Sarah Field

Introduction to the Law of Contract

Formation of a Contract

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SARAH FIELD

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FORMATION OF A CONTRACT

Introduction to the Law of Contract: Formation of a Contract
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1 INTRODUCTION

1.1 THE AIM OF THIS BOOK

The aim of An Introduction to Contract Law is to introduce the reader to the main concepts of the Law of Contract, and its role in relation to both the individual and to business. It is designed for both law and non law students.

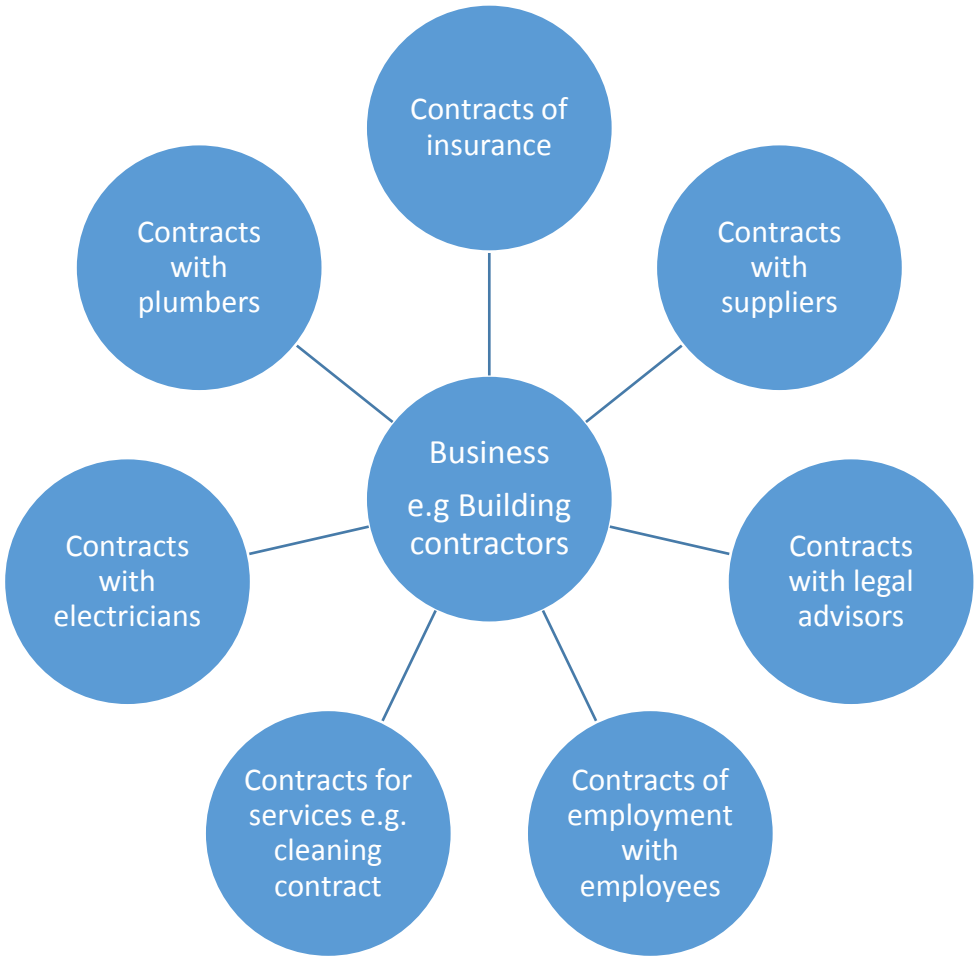
The book will consider the essential elements required for the formation of a contract. It will outline the fundamental principles relating to each of the key elements, including offer and acceptance, consideration, intention to create legal relations, certainty and terms and exclusion clauses.

The law is presented in a clear and simple manner in order to make the book user friendly and easily accessible to all readers. Definitions of key concepts and legal terms are explained and illustrated in each chapter and the content is supported by case summaries to illustrate points of law.

The book begins with a brief introduction to the law of contract and then examines in turn each of the requirements for the formation of a contract.

1.2 WHAT IS A CONTRACT?

Contract law permeates our lives. We make contracts when we purchase food and clothing, when we book a holiday, travel by bus or rent a flat. Contracts are also vital to organizations. Take for example, the building of a local hospital – this will no doubt have involved contracts with carpenters, plumbers, suppliers of building materials, suppliers of specialist medical equipment, legal advisers and so forth.



1.2.1 WHAT ARE THE REQUIREMENTS FOR A LEGALLY VALID CONTRACT?

A contract can be defined as a *legally enforceable agreement* between two or more persons.

Most binding contracts do not require special formality or even to be made in writing. Every time you buy a packet of biscuits or a bottle of milk from a shop, every time you order a pizza over the telephone, or put petrol into your car at a petrol station you enter into a contract. The vast majority of the contracts you make are either verbal, or made solely by the implication of your actions and devoid of any particular formality. So, ***the general rule is a contract may be in any form i.e. contracts may be created orally, in writing or inferred from conduct.***

However, there are some exceptions for certain types of contracts. Some contracts must be:

i. **By written deed**
   In writing, signed as a deed and witnessed for example, for the transfer of land.
ii. **In writing**
   Signed by one or both parties and containing the contract terms, for example, the transfer of shares in a company.
iii. **Evidenced in writing**
   Where a contract cannot be enforced unless there is at least some written evidence of the terms, for example, a contract of guarantee.

For an agreement to be legally enforceable in English law by an action in the civil courts the following are normally essential:

Essentials for the creation of a contract

Offer and Acceptance (these establish that an agreement has been reached)
Consideration (element of exchange)
An intention to create legal relations (usually presumed)
Certainty as to the terms of the agreement
Capacity to contract (e.g. those of 'unsound mind' or minors lack capacity)
The contract must be legal
Compliance with required formalities where applicable

In addition, the parties must genuinely consent to the terms of the contract (for example, there should not be undue influence by one of the parties, or an actionable misrepresentation).

1.2.2 KEY TERMS

Void, voidable or unenforceable contracts

If any of the above essentials are absent the contract may be void, voidable or unenforceable:

Void i.e. have no legal effect because there is no contract. A void contract has no legal force from the moment of its making. Void contracts occur when there is lack of capacity to contract and by the operation in some instances of the doctrine of mistake. An illegal contract will also be void. Under UK and EU competition law on restrictive trade practices, clauses infringing those laws are void but usually the rest of the contract continues.

Voidable i.e. though valid when made, a voidable contract is binding on one party while the other has the option to set aside. Voidable contracts may arise through misrepresentation, some instances of mistake, nondisclosure, and duress. Certain proprietary contracts entered into by minors are also voidable (due to lack of capacity to contract).

Unenforceable i.e. a valid contract but which the courts will not enforce.

Bilateral contracts

Most legally binding agreements are made up of mutual promises. Each party takes on some sort of obligation, usually promising to do something in return for a promise to do something by the other party. These are called '**bilateral contracts**'. In fact, most contracts are bilateral which means that both parties can bind themselves by exchanging promises.

I promise to pay you £10 if you promise to deliver a pizza to me.

Unilateral contracts

However, in some contracts, only one party may promise to do something (usually to pay money) in return for an **act** by the other party. One party promises to do something usually in return for completion of a specified act, but the other party does not promise to carry out the act. These are known as '**unilateral contracts**' because only one party is making a promise.

I promise to pay you £50 if you find my lost dog.

Privity of contract

As a general rule only someone who is party to a contract has enforceable rights and obligations under it – in other words, only a party to the contract can sue or be sued under it even if they may have suffered a loss as a result of its breach (see *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] UKHL 1, [1915] AC 847). This is known as **privity of contract**.

There are however a number of ways in which the strict rules of privity may be avoided to allow third parties to recover for losses suffered, and The Contracts (Rights of Third Parties) Act 1999 specifically creates an exception which mitigates the harshness of this rule. In certain specified circumstances, this Act can be used to give a non-party to a contract a right to enforce some terms of the contract.

Terms and exemption clauses

Parties can generally enter into a contract on any **terms** they want (stating the rights and obligations between the parties). Terms may be either expressed (i.e. made by the parties themselves) or implied from various sources, and other terms in the contract may be overridden by statute. Clauses which attempt to exclude or limit one of the party's liabilities under the contract are known as **exemption clauses**. We will be looking at the rules governing terms and exemption later in the book.

Discharge of contract

When contracts come to end this is known as **discharge of contract**. This can come about in a number of ways. The contract may be performed, or the parties come to an agreement to end the contract; the contract may become frustrated (impossible), or the contract may be breached, in which case the aggrieved party may be able to sue for damages, or in certain circumstances, the court can order an equitable remedy such as specific performance.

A final point

It is important to note that other branches of law are based primary on contract law e.g. sale of goods, consumer credit agreements, employment, partnership, and agency. In addition, European law plays an important role with regard to contract law in England and Wales. There have been a range of European directives. Arguably the most important of these (and which we will look at in the chapter on terms and exemption clauses) was the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999, No. 2083). This gave effect to an EC Directive on Unfair Terms in Consumer Contracts (93/13/EEC), and although the Unfair Terms in Consumer Contracts Regulations have now been replaced by the Consumer Rights Act 2015, the importance of the European law cannot be ignored. Whether this influence will continue post Brexit remains to be seen. In addition to European influences, there are non-binding statements of principle and standard contract terms at an international level. For example there are the UNIDROIT Principles of International Commercial Contracts.

1.3 FURTHER READING

Beale, H. *Chitty on Contracts* (Sweet & Maxwell)

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2 OFFER

2.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- The first requirement for the formation of a valid contract: offer.
- The distinctions between an offer and: an invitation to treat; supply of information; declaring an intention.
- The termination of an offer.
- The key case law in this area.

2.2 INTRODUCTION

In this chapter we shall begin our examination of the essential elements in the formation of a valid contract, starting with the first requirement for a valid contract, namely that an offer has been made. To establish whether agreement has been reached the courts will generally look for **an offer** made by one party (known as the **offeror**) and that the other party (the **offeree**) has **accepted**. Assuming that the other requirements for a valid contract are satisfied, a contract is formed when an offer has been accepted.

The existence of agreement is ascertained objectively on the impression given by the parties' words and actions. Sometimes the courts adopt promisee objectivity, sometimes independent third party objectivity.

2.3 THE OFFER

A contract begins with an offer. The offer is an expression of willingness to contract on certain terms. It allows the other party to accept the offer and provides the basis of the agreement. So it is important first to establish exactly what constitutes an offer.

An offer is a proposal made on certain terms by the offeror with a promise to be bound by that proposal if the offeree accepts the terms.

An offer has been defined as:

> **"An expression of willingness to contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed". E Peel, Treitel on the Law of Contract (12th edition Sweet and Maxwell London 2007) 2-002.**

An offer must be firm i.e. not a negotiating point, and not too vague. An offer will not be valid if it is uncertain or unclear. The reasoning behind this is that once the offer is made, the offeree should know what he is contracting for. The offeree should know and understand the consequences of his acceptance. Therefore, the Courts have held that the statements which were ambiguous or vague could not be considered as valid offers. For example, in *Guthing v Lynn* (1831) 2B & AD 232, a promise to pay an extra £5 for a horse if 'the horse is lucky for me' was too vague to create a valid contract.

But an ostensibly vague offer may be capable of clarification by reference to previous dealings, or trade custom and so be able to form the basis of a valid contract. For example, in *WN Hillas & Co Ltd v Arcos Ltd* [1932] Int.Com.L.R. 07/05 it was held that an option in a contract for the supply of wood that permitted the buyer to buy additional wood the following year was valid, as the details could be obtained from previous dealings and ascertained from the custom and practice in the timber trade.

An offer must be communicated to be effective. An offer may be communicated to a particular person, a group of people or to the whole world: *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

It is important to emphasise that not all communications will be offers. At this point, we need to distinguish an offer from other steps in the negotiation process, namely from an invitation to treat, a mere sales 'puff' or boast, supplying information, and declaring an intention. We will now examine each of these in turn.

2.3.1 DISTINGUISHING AN OFFER FROM AN INVITATION TO TREAT

It is important to distinguish statements which are firm offers from statements which are mere **invitations to treat**. An 'invitation to treat' is a puzzling term. It can be the first stage of forming a contract but an invitation to treat is not an offer. It is a preliminary statement, a pre-offer, and often induces negotiation.

An invitation to treat is generally described as 'an invitation to make an offer' (an expression of willingness to negotiate).

A good way of looking at the difference between the two terms is that an offer is a definite promise to be bound on specific terms, whereas an invitation to treat is only an indication that someone is prepared to receive offers with a view to forming a binding contract. A person making an invitation to treat does not intend to be bound as soon as it is 'accepted'.

The distinction between an offer and invitation to treat can be seen in the following cases:

In *Gibson v Manchester City Council* [1979] 1 WLR 294 the defendant city council adopted a policy of selling council houses to its tenants and a council tenant was interested in buying his house. He completed an application form and received a letter form the Council stating that, 'The Corporation may be prepared to sell the house to you at…£2,180'. After some discussions, the claimant council tenant then wrote to the Council to proceed with the purchase as per the application. A change in the political control of the Council however meant that the Council had stopped selling Council houses to tenants. The question for the court was whether there was a concluded contract for the sale of the house. The House of Lords found in favour of the defendant, on the grounds that the words in the letter 'may be prepared to' were 'fatal' in that they simple set out the financial terms on which the council would be prepared to consider a sale and purchase in due course.

The case of *Storer v Manchester City Council* [1974] 1 WLR 1403 was based on a similar issue as Gibson in that it involved the sale of council houses: In this case the Council wrote: 'I understand you wish to purchase your council house and enclose the Agreement for Sale. If you sign the agreement and return it to me I will send you the agreement signed on behalf of the Corporation in exchange'. The Plaintiff, Storer duly signed and returned the Agreement for Sale, but again the new Council refused to continue with the sale. In this case the court held there was a binding obligation on the defendant Council to sell since objectively, to a 'reasonable man', the Council's letter appeared to commit to selling the property if the Plaintiff returned the signed documents.

Crucially, the use of the word 'offer' by one party is not decisive.

In *Spencer v Harding* (1870) LR 5 CP 561 the defendants advertised a sale by tender in these terms: 'We are instructed to offer [certain business stock] to the wholesale trade for sale by tender'. The advertisement specified where the goods could be viewed, the time of opening for tenders and that the goods must be paid for in cash. No reserve was stated. The claimant submitted the highest tender but the defendant refused to sell to him. The court held that unless the advertisement specified that the highest tender would be accepted there was no obligation to sell to the person submitting the highest tender.

Over the years, the courts have developed a set of rules to be applied in certain specific situations to determine whether there has been an offer or an invitation to treat.

Advertisements

One such rule concerns advertisements. An advertisement is not an offer, but rather an attempt to induce offers. Consider, for example, the following advertisement, placed in a local paper:

FOR SALE
Ferrari 458 Coupe
One previous owner, low mileage, mint condition
£20,000 ono.

There is a good chance that there would be an extremely high response rate! Advertising is however classed under contract law as an invitation to treat, and only when the customer indicates that they will pay for the goods at the advertised price has an offer been made, i.e. by the customer who is offering to buy the item (the car in this example). The owner of the item is then free to accept or reject the offer. One rationale for this is to ensure that the party placing the advertisement is not liable in contract to everyone who is willing to purchase the goods.

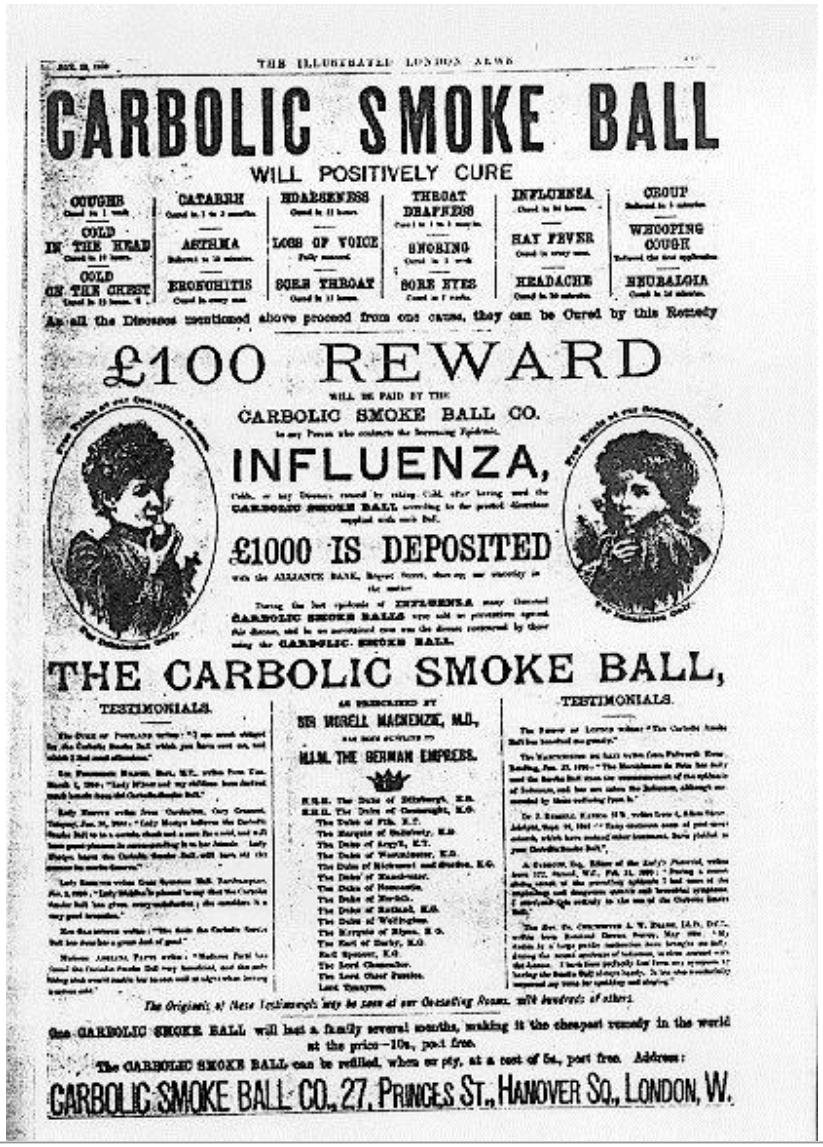
In *Partridge v Crittenden* [1968] 2 All ER 421 the defendant placed an advert in a classified section of a magazine offering some bramble finches for sale. S.6 of the Protection of Birds Act 1954 made it an offence to offer such birds for sale. He was charged and convicted of the offence and appealed against his conviction. The defendant's conviction was quashed since the court determined that the advert was an invitation to treat not an offer.

In another case, *Grainger & Son v Gough* (1896) AC 325, it was held that a issuing a price list does not amount to an offer, but is an invitation to treat.

Since an advertisement of goods generally does not constitute an offer, similarly it would seem that a website advertising goods would be an invitation to treat. So where, for example, there is an online advertisement of goods for sale, the offer occurs at the checkout stage, i.e. the customer offers to purchase the item(s). This is of particular importance where a pricing error has occurred in the initial advertisement – since the advertisement is an invitation to treat, and therefore it is the customer making the offer, this offer can then be rejected by the supplier. Problems can and do arise however, where the supplier sends an automated reply confirming the order (with the incorrect price).

However, where the advertisement is for a **unilateral contract** – such as the offer of a reward for lost property – the courts have held that the advertisement **will** generally amount to an offer. Also, it is important note that there is difference between a **mere boast or 'puff'** (a promotional statement or claim, often associated with advertising, such as 'your wife will absolutely love this necklace!') and a promise which a reasonable man would take seriously.

The leading case on the difference between a mere puff and an offer, and on unilateral contracts is *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256:



CARBOLIC SMOKE BALL

WILL POSITIVELY CURE

COUGH | CATARRH | HOARSENESS | THROAT DEAFNESS | INFLUENZA | CROUP
COLD IN THE HEAD | ASTHMA | LOSS OF VOICE | SNORING | HAY FEVER | WHOOPING COUGH
COLD ON THE CHEST | BRONCHITIS | SORE THROAT | SORE EYES | HEADACHE | NEURALGIA

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£100 REWARD

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£1000 IS DEPOSITED

THE CARBOLIC SMOKE BALL,

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H.I.M. THE GERMAN EMPRESS.

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CARBOLIC SMOKE BALL CO., 27, PRINCES ST., HANOVER SQ., LONDON, W.

In *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, the defendants published an advertisement which claimed that their product ('smoke balls') would prevent influenza and promised that they would pay £100 to any person who caught influenza after using the product. The advertisement stated that £1,000 had been put in a bank account to meet any claims. Carlill bought a 'smoke ball', used it correctly, but nonetheless caught influenza and so claimed £100 from the defendants.

The court held that the advertisement was a unilateral offer by the defendants to the world at large, and was more than a 'mere boast' (evidenced by the deposit of the money to pay for any claims), and the defendants had to pay up.

Per Lindley LJ: "Was it a mere puff? My answer to that question is No, and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as proof of his sincerity in the matter – that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it."

Per Bowen LJ: "In my judgment…this was an offer intended to be acted upon, and, when acted upon and the conditions performed, constituted a promise to pay… Although there was an offer to the whole world, there was not a contract with the whole world." – only the people that used it would bind the company.

More recently, in *Bowerman v Association of British Travel Agents Ltd* [1996] CLD 451 the court held that an advertisement by ABTA displayed in travel agents, constituted an offer of ABTA protection for customers performing the act of booking holidays with ABTA members.

Displays in shops

The display of goods for sale can be confused as an offer when in fact it is an invitation to treat. When goods are displayed in a store this constitutes an invitation to customers to make offers to purchase the items. The offer will therefore come from the customer at the checkout.

Fisher v Bell [1961] 1 QB 394: The defendant had a flick knife displayed in his shop window with a price tag on it. It was an offence to 'offer' such flick knives for sale. His conviction was quashed as goods on display in shops are not 'offers' in the technical sense but an invitation to treat.

Pharmaceutical Society v Boots [1953] 1 QB 401: Boots introduced a new self-service system into their shops whereby customers would pick up goods from the shelf put them in their basket and then take them to the cash till to pay. The Pharmaceutical Society of Great Britain brought an action to determine the legality of the system with regard to the sale of pharmaceutical products which were required by law to be sold in the presence of a pharmacist. The court thus needed to determine where the contract came into existence.

Auctions

There are special rules governing auctions. At an auction (with a reserve price) the auctioneer is making an invitation to treat, not an offer. The offer is made by the person who makes a bid for the lot. The auctioneer then accepts the bid on the fall of his hammer.

However, the situation is different in the case of an auction without a reserve price, whereby the auctioneer makes a unilateral offer to sell the goods and that offer is then accepted whoever makes the highest bid at the auction.

Payne v Cave (1789) 3 Term Rep 148
Warlow v Harrison (1859) 1 E & E 309
Barry v Davies [2000] 1 WLR 1962

Similar rules apply to **tenders**. Companies will often invite tenders from those interested in supplying the certain goods or services. Generally, an invitation to tender will constitute an invitation to treat and not an offer.

Spencer v Harding (1870) LR 5 CP 561

2.3.2 DISTINGUISHING AN OFFER FROM THE SUPPLY OF INFORMATION

If a party is simply supplying information, it is unlikely to amount to a firm offer. This rule is nicely illustrated by the following case:

Harvey v Facey [1893] AC 552: This case concerned a dispute over the sale of a property (in Jamaica) and an alleged agreement made via telegram correspondence.

Telegram 1: Plaintiff (H): 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'
Telegram 2: Defendant (F): 'Lowest price for Bumper Hall Pen £900'
Telegram 3: Plaintiff (H): 'We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you'

Held: H was asking questions about the property and clearly not making an offer and F was simply answering the second part of H's question. F's telegram was just a statement of price rather than an offer to sell at that price. The offer was contained in the second telegram from Harvey, which was never accepted by Facey.

In other words:

Telegram 1	Request for information
Telegram 2	Information supplied
Telegram 3	Offer by H

2.3.3 DISTINGUISHING AN OFFER FROM DECLARING AN INTENTION

It is also important to distinguish an offer from other pre-contractual statements. For example, in *Harris v Nickerson* (1873) LR 8 QB 286 an advertisement to hold an auction was not a firm offer. It was simply declaring an intention to hold the auction. And in *Clifton v Palumbo* [1944] 2 All ER 497, the claimant wrote to the defendant stating, "I am prepared to offer you my estate for £600,000…" It was held this did not amount to an offer but had simply been a statement as to price.

2.4 TERMINATION OF AN OFFER

There is no legal commitment until a contract has been concluded by the acceptance of an offer but offers do not exist indefinitely, open for an indeterminate time awaiting acceptance. Indeed, some offers may never be accepted. What we will consider now is how an offer may be terminated.

a) **By acceptance**
Once an offer has been accepted, a binding contract is made (presuming the other essential ingredients of a valid contract are present) and by definition, the offer ends.

b) **Rejection**
Conversely, if an offer is rejected, it comes to an end.

c) **Counter-offer**
If the offeree makes a counter-offer (by introducing new terms or altering the terms in the offer) the original offer is destroyed – see *Hyde v Wrench* discussed below in the chapter on acceptance. Also, an offer may be impliedly revoked by the **offeror** making a **second** offer: *Pickfords Ltd v Celestica Ltd* [2003] EWCA Civ 1741.

d) **By revocation**
The offeror is free to withdraw the offer at any time before acceptance and once revoked the offeree cannot accept it. Even if an offer is said to be valid for a certain period of time, it can be revoked during that time (unless there was consideration).

***Routledge v Grant* (1828) 4 Bing 653**

As per Best CJ: "…if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other…"

This will not be the case, however, where the offeror is obliged (by a separate binding collateral contract) to keep the offer open for a specified period of time.

Where the offeror wishes to withdraw the offer, the revocation will only be effective when it reaches the offeree. In other words, for the revocation of an offer to be effective, there must be actual communication of the revocation. Where the revocation is communicated by post it takes effect from the moment it is received by the offeree and not from the time of posting – the postal rule does not apply to withdrawal of an offer.

Byrne v Van Tienhoven (1880) 5 CPD 344

The offeror posted an offer. The offeree posted a letter of acceptance. Before the acceptance had arrived the offeror posted a revocation of the offer. It was held there was a valid contract. This case is a good illustration of the rule that a postal revocation only takes effect when it is received, not when it is posted (whereas a postal acceptance is valid on posting).

However, it is not necessary for revocation to be communicated by the offeror. Communication of the revocation to the offeree through a reliable third party is sufficient. In *Dickinson v Dodds* 2 Ch D 463 the defendant offered to sell his house to the claimant but before the claimant had accepted the offer, the defendant accepted an offer from a third party to purchase the house. A friend of the defendant's informed the claimant that the offer was withdrawn. The court held that the offer had indeed been effectively revoked.

Revocation of an offer in unilateral contracts poses particular problems. As we have already seen, in a unilateral contract acceptance is by performance of the act requested. A common example might be an offer of money if a person eats 100 doughnuts. The person accepts when he performs this act (ie the eating of 100 doughnuts), and so it would be theoretically possible to revoke the offer at any time before completion. But what if the person had nearly finished eating all the doughnuts – is it possible to revoke the offer then? This was the question before the court in *Errington v Errington and Woods* [1952] 1 KB 290.

In _Errington v Errington and Woods_ a father had bought a house for his son and daughter-in-law but held it in his own name. He told them that if they paid the mortgage, the house would be signed over to them when the mortgage was paid off. The couple began payments, but then the father died and in the will the house had been left to his widow.

Held: The father's offer of a unilateral contract could not be revoked after the couple had started to pay off the mortgage instalments. The father's promise was a unilateral contract – a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act.

e) **Lapse of time**

If the offer is for a specific period of time, the offer will lapse at the end of that time. In cases in which no time period is stipulated for the offer, an offeree cannot make an offeror wait forever, so if no time period is set, the offer will lapse after a reasonable time. The offeror is entitled to assume that acceptance will be made within a reasonable time period or not at all. What is a reasonable time period is will depend upon the circumstances of the case. In *Ramsgate Hotel v Montefiore* (1866) LR 1 Ex109 an offer to purchase shares in a company had lapsed after five months and in *Korbetis v Transgrain Shipping BV* [2005] EWHC 1345 (QB) the offer lapsed after 8 months.

f) **Death**

The death of the offeror or the offeree sometimes causes the offer to lapse.

g) **Failure of a condition subject to which the offer was made**

An offer may be made subject to a condition. If the condition is not satisfied the offer is not capable of being accepted.

2.5 FURTHER READING

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McKendrick, E. *Contract Law – Text, Cases and Materials* (Palgrave Macmillan)

2.6 EXERCISES

Exercises on Offer

1. What is meant by 'an invitation to treat'?
2. Consider each of the following statements. Is the statement likely to be treated as an offer or as invitation to treat?
   a. "I'm thinking about selling my motorbike for £5,000. Would you like to buy it?"
   b. "I'm prepared to sell you my motorbike for £5,000. Are you interested?"
   c. "I'll sell you my motorbike for £5,000."
3. What type of contract was made in *Carlill v Carbolic Smoke Ball Co.?*
4. An advertisement reads: 'Ladies! Are you suffering from ageing skin? Don't waste money on other creams – put your faith in Forever Young skincare products!' How would this be regarded by the courts?
   a. As a contractually binding promise that the product will in fact restore hair for balding males.
   b. As a 'mere puff'.
   c. As an offer.

3 ACCEPTANCE

3.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- The second requirement for the formation of a valid contract: acceptance.
- The distinctions between an acceptance and a counter offer.
- The rules on communication of acceptance.
- The key case law in this area.

3.2 INTRODUCTION

Once valid acceptance takes place a binding contract is formed. It is therefore important to know what constitutes a valid acceptance in order to establish if the parties are bound by the agreement.

Acceptance is the unconditional assent to all the terms of the offer. It may be oral, in writing or inferred by conduct. It must be absolute and unqualified. This traditional approach is referred to as the '**mirror image**' rule of contractual formation in that the court must be able to find a clear and unequivocal offer which is mirrored by a clear and unequivocal acceptance. Whilst this approach has the benefit of a degree of certainty, it is important to keep in mind that this traditional approach has been subjected to criticism as being excessively rigid.

In Butler v Ex-Cell-O Corporation (England) Ltd [1979] 1 WLR 401 Lord Denning rejected the traditional approach and in *Gibson v Manchester City Council* [1978] 1 WLR 520, 523 he said that 'to my mind it is a mistake to think that all contracts can be analysed into the form of offer and acceptance'.

Acceptance must be made in response to an offer, as an acceptance cannot 'mirror' an offer if the acceptance is made in ignorance of the offer. The reason for this requirement is that if a contract is an agreed bargain, ***there can be no agreement without knowledge***. So a claimant would not, for example, be entitled to a reward if s/he performed the act in ignorance of the reward offer. The following case nicely illustrates this rule:

R v Clarke (1927) 40 CLR 227: The Government offered a monetary reward for information leading to the arrest and conviction of people responsible for the murder of two police officers. C was arrested in connection with the murders and made a statement to police about the murders which led to the conviction of other men. C was released and subsequently claimed the reward.

Held: C gave information to secure his own release and not in response to the offer for reward (it probably didn't help his case that he admitted this!) – to be effective as an acceptance the information needed to be 'given in exchange for the offer'.

3.3 COUNTER OFFER

The offeree must agree to all the terms of the offer and not try and introduce new terms. If the offeree, instead of agreeing to all the terms of the offer, attempts to alter the terms or introduce new terms, it will not constitute an acceptance, but instead will be what is known as a **counter-offer**. A counter offer does not constitute an acceptance. A counter-offer is an offer made by the offeree in reply to an offer and implies a rejection of the original offer, which is thereby destroyed and cannot subsequently be accepted. This is illustrated by the following case:

Hyde v Wrench (1840) 49 ER 132:

The defendant Wrench (the offeror) offered to sell a farm to the claimant for £1,000. The claimant Hyde (the offeree) in reply offered £950 which the defendant refused. The claimant (H) then sought to accept the original offer of £1,000. The defendant (W) refused to sell to the claimant and the claimant brought an action for specific performance.

Held: There was no contract. Where a counter offer is made this destroys the original offer so that it is no longer open to the offeree to accept.

In other words:

Wrench	makes offer
Hyde	makes counter offer
Wrench	rejects counter offer
Hyde	tries to 'accept' original offer but original offer no longer exists

If, however, the offeree is simply requesting further information before accepting, this will not constitute a counter-offer and the offer will remain 'open' i.e. available to accept.

In *Stevenson v McLean* (1880) 5 QB 346: M wrote to S offering to sell iron at 40s per ton, stating that he would hold the offer open until the following Monday. S then telegraphed M asking if M would agree to delivery over 2 months and if not what was the longest time he could give. M did not reply but on receiving the telegram sold the iron to someone else. Later that day S telegraphed accepting the original offer. When M did not deliver the iron S sued him for breach of contract.

Held: S's first telegram was simply a request for information, not a counter offer.

Sometimes the two parties use standard forms and each tries to impose their terms on the other. This is known as **the battle of the forms**. In *Butler Machine Tool Co Ltd v Ex-Cell-O Corp* [1979] 1 All ER 965, for example, Butler sent standard forms to the defendant offering to sell tools for a named price but he stated that the price could change. The defendant sent back his own terms with a fixed price for tools and asked Butler to sign a slip agreeing to the terms. Butler signed the acceptance slip but when he delivered the tools he wanted more cash from the defendant. The court held that the defendant was entitled to goods at the fixed price as his own terms were a counter offer which had subsequently been accepted by Butler when Butler signed the slip.

3.4 COMMUNICATION OF ACCEPTANCE

3.4.1 THE GENERAL RULE

The general rule is that acceptance must be communicated to the offeror. There must be some positive act of acceptance. Mere silence will not usually constitute acceptance. Authority for this proposition is found in: *Felthouse v Bindley* (1862) 11 CB (NS) 869. In this case negotiations were taking place regarding the sale of a horse. Felthouse wrote to his nephew and said, 'If I hear no more about it I consider the horse is mine for £30 15s'. His nephew did not reply. The court determined that there was no sale as silence does not amount to acceptance. If the nephew wanted to enter into the contract he should have given clear indication of his acceptance, which he had failed to do.

The rule that silence does not amount to acceptance is useful and underpins The Unsolicited Goods and Services Act 1971. Also, s24.2 Consumer Protection (Distance Selling) Regulations 2000 which came into effect in October 2000 provide that unsolicited goods can now be kept by the customer as an unconditional gift. There is thus no need to send them back (as set out in the original 1971 Act).

The general rule that acceptance must be communicated means that it must be **received**. So, where the parties are in each other's presence or talking on the telephone the acceptance must be heard. And where the parties are not in each other's presence and instead are using a long distance means of communication, like a telex, the contract is only complete when the acceptance is received by the offeror.

Entores v Miles Far East Corporation [1955] 2 QB 327. In this case the offeror, a company in London, made an offer by telex to the offeree, a company in Amsterdam. The offeree sent their acceptance of the offer by telex back to the company in London. The question for the court was, where was the contract made? It was held the contract is only complete when the acceptance is received by the offeror, and the contract is made at the place where the acceptance is received (in this case it was received in London).

The decision in Entores was reaffirmed in the House of Lords in *Brinkibon v Stalag Stahl* [1983] 2 AC 34, where an offer was made by telex in Vienna and accepted by telex in London. It was held the contract was made in Vienna, ie where the acceptance was received.

Similarly a fax acceptance must be received: *JSC Zestafoni Nikoladze Ferroalloy Plant v Ronly Holdings Ltd* [2004] EWHC 245.

The difficult question then arises as to exactly when a telex, fax or answer phone message is in fact communicated to the offeror. Is it when it is actually received *on the machine*, or when it is *read/heard by the offeror*? In addition, what would be the position if, for example, a fax was sent outside of business hours? Both the case of *The Brimnes* [1975] QB 929 and *Mondial Shipping and Chartering BV v Astarte Shipping Ltd* [1995] CLC 1011 reached the conclusion that a message sent outside of business hours was not communicated until the office re-opened for business.

3.4.2 EXCEPTIONS TO THE GENERAL RULE OF COMMUNICATION OF ACCEPTANCE

Acceptance by post

Communication by post gives rise to special practical difficulties as a letter of acceptance may take several days to arrive. At what point is the acceptance good? The offeree knows from the moment he posted the letter that he has accepted the offer but how will the offeree know when this is? To overcome these problems, the courts devised an exception to the general requirement of communication. Thus, if acceptance is communicated by post, the acceptance takes effect from ***the moment the letter is properly posted*** (as long as the letter is properly stamped and addressed), and not when it is received by the offeror.

In *Adams v Lindsell* (1818) 1 B & Ald 681 the defendants wrote to the plaintiffs on 2 September, offering to sell them some wool and requested that the plaintiffs reply 'in course of post'. The letter which contained the offer was wrongly addressed and therefore the plaintiffs did not receive it until 5 September. As a result of this delay, the letter of acceptance subsequently posted by the plaintiffs was not received until 9 September by the defendants, and this was two days later than the defendants would have expected to receive it. Because of this, on 8 September the defendants had sold the wool to a third person. The question for the court was therefore whether a contract of sale had been entered into before 8 September when the wool was sold to the third party. If the acceptance was effective when the letter of acceptance arrived at the address or when the defendant saw it, then no contract would have been made.

Held: The offer had been accepted as soon as the letter had been posted. Thus, there was indeed a contract in existence before the sale of the wool to the third party, even though the letter had not actually been received by the defendant and the defendant was therefore liable in breach of contract.

The rule holds true *even if the postal acceptance never arrives*: *Household Fire Insurance Co v Grant* (1879) 4 Ex D 216. Grant had negotiated to purchase shares in Household Fire. His application was accepted, and his name was added to the list of registered shareholders, however, the letter informing the appellant of this never reached him and thus Grant never paid for the shares. His earnings from dividends were credited to his account. Eventually Household Fire went into liquidation and the liquidator applied for money from the appellant. He refused to pay on the grounds that he was not a shareholder – he had never received the notification in the mail and was not aware.

Held: Even though Grant had not known about the acceptance, it had happened and he had to pay the amount still outstanding for the shares. A contract becomes binding the instant that the acceptance is put in the mail, so long as the parties have contemplated the mail as a viable means of communication in their dealings.

However, it is possible to avoid the postal rule by stipulating a different method of acceptance or ensuring the offer requires actual communication of the acceptance: *Holwell Securities v Hughes* [1974] 1 All ER 161. In this case the use of the words "notice in writing" meant that Hughes required actual notice of acceptance. The postal rule does not apply when the terms of a contract point to the necessity of actual communication, even if the post is the desired means of communication.

In fact, as a general rule, if an offeror prescribes a certain method of acceptance, then only acceptance by that method or an equally effective one will be binding. To be equally effective, the mode of acceptance should not be slower or be disadvantageous to the offeror in any way. In *Tinn v Hoffman* (1873) 29 LT 271 for example, the offeree was asked to reply 'by return of post'. However, in spite of this stipulation for the post as means of communication, the court held that any method which would arrive before return of post would be sufficient. The court came to a similar decision in *Manchester Diocesan Council of Education v Commercial & General Investments Ltd* [1970] 1 WLR 241. In this case the claimant put out a request for tenders to buy land stating that, 'The person whose tender is accepted shall be the purchaser and shall be informed of the acceptance of his tender by letter sent to him by post addressed to the address given in the tender'. The defendant completed the tender and sent it to the claimant's surveyor. However, the claimant's solicitor mistakenly sent his reply to the defendant's surveyor approving the sale rather than the defendant. The court determined that there was a valid contract because sending the acceptance to the defendant's surveyor was no less advantageous to the defendant.

Note: The postal rules only apply to acceptance of an offer and do **not** affect a posted **offer** or a posted **revocation.**

Unilateral contracts

In a unilateral contract the offeree accepts the offer **by performing the act** – as we saw in *Carlill v Carbolic Smoke Ball Co*, where the customer purchased and correctly used the advertised 'smoke balls'. There is no need to communicate that one is going to attempt to perform the act; conduct is sufficient.

Per Lindley LJ in *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256:

"…advertisements offering rewards…are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions is the acceptance of the offer".

Per Bowen LJ: "It was also said that the contract is made with all the world – that is, with everybody; and that you cannot contract with everybody. It is not a contract made with all the world. There is the fallacy of the argument. It is an offer made to all the world; and why should not an offer be made to all the world which is to ripen into a contract with anybody who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the condition, and, although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement".

So, where for example, a reward is offered for the return of lost property, the offeree accepts by performing the act i.e. by returning the lost property, and there is no need to communicate the intention to accept.

Contracts made through the internet/e-mail

The European Electronic Commerce Directive laid down formalities which need to be complied with in order to make binding contracts and these have been implemented in the UK by the **Electronic Commerce (EC Directive) Regulations 2002**. As noted above, websites are usually considered to be shop windows and therefore displays of goods online etc are considered to be invitations to treat. The offer is made by the purchaser and the seller has option to accept or reject. Acceptance in contracts made online depends upon the wording of the electronic communication sent back to the purchaser. It may be when the seller accepts the order or when he dispatches the goods.

3.5 FURTHER READING

Beale, H.G., Bishop, W.D. & Furmston, M.P. *Contract – Cases and Materials* (Butterworths)

Capps, D. 'Electronic Mail and the Postal Rule' (2004) 15 *ICCLR* 207

Downing, S. & Harrington, J. 'The Postal Rule in Electronic Commerce. A Reconsideration' (2000) 5 *Communications Law* 43

Elliot, C. & Quinn, F. *Contract Law* (Pearson)

Poole, J. *Textbook on Contract Law* (OUP Oxford)

Poole, J. *Casebook on Contract Law* (OUP)

Koffman, L. & MacDonald, E. *The Law of Contract* (OUP)

McKendrick, E. *Contract Law* (Palgrave Macmillan)

McKendrick, E. *Contract Law – Text, Cases and Materials* (Palgrave Macmillan)

Miller, C. 'Felthouse v Bindley Revisited' (1972) 3 *MLR* 489

3.6 EXERCISES

Exercises on acceptance

1. What is the general rule about acceptance i.e. when will it normally be effective?
2. Andrew sends a text to Charles on Monday, stating "I want to buy your car for £500". Charles texts back "Agreed" on Tuesday. On Tuesday Andrew is in the Scottish Mountains and has no signal. He buys another car while in Scotland. Has a contract been formed?
3. How (if at all) must acceptance be communicated in a unilateral contract?
4. What is meant by the postal rule? What are its limitations?
5. What is the legal significance of the following replies to an offer to "sell my car for £5,000"?
   a) "I'm sorry – that is too much. Would you take £3,000?"
   b) "I'm going to buy it! Shall I come and collect it or will you deliver?"
   c) "I can only manage £1000 deposit and the rest in monthly instalments"
   d) "I am unable to buy it until I get paid. Would you reserve it for me till the end of the month?"

4 CONSIDERATION

4.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- The third key requirement for the formation of a valid contract: consideration.
- The basic definition of consideration.
- What is meant by past consideration, adequacy and sufficiency of consideration.
- The rules relating to part payment of a debt.
- The doctrine of promissory estoppel.
- The key case law in this area.

4.2 INTRODUCTION

Not every agreement is an enforceable contract. The concept of 'consideration' is the key way in which English courts decide whether an agreement that has resulted from the exchange of offer and acceptance should be legally enforceable. Both parties to the contract must provide **consideration** if they wish to sue on the contract because English law does not enforce gratuitous promises.

What do we mean by 'consideration'?

The requirement for consideration in English law means that there must be ***an exchange***, in other words, one person must do something, omit to do something or promise to do or omit to do something in exchange for another person doing, omitting or promising something.

One way of defining consideration would be '*The price for which the promise or act is bought*'. However, this assumes that economic value is a requirement – which it is not. A better definition therefore might be: '*An act (or promise thereof) at the request of the other party*'. It is important to note that the essence of consideration is that there must have been a bargain between the parties – each side must promise to give or do something for the other party.

Judicial Definitions of Consideration

'Some right interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other'. *Currie v Misa* (1875) LR 10 Ex 153

'An act or forbearance (or the promise of it) on the part of one party to a contract as the price of the promise made to him by the other party to the contract'. *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] UKHL 1

For example, if one party, A (the promisor) promises to mow the lawn of another, B (the promisee), A's promise will only be enforceable by B as a contract if B has provided consideration. The consideration from B might normally take the form of a payment of money but could consist of some other service to which A might agree. Further, the promise of a money payment or service in the future is just as sufficient a consideration as payment itself or the actual rendering of the service. Thus the promisee has to give something in return for the promise of the promisor in order to convert a bare promise made in his favour into a binding contract.

The person who wishes to enforce the contract must show that they provided consideration; it is not enough to show that someone else provided consideration – under common law a party cannot enforce a contract unless he has contributed to the consideration. See *Tweddle v Atkinson* [1861] EWHC QB J57. (But note the statutory exceptions under The Contracts (Rights of Third Parties) Act 1999).

Two other key terms to be noted here are:

***Executory* consideration.** This refers to an exchange of promises which will be carried out *at a later date,* ie for something yet to be done, for example, ordering goods, payment on delivery or booking a holiday.

***Executed* consideration.** If one party makes a promise in exchange for an act by the other party, when that act is completed, it is said to be executed consideration, e.g. in a unilateral contract where A offers £50 reward for the return of her lost dog, if B finds the dog and returns it, B's consideration is executed and A must pay up!

4.3 PAST CONSIDERATION

If one party voluntarily performs an act, and the other party **then** makes a promise, it is called **past consideration** and is not valid consideration in the eyes of the law and cannot be used to sue on a contract. For example, A washes B's car while B is at work. B comes home and is so delighted he promises to give A £10 for washing his car. A cannot enforce this promise as his consideration, washing B's car, is '**past**'. Here are two cases that illustrate this principle:

Roscorla v Thomas (1842) 3 QB 234: R bought T's horse for £30. After agreement had been reached, T promised R that the horse was sound and free from vice. But the horse was not sound and the court had to consider whether there was an enforceable promise. Held: there was no consideration so no enforceable promise.

Re McArdle [1951] Ch 669: Children were bequeathed a house by their father. The wife of one of the married children paid for improvements. Then, the other children promised to repay her. Held: the consideration was past because all the work had been completed before the promise was made and so the promise was unenforceable.

4.3.1 EXCEPTION TO THE RULE

There is however an exception to the past consideration rule: where the act is done ***at the request of another***.

> *Lampleigh v Braithwait* (1615) Hob 105: B killed someone and then asked L to get him a pardon. L got the pardon and gave it to B who then promised to pay L £100 for his trouble.
>
> Held: B was liable to pay – although L's consideration was past (he had already got the pardon for B), L's act was performed at B's request. There was an implied understanding (or "assumption" of obligation) that a fee would be paid. Where a past benefit was conferred at the beneficiary's request, and where a reward would reasonably be expected, the promisor would be bound by his promise.

In cases such as *Lampleigh v Braithwait*, courts will link the subsequent promise to pay to the previous request – meaning a party can recover on the promise.

Also, if something is done in a business context and it is clearly understood by both sides that it will be paid for, then past consideration will be valid. See for example, *Re Casey's Patents* [1892] 1 Ch 104.

In *Pao On v Lau Yiu Long* [1980] AC 614 the court set out the requirements for this exception to operate. In this case Lord Scarman said:

> "An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisors' request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit: and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance."

4.4 ADEQUACY OF CONSIDERATION

The key principle to be discussed here is that consideration **need not be adequate**. This simply means that the courts will not interfere with a bargain freely reach by the parties. In line with the principle of freedom of contract, it is up to the parties, not the courts, to decide what constitutes a good or bad bargain. Provided that the consideration has some value, however small that value might be, it can constitute consideration – the courts are not concerned if you make a bad bargain. (That said, the courts do have other doctrines at their disposal ensure the agreement has been freely reached: duress and undue influence). The following cases nicely illustrate this principle:

Thomas v Thomas (1842) 2 QB 851: The defendants promised to give a cottage to the claimant and in return she promised to pay £1 per year as rent and maintain the property in good condition. The court held that the defendants were bound by their promise. They were not concerned with the adequacy of the consideration.

Chappell v Nestlé [1960] AC 87 Nestle were running a special offer whereby members of the public could obtain a music record by sending off three wrappers from Nestle's chocolate bars plus some money. The House of Lords held: the chocolate wrappers were part of the consideration. It was irrelevant that the wrappers were of no intrinsic value.

4.5 SUFFICIENCY OF CONSIDERATION

Although, as we have seen, consideration need not be adequate, **it must be sufficient**. In other words, the consideration given must have **some value** i.e. it must be real, something measurable and of material value. This excludes for example, promises of love and affection.

'Consideration means something which is of some value in the eyes of the law' Patteson J in *Thomas v Thomas* (1842) 2 QB 851.

Thus in *White v Bluett* (1853) 23 LJ Ex 36 a promise by son to stop complaining that he had been disinherited was not good consideration to release him from a promissory note he had given his father. Since the son had no right (i.e. legal entitlement) to complain he was not giving up anything of material value; there was therefore no consideration.

The reasoning behind this rule was clearly stated by Pollock CB in *White v Bluett*:

> "If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding".

4.5.1 CAN THE PERFORMANCE OF AN EXISTING DUTY AMOUNT TO SUFFICIENT CONSIDERATION?

The general rule is that a person must do more than his existing duty. There are three situations where this issue may arise:

- Performance of a public duty
- Performance of a duty owed already to the promisor
- Performance of a duty owed already to a third party

Public duty

In essence, merely carrying out a public duty as imposed by the law is not sufficient consideration.

> *Collins v Godefroy* (1831) 1 B & Ad 950: C had been subpoenaed to give evidence and G had promised him payment for his attendance as a witness. The court held that C could not enforce the promise as he was already under a legal duty to attend court due to the subpoena.

However, if a party does *more* than s/he was already bound to do (i.e. exceeds her/his legal duty), there may be sufficient consideration. In *Ward v Byham* [1956] 1 WLR 496, the parties were the parents of a daughter who lived with the father at first, but then the mother requested the child to be returned to her. The father agreed subject to a letter saying, 'I am prepared to let you have Carol and pay you up to £1 per week allowance for her, providing you can prove that she will be well looked after and happy'. The father later stopped making payments and the mother brought an action to recover the payments. The father argued that there had been no consideration for his promise since the mother was only doing what she was already obliged to do in law. The court held that by promising to ensure the child was 'well looked after and happy', the mother had gone ***beyond*** her existing legal duty and therefore had provided consideration. She was entitled to the payment.

Glasbrook Bros v Glamorgan CC [1925] AC 270: During the miners' strike the owners of the colliery wanted a special guard on the mines even though the superintendent thought this unnecessary. The police agreed in return for payment. At the end of the strike the police submitted an invoice to cover the extra costs of providing the protection. The defendants refused to pay arguing that the police were under an existing public duty to provide protection and keep the peace.

Held: the police could recover the payment – as they had done more than perform their existing legal duty, therefore there was good consideration.

Performance of a duty owed already to the promisor

Problems have arisen where one party to a contract initiates a variation of the contract that is already in existence – and then attempts to argue that the pre-existing contract has been replaced by another. Typically in such cases there is a pre-existing contract where party B finds that he cannot perform the contract for the agreed sum and informs A who then promises an additional payment to B. B completes the work but subsequently A refuses to pay the additional sum. The question here is whether or not B has provided any consideration for A's promise of the additional money.

Traditionally, the answer has been that if a party is under an existing contractual duty to perform an act, the performance of this act cannot be used as consideration for a new promise – ***unless a party goes beyond his contractual duty***. The operation of the traditional rule – and the exception – is illustrated by comparing the following two cases, *Stilk v Myrick* and *Hartley v Ponsonby:*

Stilk v Myrick (1809) 2 Camp 317: During a voyage two sailors deserted and the Captain promised to divide the deserters' wages amongst the remaining crew. An action brought to enforce the Captain's promise failed.

The court determined that the claimant was under **an existing duty** to work the ship including attending to any emergencies that transpired. Therefore he had not provided any consideration for the promise for extra money.

Hartley v Ponsonby [1857] 7 EB 872: Nearly half of a ship's crew (17/36) deserted on a voyage. The captain promised the remaining crew members extra money if they worked the ship and completed the voyage. The captain then refused to pay up.

Held: The crew were entitled to the extra payment promised on the grounds that they **had gone beyond** their existing contractual duty.

More recently, this area of the law has been developed in the important case of *Williams v Roffey Bros & Nicholls Contractors Ltd* [1990] 1 All ER 512. In this case the court derogated from the strictly traditional approach and determined that consideration could be found in the form of ***a practical benefit*** to one of the parties.

The facts of the case are these:

- Roffey Bros had a contract with a housing association to refurbish a block of flats.
- The contract stated that unless the work was completed by a specific date, Roffey Bros would have to pay a penalty to the association.
- Roffey subcontracted the carpentry work to Williams and agreed a price.
- Williams started the job, but realized that he had underpriced the job.
- Williams informed Roffey who then promised to pay Williams an additional sum of money for each flat completed on time.
- Williams completed the job but Roffey Bros refused to pay all of the additional money, arguing that Williams had not provided any consideration as he was already under an existing contractual duty to complete the work.

It was held that where a party to an existing contract later agrees to pay an additional sum in order to ensure that the other party performs his obligations under the contract, then that agreement is binding if the party agreeing to pay has thereby obtained some ***new practical advantage or avoided a disadvantage***. In the present case there were benefits to Roffey including making sure Williams continued his work (thereby avoiding the expense and trouble of getting someone else) and avoiding potential payment under the penalty clause. Therefore, the promise was binding and Williams was entitled to payment.

Contractual duty owed to a third party

Where a duty is owed to a third party, performance of that duty is considered to amount to sufficient consideration for a new promise. A good example of this rule can be seen in *Scotson v Pegg* [1861] EWHC Exch J2. Pegg was paid by a purchaser of coal to carry and unload the coal. Scotson was the supplier of the coal – and he also paid the defendant to carry and unload the coal. Scotson brought an action to recover the money paid arguing the defendant was already under an existing duty to carry and unload the coal and thus provided no consideration, but the court found that an existing contractual duty owed to a 3rd party to the contract can amount to valid consideration for a new promise. Consequently the defendant was entitled to get paid twice for doing the same thing.

***Shadwell v Shadwell* (1860) 9 CB(NS) 159**
***New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154**

***Pao On v Lau Yiu Long* [1980] AC 614**

4.5.2 PART PAYMENT OF A DEBT

The question to be considered here is whether a promise to pay less than the amount due can ever be sufficient consideration. Consider that you owe Mary a sum of money and promise to pay part of it in return for Mary's promise to forgo the balance. Mary now wants you to pay the balance. Is Mary's promise to you to forgo the rest of the money enforceable?

At common law the payment of a lesser sum does not discharge the obligation to pay the full amount – the debtor has only done what s/he was legally obligated to do under the pre-existing contract. This rule was laid down in *Pinnel's Case* (1602) 5 Co Rep 117. The case established that:

- Payment of a lesser sum on the due day cannot be satisfaction for the full sum.
- Payment of a lesser sum at the creditor's request before the due day is good consideration for a promise to forgo the balance.
- Offering something different, like a chattel, could amount to fresh consideration.

In other words, a promise by a creditor to accept less than the full sum owed does not discharge the debtor from the legal obligation to pay the full *sum unless the debtor gives some additional consideration* (benefit) to the creditor – even if it is just a chattel (an item).

"The gift of a horse, a hawk or a robe etc, in satisfaction is good". Lord Coke in *Pinnel's case*

Foakes v Beer (1884) 9 App Cas 605 confirmed the rule in *Pinnel's* case.

***Foakes v Beer* (1884) 9 App Cas 605**

Facts: Beer obtained a court judgment for a debt of £2000 from Foakes. (When a judgment is obtained on a debt interest accrues on that debt). Foakes offered to pay £500 immediately and the rest by instalments and Beer agreed not to take matters further and not to enforce the judgment if Foakes paid off the debt by instalments. Foakes did this, but when the debt had been paid, Beer sued Foakes for the interest on the debt.

Held: Beer was entitled to the interest because it had accrued and Foakes was paying less than what was due. The agreement reached amounted to part payment of a debt and under the rule in Pinnel's case no consideration had been given by Foakes for the waiver of any part of Beer's right against him.

More recently, the case of *Re Selectmove* [1995] 2 All ER 531 confirmed that *Foakes v Beer* remains good law. So it is clear that a debtor's payment of part of an existing debt **cannot** amount to consideration for a creditor's promise to accept a lesser sum in full settlement. It would be different if the debtor did something different, such as paying off the debt earlier; or, if a new element is introduced, this may amount to sufficient consideration.

The law since *Williams v Roffey* seems to be therefore that one party's promise to perform an existing contractual duty for the supply of goods or services can amount to consideration if the other party receives a practical benefit and there is no duress or fraud. But in relation to part payment of debts there must be further consideration. The full debt will be discharged by part-payment if the creditor agrees to accept part payment at an earlier date or some goods or other material benefit to accompany the part payment.

There are also three other exceptions to the general principle that part payment of a debt is not sufficient consideration to discharge the whole debt:

- Promissory Estoppel
- Composition Agreements – where a group of creditors reach a composition agreement with the debtor with respect to his debts. No single creditor can sue the debtor for the outstanding balance owned.
- Payment of a debt by a third party.

In the next section we will take a closer look at the first of these.

4.5.3 PROMISSORY ESTOPPEL

The problem outlined above relating to part payment arises in the context of a **variation** of an existing agreement. Parties on good terms may frequently vary or even terminate contracts in an informal way, but more formal arrangements require evidence of consideration. Can one-sided variations ever be enforceable?

Promissory estoppel is concerned with the modification of existing contracts and is the name that has been given to the doctrine which has as its principal source the *obiter dicta* of Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. It is important to note that it is rarely pleaded and has not removed the need for consideration – and that it is an equitable doctrine, in other words, takes into consideration matters such as fairness and justice rather than strict application of legal rules and principles.

The role and importance of equitable estoppel was stated in *Crabb v Arun D.C* [1976] 1 Ch 179:

> **"Equity comes in…to mitigate the rigours of strict law…It prevents a person from insisting on his strict legal rights…when it would be inequitable for him to do so having regards to the dealings which has taken place between the parties".**

Promissory estoppel is an exception to the rule in *Pinnel's* case in that the doctrine provides a means of making a promise binding, in certain circumstances, in the absence of consideration. The principle is that if A (the promisor) makes a promise, which he intends B (the promisee) to rely on, and B does in fact rely on to his detriment, A is stopped (or 'estopped') from going back on the promise, even though the other person did not provide consideration – in so far as it would be inequitable (unjust or unfair) to do so.

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130

Facts: CLPT granted a lease on a block of flats to High Trees House in 1937 for a term of 99 years. War broke out and a number of the flats were not let, and CLPT agreed in 1940 to reduce the rent. When the war ended CLPT brought an action for full (ie the original) rent including the final two quarters of 1945.

Held: CLPT could now charge full rent and in addition were owed full rent for the last two quarters of 1945. They were entitled to recover this money as their promise to accept half was only intended to apply during war conditions.

Obiter Denning J stated that if CLTP had sued for the arrears from 1940–45, the 1940 agreement would have defeated their claim. Even though High Trees had not provided consideration for the promise by CLTP to accept half rent, this promise was intended to be binding and was acted on by High Trees. Therefore CLTP would be estopped from going back on their promise and would not have been able to claim the full rent for 1940–45.

In other words, Denning J suggested that where the conditions of promissory estoppel were satisfied, a creditor could not go back on a promise to accept less (and not to sue for the balance) where it would be inequitable to do so even though there was no consideration to support the promise.

Promissory estoppel is traceable to *Hughes v Metropolitan Railway* (1877) 2 App Case 439 – a case Denning J relied upon when making his pronouncement in *High Trees*. In this case the landlord gave his tenant six months to repair the property. Negotiations about the lease were then begun between the landlord and tenant, with an implied promise that the period of notice would not run during negotiations. The negotiations proved fruitless, and the tenant failed to repair. The landlord tried to treat the lease as forfeited but it was held that the promise by the landlord (that the period of notice would not run during negotiations) was enforceable despite the absence of consideration.

Thus it seems that if a person promises that he will not insist on his strict legal rights, and the promise is acted upon, then the law may require the promise to be honoured even though it is not supported by consideration. Nonetheless there are certain strict requirements that have to be satisfied before the doctrine can come into play.

4.5.3.1 THE KEY ELEMENTS OF PROMISSORY ESTOPPEL

Normally the following have to be present:

- A pre-existing contractual relationship. Promissory estoppel is only available where there has been an alteration to an existing contract.
- A clear and unequivocal promise or representation. In *Baird Textiles Holdings Ltd v Marks and Spencer plc* [2001] EWCA Cive 274, for example, the alleged representation was not sufficiently clear for a court to be able to give effect to it. For another recent case see *North Star Land Ltd v Maitland Brooks* [2006] EWCA Civ 756.
- Reliance on the promise i.e. the promise has influenced the conduct of the promise. The representation/promise was intended to be binding and acted upon and was in fact acted upon by the promise. See *Ajayi v Briscoe* [1964] 1 WLR 1326.
- It would be inequitable for the promisor to go back on the promise.

D & C Builders v Rees [1965] 2 QB 617

Facts: D & C Builders were claiming payment for work done for Rees. Rees paid £250, then stated he would only pay a further £300 (£200 less than owed) in full settlement, knowing that D & C Builders were in financial trouble. After a few months D & C Builders reluctantly agreed. D & C Builders later sued for the balance.

Held: No binding settlement – it was not inequitable for the plaintiff to go back on his promise.

If the promisor's promise has been extracted by improper pressure it will not be inequitable for the promisor to go back on his promise. What was important for the court in *D & C Builders v Rees* in reaching its decision was that Rees had taken advantage of the creditor's situation.

- The effect is normally only suspensory, not permanent. In other words, the promisor can resume his full legal rights under the contract after giving reasonable notice. See *Tool Metal Manufacturing Co v Tungsten Electrical Co Ltd* [1955] 1 WLR 761

It cannot normally be used to create new rights. Promissory estoppel does not create a cause of action –it generally operates as a defence to an action: a shield and not a sword. See *Combe v Combe* [1951] 2 KB 215.

4.6 FURTHER READING

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Halson, R. 'Sailors, sub-contractors and consideration' (1990) 106 *LQR* 183

Halson, R. 'The offensive limits of promissory estoppel' (1999) *LMCLQ* 256

Hird, N. and Blair, A. 'Minding your own business – Williams v Roffey revisited' [1996] *JBL* 254

O'Sullivan, J. 'In defence of Foakes v Beer' [1996] *CLJ* 219

Poole, J. *Textbook on Contract Law* (OUP Oxford)

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Treitel, G.H. 'Consideration: a critical analysis of Professor Atiyah's fundamental restatement' (1976) 50 *Australian LJ* 439.

4.7 EXERCISES

Exercises on consideration

1. Executory consideration is usually only relevant to unilateral contracts, not bilateral contracts.
   a. True
   b. False

2. Complete the following sentence: Consideration must be…
   a. considerable.
   b. sufficient.
   c. energetic.
   d. adequate.

3. Complete the following sentence: Consideration must ***not*** be…
   a. in the past.
   b. in the future.
   c. in the present.

4. Which of the following is good consideration?
   a. A promise to comply with a court order.
   b. A promise not to bore someone.
   c. A promise to do something that you are already contractually obliged to do.
   d. A promise to pay a third party.

5. Which of the following is ***not*** a condition which must be met for the principle in *Williams v Roffey* to be applied?
   a. The contract is for goods or services.
   b. One party (B) doubts that the other (A) will complete his side of the bargain.
   c. B has exerted undue pressure on A.
   d. B promises A an additional payment in return for A's promise to fulfil his obligations.
   e. As a result of A's renewed promise, B gains a benefit or obviates a disadvantage.

6. Which of the following cases is an example of how even relatively trivial things of low economic value can amount to sufficient consideration?
   a. Chappell v Nestlé
   b. White v Bluett
   c. Williams v Roffey

7. Which of the following is ***not*** a condition for the application of the principle of promissory estoppel?
   a. The parties must be in an existing contractual relationship.
   b. The contract must be for goods or services.
   c. One party must promise not to exercise their strict legal rights.
   d. The other party must act in reliance on the first person's promise.
   e. It must be inequitable (unfair) for the person making the promise to go back on it.

8. What principle is illustrated by *Foakes v Beer*?
   a. Consideration must move from the promisor.
   b. Consideration must not be in the past.
   c. Part payment of a debt is not normally good consideration for a promise not to take legal action to recover the remainder of the debt.
   d. Part payment of a debt can be good consideration for a promise not to take legal action to recover the remainder of the debt where it is inequitable for the creditor to go back on his promise.

5 INTENTION TO CREATE LEGAL RELATIONS; CERTAINTY

5.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- Two key requirements for the formation of a valid contract: intention and certainty.
- The purpose of the rules on intention.
- The distinctions between social and domestic agreements and business arrangements.
- The courts' approach to uncertain or incomplete agreements.
- The key case law in this area.

5.2 INTRODUCTION

Once an offer has been accepted, there is an agreement, but not necessarily a contract. In addition to a valid agreement between the parties and good (valid) consideration, for the formation of a contract it is necessary to establish that both parties entered into the agreement **with the intention of creating legal relations**. Furthermore, unless an agreement is constituted in reasonably specific and definite terms, no court will be able to entertain its enforcement. Lack of **certainty**, i.e. where an obligation is not adequately defined or specified in a purported bargain, means there can be no agreement on that particular point (and thus no contract) between the parties.

5.3 INTENTION TO CREATE LEGAL RELATIONS

Simple contracts frequently take the form of mutual promises of some future performance but not every agreement leads to a binding contract which can be enforced through the courts. You may have an agreement to go out for dinner with a friend but generally the parties to such an agreement do not intend to be legally bound. There needs to have been an intention by the parties that the agreement should be legally binding. The absence of such an intention is fatal to the existence of the contract; while the agreement may exist in fact, it will not be recognised by the law, nor will it give rise to legal obligations or consequences.

> 'To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly', Atkin LJ, *Rose & Frank Co. v Compton Bros Ltd* [1925] AC 445.

Note that despite the use of the word 'intention' the courts are rarely concerned with what the parties actually intended. If the issue of intention is disputed, the court applies an objective test. In these circumstances it matters not what the parties had in their minds, but what inference a reasonable man (a 'reasonable bystander') would draw from their words and conduct.

In deciding whether the parties had the intention to enter into a legal relationship, the court will consider the nature and context of the negotiations and the law draws a distinction between social and domestic agreements and agreements made in a commercial context. The court makes use of the device of a 'rebuttable presumption'. A presumption is a supposition that the law allows or requires to be made. 'Rebuttable' in this context means that the supposition will give way to evidence to the contrary.

5.3.1 SOCIAL AND DOMESTIC AGREEMENTS

In the case of casual social intercourse, domestic promises and most undertakings proffered in other non-commercial situations, there will usually be a rebuttable presumption that the parties **lacked** the requisite intent.

Two cases nicely illustrate the courts' approach here, the first concerning a married couple, and the second a mother and daughter:

Balfour v Balfour [1919] 2 KB 571

The defendant husband who was stationed abroad had promised his wife an allowance but failed to pay and she sued for breach of the promise. The court held that his promise was unenforceable as there was no intention to create legal relations.

Jones v Padavatton [1969] 1 WLR 328

A mother promised her daughter an allowance if she went to study to become a barrister. The mother also then purchased a house for her daughter to live in. When her daughter gave up her studies and got married the mother sued for possession.

Held: The parties did not intend to be legally bound by the agreement. The mother was entitled to possession of the house.

The rationale for this position is principally the floodgates argument, namely that the lower courts would be flooded with lawsuits if casual domestic agreements were held to have contractual status. In addition, as we saw in the above cases, the courts are generally reluctant to be involved in domestic arrangements for policy reasons. There is also a need to avoid the courts becoming clogged with trivial disputes, thus bringing the law into disrepute.

"The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law." Warrington LJ *Balfour v Balfour* [1919] 2 KB 571.

The presumption against legal intent can however be rebutted, in particular where a significant financial interest is involved. Where the issue of intention is disputed, the courts will look at the context in which the agreement was concluded. In *Merritt v Merritt* [1970] 1 WLR 1211 for example, where the parties were separating, the court held that the agreement they had made was enforceable as a contract. The husband signed an agreement whereby he would pay the wife £40 per month to enable her to meet the mortgage payments, and if she paid all the charges in connection with the mortgage until it was paid off, he would transfer his share of the house to her. When the mortgage was fully paid she brought an action for a declaration that the house belonged to her. As can be seen from the following quotation, the court clearly felt that the circumstances here differed significantly from those of *Balfour v Balfour.*

"I do not think that [*Balfour v Balfour* has] any application here. The parties there were living together in amity. In such cases their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations." Lord Denning in *Merritt v Merritt* [1970] 1 WLR 1211

The Court of Appeal in this case held that their agreement was binding and distinguished the case from *Balfour v Balfour* on the grounds that the parties were separated. Where spouses have separated it is generally considered that they do intend to be bound by their agreements. The written agreement signed was further evidence of an intention to be bound.

In other social agreements, the presumption may also be rebutted depending on the context, for example, where parties have entered into competitions or where there is a chance to win money, depending on the exact circumstances of the case: as illustrated by *Simpkins v Pays* [1955] 1 WLR 975.

Simpkins v Pays [1955] 1 WLR 975

Facts: The defendant, her granddaughter, and the plaintiff, a paying lodger at their home, entered into a weekly competition, and all contributed one third of the stake which was held in the defendant's name. When they won a prize of £750 the defendant refused to share it, and the plaintiff sued for a third of the prize money.

It was held that the presence of the outsider rebutted the presumption that it was a family agreement and not intended to be binding. The mutual arrangement was a joint enterprise to which cash was contributed in the expectation of sharing any prize.

If the agreement – although made between friends or family – is in a commercial context, the presumption may well be rebutted. For example, in *Snelling v John G Snelling Ltd* [1973] 1 QB 87, three brothers who were directors of a company entered into an agreement relating to the running of the company. The court determined that legal relations were intended.

The distinction between social and domestic agreements and commercial agreements can be very fine as can be seen when comparing the cases *Coward v Motor Insurance Bureau* [1963] 1 QB 359 and *Albert v Motor Insurance Bureau* [1971] 3WLR 291.

5.3.2 BUSINESS AND COMMERCIAL AGREEMENTS

Where negotiations take place in a commercial context there will usually be a strong presumption **in favour of an intention** to establish a binding contract – a presumption that it is not easy to rebut. In *Esso Petroleum Co. Ltd v Customs & Excise Commissioners* [1976] 1 WLR 1, Esso ran a sales promotion scheme for petrol under which they gave away a World Cup coin (with no intrinsic value) to every motorist who purchase four gallons of Esso petrol. The court held that the sales promotion by Esso was a commercial agreement with an intention to create legal relations.

If the parties do not wish to bind themselves to an agreement made in a business setting they must clearly express their contrary intention. In *Rose and Frank Co v Crompton Ltd* [1925] AC 445 it was held that an 'Honourable Pledge Clause' expressly denying legal jurisdiction fulfilled this purpose. Similarly, the 'binding in honour only' clause in the agreement in *Jones v Vernon Pools Ltd* [1938] 2 All ER 626 was found to have rebutted the presumption.

The burden of proof is on the person seeking to rebut the presumption i.e. to establish the lack of intention to create legal relations. In *Edwards v Skyways* [1964] 1 WLR 349, Edwards was employed as a pilot by Skyways. He was about to be made redundant and was promised an 'ex gratia' payment, but Skyways then refused to pay up. When sued for payment, they argued that there was no intention to create legal relations. The court determined that the agreement had been made in a commercial context and that therefore Skyways had to rebut the presumption – which they had failed to do.

5.4 CERTAINTY

An enforceable contract requires certainty of terms. That is to say, for an agreement to be a contract its terms must be clear and complete on all essential points. It must be apparent what the terms of the contract are. If the terms of the contract are uncertain or incomplete, the parties cannot have reached an agreement in the eyes of the law. An 'agreement to agree' does not constitute a contract, and an inability to agree on key issues such as the price may cause the entire contract to fail.

"An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms." Beale, H.G. (editor), *Chitty on Contracts* (London: Sweet and Maxwell, 2015)

In *Gunthing v Lynn* (1831) 2B & AD 232 the offeror undertook to pay an additional sum for a horse at a later date if it proved 'lucky' in the meantime. When the other party sought to enforce this promise he was unsuccessful. The term 'lucky' is far too vague to be susceptible to judicial enforcement. Did it mean the horse had to win a race, or two races, or all its races, or just to place well?

Thus, even though the parties may appear to have made an agreement, the courts may refuse to enforce it if there appears to be uncertainty about what has been agreed, or if essential terms require further agreement between the parties. In *G Scammell and Nephew Ltd v Ouston* [1941] AC 251 for example, the parties had agreed to the supply of a lorry on 'hire purchase terms'. The House of Lords held that in the absence of any other evidence of the details of the hire purchase agreement this was too vague to be enforceable, and there was therefore no contract. Similarly, in *Loftus v Roberts* [1902] 18 TLR 532, an agreement to employ an actress at a 'West End salary' was too vague and unenforceable as an essential term of the contract, the salary, was missing.

However, as the authors of *Chitty on Contracts* note, "*the courts do not expect commercial documents to be drafted with strict legal precision*." If a vague phrase in an agreement can be deleted and still leave a perfectly workable agreement, the courts will ignore it. This was the position in *Nicolene Ltd v Simmonds* [1952] 2 Lloyd's Rep, where the contractual documentation contained the statement 'we are in agreement that the usual conditions of acceptance apply.' Since there were no 'usual conditions,' it was held that that this was simply a meaningless phrase, which was severable from the rest of the contract and could be ignored. There was nothing left open which needed to be determined, and the contract was therefore enforceable.

If there is no *consensus ad idem* (agreement on identical terms) between the parties then there is no contract for the court to interpret; the courts are reluctant to write the parties' agreement for them. This can arise where perfectly clear words are used but where some significant part of the contractual terms is missing. In *May and Butcher v R* [1929] UKHL 2, for example, the agreement provided that the price and the date of payment under a contract of sale, was to be 'agreed upon from time to time.' The House of Lords held that there was no contract in this case because the agreement was vague and incomplete.

That said, in certain circumstances and in the context of a commercial agreement in particular, a court may be reluctant to conclude that a purported agreement is void on grounds of uncertainty. Generally the courts do endeavour to make the agreement work. If satisfied that the parties intended to create a binding agreement, the court may enforce a contract where an apparently ambiguous term can be made certain by obvious implication, by reference to a previous course of dealings between the parties, or by virtue of common usage within the relevant trade.

Hillas & Co. Ltd v Arcos Ltd [1932] UKHL 2

Arcos supplied Hillas with timber 'of fair specification'. The contract contained an option to buy further timber the following year, but failed to specify size of type.

Held: Uncertainty could be resolved by the court by reference to previous dealings and custom. Both parties had experience in the trade and had completed similar bargains in the past thus each would have known each other's intentions at the time. Therefore, the option contract was valid.

Per Lord Tomlin: Courts do not wish "to incur the reproach of being the destroyer of bargains".

Per Lord Wright: "Words are to be interpreted so that subject matter is preserved not destroyed".

In some circumstances the courts will more readily imply or infer a term, particularly when the parties have relied upon an agreement. It may be that the agreement provides a mechanism or machinery for resolving an aspect which has been left uncertain. In relation to price, the courts will often to be prepared to assume that a 'reasonable price' was intended. They may also give effect to an agreement where property is to be valued by an independent valuer, or where the price is to be determined by reference to the prevailing market.

5.5 FURTHER READING

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5.6 EXERCISES

Exercises on intention

1. It is presumed the parties do not intend to create legal relations in
   a. Business agreements
   b. All agreements
   c. Social and domestic agreements
   d. Commercial agreements

2. In *Rose & Frank v Crompton* the agreement was
   a. Not binding as it was a domestic agreement
   b. Binding as it was a written agreement
   c. Not binding as there was a binding in honour clause
   d. Binding as it was a business agreement

3. In *Simpkins v Pays* the agreement to share the winnings was
   a. Not binding as it was a social and domestic agreement
   b. Binding because it was a commercial agreement
   c. Binding because the grandmother acted unconscionably
   d. Binding because there was a third party to the agreement

4. In *Merritt v Merritt*, the agreement was
   a. Not binding as it was a social and domestic agreement
   b. Not binding because the husband was in a relationship with another woman
   c. Binding because the couple had separated and had a written agreement
   d. Binding because it was a commercial agreement

6 THE TERMS OF A CONTRACT

6.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- The distinction between terms and representations.
- The distinction between express and implied terms.
- The three categories of terms: conditions, warranties and innominate terms.
- Onerous/unusual terms.
- The key case law in this area.

6.2 INTRODUCTION

The contents of a contract are known as terms or clauses, and even the simplest of contracts will have terms stating the rights and obligations of the parties. The main terms usually consist of the price paid and the subject matter of the contract – for example, the goods or services provided.

It is not a requirement that terms are in written form in simple contracts – the terms may be either wholly oral, wholly written, or partly oral and partly written – although writing is required in certain types of contract such as contracts for the sale of land. It is also common for businesses to have standard form written terms which can be rather lengthy!

The parties may agree that they have made a binding agreement, but disagree about the content. It will then fall upon the courts to establish what the terms of the agreement are – these will define the parties' rights and liabilities.

Terms may either be **express** (made by the parties themselves) or **implied** from various sources. Where a contract is formed orally it may be particularly difficult to establish which statements made in negotiating the contract amount to terms and which are mere **representations**. It is important to know whether a particular statement is a contractual term or a representation as this will determine the appropriate cause of action and remedy available.

Terms may be classed as either **conditions**, **warranties** or **innominate terms** – again, it is necessary to know which category the term falls into as this dictates its importance and this in turns dictates what the effect of breaking that term will be.

Clauses which attempt to exclude or limit one of the party's liabilities under the contract are known as **exemption clauses**, and these will be looked at in the next chapter.

6.3 TERMS AND REPRESENTATIONS

How are terms incorporated into a contract? At first it looks like a silly question, because we would usually expect them to be explicitly included in the contract but not all statements the parties make will be deemed to be terms of the contract.

A statement might be a sales boast (a 'puff,' e.g. 'Red Bull Gives You Wings'), or a representation or a term. The basic test to determine whether the statement is a contractual term or mere representation is one of intention – which is an objective test. In addition, a number of relevant factors are taken into account:

Importance of the statement

The more importance attached to the statement by the parties then the more likely it is that it is a term. Where for example, the statement is of such importance that one of the parties would not otherwise have entered into the agreement, it will most probably be a term, not a mere representation. In *Bannerman v White* (1861) 10 CBNS 844, the claimant purchaser of hops asked the vendor during pre-sale negotiations whether sulphur had been used in the treatment of the hops and stated that if it had, he would not purchase them. The vendor assured him that sulphur had not been used and the contract was made. However, in fact the hops had been treated with sulphur. The court decided that the issue of use of sulphur was vital to this contract and that therefore the statement constituted a term. The claimant's action for breach of contract was successful.

Reliance

A statement is likely to be a term where the statement maker accepts responsibility for the truth of the statement. Contrast these two cases:

Schawel v Reade [1913] 2 IR 64

The claimant was purchasing a horse from the defendant. The claimant went to see the horse and told the defendant that he wished to use the horse for stud purposes. Whilst the claimant was examining the horse, the defendant said, 'You need not look for anything; the horse is perfectly sound. If there was anything the matter with the horse I would tell you', and told him there was no need to get a vet to check him out. In reliance of these statements the claimant purchased the horse which turned out to be unfit: it had a hereditary eye disease and was therefore not able to be used as a stud.

Held: The statement was a contractual term. The defendant had assured him he could rely on his word and the claimant had communicated the purpose for which the horse was to be used. The defendant was thus in breach of contract.

Ecay v Godfrey [1947] 80 Lloyds Rep 286

The defendant told a prospective buyer that a boat was sound, but suggested the buyer have a survey done on the boat. The boat turned out to have defects. The court held that the statement that the boat was sound was not a term. The statement was not sufficiently emphatic to amount to a term and the advice to have the boat surveyed demonstrated the defendant did not wish the claimant to rely on the statement.

Timing

Generally, the longer the lapse of time between making the statement in negotiation and creation of the contract the less likely the statement will be a term. Thus in *Routledge v Mckay* [1954] 1 WLR 615 the Court of Appeal held that a statement relating to the age of a motorbike for sale made on 23 October was not a term of the written contract concluded a week later; the lapse of time between the making of the statement and entering the contract had given the claimant the opportunity to check the statement.

Relative knowledge of the parties

Where one of the parties to an agreement has special knowledge or skill the statements made **by** them will be terms but statements made **to** them will not. Contrast these two cases:

Oscar Chess v Williams [1957] 1 WLR 370

A car dealer and the defendant agreed on a trade-in of the defendant's old car. The registration book gave the date of the car as 1948 and the defendant confirmed this date in good faith (he was unaware that the log-book was forged). It was later discovered the date should have been 1939, not 1948, and the car was therefore worth less. It was held that the age of the car was not a term of the contract and therefore there was no breach of contract.

Dick Bentley Productions Ltd v Harold Smith Motors [1965] 1 WLR 623

The defendants, Harold Smith Motors, told Mr. Bentley a car he was interested in purchasing had done 20,000 miles, and Bentley bought the car. After purchase however, it became clear the car had done more than this mileage. It was held that the representation about the mileage did in fact amount to a term of the contract.

These two cases illustrate the importance of the relative knowledge of the parties in determining whether a statement is a term or not. Where a statement is made without particular knowledge or expertise (as in the case of the defendant in *Oscar Chess*), it is less likely to be a term. However, statements made by parties with specific expertise (as in *Dick Bentley Productions Ltd*) are more likely to be able to be relied upon in court. The distinction between a term and representation is significant because if a statement is not a term of the contract the injured party will be limited to the remedies for misrepresentation if the statement is untrue, whereas if it is a term he can sue for breach.

The parol evidence rule

Where the contract has been put into writing only the terms included in the written document are terms any verbal statements will be representations.

6.4 EXPRESS TERMS

Express terms are words, provisions and conditions that have been specifically mentioned and agreed by both parties at the time the contract is made. Where the terms of a contract are disputed, the courts will have to decide whether a particular term is incorporated into the contract. Parties may also disagree as to what a clause is intended to mean.

As we have already seen, contracts can be made verbally, in writing or inferred from conduct. Courts generally try to look at what the parties intended objectively. Where a contract is oral the judge has to determine what the parties said, while if it is in writing, the document will be strong evidence of the parties' intentions and will assist the court to ascertain the precise terms.

The issue that can arise is where one party alleges the written document does not fully represent the entire contract and that there is extrinsic evidence, either oral terms or another written document containing terms. In theory the "parol evidence" rule will apply i.e. the parties will normally be bound and limited to the written evidence of their agreement. However, it is possible to circumvent the parol evidence rule by construing the contract as partly written and party oral (*Evans v Merzario* [1976] 1 WLR 1078) or by using the device of the collateral contract.

6.5 IMPLIED TERMS

Sometimes a term which has not been mentioned by either party will nonetheless be incorporated in the contract. Terms like this are called implied terms. The purpose of implied terms is often to supplement a contractual agreement in order to make the deal commercially effective, to achieve fairness between the parties or to relieve hardship.

Terms may be implied into a contract by **statute**, **custom** or by **the courts**. An implied term is binding to the same extent as an express term.

6.5.1 STATUTE

When implied by statute, Parliament may well make certain terms compulsory. The examples are numerous. For instance, the National Minimum Wage Act 1998, provides that in any contract for work, the worker must be paid according to a minimum wage set by Parliament.

One of the most important statutes which implies terms is the **Sale of Goods Act 1979** (as amended by the Sale and Supply of Goods Act 1994 and the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045).

The key implied terms of a contract under The Sale of Goods Act 1979

Section 12: the person selling the goods has the legal right to sell them.

Section 13: if you are selling goods by description, e.g. from a catalogue or newspaper advertisement, then the actual goods have to correspond to that description.

Section 14: the goods must be of "satisfactory quality" – that is, they should meet the standard that a reasonable person would regard as "satisfactory". Also, if the buyer says they are buying the goods for a particular purpose, there is an implied term that the goods are fit for that purpose.

Section 15: if you are selling the goods by sample – you show the customer one bag of flour and they order 50 bags – then the bulk order has to be of the same quality as the sample.

In addition, under the **Supply of Goods and Services Act 1982** there is an implied term that the supplier of any service will carry it out with reasonable care and skill (s13) and within a reasonable time if no time is fixed (s14) for a reasonable charge if no price is fixed (s15).

It is generally not possible to exclude these terms against a consumer: Unfair Contract Terms Act 1977, and now s31 Consumer Rights Act 2015.

6.5.2 CUSTOM

Some terms are generally known to be included in contracts in a particular trade or locality. Amongst bakers, for example, 'one dozen' means thirteen – they do not have to include a term in every baker's contract specifying that.

Terms may be implied on the grounds of a custom of a relevant trade where the custom is certain, reasonable and notorious, as can be seen from the following case:

British Crane Hire Corp v Ipswich Plant Hire [1975] QB 303

Both the claimant and defendant were in the business of hiring out plant machinery. The defendants needed a crane urgently so contacted the claimant to hire one. The contract between the parties was concluded over the phone and a copy of the terms and conditions of hire were handed to the defendant on delivery of the crane – but the defendant did not read them.

While being used by the claimant, the crane sank in marshland. It was accepted that this was not the fault of either of the parties. The issue here concerned who was responsible for paying to recover the crane. The contract specified that the risk of hire remained with the hirer but the defendant claimed he was unaware of this as he had not read the contract when handed to him.

Held: While the defendant was unaware of the term at the time the contract was made, the court was willing to imply the term into the contract as both parties were in the business of plant hire and it was known to both that the use of such terms was prevalent in the trade.

6.5.3 THE COURTS

The courts may imply terms either to reflect the parties' presumed intentions and/or to give business efficacy to the contract (terms implied ***in fact***) or into a contract of a particular type on the basis that the term is necessary for that type of contract (terms implied ***in law***). But the courts are generally reluctant to imply terms in to a contract at common law. They take the view that it is the parties' role to agree the terms of their particular agreement; it is not the role of the courts to rewrite a contract for the parties. Freedom of contract prevails. Thus the courts will only imply terms when it is **necessary** for them to do so (*Equitable Life Assurance Society v Hyman* [2002] 1 AC 408) – not simply when it would be **reasonable**.

6.5.3.1 TERMS IMPLIED IN FACT

Here the term is being implied as a matter of fact to give effect to what the courts perceives to be the unexpressed intention of the parties; terms which are implied as fact are those which are imputed from the intentions of the parties.

Two tests have evolved in the courts in order to determine whether to imply a term in fact: the **officious bystander** test and the **business efficacy** test.

Officious bystander test

This occurs where something is so obviously included that it does not need to be explicitly mentioned in the contract.

MacKinnon LJ in *Shirlaw v Southern Foundries* [1939] 2 KB 206:

"…something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common 'Oh, of course!'"

For example, if I agree to pay you '1000 pounds' for a car, it probably would not occur to us to write down that we mean pounds sterling, as opposed to any other sort of pound, since it would be obvious to both of us. The following case nicely illustrates how this works in practice:

Shell UK v Lostock Garage Ltd [1976] 1 WLR 1187

The defendants (Lostock Garage) had entered an agreement with the claimant (Shell) by which they would only buy and sell petrol from Shell for 20 years in return for a discount. However, after entering this agreement, a petrol price war ensued and Shell introduced a scheme to subsidise petrol at other garages (but not at Lostock's). Lostock could not compete with these prices and so obtained petrol from a third party. Shell brought an action for breach of contract and Lostock asked the court to imply a term that Shell would not abnormally discriminate against them in supplying other garages in the locality.

Held: The court refused to imply the term as it was not necessary, since the contract made business sense without it, nor was it obvious that Shell would have agreed to it at the outset.

Per Lord Denning MR: "If Shell had been asked at the beginning: 'Will you agree not to discriminate abnormally against the buyer?' I think they would have declined. It might be a reasonable term, but it is not a necessary term. Nor can it be formulated with sufficient precision."

The key issue for the court in this case was that the term that Shell wanted to be implied into the contract was not obvious – as Shell may not have agreed to it.

But note, the term has to have been obvious to both parties – it is not enough to show that one party thought it was included, nor can the test be used where one of the parties is unaware of the term that it is sought to imply into the contract. Moreover, it cannot be applied if there is uncertainty as to whether both the parties would have agreed to the term which has been omitted from the contract, nor simply because the contract would have been more reasonable with the added term.

Business efficacy test

Under this test, the term has to be implied because it is required to make the contract workable. The test was first articulated in *The Moorcock* (1889) 14 PD 64:

> According to Bowen LJ, in *The Moorcock*, the implying of terms "...is founded upon the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving efficacy to the transaction".

In this case there was a contract between the parties that the plaintiff's ship could load and unload at the defendant's wharf of the Thames. The ship became damaged due to uneven surfaces and rocks on the river bed. The claimant sought to claim damages from the defendant and the defendant argued that there was no provision in the contract warranting the condition of the river bed. The court implied a term in fact, namely that the defendants would take reasonable care to see that the berth at the wharf was safe because the term was necessary to give the contract business effect.

In order for a term to be implied it must be obvious and necessary to give business efficacy to the agreement; merely being 'desirable and reasonable' will not suffice. A term will only be implied in fact if its absence would render the contract incomplete. If however the contract makes business sense without the term, the courts will not imply a term.

More recently, in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, Lord Simon explained the conditions required to imply a term into a contract as a matter of fact as follows:

> "(1) It must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract".

6.5.3.2 Terms implied in law

Whilst terms implied in fact are based on the idea that such a term emanates from the common implied intention of the parties, terms implied by law are obligations that arise within the contract **regardless** of the intentions of the parties or the facts of a particular case. This is about general considerations of public policy – the courts are laying down, as a matter of law, how the parties to certain types of contract ought to behave.

> "When it implies a term in a contract the court is sometimes laying down a general rule that in all contracts of a certain type – sale of goods, master and servant, landlord and tenant and so on – some provision is to be implied unless the parties have expressly excluded it. In deciding whether or not to lay down such a prima facie rule the court will naturally ask itself whether in the general run of such cases the term in question would be one which it would be reasonable to insert". Lord Cross *Liverpool City Council v Irwin* [1977] AC 239.

Liverpool City Council v Irwin [1977] AC 239

Liverpool City Council owned a tower block that was in disrepair – the lifts were not working, and the stairwells unlit. In protest at the poor condition of the common parts of the building, the defendant tenant withheld rent and Liverpool City Council sought possession of the flat while the defendant counterclaimed for damages for breach of an obligation to repair. However, the tenancy agreement did not mention any obligation to repair. In fact, the tenancy agreement only imposed obligations on the tenant with no mention of the obligations of the landlord. The defendant asked the court to imply a term that the council had an obligation to repair the common parts of the block of flats.

Held: The House of Lords were willing to imply a term, namely an obligation on the landlord 'to take reasonable care to keep in reasonable repair and usability the common parts'. Such a term would be a necessary incident of all tenancy agreements in which tenants are granted the use of communal stairways, corridors and lifts etc. (However, the court decided that in this case there was no breach of this duty).

Once a term is implied by law and the courts find for its existence in the particular circumstances of a case, then that case becomes the authority for the inclusion of the term in all subsequent similar cases.

6.6 CLASSIFYING TERMS: CONDITIONS, WARRANTIES AND INNOMINATE TERMS

Once it has been determined that a statement is a term, it may be important to decide what type of term it is, as the remedy will vary for breach of the term according to how significant a term it is. There are three categories: conditions, warranties and innominate terms.

6.6.1 CONDITIONS AND WARRANTIES

Conditions are important terms which are essential to the main purpose of a contract; they are said 'to go to the root of the contract'. If a condition is broken, the injured party is entitled to treat the contract as at an end (i.e. as 'repudiated') as well as to claim damages. **Warranties** are less important terms; terms which are not central to the contract. A breach of warranty merely gives rise to the right to sue for damages i.e. there is no right to treat the contract as at an end.

The distinction between a condition and a warranty is demonstrated by contrasting these two cases:

Poussard v Spiers & Pond (1876) 1 QBD 410

Madame Poussard was under a contractual obligation to perform during the entire run of an operetta. She did not arrive until one week of the run, when a substitute had been taken on. It was held that the obligation to perform as from the first night was a condition, the opening night (which she had missed) was the most important performance as all the critics and publicity would be based on this night. Breach of the condition entitled the producers to dispense with her services (ie to repudiate the contract).

Bettini v Gye (1876) 1 QBD 183

A singer was under a contractual obligation to sing in a series of concerts and take part in six days of rehearsals before the first performance, but she was three days late. The court held that the undertaking to take part in the rehearsals was a warranty and not a condition as missing the rehearsals did not go to the root of the contract. The singer's breach did not allow the contract to be repudiated, it only entitled the other party to damages.

Contracts will always contain different types of terms (said or written), some more important than others. It is the court that decides whether a term is a condition or a warranty. The court looks at each case on its own merits. In making a decision as to whether a term is a condition or a warranty, the court will consider all the surrounding circumstances, including the seriousness of the consequences if the contract is held to be non-binding, and the intentions of the parties at the time they made the contract (see *Bannerman v White* (1861) 10 CB NS 844).

Just because a term is described in the contract or by the parties as a condition or warranty does not necessarily mean that it will be regarded as such by the court. In *Schuler AG* v *Wickman Machine Tool Sales* [1974] AC 235 a term expressly stated in the contract to be 'a condition of this agreement' provided for weekly visits over a four and a half year period to six named firms (1,400 visits).

Per Lord Reid in *Schuler AG v Wickman Machine Tool Sales*, "Schuler maintains that the use of the word "condition" is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word "condition" is an indication – even a strong indication – of such an intention but it is by no means conclusive".

Despite the fact the contract had expressly stated the term was a condition in this case, the House of Lords held that it was only a warranty. The House of Lords did not believe that a single breach e.g. the failure to make one visit, should entitle the other party to bring the contract to an end.

6.6.2 INNOMINATE TERMS

It may be impossible to classify a term neatly in advance as either a condition or a warranty. Some undertakings may occupy an intermediate position, in that the term can only be assessed in the light of the **consequences** of a breach. If a breach of the term results in severe loss and damage, the injured party will be entitled to repudiate the contract; where on the other hand, the breach involves minor loss, the injured party's remedies will be restricted to damages. These intermediate terms have become known as **innominate terms**.

The concept of *innominate term* was introduced in the following landmark case:

Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26

A ship was chartered to the defendants for a two year period. Clause 1 of the contract described the vessel as 'being in every way fitted for ordinary cargo service'. However, the ship broke down on a number of occasions and her engines were antiquated. Consequently the ship was out of service for a 5 week period and then a further 15 week period. The defendants treated this as a breach of condition and ended the contract. The claimants brought an action for wrongful repudiation arguing the term relating to seaworthiness was not a condition of the contract.

Held: In this case there was no breach of a condition and therefore, no right to treat the contract as repudiated.

Rather than seeking to classify the term itself as a condition or warranty, the court in *Hong Kong Fir Shipping* determined that it was important for a court to consider **the effect** of the breach and ask whether the breach has substantially deprived the innocent party of the whole benefit of the contract.

Diplock LJ in *Hong Kong Fir Shipping*, "There are…many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties"…Of such undertakings all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract".

Only where this is answered affirmatively is it to be a breach of condition. In this case, twenty weeks out of a two year contract period did not substantially deprive the defendants of whole benefit and therefore they were not entitled to repudiate the contract.

Innominate terms can therefore be described as terms which may be broken in a number of ways, depending on the **effect of the breach**. If the effects are serious the breach will be repudiatory, whereas if the effects are not serious, the non-breaching party will be limited to a remedy in damages. The court will look at the consequences if the term is broken to help decide whether the effect is serious, namely, has the innocent party been substantially deprived of the whole benefit of the contract?

Introduction or recognition of this category of terms has given more flexibility to the law, but has also been criticised as creating more uncertainty – one has to 'wait and see' the effect of the breach.

6.7 ONEROUS OR UNUSUAL TERMS

If one party wishes to rely on a term which is particularly onerous or unusual and which would not generally be known to the other party, then it must be fairly and reasonably brought to the other party's attention. This is known as the 'red hand rule' and provides that the more unreasonable the clause is, the more notice of the clause has to be given.

> **"I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient." *J Spurling Ltd v Bradshaw* [1956] EWCA Civ 3, per Denning LJ.**

6.6 FURTHER READING

Beale, H.G., Bishop, W.D. & Furmston, M.P. *Contract – Cases and Materials* (Butterworths)

Elliot, C. & Quinn, F. *Contract Law* (Pearson)

Phang, A. 'Implied Terms Again' [1994] *JBL* 255

Poole, J. *Textbook on Contract Law* (OUP Oxford)

Poole, J. *Casebook on Contract Law* (OUP)

Koffman, L. & MacDonald, E. *The Law of Contract* (OUP)

McKendrick, E. *Contract Law* (Palgrave Macmillan)

McKendrick, E. *Contract Law – Text, Cases and Materials* (Palgrave Macmillan)

6.7 EXERCISES

Exercises on terms

1. In *Oscar Chess v Williams*, the statement relating to the year of the car was
   a. A term because the defendant knew the date of the car was incorrect.
   b. A representation because the defendant had checked the details.
   c. A term as it was an important provision of the contract.
   d. A representation as the claimant car dealer had the greater expertise.

2. If a statement is a representation the claimant cannot sue for breach of contract
   a. True
   b. False

3. In *Bannerman v White* the statement that the hops had not been treated with sulphur was
   a. A representation because it was made orally.
   b. A representation because it was not an important term.
   c. A term because the statement was in writing.
   d. A contractual term because C had communicated the importance of the term to D.

4. In *Ecay v Godfrey* the statement that the boat was sound was
   a. A term because of the importance of the statement.
   b. A representation because it was made orally.
   c. A representation as the seller advised him to get the boat surveyed.
   d. A term because the contract was entered immediately after the statement.

5. In *Poussard v Spiers & Pond* there was a breach of condition
   a. True
   b. False

6. A condition is
   a. A major term of the contract which goes to the root of the contract.
   b. A term of the contract which is not central to the existence of the contract.
   c. Something you should seek urgent medical attention for.
   d. A representation.

7. If there has been a breach of warranty, the innocent party may
   a. Repudiate the contract and claim damages
   b. Claim damages only
   c. Repudiate the contract only
8. If the parties agree that a term is a condition, the courts will always treat it as a condition
   a. True
   b. False

9. Which case established the innominate term approach?

10. What is the innominate term approach?

7 EXEMPTION CLAUSES

7.1 LEARNING OUTCOMES

Your goals for this chapter are to learn about:

- The rules governing the validity of exemption clauses (also known as exclusion or limitation clauses)
- The principles relating to the incorporation of an exemption clause.
- The principles relating to the judicial construction (interpretation) of an exemption clause.
- The role of statutory provisions in limiting the effect of exemption clauses.
- The key case law in this area.

7.2 INTRODUCTION

Parties to a contract may insert exemption clauses into their contract – but what exactly is an exemption clause?

An exemption clause is a clause which attempts to exclude (exclusion clause) or limit (limitation clause) a party's liability.

An example of an exemption clause

'The vendor shall not be under any liability to the Purchaser for any defects in the goods or for any damage, loss, death or injury.'

Exemption clauses can be found on notices on the wall, on the back of tickets, on shop counters and in many contracts we may enter. For example, if you join a health club or gym, it is common for the contract to say that the gym owner will not be responsible if you are injured while exercising.

In addition, exclusion clauses are usually found in what are known as *standard form contracts*. These are contracts used in business whereby the same (i.e. standard) form is used for all customers and contracts.

Some clauses seek to exclude liability altogether, while others put a limit on liability, perhaps by capping the amount payable in damages on a breach, restricting the types of loss recoverable or the remedies available, and exclusion clauses can play a useful role in allocating the risks between the parties. However, they can also be used as a means of imposing onerous terms on the weaker party to a contract.

The courts aim to balance the general principle of freedom of contract against concerns that a party who freely undertakes a binding contractual obligation should not be equally free to absolve itself from his attendant duties and liabilities. To help strike this balance, English law has developed statutory rules and common law principles to limit the operation of exclusion clauses.

What we will be looking at in this chapter is whether a term purporting to exclude or limit a party's liability for breach is effective i.e. has become a term of the contract.

For an exclusion clause to be effective there are three tests that have to be passed:

1. Incorporation: Has the exclusion clause been incorporated into the contract?
2. Construction: Does the exclusion clause effectively cover the breach?
3. Legislation: Is the clause valid under The Unfair Contract Terms Act 1977, the Unfair Terms in Consumer Contract Regulations 1999/the Consumer Rights Act 2015?

7.3 INCORPORATION

The courts have traditionally held that exclusion clauses only operate if the exemption clause has been effectively incorporated as a term of the contract. Because exemption clauses can be oppressive, the party seeking to rely on an exclusion clause must establish that it has been incorporated into the contract i.e. has become a term of the contract. Unless the exclusion or limitation clause is incorporated into the relevant contract, it will be unenforceable.

There are three methods of incorporation. These are: by signature, notice or a course of dealing.

7.3.1 SIGNED DOCUMENTS

When a document containing contractual terms is signed, then the party signing it is bound – ***regardless of whether s/he has read the document or not***. In *L'Estrange v Graucob* [1934] 2 KB 394, L'Estrange bought a cigarette vending machine from the defendants. She signed a printed contract of sale which contained an exemption clause in very small print on poor quality paper. It was held that as she had signed the contract she was bound by its terms. It was irrelevant she had not read it.

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not," Scruton LJ in *L 'Estrange v Graucob* [1934] 2 KB 394.

But the situation would be different if misrepresentations were made – as the following case illustrates:

Curtis v Chemical Cleaning Co [1951] 1 KB 805

Curtis took a wedding dress for dry cleaning and signed a document which exempted the cleaners from liability. However, the cleaner had misrepresented the effect of the document by stating that it simply meant they would not accept liability for damage to sequins or beads.

Held: The statement made by the cleaners misrepresented the effect of the clause, and therefore the cleaners could not rely on it to exclude their liability for damage to the dress despite the signature.

Thus, if there has been a misrepresentation of the terms, the clause will not be effective.

7.3.2 UNSIGNED DOCUMENTS AND NOTICES

Where the parties are dealing on unsigned business terms, there can be difficulty in deciding whether one party's terms are incorporated in the contract when it was actually formed. In the absence of a signature, for a written term to be considered incorporated by the courts, it must fulfil three requirements. Firstly, the term must be contained in a document intended to be contractual. Secondly, reasonable steps must be taken by the party who is inserting the term to bring it to the attention of the other party. Thirdly, notice of the term has to be given before or at the time of the formation of the contract. In addition, there are special requirements where the term is particularly onerous or unusual.

The first thing to be established is whether the clause is contained in the **type of document** which would be expected to contain contractual terms – if not, then the clause will not be incorporated. In *Chapelton v Barry UDC* [1940] 1 KB 532 for example, Chapelton had hired two deckchairs, and was issued with 'tickets' for the hire. When one of the deckchairs collapsed injuring Chapelton, the defendant Council sought to rely on an exemption term on the back of the ticket. The court held that the clause did not form part of the contract. The document was merely a receipt (acknowledging payment for the hire of the deckchair) and was not a contractual document. As a reasonable person would regard the ticket as nothing more than a receipt and would not expect it to contain contractual terms it was not effective to give the hirer notice of the terms.

"If a man does an act which constitutes the making of a contract, such as taking a railway ticket, or depositing his bag in a cloak-room, he will be bound by the terms of the document handed to him…; but if he merely pays money for something and receives a receipt for it…he cannot be deemed to have entered into a contract in the terms of the words that his creditor has chosen to print on the back of the receipt, unless, of course, the creditor has taken reasonable steps to bring the terms of the proposed contract to the mind of the man". MacKinnon LJ in *Chapelton v Barry UDC* [1940] 1 KB 532

If the document is the correct type, the general rule is that any exemption clause which has **not reasonably been brought to the notice** of the offeree **before** the time of acceptance of the offer will **not** be incorporated into the contract. Therefore, the party seeking to rely upon the exclusion clause has to take **reasonable steps** to bring the exemption clause to the notice of the other party for example, by inserting the words "see back" on the front of a ticket. The test is, 'Has there been reasonably sufficient notice of the clause'?

Parker v S E Railway (1877) 2 CPD 416

Parker left a bag in the luggage office of SE Railway, paid the required fee and received a ticket in return. The ticket stated "see back" and on the back there was an exemption clause limiting the company's liability in the case of lost luggage to £10. Parker's bag lost and was worth more than £10 and he sought to claim back the actual financial loss.

Held: The clause on the ticket limited the company's liability as stated as they had given reasonable notice of the clause.

But note: the test is objective i.e. there is only a requirement to take reasonable steps to bring the clause to the attention of a reasonable person – so if the recipient is illiterate (*Thompson v LMS Railway* [1930] 1 KB 41) this will make no difference (unless the disability was known).

The next factor to be considered is timing. Timing of notice of the clause is crucial: it must be given **before/at the time** the contract is made:

Olley v Marlborough Court Hotel [1949] 1 KB 532

A couple booked into a hotel. When they had entered their room they saw a notice stating that the hotel accepted no liability for loss of property. Their fur coats were subsequently stolen.

Held: The notice was ineffective because it was too late to be incorporated as a term of the contract as the contract had already been formed at the reception desk.

Thornton v Shoe Lane Parking [1971] 2 QB 163

Thornton drove up to an automatic barrier at a car park where a machine dispensed the ticket, which stated that it was 'issued subject to conditions displayed on the premises'. The conditions (the exemption clause) was found inside the car park. When Thornton later returned to the car park he was injured. The defendant sought to rely on the exemption clause.

Held: The contract for the use of the car park was concluded before the motorist entered the car park ie the machine itself constituted the offer, and the acceptance took place when Thornton put the money into the machine. Therefore, notice of the exemption clause on the ticket was too late as it was after the contract had been concluded and therefore could not be incorporated into the contract.

It is clear from the above two cases that clauses introduced after the contract will not be incorporated. If the term was not brought to the party's attention it cannot be said that they had accepted the term. Therefore the term will not be part of the agreement.

The next consideration for the courts is how unusual the clause is. The rule is that the more onerous or unusual a clause is, the higher the degree of notice that will be required. As was noted in the previous chapter on terms, this principle has become known as the '**red hand rule**'.

Interfoto Picture Library v Stiletto Visual Programmes [1989] QB 433

The defendants Stiletto were an advertising agency. They borrowed transparencies from Interfoto picture library. The delivery note stated that after 14 days pictures would incur a fee of £5 per picture per day until returned. The defendants did not return the pictures for almost a month and as a result Interfoto demanded payment of £3,783.50 for their hire.

Held: Stiletto did not have to pay; the term was 'very onerous' and attention had to be drawn to it very explicitly. This had not been done and therefore the term was not incorporated.

7.3.3 COURSE OF DEALING

When the parties have dealt with each other on a regular basis on standard terms, even if notice of the term was not given on the particular occasion, the term may be incorporated into the contract on the basis of the previous course of dealing.

Spurling Ltd. v Bradshaw [1956] 1 WLR 461

The parties had been doing business for many years. The defendant Bradshaw regularly stored barrels of orange juice at Spurling's warehouse and received a document from Spurling which acknowledged the receipt of the barrels and which also exempted liability for loss or damage.

The juice was ruined and Bradshaw claimed breach of contract through negligent storage. Spurling sought to rely on the exemption clause and Bradshaw argued that the clause was not incorporated as it was received after the conclusion of the contract.

Held: The clause was incorporated into the contract by the course of previous dealings.

However, there must be a **consistent** course of dealing and this cannot be established if the parties have only dealt with each other on a few occasions (particularly if it is a consumer contract). A good example of this rule is *Hollier v Rambler Motors* [1972] 2 QB 71 which can be contrasted with *Spurling* above.

Hollier v Rambler Motors [1972] 2 QB 71

Hollier left his car for repairs at a Rambler Motors garage. The garage damaged the car during the repair work and sought to invoke the exclusion clause excluding liability for any damage to his car through previous dealings. Hollier had used the garage before (3 times in 5 years) and in fact had previously signed an invoice containing the same exemption clause (although this time he had not signed it as the contract had been formed over the phone).

Held: Their previous course of dealing was not sufficient to justify the inclusion of such a clause; the exemption clause was not incorporated and the garage had to pay for the damage.

Hollier v Rambler Motors also demonstrates how the courts are less willing to find incorporation through previous dealings where one party is a consumer.

It is also important to note that the previous dealings must have been consistent, in other words, the parties must always have contracted on the same terms. In *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 165 for example, where sometimes a note had been signed containing an exemption clause and sometimes not, the court found that the parties' past dealings were not appropriate to incorporate the clause – since their previous transactions were limited and not consistent.

7.4 CONSTRUCTION

Once it has been established the exemption clause has been incorporated into the contract, the second issue is construction (interpretation). The words used must clearly and unequivocally cover what they are intended to cover. The question for the court is whether the clause, on its true construction, extends to cover the obligation or liability that it seeks to exclude or restrict. The general rule is that if there is any ambiguity or doubt about the meaning or extent of an exemption clause, it will be interpreted **against** the person who is seeking to rely on it. This is known as the "***contra proferentum***" rule.

Houghton v Trafalgar Insurance Co. Ltd [1954] 1 QB 247

A car insurance policy purported to exclude liability for damage if the car was conveying 'any load in excess of that for which it was constructed'. An accident occurred whilst six passengers were travelling in a car which was only intended to provide seating accommodation for five.

The court held that 'load' was ambiguous, and construed it against the insurers to limit it to excess weight rather than excess passengers.

If a clause is inconsistent with the main object of the contract i.e. if one party attempts to exclude liability even though he has failed to do basically what he promised, then it is unlikely the clause can be relied upon.

7.5 LEGISLATION

Once an exemption clause has been incorporated into the contract, and if as a matter of interpretation, it extends to the loss in question, it may still lack validity because it may fall foul of the relevant statutory provisions. In addition to the protection offered by the common law that we have examined above, there also exists statutory protection from unfair terms in the form of the **Unfair Contracts Terms Act 1977 (UCTA), the Unfair Terms in Consumer Contracts Regulations 1994 & 1999 (UTCCR)** and the **Consumer Rights Act (CRA) 2015.** The aim of the legislation is to provide a balance between consumer protection on the one hand and freedom of contract on the other.

"The court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down". Lord Bridge in *George Mitchell v Finney Locke Seeds* [1983] 2 All ER 737

The Unfair Contract Terms Act 1977 is the most important of these, but applies only **to businesses** and does not apply to consumer contracts or consumer notices. The Consumer Rights Act 2015 repeals and replaces the Unfair Terms in Consumer Contracts Regulations and also replaces the Unfair Contract Terms Act in relation to consumer contracts and notices.

7.5.1 THE UNFAIR CONTRACT TERMS ACT 1977

In this section we will be examining the effect of UCTA 1977 on the law relating to exemption clauses and the requirement of reasonableness. The purpose of the Act is to control the use of exemption clauses. The act may render an exemption clause either a) totally unenforceable or b) unenforceable unless shown to be reasonable.

Scope

The Act deals with exemption clauses but only applies to **business liability** (s. 1(3)). 'Business' is defined broadly under the Act (s.14) so that it means not only the normal meaning of commercial activity, but also the professions, government departments and local or public authorities. The Consumer Rights Act 2015 takes consumer contracts out of the scope of UCTA, with unfair terms in consumer contracts now regulated by the CRA (we will be looking at this piece of legislation below). However, UCTA does still apply to business to business contracts.

UCTA 1977 Key provisions

s.2 – Exclusion of liability for negligence
s.3 – Exclusion of liability for breach of contract
s.6 – Exclusion of liability in contracts for the sale of goods and hire-purchase
s.7 – Exclusion of liability in hire contracts
s.8 – Exclusion of liability arising from a misrepresentation
s.11 – The reasonableness test
Schedule 2 – Guidance on application of the reasonableness test

The Act **does not** apply to exclusion clauses in the following contracts:

- Where the liability in question is not a business liability e.g. liability arising from the defective state of a private house;
- Where the situation falls outside the wording of a particular section of the Act e.g. a verbal contract in which neither party deals as a consumer is outside the scope of s5;
- Where the Act specifically states that it does not apply (land, intellectual property and insurance).

The reasonableness test

If the exemption clause does not fall within one of the above types (and is therefore automatically outside the remit of the Act), it will be subject to a reasonableness test.

Section 2 UCTA (below) provides that liability for **negligence causing death or personal injury** to persons **cannot** be excluded or restricted at all and that liability for **other loss** or damage e.g. to property can be excluded but only as far as is **reasonable**.

Section 2 UCTA
Exclusion of liability for negligence

S.2(1): a business cannot exclude or restrict liability for death or personal injury arising from negligence. This provision is absolute and not subject to the requirement of reasonableness.

S.2(2): a business may exclude or restrict liability for other types of loss only if it is reasonable to do so. The question of what is reasonable is decided by applying the reasonableness test set out in s.11.

S.2(3): where a person is aware of an exclusion clause this is not to be taken as a voluntary acceptance of risk.

The burden of proving that a clause is reasonable lies with the party seeking to rely on the exclusion. The test is that the term should have been a **fair and reasonable** one to be included in the contract.

The key provisions relating to what is reasonable are found in section 11 UCTA and Schedule 2:

Section 11 UCTA
The reasonableness test

The term is required to be fair and reasonable;

This is judged by all the circumstance which were known, or ought to have been known or in the contemplation of the parties;

The fairness and reasonableness is decided at the time the contract is entered;

Where the term is restricting rather than excluding liability regard is to be had to the resources of the party seeking to rely on the term and the availability of insurance;

The burden is on the party seeking to enforce the term to show that it was fair and reasonable.

Schedule 2 UCTA
Guidance on application of the reasonableness test where the contract is a non-consumer contract and sections 6 or 7 are under consideration.

Matters to be taken into consideration:

- The relative strength of the bargaining positions of the parties;
- Whether the customer received an inducement to accept the term;
- Whether the customer knew or ought to have known of the term and whether such terms are in general use in a particular trade;
- Where exclusion relates to non-performance of a condition whether it was reasonably practicable to comply with the condition;
- Whether the goods were made or adapted to the special order of the customer.

In the two following cases, the courts had to consider the reasonableness of the disputed clauses:

Spriggs v Sotheby Parke Bernet and Co Ltd [1986] I Lloyds Rep 487

The claimant Spriggs entrusted the defendants with a diamond to sell at the defendant's auction and signed an exemption clause excluding liability for negligence. The defendants also advised Spriggs to insure the diamond, but he failed to do so. The diamond was subsequently stolen.

Held: While the defendant's security system had not been reasonably safe, the exemption clause was clear and adequate to exclude liability for negligence. The exemption clause was valid as it was reasonable.

Phillips Products v Hyland and Hamstead Plant Hire Co Ltd [1987] 2 All ER 620

Phillips Products hired a JCB excavator with driver from the defendants. The driver's negligence caused damage to a factory wall. Condition 8 of their contract stated that the driver would be deemed to be the employee of Phillips Products. Phillips argued that Hamstead Plant Hire should pay for the damage caused, while the defendants argued that they were protected by the s8 exclusion clause in the contract, namely that the effect of condition 8 was that they had no liability for the driver.

Held: Condition 8 was caught by UCTA 1977 section 2(2) and failed the reasonableness test under section 11 and Schedule 2, because the claimants' hire was for a short period, there was little opportunity for arranging insurance and no choice over the driver.

Section 3 UCTA deals with exclusion of liability for breach of contract and provides that where a business uses a **standard form contract** it cannot:

- Exclude or vary liability for its own breach of contract unless the exemption is reasonable (i.e. meets the reasonable test in s11);
- Provide substantially different performance to that reasonably expected;
- Provide no performance at all.

George Mitchell v Finney Locke Seeds [1983] 2 All ER 737

The defendants were seed merchants and agreed to supply the claimant with Dutch winter cabbage seeds. After planting, it became clear the seed was a different kind (summer, not winter variety) and defective. The crop failed and the claimant sought compensation of £60,000. The defendants wanted to rely on a clause in the invoice purporting to limit liability to replacing the actual seed or refunding the seed price (£192).

Held: The clause was incorporated and covered the breach that had occurred. BUT the limitation of liability to the cost of the seeds was not effective. Given the relative positions and capability of insurance, the clause failed the reasonableness test and was therefore ineffective under UCTA 1977.

Sections 6 and 7 UCTA deal with attempts to exclude or limit liability for breaches of the implied terms relating to the goods in sale and supply contracts. The provisions relate to liability arising under the implied terms under the Sale of Goods Act 1979 and the Supply of Goods (Implied Terms) Act 1973. Section 6 provides that a party can never exclude liability relating to title, and a *party can only exclude liability relating to quality, description, fitness for purpose or sample where it is reasonable to do so*. Section 7 applies to contracts of hire and provides that provisions relating to description, sample, quality and fitness for purpose can only be excluded in so far as it is reasonable to do so and that provisions relating to title under s.2 Supply of Goods and Services Act 1982 cannot be excluded.

7.5.2 THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1994 & 1999

In this section we will take a brief look at the Unfair Terms in Consumer Contracts Regulations 1994 & 1999 in order to understand the background to the Consumer Rights Act 2015 (which replaced UTCCR 1999) in this area in respect of consumer contracts.

The original Regulations were passed in order to comply with an EC Directive and came into force in 1995. They were replaced by the 1999 regulations on 1 October 1999. The Regulations apply where one party is a consumer (defined as a natural person who makes the contract for purposes which are outside his business, Regulation 4). The UTCCR 1999 apply to contract entered prior to Oct 2015.

A term will be regarded as unfair under Regulation 5 if:

- It has not been individually negotiated;
- It is contrary to the requirement of good faith;
- It causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

7.5.3 THE CONSUMER RIGHTS ACT 2015

The Consumer Rights Act (CRA) 2015 applies to contracts entered after October 2015 and replaces the Unfair Terms in Consumer Contracts Regulations and the Unfair Contract Terms Act 1977 in **consumer contracts and notices**.

The CRA applies to contracts between a trader and consumer and contains certain consumer rights relating to goods which cannot be excluded or restricted – satisfactory quality, fit for purpose, as described, matching the sample. These also include other rights e.g. relating to time for delivery and for a service to be carried out with reasonable care and skill.

Part 2 of the Act contains a regime to regulate the use of unfair terms in consumer contracts that is based on the wording of the original EC Directive that led to the UTCCR. Part 2 does not apply to all types of consumer contract e.g. it does not apply to insurance contracts or contracts relating to transfer of land interests (s.66).

Part 2 applies to contracts between a consumer and a trader and those are defined in s2:

- Trader is defined as 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.'
- Consumer is defined as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'

There is a basic test of unfairness in s.62 (4):

Consumer Rights Act 2015

Part 2: Unfair terms.

S62(1) An unfair term of a consumer contract is not binding on the consumer.

S62(4) A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

Section 62(5) further provides that whether a term or notice is fair is to be determined by (a) taking into account the nature of the subject matter of the contract or notice; and (b) by reference to all the circumstances existing when the term or notice was agreed and to all of the other terms of the contract or of any other contract on which it depends.

Schedule 2 Part 1 contains contains an indicative but non exhaustive list of terms that may be regarded as unfair and Part 2 provides additional notes on those terms. Where a term or notice is found to be unfair, it is not binding on the consumer but the consumer may rely on the term or notice if they choose to do so (s 62(3).

An important provision is found in s65 (1): A trader cannot by a term of a consumer contract or by a consumer notice exclude or restrict liability for death or personal injury resulting from negligence. This reflects the provision of UCTA 1977 s2(1). Section 65(2) provides additional protection, providing as it does that where a term of a consumer contract, or a consumer notice, purports to exclude or restrict a trader's liability for negligence, a person is not to be taken to have voluntarily accepted any risk merely because the person agreed to or knew about the term or notice.

The effect of an unfair term is that it is not binding on the consumer – but it is only the individual term that is invalid, not the whole contract. If the contract can exist without the valid term then it can be enforced (s67).

7.6 FURTHER READING

Beale, H.G., Bishop, W.D. & Furmston, M.P. *Contract – Cases and Materials* (Butterworths)

Bright, S. 'Winning the Battle Against Unfair Contract Terms' (2000) 20 *LS* 331

Elliot, C. & Quinn, F. *Contract Law* (Pearson)

Law Commission Report, *Unfair Terms in Contracts 2005*, Law Com No 292

Poole, J. *Textbook on Contract Law* (OUP Oxford)

Poole, J. *Casebook on Contract Law* (OUP)

Koffman, L. & MacDonald, E. *The Law of Contract* (OUP)

McKendrick, E. *Contract Law* (Palgrave Macmillan)

McKendrick, E. *Contract Law – Text, Cases and Materials* (Palgrave Macmillan)

7.7 EXERCISES

Exercises on exemption clauses

1. Which one of the following statements is correct? Whether an exemption clause is likely to be incorporated into the contract will depend on
   a. Whether the recipient had reasonable notice of it.
   b. Whether the recipient had expressly agreed to its inclusion.
   c. Whether the contract is in writing.
   d. The seriousness of the breach and possibly the extent of the loss sustained.

2. What does an exemption clause in a contract seek to do?
   a. Demonstrate that both parties are happy with the contract.
   b. Provide for the safety of a consumer.
   c. Exclude or limit liability in the event of a breach.
   d. Allow the stronger party to retain control.

3. Under the Unfair Contract Terms Act 1977, what liability can never be excluded from a contract?
   a. Liability for negligently caused death or personal injury.
   b. Rights of consumer to change their minds.
   c. Replacement of defective goods.
   d. Liability for delayed delivery of goods.

4. A term may be implied into a contract by
   a. The courts only.
   b. The courts and statute only.
   c. The courts and statute and trade custom.
   d. A term can never be implied, it must always be expressed by the parties.

5. Why was the exemption clause in *Olley v Marlborough Court* held not to have been incorporated into the contract?
   a. It did not cover the loss suffered by the claimant.
   b. It was too late to be incorporated as a term of the contract as the contract had already been formed.
   c. It breached the *contra proferentum rule*.
   d. It would have been unfair to incorporate the term.

6. What is meant by the "*contra proferentum*" rule?
7. Once signed, a contract will bind the parties whether or not they have read the terms.
   a. True
   b. False

8. In *Chapelton v Barry UDC* the court held that the exclusion clause did not form part of the contract. Why?
   a. The claimant was illiterate and so unable to read the terms.
   b. The wording on the ticket was unclear.
   c. The ticket was only for the hire of one deckchair.
   d. The document was not a contractual document.

SOLUTIONS TO EXERCISES

Answers to exercise on offers

1. An invitation to treat is generally described as 'an invitation to make an offer' (an expression of willingness to negotiate).
2. All these examples are a little vague but the answers are likely to be:
   a) invitation to treat
   b) invitation to treat or possibly an offer
   c) offer.

4. A unilateral contract.
5. (b) As a 'mere puff'.

Answers to exercises on acceptance

1. The general rule is that acceptance is effective when received and understood by the offeror.
2. Applying the general rule (which applies to texts!) Charles' text 'accepting' the offer is not effective as Andrew does not receive it so there is no contract.
3. The act itself constitutes acceptance of the offer.
4. The postal rule is one of the exceptions to the general rule. It states that a letter of acceptance takes effect when it is posted. Limitations: post must have been contemplated as a means of communication, its use must not have been prohibited either expressly or by implication *(see Holwell Securities v Hughes*), and the letter must be properly stamped, addressed and posted.
5. (a) counter-offer;
   (b) acceptance + query re delivery details;
   (c) counter-offer;
   (d) request for information.

Answers to exercises on consideration

1. b. False
2. b. Sufficient.
3. a. In the past.
4. d. A promise to pay a third party.
5. c. B has exerted undue pressure on A.
6. a. Chappell v Nestlé
7. b. The contract must be for goods or services.
8. c. Part payment of a debt is not normally good consideration for a promise not to take legal action to recover the remainder of the debt.

Answers to exercises on intention

1. c. Social and domestic agreements
2. c. Not binding as there was a binding in honour clause
3. d. Binding because there was a third party to the agreement
4. c. Binding because the couple had separated and had a written agreement

Answers to exercises on terms

1. d. A representation as the claimant car dealer had the greater expertise.
2. a. True.
3. d. A contractual term because C had communicated the importance of the term to D.
4. c. A representation as the seller advised him to get the boat surveyed.
5. a. True
6. a. A major term of the contract which goes to the root of the contract.
7. b. Claim damages only.
8. b. False
9. Hong Kong Fir Shipping v Kawasaki C.
10. Courts look at the effect of the breach rather than classifying the term.

Answers to exercises on exemption clauses

1. a. Whether an exemption clause is likely to be incorporated into the contract will depend on whether the recipient had reasonable notice of it.
2. c. Exclude or limit liability in the event of a breach
3. a. Liability for negligently caused death or personal injury.
4. c. The courts and statute and trade custom.
5. b. It was too late to be incorporated as a term of the contract as the contract had already been formed.
6. The rule is that if there is any ambiguity or doubt about the meaning or extent of an exemption clause, it will be interpreted **against** the person who is seeking to rely on it.
7. a. True
8. d. The document was not a contractual document.