LAW OF CONTRACT

Law of Contract is the basis of all commercial relationship. The objective of the Law of contract is to ensure that the parties to the contract fulfil their obligations under the contract for the satisfaction of the other.

Definition:

Pollock defines Contract as "Every agreement and promise enforceable at law is a contract".

According to Sir William Anson, a contract is "a legally binding agreement between two or more persons by which rights are acquired by one or more to acts or forbearances (abstaining from doing something) on the part of the others."

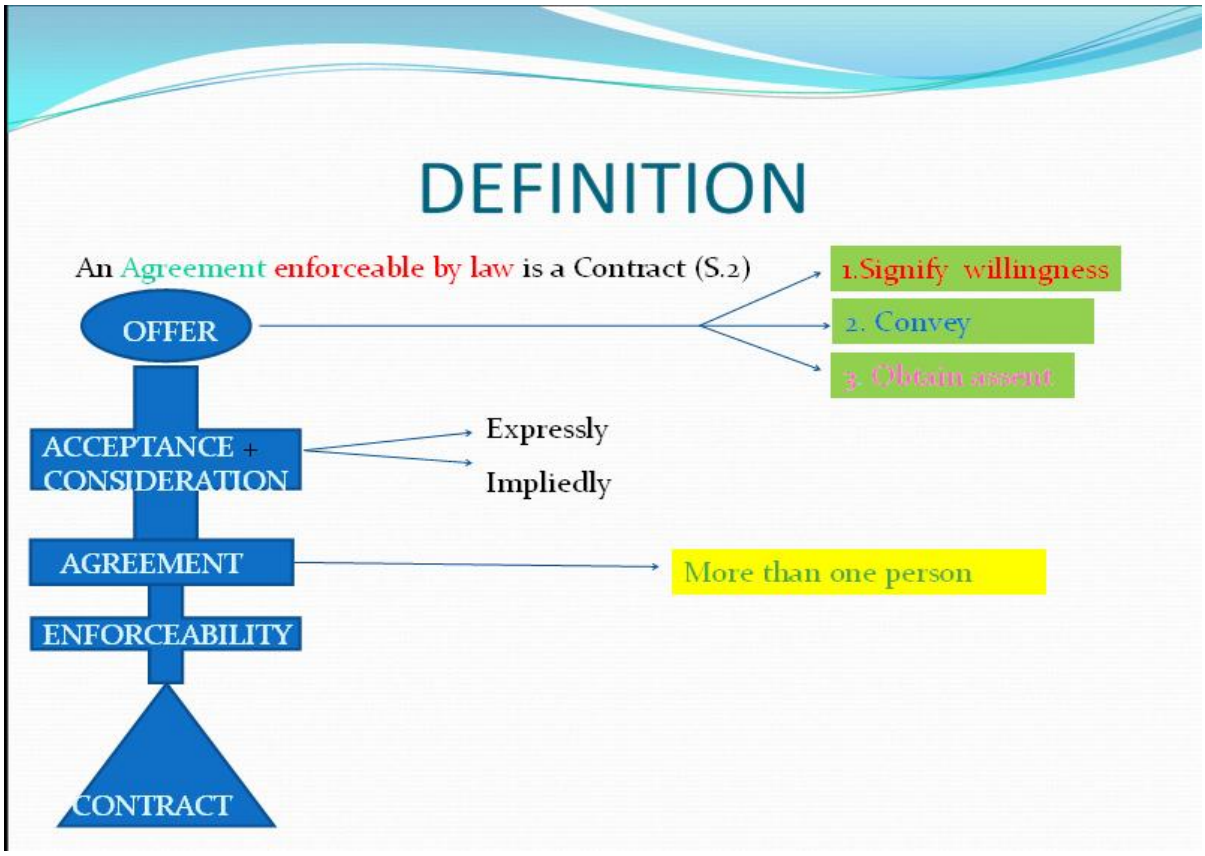
Salmond defines a contract as "an agreement creating and defining obligations between the parties".

In simple words, a contract is an agreement enforceable by law which creates rights and duties for two or more persons.

A contract has four essential elements.

- Offer
- Acceptance
- Consideration
- Intention to create legal relationship.

These ingredients are dealt with in detail in the coming chapters. Refer the diagram below for an easier understanding of the definition of contract.


DEFINITION
An Agreement enforceable by law is a Contract (S.2)
OFFER
1.Signify willingness
2. Convey
3. Obtain assent
ACCEPTANCE + CONSIDERATION
Expressly
Impliedly
AGREEMENT
More than one person
ENFORCEABILITY
CONTRACT

PART A

Chapter 1

OFFER

For the formation of an agreement (basis of a contract), there must be an offer which is certain and there has to be an unqualified acceptance.

Definition

An offer is a proposal from one party to another to enter into a legally binding agreement. The conveyance of the willingness to enter into a legal relation to do or to abstain from doing anything with a view to obtain his consents of that other to such act or abstinence.

According to Treitel, an offer is "expression of willingness to contract on *specified terms* made with the *intention* that it is to become legally binding as soon as it is accepted *by the person to whom it is addressed".*

Essentials

An offer must be
(a) certain
(b) addressed to the offeree and
(c) it must be a statement of the intention to enter into a legal relationship.

Certain

The terms of the contract must be unambiguous and definite. If the terms are vague or ambiguous, the acceptance of such offer will not be legally enforceable.

In ***Gunthing v. Lynn*** (1831), the offer in this case was to pay a sum of £5 if the "horse is lucky". According to the judge, such an offer was not definite enough to form an offer. Therefore it was held that it was not an offer.

Addressed to the offeree

An offer or proposal has to be addressed to a person or persons with whom the offeror intended to create a legal relationship. It could be made to a specific person or to the whole world. But this is different from an invitation to offer. An invitation to offer and an offer can be distinguished on the basis of the intention of the party making the party.

This position was clarified in ***Gibson* v. *Manchester City Council*** [1978] 1WLR 520 (CA). In this case, the Manchester City Council communicated to Gibson that on application made by Gibson, the Council may be prepared to sell the property for £ 2180. Gibson submitted the application form without specifying the price. The council later declined to sell the property to Gibson. The court held that the Council's communication was only an invitation to offer through a specified application form and was not an offer in itself. Therefore, acceptance of the invitation to offer by Gibson (offeree) cannot constitute a contract.

Not an offer

An offer has to be distinguished from an invitation to offer. Acceptance of an invitation to offer cannot be termed as a contract as seen in the earlier Manchester City Council case. An invitation to offer is often intended to initiate negotiations. There are certain circumstances which are often confused for an offer while they are not an offer. Such circumstances are discussed in detail as follows:

(a) Display of goods in a shop

Displaying goods in a shop window or shelf is not an offer but an invitation to the buyers to offer. A shop keeper cannot be compelled to sell a product at a price marked while displaying a product since such display is only an invitation to offer and does not by itself constitute an offer. Seller has the freedom to accept the offer of the buyer or to reject it.

In ***Pharmaceutical Society of Great Britain v. Boots Cash Chemists*** *(1953) 1QB 401,* goods were displayed in the shop's shelves for the customers to take it to the cash counter

for sale. The issue was whether the shop violated section 18(1) of the Pharmacy and Poisons Act, 1933 by allowing the customers to choose the drugs from the shelves without the supervision of a registered pharmacist. It was held that sale took place only at the cash counter and not when the drugs are selected by the customer from the shelf. Since the shop had a registered pharmacist at the cash counter who could prevent unauthorised sale of drugs to the customer, there was no violation of the Act. Therefore, an offer is made by the customer when the goods are taken to the cash counter for payment and acceptance comes from the shopkeeper. Mere display of goods with prices marked on them does not constitute an offer but only an invitation to offer.

In ***Fisher v Bell*** [1961], the defendant had displayed a knife in the window with the description "Ejector Knife -4s". The issue was whether such a display was in violation of Restriction of offensive Weapons Act 1959 which made it illegal to manufacture, sell, hire or offer for sale or hire, lend to any other person any knife of the description as provided for in Section 1(1) of the Act. It was held that a display of goods in the shop window does not amount to offer for sale and is only an invitation to treat.

(b) Advertisements

Advertisements in newspaper, catalogues, circulars etc. issued to potential customers are also regarded as a mere invitation to treat and not an offer. In ***Patridge v. Crittenden*** *[1968] 1 WLR 1204* the issue was whether an advertisement for sale of wild live birds at a specified price is a violation of Protection of Birds Act, 1954 which entails that offering wild live birds for sale is an offence. The court held that advertisement for sale is not an offer but an invitation to offer and therefore he was not convicted for the offence.

There is an exception to this rule. An offer of reward to the public is an offer. This was held in ***Carlill v. Carbolic Smoke Ball Co.****[1893] 1 QB 256 Court of Appeal*In this case, the claimant acting on the basis of an advertisement from the defendant that they will pay £100 to those who were infected with influenza after using their smoke balls as directed by them. The claimant being contracted with influenza after using the smoke balls sued the company for the offered amount. The court held that this advertisement was indeed an offer made to the public at large and therefore, the claimant had entered into a contract by

accepting the offer by performance. Thus the claimant was entitled to receive the offered amount. This position was reiterated in ***Williams v Cawardine*** *(1833) 5 C & P 566.*

(c) Auction

In an auction, the advertisement appealing for bids is only an invitation to make an offer. When the bidder offers a price, the acceptance to such offer is accorded by the fall of the hammer. In ***Harris v Nickerson*** *[1873]* LR 8 QB 286, the defendant advertised an auction of office furniture in Bury St. Edmunds. The plaintiff travelled to the place of auction but the office furniture was withdrawn on the third day of auction. The plaintiff approached the court stating that there was a concluded contract. But the court held in the contrary stating that an auction was only an invitation to bidders and not an offer. An auctioneer is free to withdraw the objects any time before the fall of the hammer. The fall of the hammer is the acceptance of the offer made by the bidder in the case of auctions.

In ***British Car Auctions v Wright*** *[1972]* also it was held that an auction is only an invitation to the bidders and not an offer. In this case the prosecution was that there was a sale of a car which was not roadworthy. The court held that an advertisement for auction does not constitute an offer.

In ***Warlow v Harrison*** [1859], a property was put up for auction without reserve. The plaintiff being the highest bidder was overbid by the vendor and the property was knocked down to the vendor. The court departing from the hitherto decisions that until the hammer falls there is no contract which binds the auctioneer held that since the auction was without reserve, the highest bonafide bidder there was a collateral contract between the auctioneer and the highest bonafide bidder.

In ***Barry v Heathcote Baal & Co***. *[2000]*, two engine analysers were put up in auction without reserve. The claimant bid for 200 dollars each for a machine. The auctioneer refused to sell the machines since the bid was too low even though it was the highest bid. The court following the decision in Warlow v. Harrison held that there was a collateral contract between the auctioneer and the highest bidder when the auction was advertised without reserve. The offer in this case was made by the auctioneer to the highest bonafide bidder and such offer was accepted by the bidder when the bid was made.

(d) Tenders

An advertisement inviting bidders for a tender is an invitation to offer and not an offer. When the bidder submits a tender, it becomes an offer. When the person inviting the tender accepts the tender, it becomes an acceptance of offer.

In ***Spencer v Harding*** *[1870]*, it was held that a tender inviting bids for the purchase of stock is only an invitation to offer and not an offer in itself. It is different from reward offer or an offer to the world. It is not an offer to sell to the highest bidder but only invites offers from bidders.

In ***Blackpool and Fylde Aero Club v Blackpool BC*** *[1990]*, the Blackpool Council invited tenders to a new licence to operate light and heavy aircraft which was to be submitted before 12 o'clock on 17th March. Aero Club also participated in the tender by giving the highest bid. But due to the mistake of the staff that bid was not included and tender was given to Red Rose helicopters. Later, the Council found the mistake and tried to rectify the mistake by granting the tender to Aero Club. But Red Rose Helicopters objected by taking a stand that the council was contractually bound to grant the tender to them. The Court of Appeal held that the inviter of tender has the right not to accept the highest bidder since invitation of tender is only an invitation to offer. Thus Aero club's petition failed.

Tender bids have to be in exact monetary terms and cannot be relative. In ***Harvela Investments Ltd v Royal Trust Co of Canada***[1986] AC 207, the Royal Trust Co., invited bids. Harvela responded with a bid for 2,175,000 dollars while Sir Leonard Outerbridge bid for "$2,100,000 or $101,000 in excess of any other offer… expressed as a fixed monetary amount, whichever is higher." Royal Trust Co accepted Sir Leonard`s bid. This was challenged by Harvela that a referential bid is invalid. The House of Lords reversed the Court of appeal's judgement and held that a referential bid is not valid.

(e) Mere Statement of Price

A statement which reveals the price of a product is not an offer. It is only a statement of price. In ***Harvey v Facey*** [1893] Harvey requested to know the lowest price for a property in Jamaica for which the defendant replied that nine hundred pounds is the lowest price. Harvey replied stating that he is willing to purchase the property for nine hundred pounds. The defendant refused to sell the property at such price. Harvey sued the defendant stating that the offer was accepted by Harvey by his reply to purchase the property at 900 pounds. The court held that the message from Harvey was only a request for information. There was no offer from Facey in this case and therefore there was no acceptance or a concluded contract. The reply from the defendant was only a statement of price and not an offer.

On the contrary, when a statement of price is made with a purpose to conclude an offer, it can be considered as an offer. This was held in ***Biggs v Boyd Gibbins*** [1971]. In this case Biggs says "for a quick sale I will accept £26,000" which Boyd Gibbins accepts. The statement made by Biggs was with an intention to sell. This becomes an offer even with a statement of price.

COMMUNICATION OF OFFER

It is necessary to communicate an offer to the offeree for the conclusion of a contract. The communication of an offer is complete when it comes to the knowledge of the offeree. Since acceptance cannot be made without the communication of the offer, it is crucial for the conclusion of a contract. An offer can be communicated through various methods. It can be through written form, verbally or by conduct. In ***Taylor v Laird*** [1856], the ship's captain resigned from his post officially but helped its workers to ship back home. Since he had not communicated his willingness to continue working for the ship to his employer, the employer could not accept the offer and therefore there was no contract between the employer and the captain.

In ***Inland Revenue Commissioners v Fry*** [2001], Fry owed 113,000 pounds as tax. Fry sent a cheque for 10,000 pounds writing "in full and final settlement to be accepted when banked". IRC banked the cheque without the knowledge of the offer or its terms. The court held that

there was no contract since the offer was not communicated to IRC and there was no acceptance to such offer.

Revocation of offer

An offer can be revoked by the offeror at any time before it is accepted by the offeree and the communication of the acceptance is complete as against the offeror. In ***Routledge v Grant*** *[1828],* Grant gave an offer to sell his house and 6 weeks' time was granted. But before the expiry of such time, Grant withdrew the offer. Since no acceptance was accorded to by the offeree and no deposit of money to keep the offer open, it was held that the revocation of the offer was valid.

The revocation of offer must also be communicated to the offeree. The communication of revocation is complete as against the person to whom it is made when it comes to his knowledge. In ***Payne v. Cave*** *(1789),* it was held that the revocation of offer is possible before it is accepted by the offeree.

In ***Byrne v Tienhoven*** [1880], the defendant posted a letter with an offer for sale of 1000 boxes of tinplate on 1st October. The letter was received by the plaintiff on 11th October and acceptance was telegraphed on the same day. But, on 8th of October the defendant had sent a letter withdrawing the offer. It was held by the court that the postal rule does not apply in this case since it will cause much inconvenience to the offeree to wait after his acceptance to know if the offer was withdrawn before his acceptance. It was held that such withdrawal is invalid. The communication of the revocation of offer is valid only if it is communicated to the offeree before the acceptance of the offer.

The communication of the revocation of offer need not be made by the offeror himself. It could be made by a third party who is reliable. Such communication is valid. This was held in ***Dickinson v Dodds*** *[1876]*. In this case a Dodds had offered to sell a property to Dickinson. Before the offer was accepted by Dickinson, he learned from Berry a third party that Dodds had sold the property to another person and the offer to Dickinson remains withdrawn. It was held that such communication of the revocation was valid.

Revocation of Unilateral Contract

A unilateral contract with an executory consideration cannot be withdrawn so long as the execution of the consideration subsists. In ***Errington v Errington& Woods*** [1952] the father took out a mortgaged property and promised his son and daughter in law to convey the property to them if they pay the mortgage. The father passed away and the son got separated from the daughter – in- law. The wife of the deceased sued for the return of the house. But it was held that as long as the payment of mortgage is continued, the daughter –in –law has the licence to stay in the house and the offer from the father was accepted when the arrangements for payment of mortgage was done. So long as the mortgage subsists, there cannot be a revocation of offer.

Termination of offer

An offer comes to an end when it is terminated or when the offer is accepted by the offeree. Termination of an offer can be through five ways: by acceptance, by revocation, by lapse of time, by happening of specific event and by rejection.

Acceptance

When an offer is accepted by the offeree, the offer comes to an end and the offer becomes a contract which binds the offeror and the offeree.

Revocation

Revocation of an offer is the withdrawal of the offer by the offeror as discussed above.

Lapse

An offer gets invalid by the passage of reasonable time. Acceptance of the offer has to be made within a prescribed time. If there no time prescribed, it lapses after a reasonable time.

In ***Ramsgate Victoria Hotel v Montefiore*** [1866], the defendant offered to purchase the shares from the claimant. After six months, the claimant accepted the offer. The value of shares had fallen by this time. So the defendant refused to sell the shares and the claimant

sued the defendant for specific performance. It was held that six months was beyond a reasonable period of time taking into consideration the nature of the subject matter. Therefore, even though there was no explicit withdrawal, the offer had lapsed due to the passage of time and cannot be enforced.

Death of the offeror is another reason for the lapse of the offer if the offeree comes to know about the death before acceptance. In ***Bradbury v Morgan*** [1862], it was held that if the offeree was not aware of the death of the offeror before acceptance, the acceptance can still occur.

Death of the offeree can also lapse the offer since the offer cannot be accepted by the offeree`s representatives. An offer is made specifically to one person. In ***Reynolds v Atherton*** [1921] it was held that the death of an offeree lapses the offer.

The non- performance of a condition precedent to acceptance can also lapse an offer. In ***Financings v Stimson***[1962] the offer to buy a car lapsed when the condition that it would work in its undamaged state failed.

Happening of Specific Events

When an offer contains a term that it will come to an end when a specific even happens, the offer is terminated at the time of such happening. Such offer cannot be accepted after such happening.

Rejection

An offeree may reject the offer made by the offeror. Such rejection prohibits the subsequent acceptance by the offeree and the offer lapses. Rejection of offer can be express or implied. Express rejection can be written or oral and happens when such rejection reaches the offeror. Implied rejection can be by making a counter- offer or when a conditional acceptance is given by the offeree.

Counter offer - When an offeree accepts the offer with new terms it is called as counter offer. In ***Hyde v Wrench***(1840), Wrench offered to sell a farm for 1000 pounds to Hyde. Hyde wrote back offering 950 pounds which Wrench refused. After two days of such refusal, Hyde

agreed to buy the farm for 1000 pounds but Wrench refused to sell the farm. Hyde sued Wrench for breach of contract. It was held that the offer made by wrench was replied with a counter offer by Hyde. This counter offer was rejected by Wrench and no contractual relation happened. Later when Hyde offered 1000 pounds, it was a new offer which Wrench was free to reject or accept. Since Wrench rejected the offer, there is no contract between the parties and so no breach of contract.

A counter offer should be distinguished from a mere enquiry. This issue was discussed in ***Stevenson Jacques v McLean*** *(1880).*In this case; Stevenson offered "40s per ton in cash was the lowest price, the offer open till Monday." Mclean later telegraphed Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give.' Stevenson without answering it sold it to someone else. Mclean before knowing this accepted the offer and sued Stevenson for failure to deliver. It was held that the telegraph of Mclean cannot be considered as a counter offer but was only a mere enquiry. Stevenson could have revoked the offer but it should have reached Mclean before the acceptance. Therefore, there was a valid contract.

Once the offer is communicated to the offeree, the next step in the formation of a contract is to attain the unqualified acceptance of the offer from the offeree.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

1. ***Gunthing v. Lynn***
2. ***Gibson* v. *Manchester City Council*** [1978] 1WLR 520 (CA)
3. ***Pharmaceutical Society of Great Britain v. Boots Cash Chemists*** *(1953) 1QB 401,*
4. ***Fisher v Bell*** [1961]

5. ***Patridge v. Crittenden*** *[1968] 1 WLR 1204*
6. ***Carlill v. Carbolic Smoke Ball Co.****[1893] 1 QB 256*
7. ***Harris v Nickerson*** *[1873]* LR 8 QB 286
8. ***British Car Auctions v Wright*** *[1972]*
9. ***Warlow v Harrison*** [1859]
10. ***Barry v Heathcote Baal & Co****. [2000]*
11. ***Spencer v Harding*** *[1870]*
12. ***Blackpool and Fylde Aero Club v Blackpool BC*** *[1990]*
13. ***Harvela Investments Ltd v Royal Trust Co of Canada***[1986] AC 207
14. ***Harvey v Facey*** [1893]
15. ***Biggs v Boyd Gibbins*** [1971]
16. ***Taylor v Laird*** [1856]
17. ***Inland Revenue Commissioners v Fry*** [2001]
18. ***Routledge v Grant*** *[1828]*
19. ***Byrne v Tienhoven*** [1880]
20. ***Dickinson v Dodds*** *[1876]*
21. ***Errington v Errington& Woods*** [1952]
22. ***Ramsgate Victoria Hotel v Montefiore*** [1866]
23. ***Hyde v Wrench***(1840)
24. ***Stevenson Jacques v McLean*** *(1880)*

Chapter II

ACCEPTANCE

Definition

A contract is formed when an offer communicated to the offeree is accepted by the offeree without any alteration in terms. Acceptance is the way by which the offeree communicates his willingness to be bound by the terms and conditions of the offer. When the offeree communicates his assent to the offer, the offer is said to be accepted by the offeree. When the offeree gives his assent to an offer, if there is any change in its terms and conditions, it is not considered as acceptance of the offer but is treated as a counter offer as discussed in ***Hyde v Wrench*** *(1840). "Mirror image" rule* was laid down in this case that an acceptance to an offer cannot alter its terms. In other words, acceptance can be defined as a "final and unqualified expression of assent to the terms of the contract".

Forms of acceptance

An acceptance can be made expressly or impliedly. It can be through words or by conduct. When the acceptance of the offer is through words (written or spoken) it is said to be made expressly. When the acceptance can be inferred from the conduct of the parties or through the circumstances, it is said to be made impliedly. In ***Smith v Hughes***, Blackburn J opined as "If, whatever a man's real intentio.., he so conducts himself that a reasonable man would believe that he was assenting…, and that other party upon that belief enters into the contract.., the man thus conducting himself would be equally bound as if he had intended to agree…" This illustrates how a party can be bound by conduct. Thus an acceptance can be in any form unless a specific mode of acceptance is mentioned in the offer.

In ***Yates v Pulleyn*** *[1975]*, the offer was made by the defendant to buy land with a condition that acceptance to be sent by "registered or recorded delivery post". The plaintiff made the acceptance through ordinary post and the defendant refused to accept it. The court held that even though a method was stipulated in the offer, it was only to ensure delivery and in effect that has happened. So the acceptance was valid. Thus even if a method of acceptance is mentioned in an offer, an equally effective or expeditious method will suffice. This was further held in ***Tinn v Hoffmann*** (1873).

ESSENTIALS OF ACCEPTANCE

For an acceptance to be valid there are certain conditions to be fulfilled.

(1) It should be in response to an offer;

(2) It should come from the offeree and

(3) It should be communicated to the offeror.

In response to an offer

Acceptance can happen only after an offer is made. In a bilateral contract, the offeror makes an offer and the offeree in response to that offer accepts it. In a unilateral contract an act is performed in response to a request and there must be a relation between such act and the request to perform. An acceptance cannot be considered valid if the party was not aware of the offer.

In ***R v Clarke***(1927) there was an offer of reward for anyone who gives information regarding a murder case. Clarke without the intention of responding to the offer gave information regarding the murder to protect himself from the charge of murder. It was held by the Australian High Court that since the acceptance was not "*in reliance upon the offer or with the intention of entering into any contract"*, a contract is not said to have arisen. Thus there must be an intention to respond to an offer which creates a valid acceptance.

Contrary to the above case, in ***Williams v Carwardine*****(**1833), the deceased's brother and defendant published an offer of 20 pounds to "whoever would give such information as would lead to the discovery of the murder of Walter Carwardine". The plaintiff gave information regarding the same and two persons were convicted. The defendant refused to pay the reward when claimed. The court held that she was entitled to the claim as she was aware of the offer. It does not matter if she had the intention to respond to the offer. Knowledge of the offer is enough to create a valid acceptance by conduct or words.

Acceptance should come from the offeree

If the offer is made to a specific person, acceptance should stem from the same person to whom it is made. This was held in ***Boulton v Jones***(1857). In this case, the business was bought by a new owner and the defendant order an amount of piping. The order was accepted

and delivered by the new owner. But the offeror refused to pay for the order since the offer was made to the old owner who owed money to the offeror. The court held that and offer made to a particular person can be accepted only by that person.

Communication of acceptance

The acceptance of an offer unless communicated and made known to the offeror cannot result in a contract. The communication of acceptance must be in the way mentioned in offer if the offer specifies any method. Even though an offer contains a specific method of acceptance, if it is not a mandatory rule any other method as expeditious and advantageous can also result in a valid acceptance. In ***Manchester Diocesan Council etc v Comm. & Gen. Inv. Ltd****[1969] 3 All ER 1593* it was held that sending the acceptance of tender to the surveyor's address is valid even though the offer specifically mentions it to be send to the address given in the offer.

Acceptance can be considered valid only if it is brought to the knowledge of the offeror. In ***Entores v Miles Far East Corpn****[1955] 2 QB 327* the plaintiff was a company that sent an offer by telex to a company based in Amsterdam. Acceptance was sent through telex by the offeree. The contract was not fulfilled and the offeree sued the offeror. In the judgement, Lord Denning observed that if the offeror cannot hear the acceptance from the offeree due to an over flying aircraft, it cannot constitute a valid communication of acceptance of offer unless the offeree communicates the acceptance after the aircraft has flown past. Postal rule is not applicable in instantaneous communication. Therefore, from the above judgement it is clear that an acceptance of an offer if not communicated in clear terms to the offeror, there cannot be a valid contract.

The rule of communication of acceptance is not applicable to reward offers as held in ***Carlill v. Carbolic Smoke Ball Co.***

Acceptance of the offer can be made by the offeree or an authorised agent of the offeree. In ***Powell v Lee***(1908), the plaintiff applied for a job in a school and he was decided to be given the job by the school managers. One of the school managers without authority informed the plaintiff that he was appointed as the headmaster. Later the school management appointed someone else. The court held that there was no contract or a valid acceptance by the member of the school management since he was not authorized to act on behalf of the school

managers. Thus only if the acceptance is communicated by an authorized agent, it becomes valid.

Silence not acceptance

Silence cannot be considered as acceptance to an offer. In ***Felthouse v Bindley*** [1863] Paul Felthouse wanted to buy a horse from his nephew. Felthouse in reply said "If I hear no more about him, I consider the horse mine at 30 pounds and 15s" Nephew did not reply. Bindley sold the horse to someone else. Felthouse sued Bindley for conversion of his property. It was held that since the acceptance was not communicated clearly by the offeree, it does not amount to valid acceptance. Even though the nephew had an intention to accept the offer, he had not communicated it to the offeror. Therefore no contract follows. Silence cannot be deemed to be acceptance. If such a rule was not laid down, an offeree would be contractually bound to all the offers to which he has not responded and will lead to unnecessary contractual problems.

POSTAL RULE

There are offers which stipulate that acceptance has to be send through post. In such cases, acceptance is deemed to be communicated to the offeror when the acceptance is put in the post box or is beyond the control of the offeree. Therefore, a contract is formed when the acceptance is in the course of transmission to the offeror even though it has not reached the offeror.

In ***Henthorn v Fraser***[1892] 2 Ch 27, according to Lord Herschell, "Where the circumstances are such that it must have been within the contemplation of the parties that, according to ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

In ***Adams v Lindsell***106 ER 250, the defendants offered to sell wool to the plaintiffs on 2nd September and expected a reply by 7th September. The plaintiffs received the offer on 5th September and replied with the acceptance on the same day. But the acceptance reached the defendants only on 9th September before which the wool was sold to someone else. It was

held that the defendants were bound by the contract as the contract had concluded on 5th September itself as the acceptance was posted on that day itself.

This is further held in ***Household Fire Insurance v Grant*** *[1879*].In this case, an application for shares was replied by the company with an allotment of shares. The defendant claimed that he never received the reply. It was held that the offer applying for shares was accepted by the insurance company when it is posted by the company. Therefore a contract is concluded at the time of posting and not when it is received. Even if the acceptance through post is lost in transit, the contract is considered to be concluded when the acceptance was posted.

Exceptions to Postal Rule

Postal rule is not applicable in offers which expressly stipulate that contract will be concluded only when the acceptance reaches the offeror. The postal rule was overruled in ***Holwell Securities v Hughes*** *[1974]*. In this case, an offer to sell a property included a stipulation that notice in writing has to be given within a period of six months. The plaintiffs sent a letter exercising the option and the letter was lost in transit. It was held that postal rule does not apply in cases where there is express condition that the acceptance should be in notice of the offeror. Therefore, contract is not concluded when it is put in the postal system but it would conclude only when the acceptance is notified to the offeror.

In cases where instantaneous communication methods are used, postal rule does not apply. This was held in *Entores v Miles Far East Corpn[1955] 2 QB 327.* In ***Brinkibon v Stahag Stahl*** *[1983]*, the plaintiff accepted the offer from the defendants in Austria. In furtherance to such from the defendants, the plaintiff company sent their acceptance through telex. It was held that the postal rule of acceptance being effective from the time it was sent does not apply. If the acceptance is received out of office hours, the acceptance becomes valid only when it is read by the offeror.

Place of conclusion of contract

In ***Entores v Miles Far East Corpn****[1955] 2 QB 327,* it was held that in instantaneous communication, the contract is concluded at the place where the acceptance is received. This

was followed in *Brinkibon v Stahag Stahl* [1983]. It was held that since the acceptance was received in Vienna and not in England.

Battle of Forms

The general rule is that the last counter offer will be deemed to be accepted by the parties in cases where alteration in terms of the contract is noticed. In ***Butler Machine Tools etc v Ex-Cell-O Corporation etc****[1979] 1 WLR 401* the plaintiffs offered a machine tool for £75, 535. Offer also mentioned that it is in accordance with the plaintiff's standard terms which included a "price variation clause". The defendants in response to the offer placed an order on their own standard terms which did not include a price variation clause. The buyer's order also contained an acknowledgement slip stating ""we accept your order on the terms & conditions stated thereon". The plaintiff signed such slip and returned stating that the order is entered on the plaintiff's original quotation. The plaintiff sued the defendant for an extra amount of 2892 pounds basing it on the price variation clause. The court held that the buyer's order was not an acceptance of the offer of the plaintiff but a counter offer and the plaintiff accepted the counter offer by signing the acknowledgement. Thus the plaintiff cannot rely on the price variation clause which was not in the defendant's terms. According to Lord Denning, the transactions have to be taken as a whole and the party who made the last offer prevails often.

In ***Davies v William Old*** *[1969]*, Davies contracted William who subcontracted builders. Builders issued a work order to Davies using the standard form "not pay for work until they had been paid". Davies` suit for unpaid work failed. It was held that the standard form was a counter offer and Davies had accepted such counter offer by conduct.

In ***British Steel Corporation v Cleveland Bridge*** *[1984]*, the plaintiff supplied steel nodes to the defendant with a disclaimer for liability for any loss caused by late delivery. But such terms were not agreed upon. The plaintiff delivered 3 out of the four steel nodes in time. The fourth steel node was delayed. The defendant refused to pay for the three nodes claiming breach of contract. It was held by the court that there is no contract that existed but ordered the defendant to pay for the nodes that were delivered by the plaintiff on time.

Battle of forms has resulted in great intricacy to the contractual relationships in the commercial sphere. The legislative methods require making the terms more certain so as to ease the business relationships.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

(*some cases have been highlighted due to their significance, however please note that, all cases are important, the highlighted ones are significant in our opinion due to the frequency in which questions have been asked based on these cases or because they set out some important precedents*)

1. ***Smith v Hughes***
2. ***Yates v Pulleyn****[1975]*
3. ***R v Clarke***(1927)
4. ***Williams v Carwardine***(1833)
5. ***Boulton v Jones***(1857).
6. ***Manchester Diocesan Council etc v Comm. & Gen. Inv. Ltd****[1969] 3 All ER 1593*
7. ***Entores v Miles Far East Corpn****[1955] 2 QB 327*
8. ***Powell v Lee***(1908)
9. ***Felthouse v Bindley*** [1863]
10. ***Henthorn v Fraser***[1892] 2 Ch 27
11. ***Adams v Lindsell***106 ER 250
12. ***Household Fire Insurance v Grant***[1879]
13. ***Holwell Securities v Hughes*** [1974]
14. ***Brinkibon v Stahag Stahl***[1983]

15. ***Butler Machine Tools etc v Ex-Cell-O Corporation etc****[1979] 1 WLR 401*

16. ***Davies v William Old*** *[1969]*

17. ***British Steel Corporation v Cleveland Bridge*** *[1984]*

Chapter III
CONSIDERATION

Consideration is one of the important factors of a contract. An agreement without consideration is void or *nudumpactum* except in certain cases.

Definition

Lush J defines consideration in ***Currie v. Misa*** *(1875) LR 10 EX.153* as "…some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other".

Justice Patterson defines consideration in ***Thomas v. Thomas*** *(1842) 2 Q.B 851* as "… something which is of some value in the eye of law… It may be some benefit to the plaintiff or some detriment to the defendant ".

It is further defined as "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable" in ***Dunlop v Selfridge*** [1915].

Consideration can be considered as "something in return" for a promise. It could be considered as the factor which forces the party to enter into a contractual relationship.
Consideration can be a promise to perform or forbear from some act in the future. It can also be in the form of money or article.

Types of consideration

Consideration can be past, present or future. Past consideration is consideration given in the past by a person for a present promise. Past consideration is not considered as a valid consideration.

Present consideration or executed consideration is simultaneously made with promise. Eg: when an article is bought from a shop and payment is made at the same time, it is known as present consideration.

Future consideration or executory consideration is when the consideration is to pass from one party to the other subsequent to the formation of the contract. Eg: A promises to deliver certain goods to B after a month. B promises to pay the price after two month. The promise of B is the consideration to the promise of A and is a future consideration.

Consideration is different from motive

Motive is the interest or the fact which induces a party to enter into a contract. Consideration is the real act or abstinence in return by a party to the contract, in ***Thomas v Thomas*** *(1842) 2 QB 851*, the deceased expressed his desire to allow his widow to hold their house for the rest of her life. But there was no such provision made in the will. The defendant made an agreement with the widow to fulfil the desires of the deceased. According to the agreement the widow was to pay one pound as rent but later the defendant tried to throw out the widow from the house. The court held that consideration is different from motive. Here motive was to fulfil the desires of the deceased while the consideration was the rent paid by the widow to the defendant upon the agreement.

Rules regarding consideration

(1) Consideration need not be adequate

Consideration need not be adequate in terms of its monetary value but must be sufficient and to the satisfaction of the other party. In ***Thomas v Thomas*** *(1842) 2 QB 851*, it was held that a ground rent of one pound is sufficient legal consideration and does not depend on the moral obligation.

In ***Chappell & Co v Nestle & Co***[1960], Nestle offered to give away its records for three chocolate wrappers. The issue arose here was whether three chocolate wrappers were good consideration for the records. The court held that "A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration

if it is established that the promisee does not like pepper and will throw away the corn." Therefore, consideration is sufficient if the other party is satisfied with it. It need not be adequate.

In ***White v Bluett***(1853),Bluett before his death had lent some money to his son. Mr. White, the executor of Mr. Bluett sued the son for the money owed. The son contended that his father had told him not to repay the money if he stopped complaining regarding the distribution of property by his father. The court held that the son had no right to complain regarding the distribution of property and the father had the right to distribute his property as he liked. So, the abstinence from doing something which he had no right is not a good consideration.

In ***Ward v Byham*** *[1956]*, the father entered into an agreement with the mother of the child to pay one pound per week if the child was well looked after and happy. Father stopped the payment when the mother of the child remarried. Mother sued for the enforcement of the agreement. Father argued that mother had the legal duty to look after the child and so there was no good consideration for the payment made. The court held that by ensuring that the child was happy, the mother went beyond the legal duty of care and it was good consideration for the payment of money.

(2) Consideration must not be past

A past consideration is not valid under English law. Consideration must be executory or executed and not past. When the promisor is in receipt of some benefit of service before the conclusion of the contract, it is said to be past consideration. ***Re McArdle****[1951] Ch 669* is the best example for past consideration. In this case the daughter in law made some improvements in the house which was to be inherited by the husband and his 3 siblings. An agreement was entered into by the siblings to compensate for the improvements made. But they refused to pay the amount. The court held that the improvements were made prior to the promise to pay for the improvements and so the consideration was past. Past consideration is not considered valid and therefore, the tenants cannot succeed in the action.

Exception

To the contrary, in ***Lampleigh v Braithwaite*** *[1615]*, Braithwaite was imprisoned for murder. He asked the plaintiff to seek pardon from the King and the plaintiff was successful in that. Braithwaite was released and he promised to pay 100 pounds in return. But he refused to make the payment later. Braithwaite contended that the consideration was an act done in the past and cannot be a valid consideration. The court in this case held that while seeking a service from the plaintiff there was an implied assumption that a fee would be paid. It was held that when the action of the plaintiff was requested by the defendant and a reward was reasonably expected. Thus the consideration was valid. Thus the act in the past which formed the consideration was made at the request of the other party and both parties were aware of the need for payment, such consideration is valid.

This was further held in***Pao on v Lau Yiu Long*** *[1980] AC 614*. According to Lord Scarman "the mere existence or recital of a prior request is not sufficient in itself to convert what is a prima facie past consideration into sufficient consideration in law"; and also "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 promisor's request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of a benefit: and payment, or the conferment of the benefit, must have been legally enforceable had it been promised in advance."

In ***Re Casey's Patent*** *[1892]*, Casey was the manager of A and B who offered one third share for the help he has done for the development of the patent. One third share was transferred to Casey. A and B demanded payment for the shares. The court held that Casey had rendered a valid consideration through his past service which was at the request of A and B. Therefore, he could rely on the agreement and was not liable to pay the money.

To conclude, there are two requirements for a past consideration to be valid. (1) It should be made at the request of the promisor and (2) there must be an understanding that payment is due.

There are statutory exceptions to the rule of past consideration. Section 27 of Bill of Exchange Act 1882 provides that a past debt will support a bill of exchange. According to the Limitation Act 1980, an acknowledgement of past within the limitation period will make the limitation period run from the date of such acknowledgement.

(3) Consideration must move from the Promisee

Only a person to whom the promise is made can give the consideration to the promisor. It is not required that the consideration must be made to the promisor. It can be made to a third party. But consideration must arise from the promise himself.

In***Tweddle v Atkinson*** *[1861]* the groom's father and the bride's father entered into an agreement to pay 200 pounds to the groom. Bride's father passed away. The groom sued for the money. It was held that a promisee cannot sue unless consideration arose from him. Third parties to the contract cannot initiate an action on the basis of the contract.

(4) Performance of legal duty is not consideration

If the promisee is under obligation to perform an act or abstain from an act, it cannot be considered as a valid consideration.

In ***Collins v Godefroy*** *(1831) 1 B & Ad 950***,** a witness in court proceedings was offered 6 guineas to give evidence in the court by the defendant. The defendant refused to pay the amount. The court held that the plaintiff had a duty to give evidence and it cannot be considered as a good consideration.

In ***Stilk v Myrick*** *[1809]*, the plaintiff had contracted with the owner of the ship to do anything in the even of emergencies for 5 pounds per month. During the journey two of the crew members deserted and the captain of the ship promised to pay the wages of the deserted crew to be divided among the rest of the crew if they managed the situation. Captain later refused to pay. The court held that being contracted to do anything during emergency, the crew were legally bound to do all the work that they did when two of the crew members deserted. Thus there is no valid consideration flowing from the crew members for payment.

Exceptions

Something more than the legal or public duty

In ***Glassbrook Bros v Glamorgan CC*** *[1925] AC 270*, the owners of a mine offered to pay money to the police for their presence in the mine during a strike. The policemen were reasonably expected to have regular checks only. The owners later refused to pay the amount. The court held that anything done in excess of the legal duty is a valid consideration. Thus the police presence in excess of the regular checks was good consideration for the payment. This ratio was held in *Ward v Byham [1956]* as discussed above.

If practically a benefit is accrued on the performance of contractual duty

In ***Hartley v Ponsunby*** *[1857] 26 LJ QB 322*, the plaintiff entered into a contract with the defendant to crew a ship. During the voyage, 17 out of the 36 crewmen deserted. The remaining 6 crewmen agreed to continue the voyage for an extra sum of money promised by the defendant. But the defendant refused to pay the extra money. The court held that this case was different from ***Stilk v. Myrick*** since more than 17 crewmen (as compared to two in Stilk case) deserted, it changed the nature of the contract. The promise of the defendant to pay an extra sum of money is a new offer and when accepted by the crew is a new contract which is enforceable. In this case the crew members were expected to do much more than what they had contracted for initially and it brought about a benefit to the owner in the practical sense.

In ***Williams v Roffey*** *(1989)*, Williams sub contracted from Roffey to do the carpentry for flats. He could not finish the work since the payment was too less. Considering this Roffey offered 575 pounds per flat for the completion of work on time. Williams completed eight flats since only 1500 pounds were paid to him. Roffey brought in other employees to finish the work on time. Williams sued Roffey. The court held that even though there was a pre-existing duty, both the parties agreed on new terms and intended to do so. Therefore, the completion of work on time was good consideration since it would save the defendant from paying damages to the clients for late completion. Williams could claim the rest of the amount.

Performance of existing duty to third party

In ***Shadwell v Shadwell*** *[1860],*Mr. Shadwell was engaged to marry Ellen Nicholl. Engagement made it a binding contract. Mr. Shadwell's uncle offered to pay a sum of 150 pounds every year after marriage to support him. Uncle passed away and Mr. Shadwell sued his estate for the complete realisation of the amount. It was argued that there was no consideration since he was under a contractual duty to marry Ellen while the promise was made. The court held that, the performance of an existing duty to a third party is good consideration and the contract is valid.

Promise not a good consideration

In ***Jones v Waite*** *(1839) 5 Bing NC 341*, it was held by the court that a mere promise to do an act does not constitute a valid consideration as opposed to the actual doing of an act.

(5) Part payment of a debt is not a good consideration

Payment of a debt lesser than the actual amount cannot be considered as a good consideration. It has been held in various cases that part payment is not a valid consideration and the person to whom money is owed can successfully sue the debtor.

In ***Pinnel's Case*** *[1602],* the plaintiff initiated action against the defendant for a sum of 8 pounds and 10 shillings. The defendant argues that even before the debt was due at the instance of the plaintiff a sum of 5 pounds- 2S-6d was paid for the full satisfaction of the debt. The court held that "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc. in satisfaction is good... [as] more beneficial to the plaintiff than the money."

In ***Foakes v Beer*** *(1884) 9 App Cas 605*, the appellant owed 2090 pounds to the respondent upon a court settlement. Beer agreed that no action will be taken against Foakes if he pays back the amount in instalments. Foaks paid back the principal amount

but not the interest that accrued. Beer took action against Foakes for the interest owed. The court held that the agreement entered into between Foakes and Beer was not valid for want of consideration. It was held that a promise to pay back the debt is not a consideration since no other benefit arouse from Foakes to Beer. Thus Beer was successful.

In ***DC Builders v Rees*** *[1965]*, the plaintiff company did work for the defendant for an amount of 732 pounds. The defendant paid only 250 pounds and refused to pay the remaining 482 pounds saying that the work was defective and agreed to pay 300 pounds only. The plaintiff company was in bankruptcy and accepted the offer in completion of account. Later the plaintiff company sued Rees for full payment. The court held that the plaintiff agreed to the less payment on duress as they were in bankruptcy. It was held that there was no accord and satisfaction and part payment is not a valid consideration in that case. Therefore, the plaintiff had the right to full payment.

In ***Re Selectmove*** *[1995] 1 WLR 474*,Selectmove Ltd owed a substantial amount as arrears to the Inland Revenue. The Managing Director offered to pay the future tax on time and the arrears as instalments but it was not replied back by the Inland Revenue. Later, Selectmove was served with a notice to pay an amount of 25650 pounds as arrears. Selectmove argues that the Inland Revenue had agreed to accept a lesser amount. The court followed the judgement in Foakes v. Beer and held that here was no consideration for such agreement and it cannot be accepted. Therefore Selectmove had to pay the full amount.

Exceptions

(a) Composition agreements: In ***Wood v Roberts*** *[1818]* it was held that when a debtor owes money to a group of creditors, and the creditors agree to accept a lesser amount in satisfaction of the money owed, individual creditors cannot sue the debtor for the full realisation of the amount.

(b) Part –payment by a third party: if the creditor accepts part payment of a debt from a third party in full satisfaction of the debt, the creditor cannot proceed against the debtor for the full amount. In ***Welby v Drake*** *[1825*], the plaintiff accepted 9 pounds

from the defendant's father in full realisation of a debt for an amount of 18 pounds. Later the plaintiff sued the defendant for the full amount. It was held that it was a fraud committed by the plaintiff on the defendant's father and it cannot succeed.

Estoppel

Estoppel is used as a defence and not as a cause of action. Estoppel is when a party through verbal or conduct makes someone believe that a state of affairs exist and the other party on reliance of such representation acts on such representation to his prejudice, then the party who makes such representation is not allowed to assert that a different state of affairs existed at the same time.

There are three stages to Estoppel by representation:

(1) one party represents that a state of affairs exist
(2) other party in reliance to such representation acts detrimentally to himself
(3) the party making the representation cannot go back on his words.

In ***Maclaine v Gatty*** *[1921]*, Lord Birkenhead explains Estoppel by representation as "Where A has by his words or conduct justified B in believing that a certain state of facts existed, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time".

In ***Avon County council v Howlett*** *[1983]*, the county council paid an employee who was sick more than what he deserved. The council later sued the employee for the overly paid amount. The defendant argued that the county council was Estopped from doing it since on the belief that he deserved such money, he had spend it or rather changed his legal position relying on the conduct of the council in paying him more. The defence of Estoppel succeeded in this case.

Promissory Estoppel

Promissory Estoppel is defined as when a person makes an ambiguous representation verbally or through conduct with an intention that the other party will rely on this

representation and change the legal position and the other party in fact relies on such representation to change his position, the person who made such ambiguous representation will be prevented from going back on his words or conduct if that will affect the representee detrimentally. In simple words, a party after making a promise and on such promise if the other party does something to change his contractual relation cannot go back on his promise.

The doctrine of promissory estoppel was first explained in ***Hughes v Metropolitan railway*** *[1877]*. In this case, Mr.Hughes was the owner of the property leased to the Metropolitan railway. According to the contract, the tenant had to complete the repairs within six months of the notice given by the owner. After giving the notice, the railways proposed to buy the property and negotiations were underway until December. The notice period was to end in April. Nothing constructive was made out in the negotiations. The owner sued the railways for non completion of repairs within April. It was held by the House of Lords, that by entering into negotiations, the owner had given an impression that the tenant did not have to strictly go by their contractual obligations on the time limit and the tenant acted on such promise to their detriment. Thus, Mr. Hughes could not succeed.

In ***Central London Pty ltd v High Trees House Ltd ('High Trees case')*** *[1947] KB 130*, the flats were let out to the defendants for 2500 pounds a year. Defendants were unable to sublet the flats due to the outbreak of World War II. The claimant thus reduced the rent to 1250 pounds a year. By 1945, all the flats were let out to tenants. Claimants sued for the original amount from 1945. The court held that the claimants had the right to full amount since the reduction was only intended as an interim measure during the war and they are entitled to the full amount from 1945.

ELEMENTS OF PROMISSORY ESTOPPEL

(1) *Representation or Promise*- There must be a representation or a promise not to enforce the legal rights completely. It could be by words spoken or by conduct. Mere silence is not considered as a representation or promise.

(2) *Representation relied upon by the promise* – For promissory estoppel to be applied, the promise needs to have relied on the representation made by the promisor and should have altered his legal position. It is not required to be detrimental to the

promisee. In ***Post Chaser****[1982] 1 All ER 19*, Goff J observed that "… it is not necessary to show detriment, indeed the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights."

(3) *Inequitable* – it may not be always inequitable to go back on a given promise. In ***D & C Builders v Rees****[1966] 2 QB 617*, it was held that it was not inequitable for the builders to go back on their promise to accept lesser amount as such agreement was entered into by the builders on duress.

(4) *Defence and not a cause of action*- In ***Combe v Combe****[1951] 2 KB 215*, Mr.Combe and Mrs.Combe got divorced and Mr.Combe promised to pay a sum as maintanence. Six years later Mrs.Combe sued Mr.Combe for the arrears of the sum. It was held in the first instance that even though there is no consideration arising from Mrs.Combe, Mr.Combe was bound by the doctrine of promissory Estoppel. But on appeal, the decision was reversed and it was held that promissory estoppel cannot give rise to an action. It can only be used as a defence.

(5) *Waiver or termination of contract:*Promissory estoppel can be used to alter the terms of the contract or to terminate a contract. The absence of consideration in altering the terms of the contract can be unenforceable but the doctrine can be used to give effect to such alterations. Waiver of the contractual terms can be through promissory estoppel as held in***Hickman v Haines*** *[1875]*. In this case it was held that neither party can claim damages once the contractual terms are waived through promissory estoppel. For eg: a seller who delivers late and the buyer accepting such delivery cannot initiate an action on damages later.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

(*some cases have been highlighted due to their significance, however please note that, all cases are important, the highlighted ones are significant in our opinion due to the frequency in which questions have been asked based on these cases*

or because they set out some important precedents.)

1. ***Dunlop v Selfridge*** [1915]
2. ***Thomas v Thomas*** *(1842) 2 QB 851*
3. ***Chappell & Co v Nestle & Co***[1960]
4. ***White v Bluett***(1853)
5. ***Ward v Byham*** *[1956],*
6. ***Re McArdle****[1951]*
7. ***Lampleigh v Braithwaite*** *[1615]*
8. ***Pao on v Lau Yiu Long*** *[1980] AC 614*
9. ***Re Casey's Patent*** *[1892]*
10. ***Tweddle v Atkinson*** *[1861]*
11. ***Collins v Godefroy*** *(1831) 1 B & Ad 950*
12. ***Stilk v Myrick*** *[1809]*
13. ***Glassbrook Bros v Glamorgan CC*** *[1925]*
14. ***Hartley v Ponsunby*** *[1857] 26 LJ QB 322*
15. ***Williams v Roffey*** *(1989)*
16. ***Shadwell v Shadwell*** *[1860]*
17. ***Pinnel's Case*** *[1602]*
18. ***Foakes v Beer*** *(1884) 9 App Cas 605*
19. ***DC Builders v Rees*** *[1965]*
20. ***Re Selectmove*** *[1995]*
21. ***Wood v Roberts*** *[1818]*

22. ***Welby v Drake*** *[1825]*

23. ***Avon County council v Howlett*** *[1983]*

24. ***Hughes v Metropolitan railway*** *[1877]*

25. ***Central London Pty ltd v High Trees House Ltd ('High Trees case')*** *[1947] KB 130*

26. ***Combe v Combe*** *[1951]*

27. ***D & C Builders v Rees*** *[1966] 2 QB 617*

28. ***Hickman v Haines*** *[1875]*

Chapter 4

INTENTION TO CREATE LEGAL RELATIONSHIP

The most important factor which determines the legal enforceability of a contract is the intention of the parties to enter into a legally binding relationship. The minds of the parties should meet so as to result in a legal relationship. Only if there is a common intention , there is *Consensus ad idem.*

Definition

According to Atkin J, in ***Rose and Frank Co. v Crompton Bros***. [1925], "To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly". Therefore, the intention of the parties is the basis for a legally enforceable contract.

But it may not be practical to presume that there is an intention to create legal obligations in all contracts, especially social contracts.

Presumption of Intention in Commercial Contracts

There is presumption in contract law that there is an intention to create legal relationship in all commercial or business promises/ contracts.

In ***Esso Petroleum v Commissioners of Customs and Excise*** *[1976],* Esso petroleum offered to give World Cup coin to everyone who purchases four gallons of petrol. The defendant contended that the coins should have purchase tax charged. The court held that only petrol and not the coins are sold. But held that there was an intention to create legal relations and applied the presumption of existence of intention in commercial contracts.

In ***McGowan v Radio Buxton*** *[2001],* the plaintiff entered in a competition for Clio. She won the competition and a small model of Clio was given to her. The defendant Radio claimed that there was no intention to create legal relation and so was not binding. The court held that there was no doubt given in the radio advertisement or transcript that the car was not real. The court applied the presumption and held that there was intention to create legal obligation.

In ***Edwards v Skyways*** *[1969]*, the plaintiff was a pilot who was offered to be paid ex- gratia payment by the Pilots Association on being made redundant. The defendant failed to fulfil the promise and was sued by the plaintiff. The defendant argued that there was no intention to create legal relationship by the use of the word ex-gratia. The court held that it was a business contract and intention to create legal obligation is presumed.

Exceptions

In ***Jones v Vernons' Pools*** *[1938]*, the plaintiff claimed to have won the football pools. The coupon had a condition that "binding in honour only". The court held that there was no application of the presumption of intention to create legal relation as the agreement was based on the honour of the parties. Thus the presumption was not applied in this case.

In ***Kleinwort Benson v MMC*** *[1989]*, the defendant company gave a comfort letter which says the subsidiary for which loan was taken is at all times in a position to meet its liabilities. But later the subsidiary went into liquidation and the plaintiff bank claimed payment from the company. The court held that the letter of comfort was only with regard to the present affairs of the company and not with regard to its future. There was no intention to create legal relations regarding the future of the subsidiary company. Therefore, it was held that there was no legal obligation for the company to pay for the subsidiaries debt.

In ***Julian v Furby*** *[1982]*, father helped his daughter and son in law to furnish their house. Later, there was a split and the father gave an invoice for materials and labour. The court held that there cannot be a presumption to create legal relationship in case of the labour applied by the father. But presumption can be applied to the materials supplied. Therefore, in relation to the labour used by the father, the presumption was rebutted.

Presumption that there is no intention to create legal obligation in Social promises

In social promises, the contract law presumes that there is an absence of intention to create legal relationship. Thus such contracts are not legally enforceable.

In ***Balfour v Balfour*** *[1919]*, husband who was working in Ceylon (Sri Lanka) had to go back to Ceylon leaving his wife in England for health reasons. He had promised to send her 30 pounds every month for her maintenance. The husband failed to pay the amount when they got divorced. The court held that promises between husband and wife have no legal enforceability as there is no intention to create legal relationship. Thus wife was unsuccessful.

In ***Jones v Padavatton*** *[1969]*, mother agreed to pay monthly allowance to her daughter if she came back to England to study. She also bought a house for the daughter and let her accept rent from other tenants. But, later they fell out and the mother claimed the house back even though the daughter had not finished her studies. The court held that the first agreement to pay monthly allowance was only a social agreement and the parties had no intention to create legal obligations. Therefore, the mother was not liable to pay the monthly allowance.

Exceptions

In ***Meritt v Meritt*** *[1970*], the husband after deserting his wife agreed to send her 40 pounds a month out of which she agreed to pay the mortgage for the house. The husband agreed to transfer the house in the wife's name when the mortgage was fully paid. This agreement was written on paper and signed. But later, the husband refused to transfer the house. The court held that when the agreement was entered into, the parties were not husband and wife and the conduct of writing it down on paper shows that there was an intention to create legal relationship between the two. Thus court rebutted from the presumption.

In ***Simpkins v Pays*** *[1955]*, Pays, his granddaughter and the plaintiff entered into an agreement to contribute one third each for entering in a competition in Pay's name. They won the competition but the defendant refused to pay the one third to the plaintiff. The court held that since the plaintiff was a stranger and not a family member, it cannot be said that there was no intention to create legal relationship. Therefore, presumption fails in this case.

In ***Parkers v. Clarkes*** *[1960]*, the Clarkes and Parkers made an agreement that if Parkers sold their house and moved in with Clarkes, they could share the bills and later Clarkes would leave the house to Parkers. On such agreement, Parkers sold their house and moved in with

Clarkes. Clarkes changed the will according to the agreement. Later, they fell out and Parkers were asked to leave the house. Parkers sued for breach of contract. The court held that the exchange of letters and the conduct of parties are such that they intended to create legal relationship. Therefore, the presumption fails in this case.

From the above analysis, it can be seen that whether the presumptions have to be applied depends on the facts of the case and has to be objectively construed. In ***Edmonds v Lawson***[2000] QB 501 (CA),Bingham LJ observed that "Whether the parties intended to enter into legally binding relations is an issue to be determined objectively and not by inquiring into their respective states of mind. The context is all-important"

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

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Esso Petroleum v Commissioners of Customs and Excise *[1976]*

McGowan v Radio Buxton *[2001]*

Edwards v Skyways *[1969]*

Jones v Vernons' Pools *[1938]*

Kleinwort Benson v MMC *[1989]*

Julian v Furby *[1982]*

Balfour v Balfour *[1919]*

Jones v Padavatton *[1969]*

Meritt v Meritt *[1970]*

Simpkins v Pays *[1955]*

Parkers v. Clarkes *[1960]*

Edmonds v Lawson[2000] QB 501 (CA)

PART B

Chapter 5

PRIVITY OF CONTRACT

According to the doctrine of privity of contract, a third party cannot sue or be sued on the basis of a contract wherein he/she is not a party. A contract cannot oblige a third party with some duty and the third party cannot claim any benefit from such contract (*except in very rare situations. Some scenarios are discussed*)

In ***Tweddle v Atkinson***[1861], the plaintiff agreed with his daughter- in- law's father to pay the groom a sum of 200 pounds. Bride's father passed away and his estate did not pay. So the son sued. The court held that third parties derive no right from the contract nor any duty can be imposed on them.

> ***Dunlop v Selfridge*** [1915] also discussed the doctrine at length. In this case, plaintiff manufactured tyres and entered into a contract with its dealers (Dew & Co) that they will not sell the tyres below a standard price and also got an undertaking that this applied to their purchasers. In the event of such happening damages were to be paid to the plaintiff. The defendant got the tyres from Dew & Co and sold them at a price below the standard price. Plaintiff sued defendant for damages. The appellate court held that since Selfridges was not a party to the contract between Dunlop and Dew, they cannot be sued on the terms of the contract entered between them. According to the doctrine of Privity only a party to a contract can sue. Thus the action failed in appeal.

N.B*The Doctrine of consideration differs from the doctrine of privity in certain aspects. In a case where the father promises his daughter to pay 10000 pounds to anyone who marries her, the consideration moves from a third party. But, that third party cannot initiate an action for the enforcement of the contract due to privity of contract. Therefore, consideration can move from a third party but claim cannot.*

The difficulties that may arise due to privity of contract are several. Even if the intention of the parties is to benefit a third party, it cannot be enforced due to the doctrine. When

consideration moves from a third party, the exclusion of the right to claim leads to injustice. In some cases, the breach of contract may lead to loss of the third party. But still he may be precluded from enforcing it.

EXCEPTIONS

There are certain exceptions to the doctrine of privity of contract.

Agency: ***Midland Silicones v Scruttons*** [1962] laid down that the application of the agency rule can circumvent the privity of contract doctrine. In this case some of the cargo loaded was damaged in transit due to the fault of the stevedores. The contract was between the carrier and the defendants. The court held that there was an agent – principal relationship between stevedores and the shipping company. Therefore, privity of contract does not apply.

Trust: When a trust is formed for the benefit of a third party, the beneficiary can sue even if he is a third party to the contract. In ***Gregory & Parker v Williams*** *[1817]*, the defendant had to pay money to Williams and Gregory. Parker assigned all his property to Williams and entered into an agreement that Williams will pay Gregory. But, Gregory failed to pay. The court held that the contract was entered into for the benefit of the third party in the form of a trust. Therefore, it was possible for Gregory to initiate action against Williams.

In ***Green v Russell*** [1959], it was held that an insurance policy covering employees cannot be attributed the characteristics of a trust and therefore privity of contract is attracted.

Tort: In ***Donoghue v Stevenson***[1932], Donogue`s friend got a bottle of ginger beer. Donogue drank some of it and then realized that there was a snail in decomposed state in the beer. Donogue sued the manufacturer. There was no contract between Donogue and the manufacturer or the vendor but the court held that, the doctrine of privity of contract does not apply in cases were negligence leading to tortuous liability.[**N.B.**, *while this is a tort case, this is significant for the privity of contract part*]

Collateral Contracts: The doctrine of privity does not apply in collateral contracts. In ***Shanklin Pier v Detel Products***[1951], Shanklin Pier upon the assurance given by Detel Products to the contractors appointed by the plaintiff, used a particular paint for painting

Shanklin Pier. The assurance was that the paint will be intact for at least seven years. But, after three months, the paint started peeling off. The plaintiff took action against Detel Products. The issue here was that there was no direct contract between Shanklin Pier and Detel Products. The court held that the warranty given by the defendant was the basis on which the main contract was entered into. Therefore no privity of contract applies in this case.

In ***Darlington v Wiltshier*** *[1995]*, a building centre was built for the benefit of the plaintiff's council on a contract given to the defendant through another person. The court held that even though the council was a third party to the contract, it was the beneficiary and all the rights were transferred from the other person to the Council. Therefore, the council had the right to initiate action for bad workmanship by the defendant.

In ***McAlpine v Panatown*** *[1998]*, Panatown engaged McAlpine to construct a building in the site owned by UIPL. There was a deed for duty of care between McAlpine and UIPL. That entitled UIPL to sue McAlpine even though it was a third party.

Contract (Rights of Third Parties) Act, 1999

The Law Revision Committee recommended in 1937 that "where a contract by its express terms purports to confer a benefit on a third party it shall be enforceable by the third party in his own name subject to any defences…"

In ***Jackson v Horizon Holidays*** [1975]Man 127, the plaintiff booked rooms in the defendant's hotel for himself and his family. When they entered the room the facilities were substandard and the plaintiff sued for himself and the family. Lord Denning quoted Lush LJ "…although there were suggestions that he meant you can sue for a disappointed benefit to a third party if you are a trustee, he 'did not think so… I think they should be accepted as correct, at any rate so long as the law forbids the third persons themselves from suing for damages. It is the only way in which a just result can be achieved.' [Otherwise] 'is no one to recover from them except the one who made the contract for their benefit? He should be able to recover the expense to which he has been put, and pay it over to them. Once recovered money had and received to their use."

Contracts (Rights for Third Parties) Act, 1999 was enforced so as to provide for the exception of the doctrine of privity of contract in various cases. It only applies to those specifically provided by the Act. The exceptions as discussed earlier remain the same. The doctrine of privity of contract applied in the imposing burden on third parties is kept intact. The Act provides for certain contracts to be excluded from its scope like employment contracts, contracts for carriage of Goods by Sea, and those relating to Companies under the Companies Act 1985.

Applicability of the Act

The Act is applicable to those contracts in which the parties expressly provide that a third party may enforce the terms and to those terms which benefit the third party unless the parties expressly provide their intention not to allow third parties in enforcing those terms. In ***Nisshin Shipping Co Ltd v Cleaves & Co Ltd***[2003], Cleaves & Co arranged charter parties for the plaintiff company. The plaintiff company had entered into contracts with the charter parties that a commission will be paid to the defendant. The issue was whether Cleaves & Co could enforce their right to commission. The court held that Cleaves & Co had the third party right to enforce its right since there was no express provision denying such right to them.

The third party to claim the right of third parties under the Act, the identity of the third party must be clearly mentioned in the contract (S.1(3)). They will have all the rights of the parties to the contract (S.1 (5)). Exemption clauses in the contract can also be relied on by the third parties (S. 1(6)). According to Section 2 of the Act, the parties to the contract cannot make any alteration to the rights of the third party if the third party has acted on such right.

The common law and the Contract (Rights of third Parties) Act exist together so as to overcome the difficulties posed by the doctrine of privity of contract.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

Tweddle v Atkinson[1861]

Dunlop v Selfridge [1915]

Midland Silicones v Scruttons [1962]

Gregory & Parker v Williams *[1817]*

Green v Russell [1959]

Donoghue v Stevenson[1932]

Shanklin Pier v Detel Products[1951]

Darlington v Wiltshier *[1995]*

McAlpine v Panatown *[1998]*

Jackson v Horizon Holidays [1975]

Nisshin Shipping Co Ltd v Cleaves & Co Ltd[2003]

Chapter 6

TERMS OF A CONTRACT

The terms of a contract are different from representation. If a term of a contract is not complied with, the party has the remedy to sue for breach of contract. But if it is only a representation, then the right to sue for breach of contract does not arise. It is the intention of the parties that determine if a statement is a representation or a contractual term.

- *Verification* – If one party asks the other to verify a fact which is stated by him, that statement does not amount to a term of contract. In ***Ecay v. Godfrey*** **(1947),** the seller said that the boat was in sound condition and asked the buyer to verify it. The court held that it was only a representation and not a contractual term.
- *Importance* – If a statement made by one party is the sole reason for the other to conclude the contract, the importance given to such statement gives it the status of a contractual term. In ***Couchman v Hill***a heifer was put up for auction. The buyer enquired if it was carrying a calf and communicated that if it was the buyer was not ready to buy the heifer. The seller said it was not carrying a calf. On that statement the buyer bought the heifer. Weeks later, the heifer miscarried and died. The court held that the importance given to the statement makes it a contractual term.
- *Special Knowledge* - If the party who makes a representation has some special skill or knowledge, the statement made on that basis may be considered as a contractual term. In **Oscars Chess Ltd v. Williams,** the seller of a car made a representation that it was 1948 Morris model which in fact was a 1939 model. This statement was held to be a mere representation since the buyers who were car dealers were in a good position to know the model of the car. In ***Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd,*** the buyer dealing with the defendant car dealers expressed his desire to buy a well vetted Bentley car. The defendants sold a car to him stating that it had run only 20000 miles whereas it had run over one hundred thousand miles. The court held that the statement was a term of the contract since the defendants has special knowledge about cars as they were car dealers.
- The differentiation of representation from a term of the contract enables the court to decide the quantum of damages to be awarded. If it is a term, it gives rise to expectation interest while if it is only a representation, it gives rise to reliance interest. The differentiation also enables to decide if the representee is entitled to set aside a

contract or not. If it is a term the consequences are much higher and only if it is an innominate term or a condition can the contract be set aside. In case of misrepresentation setting aside can be made prospectively as well as retrospectively while in a term it can only be prospectively.

Sources of Contractual Terms

Express terms – Express terms are those terms which are expressly provided in the contract. It can be made in writing or made orally. Oral terms are difficult to be proved. A party is bound by a written contract if he has his signature to it. Written terms can be incorporated by giving notice to that effect to the other party and by course of dealing.

- **Parole evidence rule** - According to this rule, when there is a written term of contract, it cannot be altered by addition or variation by any party. There are some exceptions to this rule. If the written document does not contain the whole of the contract, there can be additions to it. In ***Jacobs v Batavia Plantation Trust Ltd (1924*)**,* the plaintiff subscribed to four 100 pounds notes of the company relying on the terms in the prospectus which said in the event of a sale, proceeds will be first set aside to pay the outstanding notes. It was sold and an action was initiated to set aside the proceeds to pay for the outstanding notes. The court held that since the notes did not carry these terms, according to parole evidence rule, no term can be added, deleted or altered. In ***City and Westminster Properties Ltd v. Mudd*,(1934)** a lease was signed by the parties which read that the premises can only be used for business purposes. But there was an oral assurance given that the tenant can use it to reside upon which the tenant signed the lease. The oral assurance was admitted to prove that there is a collateral agreement existing even though it was contrary to the provisions in the written agreement.

- **Signature-** When a party signs a contract, he/ she is bound by the terms of the contract even if the terms are not read before signing. A good example for this is ***L'Estrange v F. Graucob Ltd*** [1934], in this case, the plaintiff bought a cigarette machine from the defendant company after signing a sale agreement which stated "This agreement contains all the terms and conditions under which I agree to purchase the machine specified above, and any express or implied condition, statement, or

warranty, statutory or otherwise not stated herein is hereby excluded…". The machine failed to work even after being repaired by a mechanic. The plaintiff refused to pay the remaining instalments and claimed the paid money back. The respondent contended that there was an exclusion clause which excluded any warranties for fitness. The court on appeal held that the exclusion clause formed part of the contract and it was not significant whether the plaintiff had read the clause or not.

- **Written Terms**– **By Notice**- In order to incorporate written terms into a contract, the terms must be put to notice of the other party before or at the time of conclusion of the contract. This was held in **Olley v Marlborough Court Ltd.**The contractual document which is to be given a contractual effect has to contain all the written terms of the contract. In ***Chapleton v Barry,*** the court held that a ticket given as receipt of payment of money cannot be considered as a document with contractual effect. There must be reasonable steps taken by the party to bring the terms to the notice of the other party. In ***Parker v. South Eastern Railway,*** it was held that whether the other party read the terms or not, was not a concern but whether reasonable steps were taken to bring it to the knowledge of the other party. ***Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd*** as well as ***AEG (UK) LTD v Logic Resource Ltd,*** the plaintiff delivered some photographic transparencies to the defendant. The defendant intended to use them for a presentation but he did not open the bag. There was a term which stipulated 5 pounds for each day over fourteen days of holding. The court held that such unusual terms had to be brought to the notice of the plaintiff through reasonable steps otherwise such terms cannot be enforced.

- **Incorporation of terms – By Dealing** – A consistent and regular course of dealing can incorporate terms in a contract. This was held in ***McCutcheon v David MacBrayne Ltd***.

Implied Terms - Implied terms are those which are not expressly provided for in the contract but are implied through legislations, customs and common law.

- **Statutory terms** - are those terms which are incorporated into contracts automatically through the operation of law. For example: Section 12 to 15 of the Sale of Goods Act 1979 requires consideration for a valid contract. According to Section 12(1) of the

Act, there is an implied condition that the seller has the right to sell the goods in a contract for sale. These terms are not incorporated on the intention of the parties to the contract but more as a protective measure to the consumers. The same protection is given by the Unfair Contract Terms Act 1977.

- **Customary Terms -** are terms which are incorporated into a contract owing to the fact that such terms exist as a practice in trade, market or region. In ***Hutton v Warren,***the tenant claimed that there is a custom to give reasonable allowance for seeds and labour to keep the land arable and he would leave behind the manure if the landlord purchases it. The court held in favour of the tenant that customs can incorporate terms into a contract. A custom is a practice in a trade in a region which is followed that even a person from outside the region notices it. In ***Kum v Wah Tat Bank Ltd,***the court held that the custom must be generally followed and there must be proof that it is followed.

- **Terms implied by common law -** There could be terms in fact or in law. Terms in fact are those terms which show the intention of the parties so as to make it more effective. In ***The Moorcock* (1889)**, a ship was docked in a wharf and it suffered damages. The wharfingers argued that there was no term in the contract which suggests the wharf is responsible for the safety of the ship. The court held that there was an implied warranty for the safety of the ship in the dock. In ***BP Refinery Pty Ltd v Shire of Hastings* (1978)** it washeld there was a first point test to determine if there is an implied term. They are (1) reasonableness and equitableness (2) business efficacy ,(3) obviousness,(4) clear expression and (5) consistency.

Classification of Terms

The terms of a contract can be divided into three as conditions, warranties and innominate terms. The distinction between these three types of contract enables to decide the consequence of the breach of these terms.

Conditions- Conditions are important terms of the contract which relates to the statement of fact or promise. A breach of a condition entitles the innocent party to terminate the contract as well as to claim damages. In ***Poussard v Spiers and Pond*** , an artist did not perform in an

opera and it was held that the failure to do was a breach of a condition and it entitled the other party to treat the contract as discharged.

Warranties – Warranties are those terms which are not as important as conditions and relate to secondary statement of facts or promise. Breach of a warranty does not give a right to terminate the contract but only a right to claim damages.

Innominate terms - Innominate term was first used in ***Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd*** **[1962] 2 QB 26.** In this case, a charter party contract was entered into which required that the ship was seaworthy and fit for ordinary cargo service in every way. The crew was not efficient and the captain was a drunkard. On its way the engine broke and it took five weeks for repair. The court held that the term "seaworthiness" was not a condition but an innominate term. Breach of an innominate term does not automatically give rise to a right to terminate the contract. The remedy for breach of innominate term is not restricted to the right to damages alone. Only if the breach of the innominate term results in serious injuries to the party, termination of the contract is available. Thus the remedies available for breach of innominate terms are flexible.

Exercise

Against each case, try to write down the key points as you remember them.

***Ecay v. Godfrey* (1947)**

Couchman v Hill

Oscars Chess Ltd v. Williams

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd

Jacobs v Batavia Plantation Trust Ltd (1924)

***City and Westminster Properties Ltd v. Mudd,* (1934)**

L'Estrange v F. Graucob Ltd [1934]

Olley v Marlborough Court Ltd

Chapleton v Barry

Parker v. South Eastern Railway

Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd

AEG (UK) LTD v Logic Resource Ltd

McCutcheon v David MacBrayne Ltd.

Hutton v Warren

Kum v Wah Tat Bank Ltd

***The Moorcock* (1889)**

***BP Refinery Pty Ltd v Shire of Hastings* (1978)**

Poussard v Spiers and Pond

Hong Kong Fir Shipping Co Ltd v. Kawasaki Kisen Kaisha Ltd **[1962] 2 QB 26**

Chapter 7
CAPACITY

The following are the types of personalities who are incapacitated to enter into a contract.

Minors

A minor cannot enter into a valid contract. A person who is below the age of 18 is considered as a minor. Contracts entered into by minors are void ab initio. There are certain exceptions to it. They are:

(A) Contract to supply necessaries: when a contract is entered into by a minor by any person for the exclusive benefit of the minor, it becomes a valid contract subject to the harshness of the terms of the contract.

(B) Contract of employment: A contract for employment for the benefit of the minor is also valid in the eye of law.

(C) Contracts only voidable, not void: There are certain contracts which are voidable at the option of the minor. The party who contracts with the minor, normally has no option for making the contract void. When a contract is repudiated by the minor, he will be liable for any benefit accrued on the basis of such contract to the other party. In ***Nash v. Inman***, it was held that the burden of proving that the supplies were necessities was on the supplier. In this case, the minor was supplied with 11 waist coats. It was held that these were not necessities since he had adequate clothing even otherwise. A minor cannot sue for the benefits conferred by his act on the other party. The transfer of property to a minor and from a minor is valid (Section 3(1) of Minors Contract Act 1987).

Insanity and drunkenness:

A contract entered into with a person who is not mentally stable or insane is voidable at the instance of the other party. Drunkenness also works as a factor of incapacity for entering into a contract.

Companies registered under the Companies Act:

The companies which are registered under the Companies Act are given legal personality. These Companies can enter into valid contracts like other natural persons.

Chapter 8
EXCLUSION CLAUSE

Exclusion clause is the term in the contract which limits the rights and duties of the parties in the contract. It could be with relation to the liability for a potential breach of contract or with regard to the amount of damages that can be claimed.
According to DiplockLJ in ***Photo Productions v Securicor*** [1980] an exclusion clause is "a term which excludes or modifies an obligation, whether primary [or] general, secondary".

Incorporation Rules

Exclusion clause can be used to define the liability or to exempt the party from certain liability. An exclusion clause is a part of the contract and it defines the liabilities and rights of the parties to the contract.

Knowledge
Both the parties should be aware of the exclusion clause prior to the formation of the contract or at the time of the formation of the contract.

In ***Olley v Marlborough Court Hotel*** **[1949],** the plaintiff while residing at the defendant's hotel as usual left her room key on a rack behind the reception. One day, the key was missing and her fur coat was also found missing. When the plaintiff claimed compensation for the coat from the defendant, the defendant pointed to an exclusion clause put up behind the bedroom door saying "The proprietors will not hold themselves responsible for articles lost or stolen, unless handed to the manageress for safe custody." The plaintiff contended that such exclusion clause was not incorporated in the contract. The court held that since the contract was formed at the reception desk, the notice regarding exclusion clause had to be given at the reception. Since the plaintiff was not given notice regarding that at the time of the contract nor before the contract, that exclusion clause was not a part of the contract. Therefore, the plaintiff in this case won.

Further in ***Thornton v Shoe Lane Parking*** **[1971],** the plaintiff parked the car in a car parking facility after obtaining ticket from an automatic ticket counter. The ticket said "this ticket is issued subject to the conditions of issue as displayed on the premises". On the car

park pillars there was an exclusion of liability clause notice put up saying “injury to the Customer… howsoever that loss, misdelivery, damage or injury shall be caused”. The plaintiff encountered an accident and sued the defendant. The court held that the notice to the exclusion clause had to be made before the conclusion of the contract. In this case, the contract was concluded when the ticket was taken by the plaintiff. Therefore, the conditions made known to him after such issuance cannot be considered a part of the contract.

In ***O’Brien v MGN Ltd*** [2001], the defendant newspaper came up with scratch cards. The plaintiff got two scratch cards with a sum of 50000 pounds. 1471 others also got the amount on the card. The defendant invoked Rule 5 which was published in the newspapers that if there is more than one prize claimers, prize winner will be decided through a draw. Rule 5 was not published in the newspaper on the day the scratch cards were published. It only said “Normal Mirror Group Rules apply”. The issue was whether Rule 5 was incorporated in the contract. The court held that it was since unlike the Thornton case, the liability here was not a big burden on the plaintiff. Therefore rule 5 was incorporated as there was reasonable notice of the same.

The document which has the exclusion clause needs the effect of a contract. In ***Chapelton v Barry UDC*****[1940],** there was a notice next to the display of chairs which read “Barry Urban District Council. Cold Knap. Hire of chairs 2d. per session of 3 hours”. The plaintiff took two chairs and in receipt got two tickets which read “Available for three hours. Time expires where indicated by cut-off and should be retained and shown on request. The council will not be liable for any accident or damage arising from the hire of the chair." The plaintiff suffered injury when the canvass on the chair tore from the top as he sat. The court held that the display of the chairs was an offer and it was concluded when the chairs were taken. The tickets were only a receipt of the contract. Therefore the exclusion clause cannot be considered as incorporated in the contract.

Signature

Signature of a party in a written contract makes its terms and conditions binding on the party even if the party has failed to read all the terms while signing. In ***L’Estange v Graucob*****[1934]**, the plaintiff bought a cigarette machine from the defendant company after signing a sale agreement which stated "This agreement contains all the terms and conditions

under which I agree to purchase the machine specified above, and any express or implied condition, statement, or warranty, statutory or otherwise not stated herein is hereby excluded…". The machine failed to work even after being repaired by a mechanic. The plaintiff refused to pay the remaining instalments and claimed the paid money back. The respondent contended that there was an exclusion clause which excluded any warranties for fitness. The court on appeal held that the exclusion clause formed part of the contract and it was not significant whether the plaintiff had read the clause or not.

Exceptions

- Even if there is an express exclusion clause which is signed by the parties, if one of the parties makes an oral assurance that there is a difference in the exclusion clause, the written exclusion clause will not apply. ***Curtis v Chemical Cleaning*** **[1951],** the plaintiff approached a shop to clean his dress. In the shop one of the representatives made her to believe that the exclusion clause in the contract only related to damages to "beads and sequins" only. The dress was delivered to the plaintiff with stains on it. The plaintiff claimed damages. The court held that since there was an oral representation made an alteration in the exclusion clause signed by the parties. So, the defendant cannot rely on the exclusion clause which included all kinds of damage to the dress.
- Contractual Document - A signature on a document which may not be considered to have contractual effect by a reasonable person cannot bind the parties. In ***Grogan v Robin Meredith Plant Hire*** **[1996]** , the court held that signing a time sheet does not bind the party since time sheet does not have the characteristics of a contractual document.
- *Non est factum* applies - In ***Saunders v Anglia Building Society*** **[1971],** the plaintiff signed a contract without reading the terms and believing the words of her nephew's business partner that it was only to confirm her gift of a house to her nephew. But the contract turned out to be a sanction to grant mortgage on the property to the nephew's business partner. The court held that the principle of *Non est factum* is applicable depending on the circumstance of each case. In this particular case, it cannot be applied.

Reasonable notice

For a party to rely on an exclusion clause there must be sufficient and reasonable notice of the clause to the other party. In ***Parker v South Eastern Railways*** **[1877],** Parker left his bag in the Railway cloak room after obtaining a ticket paying 2 pence. The ticket has writings on it and it was noticed by the plaintiff but he did not read it. At the back of the ticket it had an exclusion clause that the railways will not be liable for the loss of any bag above the value of 10 pounds. According to Parker, he believed that the ticket was only a receipt for the payment of money and did not think it had conditions written on it. The court held in favor of Parker that there was no reasonable notice and therefore he cannot be bound by it.

Course of dealing

A regular or continuous method of dealing can also result in the incorporation of terms in a contract. In ***McCutcheon v David MacBrayne*****[1964]**, the plaintiff lost his car during a transit in a ferry. In usual circumstances the defendant company made the customers sign a risk note but in this particular instance it was not done. The plaintiff and his brother in law have signed such notes before during their dealing with the defendant. The defendant argued that even with out signing the note, the plaintiff through consistent course of dealing had incorporated such terms into the contract. The court held that in this case, the matter of signing the risk note was not consistent. At times they were asked to sign and other times they were not. So it cannot be implied that those terms were incorporated into the contract by the parties since it was not a regular and consistent method of dealing.

In ***Hollier v Rambler Motors*** **[1972]** the plaintiff used to leave his car at the defendant's garage. He had signed an invoice with an exception clause on three or four times in the past five years. But on the instance when the cause of action arose, the invoice was not signed. The court held that there were no regular or consistent dealings between the plaintiff and the defendant and therefore it cannot be held that the exclusion clause was incorporated in the contract without signing it.

Harry Kendall & Sons v William Lillico& Sons Ltd **[1969]** overruled the dictum laid in *McCutcheon`s case*. In this case, there were three to four dealings in a month for three years between the plaintiff and the defendant. The sale note had a condition that the buyer's take responsibility for the latent defects. The buyers sued the sellers on finding that the goods

were defective. The court held that there was a regular and consistent dealing between the parties which made the incorporation of the terms implied and it did not require the prior knowledge of the buyer.

In ***PetrotradeInc v Texaco*** **[2000]** the court held that five dealings within a span of 13 months were sufficient to prove regular and consistent dealings and it automatically incorporates the terms.

Trade Custom

Trade customs also can be a reason to incorporate unsigned exclusion clauses in a contract. In ***British Crane Hire Corporation v Ipswich Plant Hire Ltd*** **[1975],** there were prior dealings between the parties to the contract. There was an urgent requirement for the respondent party for which the plaintiff supplied its services without signing the form with exclusion clauses even though this was done in all dealings prior to it. The plaintiff sued the defendant for the expenses that it incurred while recovering a sunken crane. The defendant took a stand that the form was not signed and so the clause was not incorporated. The court of first instance held that there was no incorporation of the term. But on appeal, the court held that since both the parties were in the same business, they knew the terms of the trade and so the defendant cannot preclude from its liability to reimburse the expenses only on the ground that the form was not signed. The case was decided in favour of British Crane.

In ***OfirScheps v Fine Art Logistic Ltd*** **[2007],** the plaintiff hired the services of the respondent to safely deliver a sculpture to their customer. But before it was delivered, the sculpture was lost. The sculpture was valued to be worth 350000 pounds. According to the terms of the defendant, their liability was limited to 350 pounds per cubic meter of volume. This was not brought to the notice of the plaintiff. The court held that since the plaintiff was in no way intimated regarding the terms by the defendant, the terms cannot be considered to have been incorporated into the contract. Thus the plaintiff failed.

Contra Proferentem Rule

According to this rule, when the terms of a contract are not clear and certain, it will be interpreted against the person who relies on it.

In ***Andrews Brothers v Singer & Co*** **[1934],** the plaintiffs agreed to buy new singer cars from the defendant. The exclusion clause read as "all conditions, warranties and liabilities implied by statute, common law or otherwise. On of the cars delivered was not new but was used on the road. The plaintiff sought to reject the car. The defendant took the stand that the exclusion clause comes into play and according to it S.13 of the Sale of Goods Act was implied and was excluded. The court held that the condition of the car being new was an express term and not implied therefore cannot be excluded. When there is an ambiguous term, it will be read against the party which relies on it.

The exclusion clause while referring to damages caused due to negligence of a party should be specific and clear. In ***Alderslade v Hendon Laundry*** **[1945],** handkerchiefs were given for laundry and they were lost. The clause limited the liability to 20 time the cost of the laundering the article. The court of appeal held that the clause was specific enough to limit the liability to 20 times of the laundering cost.

In ***Monarch Airlines Ltd v London Luton Airport*** **[1997],** the court held that the terms 'any act or omission, neglect or default' was sufficiently specific to include negligence.

DOCTRINE OF FUNDAMENTAL BREACH

A fundamental breach of a contract is that which allows the distressed party to put an end to the performance of the contract coupled with the right for damages. In ***Suisse Atlantique v NV Rotterdamsche*****[1967]** a ship was chartered for two years with a condition that the charterers were to pay and amount of 1000 pounds per day if there is any delay in loading and unloading. The charterers in this case, delayed the loading and unloading in many instances which made the owners loss many of the trips that they could have undertaken if the charterers had performed their duty in time. The owners were successful in claiming the damages for fundamental breach of contract. In ***Photo Productions v Securicor*** **[1980],** the court held that if the breach of a contract is fundamental then the exclusion clause is invalid and cannot be relied on.

The present position of law is elucidated in ***George Mitchell v Finney Lock Seed*** **[1983].** In this case, the respondent supplied the plaintiff with cabbage seed with a limited liability to replace "any seeds or plants sold" if they are defective. It excluded any liability for loss or damage from the use of such seed or plant. The plaintiff sued for the loss of production. The court held that when there is a clause with clear and definite terms, the court cannot give its own interpretation to change the intention of the parties. The court on appeal held that the clause applies to seeds. Thus plaintiff failed in the court.

In ***Aisla Craig v Malvern Shipping*** **[1983]**there was a clause which limited the liability of the party in case of negligence to 1000 pounds. The court held that a wide interpretation should be given to those clauses which only limit the liability and not exclude the liability of the party.

Statutory Controls

Unfair Contract Terms Act 1977

This Act deals with the exclusion and limitation clauses as defined under Section 2 and 3 and not all contractual terms. According to Section 1(3) and Section 2 of the Act, it also deals with those clauses which limit tortuous liability. The Act controls three types of exclusion and limitation liability namely, for negligence (Section2), for sale and supply of goods (Section 6 and 7) and for breach of contract (Section 3).

Negligence liability under the Act is restricted to business liability in relation to personal injury or death and damage inflicted through negligence. In relation to the damage inflicted through negligence, it should pass the reasonableness test to decide whether the party is liable for such damage.

Section 11(1) of the Act defines reasonableness as "a fair and reasonable one to have been included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made". The test of reasonableness has no relation with the gravity of damage inflicted. There are two conditions to be fulfilled so as to enable a party to show that there was reasonableness which enable him

to limit his liability. It should be shown that he had all the resources available with him to tackle the situation if it arises and the extend to which insurance could be availed of.

There are various factors which affect the reasonableness test. They are the strength of bargaining positions, inducement to agree to term, knowledge of the term to the parties, the compliance of the condition by the parties and if it concerns any special order. In ***St Albans v International Computers Ltd*** **[1995] FSR 686**, the Council entered into a contract for a software. Due to the error in the software the council suffered some loss. The council claimed damages. The court went into the fact of bargaining power of the council and held in favour of the plaintiff council.

In ***Watford Electronics v Sanderson*** **[2001]**, the plaintiff entered into three contracts with the defendant for supply of software products. There was a limitation of liability clause which limited it by 104596 pounds which was equivalent to the price paid by the plaintiff. The software performed unsatisfactorily even with changes made to it. The court held that the limitation clauses were valid under the Unfair Contract Terms Act. The Court also held that it is reasonable since both the parties had equal bargaining power, the terms of the contract was agreed to by both the parties and the claimant's terms and conditions also had similar clause.

In ***R & B Customs Brokers v United Dominions Trust*** **[1988]**, the plaintiff bought a second hand car from the defendant. There was leak in the car roof which was a breach of section14 (3) of the sale of Goods Act 1979. The exclusion clause contained an implied condition about the fitness for purpose was excluded. According to the claimants, the term was in violation of the UCTA 1977. The court held the said clause passed the reasonableness test under the UCTA. But since the company was in the role of a consumer, Section 6(2) of the Sale of Goods Act1977 was mandatory and there could not be exclusion.

In ***Stevenson v Rogers*** **[1999],** the defendant was a fisherman who sold a fishing boat to the plaintiff. The boat was not of satisfactory quality. The plaintiff pointed out the breach of Section 14 of the Sale of Goods Act. The defendant argued that it was not in the course of business since his business was selling fishes and not buying and selling fishing boats. The court held that the sale was in the course of business and provisions of Sale of Goods were mandatory.

Section 6 of the UCTA provides for the exclusion of the provision of Sale of Goods Act in various contracts. Liability for breach of the obligations that arise from Section 12 of the Sale of Goods Act 19779 and Section 8 of the Supply of Goods Act 1973 cannot be excluded or limited in any contract. Section 13 to 15 of the SGA 1979 and Section 9 to 11 of the SGA 1973 can be excluded in contracts were the person deals other than as a consumer but must pass the reasonability test. But as against consumers, none of the above provisions can be excluded.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

***Photo Productions v Securicor*[1980]**

***Olley v Marlborough Court Hotel* [1949]**

***Thornton v Shoe Lane Parking* [1971]**

***O'Brien v MGN Ltd*[2001]**

***Chapelton v Barry UDC*[1940]**

***L'Estange v Graucob*[1934]**

***Curtis v Chemical Cleaning* [1951]**

***Grogan v Robin Meredith Plant Hire* [1996]**

***Saunders v Anglia Building Society* [1971]**

***Parker v South Eastern Railways* [1877]**

***McCutcheon v David MacBrayne*[1964]**

***Hollier v Rambler Motors* [1972]**

***Harry Kendall & Sons v William Lillico& Sons Ltd* [1969]**

***PetrotradeInc v Texaco* [2000]**

***British Crane Hire Corporation v Ipswich Plant Hire Ltd* [1975]**

***OfirScheps v Fine Art Logistic Ltd* [2007]**

***Andrews Brothers v Singer & Co* [1934]**

***Alderslade v Hendon Laundry* [1945]**

***Monarch Airlines Ltd v London Luton Airport* [1997]**

***Suisse Atlantique v NV Rotterdamsche*[1967]**

***Photo Productions v Securicor* [1980]**

***George Mitchell v Finney Lock Seed* [1983]**

***Aisla Craig v Malvern Shipping* [1983]**

***St Albans v International Computers Ltd* [1995] FSR 686**

***Watford Electronics v Sanderson* [2001]**

***R & B Customs Brokers v United Dominions Trust* [1988]**

***Stevenson v Rogers* [1999]**

Chapter 9
VITIATING FACTORS

MISTAKE

Mistake is an untrue fact which the parties believe is true and subsequently finds it was false. It can be a mistake of both the parties alike which makes it a common mistake or it could be a false assumption of only one party to the contract which make it a unilateral mistake. Any subsequent even also could be termed as mutual or common mistake if the contract was entered into on a belief that such facts does not exist. ***Amalgamated investment and property co limited v john walker and sons limited*** **[1977] 1 WLR 164** the defendant sold a property to the plaintiff for redevelopment. The plaintiff has enquired before the conclusion of the contract whether it is of historic or architectural importance. The defendant assured it is not. But the defendant got intimation from the ministry that it has been listed as archeologically important and the value of the property dropped. The court of appeal said that there is no frustration of contract since the plaintiff's pre- contractual enquiries made it clear that such an event was anticipated and it was not a complete surprise.

Common Mistake

Mutual mistake or common mistake is when all the parties to the contract enter into a contract on a belief that some untrue facts exists which they believe to be true at the conclusion of the contract. In ***Bell v Lever Bros 1932***, the plaintiff along with his the vice chairman of the subsidiary company of Lever Bros agreed to retire on a huge compensation package offered by the company. It was later found that they retired with an ulterior motive to use the information for their private business. The court held that there was no mistake and the contract cannot be made void since the subject matter of the contract was different from the fact mistaken.

There can be common mistakes that can happen in 5 ways. They are:

Subject Matter - There can be a mistake with regard to the subject matter of the contract. In ***Galloway v Galloway [1914]***the parties misbelieved that they were married and entered into a separation deed. The court held that since there was no valid marriage between them, the separation deed was void. In ***Couturier v Hastie [1856]*** a cargo of corn was the subject matter which the parties to the contract thought to be at sea. The cargo was disposed of while the contract was concluded. The court held that the subject matter was not in existence and therefore the contract is void. In an Australian case ***McRae v Commonwealth disposals commission***, the Couturier's case was distinguished by holding that the contract is not void even though the subject matter did not exist since the other party relied on the promise by the commission about the existence of the tanker with oil. Therefore, it cannot be held to be void on the ground of mutual mistake.

Identity of the subject matter – When both the parties enter into a contract that they are dealing with the same subject matter but in fact the subject matter thought to be dealt with is different from what the other party believes. In ***Diamond v British Columbia Thoroughbred Breeders' Society (1966)***, both the parties dealt with horse. But the lineage of the horse dealt with was mistaken. The court held that the contract is not void since it was only about the lineage and it did not destroy the identity of the subject matter.

Possibility of performing the contract – When the possibility of performing a contract is made impossible due to physical, legal or commercial reasons, it is considered as a mutual mistake in possibility of performing the contract. Physical impossibility is when the subject matter or the party to the contract makes it impossible. Legal impossibility is by reason of law, it may become illegal. When the object of the contract becomes impossible to be performed, it is commercial impossibility. In ***Griffith v Brymer(1903)***, the plaintiff hired a room for viewing the coronation ceremony of the King. But the coronation ceremony was cancelled. The court held that the performance of the contract is vitiated since the object has become impossible. Thus the plaintiff was entitled to recover the amount he spent on the contract.

Quality of the subject matter – A mistake regarding the quality of the subject matter also vitiates the contract.

Frustration of Contract

When the performance of a contract is made impossible, illegal or fundamentally different from what was entered into, the contract becomes frustrated.

After the contract has been concluded, events occur which make performance of the contract impossible, illegal or radically different from what has been contemplated by the parties at the time they entered into the contract. ***HirjiMulji v Cheong Yue SS*** the ship which was the basis of the contract was requisitioned by the Crown which made the contract impossible to be performed. The contract was held to be frustrated.

The courts are cautious while applying the doctrine of frustration since it is easy to get rid of the contractual obligations by pleading frustration which would result in hardship to the other party. In ***Davis contractors limited v FerehamUDC(1956),*** the plaintiff entered into a contract for building flats within 8 months for a specified amount of money. The defendant took 22 months to complete the project with a higher price. The plaintiff pleaded frustration. The court held that the contract was not frustrated and had only become more onerous.

Another reason for the courts to cautiously use this doctrine is that the parties who can reasonably foresee certain events cannot run away from their contractual liability by pleading frustration. An act of God can be considered as a reason for frustration while any hardship that happens for the performance of the contract cannot be considered as frustration. The parties are obliged to take the best possible way to complete their contractual obligation. It could also enable the parties to negotiate better terms to negate the hardships caused. Force majeure and hardship clauses in a contract can bring about certainty and alleviate the effects of such happenings.

Impossibility of performance – The contract gets frustrated when the performance of the contract becomes impossible.In ***Taylor v Caldwell***a music hall was agreed to be leased for a few days for some performance to the plaintiff by the defendant. Before the concert, the music hall was burned to the ground. The contract became impossible to perform. The court held that the contract was frustrated by the impossibility to perform. When a contract is for

the personal services to be rendered by a party, the death of the party makes the contract frustrated.

Frustration of Purpose – When the purpose for which the contract was entered into becomes impossible, the contract becomes frustrated. In ***Krel v Henry [1903]*** the defendant entered into a contact with the plaintiff to rent out a room to watch the King`s coronation ceremony. The coronation ceremony did not take place. Since the object of the contract became impossible, the contract was held to be frustrated.

Subsequent Illegality – When the object of the contract becomes illegal subsequent to the formation of the contract, it becomes frustrated. In ***FibrosaSpolkaAkcyjna v Fairbairn Lawson Comb Barbor ltd [1943],***plaintiff Polish company entered into a contract with the defendant English company to buy some machinery. War broke out between England and Poland which made the transaction illegal. The court held that the contract was frustrated.

Express Provision – The courts interpret the doctrine of frustration in contracts with express provision carefully and narrowly. In the case of ***Metropolitan Water board v Dick, Carey and co. (1918)***the defendant agreed to construct a reservoir for the plaintiff. The contract had an express provision that if there is any delay, the defendant should apply to the board in a prescribed way. Due to a government order, the defendant had to stop the work and sell it. The court held that the contract was frustrated since the express clause was only to deal with temporary difficulties and not the fundamentals of a contract.

Reasonably Foreseen and Foreseeable Events– If the event which makes a contract is capable of being reasonably foreseeable, the doctrine of frustration does not apply. In ***Walton Harvey Ltd v. Walker and Homfrays Ltd [1931]***the defendant had agreed to display an advertisement of the plaintiff in defendant's hotel for seven years. Before the completion of such period the defendant's hotel was compulsory acquired. The court held that the defendant had the knowledge that the hotel will be acquired and so the contract is not frustrated.

Self-induced Frustration - When the party himself or another person for whom he is responsible is due to their action brings about the frustrating situation, the doctrine of frustration cannot be applied. In ***Maritime National Fish Limited v Ocean Trawlers Limited.***

[1935]the contract was to hire trawlers. Both the parties knew it was illegal to use the trawlers without licence. The plaintiff applied for licence but failed to get licence for the trawler contracted for. The Maritime National Fish Ltd argued that the contract was frustrated. The court held that it was self- induced and held that the contract cannot be frustrated for the fault of one party.

Effect of Frustration

The law reforms (frustrated contracts) act 1943 enshrines the provisions that deal with the effect of frustration of a contract.

- Section 1 (2) - This provision entitles a party to recover the sum paid before the happening of the frustrating event. It also envisages that the amount paid before the time of discharge of the contract ends to be payable and the amount payable is capable of being set off against the expenses incurred by the other party before the time of discharge for the performance of the contract. The provision does not give guidance on how the expenditure amount has to be calculated. No reliance interest is recoverable under this section. If a party incurs more expense than the money paid, such excess expenditure also cannot be recovered by the party.

- Section 1(3) - This section entitles to recover from one party the value of the benefit which has accrued to him before the time of discharge in furtherance of the performance of the contract. But such amount cannot be more than the value of the benefit accrues. ***BP v Hunt [1979]*** discusses the method of assessing the recoverable amount.

MISREPRESENTATION

Representation and Promise - distinguished

A representation is differentiated from a promise in ***Kleinworth Benson Ltd. V Malaysia Mining Corporation Berhad,*** the plaintiff Bank demanded a guarantee for a loan granted to

the subsidiary of the defendant. But the defendant made it clear that they would only give a comfort letter which shows the policy of the company. The court held that the comfort letter was only a statement of facts and cannot be considered as a promise or a contract. The defendant company was held not liable for the loan.

A representation does not have the characteristic of enforceability while a promise can be enforced. A representation is only an assertion of some facts but a promise gives rise to an expectation to the other party that it will be fulfilled.

Misrepresentation

When a statement about the facts is given with the knowledge that it is a false statement, it is known as misrepresentation and it is reason for the other party to enter into the contract. A representation of a material fact which is false and clear, made to the party who acts on it with an intention to influence that party to enter into a contract is misrepresentation.

A statement of existing fact or law – In ***Dimmock v Hallett (1866)*** a property was put up for auction and was described as "land is fertile and improvable". The court held that it is only a flourishing statement and cannot be the basis for the buyer to rescind a contract. In ***Bisset v. Wilkinson***, the plaintiff bought a piece of land from the defendant. During the discussions the defendant said that it would hold 2000 sheep if cultivated and used properly. It was later found that it was not true. The Court held that it was only an opinion expressed by the parties and it cannot be termed as a misrepresentation. This is differentiated from ***Esso petroleum Ltd v Mardon.***In this case, Mardon bought a petrol pump from Esso as a franchise on the statement made by Esso that the throughput would be 200000 gallons a year. Council later changes the town plan which meant fewer customers to the pump. But still Esso stated that there will be a throughput of 200000 gallons a year. But Mardon failed to have such good business as stated by Esso. Esso claimed damages and Mardon counter claimed that there was breach of warranty. The court held that it was a misrepresentation and a breach of warranty.

Addressed to the party misled – A misrepresentation can be made to a person who acts on it directly or through another person. When another person is involved, i.e., when the misrepresentation is made through a third party, it must be made with an intention to be

communicated to the party who is to act on such misrepresentation. In ***Commercial Banking Company of Sydney v RH Brown and co 1972*****,** the seller of wool enquired about the credit capacity of the buyer through his bank routed via the buyer's bank. The buyer's bank assured that the credit is fine. But the defendant did not make the payment. The court held that there was misrepresentation through third party.

The other Party must act on it – The misrepresentation made by a party should be the reason for the other party to enter into the contract. Such misrepresentation must be with regard to a material fact. In ***Edgington v Fitzmaurice***a company issued a prospectus inviting debenture bonds stating that they wish to expand their business. But the real reason was to pay off the liabilities. The claimant bought the bonds on the belief that he would get a charge on the company assets. The claimant sought recovery of money for deceit. The court held that the statement in the prospectus was intended to make the party enter into the contract and was liable for misrepresentation. The defence of misrepresentation may not be available if the party entering into the contract was not aware of such misrepresentation, where the party knew that the misrepresentation was not true and when the party considered did not consider such misrepresentation as important while entering into the contract. It does not apply when there was opportunity for the party to find out the falsehood of the misrepresentation made by the other. In ***Atwood v Small (1838***), the claimant promised to buy a property on the condition that the accounts of the defendant were true and correct. It was checked by persons appointed by the claimant. Later it was found that the accounts were not accurate and were blown up. The court held that the party had the reasonable chance to find out that the statements and accounts were wrong by appointing his own persons to verify. So he cannot plead misrepresentation.

<u>Kinds of Misrepresentation</u>

(1) **Fraudulent misrepresentation** – When a misrepresentation is made with the knowledge that it is an untrue representation, it is termed as fraudulent misrepresentation. In ***Polhill v Walter***the defendant endorsed a bill of exchange without authorisation with a belief that it will be endorsed by the authorised person later. The bill of exchange was not honoured and he was sued. The court held that there was knowledge of the misrepresentation made and so the defendant was liable. It does not matter if there was an intention to deceive.

(2) **Negligent misrepresentation –** Negligent misrepresentation and liability for it was set forth only after 1964 in the common law. In ***Hedly Byrne v Heller***(1964), the plaintiff enquired the credit worthiness of its buyer through the bank of the buyer. The bank replied stating that the credit if good for ordinary business. This was relied on by the seller. The buyer went into liquidation. The plaintiff sued the bank. The bank held that it had no duty of care in this circumstance. The court held that there was a special relationship between the bank and the plaintiff and the bank was aware that its statement will be relied on. The court the bank liable for negligent misrepresentation. The relationship between the parties, the purpose for which the statement is made, the reasonableness for the other party to rely on the statement are factors which decide the liability under negligent misrepresentation.

Section 2(1) of the Misrepresentation Act 1967 makes negligent misrepresentation a cause for action if the claimant can prove that the person who made the misrepresentation had the knowledge that the representation made was false.

(3) **Innocent misrepresentation -** When a misrepresentation is made without the knowledge of its falsehood and with no intention to deceive the other party, it is known as innocent misrepresentation.

REMEDIES

Rescission – The remedy available to a party when there is misrepresentation is to rescind the contract. It can be done from the time of the conclusion of the contract or from the time when the misrepresentation was known to the party. Misrepresentation gives a right to affirm or rescind the contract to the innocent party. Therefore rescission has to be notified. The right to rescind the contract ends when the innocent party has elected to affirm the contract or when the misrepresentation is made by a third party who is innocent. If rescission is not made within a reasonable time, the right lapses with time. In ***Whittington v Seale-Hayne [1900],*** the plaintiff bought a place for breeding poultry on reliance of the statement made by the defendant that it was in good condition. But the water was poisoned and the plaintiff lost the poultry. He sued for the amount he spent on repairs. The court held that there was no advantage for the defendant by making such a representation and the representation was not fraudulent. So the plaintiff could not recover the amount.

Damages - Damages cannot be claimed on the contractual basis for misrepresentation unless such representation was a term in the contract. Damages could be claimed for tort of deceit and under Misrepresentation act s2 (1) and (2) instead of rescission. The claimant is entitled to all the direct losses suffered due to such fraudulent misrepresentation. Damages for negligent misrepresentation are provided for in Misrepresentation Act. The right to rescind the contract and the right to damages does not co - exist. Damages is not a right but depends on the discretion of the court.

Exclusion of liability for misrepresentation – Under Section 3 Misrepresentation act 1967 and s 8 of UCTA there cannot be contractual term which limits the liability for misrepresentation. No person who makes a fraudulent misrepresentation can run away from its liabilities.

DURESS, UNDUE INFLUENCE AND INEQUALITY OF BARGAINING POWER

- **Duress** – Duress is forcefully inducing a person to enter into a contract. This makes such contract voidable at the option of the person so induced. Duress can be to person, goods or financial duress. Duress to person can be threatening the person or his relations or through actual violence. Duress to goods can be a detaining or a threat to damage the goods belonging to the person. Financial duress is when an economically stronger party induces an economically weak person to enter into a contract through illegal ways. In ***Siboen and the Sibotre*** [1976], the charterers induced the ship owners to lower the hire charges by stating that they would go bankrupt and this would affect the business of the ship owners. The two questions to be answered is whether the other party protested to such threat and if they wanted to rescind the contract. For a threat to be duress it should be illegal and force a party to enter into a contract or if the threat is lawful, the demand should be illegal.

- **Undue Influence** – When a party uses his position or relationship to exploit the other party by influencing him to enter into a contract. Undue influence in presumed by law certain cases. Actual undue influence is when the claimant has to prove that the defendant used undue influence on his to enter into a contract. No previous history of undue influence is required to be proved. There are certain relationships like father-

son, mother- daughter, doctor - patient etc which gives a presumption that there is undue influence. A relationship of trust and confidence can also give a presumption of undue influence. For example: banker- customer.

- **Inequality of bargaining power** – In ***Lloyds bank v Bundy*** [1975] the defendant was a poor farmer who gave guarantee for overdraft to his son. The Bank by elaborating on the position of the son's company which was in debt induced the farmer to enter into such a guarantee. The court held that there was inequality of bargaining power which made the contract voidable. Inequality of bargaining power happens when one party to the contract has no knowledge about the contract and is in need of an independent advice is induced to enter into a contract by the one - sided advice given by the other party thereby creating an inequality in the bargaining power. Consumer Credit Act 1974 and Unfair Contract Terms Act 1977 are enacted to protect the parties who are weak in a contract against the inequalities of bargaining power. The Unfair Terms in Consumer Contracts Regulation 1999 is a European Community Directive which provides that any terms in a contract which is not individually negotiated is treated as unfair terms.

ILLEGALITY

An illegal contract or a contract which is against public policy is not enforceable and is void *ab initio*. No benefits accrued by the other party can be recovered if it is an illegal contract. ***Pearce v Brooks [1866],*** the plaintiff contracted with the defendant to hire amenities for her knowing that it was to assist her in her profession which was prostitution. The contract was held to be void since prostitution was illegal.

- **Illegality in performance** – Illegality of a contract can be at the formation of the contract or during the performance of the contract. If it is at the formation of the contract, the contract becomes void ab initio.
- Sometimes a valid contract may be vitiated by illegality if the performance of the contract is illegal. ***St John shipping corporation v Joseph rank limited*** **(1957**), the defendant chartered a ship to carry goods. It was overloaded and the captain of the

ship was convicted of the overloading offence. The defendants claimed that the plaintiffs performed the contract illegal and refused to pay the freight. The court held that the plaintiff could recover since contract of carriage was not illegal. If one of the parties is unaware of the illegality, the contract may be enforceable. In ***Ashmore Benson Pease and co ltd v AV Dawson ltd [1973]***a contract was entered into to transport tube banks. The defendants used lorries which were unauthorised to carry the load. The plaintiffs sued for damages as the cargo was damaged. The court held that the plaintiff had the knowledge of the illegality in performance and so he cannot initiate an action on that basis.

- **Illegality by statute** – Sometimes law may prescribe some contracts as illegal. It can be through express provisions or implied provisions. For example - contracts which are against public policy or against the national security are illegal.
- **Illegality under common law** –Under the common law, a contract is illegal if it is against public policy. There is no definition for public policy and the courts interpret it according to the circumstances of the case.

  Contracts against morality – A contract to facilitate immorality is per se illegal. ***Pearce v Brooks***discussed above is an example.

  Contracts against the interests of family life - Those contracts which detrimentally affects family life is against public policy and are illegal. For example - A contract to commit bigamy or paying money to procure the marriage of another are illegal.

  Contracts to commit to crime or civil wrong – A contract to commit an offence or a civil wrong is also illegal. ***Beresford v royal exchange assurance 1938***is an example for this type of illegal contracts.

  Contracts hindering the administration of justice – Contracts which hinder the administration of justice are illegal.

  Contracts affecting the relationship with other countries– Contracts which affect the relationship of a country with other friendly countries is deemed to be void as it is illegal.

  Contracts in restraint of trade – A contract which limits a person's right to trade and conduct his performance is illegal and void ab initio.

  Contracts in restraint of employment – Contracts if it does not strive to protect the interest of the employer and are not reasonable are void if they restrict employment of the parties.

Contract restricting sale of business – A contract is void if it restricts the sale of business unless it is to protect the goodwill of the business and contains reasonable terms

Effect of Illegality

Illegality of a contract makes it unenforceable. In ***Strongman Ltd v Sincock [1955*]**, the defendant entered in to a contract with the plaintiff builders to get the licence to modernise his house for them to do the construction work. The licences were not issued. So the contract was illegal. The plaintiffs could not sue as it was an illegal contract. But they were entitled to damages for the breach of his promise to obtain the licences.

The recovery of money or any benefit accrued on an illegal contract is not possible. But there are some exceptions to this general rule. If a party was forced to enter into a contract through a misrepresentation or by concealing the illegal part of the contract, the innocent party can recover the benefit accrued to the other party. Such benefit can also be recovered if the innocent party enters into the contract by mistake of fact. If one party cancels the part of the contract which is illegal, it entitles him to recover the benefits accrued by the other party at his expense. If the right to benefit accrued to the other party can be proved otherwise than through the illegal contract, then such benefit can be recovered. In ***Bowmakers Ltd v Barnet instruments limited (1945)***; the plaintiff gave some machines on hire purchase agreement to the defendant. It had not fulfilled the statutory requirements. The defendant failed to pay for the hire purchase and contended that the contract is illegal. The plaintiff sued on the basis of his ownership of the machines and the plaintiff was successful. In the case of ***Tinsley v Millingan(1994),*** a woman transferred property on trust to her lover to evade social security payments. The court held that the presumption of trust is not defeated.
In some of the illegal contracts, the illegal part of it may be able to be separated. In such cases, the legal part of the contract can be enforced.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

Amalgamated investment and property co limited v john walker and sons limited **[1977] 1 WLR 164**

Bell v Lever Bros 1932

Galloway v Galloway [1914]

Couturier v Hastie [1856]

McRae v Commonwealth disposals commission

Diamond v British Columbia Thoroughbred Breeders' Society (1966)

Griffith v Brymer(1903)

HirjiMulji v Cheong Yue SS

Davis contractors limited v FerehamUDC (1956)

Taylor v Caldwell

Krel v Henry [1903]

FibrosaSpolkaAkcyjna v Fairbairn Lawson Comb Barbor ltd [1943]

Metropolitan Water board v Dick, Carey and co. (1918)

Walton Harvey Ltd v. Walker and Homfrays Ltd [1931]

Maritime National Fish Limited v Ocean Trawlers Limited. [1935]

BP v Hunt [1979]

Kleinworth Benson Ltd. V Malaysia Mining Corporation Berhad

Dimmock v Hallett (1866)

Bisset v. Wilkinson

Esso petroleum Ltd v Mardon

Commercial Banking Company of Sydney v RH Brown and co 1972

Edgington v Fitzmaurice

Atwood v Small (1838)

Polhill v Walter

Hedly Byrne v Heller(1964)

Whittington v Seale-Hayne [1900]

Siboen and the Sibotre [1976]

Lloyds bank v Bundy [1975]

Pearce v Brooks [1866]

St John shipping corporation v Joseph rank limited **(1957**)

Ashmore Benson Pease and co ltd v AV Dawson ltd [1973]

Pearce v Brooks

Beresford v royal exchange assurance (1938)

Strongman Ltd v Sincock [1955]

Bowmakers Ltd v Barnet instruments limited (1945)

Tinsley v Millingan (1994)

Chapter 10
DISCHARGE OF CONTRACTS

Contracts can be discharged by way of agreement, by performance or by breach of the contract terms. Discharge of contracts is the conclusion of the contract and by discharge it does not mean that there is performance of the terms of contract.

Discharge by agreement

The parties may after entering into a contract decide to terminate the contract by agreement without fulfilling all the terms of the contract. Such a discharge of contract by agreement of the parties may be effective if consideration is present. Discharge by agreement can also happen if it is agreed that the contract will be considered as discharged if happening of a condition is fulfilled.

- Consideration - if the consideration for a contract was a future consideration, then the waiving of rights and obligations of both the parties can be considered as a good consideration for discharge of contract. This was held in ***The Hannah Blumenthal*** **[1983]**. In ***Pinnel's Case*** **[1602],** the defendant had accepted £5-2s in satisfaction of a debt of 8 pounds before the debt was due. The court held that part performance of a contractual obligation if the other party is satisfied; the contract is capable of being considered as discharged.
- Subsequent condition - A contractual term becomes ineffective on the happening of a subsequent event. In ***Head v Tattersall*** **(1871),** the buyer bought a horse with a condition that he will be allowed to return it. But the Horse got injured during an accident and it could not be restored to the seller in a damaged condition. Thus the right to return it ceased with the happening of the injury.
- Waiver - discharge of contract through waiver was discussed in ***Brikom Investments Ltd v Carr*** **[1979]**.In this case, the plaintiff who was the owner of flats agreed to repair the roof of the flats at his own expense if the tenants took out a lease for 99 years. On that assurance the tenants entered into the lease terms. But after the repair, the landlord claimed the tenant's contribution. The court held that the landlord by giving such an assurance waived his right to contribution. Thus the landlord cannot claim the contribution from the tenants.

By performance

Discharge of a contract is desired through the complete performance of the rights and obligations under the contract.

In ***Cutter v Powell*** **(1795),** the contractual arrangement was such that Cutter would sail with the defendant and on arrival at the destination would be paid for acting as the second mate in the journey. Cutter passed away after seven weeks. Ship completed the journey 2 weeks later. The captain refused to pay for the serviced he had rendered on a claim set forth by his wife. The court held that he was not entitled to payment since part performance of contractual obligation is no performance.

The substantial performance of the contract entitles the party to claim the obligation of the other party to be fulfilled. In ***Hoenig v Isaacs*** **[1952],** the plaintiff contracted to decorate a flat of the defendant for 750 pounds. A bookcase and wardrobe had some defects which could be rectified by spending 55 pounds. The plaintiff refused to pay 350 pounds which was outstanding. The court held that when there is substantial performance of the contract, the money must be paid. As the work is done, the plaintiff could only initiate an action for damages for the faults.

The performance of contractual obligations by a third party can be considered as discharge of the contract if there is no specific term which enables only a particular person to perform the contract. This was held in ***British Waggon v Lea*** **(1880).** A contract was entered for rent of railcars. But during the subsistence of the contract, one of the parties went into liquidation. It assigned the contract to a third party for performance of the contract. The court held that performance by a third party is acceptable.

Doctrine of *Quantum meruit*

According to the doctrine of quantum meruit, when the obligations in a contract are substantially or partially performed by one party, that party can claim the reasonable value of the services performed or things supplied. It entitles the party to the right to restitution.

***Sumpter v Hedges [*1898],** the plaintiff entered into a contract with the defendant to build two houses and a stable for 565 pounds. He did the work for a value of 333 pounds and he abandoned the contract for scarcity of money. He was paid in part. The defendant completed the work with another builder with the materials bought by the plaintiff. The plaintiff sued for the rest of the money. The court held that he was entitled to the payment of the material used but not for labour. The plaintiff had to be reimbursed for the materials. There cannot be unjust enrichment of one party at the cost of other.

By breach of contract

According to Treitel breach of a contract is "where 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". In some contracts, even before it is time for the performance of contractual obligations, one party may anticipate his inability to perform the obligation. Such breach of contract is known as Anticipatory breach of contract. It is defined in ***Hochster v De La Tour* (1853)** as "Before the time of performance of a contractual obligation one party may inform the other that they no longer intend to perform". The breach of contract makes the defaulting party liable for damages for the failure to perform his obligations. While the primary duty of a party in a contract is to perform the obligations and the secondary obligation is to compensate the other party for his failure to perform his duties.

The remedy for breach of each term of a contract differs with the nature of the term breached. Breach of a warranty gives the right to damages only. Remedy for a breach of an innominate term depends upon the consequences of its breach.

Breach of a condition gives two options for the non -defaulting party. He can either elect to affirm the contract or to terminate the contract. If he chooses to affirm the contract, the defaulting party has to perform his obligations under the contract. Such affirmation must be unequivocal and irrevocable. In ***StoczniaGdanska SA v Latvian Shipping Co (No 2)* [2002]** the court held that the innocent party in a contract where there is a breach of a condition can take time to decide whether to affirm or terminate the contract.

In ***White & Carter v McGregor* [1962]** the plaintiff who was engaged in the business of advertising on litter bins entered into a contract with the defendant's manager. On the same day he wanted to cancel the contract. Plaintiff refused to accept the cancellation and

continued to perform his obligation. Defendant refused to pay. The majority decision in this case held that an innocent party can affirm the contract and continue to enforce it. This decision is against the principle to minimise the loss when there is repudiation by one party. The option to terminate can be made immediately. Even while affirming the contract by the innocent party, there must be a legitimate interest involved in it. In ***Clea Shipping v Bulk Oil (The Alaskan Trader)*** **[1984]** a contract was entered into between the ship owner and a charterer for two years. After the expiry of the first year, there was some fault in the engine and the charterer cancelled the contract. The owner repaired the fault and kept the ship ready for the implementation of contract for one year. The claim of the ship owner was paid in protest by the charterer and later sued for the recovery. The court held that there was no legitimate interest involved in this case for the ship owner to keep the ship ready for the contract when the other party had cancelled it. Instead he should have claimed the damages for breach and not the hiring charge.

The affirmation of contract, if frustrated by the happening of any event subsequently takes away the right to damages for the breach of contract. In ***Avery v Bowden*** **(1856),** the plaintiff entered into a contract to carry cargo from the defendant. The plaintiff arrived early and he was told there was no cargo for them to carry. The plaintiff waited in the hope of getting a cargo. Before the time for performance of the contract came, there was an outbreak of war which frustrated the contract. This took away the right of the plaintiff to sue for breach.

There must be sufficient notice given to the defaulting party by the innocent party if it treats the contract as being terminated. In ***Vitol SA v Norelf Ltd*** **[1996]** ,Norelf entered in to a contract with Vitol for supply of Propane. While it was being loaded for delivery, Vitol sent a telex stating that he does not wish to continue the contract. Neither party did anything subsequent to that but when the cargo was delivered, Norelf had to sell it a price lower than what was contracted for. Norelf sued Vitol for breach of contract. The House of Lords held that, inaction on the part of the innocent party can constitute the acceptance of the repudiation.

If the breach of a contract is anticipated and intimated before the time of performance, it entitles the innocent party to terminate the contract at once. In ***Hochster v De La Tour*** **[1853]**, in April, the defendant entered into a contract to engage the plaintiff as the courier from June. In May the defendant intimated that the contract will not be performed. It was

argued that the defendant had to wait till the time of performance to sue for breach of contract. The court held that when the repudiation is anticipated, action can be taken at once.

Frustration is another mode by which a contract is terminated. It could be through supervening impossibility, illegal contractual objects or by operation of law.

Usually the discharge of a contract happens through the performance of the contractual obligations and rights. Discharge by agreement would suit both the parties and minimise the hardships caused to the parties due to the repudiation of contract even though it requires consideration. Breach of contract arises in a small number of cases.

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them. From the list below, how many cases do you remember?

The Hannah Blumenthal **[1983]**

Pinnel's Case **[1602]**

Head v Tattersall **(1871)**

Brikom Investments Ltd v Carr **[1979]**

Cutter v Powell **(1795)**

Hoenig v Isaacs **[1952]**

British Waggon v Lea **(1880)**

Sumpter v Hedges [**1898]**

Hochster v De La Tour **(1853)**

StoczniaGdanska SA v Latvian Shipping Co (No 2) **[2002]**

White & Carter v McGregor **[1962]**

Clea Shipping v Bulk Oil (The Alaskan Trader) **[1984]**

Avery v Bowden **(1856)**

Vitol SA v Norelf Ltd **[1996]**

Hochster v De La Tour **[1853]**

REMEDIES

Breach of a contract leads to an unwanted hardship to the party which abides by the contractual obligations. There are various remedies available for breach of the terms of the contract to the innocent party. They are (1) Damages (2) compensation (3) specific performance and (4) Injunction

Damages

- Damages are one of the remedies available to the innocent party in a breach of contract. The objective is to reimburse the innocent party for the loss he suffered due to the breach. Damages can be claimed for the expectation interest, Reliance interest or restitution interest.

- Expectation interest is when there is a breach; the court tries to put him in a situation where he would have been if the contract was performed in terms of monetary value. In ***Ruxley Electronics and Constructions limited v Forsyth (1996),*** the plaintiff had agreed to build a seven feet six inch pool for the defendant. When the work of the pool was over, it was only six feet nine inches. The defendant even though did not intend to make corrections to the pool, refused to pay for the work done due to the defect. The court held that an award of 2500 pounds for loss of amenity is reasonable since the defendant had no intention to rebuild the pool and so an award for rebuilding the pool was not required. The intention of the innocent party is relevant while granting the damages.

- Restitution interest is provided so as to curtail unjust enrichment of one party at the expense of the innocent party. When the consideration for the obligations in a contract is not given by the defaulting party or when the defaulting party is enriched by subtraction, it leads to restitution interest. This was held in ***White Arrows Express Ltd*** **v** ***Lammy's distribution limited*****(1996).** An enrichment for which the basis was a wrong act also leads to restitution interest. In ***Attorney general v Blake*** [**2001]**, the defendant was a secret agent and was obliged to keep his official secrets confidential after the his service. He wrote a book about his secret agent life after his retirement

and earned an advance from the book publishers. The Crown brought an action against him for all the profits and future profits he would have acquired by publishing the book. The court held that this is a fit case for restitution interest since public interest is involved and the defendant has in fact committed a criminal offence which led to acquiring the profit. So restitution interest was awarded.

- Reliance interest is awarded to place the innocent party in the position he would have been if the contract was not entered into. In ***Anglia television ltd v Reed [1971***] the defendant agreed to act in a television pay for an amount of 1050 pounds from the plaintiff. The defendant repudiated the contract later. The plaintiff sued for the expenses wasted and not for the profits. The court held that the plaintiff was entitled for the reimbursement of the expenses incurred before the time of performance of the contract as the defendant knew his repudiation of the contract would lead to wastage of expenditure incurred so far. Thus the plaintiff was awarded reliance interest.

- Doctrine of mitigation of loss - When a contract is repudiated by a party and it is anticipatory in nature, the innocent party has an obligation to minimise the loss he may have incurred and is entitled to take only reasonable steps which he would have taken in the course of his business. In ***Brace v Calder [1995],*** the defendant partnership firm appointed the plaintiff as a manager for a fixed period. Before the period ended, the defendant firm was reconstituted and the plaintiff refused to work with them even when the new firm agreed to employ him. The court held that the plaintiff could have minimised the loss suffered by agreeing to work for the new firm. So he is entitled only for nominal damages.

- For a claimant to be successful, the damage suffered by him should not be too remote a result of the breach of the contract by the defaulting party. This is a limitation to the right to damages of an innocent party. In ***Hadley v Baxendale [1854],*** the defendant contracted to manufacture a shaft in the plaintiff's mill using it as a pattern. But there was a delay in delivering it back to the plaintiff which affected production in the plaintiff's mill. The plaintiff sued for the loss of profit. The court held that the

defendant could be made liable only for the loss which was reasonably foreseen by the defendant while entering into the contract.

- In ***Victoria Laundry Winsor Ltd v Newman Industries Limited [1949]*** the defendant had agreed to deliver a boiler for the plaintiff for his business. But the delivery was five months late. The plaintiff sued for extraordinary loss of profit. The court held that it can claim only the ordinary loss of profit and not extraordinary loss of profit.

- Causation – The party who claims damages should be able to prove the relationship between the damage he suffered and the default of the other party to perform the contractual obligations. It is not obligatory to show that it is the breach that resulted in damage but it must be shown that the breach had its role along with other factors if any in resulting in the loss. ***Monarch Steam Ship company co v KarlshamnsOljefabrieker***a ship was chartered to deliver Soya bean in Sweden. Before the ship reached the destination, there was an outbreak of war which resulted in the non - delivery of Soya bean on time. The court held that taking into consideration the international atmosphere at the time of the conclusion of the contract, it could have been reasonably expected that there will be an outbreak of war and thus the owners of the ship was made liable.

- Damages may not be the value of the subject matter in terms of the market value alone. The mental suffering of the claimant also is taken into account while awarding Damages. In the leading case of ***Farley v Skinner [2001],*** the plaintiff bought a house with all amenities and hired the defendant for surveying the house particularly the aircraft noise. The defendant answered that it was not bad. But the noise was too bad that he could not enjoy his morning on the garden. He sued the defendant. The court held that there was no financial loss but for the mental distress he suffered, he was awarded damages to the tune of 10000 pounds.

Compensation

- Conditional terms – There could be conditions incorporated in the contract to the effect that if the contract is repudiated by a party, there will be damages to be paid by that party to the innocent party.

- Exception to the doctrine of mitigation – An action against the non - payment of a debt does not require the doctrine of mitigation or remoteness of damage to be followed. This was held in ***White and Carter councils limited v McGregor*** [1962] (discussed earlier).

- Liquidated damages - There can be terms included in the contract which subscribes the amount of liquidated damages to be paid by the repudiating party to the innocent party when there is a breach of contract. This gives the benefit of knowing the consequence of breach of contract in advance. In ***Dunlop pneumatic tyre co ltd v new garage and motor co ltd [1950]*** there was an agreement that the defendant had to pay 5 pounds for each tyre it sold below the standard price as penalty and not as liquidated damages. The court on appeal held that it was not penalty since it was an estimate of the loss suffered by the plaintiff and therefore is enforceable. A term for liquidated damages is not enforceable if (a) such damages prescribed is so exorbitant (b) if the breach of a contract is the non -payment of a certain amount of money and such the liquidated damages is more than that amount (c) when the liquidated damages provided for is a lump sum amount as a penalty which is payable on various happenings even for very silly damage.

- Evading the penalty clause rule – A penalty clause cannot be enforced if such amount is payable on the happening of an event and not on the breach of a contract. In ***Alder v Moore [1961],*** the defendant was paid insurance amount on account of permanent disability on the assurance that he will pay an amount of 500 pounds if he plays professional football again as a penalty. The court held that the contractual term did not impose payment of money on playing football again and so it was not payable as damages for breach of contract. It can also be evaded by aggravating and already subsisting obligation. Another method of evading the penalty clause is to steer clear of any clause which specifies that an amount of money has to be paid if there is a breach of contract since that clause can be interpreted as penalty clause. Depositing a lump

sum amount can sometimes be mistaken for penalty. Deposit is paid more as a security than the contract price and is not recoverable. In ***Union eagle ltd v Golden achievement limited***, the plaintiff paid 10% as a deposit for a flat. The contract said time was of the essence and the flat was to be completed within time. The completion of the flat was 10 minutes late and the plaintiff sued for specific performance. The court held that contract had to be strictly followed and the plaintiff lost its deposit amount. In ***Dies v British and International mining and finance company*** [1939], it was held that payment in part can be recovered by the party.

Specific performance

Specific performance is another remedy available to the innocent parties when there is a breach of contract. According to this remedy, the innocent party can approach the court for a direction to the defaulting party to perform his obligations under the contract as it would have been valid. The court gives orders for specific performance depending on the feasibility of such orders taking the facts of the case into consideration. In ***Corporative Insurance Society Ltd v ARGYLL Stores Holding ltd [1998],*** the plaintiff had a contract with the defendant letting the defendant to run a supermarket for 35 years. The supermarket was running in loss and so the defendant closed it under protect from Coop. The plaintiff sued for specific performance. The court held that in this case order for specific performance is not fit since it would force a person to run a business at loss and will cause hardship to the defendant. So an order for damages was appropriate.

Injunction

An injunction is a prohibitory order of the court which prohibits a person from doing an act. An injunction order cannot direct a party to perform an act which he is not required to do by an order of specific performance. The courts are empowered to order damages or specific performance instead of injunction according to the circumstances of each case.

Exercise

Memorizing the cases can be very difficult. An easy way to learn the case is to try and recall them.

From the list below, how many cases do you remember? Against each case, try to write down the key points as you remember them.

Ruxley Electronics and Constructions limited v Forsyth (1996)

***White Arrows Express Ltd* v *Lammy's distribution limited* (1996)**

Attorney general v Blake [**2001]**

Anglia television ltd v Reed [1971]

Brace v Calder [1995]

Hadley v Baxendale [1854]

Victoria Laundry Winsor Ltd v Newman Industries Limited [1949]

Monarch Steam Ship company co v KarlshamnsOljefabrieker

Farley v Skinner [2001]

White and Carter councils limited v McGregor [1962]

Dunlop pneumatic tyre co ltd v new garage and motor co ltd [1950]

Alder v Moore [1961]

Union eagle ltd v Golden achievement limited

Dies v British and International mining and finance company [1939]

Corporative Insurance Society Ltd v ARGYLL Stores Holding ltd [1998]