

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XLVIII

MAY 1970 MAI

NO. 2

THE REQUIREMENT OF CERTAINTY OF TERMS IN THE FORMATION OF CONTRACT

A Quantitative Approach

ROBERT A. SAMEK*
Halifax, N.S.

The requirement that the terms of a contract must be certain is usually regarded as a corollary of the axiom that the parties must make their own contract and that the courts will not help them to do so. I shall contend that this axiom is the result of a confusion of contract and bargain which was encouraged and compounded by the doctrine of *laissez faire* and by Pothier's subjective view of contract. I shall also suggest that the axiom is inconsistent with the objective view of contract which was never abandoned by the common law courts, and that it cannot be saved by the distinction between construing and constructing a contract. Once it is recognized that it is misleading to say that the parties make their own contract, the requirement that the terms of a contract must be certain has to be reinterpreted. I shall claim that the only fruitful interpretation of this requirement is that the terms of a *bargain* must be *reasonably* certain if it is to lay the foundation for a contract. I shall call this interpretation the *quantitative* approach, and distinguish it from the *qualitative* approach on the ground that while the latter demands a more or less *absolute* quality of certainty in each and all the terms of the bargain, the former is satisfied with a *relative* quantum of certainty, namely, with that which is *reasonable* in the particular circumstances of the case.¹ The quantitative, but not the qualita-

*Robert A. Samek, of the Faculty of Law, Dalhousie University, Halifax, N.S.

¹ All language is open textured, and consequently the terms of a bargain can never be absolutely certain. But there is a considerable difference between admitting this and being satisfied *as a matter of policy* with a relative quantum of certainty, namely, with that which is reasonable in the particular circumstances of the case.

tive approach is compatible with the presence of *open terms* in a bargain, that is, of terms which were either completely or partly left open by the parties. I shall suggest that such terms may and ought to be filled in by the courts, if there is an objective standard of what is reasonable with reference to which they can be filled in. This standard is itself relative and not absolute; it need not enable the open terms to be filled in with absolute certainty as long as it enables them to be filled in within a quantum of certainty which is reasonable in the particular circumstances of the case.

There are two main policy reasons for allowing the courts to fill in open terms in a bargain: the first is bound up with what I have called the "channelling" function of contract and the second with what I have called its "remedial" function.² By the channelling function of contract I mean its function of providing a simple, speedy, flexible and effective procedure whereby private individuals and interest groups may themselves regulate their economic relations with the full backing of the law. Such a procedure must give the parties sufficient flexibility, particularly in commercial transactions, without however imposing contracts on them for which there is no foundation in their bargains. By the remedial function of contract I mean its function of protecting equities, such as those arising from injurious reliance, raised expectations and unjust enrichment. These equities could not be adequately protected if they could be defeated simply by the technical plea that the parties had left some open terms in their bargain, but again they must not be protected at the cost of imposing contracts on the parties for which there is no foundation in their bargains.

I shall not claim that the courts have explicitly recognized either the quantitative or the qualitative approach. On the contrary, I shall show with reference to a group of English cases and some Canadian cases that the development of a satisfactory conceptual model in this area of the law has been held back by the confusions engendered by the qualitative approach, and by the courts' failure to mark off uncertainty of terms as a ground of invalidity of contract from a number of other grounds of invalidity. Nevertheless, I suggest that it is only with reference to the quantitative approach that such a model can be constructed, and that the decisions of the courts have become more and more dependent on it. But it would be misleading to label the quantitative approach as new and the qualitative approach as old. The quantitative approach has very old roots, and the qualitative ap-

² *Performative Utterances and the Concept of Contract* (1965), 43 *Australasian J. of Philosophy* 196, at p. 208. See also L. L. Fuller, *Consideration and Form* (1941), 41 *Col. L. Rev.* 799, and Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936), 46 *Yale L.J.* 52.

proach still retains a powerful grip on the courts through the confusion of contract and bargain. In my view, however, it is only a question of time before the quantitative approach becomes firmly established, and a clear understanding of what is involved in these two approaches should go a long way towards bringing this about. We shall see that the quantitative approach has already triumphed in the Uniform Commercial Code, and this is a good omen.

1. *Bargain and contract.*

I have suggested in the article already referred to that a bargain is a "special kind of agreement used to effect a business-type of exchange"³ and that it is not a contract any more than a contract is a bargain. Nor are the terms of a bargain conterminal with the terms of a contract. They may be supplemented and modified by the terms to which the parties, *on the supposition that they are reasonable men*, will be deemed to have tacitly agreed; by the terms which are annexed to the contract by usage or custom; and by the terms which are impressed on the contract by statute and judicial policy. Moreover, the terms of the bargain may be refined by so-called rules of construction and interpretation which in fact depend on the hazards of judicial decision, and they will be settled retrospectively in the light of all the relevant evidence available at the trial of the action on the supposition that the parties are reasonable men. While the terms of the contract will usually overlap with the terms of the bargain (and the purpose of taking legal advice is precisely to make the former conform with the latter), the terms of the contract are not facts which can be deduced from the expressed or inferred intentions of the parties. They are *ex post facto* constructions of the courts which strictly speaking can only be predicted, not ascertained.⁴

If a contract is not made by the parties but constructed by the courts out of their bargain, then the requirement that the terms of a *contract* must be certain has to be reinterpreted; for the requirement which seems self-evident and inevitable if we accept the truth of the presupposition that a contract is a bargain, becomes decidedly odd once we recognize the falsity of the presupposition. If a contract is constructed by the courts, the question of its certainty beforehand cannot arise. The question is appropriate in regard to bargain, but not in regard to contract.

2. *The doctrine of laissez faire and Pothier's subjective view.*

In 1776 Adam Smith published *The Wealth of Nations* and Watt invented the steam engine. Between them they laid the

³ *Op. cit.*, *ibid.*, at p. 198.

⁴ *Ibid.*, at p. 207. See also Corbin, *Contracts* (1963), vol. 1, s. 9.

spiritual and material foundation of the industrial revolution. Liberty of contract without interference by the legislature or the courts was regarded not merely as economically desirable, but as a precious human right. But contracting parties could not both claim this freedom and rely on the courts to make a contract for them where they had failed to do so themselves. To the extent and as long as contracts were constructed out of bargains made between relatively equal individuals and tailored to individual needs, there was something to be said for applying the doctrine of *laissez faire* to contract.⁵ Similarly, there was something to be said for Pothier's view that a contract rests on the concurrence of wills of a promisor and a promisee,⁶ which exerted a powerful influence on English judges in the nineteenth century. With the spread of mass production and the mushroom growth of corporations, however, *laissez faire* became an increasingly hollow slogan, and Pothier's subjective view began to lose its appeal. The typical contract today is not the result of a hand made bargain between relatively equal individuals, and it does not rest on a concurrence of wills or intentions; it is a standard form contract between a relatively weak individual or corporation and a relatively strong corporation (or organ of the state) which results in substance from the adhesion of the weaker party to the standard form imposed by the stronger.

These profound changes did of course have an impact on the courts, but we must be careful not to exaggerate it. Although in the hey-day of the doctrine of *laissez faire* the courts were reluctant to interfere with the bargains of the parties, they always, I suggest, regarded their task as *regulative* as well as *remedial*, that is, as being concerned with the legal regulation of bargains as well as with their enforcement. The courts never at any stage were prepared to enforce a bargain *qua* bargain. There would be no law of contract if *any* bargain made between the parties would be automatically enforceable. The law of contract specifies the conditions under which the courts will enforce a bargain, and since law does not operate in a vacuum but has a social function to fulfil, these conditions will necessarily vary with the social climate of the times. The insistence of the courts to treat the parties to a contract as reasonable men was itself a condition of enforcement which prevented the law of contract from ever being at the mercy of the subjective intentions of the parties.⁷ A useful

⁵ In fact these conditions were never *fully* satisfied. Thus the inequality between employer and employee made a mockery and a social scandal of the notion of liberty of contract.

⁶ "Le contrat renferme le concours des volontés de deux personnes dont l'une promet quelque chose à l'autre, et l'autre accepte la promesse qui lui est faite." *Traité des Obligations*, ch. 1, s. 1, art. 1, § II, 4, in *Oeuvres de Pothier*, Bugnet ed., vol. II (1861), p. 5.

⁷ See *infra*.

analogy may be drawn between contractual and economic *laissez faire* in the nineteenth century and in our own. In the nineteenth century *laissez faire* was only controlled weakly and essentially in a negative, restrictive fashion; in the twentieth century, on the other hand, controls cover pretty well the whole area of *laissez faire*, and they are designed not merely to underpin this exhausted doctrine, but to replace it gradually with more and more positive planning both in the economic and in the contractual field.

The confusion of contract with bargain was encouraged and compounded by the fact that the basic conceptual development of the law of contract took place at a time when the doctrine of *laissez faire* was considered irresistible, and when Pothier's subjective theory exerted a powerful influence on English judges. The history of contract as a separate legal subject is very short. In Blackstone's *Commentaries* which were published between 1765 and 1769, contracts were dealt with in one brief section under Private Wrongs,⁸ and the first book on the law of contract did not appear until 1790.⁹

3. *The objective view of contract.*

Although Pothier's subjective view of contract exerted considerable influence on English judges in the nineteenth century and lip-service is still being paid to it today, the objective view of contract was never abandoned by the common law courts. This point is strongly made by Cheshire and Fifoot:

In the Common Law . . . to speak of "the outcome of consenting minds" or, even more mystically, of *consensus ad idem* is to mislead by adopting an alien approach to the problem of agreement. The function of an English judge is not to satisfy some elusive mental element but to ensure as far as practical experience permits, that the reasonable expectations of honest men are not disappointed.¹⁰

The axiom that the parties must make their own contract is inconsistent with the objective view of contract, since under

⁸ Book III, ch. 9, sec. 3.

⁹ J. J. Powell, *Essay on the Law of Contracts and Agreements* (1790). See W. S. Holdsworth, *A History of English Law* (1903-1966), vol. 12, p. 392. It was succeeded by S. Comyn's *Treatise on the Law of Simple Contracts* "as settled in the action of *assumpsit*", which was published in 1807. Holdsworth observes that "its somewhat haphazard arrangement shows that the law of contract is as yet somewhat amorphous—there is as yet no agreement as to what such a book should contain, or as to the logical connection between its parts". *Ibid.*, vol. 13, p. 483. Another work published in this period is an unfinished book by H. T. Colebrooke on *Obligations and Contracts*, which came out in 1818. According to Holdsworth, it is an attempt, "not wholly unsuccessful, to deal with the law of contract from a jurisprudential point of view". *Ibid.*, p. 484. A "better arranged work on somewhat similar lines" by Joseph Chitty Junior appeared in 1826. *Ibid.*, p. 483. The first extensive treatise on the law of contract was published by C. J. Adison in 1845. Even that work is "not very well arranged, nor does it always state the principles very clearly". *Ibid.*, vol. 15, p. 300.

¹⁰ *The Law of Contract* (6th ed., 1964), p. 22.

the latter an *objective* standard of what is reasonable is set in the interest of business certainty. The parties are *deemed* to be reasonable men, that is, their words and actions and their intentions as inferred from them, are not decisive as such, but only as interpreted on the assumption that the parties are reasonable men. Once the courts adopt an objective standard of what is reasonable, they cannot logically regard themselves as *mere* interpreters of the parties' intentions, and there is no *a priori* reason why they should not fill in open terms in a bargain. Under the objective view of contract the courts may and ought to fill in such terms if there is an objective standard of what is reasonable with reference to which they can be filled in. This standard itself is relative and not absolute; it need not enable the open terms to be filled in with absolute certainty as long as it enables them to be filled in within a quantum of certainty which is reasonable in the particular circumstances of the case.

4. *Construing and constructing a contract.*

G. H. L. Fridman in an article entitled *Construing, Without Constructing a Contract* claims that the courts in dealing with the question "What, if any, are the contractual obligations of the parties?" have stated their role to be simply one of interpreting the language used by the parties, of *construing* the terms of the contract as it has been made.

However, the duty to construe a contract does not mean that the court is to make a contract for the parties or to go outside the words they have used. On the other hand, the task of construing a contract, particularly where there are . . . "appropriate implications of law", sometimes seems to come dangerously near being tantamount to reformulating, in part at any rate, what the parties have written. At such times the courts appear virtually to have constructed a contract for the parties out of materials which the parties have provided, namely, the actual language used by the parties and their underlying intention as evidenced by their language and the general background of their relationship. The reconciliation of these apparently contradictory attitudes has been achieved as a result of the emergence of a number of very broad ideas which act as a guide to the way of the courts may construe a contract without having to construct one.¹¹

In the first place, Fridman says, there is to some extent a bias in favour of upholding contracts rather than destroying or invalidating them on the ground of uncertainty. This bias is expressed in the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*. The maxim, however, does not really state a principle of law so much as what might be called a general directive to be followed whenever the express language of the parties permits.

All it does is to put succinctly the desire of the courts to assist the survival of the intention to contract in spite of the atmosphere of un-

¹¹ (1960), 76 L.Q. Rev. 521, at p. 522.

certainty which the language of the parties is alleged to have created. Matters must be so balanced that "*without violation of essential principle*, 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".¹²

The most essential principle, according to Fridman, is that the courts will not take upon themselves the task of making a contract for the parties from language which, in a vague, uncertain way, indicates the possibility that there was present an intention to contract.

For the policy of the courts is to maintain the freedom of contract, leaving it to the parties to determine their own contractual obligations, subject only to the formal requirements of the law, and the general supervision of the courts in relation to such vitiating matters as fraud or the public interest. Although freedom of contract may be an increasingly illusory freedom in these days of standard form contracts, the fundamental judicial postulate continues to exist to the effect that, within the limits already indicated, people who make contracts must be allowed complete liberty by the courts to choose how and to what extent they are to bind themselves, and thereby to arrange their conduct and fix their liabilities.¹³

Because of this postulate, Fridman says, the courts are faced with the necessity of assisting the contracting parties to bind themselves when their efforts have been clumsy or inept, without however going to the lengths of arranging the terms of the contract for the parties; for that may involve the risk of infringing their freedom to contract by substituting other ideas for those which may have been in the minds of the parties.

Fridman though aware that the maxim *ut res magis valeat quam pereat* takes us some way towards allowing the courts to *construct* contracts, shies away from admitting that the courts do anything more than *construe* and follows the deliberately fuzzy line of judicial rationalization. Thus he admits that the choice between the application of the maxim or idea of validation, and the application of the principle that the courts do not *construct* contracts, can be a delicate one. How is it, he asks, to be made? It would seem, he says, that before the idea of validation can be brought into operation the parties must have expressed all the essential stipulations of a contract in such a way as to evidence their firm intention to enter into a binding obligation.

Viscount Maughan put this succinctly in *G. Scammell and Nephew, Ltd. v. Ouston* when he said: "In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty."¹⁴ Thus, even if the parties have not expressed their agreement with precision, as long as they have come within a reasonable distance of certainty, the contract will be upheld: and a reasonable distance appears to be settled as one which

¹² *Ibid.*, at p. 523.

¹³ *Ibid.*, at p. 523.

¹⁴ [1941] A.C. 251, at p. 255, discussed, *infra*.

the courts can bridge without difficulty by putting into exact terms what the parties have expressed inexactly.¹⁵

Fridman follows the judicial interpretation of the maxim which seeks to restrict it to cases where the uncertainty lies merely in the *language* used by the parties *and* is never more than an inexactness of expression which brings them nevertheless within a *reasonable* distance of certainty. If the parties have evinced a contractual intention, then this is sufficient to put them over the edge in spite of the inexactness of their language. Fridman tries hard to reconcile the maxim with his view that the role of the courts is limited to construing contracts in accordance with the expressed intentions of the parties, and that they are not permitted to construct contracts for the parties which are not reasonably compatible with the words they have used. But his emphasis on the subjective intentions of the parties is inconsistent with his recognition that the common law treats the parties objectively as reasonable men. Once we adopt an objective standard, construing becomes constructing. Fridman, however, arrives at the opposite conclusion:

. . . it is a fundamental postulate of contract law that the parties to a contract are deemed to be reasonable men. Therefore, to interpret the language in a reasonable way, particularly by reference to business convenience, or business efficacy, where, as in most cases, the parties are business men, is not in any way contrary to the principle that the courts must not make a contract for the parties which they have not thought fit to make for themselves.¹⁶

Even if in most cases the parties are reasonable men, and construing *their* contracts is sufficient, at least in some cases the parties are not reasonable men. Moreover, insofar as the notional reasonableness imputed to the parties by the courts allows for the injection of policy considerations, it is likely to differ in many ways from the actual intentions of business men. I suggest that the maxim *ut res magis valeat quam pereat* is a maxim of construction which *tips* the scales in favour of *validation*. If it merely applied to the case where the words used by the parties are inexact, the maxim would be superfluous, since the bargain would be sufficiently certain to give rise to a valid contract without the need for validating it. What the maxim does is to *stretch* the minimum quantum of certainty which is reasonable in the particular circumstances of the case. The effect of the maxim is marginal; it cannot validate a bargain which falls more than marginally short of the required minimum quantum of certainty. On the other hand, if that minimum quantum is met without the help of the maxim, the maxim has no application.

The idea, Fridman says, that as long as reasonably clear in-

¹⁵ *Op. cit.*, footnote 11, at p. 524.

¹⁶ *Ibid.*, at p. 536.

dication of what the parties had in mind has been given by the language they have used, the courts will give effect to that intention and validate the contract is also sometimes put in the form of the Latin maxim: *id certum est quod certum reddi potest*. But this, according to Fridman, is just as unhelpful as the directive on validation, since in a sense almost anything is capable of being rendered certain, particularly if oral evidence is admitted for that purpose. However, in general, such evidence is excluded where the contract has been in writing, unless it is only introduced to explain, and not contradict, the meaning of written words, and this requires that the written words are already reasonably clear. Hence this maxim does not materially assist the courts, for they are still left with the problem of deciding whether a particular contract expressed the intention of the parties with sufficient certainty to be accorded life and validity.¹⁷

It seems to me that this maxim differs from the previous one insofar as it does not tip the scales in favour of validation. Interpreted qualitatively, the maxim merely points out that specifying a certain method for determining the content of a term is just as good as specifying it directly. For instance, fixing the price of oil with reference to the posted price is just as good as fixing it directly. Interpreted quantitatively, on the other hand, the maxim may be regarded as *justifying* the quantitative approach.

The second general idea mentioned by Fridman "that is suggested by the cases as a possible basis for *distinguishing* between construing and constructing a contract is that commercial contracts are more likely than others to be given an interpretation which effectuates and validates them rather than one which renders nugatory the acts of the parties".¹⁸ This is, Fridman says, because the courts will more readily infer what the parties had in mind when they used the language in question, since they were dealing with affairs that were commonplace and well understood as between themselves, and therefore they had less need to put into express words what they were agreeing to do. By contrast, where the arrangement is not one made among commercial men (for instance where it is made between members of a family), it is more difficult to show that any binding agreement was intended between the parties.¹⁹

There are indeed cases which do suggest that the minimum quantum of certainty required in commercial cases is less than in non-commercial cases. This is no doubt partly so for the reasons given by Fridman, but the main reason would appear to be the greater need for flexibility in arrangements made between business

¹⁷ *Ibid.*, at p. 525.

¹⁸ *Ibid.*, at p. 526.

¹⁹ *Ibid.* My italics.

men.²⁰ I suggest that there is no maxim analogous to, or an extension of the maxim *ut res magis valeat quam pereat* which stretches the minimum quantum of certainty in commercial cases so as to tip the scales in favour of validation. In my view the minimum quantity of certainty which is reasonable here simply is less than in non-commercial cases.²¹

5. *The essential terms of a contract.*

Even the most cursory examination of the case law appears to cast strong doubt on the correctness of the requirement that the terms of a contract must be certain, and of the axiom that the parties must make their own contract of which it is a corollary. It is presumably in order to distinguish the cases which create this doubt that both the above requirement and axiom are usually limited to *essential* terms. This qualification is plausible only because it contains an ambiguity. The ostensible meaning of "essential terms" is terms which are important, as distinguished from terms which are merely incidental or subsidiary, and the appeal of the qualification is precisely that it seems to protect the substance of the requirement of certainty and of the need for the parties to make their own contract without going to extremes. However, it should be apparent that the case law leaves no doubt that the courts fill in open terms which are essential in this sense, such as the price in a sale of goods. In consequence, the qualification has tended to lose its original meaning and become a sort of rubber stamp to justify the intervention of the courts *ex post facto*. There is a sound psychological reason for the failure of the courts to come to grips with this ambiguity, for it enables them to cloak the extent of their intervention and to square it apparently with the requirement of certainty of terms and the axiom that the parties must make their own contract. Alas, the courts are sometimes taken in by their own fictions.

6. *Section 2-204 of the Uniform Commercial Code.*

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

²⁰ See *infra*.

²¹ But *cf.* the distinction mentioned by Fridman between arrangements which are wholly executory on both sides, and those which have been executed on one side or the other. *Op. cit.*, footnote 11, at p. 534. We can here postulate a principle of validation which stretches the minimum quantum of certainty in the latter cases.

The official comment tells us that "subsection (1) continues without change the basic policy of recognizing any manner of expression of agreement, oral, written or otherwise. . . . Under subsection (1) appropriate conduct by the parties may be sufficient to establish an agreement. Subsection (2) is directed primarily to the situation where the interchanged correspondence does not disclose the exact point at which the deal was closed, but the actions of the parties indicate that a binding obligation has been undertaken. Subsection (3) states the principles as to 'open terms' underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of 'indefiniteness' are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions".

Although the draftsmen of the Uniform Commercial Code clearly adopted the quantitative approach, it should be obvious that subsection (3) needs considerable amplification. Thus the reference to the parties' intentions should be construed to refer to their notional intentions as reasonable men, and the proviso that there is a reasonably certain basis for giving an appropriate remedy is, as the note indicates, linked to the existence of an objective commercial standard. This standard is itself relative and not absolute; it need not enable the open terms to be filled in with absolute certainty as long as it enables them to be filled in within a quantum of certainty which is reasonable in the particular circumstances of the case.

7. *A group of English cases.*

(i) *Loftus v. Roberts*²²

The plaintiff, an actress, brought an action against the defendant for breach of contract. The crucial document was in the form of a letter by the defendant to the plaintiff, which read as follows: "Dear Miss Loftus,—I hereby agree to engage you for the principal lady's part, 'Victoria Chaffers,' in my play, H.M.S. Irresponsible, for a suburban tour at the salary which we have agreed to. In the event of the piece coming to town under

²² (1902), 18 T.L.R. 532.

any West-end management I agree to engage you to play the part of 'Victoria Chaffers,' as played by you on tour, *at a West-end salary, to be mutually arranged between us.*" The plaintiff claimed the right to be employed at a West-end salary for the London production of the play, but the defendant refused to engage her. At the trial the jury found a verdict for the plaintiff for £250. The Court of Appeal allowed the application for judgment by the defendant.

Counsel for the defendant argued that the second part of the letter was an offer only which did not become a contract until the salary was agreed on. The intention was that there should be another contract, and no one could settle the terms of that contract except the parties themselves. He cited a number of cases, including *Taylor v. Brewer*,²³ *Bryant v. Flight*,²⁴ and *Roberts v. Smith*²⁵ in support. Vaughan Williams L.J. observed that there had been some misapprehension as to the true ground of the decisions in these cases. "The decision in the first of these cases and in the third, and the dissentient view of Baron Parke in the second, was this—that wherever words which by themselves constituted a promise were accompanied by words which showed that the promisor was to have a discretion or option as to whether he would carry out that which purported to be the promise, the result was that there was no contract on which an action could be brought at all."²⁶ This doctrine could be found in the *Roman Digest*.²⁷

This was not one of that class of cases in which it was said that there was no contract because the words used were too vague. This was a case in which it was said there was no contract because the promissory words left a discretion to the alleged promisor. Where that was the state of facts, the utmost that could be said of the engagement was that which was said . . . in the first of the three cases . . . "It seems to me merely to be an engagement of honour".²⁸

The learned Lord Justice held that there were cross promissory words, but a clear option was given, on the one side to refuse to engage, and on the other side to refuse to play, unless what was proposed by one side as to the amount of the salary was satisfactory to the other. Both parties had a discretion or option in the matter. Although in one sense the arrangement might be said to be illusory, persons connected with the theatrical professions were very sensitive in matters of honour of this kind, and they considered it of great advantage to have a statement of intention to engage on one side and of willingness to play on the other, though

²³ (1813), 1 M. & S. 290, 105 E.R. 108.

²⁴ (1839), 5 M. & W. 114, 151 E.R. 49.

²⁵ (1859), 28 L.J. Ex. 164.

²⁶ *Supra*, footnote 22, at p. 534.

²⁷ "Nulla promissis potest consistere quae ex voluntate promittentis statum capit." Dig. 45, 1, de verb. obl. 108, § 1.

²⁸ *Supra*, footnote 22, at p. 534.

such an arrangement did not amount to an enforceable contract. Here there was no existing contract until the amount of salary had been ascertained, and it made "no difference whether the amount of salary had been ascertained by valuation of arbitrators or by mutual agreement".²⁹

Vaughan Williams L.J.'s reason for his decision is in my view open to serious doubt. It is, I would have thought, far-fetched to say that the letter gave a *mere* option to the defendant to engage and to the plaintiff to play. Indeed, this construction is inconsistent with the admission that the parties had expressed their *intentions to do* these very things. I do not think that Vaughan Williams L.J.'s finding was based on their use of the form of words "to be mutually arranged between us"; for he said that it made "no difference whether the amount was to be ascertained by valuation of arbitrators or by mutual agreement". His finding was based on the alleged intentions of the parties to retain an absolute discretion to accept or reject each other's proposals.³⁰

In my view the decision should have turned on whether there was an objective standard of what was reasonable with reference to which the open term regarding the salary could be filled in. Having regard to the plaintiff's admission that she had received twice as much salary in London on one occasion than on another, it would not appear that there was such a standard. If, on the other hand, there had been such an objective standard, then the use by the parties of the form of words "to be mutually arranged" should not have been fatal. I suggest that words of this nature should be construed *prima facie* as meaning that the content of the open term is to be mutually agreed with reference to an objective standard within *the quantum of what is reasonable in the particular circumstances of the case*. I see no reason in principle why contracting parties cannot *commit* themselves to come to such an agreement, and in that event a party who unreasonably refuses to do so will commit a breach of contract. *Prima facie*, however, words of this nature should not be construed as *committing* the parties to come to a mutual agreement; they should be construed as merely *stating their intention* to fill in the open term themselves. Hence, if they fail to reach mutual agreement on the content of the open term, the term will simply remain open. It follows from what I have said that the case where the parties use a form of words such as "to be mutually arranged" is only a refinement of the case where the parties simply leave open a term of their bargain. Failing an agreement between the parties, such a term may

²⁹ *Ibid.*, at p. 535.

³⁰ The rationale for not allowing the parties to a bargain to retain an option not to perform it, would seem to be the bilateral nature of a *bargain* as well as the want of consideration in such a *unilateral* arrangement.

and ought to be filled in by the courts provided that an objective standard of what is reasonable is available.

The *prima facie* meaning of such words as "to be mutually arranged" should be deemed to be rebutted, if it can be shown either that the parties were to have an option not to perform the bargain in the event of their failing to reach agreement, or that they were to have an *absolute* discretion in filling in the open term without reference to an objective standard of what is reasonable. In the former case the reservation of the option would prevent the formation of a contract, and in the latter case the bargain would be too uncertain to give rise to a contract.

(ii) *May and Butcher, Ltd. v. The King*³¹

The appellants, May and Butcher, a firm of general contractors, brought a petition of right against the Controller of the Disposals Board for breach of contract. The material letters in the case were dated June 29th, 1921, and January 7th, 1922, and were written by the Controller to the appellants. The earlier letter stated that "in consideration of your agreeing to deposit with the Commission the sum of £1000 as security for the carrying out of this extended contract, the Commission hereby confirm the sale to you of the whole of the old tentage which may become available . . . up to and including December 31, 1921", upon the following terms: that the Commission agrees to sell and the contractors to purchase the total stock of old tentage; that the prices to be paid and the dates of payment are to be agreed from time to time between the Commission and the purchasers as the quantities of old tentage become available and are offered to the purchasers by the Commission (clause 3); that delivery is to be taken in such periods as is to be agreed on between the purchasers and the Commission when such quantities of old tentage are offered to the purchasers by the Commission; and that all disputes with reference to this agreement shall be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889. The second letter of January 7th, 1922, referred to verbal negotiations that had taken place for an extension of the agreement between the Commission and the appellants, and confirmed the sale to the latter of the tentage which might become available for disposal up to March 31st, 1923. This letter, which varied in certain respects the earlier terms, stated that "the prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free on rail . . . nearest to the depots at which the said tentage may be lying . . .". Certain proposals made by the appellants proved unacceptable to the Controller, and

³¹ [1934] 2 K.B. 17.

the Disposals Board said that it considered itself no longer bound by the agreement and declined to deliver any more goods to the appellants.

Rowlatt J. held that there was no contract between the parties because the price, date of payment and period of delivery had still to be agreed on, and that the arbitration clause did not apply. The Court of Appeal, Scrutton L.J. dissenting, affirmed Rowlatt J.'s decision. The House of Lords dismissed the appeal.

Lord Buckmaster said:

In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement in which some critical part of the contract matter is left undetermined is no contract at all. It is of course perfectly possible for two people to contract that they will sign a document which contains all the relevant terms, but it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined. It has been argued that as the fixing of the price has broken down, a reasonable price must be assumed. That depends in part upon the terms of the Sale of Goods Act, which no doubt reproduces . . . the old law upon the matter.³²

The learned Law Lord held that he could not understand the distinction between an agreement to permit the price to be fixed by a third party and one to permit it to be fixed by the parties themselves. Hence, the relevant section of the Sale of Goods Act³³ was not section 8 which only implies a reasonable price where the parties are silent about it, but section 9 which avoids an agreement if the price is to be fixed by the valuation of a third party and such party cannot or does not make such a valuation. As regards the arbitration clause, the learned Lord Justice held that it was not operative until the price was fixed and an agreement had been completed.

Viscount Dunedin said:

This case arises upon a question of sale, but in my view the principles which we are applying are not confined to sale, but are the general principles of the law of contract. To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties. . . . "*Certum est quod certum reddi potest*". Therefore, you may very well agree that a certain part of the contract of sale, such as price, may be settled by some one else. As a matter of the general law of contract all the essentials have to be settled. What are the essentials may vary according to the particular contract under consideration. We are here dealing with sale, and undoubtedly price is one of the essentials of sale, and if it is left still to be agreed between the parties, then

³² *Ibid.*, at p. 20.

³³ (1893), 56 & 57 Vict., c. 71.

there is no contract.³⁴

Viscount Dunedin agreed with the observations of his brother on the applicability of the Sale of Goods Act. But he went on to say that "as long as you have something certain it does not matter. For instance, with regard to price it is a perfectly good contract to say that the price is to be settled by the buyer".³⁵ Here, he held, there was clearly no contract. There would have been a perfectly good settlement of price if the contract had said that it was to be settled by arbitration by a certain man, but nothing of that sort was done. The general arbitration clause was one in very common form as to disputes arising out of the arrangements. In no proper meaning of the word could this be described a dispute between the parties; it was a failure to agree which is a very different thing from a dispute.

It is important to note that the present case was decided on a different ground from *Loftus v. Roberts*,³⁶ though that case was cited by Lord Buckmaster in support.³⁷ The latter, as we have seen, was decided on the ground that where a party or parties retain an option not to perform the bargain, their arrangement cannot give rise to a contract. The present case, on the other hand, was decided on the ground that the parties had left open an essential term of their bargain, namely, the price of the goods, and that since a reasonable price could not be implied in view of the provision that the price was to be settled by mutual agreement, the requirement of certainty of terms had not been met. It might be thought that in failing to fix the price the parties had in effect retained an option not to perform the bargain, but this would not be correct. The decision in the present case turned on the alleged *legal* impossibility of establishing a contract which leaves an essential term to be settled by a future agreement between the parties; it did not turn on the *intentions* of the parties to retain an option. It is, I agree, possible to say that the parties *as reasonable men* must in cases such as the present be notionally presumed to retain an option to back out, but to say this is only to confuse two separate grounds of invalidity of contract which ought to be distinguished.

Viscount Dunedin distinguished the case where an essential term such as the price is to be settled by a third party, or even by the buyer, from the case where it is to be settled by the mutual agreement of the parties on the ground that the maxim *certum est quod certum reddi potest* applied to the former but not to the latter. This distinction, however, is over simple. I have said that the maxim, if interpreted quantitatively, may be regarded as justifying

³⁴ *Ibid.*, at p. 21.

³⁵ *Ibid.*

³⁶ See *supra*. footnote 22.

³⁷ *Supra*, footnote 31, at p. 20.

the quantitative approach,³⁸ and I have suggested that the use by the parties of a form of words which calls for their future agreement is not necessarily fatal, since such words should be construed *prima facie* as meaning that the content of the open term is to be mutually agreed with reference to an objective standard of what is reasonable.³⁹ Similarly, I suggest that words giving a unilateral discretion or option to a third party, or to a party to the agreement, to fill in the content of an open term should *prima facie* give these parties only a *limited* discretion or option to fill in the content of the open term with reference to an objective standard of what is reasonable. Hence, the two cases are not as far apart as they seem. Admittedly, from the point of view of certainty of terms, there is a stronger case for upholding an agreement which gives *one* party an *unlimited* discretion or option to fix the content of an open term than one which leaves such term to be settled by mutual agreement at large, but there are other issues to be considered. In particular, the problem of unlimited options given to a party to the agreement requires careful study in the light of the doctrine of consideration and of the rule in *Loftus v. Roberts*,⁴⁰ having regard to the commercial utility of the type of option concerned. For these reasons, it is better to deal with this complex subject separately and in depth than to dispose of it *a priori* by relying on the maxim *id certum est quod certum reddi potest*.

In the present case the price and some other terms were to be mutually agreed between the parties. In my view it is clear from their previous dealings that there was an objective standard with reference to which the open terms could be filled in within a quantum of certainty which was reasonable in the particular circumstances of the case.

(iii) *Hillas & Co., Ltd. v. Arcos, Ltd.*⁴¹

The plaintiffs, Hillas & Co., a well-known timber firm in Hull, brought an action against Arcos Ltd., the business representative of the Russian government, for breach of an agreement under which the plaintiffs agreed to buy from the defendants 22,000 standards of Russian softwood goods of fair specification over the season 1930 at agreed prices less agreed discounts. Clause 9 of the agreement provided that the "buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent on the f.o.b. value of the official price list

³⁸ See *supra*.

³⁹ See *supra*.

⁴⁰ See *supra*, footnote 22.

⁴¹ (1932), 147 L.T. 503.

at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931". At the hearing before MacKinnon J., counsel for the defendants took the point that the alleged agreement was not in law a contract inasmuch as it left unsettled essential terms of a contract for the sale of goods. He contended that the option for 1931 contained no reference to any description of the goods purchased, whether by specification or otherwise, that even if you implied into the option clause that the 100.000 standards were to be delivered in accordance with fair specification, still the alleged contract was incomplete in that it did not provide for dates and times of shipment; and in that it contemplated a contract which would contain conditions which would have to be agreed. Judgment was given for the plaintiffs, and the defendants appealed. The Court of Appeal allowed the appeal. The House of Lords restored the judgment of the trial court.

The following passage from Lord Wright's speech is frequently quoted:

The document . . . may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage.⁴²

Applying the above observations to clause 9 of the agreement, Lord Wright emphasized that it was an integral part of the whole agreement. Some confusion, he said, had been imported by the words "the option of entering into a contract". It is said that this is merely a contract to enter into a contract, whereas in law there cannot be a contract to enter into a contract.

The phrase is epigrammatic, but may be either meaningless or mis-

⁴² *Ibid.*, at p. 514.

leading. A contract *de praesenti* to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more and no less; and if what may not very accurately be called the second contract is not to take effect till some future date but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is *eo instanti* a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the position is different.⁴³

In the latter case, Lord Wright said, there is no bargain except to negotiate, yet even then in strict theory *there is a contract* (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury thinks that the opportunity to negotiate was of some appreciable value to the injured party. Lord Wright took the view that clause 9 of the agreement gave the plaintiffs an option to accept an offer in the terms of clause 9, so that when it was exercised a contract came at once into existence, unless the terms of the option embodied in the clause were not sufficiently certain and complete. As regards the definition of the machinery for fixing the price there was sufficient certainty here for a business transaction; and the description of the goods was also sufficient in law. 100.000 standards, divorced from the rest of the agreement, no doubt would have been too uncertain, but in the context they refer to Russian softwood of fair specification.

In practice, under such a description, the parties will work out the necessary adjustments by a process of give and take in order to arrive at an equitable or reasonable apportionment on the basis of the respondents' actual available output, according to kinds, qualities, sizes and scantlings; but, if they fail to do so, the law can be invoked to determine what is reasonable in the way of specification, and thus the machinery is always available to give the necessary certainty. As a matter of strict procedure, the sellers would make a tender as being of fair specification, the buyers would reject it, and the court or an arbitrator decide whether it was or was not a good tender.⁴⁴

Lord Wright pointed out that a prospective specification for the 500.000 or 600.000 standards which formed the subject of a later contract between the defendants and another company was agreed to in a few days, which confirmed that the ascertainment of a fair specification of Russian softwood goods, even for a very large quantity and for a whole season, was not of insuperable difficulty to experts. The learned Law Lord also held that the contract was neither uncertain nor incomplete as regards times of delivery and of shipment. They were ascertainable from another clause, and even if they were not, the law would imply that the deliveries were to be at *reasonable* times.

In the result, the learned Law Lord said, he arrived at the

⁴³ *Ibid.*, at p. 515.

⁴⁴ *Ibid.*, at p. 516.

same conclusion as the trial judge. The judgment of the Court of Appeal, he continued, was otherwise. Apart from their conclusion that clause 9 was no more than an arrangement to negotiate in the future terms of a new contract for 1931, they held that in any view the clause was uncertain and incomplete. Scrutton L.J. held that "considering the number of things left undetermined, kinds, sizes, and quantities of goods, times and ports and manner of shipment . . . which had in this case to be determined by agreement after negotiation", the option clause was an agreement to make an agreement, which is not enforceable.⁴⁵ The conclusion of Scrutton L.J., Lord Wright observed, would in very many cases exclude the possibility of business men making big forward contracts for future goods over a period, because in general it is impossible in such contracts to specify in advance all the details of a complicated performance. Greer L.J. expressly stated the view that such contracts were impossible in law, though he regretted the conclusion.⁴⁶ But, Lord Wright said, when Greer L.J. speaks of essential terms not being precisely determined, that is by express terms of the contract, he is wrong in deducing as a matter of law that they must therefore be determined by a subsequent contract; he is ignoring the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts.

The learned Lords Justices . . . relied, I think, mainly . . . on an unreported decision of this House in the appeal of *May and Butcher Limited v. The King*. . . . A somewhat similar decision on another contract was given in the Court of Appeal in the case of *Loftus v. Roberts*, where the rule was summed up as being "Promissory expressions reserving an option as to the performance do not create a contract". No one would dispute such a rule, and its application to the instrument before the House in *May and Butcher Limited v. The King* has been finally determined in that case; but in my judgment the Court of Appeal were not justified in thinking that this House intended to lay down universal principles of construction or to negative the rule that it must be in each case a question of the true construction of the particular instrument. In my judgment, *the parties here did intend to enter into, and did enter into, a complete and binding agreement, not dependent on any future agreement for its validity*. But in any event the cases cited by the Court of Appeal do not, in my judgment, apply here, because this contract contains no such terms as were considered in those cases; it is not stipulated in the contract now in question that such matters as prices or times or quantities were to be agreed.⁴⁷

The present case, like *May and Butcher, Ltd. v. The King*,⁴⁸

⁴⁵ *Ibid.*, at p. 506. The learned Lord Justice said that he would have arrived at this view in the present case without further authority, but that the decision of the House of Lords in *May and Butcher Limited v. Regem*, *supra*, footnote 31, to which the attention of the court below was unfortunately not drawn, bound him to take this view. *Ibid.*

⁴⁶ *Ibid.*, at p. 508.

⁴⁷ *Ibid.*, at p. 517. My italics.

⁴⁸ *Supra*, footnote 31.

turned on whether some terms of the bargain between the parties were sufficiently certain in law, but I have already indicated that *Loftus v. Roberts*⁴⁹ did not turn on that point. Hence, Lord Wright's suggestion that the latter case was applied in the former is misleading. His distinction of the present case, moreover, from *May and Butcher, Ltd. v. The King* is unconvincing, since it was obviously contemplated by the parties that they would settle many of the open terms in the bargain by mutual agreement between them. Indeed, the commercial utility of permitting bargains to be amplified in this way without turning them into obligations of mere honour was surely Lord Wright's main practical reason for allowing the appeal.

The Court of Appeal was not unaware of these commercial considerations, but after the decision of the House in *May and Butcher, Ltd. v. The King*, it felt that its hands were tied, and we can hardly blame it. Consider, for instance, the following passage from Scrutton L.J.'s judgment referring to his dissent in that case:

I am afraid I remain quite impenitent. I think I was right and that nine of ten business men would agree with me. But of course I recognize that I am bound as a judge to follow the principles laid down by the House of Lords. But I regret that in many commercial matters the English law and the practice of commercial men are getting wider apart, with the result that commercial business is leaving the courts and is being decided by commercial arbitrators with infrequent reference to the courts. . . . The commercial man does not think there can be no contract to make a contract when every day he finds a policy "premium to be agreed" treated by the law as a contract. I have great sympathy with the judgment of MacKinnon J. on that point, which I think proceeds on the lines of my dissentient judgment in the "tentage" case, but I think that if he had had cited to him the decision of the House of Lords, he must have held that in the present case there was no contract enforceable in the King's courts.⁵⁰

This passage is somewhat at odds with the learned Lord Justice's statement that he would have arrived at his view without further authority.⁵¹ Greer L.J. also regretted his decision for commercial reasons, but he felt himself constrained as much by his *a priori* conception of contract as by the decision of the House of Lords. "If there remain essential terms that have not been agreed, the court, *in the nature of things*, cannot ascertain and award damages for breach of a contract which never came into existence, because before writ issued there had never been any agreement as to some of the essential terms that were to be binding on the parties."⁵² This, of course, as Lord Wright observed is a *non sequitur*: the learned Lord Justice is neglecting the availability

⁴⁹ *Supra*, footnote 22.

⁵⁰ *Supra*, footnote 41, at p. 506.

⁵¹ See *supra*.

⁵² *Supra*, footnote 41, at p. 509. My italics.

of an objective standard which has been used by the courts, namely, that of implying terms which are reasonable. The converse of what Greer L. J. says is true: the difficulty *does* arise out of an imperfection in the rules of law, and *not* out of the difficulties inherent in the conception of contractual obligations.

Romer L.J.'s judgment is interesting insofar as it shows that the learned Lord Justice decided the case on the ground of uncertainty of terms, and not on the wide ground that the law does not recognize an agreement to enter into a contract.

It is . . . generally agreed that this statement is expressed too widely, for it cannot be doubted that an agreement to enter into a contract, of which all the essential terms are specified, will be treated in law as a contract in those terms. In these circumstances, it is necessary to see if the parties have specified the terms of the contract to be entered into, and if such terms contain all the essential ones of a contract of sale and purchase. If they do not, then the agreement to enter into a contract is not enforceable at law.⁵³

We have already seen that Lord Wright also rejected this statement.⁵⁴ Indeed, I think he overreached himself in saying that there may be a contract to negotiate (if there is consideration). In my view such a contract would not be valid, since a contract to negotiate implies that the parties retain an option to terminate negotiations. This case is not the same as the case where one or both parties retain an option not to *perform* the bargain; for the latter, unlike the former case, presupposes that a bargain has been successfully negotiated, but that one or both parties nevertheless retain an option not to perform it. It should be noted that in both cases the parties may or may not have an intention to enter into contractual relations; but if they have a contractual intention it will be illusory. I have already emphasized that the subjective intentions of the parties are not decisive because they are notionally presumed to be reasonable men.⁵⁵ Thus if the parties have a contractual intention in circumstances in which as reasonable men they would not be notionally presumed to have such intention, their contractual intention will be illusory; and if they do not have a contractual intention in circumstances in which as reasonable men they would be notionally presumed to have such an intention, a contract may nevertheless be formed, unless the parties *expressly* deny such an intention which it is open to them as reasonable men to do.⁵⁶

In conclusion, I respectfully agree with the decision of the House, which was in substance based on the quantitative approach. The present case shows well the close relation between constructing a contract and filling in the open terms of a bargain

⁵³ *Ibid.*

⁵⁴ See *supra*.

⁵⁵ See *supra*.

⁵⁶ *Rose and Frank Co. v. Crompton*, [1923] 2 K.B. 261.

with reference to an objective standard of what is reasonable. Indeed, the latter is part and parcel of the former, and it is only if we think in terms of *construing* contracts in accordance with the intentions of the parties that the two processes appear distinct. In the present case the court obviously went far beyond construing. If it had not done so, the decision would have lost its commercial value which lay precisely in the recognition that business men need flexibility in their arrangements. The case also suggests that the minimum quantum of certainty required in commercial cases is less than in non-commercial cases. There was here in my view no need to stretch that quantum in reliance on the maxim *ut res magis valeat quam pereat*.

(iv) *G. Scammell and Nephew, Ltd. v. H. C. and J. G. Ouston*⁵⁷

The respondents, H. C. and J. G. Ouston, wished to buy a new van and to trade in their old Bedford van. At an interview between the representatives of the appellants and J. G. Ouston, the latter stated that the respondents would require the new vehicle on "hire-purchase". The respondents provisionally selected a new van, and the appellants wrote a few days later giving a quotation for £268 and stating that they were prepared to allow £100 for the Bedford van. Eventually the respondents placed a written order with the appellants "on the understanding that the balance of purchase price can be had on hire-purchase terms over a period of two years". Some dispute arose later regarding the age and condition of the Bedford van, and before any hire-purchase agreement was entered into the appellants refused to proceed further. The respondents brought an action for breach of contract. The appellants pleaded that until a hire-purchase agreement was effected neither party was bound and that the alleged agreement was void for uncertainty.

The trial judge held that the stipulation as to hire-purchase was merely a condition precedent to the contract of sale, and that the appellants by wrongfully repudiating the contract had relieved the respondents of showing that the condition had been fulfilled. The Court of Appeal dismissed the defendant's appeal. The Lords Justices all treated the stipulation as a term of the contract between the parties, and not as a condition precedent to the contract, but they differed *inter se* as to the construction of the contract. Slessor L.J. thought that the alleged contract might be carried out in any one of several specified ways, and that it lay on the respondents within a reasonable time, in a reasonable way, to produce some method whereby they could satisfy their undertaking by one way or another through a hire-purchase agreement. The learned Lord Justice thought that a complete agreement had

⁵⁷ *Supra*, footnote 14.

been concluded on the ground that: "You may very well agree that a certain part of the contract, such as the particular conditions on which the hire-purchase agreement was to be made, was to be settled in conjunction with a third party." Like the trial judge, he placed the obligation to procure the hire-purchase agreement on the respondents, and held that the repudiation by the appellants relieved the respondents from showing fulfilment of the condition. MacKinnon L. J., on the other hand, placed the obligation to procure the hire-purchase agreement on the appellants. He held that it was not a contract for the sale of goods, but a contract to procure a finance company to purchase the van from the appellants and let it on hire-purchase terms to the respondents. Although the contract might have been in one of various forms, the essential stipulation implied was that it should be in a reasonable form. Goddard L. J. agreed with MacKinnon L. J. in placing the obligation to procure the hire-purchase agreement on the appellants.

The House of Lords allowed the defendant's appeal and dismissed the action. Lord Wright said that the decision of the appeal depended on the answer to the question whether there was a concluded contract between the appellants and the respondents. Leading counsel for the respondents had argued that the stipulation as to hire-purchase meant that the bargain was subject to a condition precedent that a fund should be available on hire-purchase terms, and that since the appellants had repudiated the contract, the respondents were absolved from proving that this condition had been fulfilled. An alternative submission was that the appellants were either personally to enter into a hire-purchase agreement or procure another person to do so over a period of two years, containing reasonable terms having regard to the usual practice of hire-purchase finance. Junior counsel had argued that the agreement was defeasible if the respondents could not obtain suitable financial assistance on hire-purchase terms, but that the appellants could compel the respondents to take delivery if they could show the availability of hire-purchase finance.

Such are the conflicting views which are placed before your Lordships as requiring a decision in favour of the respondents. But in my opinion the correct view is that put forward . . . on behalf of the appellants, namely, that there never was a concluded contract between the parties. . . . There are in my opinion two grounds on which the court ought to hold that there was never a contract. The first is that the language used was so obscure and so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of inten-

tion is to be found in the words used. If these words, considered however broadly and untechnically *and with due regard to all the just implications*, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract.⁵⁸

Such a position, Lord Wright continued, is not often found, but it was found in this case. It was all left too vague, which is confirmed by the startling diversity of explanations tendered.

There are many cases in the books of what are called illusory contracts, that is, where the parties may have thought they were making a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a *practical* meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are *reasonably* certain. In my opinion that requirement was not satisfied in this case.⁵⁹

The second ground on which Lord Wright held that there was never a contract was that the "parties never in intention nor even in appearance reached an agreement"; "their agreement was inchoate and never got beyond negotiations".⁶⁰ They did accept the position that there should be some form of hire-purchase agreement, but they never went on to complete their agreement by settling its terms. The furthest point that they reached was an understanding or agreement to agree upon hire-purchase terms. The learned Law Lord distinguished *Hillas & Co. v. Arcos*⁶¹ as follows:

The court could not, indeed, make a contract for the parties or go outside the words they had used *except in so far as there were appropriate implications of law*, as, for instance, the implication of what was just and reasonable where the contractual intention was clear but the contract was silent in some *detail* which the court could thus fill in. Thus the condition of 'fair specification over the season' 1931 enabled the court with the help of expert evidence to identify what was a fair and reasonable specification. . . . Certain other matters were similarly dealt with. In the same way the court has in proper circumstances found itself able to determine what is a reasonable price when the price is not specified in the contract as was done in *Foley's* case,⁶² rightly, as I think, distinguishing *May and Butcher's* case, or to determine what is a reasonable time, or what are reasonable instalments. Many other ex-

⁵⁸ *Ibid.*, at pp. 267-268, per Lord Wright. My italics.

⁵⁹ *Ibid.*, at pp. 268-269. My italics.

⁶⁰ *Ibid.*, at p. 269.

⁶¹ See *supra*, footnote 41.

⁶² *Foley v. Classique Coaches, Ltd.* [1934] 2 K.B. 1. The plaintiff, a petrol retail dealer, sold some land adjoining land retained by him to the defendants who were motor coach proprietors. It was part of the consideration for the sale that the defendants should purchase from the plaintiff all petrol required for the running of their business "at a price to be agreed by the parties in writing and from time to time". The agreement contained an arbitration clause. For over three years the defendants bought their petrol from the plaintiff, but then they repudiated the agreement on the ground that it was invalid. The Court of Appeal, affirming the decision of the trial judge, upheld the agreement.

amples of this principle might be given. And in addition the court may import terms on the proof of custom or by implication. But it is in my opinion a very different matter to make an *entire* contract for the parties as the court would be doing if the course suggested by MacKinnon was adopted.⁶³

I suggest that in the present case there was a *concluded* agreement in the sense that it was not merely an agreement to negotiate. The issue in my view was simply whether the open term relating to hire-purchase terms was too uncertain for a contract to be constructed out of the bargain. I agree with the decision of the House to the extent that the quantum of uncertainty here was too great, since on the respondents' own showing there was no objective standard of what was reasonable with reference to which the open term could be filled in. The difficulty was not just one of filling in a reasonable interest rate, terms of repayment, and so on, but of stretching an agreement which might have been adequate for a sale of goods into a hire-purchase agreement for which a reasonable foundation had not been laid. For these reasons the present case can be distinguished from *Hillas & Co. v. Arcos* and from *Foley v. Classique Coaches, Ltd.*⁶⁴ In both the latter cases, moreover, there were commercial and equitable considerations for upholding the agreement which are not present here. Finally, I suggest that although there are passages in Lord Wright's speech which are misleading and can be misunderstood, it is in substance much more attuned to the quantitative than to the qualitative approach.

8. *Some Canadian cases.*

(i) *Murphy v. McSorley*⁶⁵

Murphy was the lessee of an hotel which gave him an option to purchase it from McSorley "for a period of one year from the date hereof at a price of \$45,000 with a cash payment of \$15,000 and balance to be arranged". Before the option had expired, Murphy purported to exercise it and tendered \$15,000.00 as the first payment under it, but McSorley refused to accept payment. The trial judge gave judgment for Murphy on the ground that the balance was to be arranged impliedly on a reasonable and fair basis, but that the attitude of the plaintiff was not reasonable or fair. This judgment was set aside by a majority of the British Columbia Court of Appeal. The substantial ground of reversal was that an agreement which leaves one of the essential terms to be determined by the parties at a future time is unenforceable.

⁶³ *Supra*, footnote 14, at pp. 272-273. My italics.

⁶⁴ *Cf.* the decision of the Supreme Court of Victoria (Australia) in *Judal v. McHenry*, [1958] V.R. 406; but note Hudson J.'s observation on that case in *Zieme v. Gregory*, [1963] V.R. 214, at p. 217.

⁶⁵ [1929] 4 D.L.R. 247.

Murphy appealed to the Supreme Court of Canada, and the appeal was dismissed by a majority, Newcombe J. dissenting. Mignault J. said:

With the trial judge, I am of opinion . . . that the understanding of the parties, so far as it had progressed at the time of the lease, was not that if Murphy exercised the option, he should pay the whole price in cash. There was to be a down payment of \$15,000, and the balance was to be "arranged", that is to say its mode of payment, no doubt very imprudently, was left to be determined by a further understanding between the parties. . . . The Court cannot make for the parties a bargain which they themselves did not make in proper time.⁶⁶

Newcombe J. relied on the maxim *ut res magis valeat quam pereat* in construing the option clause. He held that the word "arrange" here did not require two parties to do the arranging, and that it meant that Murphy would *provide* the funds.

The purchaser attended upon the vendor on the penultimate day of the year and tendered the requisite payment of \$15,000 in cash, stating that he intended to purchase the hotel. This involved the purchaser in the obligation to provide \$30,000 more, to be paid, of course, when the vendor made out his title; and the passing of the conveyance and the payment of the aforesaid balance should, in ordinary course, take place simultaneously. The appellant had . . . arranged the balance, and it would have been paid but for McSorley's default in rejecting the tender. . . .⁶⁷

With respect, I do not think it was necessary to go to such lengths. I suggest that here there was an objective standard with reference to which the balance of the payment could be arranged within the quantum of certainty which was reasonable in the particular circumstances of the case. Looking at the facts, the reasonable inference in my view is that the balance was to be paid in cash within a reasonable time of the exercise of the option, and what is a reasonable time here does not strike me as being beyond the capacity of the court to determine. I would say that a fairly short time only would be reasonable, say a year. Murphy had in fact raised the cash and was prepared to pay it the day after the option had expired. Now it might be argued that this is irrelevant and that we must construe the document as it stands. It would seem to me, however, that since we are concerned with the reasonable meaning of the open term, it would be quite unreasonable to ignore the subsequent conduct of the parties which might well throw important light on their previous intentions. Suppose, for instance, Murphy had tendered the whole amount in cash within the year, could McSorley have refused to accept it on the ground that the mode of payment had not been settled? If he could, there is something seriously wrong with the law.

⁶⁶ *Ibid.*, at p. 250.

⁶⁷ *Ibid.*, at pp. 251-252.

For the reasons given, I do not think there was any need here to stretch the minimum quantum of certainty required, but if I am wrong on this I would suggest that the maxim *ut res magis valeat quam pereat* should have been used to tip the scales in favour of validation. The merits were entirely on the side of Murphy. McSorley had broken his option before it expired and had sold the hotel to the other respondent. The case I think shows up well the danger of adopting the qualitative approach which was followed by the court here.

(ii) *British American Timber Co. v. Elk River Timber Co.*⁶⁸

The plaintiff sued for specific performance of an agreement for the sale of certain timber limits, clause 10 of which read: "So soon as the cruise and survey as hereinbefore provided for shall have been completed, a formal contract shall be executed between the parties hereto according to the usual form adopted in such cases in the province of British Columbia and containing *inter alia*, such of the provisions as shall be applicable." The defendant refused to execute the formal contract and claimed that without it, and a consensus as to its terms, the agreement could not be enforced. The trial judge upheld the agreement. The defendant appealed, relying *inter alia* on *Chillingworth v. Esche*.⁶⁹ The British Columbia Court of Appeal affirmed the decision of the trial judge, Martin J.A. dissenting. Macdonald J.A. held that the agreement was not conditional on the execution of a formal contract, and that the words "*inter alia*" in clause 10 were not intended to permit the introduction of new terms not already agreed to.

Clause 10 therefore means that the formal agreement should contain (1) under the heading "such of the provisions of this agreement as

⁶⁸ [1933] 4 D.L.R. 286.

⁶⁹ (1924), 93 L.J. Ch. 129. In that case an agreement for the sale of freehold land was made "subject to a proper contract to be prepared by the vendor's solicitors". A deposit was paid and the parties' solicitors agreed to a proper contract, but the purchaser declined to execute it and sued for the return of the deposit. Sir Ernest Pollock M.R. held that "when you look at the words here, that what was intended was that the whole document should be conditional on the execution of a proper contract, to be prepared by the vendor's solicitors". *Ibid.*, at p. 132. In that case it would appear that all the terms of the contract had in fact been agreed to. The case turned on the use of the phrase "subject to a proper contract". Thus Warrington L.J. said: "It has been held over and over again that where you have a document relating to the sale and purchase of land framed in those terms, the object of inserting those words is to avoid binding the parties unless and until the contract referred to has been prepared and signed by both parties." *Ibid.*, at p. 134. See also Sarjant J.'s judgment at p. 136. Sarjant J. went out of his way to say that "the Court will often enforce a contract to make a contract. . . . The true meaning of the phrase is that the Court will not enforce a contract to make a second contract, part of the terms of which are indeterminate and have yet to be agreed. . . ." *Ibid.* On the expression "subject to contract", see also the decision of the High Court of Australia in *Masters v. Cameron* (1954), 91 C.L.R. 353. The High Court followed *Chillingworth v. Esche*.

shall be applicable" those clauses in the agreement that could be re-copied almost *verbatim* and (2) other provisions made necessary by steps taken under the agreement necessitating the recasting of clauses to fit the new facts. . . . I will not take space to analyse the formal contract submitted for execution by appellant. I think it was only intended to amplify but it must be conceded that appellant would be justified in taking the ground that it went further than contemplated by cl. 10. Respondent evidently thought so too and did not insist upon it. At the trial and on this appeal its counsel took the ground that it would be satisfied with a formal contract in the same terms as the main contract: in fact that it could enforce the agreement without a formal contract at all. . . . I may add that I do not think anything decisive turns on the use of the words in cl. 10 "according to the usual form adopted in such cases in the Province of British Columbia".⁷⁰ It follows that in my view we have an enforceable contract.⁷¹

Although I agree with the decision of the Court of Appeal, it is important in my view to separate a number of points which are all too often confused and which are not clearly distinguished in Macdonald J.A.'s judgment.

Such words as "subject to (the preparation of a formal) contract" have become words of art and will be *prima facie* construed by the courts as indicating that the parties are still negotiating, which implies that they retain an option to terminate the negotiations. I have suggested that this case is not the same as the case where one or both parties retain an option not to *perform* the bargain, since the latter unlike the former presupposes that a bargain has been successfully negotiated.⁷² The above presumption is not conclusive; it can be rebutted by showing that there was a *concluded* agreement in the sense that it was not merely an agreement to negotiate. Such an agreement will still not give rise to a contract if the parties have retained an option not to perform the bargain; and it will not give rise to an *operative* contract if they have made the execution of a formal contract a condition precedent of the coming into effect of the agreement. In the latter case, however, the parties are *committed* to execute such a contract unless they have retained an option not to perform the bargain.⁷³ If the execution of a formal contract is not a condition precedent, and the parties merely *expect* to reduce their agreement to proper *form*, the agreement becomes effective immediately and a formal contract need not be executed. This was

⁷⁰ See the later decision of the Court of Appeal in *Nicolene, Ltd. v. Simmonds*, [1953] 1 All E.R. 822, which established that a "meaningless" clause may be disregarded.

⁷¹ *Supra*, footnote 68, at p. 302.

⁷² See *supra*.

⁷³ *Cf.* the case where the execution of a formal contract is not a condition precedent of the coming *into effect* of the agreement, but a condition of the agreement which must be fulfilled before a particular obligation falls due. *E.g.* the payment of the price may be made conditional on the execution of a formal contract. See *Masters v. Cameron, supra*, footnote 69, at p. 360.

the position in the present case.⁷⁴

By definition an agreement cannot *both* be an agreement to negotiate and one under which the parties retain an option not to perform it. Indeed all the classes of agreements distinguished above are *mutually exclusive*, but they overlap with the class of agreements the terms of which are too uncertain. For instance an agreement to negotiate, and an agreement which the parties merely expect to reduce to proper form, may or may not *also* be an agreement the terms of which are too uncertain. This is not to say that there is not a greater or lesser degree of overlapping *in fact* between the class of agreements the terms of which are too uncertain and the other classes mentioned. Thus agreements to negotiate are much more likely to be also agreements the terms of which are too uncertain than agreements which the parties merely expect to reduce to proper form. Moreover, bearing in mind that the parties are notionally presumed to be reasonable men, there is a *conceptual* as well as an empirical relation between these overlapping classes. An agreement will be classified under one of the mutually exclusive classes mentioned above not only on its own merits, but also in the light of the quantum of certainty of its terms. For instance an agreement which consists mostly of open terms will *prima facie* be classified as an agreement to negotiate. On the other hand, the agreement in the present case would presumably not have been treated as one which the parties merely expected to reduce to proper form if its terms had not been sufficiently certain.

(iii) *DeLaval v. Bloomfield*⁷⁵

The plaintiff claimed the sum of \$200.00 which he alleged was due to him by the defendant under an agreement for the sale of machinery on terms "\$200 on Nov. 1, 1937, balance to be arranged". The machinery was delivered to the defendant. The defendant pleaded, *inter alia*, that the contract was void for lack of certainty. The trial judge gave judgment for the plaintiff, and the defendant appealed. The Ontario Court of Appeal dismissed the appeal, Fisher J.A. dissenting. The appeal turned entirely on the defence that the contract was void for lack of certainty. Masten J.A. cited with approval the following statement from Benjamin on *Sale*:⁷⁶

"If the parties agree that the price shall be as subsequently arranged between them, no contract of sale exists unless and until the price is fixed, for the parties have reserved to themselves an option as to the price, which is an essential element of a contract of sale, and the rule

⁷⁴ Strictly speaking, the so-called formal contract is no more a contract than the original agreement. Hence, it would be more accurate to distinguish between the agreement and the formal or proposed agreement.

⁷⁵ [1938] 3 D.L.R. 405.

⁷⁶ (7th ed., 1931).

of reasonable price does not apply as the parties have impliedly excluded it. *But a contract will exist if an intention can be inferred that at any rate a reasonable price shall be paid if the price is not fixed*". . . . In the present case it is not the price but the mode of payment only that is held over. . . . [The purchaser's] breach of his agreement to arrange the mode of payment gives to the plaintiff a right of action.⁷⁷

I have suggested that such words as "to be mutually arranged" should be construed *prima facie* as meaning that the content of the open term is to be mutually agreed with reference to an objective standard within the quantum of what is reasonable in the particular circumstances of the case.⁷⁸ In my view nothing should turn on whether the open term is the price, or the mode of payment, or some other term.⁷⁹ In the present case the price was fixed, and the only open term was the mode of paying the balance. The Court of Appeal held that the defendant was in breach of agreement because he had failed to arrange the mode of payment with the plaintiff. I have suggested that *prima facie* a form of words calling for mutual agreement should not be construed as *committing* the parties to come to such an agreement, but as merely stating their intention to fill in the open term themselves. Hence, if they fail to reach mutual agreement on the content of the open term, the term will simply remain open.⁸⁰ There is nothing in the present agreement to rebut this suggested construction. In substance, however, I agree with the decision of the court, though it is inconsistent with the decision of the Supreme Court of Canada in *Murphy v. McSorley*, which oddly enough was not cited.⁸¹

Conclusion

I have distinguished the quantitative approach from the qualitative approach on the ground that while the latter demands a more or less absolute quality of certainty in the terms of the bargain, the former is satisfied with a relative quantum of certainty, namely, with that which is reasonable in the particular circumstances of the case. The quantitative but not the qualitative approach is

⁷⁷ *Supra*, footnote 75, at p. 409. My italics.

⁷⁸ See *supra*.

⁷⁹ But under the statutory provision a reasonable price is only implied where the parties are silent.

⁸⁰ See *supra*.

⁸¹ The British Columbia Court of Appeal in *Jackson v. Macaulay Nicholls Maitland & Co. Ltd.*, [1942] 2 D.L.R. 609, at p. 612, per McDonald C.J.B.C., disapproved of *DeLaval v. Bloomfield*, and this was noted by Wilson J. of the British Columbia Supreme Court in *Cherewick v. Moore and Dean*, [1955] 2 D.L.R. 492, at p. 501, who followed *Murphy v. McSorley*. That case was also followed by Williams C.J.K.B. of the Manitoba Supreme Court in *Friesen v. Braun*, [1950] 2 D.L.R. 250. See also *National Bowling & Billiards, Ltd. v. Double Diamond Bowling Supply, Ltd.* (1961), 27 D.L.R. (2d) 342.

compatible with the presence of open terms in a bargain. I have suggested that such terms may and ought to be filled in by the courts if this can be done with reference to an objective standard within the quantum of certainty which is reasonable in the particular circumstances of the case. The two main policy reasons for allowing the courts to fill in open terms in a bargain are bound up respectively with the channelling and with the remedial function of contract. The courts have not explicitly recognized either the quantitative or the qualitative approach. On the contrary, the cases I have discussed show that the development of a satisfactory conceptual model in this area of the law has been held back mainly by the confusions engendered by the qualitative approach, and by the courts' failure to mark off uncertainty of terms as a ground of invalidity of contract from a number of other grounds of invalidity. Thus an agreement to negotiate cannot give rise to a valid contract, nor can an agreement which gives one or both parties an option not to perform the bargain. On the other hand, an agreement "subject to (the preparation of a formal) contract", and an agreement which leaves one or more terms to be mutually agreed between the parties may give rise to a valid contract. Finally, I have suggested that it is only with reference to the quantitative approach that a satisfactory conceptual model in this area of the law can be constructed, and that it is only a matter of time before that approach becomes firmly established.
