A contemporary reimagining of the intention to create legal relations doctrine

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A CONTEMPORARY REIMAGINING OF THE INTENTION TO CREATE LEGAL RELATIONS DOCTRINE

Keywords: Contract law, intention to create legal relations, England and Wales, domestic/social presumption, commercial presumption, working practices

Abstract

This article examines the difficulties with the presumption/rebuttal model to assess intention to create legal relations in contract law. It explores the blurred boundaries between domestic and commercial agreements, proposing a new framework. This, we suggest, would mitigate the problems seen in the case law to date and ensure the doctrine is fit for the 21st century.

INTRODUCTION

Intention to create legal relations (ICLR) plays an important role in identifying which agreements are legally binding. The law adopts an objective test, making use of a presumption/rebuttal model. In the case of ordinary commercial agreements there is a presumption that the parties do intend to create legal relations and it is not normally necessary to prove intention. However this presumption can be rebutted, the onus being on the party who asserts that no legal effect was intended, with the burden a heavy one.

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Contracts relating to domestic/social agreements are presumed not to have intended to create legal relations. Again, this presumption is rebuttable.

As will be explored, the doctrine is not without its critics and some commentators have called for its removal altogether, arguing that the mechanism of offer, acceptance and consideration make an additional requirement for ICLR superfluous. We suggest that intention does have a role to play, but is unsustainable in its current form.

We argue that there are two key tensions with the current doctrine. The first tension is that the boundary between the commercial and domestic/social presumptions has become increasingly blurred. The courts have had to assess the enforceability of agreements which do not fit neatly into either presumption in a myriad of situations. These include the contractual status of giving someone a lift to work; religious ministries; agreements in a social setting to ghost-write a businessman’s autobiography; banter in a pub between colleagues; and an alleged 13.5mn euro oral agreement regarding a share in the sale proceeds of a business whilst at dinner in Mayfair. Analysis of the reasoning shows the courts in these instances moving away from the presumption/rebuttal model, and instead placing the onus on the party wishing to demonstrate ICLR, to prove it, making use of a range of indicators to assess this.

The second tension relates to the presumptions themselves. Recent case law indicates that the commercial presumption itself is perceived as useful in some, not all, commercial cases. If the agreement is partly written/partly oral (or wholly oral), the courts have moved

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6 Balfour v Balfour [1919] 2 KB 571.
12 Blue v Ashley [2017] EWHC 1928 (Comm), [2017] 7 WLUK 593.
14 Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (Comm) at [82], [2020] 3 WLUK 197.
away from the presumption and rebuttal model, in favour of once again, the onus being on
the person claiming that there is a contract to show ICLR (albeit a less onerous burden than
in a purely social agreement), again based on a range of indicators.15

Equally, there are problems with the domestic/social presumption. Just over a century has
passed since Atkin L.J.’s “celebrated judgment” in Balfour v Balfour (Balfour)16 and there has
been longstanding feminist critique of the presumption.17 The problems have not abated
over time, indeed quite the opposite, and the late 20th and 21st centuries have seen societal
changes and changing contemporary working practices, which make the doctrine in its
current form problematic at best, damaging at worst. As in the commercial sphere, the
courts have considered the enforceability of a range of agreements including pre-nuptial
agreements;18 the legal implications of entering competitions with members of your
household;19 and in the sphere of a family business.20 The changing perception of the
‘domestic’ landscape would have been unimaginable in the time of Balfour.21 As Freeman
notes, theirs was a Victorian marriage:

If Balfour was a “wise” decision based on the “realities” of life, then wisdom
dictates that we rethink the doctrine it embodies. It no longer reflects realities nor is it in
line with developments taking place in family law.22

Other critics of the domestic/social presumption have noted that it is a ‘fiction’, with many
domestic/social agreements falling outside the remit of contract law, not because of the
intention of the parties, but for reasons of policy23. The result of these tensions is that

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16 Jones v Padavatton [1969] 1 WLR 328 at [332].
21 Balfour v Balfour [1919] 2 KB 571.
judicial decision-making is inconsistent and unpredictable, as well as out of step with societal changes which have seen a merging of the work/home relationship.

Notwithstanding these problems, which make revisiting the doctrine desirable, recent developments in the law of contract, particularly the relaxation of the consideration requirements, make a re-examination necessary. Commentators have argued that a possible consequence of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*\(^\text{24}\) and the missed opportunity of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*\(^\text{25}\) to clarify the promises to pay more/accept less distinction, is that the question of whether there was ICLR, will move more into focus.\(^\text{26}\)

Various options have been suggested for the way forward, including maintaining the status quo; removing the presumption solely in the domestic sphere;\(^\text{27}\) and abandoning the doctrine altogether on the basis of promise/bargain argument.\(^\text{28}\) However, we argue it is time for a contemporary reimagining of the doctrine with the introduction of a framework for assessment of intention. Instead of utilising a domestic/commercial presumption and asking whether this has been rebutted, the new framework uses a set of indicators to assess intention. These indicators are evident in existing case law, and the aim is to bring coherence to what is already happening, particularly in the lower courts. This fresh framework, we suggest, has the potential to mitigate many of the problems of the doctrine, bring it up to date, and help to ensure greater transparency in the decision-making process.


\(^{26}\) J.Ashton and J.Turner “Between a rock and a hard place? No consideration from the Supreme Court in Rock Advertising Ltd v MWB Business Exchange Centres Ltd” (2018) ICLR. 29(10), 593.

\(^{27}\) Saprai, see note 17 above p 492.

\(^{28}\) Hepple, see note 8 above.
1. FOUNDATION, DEVELOPMENT AND KEY PRINCIPLES OF THE DOCTRINE

Whilst a common perception may be that the doctrine of ICLR was developed by Atkin LJ in *Balfour*\(^29\), commentators have noted that its roots are in Roman law, where a lack of seriousness obvious to both parties prevented the contract from coming into force.\(^30\)

Pollock’s first edition of ‘Principles of Contract at Law and in Equity’ of 1876 is thought to have mandated the requirement of an ‘intention directed to legal consequences’\(^31\) and Freeman states that, although Atkin LJ does not cite the commentators in the judgment, it is ‘inconceivable’ that he would not have read the calls for an ICLR requirement.\(^32\) Set in the historical context of economic liberalism of nineteenth-century England and influenced by the work of French legal theorists\(^33\), rules of contract law, primarily in line with an individualist approach, were being developed apace.

Freeman notes that the decision in *Balfour*\(^34\) was able to “clothe with authority” the prior calls for an ICLR requirement, but that it wasn’t until the 1940s that Atkin LJ’s judgment came to prominence. Prior to *Balfour*, the absence of consideration had been the reason not to enforce a promise and this is certainly one strand of Warrington LJ’s position\(^35\), interspersed with an assessment of whether this agreement was contractual or “merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse.”\(^36\) However, whilst concluding that Mr Balfour was “bound in honour” only in respect of the payments,\(^37\) it is important to note that his conclusion was for this particular situation and not a general ruling on the lack of ICLR in domestic settings. He

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\(^29\) *Balfour v Balfour* [1973] QB 87.
\(^32\) Freeman, see note 22 above, on Leake, Pollock and Anson, p71.
\(^34\) *Balfour v Balfour* [1919] 2 KB 571.
\(^35\) Ibid at [574].
\(^36\) Ibid.
\(^37\) Ibid at [575].
is explicit on this point, stating “It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband
and wife”38. It is arguable that the reason for the case’s prominence is largely due to timing
and Atkin LJ’s “flourish of language”39, which will be explored in more detail below.

Saprai acknowledges that “It might be objected that the feminist critique of the doctrine that
[I] present here is aimed at case law that has been gathering dust.”40 He continues that whilst developments in family law and changing societal and judicial attitudes may lead us to conclude that the doctrine is of academic rather than practical interest, it may be the case that women and other vulnerable groups are deterred from bringing cases because of the presumption. In order to gauge the best way forward, it seems apposite to highlight some of the difficulties inherent in the doctrine, blow off the dust from a selection of that case law and to re-evaluate the reasoning in light of those difficulties.

**Key principles of the doctrine**

In deciding whether there is ICLR, the courts apply an objective test, as illustrated in *RTS Ltd v Molkerei Alois Muller GmbH and Co KG*41. This objective approach can be seen in application in a range of recent case law,42 although the concept has been questioned.43 In the case of ordinary commercial transactions, there is a presumption that the parties intend to create legal relations, as illustrated in *Esso Petroleum v Commissioners of Customs and Excise*44 and *Edwards v Skyways*45 alongside more recent decisions such as *Barbudev v*

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38 Ibid at [574].
39 Freeman, see note 22 above, p. 70.
40 Saprai, see note 17 above, p. 476.
Eurocom\textsuperscript{46}, Dresdner Kleinwort Ltd v Attrill\textsuperscript{47} and New Media Holding Company LLC v Ivan Kuznetsov.\textsuperscript{48} It is however possible to rebut this presumption\textsuperscript{49}, the onus of proof being on the party who asserts that no legal effect was intended\textsuperscript{50}. Recently in Dresdner Kleinwort Ltd v Attrill\textsuperscript{51}, the court found an announcement of bonus payments during a ‘town hall’ meeting legally binding, demonstrating that the burden on the party asserting lack of intention is an onerous one.\textsuperscript{52} Interestingly, whilst academic commentators make use of the language of presumption/rebuttal\textsuperscript{53}, practitioner texts such as Chitty refer to the same concept in terms of burden of proof on the party asserting no legal effect.

The 2019 High Court decision in Volumatic Limited v Ideas for Life Limited\textsuperscript{54} provides an illustration of successful rebuttal of the commercial presumption. The court in this case had to decide whether there was ICLR in connection with the design and production of a banknote pouch to fit Volumatic’s cash counting machines. It was held, applying the objective test, that the parties did not intend the agreement to be legally binding and it was noted that given that the agreement was an express, written, commercial document, the onus of proving no contractual intention was on the asserting party, with the burden being a heavy one.\textsuperscript{55}

Conversely, there is a strong presumption in domestic/social agreements that the parties do not to intend to create legal relations. This can apply in relation to domestic agreements

\textsuperscript{46} Barbudev v Eurocom Cable Management Bulgari Eood [2012] EWCA Civ 548, 2012 2 All E.R. (Comm) 963
\textsuperscript{47} Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394, [2013] 3 All E.R. (Comm) 607.
\textsuperscript{48} New Media Holding Company LLC v Ivan Kuznetsov [2016] EWHC 360 (QB) at [99], [2016] 2 WLUK 713.
\textsuperscript{49} Rose & Frank Co v Crompton Bros Ltd [1925] A.C.445.
\textsuperscript{50} Chitty, see note 3 above, 2-168/2-169. See also Megaw J in Edwards v Skyways [1964] 1 W.L.R 349 [at 355].
\textsuperscript{51} Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394, [2013] 3 All E.R. (Comm) 607.
\textsuperscript{52} Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394, [2013] 3 All E.R. (Comm) 607, at [63].
\textsuperscript{53} Stone and Devenney, see note 1 above, p. 132.
between spouses\textsuperscript{56} and civil partners,\textsuperscript{57} and social agreements\textsuperscript{58}. Again, this presumption can be rebutted, with examples of successful rebuttals being seen in agreements between co-habitants where there has been an element of reliance\textsuperscript{59}; separating spouses;\textsuperscript{60} pre-nuptial agreements,\textsuperscript{61} and in some ‘social’ situations.

2. BLURRED BOUNDARIES BETWEEN THE PRESUMPTIONS

Despite the apparent clarity of the presumption/rebuttal model described above, there are a burgeoning number of agreements whereby it is difficult to identify whether it is a commercial agreement or social/domestic. In practice, the courts in these more nuanced settings, appear to abandon the language of a presumption/rebuttal model and instead adopt a range of indicators to assess intention.

Some agreements have a commercial basis, but a social element. An example of this is \textit{Blue v Ashley},\textsuperscript{62} which featured widely in the media and concerned an ‘agreement’ between Mike Ashley, chief executive of Sports Direct, and a colleague made in colourful circumstances.\textsuperscript{63} Interestingly, the court deals with the question of intention\textsuperscript{64} not through the presumption/rebuttal model, but instead by considering a range of factors.\textsuperscript{65} These include the social setting; the purpose of the occasion; the nature and tone of the conversation; the lack of commercial viability; the vagueness of the ‘offer’; the perceptions of the witnesses and the perceptions of the claimant.\textsuperscript{66} Similarly, the case of \textit{Sadler v Reynolds}\textsuperscript{67}, falls

\textsuperscript{56} \textit{Balfour v Balfour} [1973] QB 87.
\textsuperscript{57} Chitty, see note 3 above 2-180.
\textsuperscript{58} Chitty, see note 3 above 2-178.
\textsuperscript{59} \textit{Simpkins v Pays} [1955] 1 W.L.R. 975.
\textsuperscript{60} \textit{Merritt v Merritt} [1970] 1 W.L.R. 1211.
\textsuperscript{62} \textit{Blue v Ashley} [2017] EWHC 1928 (Comm), [2017] WLUK 5913.
\textsuperscript{63} \url{https://www.bbc.co.uk/news/uk-england-40727521} (accessed 7 May 2020)
\textsuperscript{64} \textit{Blue v Ashley} [2017] EWHC 1938 (Comm), [2017] WLUK 5913 at [55]
\textsuperscript{65} Ibid at [56]
\textsuperscript{66} \textit{Blue v Ashley} [2017] EWHC 1928 (Comm) at [81-121].
\textsuperscript{67} \textit{Sadler v Reynolds} [2005] EWHC 309 (QB), [2005] WLUK 238.
somewhere between the commercial agreement and social/domestic spheres. These two cases are not simply outliers, and we find other recent examples of cases falling somewhere between the two presumptions. In *MacInnes v Gross*\(^{68}\) a 13.5-million-euro oral agreement at a dinner in a Mayfair restaurant was found to have no ICLR. Whilst Coulson LJ noted that the setting was not fatal in that a contract could occur “anywhere, in any circumstance”, the highly informal/relaxed setting provided a counter-indication. In *Wright v Rowlands*\(^{69}\) an agreement on a yacht was found lacking the requisite intention. Whilst informality of setting alone is not fatal, it is clearly a factor.

Another area relates to employment agreements. In *Edwards v Lawson*\(^{70}\) the Court of Appeal found intention in a claim by a pupil barrister in relation to her pupillage contract. The Court of Appeal did not apply either presumption, stating that “[T]he context is all important.”\(^{71}\) Again, we see the court turning away from the presumptions and instead utilising a range of indicators to objectively assess intention. What seems decisive here is the seriousness of the arrangement.\(^{72}\)

Similarly, there have been a range of cases dealing with disputes about the employment status of religious ministers, which have raised issues of intention. In *Percy v Church of Scotland Board of National Mission*\(^{73}\) Lord Nicholls stated “[T]he context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection.”\(^{74}\) In *Percy*, the requisite intention was found and the claimant protected, however in *Moore v President of the Methodist*

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\(^{68}\) *MacInnes v Gross* [2017] EWHC 46 (QB), [2017] 1 WLUK 558.
\(^{69}\) *Wright v Rowland* [2017] EWHC 2478 (Comm), WLUK 179.
\(^{70}\) *Edmonds v Lawson* [2000] Q.B. 501
\(^{71}\) Ibid at 414.
\(^{72}\) Ibid.
\(^{73}\) *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] 2 A.C. 28
\(^{74}\) Percy, ibid, at [26].
Conference\textsuperscript{75} the court found there was no contract. In her dissenting speech in Moore, Lady Hale states that “we can approach the issue with an open mind”\textsuperscript{76} and that this can be “without the distractions of a presumption against legal relations”.\textsuperscript{77}

Another ‘blurred’ area involves lifts to work, which again do not fit neatly into either presumption. In Coward v MIB\textsuperscript{78} there was a finding of intention and it seems policy considerations played a role here. However, in Albert v Motor Insurers’ Bureau\textsuperscript{79} intention was found, via the route of analysing the case as a commercial situation, therefore falling within the commercial presumption. The question in Coward (whether driver could be compelled to carry others in the future) was different from Albert (where the question was whether there was an obligation to pay for a service already delivered. We would argue that the law has had to utilise these fine distinctions to circumnavigate the problems created by the presumptions themselves.

This section has demonstrated that there is a disconnect between what the law states it does, utilising presumptions and rebuttals, and what actually occurs in practice, namely looking at a range of factors to assess whether the reasonable person would expect legal consequences to flow from the arrangement, whilst taking into account policy considerations. It has shown that there are numerous cases which do not fit neatly into one category or the other. We envisage that the number of cases which do not fit neatly into either category will grow, with the blurring of the work/home delineation likely to increase in the post Covid-19 landscape and concur with Lady Hale that the presumptions are a distraction in such cases.

\textsuperscript{75} Moore v President of the Methodist Conference [2013] UKSC 29, [2013] 2 A.C. 163.
\textsuperscript{76} Moore, ibid, at [35].
\textsuperscript{77} Ibid at [45].
\textsuperscript{78} Coward v Motor Insurers’ Bureau [1963] 1 Q.B. 259.
\textsuperscript{79} Albert v Motor Insurers’ Bureau [1972] AC 301.
3. DIFFICULTIES WITH THE COMMERCIAL AND DOMESTIC/SOCIAL PRESUMPTIONS

Whilst the section above discussed the issues with the blurred boundaries cases, this section highlights some of the difficulties with the presumptions themselves.

**Commercial presumption**

As previously noted, in the case of ordinary commercial transactions it is not normally necessary to prove ICLR. The party seeking to prove absence of intention has the onus of proof, which is a heavy one. This is said to apply whether the agreement is written or oral. However, this seems at odds with what is happening in the courts in practice. In fact, it has been said that it is only in ‘some’ commercial cases that ICLR is presumed and that “the presumption may not arise and is less useful where…there is no written, signed agreement or single final email”. In these situations, where the agreement is partly written/partly oral, or wholly oral, the courts once again appear to turn to a range of indicators to objectively assess intention.

In *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP*, which will be examined in more detail below, the judge stated:

> In some commercial cases, it is presumed that upon the agreement of a contract, the parties intended to create legal relations. However, that presumption may not arise and is less useful where the existence of the contract is itself in issue, for example because there is no written, signed agreement or because there is no single final email recapitulation of the terms agree’.

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80 Chitty, see note 3 above 2-168-170.
81 *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP* [2020] EWHC 593 (Comm) at [82], [2020] 3 WLUK 197.
82 Ibid at [82].
83 Ibid at [87], [92-99], [100], [103-104].
84 Ibid at [82].
In this case the burden fell squarely on Moorgate to establish that there was a contract.\textsuperscript{85} The judge felt that ICLR “takes on a greater importance” if a contract is oral or if oral and written, as then the classical analysis of contract formation may not be “neat and tidy”.\textsuperscript{86} Instead, in this type of situation the onus is on the party claiming that a binding contract was made to prove ICLR.

Similarly, in *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* \textsuperscript{87}, a combination of written and oral agreement, it was stated:

> In such a case, notwithstanding the commercial context, I do not consider that it is appropriate to approach the matter with a presumption that there was an ICLR. In a hybrid case such as this, involving a combination of what the parties said and did and no expressly stated offer to contract in the terms alleged, I consider that in principle the onus is on the party claiming that a binding agreement was made to prove that there was an intention to create legal relations\textsuperscript{88}.

The court found support for such an approach in the Court of Appeal decision in *Blackpool Aero Club v Blackpool BC*\textsuperscript{89} in which the burden of proof rested on the party alleging that a contract was made, notwithstanding the commercial context. This seems to differ from the presumption/rebuttal approach.

It might be suggested that requiring a party to prove intention may hinder contract formation. Our response is that the courts are already requiring the person claiming a contract to demonstrate intention in cases falling between a social/commercial situation or in hybrid written and oral commercial agreements. The introduction of a fresh framework would

\textsuperscript{85} Ibid at [75].
\textsuperscript{86} Ibid at [81].
\textsuperscript{87} *Assuranceforeningen Gard Gjensidig v International Oil Pollution Compensation Fund* [2014] EWHC 3369 (Comm) at [102], [2005] WLUK 238.
\textsuperscript{88} *Assuranceforeningen*, ibid at [102].
\textsuperscript{89} *Blackpool Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195.
facilitate a more transparent discussion of what actually occurs in practice. It is however, essential that the structure and wording of the new framework does not impede the formation of commercial agreements.

**Domestic presumption**

**Criticisms**

The criticism of the presumption against ICLR in a domestic setting as it currently stands, simply put, is that it denies legal effect to agreements in the domestic context. This, Saprai argues, drawing on the feminist critique of the *Balfour* doctrine which he describes as “trenchant”, “leaves women vulnerable to the exploitation and distributive unfairness that result when men break important promises (particularly when women rely or confer benefits on the basis of these assurances).” Saprai, see note 17 above, p 473. Freeman states that Atkin LJ’s privacy argument of the “domestic code”, whereby “each house is a domain into which the King’s writ does not seek to run…” “needs to be recognised for what it is”, namely in a wider context of a legal system where until 1962 husbands and wives could not sue each other in tort and rape within marriage only became a criminal offence in 1991 with *R v R*. This separation of the domestic / ‘private’ sphere from the legal / ‘public’ world he argues, “devalues women by saying that they are not important enough to merit legal regulation” and denies them the legal relief which could result. Keyes and Burns note that contract law is out of step with Australian legislative developments in family law, which does recognise such ‘domestic’

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90 Saprai, see note 17 above, p 473.
90 *Balfour v Balfour* [1919] 2 KB at [579].
94 Freeman, see note 22 above, p. 74. He also discusses the issue of issue of ‘domestic’ abuse and the longstanding reluctance of police authorities to intervene in such disputes. Although outside the scope of this paper, this is an issue which has yet to be resolved, with the Domestic Abuse Bill having been re-introduced in March 2020, following delays since the initial consultation after a 2014 HMIC report revealing significant shortcomings in police response to victims [https://www.gov.uk/government/speeches/hmics-inspection-of-police-handling-of-domestic-violence-and-abuse](https://www.gov.uk/government/speeches/hmics-inspection-of-police-handling-of-domestic-violence-and-abuse) (accessed 17 April 2020).
agreements\textsuperscript{95}, and the same point can be made of England and Wales, though a counterpoint is that this is the court deciding what is fair in the circumstances, rather than enforcing agreements \textit{per se}.\textsuperscript{96} In exploring a way forward, it is essential to address the issues raised by the feminist critique alongside appreciating the exponential changes in concepts of the family and intimate relationships since \textit{Balfour}\textsuperscript{97} was decided.

\textbf{Pushing the boundaries of the domestic/social sphere}

Alongside the cases discussed above which lie somewhere between the two presumptions, there are a growing number of cases which seem at the outer reaches of what could feasibly be termed domestic or social. Modern family arrangements are very different from that of the Balfours, a case heard not long after the time when wives could not legally hold property\textsuperscript{98} and for women, particularly non-working class women, working outside of the home was not the norm as it is today. Whilst the changes in working patterns are outside the scope of this paper\textsuperscript{99}, it is apparent that with flexible working, home working and the ‘gig economy’, facilitated by now standard tech innovations and roles such as ‘influencers’, which were not envisaged even a couple of decades ago, let alone a century ago, attempting to separate the two spheres even if desirable, proves challenging.

Alongside this, couples or family members may, as illustrated by the trusts case \textit{Marr v Collie}\textsuperscript{100}, acquire investments together, such as a ‘buy to let’ property, and of course family

\textsuperscript{96} See e.g. Matrimonial Causes Act 1973, Same Sex Marriage Act 2013, Civil Partnership Act 2004, as amended by the 2019 Act, giving the courts wide-ranging powers of distribution on relationship breakdown. There has been much debate on the lack of parity for cohabitees see e.g. Law Commission report 307 ‘Cohabitation: The financial consequences of relationship breakdown (July 2007) and Cohabitation Rights Bill 2019-21.
\textsuperscript{97} \textit{Balfour v Balfour} [1919] 2 KB 571.
\textsuperscript{98} Married Women’s Property Act 1882.
\textsuperscript{100} \textit{Marr v Collie} [2017] UKPC 17, [2017] 3 W.L.R. 1507.
businesses are commonplace, with intention in this context considered in *Snelling v Snelling*.\textsuperscript{101} Gulati notes “[P]eople are becoming more and more commercial even in familial relations” and believes that the presumptions cannot be justified.\textsuperscript{102} Gulati also raises the issue of social and cultural differences and the prevalence of family businesses found in many Asian countries. It is questionable whether *Snelling v Snelling*\textsuperscript{103} addresses the family business distinction in more than a perfunctory manner and it is arguably unlikely that the Victorian textbook writers, which Freeman argues Atkin LJ drew on, would, at the height of the British Empire, have concerned themselves with such cultural differences.

**Findings of no intention: policy in another guise?**

The cases discussed below consider whether there is or is not the requisite intention, but ascertaining from the reasoning what intention actually is, is not easy. Many commentators argue that these are effectively decisions of policy in another guise, with Hedley stating:

> the wonderfully flexible doctrine of “intent to create legal relations” keeps legal contract-talk out of areas the judges do not wish it to go – if contract seems unfamiliar and desirable in a particular social context, the judges can simply declare the parties lack the necessary intent.\textsuperscript{104}

This we suggest is a key reason for the need for a fresh approach. Atkin LJ in *Balfour*\textsuperscript{105} explicitly discusses policy considerations with his floodgates argument, discussed below,

\begin{footnotesize}\textsuperscript{101} *Snelling v John G. Snelling Ltd. and Others* [1973] QB 87, [1972] 2 W.L.R. 588.
\textsuperscript{103} *Snelling v John G. Snelling Ltd. and Others* [1973] QB 87, [1972] 2 W.L.R. 588.
\textsuperscript{104} S Hedley Restitution: its Division and Ordering (London 2001) p 76.
\textsuperscript{105} *Balfour v Balfour* [1919] 2 KB 571.\end{footnotesize}
and commentators such as Hepple discuss the role of policy in decision-making. Atiyah describes policy as the “real reason” and this fiction of intention argument is a persuasive one, as Keyes and Burns note, “the parties are most unlikely to have considered the question of their agreement at all, so proof of an actual intention, or lack thereof, is impossible in almost all cases.” Perhaps there has been a more honest discussion within the law of equity and trusts, as seen in the discussion of inferred and imputed intention in Stack v Dowden and Jones v Kernott, in the context of beneficial ownership of the family home via a constructive trust. If, as Hedley notes, a key part of contract law is “gap-filling” or “interpretation”, it is arguable that any modification to the current doctrine at the very least needs to articulate how that is to be done.

4. DIFFICULTIES IN FOCUS: A CRITIQUE OF KEY CASES

This section revisits some of the authorities often cited when discussing the presumptions. It is not intended to be a comprehensive review of those cases, but instead to highlight points which will need to be considered when formulating a fresh framework.

Sadler v Reynolds

This case, a claim for damages for breach of an alleged contract to ghost-write an autobiography, is a good example of the blurred boundaries between the presumptions. Interestingly, it shows the courts’ overt recognition that there are cases which do not fit neatly into either category, with the court noting “the facts of this case place the agreement

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106 Hepple, see note 8 above, p 134.
108 Keyes and Burns, see note 95 above, p 581.
110 Hedley, see note 104 above p 59.
between the parties somewhere between an obviously commercial transaction and a social exchange". 112

This is problematic as it then impacts on the burden of proof. If the case had been perceived as a commercial matter, then the onus would have been on the defendant to prove that there was no ICLR, a heavy burden as discussed. If, however, the case was considered to fall within the social/domestic presumption, then the onus is on the claimant to prove that there was such intention, a lighter burden to discharge. After noting that contractual intention is judged objectively 113, the judge states that:

the onus is on John Sadler [the claimant] to establish an intention to create legal relations, albeit that the onus is a less heavy one than that which would be required to establish such intent in the context of a purely social relationship 114.

Therefore, it seems the court found that the claimant had to show ICLR, as one would for the social/domestic presumption, but with a reduced burden than normal, presumably to acknowledge that it was not a purely social exchange and involved a business. In finding that there was such an intention, there is no suggestion of the decision being based on a presumption/rebuttal model of ICLR. Rather the approach was to put the onus on the claimant to establish intention.

Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP 115

This High Court case, in which Moorgate (a corporate finance advisory firm) claimed the sum of £1,000,000 from Sun European (a European private equity advisory arm of a global

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112 Ibid at [56].
113 Ibid at [52].
114 Ibid at [56].
115 Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (Comm), [2020] 3 WLUK 197.
private equity firm) based on an alleged oral contract during a telephone conversation, illustrates the difficulties with the commercial presumption itself. Adopting the traditional presumption/rebuttal analysis, this prima facie can be seen as a commercial transaction, which should therefore follow the principle that there is no need to prove ICLR. The party seeking to deny intention, Sun here, would need to prove such absence.

However, in finding that no contract was concluded, the court considered one of the reasons to be that Moorgate had failed to prove that there was mutual ICLR. This reasoning seems inconsistent with the normal commercial presumption. The judge openly acknowledged that the presumptions may not arise and are less useful in a range of ‘commercial’ cases, namely those that are partly written/partly oral or those that are wholly oral. This sits uneasily with practitioner texts, which say that the rules relate to written or oral contracts.\(^\text{116}\)

Instead of a presumption/rebuttal model, the court considered a range of factors. In making an objective assessment as to intention, the following were considered important: evidence of the parties’ relationship and communications between the parties before, at the time of and after the alleged contract was said to be formed, and evidence of market practices.\(^\text{117}\) Persuasive factors were that the parties would have been unlikely to make such a contract in a telephone call of only 10 minutes; absence of an engagement letter in line with usual market practice; the unusually large size of the fee; failure in a later e-mail to mention the agreement; the ‘agreement’ lacked specifics and was described as a proposal, which was not mentioned in internal e-mails, and furthermore the Defendant had other advisors so it was unnecessary to engage the Claimant.

Moorgate concludes that “the Court must consider all of the evidence available and determine on an objective appraisal of such evidence whether the parties…intended to

\(^\text{116}\) Chitty, see note 3 above 2-170.
\(^\text{117}\) Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (Comm) at [92].
create legal relations such that they are both bound by a resulting contract”.118 This appraisal by the court is far removed from a presumption of intention requiring rebuttal. It would seem therefore that whilst the presumption of ICLR in commercial agreements is appropriate in “ordinary commercial transactions”119, there are some cases, as noted by the judge in this case, that fall outside that normal rule and in those instances the courts prefer to draw upon a range of factors to assess intention rather than employing the presumption/rebuttal approach.

**Balfour v Balfour**

The facts of *Balfour*120 are straightforward, an alleged verbal agreement by the defendant husband to pay a sum of maintenance to his plaintiff wife, whilst he was overseas in Ceylon on a government appointment, his wife having been unable to join to him for health reasons. The dispute arose when the defendant took the decision to remain in post in Ceylon. With Warrington LJ and Duke LJ discussing the undesirability of finding intention in this kind of domestic context, but essentially leaning towards determining the issue via the absence of consideration, it is as previously noted, Atkin LJ’s reasoning which has been accepted as authoritative. Departing from the absence of consideration point, recognising that there will be arrangements between spouses which do satisfy the definition of consideration,121 he finds that they are not contracts “and they are not contracts because the parties did not intend that there should be legal consequences.”122.

What appears to be lacking in this reasoning is on what basis lack of intention can be found. It is arguably a triumph of form over substance “[T]he consideration that really obtains for

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118 Ibid at [83]
119 Chitty, see note 3 above 2-168-169.
120 *Balfour v Balfour* [1919] 2 KB 571.
121 “…some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.” Ibid at [578].
122 Ibid at [579].
them is that natural love and affection which counts for so little in these cold Courts.”¹²³

What it seems to be distilled down to is a floodgates argument “…the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations.”¹²⁴ It is not hard to find praise for the judgment. Writing in 1952, Kahn-Freund talks of the “celebrated case”, describing it as “one of those wise decisions in which the courts allow the realities of life to determine the legal norm which they formulate.”¹²⁵ Whatever your view of the ‘realities of life’ in 1919 and 1952, it is hard to disagree with Freeman’s comment above, writing in 1996, that the ‘realities of life’ have changed and arguably a quarter of a century on, even more so.¹²⁶ Freeman asserts, alongside the reductionist example given of two parties agreeing to take a walk which is discussed below, that the floodgates fears are “entirely exaggerated, even more so in 1921 when there was no legal aid.”¹²⁷ Keyes and Burns are also critical of the floodgates argument and don’t pull any punches, describing it as “among the most melodramatic floodgates claims ever made…”¹²⁸ and noting the development of small claims tribunals and alternative dispute resolution mechanisms which make the floodgates argument even harder to sustain in current times.

Questioning the decision is not solely a late twentieth/early twenty-first century occurrence. Writing in 1970, Hepple highlights the interesting House of Lords discussion on the Balfour¹²⁹ principle in Pettitt v Pettitt¹³⁰, a case to determine the equitable interest of a spouse in the marital home in the absence of legal interest. Hepple notes that “[Although] Lord Atkin’s celebrated judgment has been accepted as authoritative for fifty years….there

¹²³ Ibid.
¹²⁴ Ibid.
¹²⁶ Freeman, see note 22 above.
¹²⁷ Ibid p 70, though note that this article was published in 1996, pre Legal Aid, Sentencing and Punishment of Offenders Act 2012, which effectively ended any legal aid for this kind of civil dispute, meaning the floodgates argument is as limited now as it was when Balfour v Balfour was decided.
¹²⁸ Keyes and Burns, see note 96 above p 585.
¹²⁹ Balfour v Balfour [1919] 2 KB 571.
was a keen desire to limit its application”, being ‘described as “an extreme case” and one which “stretched the doctrine ‘[T]hat in ordinary day-to-day life spouses do not intend to contract’ to its limits.”’

Lord Hodson states that “The Balfour decision has no direct bearing on the kind of situation which has arisen here but I think it rightly indicates that the court will be slow to infer legal obligations from transactions between husband and wife in the ordinary course of their domestic life”

Treitel notes the “stretched to its limit” point in Pettitt v Pettitt but goes on to say that “the doctrine itself has not been judicially questioned” and it certainly seems academic commentators are more critical than the judiciary, who seem to distinguish rather than question. It is interesting that the reasoning in Pettitt v Pettitt seems to suggest, though not define, tiers of domestic agreements, distinguishing here on the basis of title to property and “property of the magnitude we are now considering.”

This seems to introduce an additional layer of difficulty and begs the question of what would constitute sufficient ‘magnitude’. Mrs Balfour was not bringing an action to enforce a promised walk, to use Atkin LJ’s example, but a monthly maintenance sum, presumably ‘serious’ enough to meet Fried’s test.

Hedley, disagreeing with the view that consideration or rather absence of, played a significant part, states that what was key here was that Mrs Balfour would not be left without a remedy as her claim in contract was additional to her orders already awarded for restitution of conjugal rights and for alimony.

His view is that the absence of consideration argument was not the real issue and that Sargant J’s finding of consideration, in Mrs Balfour’s consent to the agreement, was a sound one, and that what was needed “was an excuse not to apply

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131 Hepple, see note 8 above, p130 citing Lord Upjohn at [992] and Lord Reid at [973].
134 Pettitt v Pettitt [1969] 2 W.L.R. 966 at [816].
135 Saprai, see note 17 above.
136 S.Hedley ‘ Keeping Contract in its Place – Balfour v Balfour and the Enforceability of Informal Agreements’ (1985) OJLS Vol 5 p 392. Interestingly the potential availability of an alternative remedy to the claim in contract was noted in Diane Modahl v British Athletic Federation [2001] EWCA Civ 1447 at [81].
normal principle.” Enter Lord Justice Atkin’s general requirement of ICLR for all contracts, which Hedley argues is primarily “to keep contract in its place; to keep it in the commercial sphere and out of domestic cases, except where judges think it has a useful role to play.”

**Simpkins v Pays**

This case, which Judge Sellers describes as “[H]appily…an unusual type of case to come before a court of law” concerned a dispute over shares of prize money in a newspaper competition, which the lodger plaintiff, defendant landlady and her granddaughter, not part of the claim, entered weekly together, sharing the costs of entry. Acknowledging the informal arrangement as to who paid the entry costs and postage, the key question was what the intention was should they win. Sellers J, recognising the informality, concluded that the basis was that any prize monies should be shared. Interestingly, them living “in harmony” did not preclude a finding of ICLR, whereas in *Balfour*, the fact that the parties were living together “in amity”, at least according to Lord Denning MR in *Merritt v Merritt*, would appear to have been a key factor. Addressing the question of ICLR, Sellers J remarks:

> It may well be there are many family associations where some sort of rough and ready thing is said which would not, on a proper estimate of the circumstances, establish a contract which was contemplated to have legal consequences, but I do not find so here.

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137 Ibid.
138 Ibid at [393].
139 *Simpkins v Pays* [1955] 1 W.L.R. 975.
140 Ibid at [976].
141 Ibid at [977].
143 *Simpkins v Pays* [1955] 1 W.L.R. 975 at [979].
The decisive factor here is the “mutuality” of the arrangement, which overrides the lack of formality. This idea of mutuality or joint endeavour, involving some kind of shift in position is explored later as an indicator for a fresh framework.

Parker v Clark

This case concerned an agreement for the defendant’s niece and her husband to move in and assist the defendants, an elderly couple not in good health, with domestic chores and to share the household expenses. This was on the understanding, as evidenced by a letter, that the defendants would leave their house to the younger couple, who had sold their own property, an agreement which the defendants later denied. Describing this, like Simpkins v Pays above, as an “unusual sort of contract”, Devlin J found for the plaintiffs. Addressing, and then rebutting the Balfour presumption, he stated:

No doubt a proposal between relatives to share a house, and a promise to make a bequest of it, may very well amount to no more than a family arrangement of the type considered in Balfour v Balfour, which the courts will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract.

He proceeds to say that intention is to be inferred from the language used and context and whilst acknowledging the “lack of formality” here, makes the point that this is “largely explained by the relationship between the parties; it is easier to demand formal documents from a stranger than it is from a relative and friend.” This is a compelling point, but was not considered a factor in Balfour, where the reasoning seems to be that a level of

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144 Ibid.
147 Ibid at [292].
148 Ibid at [293].
149 Balfour v Balfour [1919] 2 KB 571.
formality would be necessary to rebut the presumption. What appears decisive in *Simpkins v Pays*[^150] is the shift in position, with the younger couple selling their property in reliance on the promise, and the fact that the arrangements had worked successfully for more than a year and a half. This aligns with Hedley’s suggestion that in the domestic context, contractual liability will only be imposed if one side has already performed their side of the bargain and is seeking reciprocity[^151], which was the situation here. We might then, wish to evaluate the importance of ongoing agreements and whether an agreement is executed or executory in formulating indicators for a fresh framework.

**Jones v Padavatton[^152]**

This case concerned a daughter, Mrs Jones, coming to England to study at the Bar, under, she claimed, intense pressure from her mother, Mrs Padavatton, who gave her an allowance. The agreement was subsequently varied, whereby her mother provided a house, with the dispute heard in court concerning occupancy of the house when her mother sought possession. The trial judge had refused to grant an order for possession on the basis that the varied agreement had legal effect and therefore the daughter was entitled to remain. The Court of Appeal allowed the appeal, finding no ICLR. Danckwerts LJ described the action as “really deplorable”, stating that it was “distressing that they could not settle their differences amicably”.[^153] This gives a palpable sense from the outset of reluctance for this dispute to be settled via the mechanism of contract law but this begs the question why, with the dispute being very different from Lord Justice Atkin’s agreement to take a walk together in *Balfour*, with the daughter having giving up a good job in Washington and moving to England to retrain.

[^151]: Hedley, note 136 above p. 393.
[^152]: *Jones v Padavatton* [1969] 1 W.L.R. 328.
[^153]: Ibid at [329].
Dividing the agreements into two parts, Danckwerts LJ finds consideration, at least for the first part, with the daughter giving up her job in Washington, and studying at the Bar in England, but then proceeds to focus on the form of the agreements, stating “[T]here were no terms recorded in writing”, though a well-established principle of contract law is that a contract does not have to be in writing to be valid, and noting there was “no sort of businesslike statement of the parties’ respective obligations” (our emphasis).\(^{154}\) He highlights various ‘incidental matters’ which had not been decided, including how long the agreement would last if the studies took longer than anticipated for part one and various aspects of the living arrangements in the acquired house, where the other rooms were let to tenants. Writing on relational contract theory, Keyes and Burns make the compelling point that “In both commercial and family agreements, the long-term nature of the relationship and related agreement impedes the ability to settle finally all terms at time of contract formation.”\(^{155}\) Reading this judgment, it is hard not to conclude that Danckwerts LJ was looking for reasons to keep this contract in its place, to echo Hedley’s argument discussed above.\(^{156}\) Whilst acknowledging that there is no difficulty with family members entering into legally binding contracts, he clearly prefers Atkin LJ’s “magnificent exposition of the situation in regard to such arrangements in Balfour v Balfour”\(^{157}\) to the decision in Parker v Clark\(^ {158}\), though arguably the latter shift in position in reliance on an agreement was more analogous to the situation at hand.

Salmon LJ reaches the same conclusion, but via different reasoning. Interestingly, his view is that the uncertainties in the agreements do not preclude them from being contractual. Focussing instead on the arrangements as to the house, he finds no evidence that the mother had given up her proprietary rights, stating that the arrangements were “very vague

\(^{154}\) *Jones v Padavatton* [1969] 1 W. L.R. at [330].

\(^{155}\) Keyes and Burns, note 95 above.

\(^{156}\) Hedley, see note 136 above.

\(^{157}\) *Balfour v Balfour* [1919] 2 KB 571.

\(^{158}\) *Parker v Clark* [1960] 1 W.L.R. 280.
and made without any contractual intent”\textsuperscript{159}. Frustratingly, but perhaps unsurprisingly, he does not address why there was no contractual intent, instead referring to Atkin's “celebrated judgment”, which is “not a presumption of law, but of fact..” and “derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of love and affection.”\textsuperscript{160} Interestingly, like Dankwerts LJ, he cites \textit{Parker v Clark} but does not address it at all. Agreeing with the other two justices, but more aligned to Salmon LJ’s reasoning in respect of the second agreement, Atkinson LJ describes this as a “most unhappy case”, quoting the daughter’s words that she and her mother had been “very close”.\textsuperscript{161} This seems something of a distraction and it is questionable as to why this makes intent less likely. After all, most commercial contracts are made on an amicable footing, why should family/social agreements be any different?

\textit{Gould v Gould}\textsuperscript{162}

This dispute concerned the enforceability of a husband’s promise, on leaving his wife and two children, to give her £15 per week as long as he had it. Allowing the husband’s appeal, the court found insufficient certainty for the requisite intent (Edmund Davies LJ and Lord Megaw LJ, with Lord Denning MR dissenting). The majority judges focus on the words used, with Edmund Davies LJ stating “those words [as long as he had it] import such uncertainty as to indicate strongly that legal relations were not contemplated”, whilst acknowledging that the probability of such intention “may” be greater than that of \textit{Balfour}.\textsuperscript{163} Lord Denning MR, echoing the discussion in \textit{Pettitt v Pettitt}\textsuperscript{164}, makes the point that “[The] parties probably possessed no intention one way or the other. It is not the actual intention of

\begin{itemize}
  \item \textsuperscript{159}Ibid at [335].
  \item \textsuperscript{160}Ibid at [332].
  \item \textsuperscript{161}Jones \textit{v} Padavatton [1969] 1 W.L.R. at [337].
  \item \textsuperscript{162}Gould \textit{v} Gould [1970] 1 QB 275.
  \item \textsuperscript{163}Ibid at [381].
  \item \textsuperscript{164}Pettitt \textit{v} Pettitt [1969] 2 W.L.R. 966.
\end{itemize}
the parties, but the intention which the court imputes to them."\textsuperscript{165} The tension inherent in assessments of certainty seem to align with the ‘fiction of intention’ point discussed above. Denning concludes that although the qualification of the husband’s promise to pay as long as he had it, lacks precision, this is not so uncertain as to render the whole agreement void\textsuperscript{166}. His view is that a "perfectly intelligible" term could be implied that the husband would, if no longer able to manage the payments, give notice, but until such time would be bound.\textsuperscript{167}

\textit{Merritt v Merritt}\textsuperscript{168}

Decided shortly after \textit{Gould v Gould} (Gould),\textsuperscript{169} this case concerned a husband’s agreement on separation to transfer the matrimonial home to his wife, in consideration for her paying the outstanding mortgage payments. Distinguishing \textit{Gould, Jones v Padavatton}\textsuperscript{170} and \textit{Balfour},\textsuperscript{171} Lord Denning MR’s dissenting reasoning in \textit{Gould}, is the majority view here, with the question distilled down to whether the reasonable person would regard the agreement as binding. According to Widgery LJ, there is “no room” for the Balfour presumption here because the parties were separating at the time of the agreement and “that natural love and affection has gone”,\textsuperscript{172} with Karminski LJ agreeing. He notes that Mrs Gould had not sought other remedies to which she would have been entitled because she believed that her husband would fulfil his side of the agreement. It is suggested that it is this which seems a more convincing reason to enforce the promise, than whether or not the agreement was ‘friendly’ or not. In thinking about a way forward, the ‘friendly’ living ‘in amity’ argument as bolstering the application of the presumption against intention in a domestic context, seems unsustainable.

\begin{footnotesize}
\begin{enumerate}
  \item Gould v Gould [1970] 1 QB 275 at [279].
  \item Ibid.
  \item Ibid at [280].
  \item Merritt v Merritt [1970] 1 W.L.R 1211.
  \item Jones v Padavatton [1969] 1 W.L.R. 328.
  \item Balfour v Balfour [1919] 2 KB 571.
  \item Merritt v Merritt, [1970] 1 W.L.R. at [1214].
\end{enumerate}
\end{footnotesize}
Featuring again, in *Snelling v John G. Snelling Ltd.*\(^{173}\), a dispute between brothers, all directors of the family business, Ormrod J distinguishes *Balfour*\(^{174}\) as having “wholly different” circumstances, with the relationship here having been “destroyed by dissensions” with “[N]othing but the biological tie” remaining.\(^{175}\) Here the context suggested that they intended to be bound, as did the language. Addressing the argument that the terms were too vague or uncertain, Ormrod J states that, where an agreement is, as here, prepared by laymen rather than lawyers, the court “ought not to seek ways for avoiding it but rather to do its utmost to give effect to it if it is possible to do so”.\(^{176}\) This echoes Lord Denning MR’s reasoning in *Gould*\(^{177}\) and it is suggested that if this is to be the approach for agreements in a commercial setting, as was the case with the Snelling brothers, the same should be applied in a domestic/social setting, with arguably greater latitude in the latter in respect of the form of the agreement.

### 4. TIME TO REMOVE INTENTION OR FOR A FRESH FRAMEWORK WITH INDICATORS?

From the above discussion, it is clear that maintaining the status quo is undesirable, with an expanding number of cases not fitting into either presumption and any attempts to categorise such cases becoming unwieldy.\(^{178}\)

Removing the doctrine altogether has the merit of simplicity. Arguably, the requirement of ICLR is superfluous and the tools for establishing contract formation, namely offer and

\(^{173}\) *Snelling v John G. Snelling Ltd. and Others* [1973] QB 87.

\(^{174}\) *Balfour v Balfour* [1919] 2 KB 571.

\(^{175}\) *Snelling v John G. Snelling Ltd. and Others* [1973] QB 87 at [93].

\(^{176}\) Ibid at [95].

\(^{177}\) *Gould v Gould* [1970] 1 QB 571.

\(^{178}\) Chitty, see note 3 above 9 – Contractual Intention.
acceptance consideration, alongside the ability of the courts to imply terms, particularly with the recent Supreme Court decision in *Wells v Devani* clarifying on what basis such terms are to be implied, are sufficient, though the focus may simply shift to issues of certainty.\(^{179}\)

Keyes and Burns argue that the distinction between the two types of agreement “serves no legitimate purpose”, but instead “performs a powerful symbolic function delineating the realm of law from the realm of the family and the feminine, preferring the former over the latter.”\(^{180}\)

However, this brings us to the issue of the changes to consideration in *Williams v Roffey Bros*.\(^{181}\) and it is suggested that if this is to be the way forward, clarification by the Supreme Court, particularly in contractual modification agreements, in both a domestic/social setting and a commercial one, is necessary to avoid uncertainty.

Saprai makes a compelling argument against the separation of promise from intention\(^{182}\). He suggests that in addition to the promise, there needs to be a level of seriousness and a contemplation, at least in part, of subsequent legal enforcement\(^ {183}\). Alongside the ‘fiction of intention’ point discussed above, Saprai argues that this argument is hard to sustain when considering cases like *Balfour*\(^ {184}\) and *Gould*\(^ {185}\), as the ‘promises’ pertained to financial arrangements which certainly seem ‘serious’. Analogous to Saprai’s argument that promise and intent should not be separated, the same can be suggested for consideration and intent in respect of enforceability. Hepple notes that the requirement of ICLR, in addition to the bargain requirement of the doctrine of consideration has been subject to much criticism by academic commentators\(^ {186}\) and states that ‘[T]his test of bargain renders superfluous any additional proof of intention’. However, since Hepple’s paper was published in 1970, changes to the doctrine of consideration, in particular the ‘practical benefit’ development of


\(^{180}\) Keyes and Burns, see note 95 above.


\(^{182}\) Saprai, see note 17 above.

\(^{183}\) Ibid, p 477.

\(^{184}\) *Balfour v Balfour* [1919] 2 KB 571.

\(^{185}\) *Gould v Gould* [1970] 1 QB 571.

\(^{186}\) Hepple, see note 8 above p127
Williams v Roffey\textsuperscript{187} in promises to pay more contractual modifications, mean that consideration is perhaps not the bulwark it once was.

If the requirements of consideration have been relaxed through Williams v Roffey\textsuperscript{188} ‘practical benefit', there is no reason why this should not apply in a domestic context too. Consider, disregarding any statutory obligations, if for example, a previously cohabitant father leaves the mother as primary carer of the children, agreeing to pay a certain sum per month, but then, on receipt of a salary increase, offers to pay more. He then reneges on the promise. Is the second promise enforceable on the basis of ‘practical benefit', with the children able to say, go on a school trip or afford music lessons even though the mother has not ostensibly changed her position? If it is, presuming the first promise can be distinguished from Balfour\textsuperscript{189} on the Merritt v Merritt basis of separating parties who "bargain keenly"\textsuperscript{190}, then does the second promise also need, if consideration is established, to fulfil a separate ICLR requirement? Hepple, while not considering the question in detail, notes the view of some commentators that the doctrine of consideration could be abolished because the rules assessing the ‘seriousness' of a promise would remain\textsuperscript{191}. Conversely, it is possible to argue that if consideration is found, there is no need for a separate requirement of intention\textsuperscript{192}. If one favours retaining consideration and ICLR, or retaining one and removing the other, as the reason for enforcing a promise, it is desirable that there should be less obfuscation as to what those requirements actually are.

Whilst a comparative analysis is beyond the scope of this article, it is interesting to note the role of ICLR in other jurisdictions. An initial survey of the European civil jurisdictions shows that ICLR is necessary, but commentators note that “[T]he 'intention to be bound' is usually

\textsuperscript{187} Williams v Roffey Bros and Nicholls (Contractors) Ltd. [1991] 1 QB 1, [1990] 2 W.L.R. 1153.
\textsuperscript{188} Williams v Roffey Bros and Nicholls (Contractors) Ltd. [1991] 1 QB 1, [1990] 2 W.L.R. 1153.
\textsuperscript{189} Balfour v Balfour [1919] 2 KB 571.
\textsuperscript{190} Merritt v Merritt [1970] 1 W.L.R 1211 at [1213].
\textsuperscript{191} Hepple, see note 8 above p122 citing Chloros.
\textsuperscript{192} Hepple, see note 8 above.
discussed in very general terms.”\textsuperscript{193} The Principles of European Contract Law state that the intention of a party to be legally bound is to be determined from the party’s statements and conduct as reasonably understood by the other party\textsuperscript{194}. Similarly, the UNIDROIT principles state that “Since such an intention will rarely be declared expressly, it often has to be inferred from the circumstances of each individual case”\textsuperscript{195}.

Despite the problems explored throughout this article, in our view ICLR still has a key role to play in determining enforceability of agreements. Removing the requirement altogether would, we suggest, create a fresh set of difficulties, particularly with the current uncertainty with consideration. Instead, a reimagining of the doctrine has the benefit of drawing on the wealth of previous decisions as to determinative factors for enforceability, whilst developing the law in line with socio-economic changes, ensuring it is fit for the 21\textsuperscript{st} century.

5. A FRESH FRAMEWORK

Our view is that it is time for a reimagining of the doctrine. Our proposed framework retains ICLR as a tool to assess enforceability of agreements, and retains the presumption/rebuttal model for clear commercial agreements, where, we suggest, the model works well. For all other agreements, if ICLR is pleaded as an issue, the ‘presumption/rebuttal’ model should be replaced with a new framework with a series of indicative factors, drawn from the existing body of case law, which the courts can utilise to objectively assess intention. This, we suggest, will move away from problematic labelling of agreements as ‘domestic’, increase

\textsuperscript{193} G. Christandl in N Jansen, R Zimmerman, ‘Commentaries on European Contract Laws’ (Oxford 2018), 241 – see e.g. the French law of obligations requirement of intention in Article 113 code civil.
\textsuperscript{194} Principles of European Contract Law, Article 2:101(1): Conditions for the Conclusion of a Contract – a contract is concluded if: a) the parties intend to be legally bound. Article 2:10: Intention – the intention is to be determined from the party’s statements or conduct as they were reasonably understood by the other party.
\textsuperscript{195} UNIDROIT Principles of International Commercial Contracts 2016, Article 2.1.2.
transparency and, rather than being a departure from the current position, reflects what is happening in practice.

**Indicators:**
Where intention is disputed, these can be used to objectively ascertain whether there was the requisite intention and a party wishing to demonstrate intention will need to provide evidence pertaining to such. The indicators are intended to be a range of factors to assess ICLR, not all the indicators will feature in any one case, and it may well be that one is more determinative than another. This is an approach familiar to contract law and should not present any difficulty\textsuperscript{196}, particularly given that they are drawn from existing decisions.

**a. Language used**
In most of the ‘domestic’ cases discussed, in line with Lord Denning’s comments in *Gould*\textsuperscript{197}, there is no express discussion of ICLR. However, if there were such discussions, clearly these would need to be considered. Evidentially of course this can be problematic and there are many examples of constructive trusts of the family home cases which highlight vague recollections of such conversations\textsuperscript{198}. Looking at the more ‘commercial’ case law, we find frequent references to the language used, examples being *Blue v Ashley*, which notes “the nature and tone of the conversation”\textsuperscript{199}, and *New Media Holdings*, where the language used was “consistent with a legally binding agreement”\textsuperscript{200}.

\textsuperscript{196} See Lord Bridge’s comments on exemption clauses in *George Mitchell (Chesterhall) Ltd. v Finney Lock Seeds* [1983] 2 AC 803 at [816].
\textsuperscript{197} *Gould v Gould* [1970] 1 QB 571.
\textsuperscript{199} *Blue v Ashley* [2017] EWHC 1928 at [85].
\textsuperscript{200} *New Media Holding Company LLC v Ivan Kuznetsov* [2016] EWHC 360 (QB) at [105]. See also *Barbudev v Eurocom Cable Management Bulgari Eood* [2012] EWCA Civ 548 at [37]: ‘its language is that of legal relations’ and *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP* [2020] EWHC 593 (Comm) where the judge considered the use of the word ‘proposal’ to be indicative of lack of intention.
If, as was the case in *Snelling v Snelling*, there is a written agreement, this will need to be evaluated in light of the overall context. Here Ormrod J found the use of the word “forfeit”, “we hereby agree” and reference to “the court” indicative of legal intention. It is suggested that whilst it is clearly important to look closely at any language used, a lack of formality and legal sounding words, which are less likely to be used in an agreement in a family/social setting, should not preclude a finding of intention.

b. Reliance / shift in position

Atiyah, whilst acknowledging that the *Balfour* presumption ‘seems appropriate in principle’, suggests that where a party has “detrimentally relied” on the agreement, it may be appropriate to allow a claim on a reliance basis, even if contractual damages on an expectation basis, were denied. It is outside the scope of this paper to explore that suggestion, but reliance was a decisive indicator in *Parker v Clark*. This is familiar to contract law, seen also in the doctrine of promissory estoppel, and we see reliance / shift in position in a number of the cases. This could encompass the combined efforts and ‘mutuality’ which were decisive in *Simpkins v Pays* and may, though not necessarily, include a financial element, such as the sharing of entry fees in that case. Such mutuality would also apply in, for example, couples acquiring assets with the understanding that these were to be shared jointly.

Subsequent conduct is considered important in many of the commercial cases and links with reliance and shift of position. In *New Media Holdings*, the judge states that “[S]ubsequent

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201 *Snelling v John G. Snelling Ltd. and Others* [1973] QB 87.
203 *Parker v Clark* [1960] 1 W.L.R., where the younger couple sold their house and moved in with the defendants.
204 *Simpkins v Pays* [1955] 1 W.L.R. 975 at [978] and [979].
conduct can be taken into account as objective evidence of whether or not the parties understood themselves to have concluded a contract and to have been bound by such a contract. In *Blue v Ashley*, the fact that Mr Blue had waited nearly a year before mentioning the ‘agreement’ was strongly indicative of absence of ICLR, as was the absence of any mention of the ‘agreement’ in subsequent emails in *Moorgate*.

We suggest that requiring a financial outlay for a finding of intention, would be counter-productive. Firstly, it may be that, in a cohabiting couple acquiring, for example, a ‘buy to let’ property, one of the parties provided the capital, for whatever reason that may be, including the other party doing the bulk of the childcare. This is of course specifically recognised in Family law for couples in a marriage or civil partnership, but there is no such provision for cohabiting couples, so a requirement of financial outlay could perpetuate the inequity in the current presumption. Secondly, such a requirement could lead to confusion. There may be agreements of the “magnitude” of *Pettitt v Pettitt* discussed above, which would obviously satisfy the requirement, but what would the threshold be? In the bottle of wine in exchange for dinner example, the host may have spent a not insignificant sum on dinner, but we would not expect this to be enforceable through the courts.

c. Seriousness of the agreement

The notion of ‘seriousness’, whilst acknowledging the potential for subjectivity, is one which features in the case law. Christandl notes that the requirement of intention has its roots in Roman law, where a lack of seriousness obvious to both parties prevented the contract from

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205 *New Media Holding Company LLC v Ivan Kuznetsov* [2016] EWHC 360 (QB) at [101].
206 *Blue v Ashley* EWHC 1928 (Comm) at [102].
207 *Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP* [2020] EWHC 593 (Comm) at [97] and [100].
208 Matrimonial Causes Act 1973 s25 (2)(f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family.
coming into force. Seriousness will include the subject matter and is alluded to in the case law, including LJ Atkin's walk in Balfour and the free coin in Esso. By focussing on the seriousness and subject matter, rather than the individuals, the fact that the agreement concerns routine household management or an everyday social arrangement is a strong indicator that there is no ICLR. This, we suggest, will go some way to mitigating the problematic connotations of the ‘domestic’ presumption as previously discussed, whilst recognising that policy has role to play i.e. that there are agreements which we do not want to be legally enforceable.

d. Overall context

Finally, consideration of overall context is suggested as a residual indicator. This could include the nature of the relationship; the setting of the agreement, for example the pub in Blue v Ashley, any previous dealings or prior contractual relationship as seen in New Media Holdings and Attrill, whether the agreement is executed or executory, and any other considerations the court may consider relevant.

Sitting alongside the above is the overarching objective/reasonable person approach. Freeman notes that although it seems that Atkin LJ in Balfour is imputing intention on what might be expected from people in the Balfours’ situation, he does not explicitly put this into a “reasonable spouses” context. Had he done so, would the finding on intention have been the same? For Ormrod J the fact that the agreement in Snelling v Snelling was drafted by an “unsophisticated layman” was a key factor, and viewing an agreement in a family/social setting through the lens of the reasonable person will, we suggest, assist with bringing the

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212 Blue v Ashley [2017] EWHC 1928 (Comm).
213 New Media Holding Company LLC v Ivan Kuznetsov [2016] EWHC 360 (QB) at [100].
214 Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394, [2013] at [80].
215 Chitty, see note 3 above, notes the courts are reluctant to find lack of ICLR where there has been substantial performance 2-171.
216 Freeman, note 22 above p.70.
question of intention up to date. It would also mean that family/social agreements would not have the additional hurdle of having to show a certain level of formality. Freeman suggests, as did Lord Denning MR in Gould, that in respect of that agreement, whereby the husband would pay a sum of maintenance as long as he had it, “[I]t is a fair suspicion that reasonable people, certainly people who understood the lives of couples like the Goulds, would have concluded that they had made a binding agreement.”

Discussing President of the Methodist Conference v Parfitt, Freeman notes that all the lay members of the Employment Tribunal and Employment Appeal Tribunal decided in Parfitt’s favour, whereas the lawyers, that is the legally qualified chairmen in the Tribunals and the Court of Appeal judges, decided against him. Clearly, whilst recognising that a reasonable person test is not a ‘silver bullet’, it has the advantages of adding a non-legal perspective and of evolving with time to encompass changing social norms including language and context.

In commercial cases where intention is disputed, the reasonable person test can encompass the question of whether the ‘agreement’ made business and commercial sense, including consideration of market practice. Blue v Ashley held that ‘no reasonable business person would have thought that a serious contractual offer was being made’. In Moorgate, the fact that the fee was ‘unusually large’ and that there would have been ‘no need’ to engage additional advisory services, was indicative of lack of intention. Similarly, in Athena

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218 Freeman, note 22 above p.72.
219 Dacy Building Services Ltd v IDM Properties Ltd [2018] EWHC 178 (TCC) at [54] where the alleged agreement was verging on the “commercially suicidal”.
220 Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (Comm) at [92], where the judge noted: “the absence of such an engagement letter or any written agreement is at odds with the market practice”.
221 Blue v Ashley [2017] EWHC 1928 (Comm) at [88].
222 Moorgate Capital (Corporate Finance) Ltd v Sun European Partners LLP [2020] EWHC 593 (Comm) at [93] and [98].
Brands Ltd v Superdrug, the court considered whether the agreement made ‘commercial sense’\textsuperscript{223} and in Esso Petroleum, Glaisdale LJ refers to commercial advantage.\textsuperscript{224}

CONCLUSIONS

To sum up, our review of the case law has identified two problems with the existing ICLR doctrine. Firstly, the boundaries between commercial and social agreements are becoming increasingly blurred, with numerous cases not fitting into either presumption and the courts abandoning the presumption/rebuttal model in favour of identifying factors/indicators to assess intention. Secondly, the presumptions themselves are beset with problems.

As the law of contract changes to encompass the current realities of working practice,\textsuperscript{225} why should it not in the same way develop to reflect the infinite variety of agreements made in a wide range of relationships and settings? The introduction of a fresh framework, through the series of indicators, will enable the courts to assess intention and, perhaps more importantly, to articulate the reasons for their findings in a more transparent way.

Writing in 1970, Hepple noted that it was open to the then House of Lords to review the post-\textit{Balfour}\textsuperscript{226} cases and reject or modify the requirement of ICLR, noting however “that the device of constructive “intention” is superficially attractive because it enables the courts to

\begin{itemize}
  \item \textsuperscript{223} Athena Brands Ltd v Superdrug Stores Plc [2019] EWHC 3503 (Comm) at [15].
  \item \textsuperscript{224} The authors considered whether the subjective approach of the equitable remedy of rectification of agreements in the absence of an antecedent contract as discussed in \textit{FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd} [2019] EWCA Civ 1361, would be effective in the context of intention. Our present conclusion is that the objective approach has the advantage of commercial certainty, as noted by Leggatt, LJ at [150], which we feel outweighs the advantages of the subjective approach, effective though that is for the contexts discussed in \textit{FSHC} and the facts of that case itself. However, this would be an interesting area to explore in future research.
  \item \textsuperscript{226} \textit{Balfour v Balfour} [1919] 2 KB 571.
\end{itemize}
cloak policy in the mantle of private contractual autonomy.”\textsuperscript{227} Some fifty years on from that, and a century on from \textit{Balfour}\textsuperscript{228}, we suggest that such a review of the doctrine would not only be welcome, but is long overdue.

\textsuperscript{227} Hepple, note 8 above.

\textsuperscript{228} \textit{Balfour v Balfour} [1919] 2 KB 571.