L.R. 206, 240 *et seq.*

be rendered might reasonably be worth, are not too uncertain to be enforceable.⁸⁵ Generally speaking, defining an obligation to pay by reference to the value of a stipulated performance will not be regarded as too vague and uncertain: “. . . a question of the value of land or a chattel is an intelligible question of objective fact, to be decided on evidence like any other question of fact, and courts cannot, when such a question arises, refuse to decide it on the ground that it is too difficult.”⁸⁶

As with all other references to matters external to the contract, the reference to value as the measure of a party's obligation may fail because there is no objectively ascertainable value as assumed in the reference clause. As Dixon C.J. explained in *Hall v. Busst*⁸⁷ a contract for the sale of land, the price to be its value, can be effective only if an ascertainable standard for measuring the value of the land does in fact exist. This, so his Honour considered, was not the case where the land was as unusual as an island off the coast of Queensland or as unique as a modern city building. As Menzies J. explained, the same difficulty could arise with respect to chattels which have no market value:

“. . . I am not satisfied that there could be either specific performance or damages in the event of a failure to deliver a picture disputedly attributed to Vermeer which was the subject of an agreement to sell at a reasonable price. If it had to, a court could, of course, decide the value of such a picture, but to do so it would have to hear and weigh the evidence for and against authenticity as well as to take into consideration evidence of value. [Such an agreement] would be no more than an agreement to pay what the court should fix as its value. I am inclined to think such a bargain would be no contract and that before delivery a court would not undertake its enforcement.”⁸⁸

Incorporation by Reference: The “Standard of Reason”

*Hall v. Busst*⁸⁹ would probably have caused less controversy and confusion if commentators had distinguished more sharply between references to *value* as a measure of obligation and references to *reasonableness* as such. The former is traditionally regarded as sufficiently definite, the latter is problematical. One reason why this confusion has occurred is that one rarely finds a reference simply to “value”; more commonly the reference is to “reasonable” or “fair” value and this makes it seem as though the concept of “reasonableness” were directly involved. However, even where one promises to pay the “reasonable value” of a thing, the basic reference is still to “value” as the starting point for the calculation of price. “Reasonable” as a qualification of “value” is little more than a reminder that the special circumstances of the case must be carefully assessed so as to ensure that

85. “. . . such promise to pay *tantum quantum meruerit* is certain enough, and he shall make the demand what he deserves; and if he demand too much, the jury shall abridge it according to their discretion . . .” *Hall v. Walland* (1622) Cro.Jac. 618, 619.

86. *Hall v. Busst* (1960) 104 C.L.R. 206, 221 *per* Fullagar J.

87. (1960) 104 C.L.R. 206, 216 *et seq.* It is submitted that *Hall v. Busst* applies only when it is impossible to establish objectively the value of the land. Statements of the *ratio* of the case tend to be too sweeping. See *e.g.*, the following *dictum* in *Corser v. C.G.A. Corporation* [1963] N.S.W.R. 225, 228: “. . . it is not possible to treat a contract for the sale of land, which fails to specify any price at all, as being an enforceable contract to sell and buy at a reasonable price.”

88. *Id.*, 235.

89. (1960) 104 C.L.R. 206.

the appropriate meaning of "value" is selected⁹⁰ and that necessary allowances are made for peculiarities of the thing or service in question which may justify departures from the norm.

Where the reference is simply to "reasonableness" the question arises whether "reasonableness" is an externally existing standard at all. An affirmative answer seems implicit in Bowen L.J.'s dictum: ". . . you introduce the consideration of what measure reason will apply, because the measure which reason will apply tends towards certainty, and therefore enables you to make up for the absence of distinctness on the part of the contract by reference to a standard which the parties had in their minds . . . namely the standard of reason."⁹¹ One doesn't need to be a legal realist to see that a point which is settled by reference only to "reasonableness" is not really settled at all until a judge determines what was reasonable in the circumstances. Fullagar J. in *Hall v. Busst* regarded this consideration as a decisive objection to a contract for the sale of land at "a reasonable price": "For in such a case . . . the party who brings an action or suit comes into court without a complete cause of action. He is saying to judge or jury: 'Complete our contract for us, and then enforce it.' It is the same as if the 'contract' had said: 'for a price to be fixed by a judge or a jury'. And clearly a contract in those terms could not be enforced, for no breach antecedent to litigation could be assigned."⁹²

The question to be answered, however, is not whether according to some philosophical analysis "reasonableness" constitutes an objective standard but whether the law says that it does. The law is free to assume, contrary to fact if need be, that all members of the community come to largely similar, if not identical, conclusions when asked what reason demands in particular circumstances. There cannot be any doubt that the parties can settle matters relating to mode of performance by a simple reference to "reasonableness". "The concepts of reasonable price for goods sold and of reasonable remuneration for services rendered, and indeed of contractual stipulations, express or implied, for reasonable time and reasonable notice . . . are all the products of similar developments."⁹³ Perhaps the best known example is the rule that delivery in contracts for the sale of goods must be made within a reasonable time where no specific delivery date has been specified. In this context "reasonableness" is obviously treated as a sufficiently certain standard.

However, it seems that more crucial aspects of performance, in particular its *quantum*, cannot be effectively defined by means of a direct appeal to reasonableness. A court would hardly enforce a contract for the sale of land which purported to define the intended boundaries in this way. It was held in *Davies v. Davies*⁹⁴ that covenants in restraint of trade cannot effectively be given geographical limits by stipulating that they are to operate for "a reasonable distance" from a certain point.

90. ". . . the word 'value' is capable of different meanings. It may bear one meaning in one statute or contract, and another meaning in another statute or contract. The value referred to may be 'market value', or 'replacement value', or it may be that the purpose of the statute or contract will be best achieved by taking the value as 'cost less depreciation'. But, however difficult the task may be, the task of giving a meaning to the word 'value' is such a task as the courts daily undertake." *Hall v. Busst* (1960) 104 C.L.R. 206, 220 *per* Fullagar J.

91. *Davies v. Davies* (1887) 36 Ch. D. 359, 393 *et seq.*, quoted by Kitto J. in *Hall v. Busst* (1960) 104 C.L.R. 206, 227.

92. *Hall v. Busst* (1960) 104 C.L.R. 206, 222.

93. *Id.*, 240 *per* Windeyer J.

94. (1887) 36 Ch. D. 359.

That "the standard of reason", unsupported by an implied reference to value, is no substitute for an objective specification of the *quantum* of performance is borne out by *Placer Developments Ltd. v. Commonwealth*.⁹⁵ The parties agreed, *inter alia*, that the Commonwealth, the defendant, "will pay . . . a subsidy upon the exportation of [plywood, veneers, logs and other products] from the Territory [of Papua and New Guinea] for entry into Australia of an amount or at a rate determined by the Commonwealth from time to time, but the amount of subsidy paid shall not exceed the amount of customs duty paid and not remitted". The question was whether this undertaking, once exports had taken place and customs duty had been paid, placed the Commonwealth under an obligation to pay some specified sum, or, at least, to determine the amount it considered appropriate as a subsidy and then to pay the amount so determined. The High Court held (Menzies and Windeyer JJ. dissenting) that there was no such duty. Taylor and Owen JJ. considered the "undertaking" illusory because it was, in their view, no more than a promise to pay what the Commonwealth in its discretion thought fit.⁹⁶ Kitto J. agreed with this analysis and explained further that the clause could not be given sufficient content by implying the requirement that the subsidy had to be reasonable: "A promise of a governmental subsidy is meaningless in the absence of a specification of some amount or some basis of calculation. It carries no implication that at least a reasonable subsidy shall be paid, for there is no general standard of reasonableness with respect to the quantum of a subsidy."⁹⁷ The concept of reasonableness, so the learned judge thought, "cannot be applied because of the absence of any agreed basis of calculation".⁹⁸ Windeyer J. adopted the same viewpoint: ". . . a jury cannot say what is a reasonable sum if there be no weight or measure they can apply, and which a court could use to test whether their verdict is or is not within the bounds of reason. . . . There are no objective criteria of the reasonableness of a subsidy."⁹⁹ Windeyer J. and Menzies J. dissented on the ground that there was an obligation to make a determination which was not without value and significance.¹⁰⁰

A promise to pay a reasonable sum will usually be treated as sufficiently specific, once the promisee has performed his own side of the bargain. In *Hall v. Busst* this was expressly recognized by Menzies J. when he indicated that the sale, at a reasonable price, of a picture disputedly attributed to Vermeer would probably be enforced after delivery, though in his view it would have been unenforceable while wholly executory.¹⁰¹ This observation is fully supported by other Australian cases concerning contracts performed by plaintiffs in reliance upon promises of remuneration which were couched in terms as vague as "reasonable". In *Sinclair v. Schildt*¹⁰² a promise to pay "a substantial sum" from the proceeds of the sale of a business was held to be enforceable after the plaintiffs had performed their part of the contract. Northmore J. commented: ". . . the Court would find very little more difficulty in ascertaining what was a substantial sum, than in assessing what

95. (1969) 43 A.L.J.R. 265.

96. *Id.*, 268.

97. *Id.*, 266.

98. *Ibid.*

99. *Id.*, 272.

100. *Id.*, 268, 270.

101. (1960) 104 C.L.R. 206, 235. It should be remembered that, in his Honour's view, no particular value can be attributed to such a painting; this would obviously still be true after delivery.

102. (1914) 16 W.A.L.R. 100. The facts are stated *supra*, at n.73.

is a reasonable sum, and a contract to pay a reasonable sum for work done or goods sold is quite usual.”¹⁰³ Similarly, in *King v. Ivanhoe Gold Corporation Ltd.*¹⁰⁴ the plaintiff, a metallurgist who had been employed to improve the extraction of gold in the defendant’s goldmine, succeeded in enforcing the defendant’s promise to “pay . . . handsomely . . . if the extraction is still the same at the end of July . . .”¹⁰⁵ However, in such cases the courts can exercise their generosity in matters of vagueness only if they have first decided that the statement in question was meant and understood as a genuine promise. In *Stevenson v. Ellis*¹⁰⁶ for instance, a field assistant sued his employer, a surveyor, seeking to enforce a promise that he would receive, apart from weekly wages, “a substantial cut on all work done”. At first sight this case seems indistinguishable from *King v. Ivanhoe*, but the court construed the defendant’s statement as an undertaking to be generous if and in so far as the defendant might think fit. In these cases the defendant’s performance was to be rendered in money, the amount payable being defined in rather vague terms. Promises to remunerate in kind give rise to the same problems of principle. In *Lindsay v. L. Stevenson & Sons Ltd.*¹⁰⁷ damages were awarded for breach of the promisor’s promise to do “a considerable portion of [my] business” with the promisees. Damages were assessed on the assumption that the expression meant “at least half the total business”.¹⁰⁸

Incorporation by Reference: Promises to Perform According to One’s Capacity

Another standard not infrequently used when defining obligations is the promisor’s subjective capacity and opportunity to perform. Such a standard can, by definition, never overtax the promisor. On the other hand, it will frequently be very unsatisfactory from the promisee’s point of view, since the promisor has infinite scope for excuse and argument even where his disregard of the obligation has been flagrant. The courts have wondered whether promises “to do one’s best” are really sufficiently distinct and not illusory; however, common sense indicates that there is little point in depriving the promisee of the small degree of protection (*i.e.*, protection against particularly flagrant breaches) with which he has chosen to be content, and this is the view which the courts have adopted.

In *Egel v. Drogemuller*¹⁰⁹ where the promisor undertook to “do his best” to pay a weekly sum in maintenance payments, Reed J. commented that many difficulties would arise if it should become necessary to determine whether the defendant had “done his best”.¹¹⁰ With respect, however, it seems that Murray J. stated the position correctly when he said that, although specific performance of such a promise might be out of the question, there was no reason why damages should not be recoverable if a breach could be proved.¹¹¹ This kind of standard is encountered fairly frequently in moratorium agreements. Such agreements occasionally purport to bestow on the debtor an almost unlimited latitude for repayment. Faithful to their resolve to give effect to the parties’ intention to make a contract, no matter how difficult the

103. *Id.*, 111.

104. (1908) 7 C.L.R. 617.

105. *Id.*, 619.

106. (1912) 29 W.N. (N.S.W.) 52.

107. (1891) 17 V.L.R. 112.

108. See *supra*, at n.14.

109. [1936] S.A.S.R. 407.

110. *Id.*, 416.

111. *Id.*, 412.

problems of construction which may arise, the courts have tended to the view that vaguely-worded conditions qualifying the obligation to pay a debt are valid and effective as long as they purport to settle the time for payment by reference to objective circumstances (*i.e.*, circumstances other than the debtor's discretion). In *Head v. Kelk*¹¹² for example, a clause that the debtor would pay "when he was financially able to do so and not before" was held valid. Other examples of such indefinite but nonetheless valid clauses are undertakings to pay "when I can", "when I am able", "by instalments", and "as soon as we can get our affairs arranged".¹¹³ But a moratorium that a company should repay a sum of money when it "considered that it was in a position to pay . . ." was held ineffective, either because it was illusory or because it was too uncertain to be given any distinct meaning; in consequence the money was payable on demand.¹¹⁴ Whether such an agreement is part of a loan contract or subsequent to and separate from it, its invalidity must not be regarded as invalidating the loan contract, in particular the obligation of repayment. Severance of the moratorium will invariably be possible.¹¹⁵

Incorporation by Reference: Determination by Third Party

The standard used for settling essential points of the parties' agreement need not be an abstract formula existing at the time of the conclusion of the contract. Particularly impressive applications of the maxim, *certum est quod certum reddi potest*, are agreements by which the parties undertake to act in accordance with a determination to be made by a third party. There is now no doubt, for instance, about the validity of an undertaking to sell goods or even land at a price which represents the value of the subject matter as determined by a named valuer.¹¹⁶ It would be wrong to regard the contract as not concluded in such cases until the third party has made his determination; rather, there is an immediate and sufficiently certain obligation to comply with the third party's directions. A repudiation of this obligation would be an anticipatory breach.¹¹⁷ Problems may well arise when the third party dies or refuses to act.¹¹⁸ It appears, however, that the courts will usually imply a term that, in the absence of a valuation, the actual value will be the price.

One wonders whether a promise would be regarded as illusory if the task of valuation were to be left to the promisor himself. Some choice or discretion on the promisor's part is certainly perfectly compatible with the existence of a binding obligation. This is shown by *Allcars Pty. Ltd. v. Tweedle*.¹¹⁹ A stipulation that the contract was to be on the usual terms of any person or corporation which the seller cared to nominate, was held not to be too vague or uncertain.

Incorporation by Reference: Demand to be Made by Promisee

Is it legally possible for a promisor to bind himself to do whatever the promisee may demand? It is well established that a promise to comply with reasonable, as distinct from arbitrary demands is legally valid. Whenever

112. (1961) 80 W.N. (N.S.W.) 290.

113. *Bailes v. Modern Amusements Pty. Ltd.* [1964] V.R. 436, 440 *per* Sholl J.

114. *Ibid.*

115. See Sholl J.'s comments in *Bailes' case, id.*, 440 *et seq.*, on *Re Vince* [1892] 2 Q.B. 478.

116. *Prior v. Payne* (1949) 23 A.L.J. 298. See also *Hall v. Busst, supra*, n.87. For a discussion of earlier difficulties with such situations, see Ellinghaus, (1972) 4 *Ad. L.R.* 365 *et seq.*

117. See *Frost v. Knight* (1872) L.R. 7 Ex. 111.

118. *Wenning v. Robinson* (1964) 81 W.N. (N.S.W.) 269.

119. [1937] V.L.R. 35.

possible the courts will read the element of reasonableness into promises made by one party to comply with demands to be made by the other. It has been laid down, for instance, that the owner of a public house who undertakes to buy all his supplies of beer from a particular brewery ("tied house") implicitly promises to pay such prices as the brewery may reasonably demand since "no publican binds himself to take all his beer from the particular brewer at any price the brewer likes to put upon it".¹²⁰ In *Sweet & Maxwell Ltd. v. Universal News Services Ltd.*¹²¹ the Court of Appeal held that an agreement to enter into a lease containing "such other covenants and conditions as shall be reasonably required" by the lessor was sufficiently certain and capable of specific performance.

The question remains, however, whether an express submission to the promisee's *arbitrary* judgment as to the *quantum* of the promisor's performance would be legally effective.¹²² Bray C.J. faced this problem squarely in *Powell v. Jones*.¹²³ The case gave rise, *inter alia*, to the question whether the following term was capable of legal enforcement: "Agreement for Tenancy or Lease to be in terms and to contain such special clauses as the Landlord may require to be prepared by R. W. Swan & Co. Pty. Ltd.¹²⁴ at the cost of the Tenants and signed when ready." The learned Chief Justice held that the landlord was able to enforce the contract which contained this term, rejecting the attempt made by the tenant's counsel to distinguish *Sweet & Maxwell's* case on the ground that the controversial clause in that case required the terms to be supplied by the lessor to be reasonable whilst there was no such express requirement in *Powell's* case. Bray C.J. could probably have met the argument by pointing out that reasonableness, though not expressed in the agreement in *Powell's* case, had to be implied.¹²⁵ The learned Chief Justice did not seize upon this opportunity of avoiding what is undoubtedly a major problem of principle. Instead he declared the controversial clause enforceable as it stood.

The view expressed by Bray C.J. cannot be regarded as settled. In *Upper Hunter C.D.C. v. Australian Chilling and Freezing Co. Ltd.*¹²⁶ Menzies J. stated that "an unrestricted right to vary charges" purportedly vested by contract in a supplier of electricity might "give rise to problems". In *Godecke v. Kirwan*¹²⁷ Gibbs J. seemed critical of Bray C.J.'s view although he did not express a final opinion.

VAGUENESS AND UNCERTAINTY: TERMS LINKING PRESENT CONTRACTS WITH FUTURE TRANSACTIONS The "Contract to Make a Contract"

Despite doubts which are occasionally voiced about the legal efficacy of a "contract to make a contract", there is no reason why a contractual undertaking to enter into some future transaction should not be fully effective

120. *Foley v. Classique Coaches* [1934] All E.R. 88, 93.

121. [1964] 2 Q.B. 699.

122. The efficacy of such an arrangement seems to have been assumed by Davidson J. in his judgment (reversed on another point by the High Court) in *Peters American Delicacy Co. Ltd. v. Champion* (1928) 28 S.R. (N.S.W.) 253, 261 *et seq.* See also the observations by Street C.J., *id.*, 259.

123. [1968] S.A.S.R. 394.

124. This was the firm which had been acting as the landlord's agent in arranging the contract.

125. See *Jubal v. McHenry* [1958] V.R. 406.

126. (1968) 41 A.L.J.R. 348, 352.

127. (1973) 47 A.L.J.R. 543, 549.

legally.¹²⁸ However, it is essential that any such undertaking specify in detail the exact terms of the transaction which is envisaged. Parties frequently fail to do this and so render the undertaking illusory because its detailed terms cannot be determined without further agreement.

A good example is *Duggan v. Barnes*.¹²⁹ A purchaser of land undertook to give a lease to any person who might purchase the vendor's business which was situated on the land. The terms of the proposed lease were not specified nor was there any reference by means of which they could be ascertained. Speaking for the Full Court, Cussen J. stated: "Reference to the authorities shows that sometimes the standard indicated is the determination of one of the parties, sometimes the determination of a third person, sometimes the terms of a prior transaction, sometimes what is usual or reasonable. But a standard of some kind there must be."¹³⁰ It seems hardly possible to save such a contract by implying a term that the future transaction should be a reasonable one:¹³¹ to read a whole set of terms into a simple appeal to reasonableness would be too blatant an exercise of judicial discretion. However, it may sometimes be possible to imply a term that the future transaction should be on such terms as are usually found in transactions of the particular type. This may save the contract, provided there are terms which can be identified as being in common use in the particular place at the time the contract was made.¹³²

The Contract to Make a Will

Undertakings to make testamentary provision for the promisee are of frequent occurrence: litigation has stamped upon them an identity of their own. Enforcement of such arrangements is often resisted on the basis of alleged vagueness. Sparks¹³³ has given some typical examples from the wealth of American case law:

"... a promise that the alleged promisee will receive the 'bulk' of the promisor's estate, enough for 'sufficient and competent maintenance', enough to prevent him from becoming a public charge, or an amount sufficient to produce a certain income, or that he will be well paid for his services or liberally provided for have more of the appearance of declarations of intention than of actual bargains. Yet each of these has been held sufficiently certain to justify the finding of a contract."

Australian courts have been presented with similar promises, *e.g.*, "to provide for you so that you will have to work no more",¹³⁴ to "leave you my fortune",¹³⁵ or to "see that you will be well rewarded . . . if you stay with me till I die",¹³⁶ but they seem to have treated such claims with greater caution.

128. This problem is analysed in detail in (1967) 3 *Ad. L.R.* 46, 51 *et seq.*

129. [1923] *V.L.R.* 27.

130. *Id.*, 30 *et seq.*

131. But see *Jubal v. McHenry* [1958] *V.R.* 406.

132. See *In Re Rogers to Clifford* (1915) 11 *Tas. L.R.* 1, 5.

133. *Contracts to make wills* (1956), 32 *et seq.*

134. *O'Sullivan v. National Trustees Executors & Agency Co. of A'asia Ltd.* [1913] *V.L.R.* 173 (held: sufficiently certain to be enforced).

135. *Horton v. Jones* (1935) 53 *C.L.R.* 475 (held: caught by Statute of Frauds because "fortune" included real estate, and also too vague to be enforceable).

136. *Stinchcombe v. Thomas* [1957] *V.R.* 509 (held: too vague to be enforced, but *quantum meruit* allowed for services rendered); see also *Shiels v. Drysdale* (1880) 6 *V.L.R.* (Eq.) 126.

Actions in this category are usually brought by housekeepers against the estates of their deceased employers. Uncertainty of terms is only one of a number of obstacles which the plaintiff has to overcome. The cases bear out Monahan J.'s statement in *Stinchcombe's* case: "This type of claim is always treated by the Court with a degree of jealous suspicion."¹³⁷ Usually the plaintiff will find herself in evidentiary difficulties: she has the misfortune of having to charge a man who can no longer defend himself and there may be little or nothing to corroborate her story. In *O'Sullivan's* case, Madden C.J. stated: "The Court and jury should be very wary how they accept statements made by a person against a dead man . . . any inconsistency in the attitude of the parties, anything that shows that no promise was made, should be carefully considered . . ."¹³⁸ Even where the plaintiff's story is convincing, she runs the risk that it will prove too much: the assurances and promises given to the plaintiff may have been too emphatic and personal to be compatible with the creation of a cold contractual relationship. In *Horton v. Jones*¹³⁹ the deceased had explained that he was lonely and suffered from a heart condition, had asked whether she would "make a home" for him and look after him for the rest of his life, and had promised that, if she accepted, he would leave her his fortune. Although she had fulfilled these conditions, her action failed on several grounds. Evatt and McTiernan JJ. considered that the *animus contrahendi* was lacking: "The words 'to make a home' and 'to give up everything' extend beyond the relationship of master and servant: they point to the conclusion that sacrifice of her own interests and prospects as well as service was part of the obligation. It is not suggested that her part was not honourable, but it cannot be measured by any legal standards."¹⁴⁰

The next line of defence against such actions is a plea of vagueness and uncertainty. *Prima facie* one would surmise that courts would not look too kindly upon such a defence, if only because it is raised against a plaintiff who has wholly performed her part of the arrangement. In *O'Sullivan's* case¹⁴¹ the plaintiff had looked after the deceased for a meagre weekly wage until his death on the strength of his promise that he would provide for her so that she would not have to work anymore. He left her nothing in his will and she recovered substantial damages.¹⁴² In dealing with the defence of uncertainty, Hodges J. confessed "to a feeling of reluctance to determine that a person who for a number of years, on an understanding like that, has attended to a man under these circumstances should in the end be deprived of all remuneration except the small wages given at the time . . ."¹⁴³

Although such considerations have since become a legitimate answer to a plea of vagueness, it is arguable that *O'Sullivan's* case would be decided differently today. In *Stinchcombe's* case¹⁴⁴ the plaintiff had been the deceased's housekeeper for the last twelve years of his life, working very hard for low wages.¹⁴⁵ Monahan J. accepted her contention that she had taken up the position on the strength of the deceased's promise that she would be

137. *Id.*, 510.

138. [1913] V.L.R. 173, 177.

139. (1935) 53 C.L.R. 475.

140. *Id.*, 492.

141. [1913] V.L.R. 173.

142. In assessing damages the court relied on an analogy with accident cases: *id.*, 180.

143. *Ibid.*

144. [1957] V.R. 509.

145. For a description of her arduous working conditions, see *id.*, 512 *et seq.*

“well rewarded” if she stayed with him until his death. The learned judge pointed out that a majority of the judges in *Horton v. Jones* had thought the promise in that case (“I will promise to leave you my fortune”) too uncertain and that “well rewarded” was no more specific. Accordingly Monahan J. concluded that the promise was unenforceable for uncertainty and allowed some additional remuneration on the alternative *quantum meruit* claim. It is submitted with respect that *Stinchcombe’s* case is not a satisfactory precedent. Although uncertainty of terms was discussed in *Horton v. Jones*, the main reasons for that decision were absence of contractual intent and, even more importantly, absence of writing (required under the Statute of Frauds). Uncertainty of terms, as a defence to a claim based upon a fully executed contract, should be allowed only in the most exceptional circumstances. Problems of vagueness are less likely to arise when, as in *Schaefer v. Schumann*,¹⁴⁶ an actual draft will is presented to the plaintiff and she enters upon her employment in reliance upon specific provisions of such draft which are favourable to her and couched in sufficiently clear terms. Even then, other pitfalls await the plaintiff when she seeks to establish the *animus contrahendi*, or to satisfy the requirements of the Statute of Frauds where that is applicable,¹⁴⁷ or to prove that actions of the testator which have depleted the estate have amounted to a breach of his promise. In *Palmer v. Bank of N.S.W.*¹⁴⁸ an old man, who felt in need of care and attention, had not just promised to make a will in favour of his prospective housekeepers, a married couple (the plaintiffs), but had in fact made a will leaving the whole of his estate to them and had secured their services by promising not to revoke the will if they looked after him until his death. Although the primary judge regarded vagueness as a relevant issue, the Court of Appeal of N.S.W. and the High Court considered the arrangement that the plaintiffs would look after the testator and that the testator would not revoke his will (which had been reduced to writing) a fully binding contract. In the last year of his life the testator had paid nearly \$7,000 into a joint account with a third party, thus decreasing the value of the estate. The High Court held that these actions of the testator did not amount to a breach of contract even if his motive had been to deprive the plaintiffs of some of the benefit of the contract. Barwick C.J. considered that authorities of long standing supported the proposition that “a promise to leave . . . by will the deceased’s estate at death . . . does not involve an obligation not to part with any property during life . . .”¹⁴⁹ The creation of such an obligation requires an express undertaking.¹⁵⁰

Future Transactions as Conditions Precedent in Present Contracts

Contracts frequently provide that obligations are to come into effect only upon the conclusion of some other transaction or upon the granting of some licence or approval. Cases of this kind should be divided into two fundamentally different categories. The first of these is concerned with situations in which the parties have formulated their terms, but intend that the contract as such will come into legal existence only upon conclusion of the further transaction, or upon the granting of the required approval,

146. [1972] 46 A.L.J.R. 82.

147. *Ibid.*; see also *Horton v. Jones* (1935) 53 C.L.R. 475, in particular the judgment by Rich and Dixon JJ., 481 *et seq.*

148. (1975) 133 C.L.R. 150.

149. *Id.*, 159.

150. *Id.*, 162 *per* Barwick C.J.

and not before. One celebrated example is the arrangement involved in *Pym v. Campbell*.¹⁵¹ Other equally well known instances are arrangements which the parties have explicitly made "subject to contract". Almost invariably this phrase is taken to indicate that a contract is not to come into being until a formal document has been executed.¹⁵² Whether the terms of the initial arrangement are vague and uncertain or defined with precision is legally irrelevant in such cases, because in any event there is no *animus contrahendi*. Accordingly cases in this first category are not really relevant to this article.

The second category comprises arrangements which are intended to be binding even before the further transaction is concluded or the approval is granted: only the operation of the contract, not its creation, is intended to be dependent upon the transaction or the approval as a condition precedent. *Waldron v. Tsimiklis*¹⁵³ provides a suitable illustration. A contract for the sale of land contained the following clause: "This contract of sale is subject to the approval of all relevant authorities for the erection of a residential flat building on the subject land." The contract further provided that settlement was to take place "within 28 days of approval of special conditions clause". In an action by the purchasers for specific performance, the vendor argued that the approval clause gave no indication of the kind of residential flat building which was contemplated and was therefore so vague and uncertain as to be void. King J. considered that the approval clause had been inserted solely for the purchasers' benefit, that they were therefore legally able to waive it, and that they had in fact done so.¹⁵⁴ Specific performance was ordered on this basis. The approval clause having been waived, its alleged vagueness did not become a decisive issue in the case. However, King J. expressed the opinion that it had sufficient meaning: "The residential flat building contemplated is any *bona fide* flat building project determined by the purchasers. The purchasers were to be bound by the contract only if they could secure approval of the relevant authorities for whatever genuine flat project they decided upon and wished to proceed with."¹⁵⁵ With respect, there is indeed no legal reason why the contract should not impose upon the purchasers in this rather indeterminate way an obligation to apply for approval.¹⁵⁶ It should be noted that the contract in *Waldron's* case did not expressly create an obligation to apply for approval,¹⁵⁷ nor did King J. make a positive finding that such a duty was implied. Should the contract in fact have left the purchasers free not to apply for approval, all their undertakings under the contract would have been illusory. However, given a convincing demonstration of a contractual intent, business efficacy would readily justify the implication of a duty to apply for approval and this appears to have been assumed by the learned Judge.

The most common instance of a provision importing into a contract a future transaction as a condition precedent is the "subject to finance"

151. (1856) 6 E. & B. 370. See also *Kirwin v. Pearson* (1882) 3 N.S.W.L.R. 162; *Svenska Centrifug Aktiebolaget v. Ross* (1907) Q.W.N. No. 2; *Hodges v. Dossetor* (1925) 28 W.A.L.R. 17.

152. See (1967) 3 *Ad. L.R.* 46, 54 *et seq.*

153. (1976) 12 S.A.S.R. 481.

154. It should be noted that this application of waiver involved the whole of the clause rather than merely one possible meaning of it; it is thus substantially different from the use of waiver discussed *supra*, at n.41.

155. *Id.*, 483.

156. See the principle stated by Menzies J. in *Thorby v. Goldberg*, *supra* n.17.

157. Occasionally such duties are created expressly—see *Gagliardi v. Lamont* [1976] Qd.R. 53.

clause.¹⁵⁸ Such clauses purport to make the conclusion of a loan contract a condition precedent to the operation of a contract (usually one involving a sale of goods or of land) which is meant to be immediately binding.

The leading English case in this area is *Scammell v. Ouston*.¹⁵⁹ The action for failure to supply a motor van under an alleged contract of sale was unsuccessful because the arrangement between the parties was subject to an understanding that the balance of the purchase money (£100 had been allowed for an old truck which was to be "traded in") could "be had on hire purchase terms over a period of two years". This was said to be so indefinite that the House of Lords inferred the arrangement had not been intended to be a binding contract and that, even if it had been so intended, it would be unenforceable. Viscount Maugham explained: ". . . a hire purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth."¹⁶⁰

Scammell v. Ouston was applied by the Court of Appeal of N.S.W. in *Moran v. Umback*.¹⁶¹ A document had been signed which appeared to contain a contract for the sale of a wine saloon in Sydney for £2,400. One of the clauses made the arrangement "subject to finance being arranged on £1,000 deposit". The Court of Appeal took the view that there was no binding contract, since there were many ways in which that kind of transaction might be financed and none of these had been specified in the clause. Moffit A.J.A. thought¹⁶² that the clause probably meant to leave the approval of any particular set of loan terms which could be arranged entirely to the purchaser's discretion and that, on this basis, no genuine promise of any kind had been made by him. However, his Honour conceded that the clause might have been intended as limited to finance available to the purchaser on reasonable terms. On this supposition his Honour took the view, as did Herron C.J. and Sugerman J.A., that *Scammell v. Ouston* was directly applicable and the contract too vague to be enforceable. As Moffit A.J.A. explained: "There is no definition whatever of the nature of the finance, such as who is to arrange the finance, as to the type of institution or person who is to provide the finance or as to the rate of interest or as to the term of the security to be provided."¹⁶³

There is, it seems, a fairly fine dividing line between this case and *Jubal v. McHenry*,¹⁶⁴ distinguished not without some difficulty by the Court of Appeal in *Moran's* case. *Jubal's* case also involved what appeared to be a written agreement for the sale of a shop, containing, *inter alia*, the clause: "This sale is subject to bank finance of £1,500 being obtained for the purchaser." O'Bryan J. held that it was "proper to read into this condition the requirement that the finance obtained shall be on reasonable terms"¹⁶⁵ and that, so supplemented, the condition was sufficiently certain. An important factor was that the clause (unlike the clause in *Moran's* case) required *bank*

158. For an early example, see *In Re Gibbings to Higgins* (1915) 11 Tas. L.R. 41. See also Nicholson, (1967) 8 *U.W.A.L.R.* 1; Sutton, *supra*, n.9. What was said *supra*, at nn.155 and 156 concerning the express or implied duty to seek approval applies *mutatis mutandis* in this context.

159. [1941] A.C. 251.

160. *Id.*, 256.

161. [1966] 1 N.S.W.R. 437.

162. *Id.*, 439.

163. *Ibid.*

164. [1958] V.R. 406.

165. *Id.*, 411.

finance and this was available at the time at standard rates of interest and upon substantially similar terms. O'Bryan J. found it possible to give sufficient meaning to the term as regards length of the loan, the type of security to be provided and other conditions by relying upon what was common and well-known banking practice at the time.

The lesson to be learnt from *Jubal's* case is that the principle in *Scammell v. Ouston* cannot be applied without a careful examination of the nature of the particular contract, the exact wording of the finance clause,¹⁶⁶ the commercial practices which surround the transaction at the particular time and place,¹⁶⁷ and all other relevant surrounding circumstances.¹⁶⁸ Moreover, once satisfactory finance has in fact been secured, it will usually be too late to raise the defence of vagueness and uncertainty.¹⁶⁹

CONCLUSIONS

Disputes involving illusoriness, vagueness and uncertainty of terms have occasioned a great deal of litigation. Numerous judicial opinions and a steadily growing number of academic contributions have helped greatly to clarify the issues. Although some of the relevant material remains elusive and intractable,¹⁷⁰ sympathetic reading of the Australian authorities reveals a coherent and rational pattern of rules and principles which should enable the courts to give just and consistent answers to the manifold questions which arise in practice. Some of the main rules and principles may be stated as follows:

- (1) An illusory promise is a statement in promissory form which lacks genuine promissory content because it is so qualified as to leave the "promisor" free not to render any performance. An illusory promise does not give rise to a contractual obligation, nor is it a sufficient consideration for a counter-promise.
- (2) A promise to render a performance, all or part of which is still to be defined by further negotiations to which the "promisor" is meant to be a party ("to be agreed"), is *prima facie* illusory, because the "promisor" is neither bound to perform the incomplete promise nor obliged to agree to any particular proposal when he negotiates. Such a promise is only genuine and enforceable if the contract lays down what the promisor's duties are to be if negotiations should break down. Such provision may be found implied in cases where the parties have made clear their intention to make a binding and effective contract.
- (3) A contract is too vague and uncertain to be enforceable if the parties have failed to settle the essential terms (*e.g.*, the terms specifying subject matter and price in contracts of sale).
- (4) An individual term in a contract is ineffectual on grounds of vagueness and uncertainty when it suffers from conceptual confusion or vacuity

166. ". . . the more specific the clause is, the greater the likelihood of its being upheld": Sutton, *supra*, n.9, 6, citing *Zieme v. Gregory* [1963] V.R. 214 and *Tait v. Bonnice* [1975] V.R. 102.

167. O'Bryan J. appears to have taken judicial notice of the relevant banking practice in *Jubal's* case and this was a decisive factor: [1958] V.R. 406, 410 *et seq.*

168. See *supra*, at nn.61-64. See also Sutton's analysis of the admissibility of extrinsic evidence, *supra*, n.9, 6 *et seq.*, citing *Jones v. Walton* [1966] W.A.R. 139.

169. *Bradford v. Zahra* [1976] Q.W.N. No. 20; *supra*, at nn.65-79.

170. Ellinghaus, in commenting upon the cases set out in the *Australian Digest*, has complained of the "amorphousness of the materials": *supra*, n.9, 4, n.6.

to such an extent that its application to particular fact situations would become a matter of unguided speculation.

- (5) When the parties have had an overall intention to make a binding and effective contract, the courts will strive to give effect to this intention by avoiding whenever possible a construction which will render all or some of the terms illusory or vague and uncertain. Extrinsic evidence should be freely admitted to clarify the parties' true common intention when, without such evidence, the contract would fail for illusoriness or vagueness.
- (6) Although vagueness and uncertainty are often said to render contracts void, that description should be reserved for contracts involving extremes of vagueness. In most cases of vagueness and uncertainty, it would be more accurate to describe the affected contracts as ineffective for the time being, but capable of being rendered effective by events subsequent to their conclusion. Contracts become effective and enforceable despite initial vagueness when (a) subsequent conduct of the parties (particularly acts of performance) supplies additional evidence of the parties' true common intention; and (b) the plaintiff has performed his part of the contract in reliance upon its efficacy and is claiming his remuneration. The second of these rules ((b)) also applies when the contract was initially illusory.
- (7) A common instance of vagueness and uncertainty arises when a contract seeks to incorporate an extrinsic fact or standard as a measure of one or several of the obligations, and when that fact or standard does not exist. Some standards occasionally employed in contracts are inherently problematical and may be insufficient (*e.g.*, the promisor's capacity for performance or the promisee's demand, whether reasonable or not). The "standard of reason" as such is insufficient, at least as a measure of the parties' primary obligations.
- (8) A further common instance of illusoriness or vagueness and uncertainty arises when a contract seeks to create a link with a future transaction without making it sufficiently clear how that transaction is to be brought into being or what its terms are to be. An undertaking to make another contract will be illusory if the promisor is not committing himself to the acceptance of any particular set of terms. A contract to make a will may fail for vagueness and uncertainty if the character and extent of the promised testamentary benefits are left at large. A contract which is made subject to the approval of a third party is illusory if one of the parties is left free to ensure failure of the condition by not seeking the approval, and may be too vague and uncertain if the terms of the approval are left at large. A contract which is made subject to one of the parties obtaining finance may fail for vagueness and uncertainty, depending upon the nature of the contract, the commercial practice of relevant finance institutions and all the surrounding circumstances.