A RESTATEMENT OF
THE ENGLISH LAW
OF CONTRACT

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ASSISTED BY AN ADVISORY
GROUP OF ACADEMICS, JUDGES,
AND PRACTITIONERS

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INTRODUCTION

This is the second Restatement of English law that I have undertaken. The first, *A Restatement of the English Law of Unjust Enrichment* (‘RELUE’), was published by OUP in 2012. I was greatly encouraged by the welcome given to that book, both in the courts and by commentators,¹ and have thereby been inspired to believe that this type of work fills a gap in relation to English law. While knowing what the law of contract is in England and Wales does not involve the multi-jurisdictional problems that might be encountered in some other countries (for example, the USA), there nevertheless appears to be considerable benefit from setting out this law in as clear and accessible a form as possible.

The present Restatement largely follows the format, working methods, and approach of RELUE. I have again had the assistance of an advisory group. While I alone accept responsibility for the Restatement and commentary, and not all members of the Advisory Group agree with this version—indeed it may be that each member would express matters somewhat differently throughout—I wish to put on record the immense assistance I have derived from the Advisory Group for which I am extremely grateful. Further tremendous help on drafting has been given by Philip Davies, former Parliamentary Counsel.

It is hoped that, not least because so many lawyers here and abroad need to understand the English law of contract—it is one of the most respected systems of contract law in the world and by the device of a ‘choice of law’ clause is often chosen by foreign commercial parties as the applicable law to govern their contract—this work may attract an even wider readership than RELUE. This includes lawyers in civil law systems. One of the aims is for the reader to see quickly and easily how the different elements of this area of English law fit together. Civil lawyers, who are used to a statutory code, often find English law difficult for that reason.

The hope, therefore, is that all lawyers dealing with the English law of contract, whether as practitioners, judges, academics, or law students, will benefit from this Restatement. Non-lawyers too may find it of interest and help but the complexities are such that a degree of legal knowledge is likely to be necessary in order to understand all the provisions and commentary.

¹ See eg Rose (2013) 129 LQR 639, Lee [2013] RLR 228, and the review article by Barker, ‘Centripetal Force: The Law of Unjust Enrichment Restated in England and Wales’ (2014) 34 Oxford Journal of Legal Studies 155–79; and RELUE has been cited in many of the leading English cases on unjust enrichment since it was published (including in the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 and *Crown Prosecution Service v Eastenders Group* [2014] UKSC 26, [2015] AC 1 and in the Court of Appeal in *Relfo Ltd v Varsani* [2014] EWCA Civ 360 in which, at [74], Arden LJ described it as ‘this valuable work’).
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I have drawn inspiration from the American Law Institute’s Restatement (Second) of Contracts, from the Unidroit Principles of International Commercial Contracts, and from the various European codification or restatement projects, in particular the Principles of European Contract Law, the Draft Common Frame of Reference, and the earlier Contract Code drawn up by Harvey McGregor. The work on the European harmonisation of contract law inevitably raises the question as to the value of a Restatement of English law. As with RELUE, it is my view that, whether one believes in European legal harmonisation or not, it is essential that the subtleties of English law are properly understood and appreciated before there is a consideration of whether they should be abandoned. Many English lawyers would also argue that English contract law has a particularly prominent and distinctive global role that should not be lightly given up.

The aim of this Restatement is to provide the best interpretation of the present English law of contract. It is believed that the interpretation put forward is both faithful to precedent (without requiring any change by the Supreme Court) and accurately summarises the core elements of the relevant legislation.

One might have thought that, because the law of contract is better understood and more ‘worked out’ than the law of unjust enrichment, this project would have posed less of a challenge than the last. That has not been so. On the contrary, there have been difficult issues raised in the course of this project that were non-problematic in the last. In particular, English contract law is in many areas very detailed. Almost inevitably, therefore, one has to draw a distinction between the ‘general law’ of contract and the law on specific contracts with this work being concerned with the former and not the latter (see the commentary to s 1(b)). But the drawing of that division between the general law and the rest is not straightforward. Closely connected with this is that there is more legislation in the law of contract than in the law of unjust enrichment and plainly some of that legislation has to be regarded as part of the general law of contract. Deciding which legislation falls within the general law of contract—and how to present the essence of that

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2 (1981). The ALI Restatements are non-legislative, but powerfully persuasive, statements of the law applying across the USA.
3 (3rd edn, 2010). Unidroit is the International Institute for the Unification of Private Law.
4 A non-binding code and a Restatement are clearly very similar. But a code, unlike a Restatement, does not need to be tied to the existing law. With a code, unlike a Restatement, one can simply start with a blank sheet of paper, decide on what is the best legal rule, and then set that out in the code. One cannot do that with a Restatement.
5 (Eds Olé Lando and Hugh Beale, 2000). This was the work of the Commission on European Contract Law.
7 This was drawn up for the English Law Commission and was intended to embrace English and Scottish law. The final 1972 draft was published in 1993 in Italy at the instigation of Giuseppe Gandolfi (Milan: Guìfrè Editore).
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legislation alongside the common law without losing overall coherence and accuracy—has been daunting and, as far as I am aware, is not an exercise that has been undertaken before. As with RELUE, the principal intellectual challenge has been in trying to restate complex judge-made law in as succinct and consistent a way as possible. Even though the law of contract is long-established and relatively well-settled, at almost every turn there can be (and, within the advisory group, there was) disagreement and heated debate as to what is the best interpretation of the law.

Nevertheless, the long pedigree of the English law of contract, in contrast to the recently developed English law of unjust enrichment, has meant that the distinction, between what the law is and views as to what it ought to be, can be drawn more sharply in this project than in the last. Put another way, there has been less ‘room for manoeuvre’ in restating the English law of contract than in restating the English law of unjust enrichment. So, for example, despite criticisms sometimes made, the Restatement adopts the conventional interpretation that the doctrine of consideration is a fundamental feature of the English law of contract; past consideration is not good consideration; part payment of a debt is not good consideration for the creditor’s promise to forgo the balance; the subsequent conduct of the parties cannot be taken into account in interpreting a contract; the exceptions to the approach to the award of an agreed sum in White and Carter (Councils) Ltd v McGregor8 are rare; specific performance is a secondary, not a primary, remedy; there is a constant supervision bar to specific performance; and there is no doctrine of mistake (not induced by misrepresentation) rendering a contract voidable rather than void. It would surely require a radical reanalysis by the Supreme Court if it were to depart from those conventional interpretations.

This is not to deny that the Restatement has adopted, as the best interpretation of the law, some positions that may be regarded as controversial. These include that: one cannot accept in ignorance of an offer but the acceptance need not have been induced, or influenced, by the offer; acceptance in a unilateral contract is generally constituted by the promisee starting to perform; the promise to perform, or the performance of, a pre-existing duty is good consideration for a counter-promise of more money; there are three possible explanations for ‘Wrotham Park damages’; there is a doctrine of unilateral and common mistake that renders a contract void; and there is a judge-made doctrine covering exploitation of weakness.

On two major issues of topical dispute it has been decided, after considerable debate, that the Restatement should restate the law in a neutral way (ie the text ‘sits on the fence’) while fully discussing the different approaches in the commentary. Those two issues are, first, whether Lord Hoffmann was correct in obiter dicta in

8 [1962] AC 413.
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Chartbrook Ltd v Persimmon Homes Ltd\(^9\) to regard the continuing common intention needed for rectification as objective rather than subjective; and, secondly, what the correct approach should be to the defence of illegality which has been considered in no fewer than three recent cases in the Supreme Court.

It should be stressed that it is not intended that the Restatement should be enacted as legislation. On the contrary, the intention is for the Restatement to be a persuasive authority but non-binding; and it is envisaged that there may be periodic revisions of the Restatement to reflect new developments and thinking. It would be wholly contrary to the desires and aspirations of those who have been responsible for this project for the Restatement to be seen as working against the common law tradition. The essential idea is for the Restatement to supplement and enhance our understanding of the common law, and to make it more accessible, not to replace it.

It will be seen that the commentary attempts to state matters as succinctly as possible. Hypothetical or real examples have often been used in the belief that this is commonly the best way of understanding the law. The leading cases, but not all conceivable relevant cases, have been cited and the citation of academic literature has been kept to a minimum. The aim is to explain the Restatement, not to reproduce the (many excellent) textbooks in this area.

Where it has been thought helpful to refer to textbooks, I have steered towards books favoured by practitioners, in particular the superb detailed accounts of the English law of contract in Chitty on Contracts\(^10\) and Peel, Treitel on the Law of Contract,\(^11\) rather than to one of the many fine books principally intended for students.

Work started on this project in October 2013. Four five-hour meetings of the advisory group were held. In advance of those meetings, drafts of parts of the Restatement and the commentary were prepared and circulated electronically. Comments were then sent back and revised versions of the Restatement and commentary were again sent out in advance of each meeting. Those drafts were then discussed at the meetings. They were further revised in the light of the discussions. The Restatement and the commentary seek to reflect the insights gained from the written comments and the discussions in the meetings and the advice of former Parliamentary Counsel. It has been a rich and rewarding collaborative exercise.

\(^10\) (32nd edn, 2015). The general editor is Hugh Beale.
\(^11\) (14th edn, 2015).
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Thanks are owed to Norton Rose Fulbright LLP, who provided funding for this project, and to those involved at Oxford University Press, especially Alex Flach, Natasha Flemming, and Emily Brand, for their enthusiasm for publishing this work and for their efficiency and skill in doing so.

This Restatement has eight Parts and 50 sections.

This work is based on the law as at 1 October 2015, subject to a few amendments at proof stage to deal with the Supreme Court’s decisions, on penalties, in the conjoined appeals in Cavendish Square Holdings BV v Talal El Makdessi and ParkingEye Ltd v Beavis.
