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## Vanishing Contract Law

### 1.1 Introduction

We may be living in an ‘age of statutes’<sup>1</sup> but it is also clear that we exist in the era of contracts. Contract is one of the principal normative frameworks for social organisation. Many of our most significant relationships are created, structured or constituted by voluntarily assumed, consensual and legally enforceable obligations. One would assume, therefore, that contract law plays an important role in a contractualised economy and society.<sup>2</sup> In one sense this is true. Contract law notionally controls many aspects of the contracting process – how we become bound to contracts, how we might lawfully escape from the obligations they impose, what can and cannot be the subject of a contractual obligation – and thus is central to the operation of the market.<sup>3</sup> Yet in another important sense contract law, and the judicially created common law in particular, is disappearing. The law is increasingly disengaged from the realities of our contracting experience. Perhaps counterintuitively, the growth of contract and private ordering in society since the latter half of the twentieth century has not led to the emergence of a reinvigorated common law. Instead, the common law has largely retired from the field as general regulator of

<sup>1</sup> Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982), p. 181; quoted in Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2017), p. 1; see also Patrick S. Atiyah, ‘Freedom of Contract and the New Right’ in *Essays on Contract* (Oxford University Press, 1990), pp. 355, 363ff.

<sup>2</sup> On contractualisation see John Wightman, *Contract: A Critical Commentary* (Pluto Press, 1996), p. 3; Hugh Collins, *The Law of Contract*, 4th ed. (Butterworths, 2003), Chapter 6; see also Margaret Jane Radin, ‘The Deformation of Contract in the Information Society’ (2017) 37 *Oxford Journal of Legal Studies* 505.

<sup>3</sup> Nathan B. Oman, *The Dignity of Commerce* (University of Chicago Press, 2016); Hanoch Dagan, Avihay Dorfman, Roy Kreitner and Daniel Markovits, ‘The Law of the Market’ (2020) 83 *Law and Contemporary Problems* ii; Collins, *The Law of Contract*, p. 107.

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agreements, reverting to an abbreviated and formal model redolent of the classical law and perceiving its primary purpose as to enforce the express terms of the contract, provided the process of reaching agreement was free of vitiating factors.<sup>4</sup> On the occasions when contracts and contracting processes are subject to judicial scrutiny, they are mostly held not to offend the individualistic contract norms of the common law, notwithstanding that the formal contract structures that accompany even the simplest transactions often fail to embody the liberal contract ideals of voluntariness and consent. Freedom of contract and sanctity of contract have reasserted themselves as the basic DNA of contractual commitments. It is a model of contract designed primarily with commercial contractors in view.

From a particular perspective contract law diminishment seems unavoidable, unremarkable and not necessarily confined to contract.<sup>5</sup> The common law of contract has been supplemented and modified,<sup>6</sup> and sections of it have been abolished entirely, by legislation dealing with discrete areas of contract doctrine or with certain varieties of contractual relationship.<sup>7</sup> Fragmentation of contracts and the creation of specific rules and regulatory regimes to govern areas such as consumer protection and employment rights have generated doubts about the continuing relevance of general principles of contract law for some time.<sup>8</sup> The identification and vindication of individual legal entitlements tend to be marginalised by modern systems of regulatory enforcement aimed

<sup>4</sup> Jay M. Feinman, 'Un-Making Law: The Classical Revival in the Common Law' (2004) 28 *Seattle University Law Review* 1, 55. For a comprehensive defence of formalism in contract law, see Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013).

<sup>5</sup> On the idea of private law concepts becoming redundant see Steve Hedley, 'Tort: The Long Goodbye' (8 April 2020) <https://ssrn.com/abstract=3571950>

<sup>6</sup> The Equality Act 2010 prohibits refusal to contract with a person on the basis of a protected characteristic in relation to some goods and services. Contracting around the provisions is also prohibited (s142). The Insolvency Act 1986 (as amended by the Corporate Insolvency and Governance Act 2020) invalidates contract terms that terminate supply contracts on the grounds of a counterparty's insolvency (s 233B(3)).

<sup>7</sup> Consumer contract regulation is now almost entirely a matter of statute, notably the Consumer Rights Act 2015. Also see the Unfair Terms in Commercial Contracts Regulations 1999; Consumer Protection (Distance Selling) Regulations 2000; Consumer Protection from Unfair Trading Regulations 2008; Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013; Consumer Protection (Amendment) Regulations 2014; Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. Intervention is not confined to consumer contracts; see, for example, Commercial Agents (Council Directive) Regulations 1993.

<sup>8</sup> See, for example, Ian R. Macneil, 'Whither Contracts?' (1969) 21 *Journal of Legal Education* 403, 403.

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at rectifying market-wide problems. Non-legal norms, such as desire to protect reputation, still matter to most contractors and present powerful incentives to perform as agreed.<sup>9</sup> Contract law has also come under pressure from contemporary trends in dispute resolution. Individuals can seek dispute resolution through informal means, such as following complaints procedures mandated by a supplier or industry governing body or escalating an unresolved issue to a specialist organisation charged with facilitating settlement. Legal claims that arise can be processed through electronic platforms that promise prompt online dispute resolution.<sup>10</sup> There are also structural problems around the limitations of the litigation and trial process and an expensive and inaccessible court system. Notwithstanding contract law's reversion to its traditional role in overseeing commercial contracting, a multitude of alternatives to law exist for contract management in the commercial sphere. In complex forms of economic activity involving exchange between independent firms, the rules of the common law of contract are mostly defaults that apply only to the extent the parties do not stipulate for anything else.<sup>11</sup> Common law stagnation appears likely to be compounded further by the advent of new forms of transacting in the market, facilitated by novel technologies developed specifically to bypass the scrutiny of national legal institutions. Contrary to the views of some commentators, it is not a given that these changes will transform the common law.<sup>12</sup>

Contract law's reversion to a classical-style model may be presented as a natural and inevitable response to the shrinking demand for judicially created contract rules from all apart from a certain class of commercial contractor. But it is nonetheless a troubling response because it insulates much of our contracting life from effective legal scrutiny and challenge. Modern society is replete with examples of how the proliferation of contract as one of the chief structures of social organisation has been accompanied by the substantial denigration of contract law norms, with little by way of an effective response

<sup>9</sup> For analysis of adverse publicity in a regulatory context see Peter Cartwright, 'Publicity, Punishment and Protection: The Role(s) of Adverse Publicity in Consumer Policy' (2012) 32 *Legal Studies* 179.

<sup>10</sup> See the MoneyClaimOnline service for issuing claims for fixed sums up to £100,000; the Civil Money Claim site for claims up to £10,000; and the Claims Portal ([www.claimsportal.org.uk/](http://www.claimsportal.org.uk/)) for processing personal injury claims up to £25,000.

<sup>11</sup> Wightman, *Contract: A Critical Commentary*, pp. 1–2; Morgan, *Contract Law Minimalism*, pp. 87–88; Ian Ayres and Robert Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale Law Journal* 87; Ian Ayres and Robert Gertner, 'Majoritarian vs Minoritarian Defaults' (1999) 51 *Stanford Law Review* 1591.

<sup>12</sup> Collins, *The Law of Contract*, p. 39ff.

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from courts and judges. That it is possible for a customer shopping online to be taken to have agreed to the retailer's standard conditions of sale simply by making a purchase or clicking on a box labelled 'Agree' is largely the result of our law of contract. Similarly, that a driver, by the action of driving into a public car park and parking their car, has supposedly agreed to pay a fine if they stay beyond the prescribed time limit is down to the operation of contract legal rules. An employee settling a sexual harassment claim against an employer is required to sign a non-disclosure agreement as a condition of the settlement, which effectively prevents them from revealing their experience. The common law has bequeathed a dubious legacy in legitimising a bureaucratic, planning model of contract that encourages contract commitment by stealth and inertia.<sup>13</sup> Yet common law engagement with the deeper policy questions raised by the use of contracts in these contexts, particularly when characterised by economic inequality between the parties, has been largely non-existent. Restrictions on the operation of freedom of contract are a matter for parliament and not the courts.<sup>14</sup> As a result, the classical law intellectual baggage of autonomy, individualism and objectivity reigns supreme in the common law, distorting our understanding of contract and crowding out alternative normative standards based on contractual justice, collective action and responsibility.<sup>15</sup>

Is it a matter of concern that a significant amount of contracting activity is conducted beyond any effective legal scrutiny or control? And to what extent have judges contributed to common law diminishment through their value choices in contract decision-making? Ultimately these questions boil down to a single enquiry: what is at stake if contract assumes primary place as the main social institution for organising, constructing and understanding some of our most significant relationships without robust legal principles at its base? It seems that an enquiry into the implications of a disengaged – or vanishing – contract law in a society heavily dependent on private ordering through contracts is overdue. In the following chapters we explore how contract law has relinquished its role as general overseer of contracting activity in favour of an attenuated model of limited range and applicability. We examine what has

<sup>13</sup> Ian R. Macneil, 'Bureaucracy and Contracts of Adhesion' (1984) 22 *Osgoode Hall Law Journal* 5, 8.

<sup>14</sup> Judicial statements along these lines are numerous. See, for example, Lord Scarman in *National Westminster Bank plc v. Morgan* [1985] 1 AC 686, 708.

<sup>15</sup> See Steve Hedley on this critique of the lack of 'collective' and indeed suspicion of the idea in private law theory: 'The Rise and Fall of Private Law Theory' (2018) 134 *Law Quarterly Review* 214, 228ff.

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replaced contract law. We consider the implications of common law's declining role in an era when contracting has become ubiquitous throughout society and what possibilities exist for common law revival.

In the remainder of this chapter, the broader themes of the book are presented, the initial arguments that inform the rest of the work are introduced and some preliminary issues of scope addressed. It should be noted at the outset that the work is concerned with English contract law. Its methodology is primarily doctrinal – judicial pronouncements are taken at face value as an accurate expression of the values beneath, and it naturally takes case law as the prime evidence of common law trends. It appreciates, however, the practical reality that common law is not an expression of the whole of contract regulation but is superseded in many respects by other forms of contract governance. With this pragmatic realisation in mind, the work is not overly concerned with private law theory – perhaps because of the difficulty for any unifying theory to explain and justify the fragmented realm of contract. That said, the dominance of some theories (particularly the economic analysis of law) has contributed to the problem of common law disengagement from some pressing policy issues affecting modern contracting practice. This is discussed further where relevant below. In addition, to this author it has long seemed to be the case that only a broadly relational contract theory comes close to capturing the diverse considerations and forces affecting contracts and their regulation. Aspects of this theory are referred to, therefore, when its insights appear particularly pertinent.

### 1.2 Diminishing Contract Law

One claim in the book is that contract law, particularly in the hands of judges, has diminished in scope and significance. This diminishment claim is explored more fully in Chapters 2 and 3, where changing trends in contract law are examined. In brief, the claim is that the recent resurgence of formalist values in contract adjudication impoverishes contract law and renders it inadequate as a general tool of contract regulation. At first blush, this claim looks unsustainable. First, there appears to be no decline in contract matters coming before courts. Appeal courts have delivered a number of judgments over recent years touching upon important areas of contract law principle: contract formation;<sup>16</sup>

<sup>16</sup> *Wells v. Devani* [2020] AC 129.

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illegality;<sup>17</sup> remedies and penalties;<sup>18</sup> interpretation of contracts;<sup>19</sup> implied terms;<sup>20</sup> consideration;<sup>21</sup> and the legal validity of commonly used terms.<sup>22</sup> A concept of relational contracts has been developing in the lower courts, in an attempt to modify, in some contexts, the operation of the classical law model of self-interested and adversarial commercial dealing.<sup>23</sup> These instances could be taken as indications of the continued relevance and vibrancy of the common law of contract. However, an argument about diminishment is not rebutted by demonstrating that courts continue to rule on contract cases. What also matters is the kind of rules that result from judicial decisions, as well as the contribution they make to contract regulation. Nor is the attempt to develop a special category of relational contracts any indication that the classical law is in abeyance. At most, the jurisprudence of relational contracts is exceptional, an enclave surrounded by an increasingly formal law committed to upholding commercially oriented interests and party autonomy.<sup>24</sup> Appeal courts remain reticent about the development and have not given unequivocal endorsement to doctrinal advances that bear a relationalist imprint.<sup>25</sup>

A second initial criticism is that the work misunderstands the function of the common law rules of contract. They are designed to enable contracting between sophisticated commercial contractors operating in complex markets

<sup>17</sup> *Patel v. Mirza* [2017] AC 467.

<sup>18</sup> *Morris-Garner and another v. One Step (Support) Ltd* [2019] AC 649; *Cavendish Square Holding BV v. Makdessi*; *ParkingEye Ltd v. Beavis* [2016] AC 1172; *Lowick Rose LLP (in liquidation) v. Swynson Ltd* [2018] AC 313; *BV Nederlandse Industrie van Eiprodukten v. Rembrandt Enterprises Inc* [2020] QB 551.

<sup>19</sup> *Arnold v. Britton* [2015] AC 1619; *Wood v. Capita Insurance Services Ltd* [2017] AC 1173.

<sup>20</sup> *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co Ltd* [2016] AC 742.

<sup>21</sup> *Simantob v. Shavleyan* [2019] EWCA Civ 1105; *MWB Business Exchange Centres Ltd v. Rock Advertising Ltd* [2017] QB 604 (CA).

<sup>22</sup> Notably the ‘no oral modification’ clause: *Rock Advertising Ltd v. MWB Business Exchange Centres Ltd* [2019] AC 119 (SC).

<sup>23</sup> *Yam Seng Pte Ltd v. International Trade Corporation* [2013] EWHC 111; *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v. Kent* [2018] EWHC 333; *Amey Birmingham Highways Ltd v. Birmingham City Council* [2018] EWCA Civ 264; *Alan Bates and Others v. Post Office Limited (No 3)* [2019] EWHC 606.

<sup>24</sup> Zhong Xing Tan, ‘Disrupting Doctrine: Revisiting the Doctrinal Impact of Relational Contract Theory’ (2019) 39 *Legal Studies* 98, 100.

<sup>25</sup> *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200; [2013] BLR 265; *MSC Mediterranean Shipping Company SA v. Cottonex Anstalt* [2016] EWCA Civ 789.

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with access to legal advice.<sup>26</sup> Apart from some basic rules controlling the worst excesses of dishonest behaviour, contract law's function is not to regulate markets but to facilitate self-regulation. It does this by conferring on contracting parties a wide power to contract around its default rules and by enforcing that self-governance on the basis of party autonomy. Thus, the resurgence of classical values in the law is not evidence of diminishment but the natural realignment of the law with the interests of the economic group that the rules serve. The common law has returned to its primary role as enforcer of private ordering in commercial contexts, transferring responsibility for identifying and protecting the public interest in exchange activities, a task that the common law was always constitutionally and institutionally ill-equipped to perform, to statute and regulation.<sup>27</sup> The common law's attempt during the latter half of the twentieth century to regulate agreements characterised by inequality of bargaining power was an aberration now thankfully abandoned.

There are three immediate responses to this line of argument. First, the argument obscures how the values of freedom of contract and party autonomy that underpin a commercially oriented model of contract law reflect broader political trends and choices that are not stable and unvarying through time but are contingent and contested.<sup>28</sup> The argument also presents contract law development as neutral, concealing the extent to which the classical model of contract aligns itself with a particular version of contract, marginalising the impact that other contract types are permitted to have upon the law. Common law is not predisposed to follow a single path, as is amply demonstrated by examining other common law jurisdictions that have taken a different direction to English law when confronted with substantially the same dilemmas.<sup>29</sup>

<sup>26</sup> Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction between the Real and Paper Deal' (2009) 29 *Oxford Journal of Legal Studies* 675; *Commercial Law and Commercial Practice* (Hart Publishing, 2013), p. 91ff; Dori Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27 *Oxford Journal of Legal Studies* 232, 247.

<sup>27</sup> Jonathan Morgan, 'Opting for "Documentary Fundamentalism": Respecting Party Choice for Entire Agreement and Non-Reliance Clauses' in Paul S. Davies and Magda Raczynska (eds.) *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing, 2020), pp. 239–40.

<sup>28</sup> Feinman, 'Un-Making Law', 58.

<sup>29</sup> In Canada, see *Bhasin v. Hyrnew* [2014] SCC 71 on good faith as an organising principle in contract law and *Uber Technologies Inc v. Heller* [2020] SCC 16 on unconscionability; in Australia, *Andrews v. Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; *Paciocco v. Australia and New Zealand Banking Group Limited* [2016] HCA 28 on the operation of the penalty rule.

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Indeed, it is also reflected in English law by the faltering attempt to develop an alternative relational contract jurisprudence.

Second, the argument is complacent. It is true that it is unnecessary for the modern law of contract to do anything like the work required of it a century or more ago. Specialist regulatory regimes have moved into the territory where contract law and judicial action may have once exercised the main form of control.<sup>30</sup> But there is still plenty for general contract law to do. This includes regulating relationships that are an uneasy fit with the discrete model of contract associated with the classical law – franchising, supply chains, joint ventures, distributorships – and developing protection for small businesses that do not benefit from legislation designed with the consumer in mind. The common law may also be the primary source of the relevant rights and rules in a wide and often unpredictable variety of contracting scenarios. The decision in *Arnold v. Britton* is a good example of a non-commercial contract (lease for holiday chalets) to which no other set of rules except the common law applied.<sup>31</sup> Similarly, *Beavis v. ParkingEye*<sup>32</sup> presents a common contracting scenario that, due to the sometimes-narrow application and interpretation of controlling statutes, is also subject to the common law rules. The fallout from algorithmic contracting may present a further common law frontier.<sup>33</sup> Worryingly, contract terms that appear to operate in a relatively benign fashion in the ordinary business context, and whose legal meaning is settled, can easily be deployed to more insidious effect in a different contracting environment. Compare, for example, a confidentiality clause between employer and employee that protects a trade secret, with a non-disclosure agreement designed to conceal wrongdoing. The possibility that the rules developed in one context should apply unmodified in the other without serious legal consideration is absurd. But contract law's modern tendency is to eschew contract context in favour of upholding contract terms, eliding these two scenarios much more readily.

Third, and more practically, legislation and regulation rarely render common law completely redundant. The law governing a contract is often an awkward patchwork of legislative provisions, the rules of a specific

<sup>30</sup> See, for example, the discussion in Collins, *Law of Contract*, 8, of the modern regulatory approach to the problem arising in *Carlill v. Carbolic Smoke Ball* [1893] 1 QB 256.

<sup>31</sup> [2015] AC 1619. <sup>32</sup> [2016] AC 1172.

<sup>33</sup> Already being considered in other jurisdictions: *Quoine Pte Ltd v. B2C2 Ltd* [2020] (1) SGCA 02.

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regulatory regime and the common law.<sup>34</sup> There is no guarantee that these different sources, when considered together, will produce a consistent, comprehensive or normatively appealing legal position. This might strengthen the case for an attenuated common law (why overcomplicate an issue by layering judge-made rules on top of legislation and regulation?). But if anything the problem of regulatory overload affects legislation and regulation designed to respond to a single problem. There is no requirement that legislation be coherent and consistent, whereas the need for coherence in the common law is an important constraint.<sup>35</sup> Simple, widely applicable principles – the kind produced by common law – can help to unify an area of law and make underlying values operative in one situation applicable to analogous ones. Legal judgments provided by courts may be required by regulators whose power does not extend to providing authoritative determinations of legal rights or remedies under the regulatory regime. In addition, express contract terms often seek to reverse or lessen the impact of legislative provisions with an enabling or protective effect.<sup>36</sup> Controls on the ability of contracting parties to contract around legislation may be found within the legislation itself. If the legislation is silent, whether it should be possible to contract around legislative provisions, and the interpretation of exculpatory terms that attempt to do so, is a matter for judicial determination.<sup>37</sup> Common law application is not confined to commercial agreements, though it may appear so. As such, maintaining its general principles is important.

### 1.3 The Formalist Revival in Modern Contract Law

One of the arguments presented in this book is that the contractualisation of society has coincided with the return to a more formal style of contract law in

<sup>34</sup> Consider, for example, privity of contract, where legislation, contract terms and common law all intersect, or control of bank and credit charges in consumer contracts, which may be subject to control under statute (Consumer Rights Act 2015; Consumer Credit Act 1974), under the common law (rules on penalties and unconscionability) and under regulation by the Financial Conduct Authority and the Competition and Markets Authority.

<sup>35</sup> Neil MacCormick, *Legal Reasoning and Legal Theory*, revised ed. (Oxford University Press, 1994); Ronald Dworkin, *Law's Empire* (Fontana, 1986).

<sup>36</sup> As appears to have been the case with the Contract (Rights of Third Parties) Act 1999; see also the attempt by way of 'basis of the contract' clauses to contract around the controls on excluding liability for misrepresentation under s 3 Misrepresentation Act 1967. This is discussed further in Chapter 3.

<sup>37</sup> See early cases on the operation of the Unfair Contract Terms Act 1977, especially *Smith v. Eric S Bush* [1990] 1 AC 831.

the courts. The re-emergence of formalist and classical values can be observed in a number of developments in contract law over the past few years. These changes have signalled a judicial retreat from the more contextual and standards-based method of legal reasoning previously adopted by courts. The changes include the return to plain-meaning contract interpretation;<sup>38</sup> an emphasis on upholding express contract terms at the expense of the application of established contract doctrine;<sup>39</sup> a generally negative response in superior courts to attempts in lower courts to develop a relational category of contracts or to expand the role of good faith;<sup>40</sup> the burgeoning acceptance that contract terms can nullify the operation of legal claims and rights that a party might otherwise enjoy under general contract law;<sup>41</sup> and the marginalisation of equity, except in the service of insulating the express contract terms from challenge.<sup>42</sup> These moves reflect and reinforce contract law's increasing orientation towards upholding commercial interests and the belief that these interests are best served by a 'formal, simple, and . . . classical' law.<sup>43</sup>

In intellectual terms the predominance of commercial concerns and interests in contract legal reasoning has been encouraged by the economic analysis of contract law in contract scholarship. It is often noted that economic analysis has become the primary theoretical framework within which contract legal rules are explained and a strong formalist and liberal justification for them defended.<sup>44</sup> The focus on efficiency seeks to justify contract law instrumentally in terms of what it contributes to achieving the economic goals of commercial contractors operating in markets. Dagan and Heller assert that contract law has become synonymous with the commercial transaction, minimising the influence that other contracts (involving marriage, the consumer or the

<sup>38</sup> For a fuller examination of these factors, see Catherine Mitchell, *Interpretation of Contracts*, 2nd ed. (Routledge, 2018).

<sup>39</sup> *Rock Advertising Ltd v. MWB Business Exchange Centres Ltd*, above n. 22.

<sup>40</sup> See further Chapter 7.

<sup>41</sup> Margaret Jane Radin in *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013) explores this phenomenon in depth in the US consumer context.

<sup>42</sup> In particular, the development of 'contractual estoppel' in relation to upholding 'basis of the contract' clauses: Gerard McMeel, 'Documentary Fundamentalism in the Senior Courts: The Myth of Contractual Estoppel' (2011) *Lloyd's Maritime and Commercial Law Quarterly* 185; Jo Braithwaite, 'The Origins and Implications of Contractual Estoppel' (2016) 132 *Law Quarterly Review* 120.

<sup>43</sup> Robert E. Scott, 'The Case for Formalism in Relational Contract' (2000) 94 *Northwestern University Law Review* 847 at 852.

<sup>44</sup> Scott, above. See also David Charny, 'The New Formalism in Contract' (1999) 66 *University of Chicago Law Review* 842.