English Law and Terminology 2.

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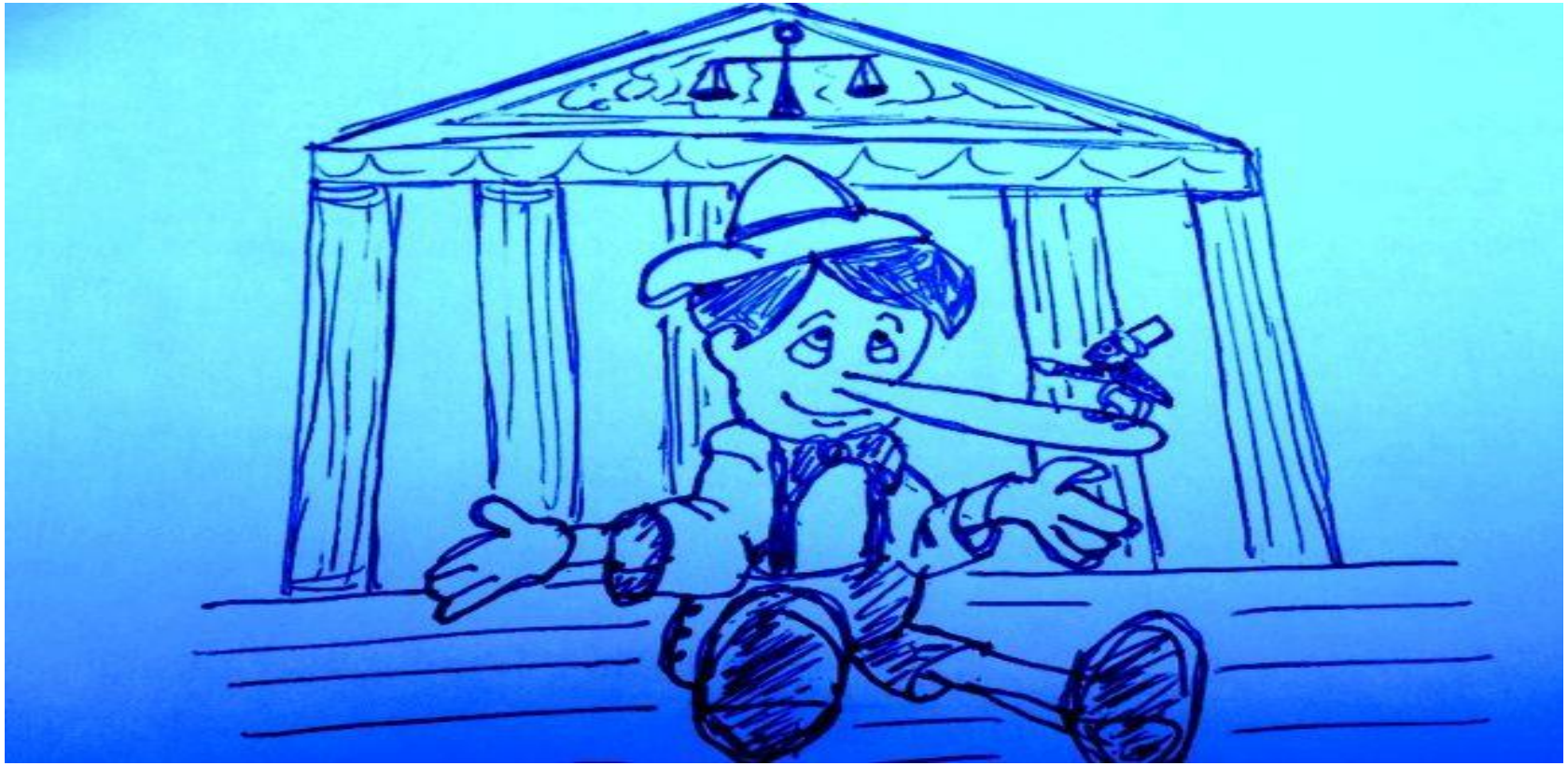
Agenda.

- Week 1-April 10th- Contract Law.
- Week 2- April 17th- Tort Law & Equity and Trusts.
- Week 3- April 24th- Commercial Law.
- Week 4- May 15th- Company Law.
- Week 5- May 22nd- Presentations and Recap.

The Law of Contract.



Contract- Definition.

- **Definition**-An agreement between private parties creating mutual obligations enforceable by **law**. The feature which distinguishes contractual obligations from other types of law is that it is voluntary and therefore based on agreement of relevant parties unlike others where legal obligations may not only be involuntary but also unwanted.
- However, it must be noted that this is the basic distinction, it is sometimes inaccurate as contracts can sometimes not be based on agreements.
- A basic binding **contract** must comprise four key elements: offer, acceptance, consideration and intent to create **legal** relations. (**English**)
- The basic elements required for the agreement to be a legally enforceable **contract** are: mutual assent, expressed by a valid offer and acceptance; adequate consideration; capacity; and legality. (**American**)
- Simple social arrangements such as informal invitations are not legally binding nor enforceable by courts. However it is not always that easy to distinguish between the two.

Formation of Contract.

- The law relating to **freedom of contract** is defined as individuals of full capacity being able to freely choose who they **contract** with and on what terms within that **contract** ...

- However, **freedom of contract** still remains in the majority of **cases**, despite these new legislations.

Formation of Contract cont.

- This began in the nineteenth century when judges believed that people should be able to make their own decisions, since they know what is best in their interests, under the assumption that nobody would choose unfavourable terms- **Laissez Faire** philosophy. The judges would refuse to act even where there was inequality in bargaining power, that is where one party was more powerful than the other.
- The courts simply acted as an umpire, ensuring parties were upholding their promises. They only interfered in special cases, including those involving **misrepresentation**, **undue influence** or **illegality** and it was not within their role to question whether the contract was fair.
- There is a need for stability, certainty and predictability under the notion of Freedom of Contract however; even though these values play an important part, they are not absolute and there are people who require protection, especially consumers. Legislation, such as **The Unfair Contract Terms Act 1977** and **The Sale of Goods Act 1979** has been passed to help protect the disadvantaged, especially in fields of employment law, racial and gender discrimination, by shaping the law of Contract.
- This in turn has brought about social justice and equality of bargaining power has been restored, resulting in the United Kingdom being of great benefit to this legislation. However, freedom of contract still remains in the majority of cases, despite these new legislations.

Formation of Contract cont.

- **Lord Denning**, in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd.* stated;
- "I myself have always regarded it as in the public interest that parties who, being in an equal position of bargaining, make contracts, should be compelled to perform them, and not to escape from their liabilities by saying that they had agreed to something which was unreasonable."
- In an article called 'The Ideologies of Contract Law,' Adams and Brownsword favour Lord Denning by proposing that realist judges fall into two categories. These are known as 'market-individualists' and 'consumer-welfarists.'
- They suggest that market-individualists are firm believers in the principle of freedom of contract and hold the view that individuals are capable of making their own decisions and bargains, with the courts interfering as little as possible.
- However, one could argue that the principle of freedom of contract is being undermined by the law and its legislation. Exemption and limitation clauses, for example, are regulated under the **Unfair Contract Terms Act 1977.**
- Although weaker parties are protected within their contracts, those with individually negotiated terms are also regulated. This means that large companies and corporations who are able to individually negotiate terms within a contract could potentially take advantage of these legislations and exclude themselves from liability or even leave the contract.
- Some academics, have suggested that the courts always considered, if not established, the concept of fairness. This view has been challenged, however, it is apparent that the courts have moved away from their laissez faire belief that they should not intervene. This might have been on their own accord or due to legislation under the guidance of the government.

Offer and Acceptance.

- **Offer**- An offer is an expression of willingness to contract on specified terms, made with the intention that it is to be binding once accepted by the person to whom it is addressed (*Stover v Manchester City Council*).
- There must be an objective manifestation of intent by the **offeror** or **promisor** to be bound by the offer if accepted by the other party.
- Therefore, the **offeror** will be bound if his words or conduct are such as to induce a reasonable third party observer to believe that he intends to be bound, even if in fact he has no such intention. This was held to be the case where a university made an offer of a place to an intending student as a result of a clerical error (Moran v University College Salford).
- An offer can be addressed to a single person, to a specified group of persons, or to the world at large. An example of the latter would be a reward poster for the return of a lost pet.
- An offer may be made expressly (by words) or by conduct.
- An offer must be distinguished from an invitation to treat, by which a person does not make an offer but invites another party to do so. Whether a statement is an offer or an invitation to treat depends primarily on the intention with which it is made.
- An invitation to treat is not made with the intention that it is to be binding as soon as the person to whom it is addressed communicates his assent to its terms. Common examples of invitations to treat include advertisements or displays of goods on a shelf in a self-service store.
- The famous case of *Carlill v Carbolic Smoke Ball Company [1893] 2 QB 256* is relevant here. A medical firm advertised that its new drug, a carbolic smoke ball, would cure flu, and if it did not, buyers would receive £100. When sued, Carbolic argued the advert was not to be taken as a legally binding offer; it was merely an invitation to treat, a mere puff or gimmick.
- However, the Court of Appeal held that the advertisement was an offer. An intention to be bound could be inferred from the statement that the advertisers had deposited £1,000 in their bank "shewing our sincerity".

Offer and Acceptance cont.

- **Acceptance**- An acceptance is a final and unqualified expression of assent to the terms of an offer. Again, there must be an objective manifestation, by the recipient of the offer, of an intention to be bound by its terms.
- An offer must be accepted in accordance with its precise terms if it is to form an agreement. It must exactly match the offer and **ALL** terms must be accepted.
- An offer may be accepted by conduct (for example, an offer to buy goods can be accepted by sending them to the **offeror**).
- Acceptance has no legal effect until it is communicated to the **offeror** (because it could cause hardship to the **offeror** to be bound without knowing that his offer had been accepted). The general rule is that a postal acceptance takes effect when the letter of acceptance is posted (even if the letter may be lost, delayed or destroyed.
- However, the **postal rule** will not apply if it is excluded by the express terms of the offer. An offer which requires acceptance to be communicated in a specified way can generally be accepted only in that way. If acceptance occurs via an instantaneous medium such as email, it will take effect at the time and place of receipt.
- If acceptance occurs via an instantaneous medium such as email, it will take effect at the time and place of receipt. Note that an **offeror** cannot stipulate that the offeree's silence amounts to acceptance.
- A communication fails to take effect as an acceptance where it attempts to vary the terms of an offer. In such cases it is a counter-offer, which the original **offeror** can either accept or reject. For example, where the **offeror** offers to trade on its standard terms and the offeree purports to accept, but on its own standard terms, that represents a counter-offer.
- Making a counteroffer amounts to a rejection of the original offer which cannot subsequently be restored or accepted (unless the parties agree). It is important to distinguish a counter-offer from a mere request for further information regarding the original offer.
- An offer may be revoked at any time before its acceptance, however the revocation must be communicated to the offeree. Although revocation need not be communicated by the **offeror** personally (it can be made by a reliable third party), if it is not communicated, the revocation is ineffective.
- Once an offer has been accepted, the parties have an agreement. That is the basis for a contract, but is not sufficient in itself to create legal obligations.

Consideration.

- In common law, a promise is not, as a general rule, binding as a contract unless it is supported by consideration (or it is made as a deed).
- Consideration is "something of value" which is given for a promise and is required in order to make the promise enforceable as a contract. This is traditionally either some detriment to the **offeree/promisee** (in that he may give value) and/or some benefit to the **promisor/offeror** (in that he may receive value). There must be reciprocity- some element of exchange/bargain on both parties side.
- For example, payment by a buyer is consideration for the seller's promise to deliver goods, and delivery of goods is consideration for the buyer's promise to pay. It follows that an informal gratuitous promise does not amount to a contract.
- A Bilateral contract consists of 2 promises.
- A Unilateral contract consists of a promise by one party and the performance of an act by the other.

Maxims of Consideration.

- **Consideration must be sufficient, but need not be adequate**- Although a promise has no contractual force unless some value has been given for it, consideration need not be adequate.
- Courts do not, in general ask whether adequate value has been given (in the sense of there being any economic equivalence between the value of the consideration given and the value of any goods or services received). **Nominal** consideration- **Peppercorn** consideration.
- This is because they do not normally interfere with the bargain made between the parties. Accordingly, nominal consideration is sufficient.
- **Consideration must not be from the past -** The consideration for a promise must be given in return for the promise.
- **Consideration must move from the promisee -** The **promisee** must provide the consideration. Traditionally, a person to whom a promise was made can enforce it only if he himself provided the consideration for it.
- He has no such right if the consideration moved from a third party. For example, if A promises B to pay £10,000 to B if C will paint A's house and C does so, B cannot enforce A's promise (unless B had procured or undertaken to procure C to do the work).
- However, where the conditions of the Contracts **(Rights of Third Parties) Act 1999** are met, a third party may be able to enforce rights created in his favour by a contract which he was not a party to, and the courts are also adopting a more flexible position under the common law here.
- While consideration must move from the **promisee**, it need not move to the promisor. First, consideration may be satisfied where the **promisee** suffers some detriment at the promisor's request but confers no corresponding benefit on the promisor.
- For example, the promise to give up tenancy of a flat may be adequate consideration even though no direct benefit results to the promisor. Secondly, consideration may move from the **promisee** without moving to the promisor where the **promisee**, at the promisor's request, confers a benefit on a third party.
- In situations where goods are bought with a credit card, the issuer makes a promise to the supplier that s/he will be paid. The supplier provides consideration for this by providing goods to the customer.

Intention to Create Legal Relations.

- An agreement, even if supported by consideration, is not binding as a contract if it was made without an intention to create legal intentions. That is, the parties must intend their agreement to be legally binding.
- In the case of ordinary commercial transactions, there is a presumption that the parties intended to create legal relations. The onus of rebutting this presumption is on the party who asserts that no legal effect was intended, and the onus is a heavy one. The party has to positively prove the opposite- gentleman's agreement.
- Many social arrangements do not amount to contracts because they are not intended to be legally binding. Equally, many domestic arrangements, such as between husband and wife, or between parent and child, lack force because the parties did not intend them to have legal consequences.
- In **Balfour v Balfour [1919] 2 KB 571**, a husband who worked abroad promised to pay an allowance of £30 per month to his wife, who was in England. The wife's attempt to enforce this promise failed: the parties did not intend the arrangement to be legally binding. (Note that in addition, the wife had not provided any consideration.)
- An agreement which is made "subject to contract" (typically, agreements for the sale of land) or a "letter of comfort" is generally unenforceable. The words normally negate any contractual intention, so that the parties are not bound until formal contracts are exchanged.

Form.

- The general rule is that contracts can be made informally; most contracts can be formed orally, and in some cases, no oral or written communication at all is needed. Thus, an informal exchange of promises can still be as binding and legally valid as a written contract. There are statutory exceptions to this rule.

- There are statutory exceptions to this rule. For example: (i) a lease for more than 3 years must be made by deed: **Law of Property Act 1925, ss 52, 54(2);**
- (ii) most contracts for the sale or disposition of an interest in land must be "made in writing": **Law of Property (Miscellaneous Provisions) Act 1989, s 2;**
- (iii) contracts of guarantee are required to be evidenced in writing: Statute of Frauds, s 4.

Contents of the Contract.

- The terms of a contract can be divided into **express** terms and **implied** terms.
- **Express terms**- Express terms are ones that the parties have set out in their agreement. The parties may record their agreement, and hence the terms of their contract, in more than one document.
- Those terms may be incorporated by reference into the contract; (for example, where a contract is made subject to standard terms drawn up by a relevant trading association).
- Or, a contract may be contained in more than one document even though one does not expressly refer to the other (for example, dealings which take place under a 'master contract' with a separate document being executed every time an individual contract is made).
- Here, the master contract lays out most of the underlying terms on which the parties are dealing, while certain specific terms – price, times for delivery etc – are covered in individual contracts for each specific trade.
- Incorporation without express reference depends on the intention of the parties, determined in accordance with the objective test of agreement.
- Once the express terms have been identified, there is the question of interpretation. The document setting out the parties' agreement must be interpreted objectively: it is not a question of what one party actually intended or what the other party actually understood to have been intended but of what a reasonable person in the position of the parties would have understood the words to mean.
- The starting point for ascertaining the objective meaning is the words used by the parties. These are interpreted according to their meaning in conventional usage, unless there is something in the background showing that some other meaning would have been conveyed to the reasonable person.
- Thus, the terms of the contract must be read against the "factual matrix"; that is, the body of facts reasonably available to both parties when they entered the contract.

Contents of the Contract cont.

- The **"parol evidence"** rule provides that evidence cannot be admitted to add to, vary or contradict a written document.
- Therefore, where a contract has been put in writing, there is a presumption that the writing was intended to include all the terms of the contract, and neither party can rely on extrinsic evidence of terms alleged to have been agreed which are not contained in the document.
- This presumption is rebuttable, and extrinsic evidence is admissible, if the written document was not intended to set out all the terms on which the parties had agreed.
- The **parol evidence rule** prevents a party from relying on extrinsic evidence only about the contents of a contract (and only express terms), and not about its validity (such as the presence or absence of consideration or contractual intention, or where a contract is invalid for a reason such as incapacity).

- **Implied Terms**- A contract may contain terms which are not expressly stated but which are implied, either because the parties intended this, or by operation of law, or by custom or usage.
- *Terms implied by fact*- Terms implied in fact are ones which are not expressly set out in the contract, but which the parties must have intended to include. The courts have adopted two tests governing whether a term may be implied. The first is the "officious bystander" test, where a term is so obvious that its inclusion goes without saying, and had an officious bystander asked the parties at the time of contracting whether the term ought to be included, the parties would have replied "Oh, of course".
- In other words, if it can be established that both parties regarded the term as obvious and would have accepted it, had it been put to them at the time of contracting, that should suffice to support the implication of the term in fact. The alternative test for implication is that of "business efficacy", where the contract would be unworkable without the term.
- For example, it has been held that in a contract for the use of a wharf, it was an implied term that it was safe for a ship to lie at the wharf. Under this test, a term will be implied if the contract simply could not work without such a term. It is important to note that the courts will not imply a term merely because it would be reasonable or desirable to do so. Further, a term cannot be implied if it conflicts with the express terms of the contract.

Contents of the Contract cont.

- **Terms implied in law and by statute**- Terms implied in law are terms imported by operation of law, whether the parties intended to include them or not. For example, in a contract for the sale of goods, it is an implied term that the goods will be of a certain quality and, if sold for a particular purpose, will be fit for that purpose.
- For certain contracts the law seeks to impose a standardised set of terms as a form of regulation. Many terms which are implied in law have been put into statutory form. For example, a number of important terms are implied into contracts for the sale of goods by **ss 12 to 15 of the Sale of Goods Act 1979**.
- Further significant terms may be implied from the nature of the relationship between the parties – for example, contracts for professional services require the professional to act with reasonable standards of competence, a lawyer must act in his client's best interests and a doctor has a duty of confidentiality to his patients.
- **Terms implied by custom or usage**- Evidence of custom is admissible to add to, but not to contradict, a written contract. Terms may also be implied by trade usage or locality.

Contents of Contract cont.

- Conditions, warranties and innominate terms- contractual terms can either be **conditions, warranties or innominate terms**. Traditionally, contractual terms were classified as either **conditions** or **warranties**. The category of **innominate terms** was created in *Hong Kong Fir Shipping*.
- It is important for parties to correctly identify which terms are to be conditions and which are to be warranties. Where there has been a breach of contract, it is important to determine which type of term has been breached in order to establish the remedy available.
- A **condition** is a major term of the contract which goes to the root of the contract. If a condition is breached the innocent party is entitled to repudiate (end) the contract and claim damages: *Poussard v Spiers* (1876) 1 QBD 410.
- **Warranties** are minor terms of a contract which are not central to the existence of the contract. If a warranty is breached the innocent party may claim damages but cannot end the contract: *Bettini v Gye* 1876 QBD 183
- The **innominate/intermediate** term approach was established in the case of *Hong Kong Fir Shipping*. Rather than classifying the terms themselves as conditions or warranties, the innominate term approach looks to the effect of the breach and questions whether the innocent party to the breach was deprived of substantially the whole benefit of the contract. Only where the innocent party was substantially deprived of the whole benefit, will they be able to treat the contract as at an end: Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26
- This approach has been criticised for sacrificing certainty. Also the innocent party may well be liable for wrongful repudiation if they treat the contract as at an end where it is found that the breach did not deprive them of substantially the whole benefit of the contract.
- Even where the parties have themselves classified the term as a condition the courts can hold that it was in fact only a minor term and therefore a breach of that term would not give rise to the right to repudiate the contract.

Standard Form Contracts.

- Standard Form Contracts are agreements that employ standardised, non-negotiated provisions, usually in pre-printed forms. These are sometimes referred to as 'boilerplate contracts', 'contracts of adhesion', or 'take it or leave it' contracts.
- The terms may be drafted (or selected) by or on behalf of one party to the transaction – generally the party with superior bargaining power who routinely engages in such transactions. With few exceptions, the terms are not negotiable by the other party.
- Standard form, business-to-consumer contracts fulfil an important efficiency role in the mass distribution of goods and services. These contracts have the potential to reduce transaction costs by eliminating the need to negotiate the many details of a contract for each instance a product is sold or a service is used. However, these contracts also have the ability to trick or abuse consumers because of the unequal bargaining power between the parties.
- For example, where a standard form contract is entered into between an ordinary consumer and the salesperson of a multinational corporation, the consumer typically is in no position to negotiate the standard terms; indeed, the company's representative often does not have the authority to alter the terms, even if either side to the transaction were capable of understanding all the terms in the fine print. These contracts are typically drafted by corporate lawyers far away from where the underlying consumer and vendor transaction takes place. Exemption and exclusion clauses are of particular concern to ordinary consumers as they exclude or limit the liability of one party to the contract n relation to his7her conduct which amounts or negligence or breach of contract.
- Special statutory rules now apply to such clauses to avoid misuse.

Contracts and Third Parties.

- A common law doctrine which prevents a person who is not a party to a contract from enforcing a term of that contract, even where the contract was made for the purpose of conferring a benefit on the third party. The **UK Contracts (Rights of Third Parties) Act 1999** reformed the privity of contract rule and gives a person who is not a party to a contract a right to enforce a term of that contract in specified circumstances.
- Consideration must flow from the promisee. In other words, "if a person with whom a contract has been made is to be able to enforce it consideration must have been given by him to the promisor"- *Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd* [1915] AC 847, 853. Thus, while this rule of consideration is distinct and separate from the doctrine of privity, as upheld in *Kepong Prospecting Ltd v Schmidt* [1968] AC 810, it yields the same result so as to be closely connected.
- Right of Action- it is worthwhile to highlight that what the doctrine prohibits is the right of action or enforcement in favour or against a third party, and not beyond. That is, a contract may bestow benefits to a third party, although such imposition of liabilities remains a bar. In the former case, a breach may be enforced by the other contracting party for and on behalf of the third party, by way of remedies such as specific performance, stay of proceedings, and damages, as discussed below.
- This is to be distinguished from **Agency relationships**-where an Agent which is a person who is authorised to act as the representative of another called the Principal. Where an agent enters into a contract with a third party he/she does so on behalf of the principal and it is the principal not the agent who is legally bound by the agreement. The contract between the principal and third party is different and must be distinguished from the contract between the principal and agent, which is the basis of the agency between them.

Void or Voidable contracts.

- When dealing with contracts, the terms "void" and "voidable" are often confused. Even though these two contract types seem similar, they are actually completely different.
- A contract that is "void" cannot be enforced by either party., The law treats a void contract as if it had never been formed. A contract will be considered void, for example, when it requires one party to perform an act that is impossible or illegal.
- A "voidable" contract, on the other hand, is a valid contract and can be enforced. Usually, only one party is bound to the contract terms in a voidable contract. The unbound party is allowed to cancel the contract, which makes the contract void.
- The main difference between the two is that a void contract cannot be performed under the law, while a voidable contract can still be performed, although the unbound party to the contract can choose to void it before the other party performs.
- **Void** contracts are unenforceable by law. Even if one party breaches the agreement, you cannot recover anything because essentially there was no valid contract. Some examples of void contracts include:
- Contracts involving an illegal subject matter such as gambling, prostitution, or committing a crime.
- Contracts entered into by someone not mentally competent (mental illness or minors).
- Contracts that require performing something impossible or depends on an impossible event happening.
- Contracts that are against public policy because they are too unfair.
- Contracts that restrain certain activities (right to choose who to marry, restraining legal proceedings, the right to work for a living, etc.).
- **Voidable** contracts are valid agreements, but one or both of the parties to the contract can void the contract at any time. As a result, you may not be able to enforce a voidable contract:
- Contracts entered into when one party was a minor. (The law often treats minors as though they do not have the capacity to enter a contract. As a result, a minor can walk away from a contract at any time.)
- Contracts where one party was forced or tricked into entering it.
- Contracts entered when one party was incapacitated (drunk, insane, delusional).

Contract Law cont.

- Capacity- The law states that individuals who enter into a contract must have the capacity to enter into a contract, otherwise it is voidable. Adults who have full capacity are able to enter into contracts and enforce them at law (unless they are illegal contracts).
- The law sets out those who do not have legal capacity to contract, particularly providing special legal protection to those who are minors, or under a mental disability.
- Minors and capacity in contract law- Individuals who are under the age of 18 are known as 'minors' under the Family Reform Act 1969. A minor can enter into a contract at law, however, such a contract is 'voidable' by the minor before they reach 18 (and for a time thereafter). This means that the minor can enforce the contract, but they can also terminate it if they wish. Once the minor reaches the age of 18, the contract becomes legally binding on both parties.
- However, there are exceptions to the general rule: a minor may need to enter into a contract to buy necessities, such as food, clothing, medicine and other things necessary for them and their lifestyle. Minors may also need to enter into legally binding contracts for their education, such as apprenticeships.
- These types of contract are enforceable against the minor, however, such contracts must be fair to be enforceable against the minor. So if a minor pays a reasonable price for items required in the circumstances, the minor is legally required to fulfil the contract (ie. pay for the goods or service).
- A case where such a contract has been enforced is that of *Doyle v White City Stadium* (1935), where there was an agreement to train a boxer. There was no money paid, but the contract was enforceable as it was considered that the contract was beneficial because of the training provided. Another case where the contract was held enforceable is *Clements v London & NW Rail Co* (1894) where certain benefits were removed following a contract of employment, but the contract was considered to be beneficial and was upheld.

Contract Law cont.

- Illegality- Illegality in contract law is a concept which indicates that a contract is illegal, and therefore, unenforceable. Even if the other requirements of a contract are present–the offer, acceptance, consideration, and mental capacity–a court could still deem that the contract is illegal.
- Moreover, even if the parties to the contract aren't questioning the legality of the agreement, the court could still determine that it is illegal. If such agreements are in fact deemed illegal, then the entire contract will be void.
- Generally, an illegal contract is one that is made for an illegal purpose, and for that reason, violates law. For example, a contract that requires some sort of illegal act or conduct on the part of one or both parties, will be deemed illegal in entirety. However, a contract can be deemed illegal even if the performance under the contract wouldn't otherwise violate law. There are certain activities that might not be prohibited by law, but would still be discouraged by the public. Such activities could also deem a contract illegal.
- The illegality itself must relate to the contract, whether it be what is included in the contract or how the contract was entered into. If a court determines that the contract is illegal, it will no longer exist. Thus, it becomes void or unenforceable.
- Arguing that the contract is illegal can be a defense to a breach of contract should such a suit arise. Therefore, if the other party brings a legal suit against you for breach of contract, you as the defendant can argue that the contract itself is illegal, and therefore, the entire contract is void.
- It could be rather difficult to prove that a contract is illegal, particularly if the illegal conduct isn't related to the agreement. But, if the contract requires either party to act illegally, then you know that you'll have an argument to make for its illegality.

Contract Law cont.

- **Mistake**-A contract may be void or voidable if mistake has occurred. If a contract is void, then it is so 'ab initio' (from the beginning), as if the contract was never made. In such cases, no obligations will arise under it.
- Alternatively, if the contract is voidable, the contract will have been valid from the start and obligations may arise under it despite the mistake.
- Mistake can be classified into different forms: 1. Common Mistake- A common mistake is one where both parties make the same error relating to a fundamental fact. For example, a contract will be void at common law if the subject of the contract no longer exists – e.g. a contract for the sale of specific goods where those goods have already perished. Similarly, the contract will be void if the buyer makes a contract to buy something that in fact already belongs to him.
- 2. Unilateral Mistake-This occurs when only one party is mistaken. This includes mistake as to the terms of the contract or mistake as to the identity of the parties. A mistake as to terms will make a contract void.
- 3. Mutual Mistake- A mutual mistake is one where both parties fail to understand each other.
- 4. A mistake as to the quality of what is being contracted for – only in extreme cases of such a mistake will the contract be void. It must be a mistake "which makes the thing without the quality essentially different from the thing as it was believed to be".

Contract Law cont.

- **Misrepresentation**- A misrepresentation is a false statement of fact made by one party to another, which, whilst not a term of the contract, induces the other party to enter into the contract.
- An actionable misrepresentation must be a false statement of fact, not of opinion or future intention or law. Silence does not normally amount to misrepresentation.
- However, the representor must not misleadingly tell only part of the truth. Thus, a statement that does not present the whole truth may be a misrepresentation. Where a statement was true when it was made but due to a change of circumstances becomes false, there is a duty to disclose the change. This is to be distinguished from the right of non-disclosure in English law, which simply means someone did not volunteer information and as such cannot have a duty because of it.
- A misrepresentation may be: (i) Fraudulent- made knowingly, without belief in its truth or recklessly; (ii) Negligent- made by a person who had no reasonable grounds to believe that it was true; or (iii) Innocent- made in the wholly innocent belief that it was true.
- The misrepresentation must have induced, at least partly, the party to enter into the contract and must have been relied on to at least some degree by the person to whom it was made.
- If that person in fact relies on his own judgments or investigations, or simply ignores the misprepresentation, then it cannot give rise to an action against the person who made the misrepresentation.
- There are multiple remedies available once misrepresentation has been proved: (i) Rescission- This sets aside the contract and primarily aims to put the parties back in their original position as if the contract had never been made. Rescission can be sought for all cases of misrepresentation.
- However, this is a discretionary remedy – meaning that the courts will not always allow a party to rescind - and the injured party may lose the right to rescind if: a) he has already affirmed the contract; b) he does not act to rescind in a reasonable time; c) it is or becomes impossible to return the parties back to their original position; or d) a third party has acquired legal rights as a result of the original contract

Contract Law cont.

- Indemnity- (ii) The court may order payment for expenses necessarily incurred in complying with the terms of the contract.
- Damages- This remedy varies according to the type of misrepresentation. In fraudulent misrepresentation cases there is an automatic right to damages, in negligent cases the injured party may claim damages under common law or under the Misrepresentation Act 1967 s2(1).
- In situations of innocent misrepresentation, the court has discretion whether to award damages and may opt to award damages in lieu of rescission.

- **Duress and undue influence** essentially means that a person or party has been forced into a contract. The contract cannot be considered to be a valid agreement under these circumstances. Under common law, there are two doctrines to consider: duress and undue influence.
- Duress- This is where someone enters into a contract as a result of undue pressure. Duress can take many different forms. Testing Question: 'was the conduct in question sufficient to constitute a coercion of will which vitiates consent'?
- Threats of violence- In *Barton v Armstrong* (1976) the plaintiff threatened to kill the defendant if he did not sell his interest in the company they were both major shareholders in. The trial judge ruled that duress could not be pleaded since it was not established that the agreement would not have been entered into without the threats being made. The Privy Council, however, later ruled that a plea of duress should stand even if the death threat was not the only reason for entering into a contract.

Contract Law cont.

- Threats of unlawful restraint- In *Cummings v Ince* (1847), an elderly lady was told to sign over all her property or face not ever having a committal order to a mental asylum lifted. The contract was found to be void.
- Threats to property- In *Skeate v Beale* (1840), the court decided that since the threat had been directed towards property, this did not constitute duress. However, in *The Siboen and the Sibotre* (1976), the court decided that serious threats that constituted burning a house or damaging expensive paintings should be considered as duress. Therefore, duress also covered property in the most serious circumstances.
- Economic duress- In *Atlas Express v Kafco* (1989), the court decided that because there was a threat made to a small business for them to breach the rules of a contract it had entered into, this would be considered economic duress. In *Universe Tankships of Monravia v ITWF* (1982), the threat made by the union in the matter of a ship, because workers demanded a change in circumstances, was found to be economic duress.
- In *Pao On v Lau Yiu Long* (1980), the Privy Council identified four matters to consider in determining whether economic duress was present:
- Did the person claiming to be coerced protest?
- Did the person have another viable course of action?
- Were they independently advised?
- After entering into the contract, did they take steps to avoid it?
- Undue influence was introduced to deal with cases where a contract was entered into as a result of pressure, but this pressure did not amount to duress. Undue influence can arise where there is a relationship between the parties which has been exploited by one party to gain an unfair advantage.
- In *Bank of Credit & Commerce International v Aboody* (1990), the Court of Appeal set out three different classes of undue influence:
- Class 1 – actual undue influence
- Class 2a – presumed undue influence/relational undue influence
- Class 2b – presumed undue influence/relational undue influence

Contract Law cont.

- Class 1 – actual undue influence- Actual undue influence requires proof that the contract was entered into as a result of the undue influence. It could include acts such as threatening to end a relationship or persistent pestering of a party where they have refused consent until they eventually submit.
- Class 2a – presumed undue influence/ relational undue influence- In this class, there is no need to prove that improper influence was actually exerted. It must, however, be shown that that there was a relationship which in law gives rise to a presumption of undue influence (eg, parent/child; doctor/patient; solicitor/client) and the transaction cannot easily be explained by the relationship of the parties.
- Class 2b – presumed undue influence/relational undue influence- If a relationship exists which does not give rise to an automatic presumption under Class 2a, but in which it can be shown that someone placed their trust and confidence in another, a presumption of undue influence can still be found ((eg, employee/employer; cohabitees).
- Rebutting presumed undue influence- The person accused of exerting undue influence can rebut the presumption by showing that the other party entered into the transaction of their own free will and were aware of the risks involved. Showing that they received independent legal advice before signing the contract might suffice.

THE END OF A CONTRACT – EXPIRATION, TERMINATION, VITIATION, FRUSTRATION.

- There are essentially four ways in which a contract can be brought to an end.
- **Expiration**- This refers to a contract which comes to an end in accordance with its terms, either because it has a fixed expiry date or because there is a right to terminate contained in the contract (a contractual right to terminate is distinct from a common law right to terminate for breach).
- **Termination**- *Breach*- A breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.
- (a) Failure or refusal to perform – a failure or refusal to perform a contractual promise when performance has fallen due is prima facie a breach.
- (b) Defective performance – where a person promises to do one thing but does another, which differs, for example, in time, quantity or quality, this amounts to a breach. The effect of such a breach often differs from those of a complete failure or refusal to perform (see below). Note that where the "defect" in performance is particularly serious, the breach may amount to non-performance rather than defective performance (for example, if a seller promises beans but delivers peas).
- (c) Incapacitating oneself – for example, a seller commits a breach of contract for the sale of a specific thing if he sells it to a third party.

THE END OF A CONTRACT cont.

- **Anticipatory Breach-** An anticipatory breach occurs when, before performance is due, a party either repudiates the contract or disables himself from performing it.
- (a) Repudiation – clear and absolute refusal to perform, which includes conduct showing the party is unwilling, even though he may be able, to perform.
- (b) Disablement – for example, where a party disposes elsewhere of the specific thing which forms the subject matter of the contract. Where one party commits an anticipatory breach, the other can elect to: (i) keep the contract alive by continuing to press for performance (in which case the anticipatory breach will have the same effect as an actual breach); or (ii) "accept" the breach (in which case he has a right to damages and termination)
- If the injured party does not accept the breach, he remains liable to perform and retains the right to enforce the other party's primary obligations. However, it must be borne in mind that the effect of one party's breach may mean that it prevents the other party from performing his continuing obligations. Affirmation does not prevent the injured party from terminating the contract on account of a later actual breach.
- If the injured party does accept the breach, acceptance must be complete and unequivocal and he should make it plain that he is treating the contract as at an end. A breach can be accepted by bringing an action for damages, or by giving notice of intention to accept it to the party in breach.
- Acceptance of the breach entitles the injured party to claim damages at once (before the time fixed for performance). As with an actual breach, an anticipatory breach can also give rise to a right to terminate. This right arises immediately, if the prospective effects of the anticipatory breach are such as to satisfy the requirement of substantial failure in performance.
- **Termination for Breach-** Termination is the remedy by which one party (the injured party) is released from his obligation to perform because of the other party's defective or non-performance. A breach gives the injured party the option to terminate the contract or to affirm it and claim further performance.
- Termination depends on the injured party's choice of action because the guilty party should not be allowed to rely on his own breach of duty to the other party in order to get out of the contract. The injured party must unequivocally indicate his intention to terminate such as by giving notice to this effect to the party in breach or by commencing proceedings. He must terminate the contract as a whole. And, if the injured party accepts further performance after breach, he may be held to have affirmed, so that he cannot later terminate the contract. After termination, the injured party is no longer bound to accept or pay for further performance.
- However, termination does not release the injured party from his duty to perform obligations which accrued before termination. If the injured party fails to exercise his option to terminate, or positively affirms the contract, the contract remains in force and each party is bound to perform his obligations when that performance falls due

THE END OF A CONTRACT cont.

- At law, the right to terminate for breach arises in three situations: (a) repudiation – where a party evinces a clear and absolute refusal to perform; (b) impossibility – where a party disables himself from performing; (c) substantial failure to perform. Any defect in performance must attain a certain minimum degree of seriousness to entitle the injured party to terminate.
- A failure in performance is "substantial" when it deprives the party of what he bargained for or when it "goes to the root" of the contract. For less serious breaches, a right to damages may arise, but not a right to terminate.
- It should be noted that bringing proceedings for breach of contract does not necessarily amount to termination of that contract. It may be that the claimant is seeking damages alone and/or the contract may contain specified formalities to be met before termination can occur.
- **Vitiation**- There are situations where the parties have reached agreement but the question arises whether the existence or non-existence of some fact, or the occurrence or non-occurrence of some event, has destroyed the basis on which that agreement was reached so that the agreement is discharged or in some other way vitiated.
- **Frustration**- Under the doctrine of frustration, a contract may be discharged if, after its formation, an unforeseen event occurs which makes performance of the contract impossible, illegal or essentially different from what was contemplated.
- A good example is Avery v Bowden, in which a ship was supposed to pick up some cargo at Odessa. With the outbreak of the Crimean War, the government made it illegal to load cargo at an enemy port, so the ship could not perform its contract without breaking the law. The contract was therefore frustrated.
- Frustration will not occur where the frustrating event was caused by the fault of one party. Equally, frustration will not occur where the parties made express provision for the event in their contract (such as in a force majeure clause). The doctrine cannot be invoked lightly, and cannot allow a party to escape from a bad bargain.
- The position at common law is that frustration discharges the parties only from duties of future performance. Rights accrued before the frustrating event therefore remain enforceable but those which have not yet accrued do not arise. This may cause hardship, as exemplified in Chandler v Webster. Here money for hire of a room for the King's coronation was due in advance. Not all the monies had been paid when the coronation was postponed, but the hirer was still liable to pay the full amount. The payment had fallen due before the frustrating event.
- The Law Reform (Frustrated Contracts) Act 1943 was enacted to remedy this defect. Under the Act, sums paid before that date are recoverable; sums due after that date cease to be payable. Where there has been partial performance, the performing party may be able to recover its expenses incurred in carrying out, or preparing to carry out, that performance.

Remedies.

- We Have already visited some forms of remedies before.
- **Damages** are intended to compensate the injured party for the loss that he has suffered as a result of the breach of contract. In order to establish an entitlement to substantial damages for breach of contract, the injured party must show that:
- (i) actual loss has been caused by the breach; (ii) the type of loss is recognised as giving an entitlement to compensation; and (iii) the loss is not too remote. A breach of contract can be established even if there is no actual loss but in that case, there will be an entitlement to only nominal damages.
- The underlying principle is to put the injured party financially, as near as possible, into the position he would have been in had the promise been fulfilled. As a general rule, damages are based in loss to the claimant not gain to the defendant. In other words, damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party.
- Damages may sometimes be an inadequate remedy. There are a number of equitable remedies, which are discretionary, directed at ensuring that the injured party is not unjustly treated by being confined to the common law remedy of damages.
- For example: (i) Specific Performance -Where damages are deemed inadequate, the court may make an order for specific performance which will compel the party in breach to fulfil the terms of a contract. The court "will only grant specific performance if, under all the circumstances, it is just and equitable to do so.“
- Specific performance may be refused if the claimant has acted unjustly or unfairly on the basis that the claimant must come to equity with "clean hands".

Remedies cont.

- (ii) Injunction- A court may restrain a party from committing a breach of contract by injunction. Such injunctions may be "interlocutory" ones which are designed to regulate the position of the parties pending a full hearing of a dispute or permanent.
- Further, an injunction (whether interlocutory or permanent) may be "prohibitory" ordering a defendant not to do something in breach of contract or "mandatory" requiring a defendant to reverse the effects of an existing breach.
- An injunction will not normally be granted if the effect is to directly or indirectly compel the defendant to do acts for which the plaintiff could not have obtained an order for specific performance.
- Restitution- also known as restitutionary damages, is a type of remedy available in many civil lawsuits and in some criminal cases. This type of remedy is calculated based on the gains of the defendant, rather than the plaintiff's losses. Restitution basically requires a defendant to forfeit gains that they have unlawfully obtained to the plaintiff.
- In contracts law, restitution is used the most. Restitution in contracts law is designed to restore the injured party or the party who suffered damages, to the position they were before the formation of the contract. Parties that want restitution cannot seek lost profits or earnings caused by the breach.
- In order to obtain restitution, the plaintiff must include this claim in the initial complaint. Also, restitution will not be awarded if the amount cannot be calculated with certainty.
- Restitution is commonly awarded for two main purposes:
- To "make the victim" whole and restore them to their financial status before the offense occurred
- To prevent the unjust enrichment of the defendant (i.e., prevent them from keeping unlawful gains)
- Restitution typically applies in situations where one person has benefited from someone else's loss and there is a need to make return the victim and the defendant to the economic statuses they were at prior to the defendant's actions. For example, in a contract lawsuit, a non-breaching party may cancel the contract and bring suit for restitution if the non-breaching party has given a benefit to the breaching party to their detriment as a result of attempting to fulfil the obligations of the contract.

Remedies cont.

- In criminal cases, one of the penalties that may be imposed is requiring of the defendant to financially reimburse the value of stolen goods to the victim or pay the victim for harm caused, such as giving money to the victim to cover hospital bills in the event of criminal battery. This is known as criminal restitution.

- What Is the Difference between Restitution and Compensation?

- The difference between restitution and compensation lies in the manner in which the monetary award is calculated. With restitution, the award is calculated based on how much the defendant gained from the violation. With compensation, the amount is calculated based on how much the plaintiff lost, financially speaking.

- In some cases, the judge will give the plaintiff a choice between restitution and compensation. For example, a restitution award may result in a higher payoff to the plaintiff than would compensation. The plaintiff may then be allowed to choose the higher award amount. This type of choice in remedies may not be available in all cases.

Cases.

- **Storer v Manchester City Council [1974] 1 WLR 1403**
- **FORMATION OF CONTRACT- Facts**
- The defendant City Council refused to proceed with the sale of a council property to the claimant under an arrangement which had been agreed with its predecessor. All of the terms of the contract had been agreed but for the date on which the lease was to end and the mortgage payments were to begin, which had been left blank on the form returned to the defendant by the claimant. The claimant alleged that the contract was completely concluded and sought specific performance of the agreement.
- **Issue**
- The question was whether the contract had been concluded, despite the fact that the date on which the claimant became a purchaser rather than a tenant was still to be determined.
- **Held**
- The Court of Appeal held that the contract was complete despite the absence of this term. In distinguishing between an offer and an invitation to treat, it is necessary to look. not to the subjective intentions or beliefs of the parties, but rather on what their words and conduct might reasonably and objectively be understood to mean. In this case the defendant had made clear by their conduct and language that they intended to be bound upon the acceptance of the offer despite the fact that some terms remained to be agreed. In the words of Lord Denning MR:
- "In contracts, you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract" (p. 827).

- **Moran v University College Salford-** After choosing to study for a recognised qualification in a competitive field, the appellant used a central admissions system to act on his behalf when approaching a number of suitable universities. After facing a volume of rejections, he received an unconditional offer from a provider of notable standing. There were of course certain conditions attached to the offer, and one of those was the preclusion from seeking admission through the clearing system, as well as accepting any other offers from universities at a later date. The appellant duly acquiesced to these conditions, and returned his acceptance form both in good time, and using the methods prescribed by the university.
- During the period between his acceptance and subsequent discovery that his application had been denied due to over subscription, the appellant had left his position of employment, turned down a second interview for another post, surrendered his tenancy with his landlord and made plans to relocate, so as to support his education. In fact, it was due to a phone call to the university that he learned of the error, at which point he was informed that he could try to apply for an alternative course through clearing (which by this time had run its course).
- When seeking legal remedy under three heads of (i) specific performance (ii) mandatory injunction and (iii) breach of contract, the court found that although the offer had been sent and the acceptance received within the guidelines, there was no guarantee of contract until the enrolment process and payment of fees had occurred. As this fact then prevented the existence of a contract, any claim for specific performance was quashed, along with that of a breach or mandatory injunction.
- Upon appeal, the details of the arrangement were given a thorough examination, and some interesting facts emerged. While it was central admission policy to issue application guidelines to the public, there were similar guidelines issued to the receiving universities that contained within them, important information that upon consideration warranted inclusion to the former documentation, as they outlined the responsibilities of the providers where such errors were found. In addition to this, the failure of the admissions team to properly address the appellant's application, had denied him any opportunity to enter clearing, an act which was held as consideration prior to contract.
- Unfortunately, despite the good intention and sufferance of the applicant (under the assumption that a legal contract had been constructed), the Court ruled that as with the first judgment, there had been no evidence to suggest that a contract existed, because there had been no formal enrolment and agreed payment of fees; a caveat which had been further construed from the terms contained within the central admissions guide.

Cases.

- ***Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 QB 26** Court of Appeal

  A ship was chartered to the defendants for a 2 year period. The agreement included a term that the ship would be seaworthy throughout the period of hire. The problems developed with the engine of the ship and the engine crew were incompetent. 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:

  The defendants were liable for wrongful repudiation. The court introduced the innominate term approach. Rather than seeking to classify the term itself as a condition or warranty, the court should look to the effect of the breach and ask if the breach has substantially deprived the innocent party of the whole benefit of the contract. Only where this is answered affirmatively is it to be a breach of condition. 20 weeks out of a 2 year contract period did not substantially deprive the defendants of whole benefit and therefore they were not entitled to repudiate the contract.

- ***Poussard v Spiers* (1876) 1 QBD 410**

  Madame Poussard entered a contract to perform as an opera singer for three months. She became ill five days before the opening night and was not able to perform the first four nights. Spiers then replaced her with another opera singer.

  Held:

  Madame Poussard was in breach of condition and Spiers were entitled to end the contract. She missed the opening night which was the most important performance as all the critics and publicity would be based on this night.

- ***Bettini v Gye* (1876) QBD 183**

  Bettini agreed by contract to perform as an opera singer for a three month period. He became ill and missed 6 days of rehearsals. The employer sacked him and replaced him with another opera singer.

  Held:

  Bettini was in breach of warranty and therefore the employer was not entitled to end the contract. Missing the rehearsals did not go to the root of the contract.