CHAPTER 4

The Intention to Create Legal Relations

IN THIS CHAPTER

Introduction .........................................................................................................[4–01]
1. Social or Domestic Arrangements...............................................................[4–02]
2. Commercial Arrangements ........................................................................[4–08]

INTRODUCTION

A mere agreement between two parties does not give rise to legal obligations enforceable by law. People entered into agreements every day e.g. agreeing to meet for coffee or to go for dinner. Generally, it is not the parties’ intention that such agreements give rise to contractual obligations and therefore the law will not enforce them in a court of law. Thus, the law requires that in addition to forming an agreement the parties must display some outward signs that they intended to be legally bound by that agreement. Hence, the formality of the transaction and the relationship of the parties entering into that transaction might be determinative from an evidentiary point of view. The question of whether such intention existed is to be determined objectively. As Lord Bingham noted in Edmonds v Lawson [2000] 1 WLR 1091:

Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by inquiring into their respective states of mind.

In determining whether a particular contract gives rise to legal relations, the courts have traditionally categorised contracts into social or domestic arrangements and commercial arrangements. Where the contract is classified as a social or domestic arrangement a presumption that it does not give rise to legal relations is raised. On the other hand, where it is classified as a commercial arrangement a presumption that it does give rise to legal relations is raised. Once the presumption is raised it can only be rebutted by evidence which indicates otherwise.

1. Social or Domestic Arrangements

Where the relationship between the parties is of a personal nature and lacking in formality it is likely that the law will presume that the parties did not intend that the transaction between them would give rise to legal relations.

Agreements between Husband and Wife

In Balfour v Balfour [1919] 2 KB 571; an agreement was entered into between a husband and wife when she was unable to return with him (because of illness) to his place of work, in Ceylon. He agreed that he
would pay her £30 per month while he was away. The marriage later broke up and the wife sued her husband for failing to honour his agreement of paying her the monthly allowance. Held – in denying the wife’s claim, the court focused on the lack of consideration from the wife. However, the court also held that given the nature of the personal relationship between the parties it could not be said that it was their intention that it would give rise to legal relations. Lord Atkin observed:

All I can say is that the small courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether.

The presumption that husband and wife relationships do not give rise to legal relations is a presumption only and can be rebutted by evidence to the contrary. Thus, in *Courtney v Courtney* (1923) 57 ILTR 42; the Irish High Court held that a separation agreement entered into upon the breakdown of a relationship was deemed to be legally enforceable. Similarly, in *Merrit v Merrit* [1970] 1 WLR 1211; following the breakdown of their marriage a couple entered into an arrangement whereby the husband agreed to pay the wife £40 a month from which the mortgage on the former family home held in both their names would be paid. He furthermore agreed that once the mortgage was repaid he would transfer the house to her. The wife insisted that her husband put the arrangement in writing. In finding that the arrangement gave rise to legal relations, Lord Denning distinguished *Balfour* on the following basis:

It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

**Agreements between Mother and Daughter**

In *Jones v Padavatton* [1969] 2 All ER 616; a mother lived in the West Indies agreed with her daughter who was living in the United States that if the daughter moved to England to study for the Bar her mother would pay her $200 a month. The agreement began in 1962. In 1964, the agreement between the two was replaced with another. In this subsequent agreement, the mother bought a house in which she allowed her daughter to live. The daughter could support herself by letting out rooms in the house. By 1967 the daughter had not passed the Bar examinations and the mother sought repossession of the house. The daughter argued that a legally enforceable contract existed between them. Held – given the nature of the relationship which existed between mother and daughter at the time of entering the arrangement and the vagueness of the agreement (for example, there was no time limit placed on the daughter passing the examinations) the court held that it was not an arrangement that gave rise to legal relations:

At the time when the first arrangements were made, the mother and daughter were, and always had been, to use the daughter’s own words, ‘very close’. I am satisfied that neither party at that time intended to enter into a legally binding contract, either then or later when the house was bought. The daughter was prepared to trust the daughter to study for the Bar with diligence, and to get through her examinations as early as she could.
Other Family Relationships

It would seem that the more distant the personal relationship between the parties, the weaker the presumption becomes. The presumption of no legal relations was found to exist between uncle and nephew in *Mackey v Jones* (1959) ILTR 177. In that case, the uncle had promised his nephew’s mother that if he came to live with him and help look after the farm it would pass to the boy upon his death. Held – there was no intention to create legal relations. However, in *Hynes v Hynes* (unreported, High Court, 21 December 1984); it was held that an arrangement between two brothers did give rise to legal relations. However, most recently the High Court in *Leahy v Rawson* (unreported, High Court 14 January 2003); it was held that the presumption only applies to “the closest family kinship, such as parent and child and spouses.”

Lottery Syndicates

It has been held that notwithstanding the informal nature of arrangements such as lottery syndicates can give rise to legal relations. In *Simpkins v Pays* [1955] 3 All ER 10; three women (the plaintiff, the defendant, and the defendant’s granddaughter) lived in the same house. They regularly entered into a newspaper fashion competition. On this particular occasion, the women each submitted entries. The form was submitted with the defendant’s name. When one of the entries won, payment was made to the defendant. The plaintiff sued for her one third share. Held – there was evidence that there was an agreement to “go shares” if one of the lines won and this was intended to be legally binding.

Other Social Relationships

The presumption of no legal relations may also be raised in cases of close friendships. In *Hadley v Kemp* [1999] EMLR 589; it was held that an agreement to share songwriting royalties with other members of the band *Spandau Ballet* did not give rise to legal relations:

The members of the band had known each other since their schooldays. They have all stressed how at the time they were a close-knit group of friends who were in company with each other constantly. They had formed themselves into a band not just for the business purpose of making money (though they had certainly wanted to do that, and rightly so) but also because they loved what they were doing.

2. Commercial Arrangements

Where the relationship is not personal and is based on a commercial transaction the presumption is that such transactions are intended to give rise to legal relations. Thus, even if informal, a legally binding agreement may be entered into if set in the context of a commercial transaction. In *Esso Petroleum v Commissioner of Customs & Excise* [1976] 1 All ER 117; it was held that a binding contract existed between parties regarding the supply of football tokens to drivers who purchased the plaintiff’s petrol. Held – the arrangement was one which gave rise to legal relations. The whole purpose of the offer was commercial – the plaintiff wished the public to purchase its petrol.

The question as to whether the arrangement or offer gives rise to legal relations is judged objectively. If a reasonable person would conclude that no intention existed notwithstanding the commercial setting, then no enforceable agreement will come into existence. For example, in *Carlill v Carbolic Smokeball...*
Company [1893]: the offer regarding the smokeball and the payment of a £100 reward was deemed to be seriously intended given that the company had set aside £1,000 in a separate bank account from which it would pay users. A similar conclusion was reached in Leonard v PepsiCo (1999).

Honour Agreements

[4–10] The presumption that commercial arrangements will give rise to legal relations may be rebutted by evidence to the contrary. For example, notwithstanding the commercial nature of the relationship the parties may rebut the general presumption by evidence of a clear expression of a contrary intent. This may be done by a clause which clearly seeks to oust legal jurisdiction over the agreement. This type of clause may be described as a ‘honour clause’ or a ‘gentleman’s agreement.’ In Rose & Frank Co v Crompton Bros [1923] 2 KB 261; the parties entered into a distribution agreement. A clause in the agreement stated the following:

This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts of the United States or England, but is only a definite expression and record of the purpose and intention of the three parties concerned to which each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation.

[4–11] It was held that the distribution arrangement did not give rise to an intention to create legal relations. Similarly, in Jones v Vernon's Pools Ltd [1938] 2 All ER 626; a football pools coupon clearly stated that it did not give rise to a legal relations and was binding in honour only.

Letters of Comfort

[4–12] Letters of comfort are often issued by a company in a commercial transaction and are similar to honour clauses. Such letters normally seek to convey the present intentions of the company but do not provide a future legal commitment. Such letters are intended to provide reassurance but not necessarily a legally binding commitment. Properly drafted, a letter of comfort does not give rise to legal liability. In Kleinwort Benson v Malaysia Mining Corp. Bhd [1989] 1 All ER 785; a plaintiff bank had agreed to lend money to a subsidiary company of the defendant (the defendant having previously refused to provide a letter of guarantee). The letter stated the following:

… it is [our] policy to ensure that the business of our subsidiary is at all times in a position to meet its liabilities to you under the above arrangements.”

The court held that objectively speaking this letter did not have a promissory effect – there was no future commitment. Strictly speaking, the letter simply indicated that the present commitment (at the time the letter was written) was to honour its subsidiary’s debts. There was no commitment given that this policy would not be readjusted in the future. It is clear that whether correspondence is considered to be a ‘letter of comfort’ is a question of interpretation. Labelling such correspondence as a ‘letter of comfort’ does not necessarily make it so. In Banque Brussels Lambert v Australian National Industries (1989) 21 NSWLR

1 1 QB 256.
502; a bank gave a loan facility to the defendant’s subsidiary on the proviso that they could call in the loan with thirty days notice. The bank only did so after the following correspondence was received from the defendant:

… it would not be our intention to reduce our shareholding in [the subsidiary] from the current level of 45% during the currency of this facility. We would, however, provide your Bank with ninety (90) days’ notice of any decisions taken by us to dispose of this shareholding …

Given that this correspondence contained a promissory element (a future commitment) and given that it did not explicitly state that it was not intended to give rise to legal relations. In so doing, Rogers CJ was critical of a trend whereby such arrangements could be deemed not give rise to legal relations notwithstanding the commercial setting in which they were entered into:

There should be no room in the proper flow of commerce for some purgatory where statements made by a businessman, after hard bargaining and made to induce another business person to enter into a business transaction would, without any express statement to that effect, reside in a twilight zone of merely honourable engagement. The whole thrust of the law today is to attempt to give proper effect to commercial transactions.

**Letters of Intent**

Normally, letters of intent do not give rise to legal relations. By definition, such letters do not provide a commitment to be bound but merely indicate an intention to do so at some future point. Such letters are issued during the course of contractual negotiations as a signal of the parties’ intentions and to induce the other side to commence work in anticipation that a contract will be concluded at a later date. Whether such documents are legally binding, once again, is a question of interpretation. As Leggatt explained in *Wilson v Bangladesh Sugar* [1986] 1 Lloyds Law Rep 378:

It is common ground that when I come to look at the document styled by the defendants “letter of intent”, I must look for the purpose of construing it at the document itself, at the surrounding circumstances, and at what happened when it was brought into existence. The fact that it has the particular label that it has does not brand it at the outset as a contractual document or as a non-contractual document.

**Collective Agreements**

Under English law it would appear that a collective agreement between a trade union and an employer will not give rise to legal relations. In *Ford Motor Co Ltd v Amalgamated Union of Engineering and Foundry Workers* [1969] 2 All ER 481; it was held that this was so because of the unique characteristics of such agreements:

Agreements such as these, composed largely of optimistic aspirations, presenting grave practical problems of enforcement and reached against a background of opinion adverse to enforceability, are in my judgment not contracts in the legal sense and are enforceable at a law. Without clear and express provisions making them amenable to legal action, they remain in the realm of undertakings binding in honour.
In Ireland, such agreements may give rise to legal relations particularly if they are specific and certain - *Ardmore Studios v Lynch* [1965] IR 1. This view was endorsed by the Irish Supreme Court in *Goulding Chemicals v Bolger* [1977] IR 211; where it was held the collective agreement in question was legally binding as it “was a business-like document and had all the appearances of being intended to create legal relations between the unions which accepted and the plaintiffs who proposed.”
CHAPTER 5

Formal and Evidentiary Requirements

IN THIS CHAPTER

Introduction .................................................................................................................. [5–01]
1. Contracts to Answer for the Debt or Miscarriage of Another .............. [5–02]
2. Contracts Made in Consideration of Marriage ................................. [5–03]
3. Contracts for the Sale of Land or Interest Therein .......................... [5–04]
5. Contracts not Intended to be Performed within One Year ............... [5–09]
Statute of Frauds: Requirements ................................................................. [5–10]
The Memorandum Must Recognise the Existence of a Concluded Oral Agreement .... [5–23]
The Memorandum Must be Signed by the Party to be Charged ............... [5–25]
Joinder of Documents ....................................................................................... [5–26]
‘Subject to Contract’ ......................................................................................... [5–28]
Non-Compliance with the Statute ............................................................... [5–31]
Rectification ......................................................................................................... [5–32]
Estoppel ................................................................................................................ [5–33]
Waiver .................................................................................................................. [5–34]
Where the Statue is Being Used as an Instrument for Fraud ................ [5–35]
Part Performance ............................................................................................... [5–36]

INTRODUCTION

Most contracts are legally enforceable once an agreement has been reached, consideration has been exchanged and an objective intention to create legal relations has been found to exist. No other formality is required and certainly whether the contract is in writing does not necessarily affect it’s legally validity. However, there are a limited number of contracts which, if not in writing, or evidenced in writing, will be deemed unenforceable.¹ According to section 2 of the Statute of Frauds (Ireland) Act 1695, the following contracts were deemed unenforceable but not void (Thomas v Brown (1876) 1 QBD 714):

1. Contracts to answer for the debt of another
2. Contracts made in consideration of marriage
3. Contracts for the sale of land or interest therein

¹ There is other legislation which requires that contracts must be in writing. For example, Section 15(1) of the Package and Travel Trade Act 1995; Hire Purchase Agreements under the Consumer Credit Act 1995; Assignment of copyright under the Copyright and Related Rights Act 2000, etc.
4. Contracts for the sale of goods in excess of £10
5. Contracts not intended to be performed within one year

The legislation – as its title intimates – was initially introduced to discourage and prevent fraud. The danger of relying exclusively on oral (or parol) evidence in contract disputes was – at a time of underdeveloped litigation procedure – that it would lead to “he said/she said” type scenarios and would encourage perjury. It was decided that for certain types of contracts – those which could be deemed more onerous – something more than just oral evidence was necessary and that external evidence of the written kind should also be required. In more modern times it has been argued that the purpose of the legislation is paternalistic. The requirement of extra formality causes the parties to ‘pause and think’ before they enter into certain types of transaction. As Enright concludes:

… the statute is “a paternalistic device designed to protect people from the consequences of hasty or ill-considered contracts” which are likely to result from negotiation conducted in these kinds of contexts. The idea is that, by requiring the parties to record their contract in writing, the statute stimulates reflection and consideration of the contract. This function is aided by the layman’s perception that a written contract has special significance – that he is “really” bound once a document is in place. However, the usefulness of written records for this purpose may be doubted, particularly where the written memorandum of the contract takes the shape of a standard form drafted by the more powerful party to protect his own interests.

1. Contracts to Answer for the Debt or Miscarriage of Another

Contracts whereby one party agrees to guarantee a debt owed by another to a third party must be in writing or evidenced in writing. It would seem that this category is included in the legislation on the basis that the party guaranteeing the debt will consider carefully before agreeing to act as guarantor. The legislation does not apply to contracts of indemnity. An indemnity is where a party agrees to discharge the debt of another in any event i.e. regardless of whether there is default or not. Thus, a guarantee must involve at least three parties – the creditor, the principal debtor, and the secondary debtor (the guarantor). The legislation also applies to promises to answer for the “miscarriage” of another e.g. agreeing to meet the tortious obligations of another wrongdoer. In Kirkham v Marter (1819) 2 B & Ald 613; where the defendant agreed (orally) to pay for damage caused by the defendant’s son was deemed unenforceable as this agreed was not evidenced in writing.

2. Contracts Made in Consideration of Marriage

This category relates to agreements whereby an engaged couple are promised property or money upon their marriage. Such promises must be in writing or evidenced in writing to be enforceable – In re the Goods of Leslie Good deceased (1986) unrep High Court, 14 July 1986. In Saunders v Cramer (1843) 5 IR Eq R 12 (Ch); a Lady Cramwell agreed that should her niece marry Saunders she would leave

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2 Raymond J. Friel, *The Law of Contract* (2nd ed.) (Round Hall 2000) 149; where the author points out that “the Statute was not, primarily, enacted to regulate formalities in contracts, but rather to the protection of property rights following the Civil War and the Cromwell era.”

her niece £2,000 and a house. She signed a memorandum to this effect. Held – this agreement was enforceable.

3. Contracts for the Sale of Land or Interest Therein

It is this category of contract that is of most concern to lawyers. Any contract involving the sale of land must in writing or evidenced in writing. Some confusion can arise in relation to the meaning of “any interest therein”. It certainly applies to leases, assignments etc but would not apply to any transaction that does not create an interest in land. What about crops growing on the land? Are they part of the land i.e. naturally occurring (fructus naturales) or are they considered something detached and more akin to goods i.e. industrial growing crops (fructus industriales)? Less formality is required for the sale of crops which are not considered part of the land (and therefore falling within the ambit of the Statute of Frauds) and those which are not considered part of the land and which would fall within the Sale of Goods legislation (below). In *Scully v Corboy* [1950] IR 140; an agreement to let meadowing was deemed to be a sale of goods and not an interest in land and enforceable. As a consequence, part-payment dispensed with the need for a memorandum. Had the contract fallen within the ambit of the Statute of Frauds a memorandum would have been required.


Section 4 of the Sale of Goods Act 1893 requires that the sale of goods in excess of £10 (as it then was) should be in writing or evidenced in writing. There are a number of exceptions to this rule:

1. The Buyer Accepts and Receives Part of the Goods Sold

If the buyer does any act which indicates a pre-existing contract between the parties this may be sufficient to render the contract enforceable even in the absence of a memorandum. Thus, acceptance of some of the goods may satisfy this exception. In *Tradax (Ireland) v Irish Grain Board* [1984] IR 1, it was held that acceptance by the buyer of 1,800 tonnes out of 12,000 for an order of grain was sufficient for these purposes. The intent of the buyer is crucial and acceptance of the goods must be from the buyer and not a third party. Thus, in *Hopton v McCarthy* (1882) 10 LR (Ir) 266 (Exch); delivery of an order materials was made to the carriers warehouse where collection by the buyer was awaited. However, because business was slow the buyer changed his mind and did not continue with the contract. Held – the agreement was orally made and was not evidenced in writing nor was there any acceptance of the goods by the buyer sufficient to dispense with the need for a memorandum.

2. The Buyer has Given Something in Earnest to Bind the Bargain

It is not clear what suffices as “something earnest”, however, it would appear that given a credit card number, for example, would suffice. It might also include the payment of a deposit, or a business card. In *Farr, Smith & Co v Messers Ltd* [1933] IR 36; Wright J noted that:

The thing given in that way must be given by the contracting party who gives it, as an earnest or token of good faith, and as a guarantee that he will fulfil his contract, and subject to the terms that if, owing to his default the contract goes off, it will be forfeited.
3. The Buyer has Made Full or Part Payment

Where payment has made and accepted by the other side, this may dispense with the need for a memorandum of the oral agreement. In *Kirwan v Price* [1958] Ir Jur 56; an oral agreement was reached between the parties regarding the sale of a horse. An offer of payment was made by the buyer but refused by the seller. Held – the oral agreement was unenforceable as there was no acceptance of payment by the purchaser.

5. Contracts not Intended to be Performed within One Year

Any agreement entered into between the parties where it is not intended that it is to be performed within one year must be in writing, or evidenced in writing. This category does not apply to contracts where it was intended at the outset that they would be performed within one year but due to delays were not. In *Naughten v Limestone Land Co* [1952] Ir Jur Rep 19; an oral agreement was entered into between the parties whereby the plaintiff would go to England to study for three months and that on his return he would work with the defendant for four years. Held – this agreement’s total duration was longer than one year and was required to be in writing or evidenced in writing. The plaintiff did not succeed in arguing that the performance of one part of the contract (studying in England) was intended to be performed within one year and therefore should not require a memorandum. Similarly, in *Tierney v Marshall* (1857) 7 ICLR 308; a contract which was to last for 12 years was deemed unenforceable due to a lack of written evidence.

**STATUTE OF FRAUDS: REQUIREMENTS**

The requirements of the statute are flexibly applied. It is not the intention to bring down otherwise valid agreements simply because they do not strictly comply with the requirements of the legislation. The sole purpose of the legislation is to provide independent external proof of the concluded oral agreement between the parties. Thus, the Statute does not require that the contract itself be in writing, it is sufficient that a written memorandum or evidence of the agreement exists. Moreover, the memorandum does not have to exist in a specific format nor is there any requirement that the parties must have intended to create a memorandum for the purposes of the Statute. Thus, written documentation exchanged between the parties such as letters, receipts and so forth may be sufficient compliance with the Statute. McDermott opines that in determining whether a contract is valid and enforceable a three stage process must be followed by the courts:

(i) First, the court must decide if all the essential terms have been agreed so that there is a concluded oral contract.
(ii) Secondly, the court must decide if the contract is one which comes within the Statute of Frauds (Ireland) 1695).
(iii) Finally the court will proceed to consider whether there is an adequate not or memorandum of the contract.

*Contents of the Memorandum*

In *Godley v Power* (1961) 95 ILTR 135; Maguire CJ stated that:

A memorandum must contain all essential terms. The parties, the property and the consideration must always be ascertainable from it, but it need not contain any terms which the general law would imply…

Thus, the memorandum must contain the 3Ps (property, price and parties) and any other essential terms. These matters must be reasonably identifiable from the documentation. Finally, the documentation need not contain any terms that would be implied by law – See also Supermac’s Ireland Ltd v Kateson [2001] 1 ILRM 401. It is not necessary that the parties intended to create a memorandum. As was noted In re Hoyle [1893] 1 Ch 84; it was said that the court was not “in quest of the intention of the parties, but only of evidence under the hand of one of the parties to it that he has entered into it.” While no specific formality is required, the memorandum must consist of the following minimum requirements:

(a) The Parties
(b) The Property
(c) The Price
(d) All other terms essential to the parties

(a) The Parties
The documentation purporting to be a memorandum of the concluded oral agreement must sufficiently identify the parties to the agreement. It is not necessary that the parties are named, it is enough that they are readily identifiable. Thus, in Law v Roberts [1964] IR 292; despite the fact that the parties were not named in the documentation it was enough that their identities were sufficiently clear from correspondence and other related evidence. In Bacon & Co v Kavanagh (1908) 42 ILT 120; the use of the words “you” and “your employment” were sufficient to identify one of the parties to the agreement. Kenny J concluded:

It is not necessary that the actual names of the parties should appear in the memorandum, but if the parties are sufficiently described or indicated or referred to, so that there is no real doubt as to their identity, the statute is satisfied.

See also Guardian Builders Ltd v Patrick Kelly and Park Avenue Limited (1981) unrep, High Court, 31 March 1981; where the High Court held that despite the fact that the defendant was referenced by his first name only in the documentation and there was an error made in relation to the name of the company involved did not mean that the parties were not sufficiently identifiable for the purposes of the Statute.

(b) The Property
The subject matter of the property must be referenced in the memorandum to such an extent that it is readily identifiable. In Guardian Builders Ltd v Patrick Kelly and Park Avenue Limited (1981) unrep, High Court, 31 March 1981; where the property was sufficiently identifiable even though it was not explicitly identified:

The letter is headed “The Nurseries, Park Avenue” and it states that a sale had been concluded of “Half of the above site” and that the site area was as agreed between the plaintiff and the defendant. The parties had agreed to the site area. They had marked it out on a map and agreed it and in my opinion this is a sufficient description to satisfy the Statute of Frauds. The test is that the property so described has to be readily identifiable. It can be identifiable on the oral evidence which produces the map agreed between the parties as being the site.