

1 Introduction and general principles

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Introduction

This module guide is designed to help you to study the **Contract law** of England and Wales. This guide is not a textbook and it must not be taken as a substitute for reading the texts, cases, statutory materials and journals referred to in it. The purpose of the guide is to take you through each topic in the syllabus for **Contract law** in a way which will help you to understand contract law. The guide is intended to 'wrap around' the recommended textbooks and casebook. It provides an outline of the major issues presented in this subject. Each chapter presents the most important substantive aspects of the topic and provides guidance as to essential and further reading. Each chapter also provides you with activities to test your understanding of the topic and self-assessment exercises designed to assist your progress. Feedback to many of these activities is available at the back of this guide. There are also sample examination questions, with appropriate feedback, which will assist you in your examination preparation and quick quizzes to measure your progress, with answers on the virtual learning environment (VLE). The method of study described is the result of the accumulated experience of highly experienced teachers and writers on this topic. Your knowledge of the subject will be maximised when you use this guide in the intended way. Any other approach (e.g. reading the feedback before or alongside the self-assessment) might give false confidence in your knowledge and ability to answer questions under examination conditions.

In the study of contract law, it is essential to try to gain an understanding of the underlying basis of contract law – what the law is trying to do in response to particular issues. This is then supplemented and exemplified by a more detailed knowledge of its substantive principles. The rote memorisation of rules and cases alone will not equip you to analyse a legal problem or statement of the sort that form the basis of formative and summative examination in this subject. To do this you need to acquire an overview of the topic, understand its structure, parts and inter-relationships. When this is supplemented by a more detailed knowledge and skills of analysis you will be able to apply the law in written answers that gain maximum credit. To do this it is most likely that you will need to read passages or chapters in the guide (and the relevant suggested reading materials) several times in order to understand the principles of law being covered.

1.1 Studying the law of contract

As already stated, this guide is not a textbook nor a substitute for reading the primary materials that comprise the law of contract (i.e. cases and statutory materials). Its purpose is to take you through each topic in the syllabus for **Contract law** in a way which will help you to **understand and apply** contract law. It provides an outline of the major issues presented in this subject. It will also help you prepare to answer the kind of questions the examination paper is likely to contain. Note, however, that no topic will necessarily be included in any particular examination and that some are more likely to appear than others. Examination questions may take different forms, though most in the past have been of a traditional 'problem' or 'essay' style. The examiners are bound only by the syllabus and not by anything said in – or omitted from – this guide.

What do we mean by 'taking you through' a topic? Very simply it is to spell out what problems or difficulties the law is seeking to provide a solution for and to give a structured guide to the materials (textbooks, cases and statutes). You must read these in order to appreciate how English law has dealt with the issues and to judge how satisfactory the solutions are in terms of overall policy.

How to use this module guide

Each chapter begins with a general introduction to the topic covered.

Following that, the topic is divided into subsections. Each subsection provides a reference to the recommended readings in McKendrick's textbook and Poole's casebook (see Section 1.2 below). At a minimum, you should read these; in many cases you will probably find that you need to re-read them. It is often difficult to grasp some legal principles and most students find that they need to re-apply themselves to some topics.

In addition, at the end of each chapter, there are recommendations for further reading. This will always cover the relevant chapter in the most appropriate more detailed text. You may find it desirable to review this second textbook from time to time because it is sometimes easier to grasp a point that you have found difficult when it is explained in a different, even if more detailed, fashion. Some recommended readings are also included in the **Contract law** study pack.

Throughout each chapter, self-assessment questions and learning activities are provided. Feedback is also given with regard to the learning activities to allow you to check your comprehension of a particular matter. You will find this process most helpful if you attempt to answer the question before you check the feedback. This approach provides invaluable examination practice. If instead you get into the habit of simply reading the question and then immediately checking the feedback this will not help you improve your question answering technique and may give you a false confidence. The unsubstantiated reflection: 'oh yes I would have written that in an exam' is not the same as actually demonstrating that you could have done so. The object of your studies is to understand, rather than memorise, the law. This requires a sufficiently detailed knowledge of the substantive law which you are then able to apply to answer legal questions. At the end of each chapter, some advice is given with regard to possible examination questions on this topic. The fact that this constitutes advice about **possible** examination questions cannot be stressed enough. The quick quizzes at the end of each chapter are designed to help you reflect on your learning. Again, answer the questions before looking at the answers and feedback on the VLE. The 'Am I ready to move on?' section is for you to reflect on what you have learned and ensure you have sufficient knowledge of the areas covered in each chapter before you move on to the next one. There is no feedback for these questions but you should be honest in your self-reflection.

The reasons for studying the principles of the law of contract are readily apparent: as individuals we enter and perform contractual obligations every day of our lives and contracts are the foundation of most commercial activity. Many specialist areas of law are built upon a contractual foundation e.g. insurance law, employment law and landlord and tenant law.

ACTIVITY 1.1

How many contracts did you think about entering yesterday? Did you enter any contracts yesterday? How many contracts did you (at least partially) perform yesterday? Did any contracts to which you are a party 'end' yesterday? If so why did they end?

Reflection upon this series of questions will make you aware of how much the law of contract lays behind 'everyday life'. Perhaps you looked in a shop window or at a website, rang up a shop or business to ask about the availability of some good or service. All of these actions are preparatory to entering a contract. If you purchased any good (newspaper, drink, lunch or shopping) or service (getting on a bus or train with a ticket) you will have entered a contract. Remember that contracts may be formal in the sense of a signed document or informal such as an oral agreement. If you are employed to work you will have (hopefully) performed some contractual duties yesterday. If you 'returned' a purchase to a shop or posted it back to an online supplier, if your contract with a mobile network supplier came to an end or you were 'sacked' from your employment you have participated in the termination of a contract as a result of breach of contract (returned goods and sacking) or performance (mobile phone).

ACTIVITY 1.2

Look at a newspaper and identify any stories/subjects/parts which might be better understood with knowledge of contract law or where that area of law is the essential background. How would you describe the 'status' of the parties to these contracts?

Most newspapers carry advertisements which aim to persuade readers to purchase goods and services. If untrue statements are made (called misrepresentations) the law of contract may provide a remedy to the disappointed purchaser. The business pages will directly discuss lucrative contracts concluded between businesses: perhaps the purchase of valuable TV broadcasting rights or the takeover (by the purchase of shares) of one company by another. Other sections of the newspaper may less obviously 'involve' contract law, for example the sports pages may discuss the 'transfer' of football players for large sums of money. Such a transfer is of course a contract entered between (at least) the player, and selling and purchasing clubs. Newspaper advertisements are often placed to stimulate sales by a business to consumers (i.e. private individuals); these are known as B2C contracts. The purchase of broadcasting rights and the takeover of companies are concluded between businesses and so are known as B2B contracts.

The importance of case law

It cannot be too strongly emphasised that the law of contract in England and Wales was established through the decisions of the courts. There are a small number of important statutory provisions. Older statutes such as the Sale of Goods Act 1979 (originally 1893) were themselves codifications of previous case law. More recent statutes have been enacted in order to effect reforms in the law of contract either to implement the recommendations of law reform agencies or as required by particular European Directives. Nevertheless, the law of contract remains predominantly a **case law subject** and the examiners will, primarily, be seeking to test your understanding of how the judges in the leading cases have formulated and refined the relevant principles of law. You should attempt to read the important cases. The Online Library (which you can access through the student portal) will give you access to the relevant cases. This subject presents an ideal opportunity for you to take the first steps towards developing the essential transferable skills of understanding and applying the judgments of courts and, to a lesser extent, of interpreting statutes.

To be explicit, there are no shortcuts to gaining an adequate knowledge of the development of the case law. If the job is to be well done, it will be time consuming. Individuals vary, obviously, but it would probably be exceptional to cover the whole syllabus thoroughly in less than 200–250 hours of study.

1.2 Reading

You should begin your reading with this module guide. Start at the beginning and work through the guide sequentially, reading the textbook and doing the activities as directed.

ACTIVITY 1.3

Review Activity 1.1 above to see if you can identify different stages in a contract, especially a long term one such as a lease or mortgage.

A contract, particularly one between parties with equal bargaining power, is often preceded by a period of negotiation. If successful, a contract may be agreed. It must then be performed. If the contractual performance is to take place over a long period of time, altered external circumstances, or the changing preferences of the parties, may result in some agreed modifications. The contract may then end when performance is complete or if it is breached in a serious way, in which case the 'guilty' party may be required to pay damages. This highly abbreviated account of the 'life' of a contract describes four important stages: negotiation, formation, modification and termination.

Since a contract has distinct phases it must be studied and problems analysed in a roughly chronological order. Until a contract comes into existence it is meaningless to talk about its modification or termination. So while it may be tempting to start with, say, illegality or incapacity, this is not a good idea. The subject builds on the basic foundations, without which particular topics later in the subject cannot be understood.

You will also derive assistance from the selected readings provided in the Contract law study pack and the Newsletters on the Contract law section on the VLE.

No feedback provided.

1.2.1 Books for everyday use

The core text for this subject is:

- McKendrick, E. *Contract law*. (London: Palgrave Macmillan, 2017) twelfth edition [ISBN 9781137606495]. (Referred to in this module guide as 'McKendrick'.)

This text forms the foundation text for this subject. It sets out the law in a clear way and examines all the major issues in reasonable, but not confusing, depth. It is advisable to read and re-read this text to allow the material to be thoroughly understood.

You should also buy a casebook. This guide is structured around:

- Poole, J. *Casebook on contract law*. (Oxford: Oxford University Press, 2016) thirteenth edition [ISBN 9780198732815]. (Referred to in this module guide as 'Poole'.)

You will find it most beneficial to refer from time to time to the more advanced texts set out in the next section.

1.2.2 More advanced books

On occasion you may want to refer to more detailed accounts of the law. Chapters or passages from the following medium and longer length books may be referred to in the Further reading at the end of each chapter.

Two 'medium' sized accounts by other authors you might wish to use are:

- Chen-Wishart, M. *Contract law*. (Oxford: Oxford University Press, 2015) fifth edition [ISBN 978019989163].
- Halson, R. *Contract law*. (Harlow: Pearson, 2013) second edition [ISBN 9781405858786].

The areas covered by the standard textbooks are all very similar. The differences between the various books are in their arrangement, depth, presentation and style. To illustrate: Chen-Wishart above makes extensive use of flowcharts, diagrams and tables while Halson analyses a contract as a transaction with distinct phases. The extent to

which you will choose to refer to textbooks beyond the core text by Mckendrick will depend upon your needs and your liking for the author's approach and style.

The following books contain an even greater depth of discussion. To illustrate this all contract law textbooks will contain a discussion of the so called 'parol evidence rule' which states that parties to a written contract may not rely upon evidence outside the contract, usually oral (parol) statements, to contradict the written document. You will soon realise that all legal rules are subject to exceptions though some will be more important than others. Mckendrick, the recommended textbook for this subject, describes seven major exceptions to the parol evidence rule. In contrast, the compendious Treitel, below, adds a further 9!

- **Andrews, N. *Contract law*. (Cambridge: Cambridge University Press, 2015) second edition [ISBN 9781107660649].**
- **Beatson, J., A. Burrows and J. Cartwright *Anson's law of contract*. (Oxford: Oxford University Press, 2016) 30th edition [ISBN 9780198734789].**
- **Furmston, M. *Cheshire, Fifoot and Furmston's law of contract*. (Oxford: Oxford University Press, 2017) 17th edition [ISBN 9780198747383].**
- **Peel, E. *Treitel: the law of contract*. (London: Sweet & Maxwell, 2015) 14th edition [ISBN 9780414037397] (referred to as 'Treitel').**

You may also find it useful to refer to a volume concerned with leading contemporary issues in contract law:

- **Morgan, J. *Great debates in contract law*. (Basingstoke: Palgrave Macmillan, 2015) second edition [ISBN 9781137481597].**

You may also wish to consult a more detailed casebook. Here the choice lies between:

- **Burrows, A. *A casebook on contract*. (Oxford: Hart Publishing, 2016) fifth edition [ISBN 9781509907700].**
- **Mckendrick, E. *Contract law: text, cases and materials*. (Oxford: Oxford University Press, 2016) seventh edition [ISBN 9780198748397].**
- **Brownsword, R. *Smith & Thomas: A casebook on contract*. (London: Sweet & Maxwell, 2015) 13th edition [ISBN 9780414035324].**

It is not suggested that you purchase the books mentioned in this section: they should be available for reference in your college or other library.

1.2.3 Statute books

You should also make sure you have an up-to-date statute book. Under the current Regulations you are allowed to take **one** authorised statute book into the examination room.

Information about the statute books and other materials that you are permitted to use in the examination is printed in the current Regulations, which you should refer to.

Please note that you are allowed to underline or highlight text in these documents – but you are **not allowed to write notes etc.** on them.

1.2.4 Other books

At the other end of the scale, many shorter books have been published in recent years aimed at the student market. If you are using Mckendrick and Poole, you will generally not find that there is much benefit to be gained from these other works. However, for the particular purpose of practising the art of writing examination answers, you may find it helpful to have:

- **McVea, H. and P. Cumper *Exam skills for law students*. (Oxford: Oxford University Press, 2006) second edition [ISBN 9780199283095].**
- **Finch, E. and S. Fafinski *Legal skills* (Oxford: Oxford University Press, 2017) sixth edition [ISBN 9780198784715].**

But do not be misled into thinking that any book will provide you with 'model answers' which can be learned by heart and reproduced from memory in the examination. From a study of past papers you will be aware that certain broadly defined topics are often examined. However, you will not be able to anticipate the exact questions that will be asked and every examination question requires a specific answer. If you do commit to memory and reproduce 'pre-packaged' answers these will be to questions other than the exact question posed. Such answers will contain irrelevant, and omit relevant, material. The criterion of relevance is applied strictly by examiners and so such pre-prepared answers will not score highly.

References to the recommended books in the guide

This guide is designed for use in conjunction with McKendrick's textbook and Poole's casebook. The readings in this module guide were set around the 11th edition of McKendrick's textbook and the 13th edition of Poole's casebook. In the event that you have a later edition of the textbook (i.e. a new edition of the textbook publishes before the next edition of this module guide), the subject headings set out in the readings should refer to the relevant portion of a later textbook. For example:

- McKendrick, Chapter 11 'Exclusion clauses' – Section 11.7 'Fundamental breach'.
- Poole, Chapter 8 'Breach of contract' – Section 2 'Consequences of breach'.

1.2.5 Other sources of information

Journals

It is useful to consult journals regularly to improve your understanding of the law and to be aware of recent developments in the law. Journals which may prove useful to you for their articles and case notes are:

- Cambridge Law Journal
- Journal of Contract Law
- Legal Studies
- Law Quarterly Review
- Lloyd's Maritime and Commercial Law Quarterly (not available in the Online Library)
- Modern Law Review
- New Law Journal
- Oxford Journal of Legal Studies.

Do not worry if you come across material that you do not understand: you simply need to re-read it and think about it.

Online resources

As mentioned earlier, you will find a great deal of useful material on the VLE and Online Library. These are both accessed through the Student Portal at <http://my.londoninternational.ac.uk>

The Online Library provides access to cases, statutes and journals as well as professional legal databases such as LexisLibrary, Westlaw and Justis. These will allow you to read and analyse most of the cases discussed in this guide and the relevant materials.

Students are also able to access newsletters on the VLE that deal with matters of contemporary interest.

Use of the internet provides the external student with a great deal of information, as a great deal of legal material is available online. Although the sites change on an almost monthly basis, some useful ones at the time of writing this guide are:

- ▶ www.legislation.gov.uk/ukpga
provides the full text of UK Acts back to 1991
- ▶ www.parliament.uk
the sitemap for the Parliament of the United Kingdom, which will provide you with access to a range of legislative information
- ▶ www.lawcom.gov.uk
the Law Commission's website; this provides information about law reform.

In addition to these sites, a growing number of private publishers provide legal information and case updates. A site where useful information about recent cases and developments in the law can be found is:

- ▶ www.bailii.org
Bailii is a freely available website which provides access to case law legislation and also provides a recent decisions list (www.bailii.org/recent-decisions.html) and lists new cases of interest (www.bailii.org/cases_of_interest.html).

Several publishers grant access to online resources when a particular textbook is purchased. Examples include Pearson's My Law Chamber and the online resource centre promoted by Oxford University Press. It should, however, be noted that the extent to which all advertised online resources are kept updated is at present inconsistent. One helpful source of up-to-date practical commentary on recent cases is the websites of the major law firms. If you search under a case name you will likely be directed to some commentary written by a practitioner at one of these firms primarily for the benefit of clients.

1.3 Method of working

Remember that your main objective is to understand the principles that have been laid down in the leading cases and to learn how to apply those principles to a given set of facts. As a rule of thumb, leading cases for this purpose may be defined as those which are included in the relevant sections of McKendrick and Poole, together with any other (generally more recent) cases cited in this module guide. At a more practical level the leading cases are those which Examiners would probably expect the well-prepared candidate to know about. In the nature of things, just as different lecturers will refer to a different selection of cases, there can be no absolutely definitive list of such cases. However, there will always be agreement on the importance of many of the cases and in general terms, 'core' cases are named in the guide. Space is limited and omission from the guide should not be taken to mean that a case is not worth knowing.

It is suggested that the study of the cases should be approached in the following steps.

1. Read the relevant section of this module guide.
2. Read the relevant passages of McKendrick's textbook and Poole's casebook – it may also be advisable to examine some cases in full following this.
3. Re-read the relevant passages in McKendrick.
4. Attempt to answer the relevant activities or self-assessment questions.
5. Repeat this process for each section of the module guide.

A further description of the process in each of these steps is set out in further detail below.

Step 1

Start with the relevant section of this module guide – this will give an idea of the points you need to look for. Take one section at a time – do not try to digest several at once.

Step 2

Read the textbook passage referred to. Look in particular for the cases upon which the author places special emphasis. Typically these will be decisions of higher appeal courts such as the Court of Appeal or the Supreme Court (formerly the House of Lords).

Read the cases in the casebook (together with any others mentioned in the module guide – particularly the more recent ones). You should generally be able to find the case in the Online Library.

The importance of reading the primary materials of the law – cases and legislation – cannot be overemphasised. Learn as much as possible about each case. Make a special effort to remember the correct names of the parties, the court which decided the case – particularly if it is a Supreme Court (or House of Lords) or Court of Appeal decision – the essential facts, the *ratio decidendi* and any important *obiter dicta*. It is also important to note any other striking features, such as, for example, the existence of a strong dissenting judgment, the overruling of previous authority or apparent inconsistency with other cases. It is most important that you understand not only **what** the court has decided but also **why** it has decided that. Knowing ‘the rules’ is not enough: it is essential to study the judgments and understand the reasoning which led the court in a particular case to uphold the arguments of the successful party and reject the contentions put forward – no doubt persuasively – on behalf of the unsuccessful party. It is also important to be critical when studying the cases: ask yourself whether the result produces injustice or inconvenience; whether there are any situations in which you would not want the result to apply and, if so, how they could be distinguished. If it is an older case, you should also ask yourself whether the reasoning has been overtaken by changes in social and commercial life generally. Lastly, pay attention to the impact of other cases in the area. How strong is an authority in light of subsequent decisions?

Step 3

Read the textbook passage again and ask yourself, ‘Does the book’s statement of the effect of the cases correspond with my impression of them?’ If it does not, read the cases again.

Step 4

You will find activities and self-assessment questions throughout the guide. These are intended not only to build up your knowledge of the material but also to provide you with an opportunity to measure your knowledge and understanding of the particular section. An activity requires you to think about a particular question and prepare an answer which extends beyond a simple ‘yes’ or ‘no’. Feedback is provided for these activities at the end of the guide. Self-assessment questions are designed to test your memory of the material which you have covered. No feedback is provided for these questions as they have sample answers available in the textbook or casebook. With both forms of exercise, you will find that your knowledge is enhanced if you complete the exercises as you encounter them in the particular section. You will note that each chapter of McKendrick also includes some exercises for self-assessment: completing these will further develop your legal knowledge and skills.

Step 5

Repeat the process for each section of the chapter in turn.

1.4 Some issues in the law of contract

1.4.1 Statutes

Although most of the syllabus deals only with principles developed by the courts, there are also a few statutory provisions which need to be considered because they contain rules affecting contracts generally. Cases and statutes come into existence in different ways and so must be treated differently. Judgments in cases consist of the reported speech of judges and can be very lengthy. The challenge for the reader is often to distil from these long judgments the exact point of law that was applied in the case. Statutory provisions are often short (e.g. the Law Reform (Frustrated Contracts) Act 1943 and Misrepresentation Act 1967 have three main sections), yet each effects substantial changes in the law. Statutes are usually written by parliamentary draftsmen, working in pairs, who spend a great deal of time trying to express in as few

words as possible the change in the law they have been instructed to effect. Many weeks might be spent drafting, criticising and then redrafting a single section. Statutes therefore cannot be speed read because every word and even every punctuation mark was inserted for a particular reason. When the topic of misrepresentation is studied you will see that the inclusion of the word 'so' in s.2(1) of the Misrepresentation Act effectively dictates the measure of damages available under that section. Therefore, it is suggested that you read and reread statutory sections from the perspective that every word was likely included for a purpose. Ultimately though, we must remember that in English law it is the judges who decide what Parliament meant by the words of the statute.

1.4.2 European Union law

The syllabus refers to the inclusion of relevant European Union legislation. The law of contract has not been affected by this legislation to the extent of other areas of law, especially public and human rights, law. At present, the most significant part of the general law of contract which is directly affected by European law is that dealing with consumer rights and unfair terms. For this reason the further effect of 'Brexit' (the abbreviation for 'British exit' referring to the June 2016 referendum vote by British citizens to leave the European Union) when implemented will not have a great impact upon the general law of contract.

The obligation to comply with European legislation derives ultimately from membership of the European Union. However, European Directives may be transposed into domestic law in different ways. This is well illustrated by the European Directive on Unfair Terms in Consumer Contracts (93/13 EEC). The first attempt to implement the Directive in domestic law showed a distinct lack of imagination, using the 'copy out' technique. The provisions of the Directive were simply repeated, mostly verbatim, in a statutory instrument: the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/ 3159). The 'copy out' approach creates many problems as there is no attempt to integrate the measure with the existing domestic law on the subject. These issues of integration were not addressed when the 1994 Regulations were replaced by a new statutory instrument with the same name but a different date in 1999 (SI 1999/2083). As a consequence the Law Commissions of England and Wales and Scotland proposed legislation that integrated the substance of the 1999 Regulations with the existing domestic legislation, principally the Unfair Contract Terms Act 1977 (UCTA 1977). Their basic proposal to 'tidy up' this area of law was accepted but their preferred technique of a single domestic statute dealing with unfair contract terms, especially so called exemption clauses (clauses which seek to remove or limit a contractual liability), was not used. Instead, Part 2 of the Consumer Rights Act 2015 revoked the 1999 Regulations and UCTA 1977 in so far as it applied to contracts between businesses and consumers (B2C contracts) and has produced a unified statutory protection for consumers. The provisions of UCTA 1977 will continue to apply to contracts concluded between businesses (B2B contracts). This is an important recent change in the law that will be referred to in more detail at several places in this module guide.

The reception into English law of the European Directive on Unfair Terms in Consumer Contracts was clearly complex and untidy but also illustrates a more general problem with all European legislation. This arises from the distinct ways in which English and continental courts approach statutory interpretation. Historically, the approach of common law courts has been more narrow, with great emphasis upon the exact words used as opposed to the inherent purpose or 'spirit' of the legislative provision. The European Court of Justice follows a continental, or civil law, approach and puts greater emphasis on the underlying purpose of the provision even where this cannot easily be supported by the actual words used. A question arose as to whether the 1994 Regulations applied to contracts for the sale of land. The 1994 Regulations – derived from the English text of the European Directive – referred only to 'goods' and 'services' and not to land. The usual English approach to legislative interpretation would lead to the conclusion that contracts for the sale of land were not covered by the Regulations. However, the French text of the Directive referred to the '*vendeur de biens*' which

would cover a seller of goods or land. In *London Borough of Newham v Khatun* [2004] EWCA Civ 55 the Court of Appeal avoided the possibility of different interpretations of the same Directive being upheld in different member countries and held that the Regulations (and so by inference now the Consumer Rights Act 2015) apply to contracts for the sale of land. The episode illustrates the difficulties that can arise from the implementation of EU law.

1.4.3 A law of contract or a law of contracts?

The law of contract described in this guide consists of many principles of general application. In this sense we can say that there is a single law applicable to all types of contract. However, in many specialised areas these general principles are disapplied and supplemented by specific extra rules. For this reason, authors write books which focus upon particular contracts only (e.g. the contract of employment, charters of ships, contracts to lease land). Indeed, this process of fragmentation is exactly what was mentioned above where the law on unfair contract terms could be described as now comprising consumer contract law (for B2C contracts) and business contract law (for B2B contracts). However, it is important to realise that this is not a one way process. Over recent years there has been evidence of an increasing contractualisation of the relationship between the individual and the state (e.g. the introduction of a market for healthcare where health authorities and fundholding doctors' practices purchase healthcare from private and NHS trust hospitals). Consequently, it is not possible to say whether we have a law of contract or a law of contracts. It might be safer to say simply that the general principles of contract remain important both as a part of more specific contract regimes and also as the 'default' law applicable to contracts which are not regulated in a special way.

1.4.4 The real world

This module guide describes the legal rules that collectively make up the law of contract. However, you should be careful when making inferences based upon those rules as to how contractors behave in the real world. The small number of empirical studies that have been undertaken to investigate the actual behaviour of contractors reveal that they are frequently more co-operative and flexible than the formal legal rules would seem to anticipate. In the first such study, Stewart Macaulay described the views of manufacturing companies in Wisconsin. His conclusion, confirmed by the small number of other empirical studies, was that some of the usual assumptions made about contractors' actions and the effects of legal rules 'are just wrong or ...greatly overstated...'. In general, contractors are more flexible and accommodating to changing circumstances and preferences than might be expected. Another American commentator, Ian MacNeil, pithily summarised the behaviour of contractors: 'they do not go for the jugular when trouble arises'.

1.4.5 The 'consensus' theory of contract and objective interpretation

In the past, many writers and courts placed much emphasis on the need for a 'meeting of minds' or '*consensus ad idem*' for the making of contracts. This reliance on actual intention was an expression of *laissez-faire* philosophies and a belief in unfettered freedom of contract. This subjective approach to the making of contracts has now largely been abandoned, though its influence can still be detected in certain rules. In general, what matters today is not what meaning a party actually intended to convey by his words or conduct, but what meaning a **reasonable person** in the other party's position would have understood him to be conveying. This is known as the process of 'objective interpretation'. When analysing contractual problems judges often reflect in their speech the subjective approach: they speak of trying to discover the intention of the parties. However, it is crucial to understand that this intention is ascertained objectively. My intention is taken to be not what I secretly intend but what a reasonable interpretation of my words and deeds would suggest I am intending. For example, I offer to sell you 'my car for £10k' while I am sitting on the bonnet of a Ford Fiesta. You agree to buy 'my car for £10k'. I then go round the corner and bring back an old wreck

of a car worth £200 which I tell you is the only car I own. The law would, in words usually attributed to Charles Dickens, be an 'ass' if on these facts you had entered a contract to buy the old wreck for £10k; fortunately it is not and you have not. The contractual offer I will be held in law to have made is not the one that I secretly intend (i.e. to sell the car round the corner), but rather is the offer that a reasonable individual would think I was making (i.e. to sell the car which I was sitting on at that time).

1.4.6 Law and equity

At one time in England and Wales, there were two separate court systems which dealt with contract cases: courts of equity and courts of common law. In the latter part of the 19th century, these two courts were amalgamated and one court dealt with both law and equity. Equity had developed its own principles, considerations and remedies to contractual problems. Equity is said to supplement the common law where it is deficient. In the course of studying contract law you will see many equitable principles in place (see, for example, estoppel, undue influence and the remedy of 'specific performance', the courts' order that the promisor perform the actual obligation undertaken). Equitable intervention in a contractual problem is based on the conscience of the parties; accordingly, equitable relief is discretionary and may be more flexible. Some legacies of this old distinction remain (e.g. with respect to the remedies available for breach of contract). The primary remedy, an award of damages, which originated in the common law courts, is said to be available as of right. In contrast, specific performance, which originated in the courts of equity, is said to be available at the court's discretion. The availability of equitable relief is bound by a distinct series of considerations sometimes referred to as a maxim. One such maxim is that 'he who comes to equity must come with clean hands'; that is to say, he who seeks equitable relief must himself not be guilty of some form of misconduct or sharp practice. You will see the particular restrictions placed upon the granting of equitable relief as you proceed through the module guide (see, for example, rescission for misrepresentation).

1.4.7 Human rights and contract law

From October 2000 the Human Rights Act 1998 (HRA), which incorporates into English Law the European Convention on Human Rights, has had legal effect. The HRA creates Convention Rights (CRs) which are enforceable under domestic law. The main rights are: protection of property; right to life; prohibition of torture, inhuman or degrading treatment; prohibition of slavery or forced labour; the right to liberty/security; right to a fair trial and hearing, and no punishment without lawful authority; respect for private/family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; freedom of assembly/association; freedom to marry; and prohibition of discrimination in enjoyment of CRs.

The wide ranging freedoms which are guaranteed by the HRA might have a considerable impact upon the law of contract depending on their so called 'horizontal' effect. HRA s.6(1) provides that it is 'unlawful for a public authority to act in a way that is incompatible with a Convention Right' and so clearly applies to the relationship, including a contractual one, between a public body and an individual. The extent to which the HRA will have impacted upon the law of contract is related to the extent that the HRA has a horizontal effect (i.e. to the extent that it affects relationships, including contractual ones between individuals, including companies). It has so far been recognised that CRs have some horizontal effect (e.g. the House of Lords has recognised that the Article 3 right to respect for private and family life required that legislation regarding the succession to rented property must be applied in the same way to same sex relationships as it is to heterosexual relationships). The precise extent of the horizontal effect of the HRA is a contentious issue. Further development of the extent of horizontal effect will, if it occurs, increase the importance of human rights protection upon the law of contract.

An example of how the HRA's protection of CRs has affected contracting activity is provided by the Court of Appeal's recent decision in *Dept of Energy and Climate*

Change (DECC) v Breyer Group plc [2015] EWCA Civ 408. When the DECC introduced a subsidy scheme designed to encourage the small scale generation of electricity from renewable resources it underestimated the likely 'take-up', and so the cost to the Government, of the scheme. The DECC, contrary to earlier commitments, sought to save £1.6 billion by reducing the level of subsidy to be paid for electricity produced from such sources. Companies supplying this technology claimed that they had suffered £195 million losses through abandoned installations. The Court of Appeal held, based upon assumed facts, that the implementation of the changes had unjustifiably interfered with the companies' right to the protection of property guaranteed by Article 1 of the First Protocol of the European Convention on Human Rights (known as an A1P1 right) and so, in principle, those companies affected were entitled to damages.

1.4.8 The codification of contract

The English law of contract is found in the decisions of the courts supplemented by a small number of statutory measures, some of the latter which have their origins in European Directives. The domestic law applicable in many European countries is so called 'civil' law derived from Roman law.

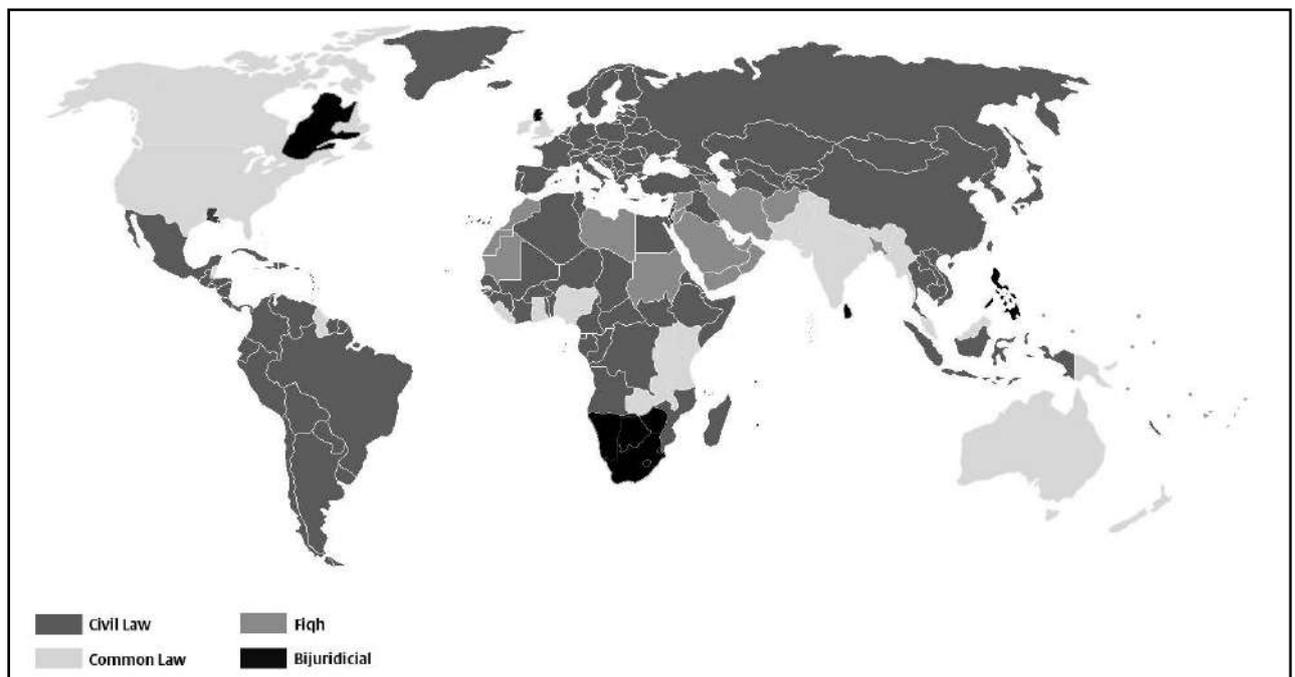


Figure 1.1 A map of the world's different legal families

Source: <https://commons.wikimedia.org/wiki/File:LegalSystemsOfTheWorldMap.png>

A distinctive feature of these systems is the place of 'codes' which in an authoritative way state the law on a particular topic such as contract or tort: in France the code civil established under Napoleon 1 in 1804 and so known as the Napoleonic Code and in Germany the *Bürgerliches Gesetzbuch* (the 'BGB'). The idea of a single source for all the legal principles on a topic has an instant, but misleading, appeal. A code is not able to provide for all possible cases and circumstances. Rather its necessarily general principles must subsequently be interpreted by courts before they are applied in concrete cases. The need to refer to such interpretations and the different stances that may be taken complicate the original code. This was acknowledged by Napoleon himself who, when the first commentary on his code was published, is claimed to have said: '*Mon Code est perdu*' (My Code is lost).

The only common law jurisdictions in Europe are England and Wales, Cyprus and Ireland (Scotland is a mixed (i.e. common law and civil law) jurisdiction). With civil law jurisdictions in the majority it was perhaps inevitable that there would be pressure to enact a single contract code for all of Europe. To this end the private work of

collections of lawyers aimed at producing such a code, the best known being Lando's Principles of European Contract Law (the 'PECL'). This work was eventually supported and endorsed by the European Commission with strong support from the European Parliament. After other initiatives in 2011, 10 years after its first communication on contract law, a Regulation on a Common European Sales Law (CESL) was published by the European Commission in order to facilitate contracting across national boundaries. Current trade within the EU is said to be worth over €2 trillion. It was asserted that different national systems of contract law impeded such trade and so the potential gains from codification, especially in the context of European economic recovery, seemed great. However, this potential reduction in transaction costs is illusory for two reasons. The imposition of a single contract law in Europe is not politically possible. Therefore, what has been proposed is an optional code that parties may choose to adopt. The illusory nature of any supposed transaction cost saving is clear when it is realised that the proposal, instead of replacing the 28 current domestic contract regimes with a single new system, instead introduces a further (i.e. 29th) possible contract framework.

An interesting perspective on this debate is provided by the World Bank's annual *Doing Business* survey which compares the ease of doing business in 190 countries. This is judged by reference to 10 metrics including enforcing contracts and trading across borders. Although common law jurisdictions comprise less than 20 per cent of the countries surveyed, nevertheless five of the top eight rated countries for ease of doing business were common law based (Singapore, New Zealand, Hong Kong, US and UK) in the latest 2017 survey. In contrast, the major European civilian jurisdictions of France and Germany ranked respectively 29th and 17th. This preference on the part of business for common law, noncodified, systems of law would appear to further support arguments against the codification of contract law across Europe. It is perhaps not surprising that the scope of the CESL has subsequently been reduced and will only apply in the main to distance and online contracts and even then only if the parties so choose.

A different approach to codification is provided by the Uniform Customs and Practice for Documentary Credits (the Uniform Customs). The Uniform Customs apply only to one particular type of commercial contract – called a documentary credit – which is a guarantee provided by a buyer's bank to the supplier of goods that the price will be paid so long as specified documents are tendered. The Uniform Customs which were drafted by the International Chamber of Commerce are possibly the most successful example of contract codification in existence. The standard form of documentary credit supported by the Uniform Customs is almost universally adopted. The most successful **general** contract code is probably the United Nations Convention on Contracts for the International Sale of Goods (known as either the Vienna Convention or CISG). Once this Convention is ratified by a country it will apply to all transactions for the international sale of goods to which that jurisdiction's law would apply unless the contract specifically provides otherwise; it is an 'opt out' rather than an 'opt in' measure. All the major trading nations except one have ratified the CISG including the US, China, France and Germany. The only major trading nation that has chosen to resist ratification is the UK.

1.5 Plan of the module guide

In line with the order of topics in the syllabus, the guide is structured as follows.

- ▶ Part I of the guide deals first with the requirements for the making of a contract (Chapters 2, 3 and 4).
- ▶ Part II deals with the content of a contract and some of the regulations of the terms of a contract (Chapters 5 and 6).
- ▶ Part III deals with the capacity to contract – the emphasis placed is upon minors' contracts (Chapter 7).

- ▶ Part IV deals with vitiating elements in the formation of a contract (Chapters 8, 9 and 10).
- ▶ Part V deals with the question of who can enforce the terms of a contract (Chapter 11).
- ▶ Part VI deals with illegality and public policy (Chapters 12 and 13).
- ▶ Part VII deals with the discharge of a contract (Chapters 14 and 15).
- ▶ Part VIII deals with remedies for a breach of contract (Chapters 16 and 17).

Topics not included in the syllabus

Although the following topics are touched upon in the recommended books (and covered in some detail in the larger books), they are excluded from the present syllabus.

- ▶ Requirements as to the form of contracts.
- ▶ Gaming and wagering contracts.
- ▶ Assignment (including negotiability).
- ▶ Agency.

1.6 Format of the examination paper

Important: the information and advice given here are based on the examination structure used at the time this guide was written. Because of this we strongly advise you to always check both the current Regulations for relevant information about the examination, and the VLE where you should be advised of any forthcoming changes. You should also carefully check the rubric/instructions on the paper you actually sit and follow those instructions.

Past examination papers can be a useful pointer to the type of questions which future papers will probably include, but you should take care not to read too much into the style and format of past papers. Remember that, in this as in other subjects, the examiners may change the format from year to year – for example, by requiring a different number of questions to be answered, by splitting a paper into Part A and Part B (with some questions to be answered from each part) or by making some questions compulsory. You must always read and comply with the instructions for the particular paper you are taking. The annual Programme handbook will normally give advance warning of major changes in the format of question papers, but the examiners will have no sympathy with a candidate who does not read the instructions properly.

1.6.1 Difficult facts

Many of the older cases that you will study conveniently arise from a simple set of facts. One of the most celebrated cases you will encounter involves the sale of a ‘quack’ medicine, consumption of which was ‘guaranteed’ to avoid the catching of influenza (the flu) (*Carlill v Carbolic Smokeball Co* [1893] 1 QB 256). Students rapidly develop an understandable preference for such cases where the factual background is easy to understand and the application of law to those straightforward facts simple to follow and relate. Litigation is, however, very expensive and cases rarely reach appellate courts unless the sums at stake are very large and such large commercial disputes rarely arise from simple sets of facts. An important skill to practice and develop is how to summarise such complex sets of facts. Commercial disputes often involve multiple parties and you may find, as most law teachers do, that it is easier to understand such facts if you draw a diagram. This should help you to focus upon what the case is really about and the relevant legal doctrine.

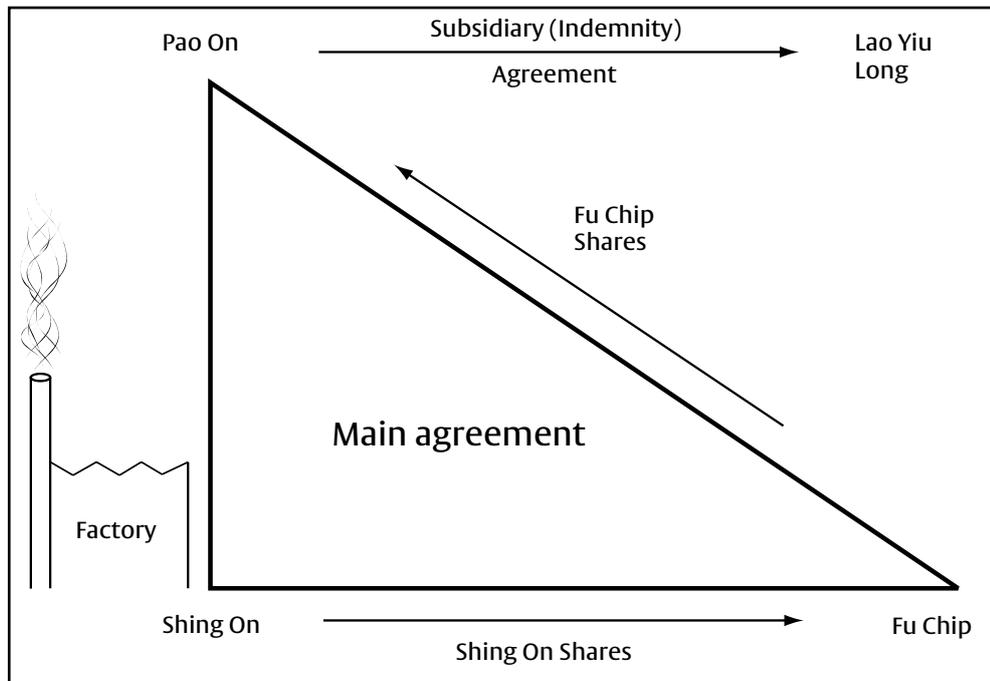


Figure 1.2

Pao On v Lau Yiu Long [1980] AC 614 presents as challenging a set of facts as you will meet. Yet the case is really about a simple issue: the purchase of a factory by an individual called Lao Yiu Long. However, this transaction was effected in a complicated way. The factory was the principal asset of a private company called Shing On which was owned by Pao On. A contract (the main contract) was entered to exchange all the shares in Shing On (and so transfer the factory) in exchange for a large number of shares in Fu Chip, a public company in which Lao Yiu Long was a major shareholder. The legal issue in the case was whether a subsidiary agreement (called an indemnity) was enforceable under which Lao Yiu Long agreed to make good any losses that were caused by a fall in the value of Fu Chip shares before Pao On was entitled to sell them. The last three sentences are a summary of the facts of a case which are stated over many pages of the law report. It is a summary that most law teachers can only assimilate with the use of a simple diagram such as that above. You should not produce such a diagram in an examination answer but it is a valuable aid to study.

1.6.2 'Spotting' questions

As we mentioned at the beginning of this Introduction, there is no guarantee that there will be a question on any particular topic in any given examination paper. It is a mistake, therefore, to assume that topic A is so important that the examiners are bound to set a question on it. You should bear this in mind when deciding how many topics you need to have thoroughly revised as you go into the examination. It is also worth noting that questions may easily involve more than one topic.

1.6.3 Examination technique in general

Make the most of your knowledge by observing a few simple rules:

1. Write legibly, using a good dark pen. If necessary, write more slowly than normal to improve legibility. If the examiners cannot read what you have written there is nothing for them to mark. You may as well have left the answer book empty.
2. Read the question carefully and at least twice. Look for hints as to the particular issues the examiners hope you will discuss. Think about what the examiners are asking you to do: what is the question about? Treat it like a passage in a foreign language. When 'translating', the sense of the text you are reading becomes much clearer on the second reading. This also helps to avoid misreading. Read the rubric or instruction many times. Sometimes it is broad (e.g. Discuss or Advise X), but sometimes it is directed. Never start writing before you have finished reading,

even if the person at the next desk has already completed one page of writing. It is not the quantity you write but how well you analyse the question and identify the relevant issues that will determine the quality of your answers.

3. Complete the required number of questions, including all parts of questions with two or more parts.
4. Poor timing is the main cause of students not achieving their full potential. Plan your time so that you spend about the same amount of time on each question. One of the worst mistakes you can make is to overrun on the first two answers: you are not likely to improve much on the quality of those answers and you will only increase the pressure and tension while you are trying to finish the other questions with inadequate time remaining.
5. Make sure that you answer the question which the examiners have asked. It is often very inconsiderate of examiners not to ask the question you wanted them to ask. However, never be tempted to answer the question you would have preferred them to ask. The criterion of relevance is applied mercilessly: only relevant material gains credit. There are no consolation marks. Think carefully about what the question asks of you and provide an answer to that question – not to a related (or even worse, unrelated) topic.
6. It is very important to plan out your answer in a rough form (on separate pages) before you begin to write your answer. An essential technique is to write out a 'shopping list' of the points – and the cases – which you intend to cover. If there is a significant chronology in the question, make a list of the sequence of events with their dates/times. You should develop a logical order of presenting your points: many points will have to precede others.
7. Begin your answer with a very short but focused introduction. Show confidence here as first impressions are important.

'This question concerns whether certain promises are enforceable'

is bad, whereas,

'This question concerns the modification, as opposed to the creation or termination, of contractual obligations. More particularly it considers the enforceability of contractual modifications which have the effect of either enlarging ('increasing' modifications) or decreasing ('reducing' modifications) the obligations assumed by one party under the original contract. The doctrines of consideration and economic duress will be discussed in relation to increasing modifications and the doctrine of promissory estoppel in relation to reducing ones.'

is good.

8. Remember above all that the examiners are particularly interested in how well you know the case law: always try to argue from named cases. Give an accurate and concise account of the *ratio decidendi* and, if relevant, *obiter dicta* of the cases you mention.
9. A good answer has balance. On the one hand it avoids the needless duplication of authorities to support settled propositions of law but also investigates in detail areas of open texture where the law is uncertain. In order to achieve this balance you might find it helpful to distinguish points from issues. A problem raises a point if it is directly covered by a case or statute which may be complicated but over which there is little or no doubt. A problem raises an issue where either no case or statute directly covers the problem, or where conflicting or unclear cases or statutory provisions need to be considered. Issues justify more lengthy treatment than points.
10. Repetition of the facts of the problem gets no credit and irritates the examiners who think you believe they cannot read! Also do not waste time setting out the whole of the law on a topic when the question is only about part of it. Irrelevant material not only earns no marks but actually detracts from the quality of the answer as a whole.

11. Remember that arguments – the exploration of possibilities – are more important than conclusions, so you should not feel obliged to come down too firmly on one side nor should you be inhibited by the fact that you are not sure what the ‘correct’ answer is. It is in the nature of the English system of judicial precedent that there is nearly always room for argument about the scope of a previous ruling, even by the House of Lords or Supreme Court, so that it is quite possible, even likely, that more than one view is tenable. It is far better to put forward a reasoned submission which the examiners may perhaps disagree with than to try and dodge the issue by saying – as surprisingly many candidates do – ‘As the law is unclear (or, the authorities are conflicting) it will be for the court to decide’.

Remember, it is important to check the VLE for:

- ▶ up-to-date information on examination and assessment arrangements for this module
- ▶ where available, past examination papers and Examiners’ reports for the module which give advice on how each question might best be answered.

Enjoy your studies – and good luck.

Part I Requirements for the making of a contract

2 Agreement: offer and acceptance

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Introduction

The law of contract defines the circumstances when a promise or promises are enforceable. However, not all promises are enforced by courts. For a promise or promises to be initially enforceable as a contract certain elements must be present. There must be:

- ▶ agreement, constituted by a corresponding offer and acceptance, supported by
- ▶ consideration, being the mutual exchange of something which the law recognises as having a value and
- ▶ an intention to create legal relations.

These are cumulative requirements (i.e. each must be present for a contract to exist). However, the identification of a contract by reference to these elements is sometimes a somewhat artificial process. Sometimes, courts will find that some agreements simply look like contracts and they then reason backward – and find the elements necessary to form a contract.

The process of agreement begins with an offer. An offer may be addressed to a single person or to many people. For a contract to be formed, this offer must be unconditionally accepted. The law imposes various requirements as to the communication of the offer and the acceptance. Once there has been a valid communication of the acceptance, the law requires:

- ▶ consideration (covered in Chapter 3) and
- ▶ an intention to create legal relations (covered, alongside other sometimes applicable requirements, in Chapter 4).

If these elements are not present, a court will not find that a contract exists between the parties. In the absence of a contract, neither party will be bound to the tentative promises or agreements they have made. It is thus of critical importance to determine whether or not a contract has been formed.

An important distinction is that between a 'unilateral' and a 'bilateral' contract. A unilateral contract is an exchange of a promise for an act. A typical unilateral contract would be the offer of a reward for the return of lost property. It is a frequent, but not a necessary, feature of a unilateral contract that the offer, such as that of a reward, is made to a large group of people. As a unilateral contract, by definition, involves a promise by one party only it follows that it generates an obligation for one party only. The offer of a reward for the return of lost property does not oblige anyone to look for that property. The only obligation it creates is a contingent one upon the offeror to pay the stipulated reward to any person who chooses to perform the stipulated act (i.e. return the lost property). In several respects the rules of offer and acceptance discussed below are modified in the case of unilateral contracts (see especially Section 2.7.1 below).

LEARNING OUTCOMES

This chapter introduces the topic of contractual agreement to enable you to discuss and apply in problem analysis its key components (and supporting authority) including:

- ▶ **The definition of a contractual offer.**
- ▶ **The distinction between a unilateral and a bilateral offer.**
- ▶ **The difference between an offer and other communications.**
- ▶ **The moment of effective communication of an offer.**
- ▶ **What is (and is not) a valid acceptance.**
- ▶ **The requirement of communication of acceptance and its exceptions.**

2.1 The offer

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.1 'Offer and invitation to treat' to Section 3.7 'Acceptance'.
- Poole, Chapter 2 'Agreement' – Section 1 'Subjectivity versus objectivity' to Section 4 'Acceptance'.

2.1.1 What offer?

It is important to remember (see Section 1.4.3) that it is not the subjective intentions of the parties that determine the legal effect of their words or actions but the reasonable inference that they would support. This is the so called 'objective' theory of agreement associated with *Smith v Hughes* (1871) and more recently summarised in the Supreme Court by Lord Clarke (*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14 at [45]).

Whether there is a binding contract between the parties and, if so, upon what terms depends... not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they... had agreed upon all the terms which they regarded...as essential.

This approach was applied in *Centrovincial Estates v Merchant Investors Assurance Co* [1983] Com LR 158 where the claimants had bought commercial premises let to the defendants for a rent of £68,320 pa subject to review. When the claimants mistakenly proposed a new rent of £65k pa instead of the £126k pa they intended to propose, the defendants predictably 'accepted' the mistaken offer. The claimants argued that no reasonable tenant would have expected the rent to be reduced; the defendants responded that this was a reasonable expectation in light of their communicated dissatisfaction with the previous letting. The Court of Appeal accepted the defendants' arguments that it was at least arguable that an offer to let premises for £65k pa meant exactly that. Subsequent cases have made explicit that in a so called B2B contract (i.e. between two businesses) the interpretation of an offer upon which the offeree is entitled to rely is that of a hypothetical and reasonable businessman in the position of the offeree (*Dhanani v Crasnianski* [2011] All ER (Comm) 799).

It should be noted, however, that there is one circumstance when the courts will depart from the usual objective approach and take account of the actual subjective knowledge of the offeree. Under this approach, sometimes known as the 'snapping up' doctrine, an offeree is not allowed to accept an offer which he knows is **mistaken as to its terms** (*Hartog v Collins and Shields* [1939] 3 All ER 566). This last factor is important and is what limits the scope of this disapplication of the usual objective approach. It is not enough to come within this exception that the offeree was aware that the offeror had made a mistake; the exception will only apply where the offeree is aware that the offeror is mistaken as to the terms he intended to offer (*Statoil ASA v Louis Dreyfus Energy Services LP (The 'Harriette N')* [2008] EWHC 2257 (Comm)). The doctrine will apply both where, as in *Hartog*, the offeree is aware of the offeror's mistake as to the terms he is offering but also where, as in *Scriven Bros v Hindley* [1913] 3 KB 564, the offeree **should** know that the offeror is mistaken as to the terms he has offered perhaps because, as in *Scriven*, the offeree induced that mistake by his own carelessness (in *Scriven*, contrary to accepted trade custom, marking two distinct commodities with the same shipping mark).

2.1.2 Offers and invitations to treat

An offer is an expression of willingness to contract on certain terms. It must be made with the **intention** that it will become **binding** upon acceptance. There must be no further negotiations or discussions required. The nature of an offer is illustrated and encapsulated by two cases involving the same defendant, Manchester City Council.

The Council decided to sell houses that it owned to sitting tenants. In two cases, the claimants entered into agreements with the Council. The Council then resolved **not** to sell housing unless it was contractually bound to do so. In these two cases the question arose as to whether or not the Council had entered into a contract.

In one case, *Storer v Manchester City Council* [1974] 3 All ER 824, the Court of Appeal found that there was a binding contract. The Council had sent Storer a communication that they intended would be binding upon his acceptance. All Storer had to do to bind himself to the later sale was to sign the document and return it.

In contrast, however, in *Gibson v Manchester City Council* [1979] 1 All ER 972, the Council sent Gibson a document which asked him to make a formal invitation to buy and stated that the Council 'may be prepared to sell' the house to him. Gibson signed the document and returned it. The House of Lords held that a contract had not been concluded because the Council had not made an offer capable of being accepted. Lord Diplock stated:

The words 'may be prepared to sell' are fatal ... so is the invitation, not, be it noted, to accept the offer, but 'to make formal application to buy' on the enclosed application form. It is ... a letter setting out the financial terms on which it may be the council would be prepared to consider a sale and purchase in due course.

A key distinction between the two cases is that in Storer's case there was an agreement as to price, but in Gibson's case there was not. In Gibson's case, important terms still needed to be determined.

It is very important to realise from the outset that not all communications will be offers. They will lack the requisite intention to be bound upon acceptance. If they are not offers, what are they? At this point, we will distinguish an offer from other steps in the negotiation process. Other steps in the negotiation process might include a statement of intention, a supply of information or an invitation to treat. We will examine these in turn.

A statement of intention

In this instance, one party states that he **intends** to do something. This differs from an offer in that he is not stating that he **will** do something. The case of *Harris v Nickerson* [1873] 37 JP 536 illustrates this point. The auctioneer's advertisement was a statement that he intended to sell certain items; it was not an offer that he **would** sell the items.

2.1.3 A supply of information

In this instance, one party provides information to another party. He supplies the information to enlighten the other party. The statement is not intended to be acted upon. See *Harvey v Facey* (1893) where one party telegraphed, in response to the query of the other, what the lowest price was that he would accept for his property, if he were to sell it. This alone did not imply an assurance that he **would** sell at this price.

2.1.4 An invitation to treat

This is a puzzling term. An invitation to treat is an indication of a willingness to do business. It is an invitation to make an offer or to commence negotiations. Courts have considered whether or not a communication was an offer or an invitation to treat in a wide variety of circumstances.

You should examine the following instances where courts have found that the communication was not an offer but an invitation to treat.

- a. A **display of goods** is generally an invitation to treat.

See *Pharmaceutical Society v Boots* [1953] 1 QB 401 (note the rationale behind treating the display as an invitation to treat rather than as an offer) and *Fisher v Bell* [1961] 1 QB 394. In contrast, where the display is made by a machine, the display will probably be an offer (*Thornton v Shoe Lane Parking* [1971] 2 QB 163).

ACTIVITY 2.1

Your local grocery shop places a leaflet through your letterbox. On the leaflet is printed 'Tomorrow only, oranges are at a special low, low price of 9p/kilo'.

Has the grocery shop made you an offer? If you visit the shop, must they sell you oranges at this price?

- b. An **advertisement** is an invitation to treat where a bilateral contract is anticipated.

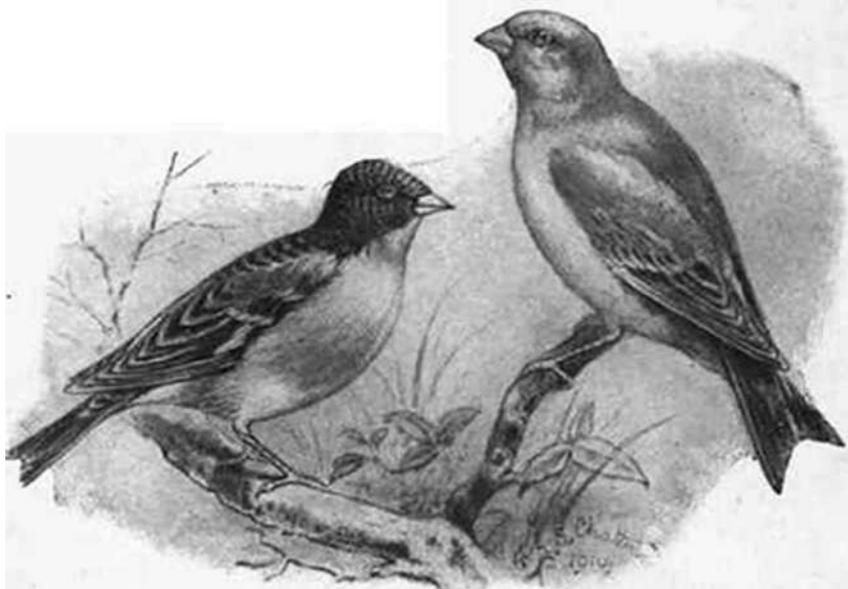


Figure 2.1 Partridge advertised 'Bramblefinch cocks, Bramblefinch hens, 25s ea'

See *Partridge v Crittenden* [1968] 2 All ER 421 – the advertisement of a bilateral contract. Where, as in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256, a unilateral contract is contemplated the advertisement may be an offer.

See the Introduction above for the distinction between unilateral and bilateral contracts.

By way of background you should be aware that the broader law of consumer protection prohibits misleading advertisements. In particular, the Unfair Trading Regulations 2008/1277, Part 2, prohibits misleading advertisements aimed at consumers. The European Court of Justice has said that it would be a breach of European consumer protection law if in a shop a consumer was refused a product under the advertised terms (*Trento Svilippo srl v Autorita Garante della Concorrenza e del Mercato* [2014] 1 All ER (Comm) 113).

ACTIVITY 2.2

How were the facts of *Carlill v Carbolic Smoke Ball Company* different from the usual situation involving an advertisement?

- c. A **request for tenders** is an invitation to treat and the tender is the offer. See *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1985] Ch 103.

Note, however, that the invitation to treat may contain an implied undertaking to consider all conforming tenders, as in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25.

- d. An **auctioneer's request for bids** is an invitation to treat.

The bid is an offer; when the auctioneer brings his hammer down he has accepted the offer. In the case of auctions without a reserve price, the auctioneer enters into a collateral (or separate) contract. The nature of the collateral contract is that the auctioneer will accept the highest bid. See *Warlow v Harrison* [1859] 1 E&E 309 and *Barry v Davies* [2000] 1 WLR 1962.

Figure 2.2 The advertisement for Carboloc Smoke Balls

ACTIVITY 2.3

A store mistakenly advertised Sony televisions for sale on its website for £2.99 each rather than the £299 they intended. Has the store entered a contract to supply the televisions at the mistaken price with customers who purported to 'buy' the TVs online?

SELF-ASSESSMENT QUESTIONS

1. How does an invitation to treat differ from an offer?
2. Does a railway or airline timetable constitute an offer?
3. Do courts treat the display of goods in a shop window differently from a display in an automated machine and if so, how?

Summary

A contract begins with an offer. The offer is an expression of willingness to contract on certain terms. It allows the other party to accept the offer and provides the basis of the agreement. An offer exists whenever the objective inference from the offeror's words or conduct is that she intends to commit herself legally to the terms she proposes. This commitment occurs without the necessity for further negotiations. The first step in finding a contract is to establish that there is an offer and who is making it. Many communications will lack this necessary intention and thus will not be offers. They may be statements of intention, supplies of information or invitations to treat. Although the distinction between an offer and other steps in the negotiating process is easy to state in theory, in practice, difficult cases arise.

FURTHER READING

- Winfield, P.H. 'Some aspects of offer and acceptance' (1939) 55 LQR 499.

2.2 Communication of the offer

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.9 'Acceptance in ignorance of the offer'.
- Poole, Chapter 2 'Agreement' – Section 4C 'Acceptance must be made in response to the offer'.

To be effective an offer must be communicated: there can be no acceptance of the offer without knowledge of the offer. The reason for this requirement is that if we say that a contract is an agreed bargain, there can be no agreement without knowledge. There can be no 'meeting of the minds' if one mind is unaware of the other. Stated another way, an acceptance cannot 'mirror' an offer if the acceptance is made in ignorance of the offer.

The authorities are, however, divided on the need to communicate the offer. In *Gibbons v Proctor* (1891) it seems as if a policeman was allowed to recover a reward when he sent information in ignorance of the offer of reward. The better view is thought to be expressed in the Australian case of *R v Clarke* [1927] 40 CLR 227:

there cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing.

The case of *Tinn v Hoffman* [1873] 29 LT 271 deals with the problem of cross-offers.

ACTIVITY 2.4

How might the decision have been different in *R v Clarke* if Clarke had been a poor but honest widow?

2.3 Acceptance of the offer

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.7 'Acceptance'.
- Poole, Chapter 2 'Agreement' – Section 4 'Acceptance'.

For a contract to be formed, there must be an acceptance of the offer. The acceptance must be an agreement to each of the terms of the offer. A communication which falls short of this e.g. by merely expressing gratitude for 'instructions' will not constitute acceptance (*Arcadis Consulting v AMEC* (BSC) [2016] EWHC 2509 (TCC)). It is sometimes said that the acceptance must be a 'mirror image' of the offer.

See also *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443 where it was held that a draft agreement was accepted by subsequent conduct that sufficiently indicated assent to its terms even though the draft expressly stated that it was only binding when signed.

Contractual acceptance, like a contractual offer, is established objectively. So acceptance occurs when the offeree's words or conduct give rise to the objective inference that the offeree assents to the offeror's terms. The acceptance can be by words or by conduct. See *Brogden v Metropolitan Railway Company* (1877), where the offeree accepted the offer by performance and *Claxton Engineering Services Ltd v TXM Olaj-ES Gazkutato KFT* (2010) where the choice of a Hungarian company to continue trading with its English counterpart after the latter had rejected a proposal for the arbitration in Hungary of any disputes was held to be an acceptance of the English company's counter offer that the resolution of disputes should be subject to English jurisdiction only.

If the offeree attempts to add new terms when accepting, this is a counter-offer and not an acceptance. A counter-offer implies a rejection of the original offer, which is

thereby destroyed and cannot subsequently be accepted. See *Hyde v Wrench* (1840) 49 ER 132.

Where the offeree queries the offer and seeks more information, this is neither an acceptance nor a rejection. It is merely an enquiry as to whether the offeror would be prepared to vary the offer and the original offer stands. See *Stevenson, Jacques & Co v McLean* [1880] 5 QBD 346.

The majority of the Court of Appeal in *Butler Machine Tool v Ex-Cell-o* [1979] 1 All ER 965 held that the 'last shot' wins this 'battle of the forms'. The minority judgment of Lord Denning MR in *Butler* criticised the 'all or nothing' approach of the old 'mirror image rule' whereby a contract was concluded on either the buyer or the seller's terms. He preferred to look at the communications as a whole and hold there to be a contract when there is substantial agreement on all material points. If the remaining differences are irreconcilable Lord Denning thought they should be replaced by 'reasonable implication'. Lord Denning's radical approach has not been followed elsewhere and in *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209 the Court of Appeal reasserted the traditional approach emphasising the importance of certainty in commercial transactions. If it is found that there is no contract between the parties it does not follow that they will not have to pay for any benefits received. A different branch of the civil law of obligation, known as the law of restitution, may impose on the recipient of a benefit an obligation to pay something to the party who conferred that benefit irrespective of whether a contract comes into existence to bind the two parties (*BSC v Cleveland Steel* [1984] 1 All ER 504).

Note, also, that in some cases courts have held that particular relationships are not capable of contractual analysis. In *The Eurymedon* [1975] AC 154 Lord Wilberforce noted that English law 'having committed itself to a rather technical and schematic doctrine of contract' nevertheless 'takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance...' On rare occasions the traditional analysis is abandoned altogether. In *President of the Methodist Conference v Preston* [2013] UKSC 29 the Supreme Court held that the manner in which a Methodist minister was engaged was incapable of being analysed in terms of contractual formation.

ACTIVITY 2.5

A wrote to B offering 300 bags of cement at £10 per bag. B wrote in reply that she was very interested but needed to know whether it was Premium Quality cement.

The following morning, soon after A read B's letter, B heard a rumour that the price of cement was about to rise. She immediately sent a fax to A stating, 'Accept your price of £10 for Premium Quality'. Assuming that the cement actually is Premium Quality, is there a contract? If so, does the price include delivery? Explain your reasoning.

ACTIVITY 2.6

What is the position under the 'last shot rule' if, after the exchange of forms, the seller fails to deliver the goods?

2.4 Communication of the acceptance

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.8 'Communication of the acceptance', and Section 3.10 'Prescribed method of acceptance' to Section 3.14 'Termination of the offer'.
- Poole, Chapter 2 'Agreement' – Section 4D 'Communication of the acceptance to the offeror'.

The general rule is that acceptance is not effective until it is communicated to the offeror. This is sometimes expressed by saying that the acceptance cannot be made

through silence and *Felthouse v Bindley* is often cited to support this proposition. Such a statement is, however, too broad and the true rule of law is discoverable by reflection upon what is 'wrong' with saying that silence cannot amount to acceptance. Most people would agree that is inconsistent with the view of a contract as a voluntarily assumed obligation to allow one party to 'force' a contract upon a party that that party does not want at the time of contracting. If a lecturer and author was able to say to his contract class that he will assume that all his audience want to buy a copy of his book unless they say not in the next five seconds it is perhaps obvious that she should not be able to rely upon those five seconds silence as evidence of acceptance of an offer to sell a copy of her book. The so called rule (i.e. that silence cannot constitute acceptance) should extend only as far as the policy that justifies it (i.e. that the law should not allow an offeror to force a contract on an unwilling offeree). So qualified the proper rule becomes: silence will not constitute acceptance when to so hold would involve forcing a contract on an unwilling party. It then follows that silence can constitute acceptance when this does not involve forcing a contract upon an unwilling party. In *Rust v Abbey Life* [1979] 2 Lloyd's Rep 334 the Court of Appeal, by way of *obiter dicta*, approved this more limited statement of the 'silence as acceptance' rule.

Where the law of contract insists on communication either as here in relation to acceptance or in relation to the revocation of a contractual offer (Section 2.7.1 below) a question can arise as to the timing of communication when it is received by a machine (e.g. a fax or email), maybe outside of usual office hours. By analogy with a case, in *Tenax Steamship Co v Owners of the Motor Vessel Brimnes (The Brimnes)* [1975] QB 929, concerning the notice of the withdrawal of a ship under a ship charter, it is suggested that communication to any 'unmanned receptor' is effective from the time at which it is reasonable to expect that machine to be checked. Therefore, if it is not reasonable to expect a computer to be checked out of usual business hours a communication sent at this time may only be regarded as communicated after the next opening of the office concerned.

ACTIVITY 2.7

You offer to buy a kilo of oranges from your local shop for 9p. Nothing further is said, nor do you receive any written correspondence. The next day, however, a kilo of oranges arrives at your house from the local shop. Is there a valid acceptance of the contract? Has there been a communication of the acceptance?

See *Brogden v Metropolitan Railway Company* [1877] 2 App Cas 666.

SELF-ASSESSMENT QUESTIONS

1. What was the detriment to the offeree in *Felthouse v Bindley*?
2. Could an offeror use this case to avoid liability?

2.5 Exceptions to the need for communication of the acceptance

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.12 'Exceptions to the rule requiring communication of acceptance'.
- Poole, Chapter 2 'Agreement' – Section 4D 'Communication of the acceptance to the offeror'.

As we saw above, the general rule is that for an acceptance to be valid it must be communicated to the offeror. It must be brought to the offeror's attention. To this general rule there are certain exceptions – situations where the law does not require communication of the acceptance.

2.5.1 Where the offeror has waived the requirement of communication

As we have seen above, in certain circumstances the offeror may waive the necessity for communication. This is what occurred in *Carlill v Carbolic Smoke Ball Co* which was a case involving a unilateral offer.

2.5.2 Unilateral offers

A unilateral contract is one where one party makes an offer to pay another if that other party performs some act or refrains from some act. The other party need make no promise to do the act or refrain from the act. In these cases, acceptance of the offer occurs through performance and there is no need to communicate acceptance in advance of performance. An example of the offer of a unilateral contract is an offer of a reward for the return of a lost cat.

In the case of *Carlill v Carbolic Smoke Ball Company* (1893) it was established that full performance is the acceptance of the offer and there is no need to communicate the attempt to perform. Communication of the acceptance is waived because it would be unreasonable of the offeror to rely on the absence of a communication which would have been superfluous or which no reasonable person would expect to be made.

The other principal exception is the postal acceptance rule.

2.5.3 The postal acceptance rule

Communication by post gives rise to special practical difficulties. An offer is posted. The offeree receives the offer and posts her acceptance. The letter of acceptance will take several days to arrive. At what point is the acceptance good? If one waits until the offeror receives the letter, how will the offeree know when this is? The offeree has known from the time she posted the letter that she has accepted the offer. There is also the occasional problem of the letter that never arrives at its destination.

To overcome these problems, the courts devised an exception to the general requirement of communication (which would have been that the acceptance is only good when the letter arrives). The exception was devised in the cases of *Adams v Lindsell* [1818] 106 ER 250 and *Household Fire and Carriage Accident Insurance Co Ltd v Grant* [1879] 4 Ex D 216.

These decisions establish the 'postal acceptance rule', that is, that acceptance is complete when posted. This puts the risk of delay and loss on the offeror. It is important to understand that the rule is an **exception** to the general rule requiring communication.

The postal acceptance rule will only prevail in certain circumstances. It will prevail where use of the post was reasonably contemplated by the parties or stipulated by the offeror. See *Household Fire Insurance v Grant* (1879).

It may be that the post is the only reasonable form of communication available. See *Henthorn v Fraser* [1892] 2 Ch 27.

The postal acceptance rule will not allow a contract to be concluded by posting the acceptance where the letter is incorrectly addressed by the offeree. The offer may accept the risk of delay occasioned by the post but not the carelessness of the offeree: *LJ Korbetis v Transgrain Shipping BV* [2005] EWHC 1345.

The operation of the postal acceptance rules creates practical difficulties. The greatest problem is that contracts can be formed without the offeror being aware of the contract. For example, an offeror makes an offer. Unbeknown to him, the offeree accepts. The offeror then revokes the offer before receiving the postal acceptance. The offeror contracts with another party over the same matter – and then receives the postal acceptance from the original offeree. The offeror is now in breach of his contract with the original offeree.

Partly because of these problems and partly because of technological advances (the post is no longer a such crucial method of communication), courts seem to

be confining the scope of the postal acceptance rule. This is a rationale behind the decision in *Holwell Securities v Hughes* [1974] 1 WLR 155. In this case, the postal acceptance rule did not apply because the offeror did not intend that it would apply. While this case is authority for the proposition that the terms of an offer must be met for acceptance to be valid, it also illustrates the reservations modern courts have over the postal acceptance rule.

In an early case involving a telegram, a form of the postal acceptance rule was applied (*Bruner v Moore* [1903] 1 Ch 305) but in later cases involving telexes, the courts refused to extend the application of the postal acceptance rules. See *Entores v Miles Far East Corp* [1955] 2 QB 327 and *Brinkibon Ltd v Stahag Stahl* [1982] 2 WLR 264. As modern forms of communication such as fax and email have become almost instantaneous, courts have shown a marked reluctance to extend the postal acceptance rule to these new forms of communication. In *JSC Zestafoni Nikoladze Ferroalloy Plant v Romly Holdings* [2004] EWHC 245 (Comm) an acceptance by fax was held to be an instantaneous communication. In *Thomas v BPE Solicitors* [2010] EWHC 306 Blair J said *obiter* that the postal rule should not apply to contracts concluded through the exchange of emails and this is supported by the Singapore decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594. Regulations governing internet trading (i.e. the purchase of goods or services from websites), principally the Electronic Commerce (EC Directive) Regulations (2002) do not identify at what stage acceptance is effected. However, Regulation 11(2) provides that in contracts with a consumer the order and acknowledgment of the order are deemed to be received when the addressee is able to access them. This reference to receipt in the Regulations would appear to indicate that the default rule that acceptance is effective upon receipt, rather than as with the postal rule on sending, should apply to all internet sales.

English contract law awaits a definitive case involving an almost instantaneous communication – such as a fax or an email. It is clear that a contract can be formed through such mediums (see, for example, *Allianz Insurance Co-Egypt v Aigaion Insurance Co SA* [2008] EWCA Civ 1455). Because of the technology involved in both these forms of communication they are not entirely instantaneous. An email, in particular, may take some time to arrive at its destination, depending upon the route it takes to its recipient. As Poole has suggested, there are two possible approaches to the email communication of the acceptance: postal analogy or receipt rule.

ACTIVITY 2.8

What rules do you think courts should adopt for communication by fax or email?

SELF-ASSESSMENT QUESTIONS

1. What reasons have been given by the courts for the postal acceptance rule?
2. A posts a letter offering to clean B's house. B posts a letter accepting A's offer. Later in the day, B's house burns down and B now no longer needs a house cleaner. B immediately posts a letter to A rejecting A's offer. Both of B's letters arrive at the same time. Is there a contract or not? See *Countess of Dunmore v Alexander* (1830).
3. In what circumstances will the postal acceptance rules not operate?
4. When, if ever, can an offeror waive the need for communication?

Summary

For a contract to be formed, the acceptance of an offer must be communicated. There are exceptions to this general rule. The most significant of these exceptions is the postal acceptance rule. The postal acceptance rule is, however, something of an anachronism in the modern world and is unlikely to be extended in future cases.

FURTHER READING

- Gardner, S. 'Trashing with Trollope: a deconstruction of the postal rules' (1992) 12

OJLS 170.

- Poole, J. *Textbook on contract law*. (Oxford: Oxford University Press, 2014) 12th edition [ISBN 9780199687220] Chapter 2, Section 2.4 'Acceptance'.
- Mik, E.K. 'The effectiveness of acceptances communicated by electronic means, or - does the postal rule apply to email?' (2009) 26 *JCL* 68.
- Nolan, D. 'Offer and acceptance in the electronic age' in Burrow and Peel (eds) *Contract formation and parties*. (Oxford: Oxford University Press, 2010) [ISBN 9780199583706].

2.6 Method of acceptance

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.10 'Prescribed method of acceptance'.
- Poole, Chapter 2 'Agreement' – Section 4B 'Offeror prescribes the method of acceptance'.

Sometimes an offeror may stipulate that acceptance is to be made using a specific method. See *Manchester Diocesan Council for Education v Commercial and General Investments* [1970] 1 WLR 241.

In other cases the required method for communicating acceptance may also be inferred from the making of the offer. See *Quenerduaine v Cole* [1883] 32 WR 185.

The problem that arises is this: if the offeree uses another method of acceptance, does this acceptance create a contract? The answer is that if the other method used is no less advantageous to the offeror, the acceptance is good and a contract is formed. This is the result unless the offeror stipulates a certain method of acceptance **and** further stipulates that only this method of acceptance is good. See *Manchester Diocesan Council for Education v Commercial and General Investments* (1970).

SELF-ASSESSMENT QUESTIONS

1. Where a method of acceptance has been prescribed by the offeror:
 - a. May the offeree choose to use another (equally effective) method of communicating his acceptance?
 - b. What does equally effective mean?
 - c. Whose interest should prevail?
2. Can an offer made by fax be accepted by letter?

Summary

If an offeror intends that a certain method of acceptance is to be used, he must stipulate this method **and** that only an acceptance using this method is to be used. If he only stipulates a method, an offeree can use another method provided that the other method is no less advantageous than the method stipulated.

2.7 The end of an unaccepted offer

ESSENTIAL READING

- McKendrick, Chapter 3 'Offer and acceptance' – Section 3.14 'Termination of the offer'.

■ **Poole, Chapter 2 'Agreement' – Section 5 'Revocation of an offer'.**

Offers do not exist indefinitely, open for an indeterminate time awaiting acceptance. Indeed, some offers may never be accepted. What we will consider at the conclusion of this chapter is what happens to an offer before it has been accepted. There is no legal commitment until a contract has been concluded by the acceptance of an offer.

2.7.1 Change of mind

Because there is no legal commitment until a contract has been formed, either party may change their mind and withdraw from negotiations any time before there is acceptance (*Payne v Cave* [1789] 100 ER 502).

In situations where an offeror has stipulated that the offer will be open for a certain time period, he or she can nevertheless withdraw the offer within this time period. This will not be the case, however, where the offeror is obliged (by a separate binding collateral contract) to keep the offer open for a specified period of time: *Routledge v Grant* [1828] 172 ER 415. If a time has been set by which to accept then the offer will automatically lapse at the end of that period.

For the revocation of an offer to be effective, there must be actual communication of the revocation. See *Byrne v van Tienhoven* [1880] 5 CPD 344. It is not necessary for revocation to be communicated by the offeror. Communication to the offeree through a reliable source is sufficient. See *Dickinson v Dodds* [1876] 2 Ch D 463.

Unilateral contracts pose particular problems here. As the act stipulated as acceptance of a unilateral offer may take some time to complete, the situation may arise where the offeror tries to revoke the unilateral offer after the offeree has begun, but before he has completed, performance of the stipulated act. Intuitively it might seem unjust if revocation was allowed in these circumstances and in most cases it is not (see *Errington v Errington* [1952] 1 KB 290 and *Soulsbury v Soulsbury* [2007] EWCA Civ 969). However, the way in which such revocation is usually prevented means that revocation is not always impossible. In *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108 the House of Lords explained that the revocation of a unilateral offer after the offeree has begun performance of the act stipulated would not be possible in most cases because a term would be implied into the contract that the offeree would not seek to revoke his offer (or otherwise prevent the completion of performance) once that performance had begun (see also *Daulia v Four Millbank Nominees* [1978] Ch 231). Such a term will be implied where it is necessary to make the agreement commercially effective ('to give it business efficacy'). It follows that where it is not necessary to imply any such term, as *Luxor* – the offeror – is free to revoke the offer after performance has begun. In *Luxor* the House of Lords said that it would not be appropriate to imply such a term where a very large consideration was being offered for a small amount of work. The Court of Appeal in *Schweppe v Harper* [2008] EWCA Civ 442 emphasised that cases such as *Luxor* where the offeror is able to revoke after performance has begun will be rare.

ACTIVITY 2.9

Your neighbour offers to sell you her car for £10,000. She tells you to 'think about it and let me know by Monday'. On Saturday, she puts a note under your door to say 'forget it – I want to keep my car'. Can she do this? Explain.

By what process must the offeror of a unilateral contract revoke his offer? The problem of an appropriate process exists when the offer is made to the world. In this situation, what must the offeror do to alert 'the world'? English law provides no answer to this question, but it is thought that the principle of *Shuey v USA* [1875] 92 US 73 would also apply in the UK (i.e. that revocation may be effected by giving the same prominence to the revocation as was given to the original offer). If this is done then revocation, contrary to the usual rule, may be effective even if it does not actually come to the attention of the offeree.

If the offeree rejects an offer, it is at an end. A counter offer (i.e. an offer substantially at variance with an earlier offer) is simultaneously a rejection of the original offer and

also a new offer (see Section 2.3 above).

ACTIVITY 2.10

Analyse all the communications in *Hyde v Wrench* (1840) and state whether they are: an invitation to treat, a contractual offer, a counter offer, a rejection or an acceptance.

Different problems arise when it is the offeree who changes his or her mind. For example, if after posting a letter of acceptance, the offeree informs the offeror by telephone, before the letter arrives, that they reject the offer, should the act of posting an acceptance prevail over the information actually conveyed to the offeror? In the absence of English cases the books refer to a number of cases from other jurisdictions – see *Dunmore v Alexander* [1830] 9 S 190 (Scotland) and *Wenkheim v Arndt* [1873] 1 JR 73 (New Zealand) – but when citing them, it is important to emphasise that they are not binding, and indeed have very little persuasive authority. The question must therefore be answered primarily as a matter of principle. Treitel suggests that ‘the issue is whether the offeror would be unjustly prejudiced by allowing the offeree to rely on the subsequent revocation’.

2.7.2 If a condition in the offer is not fulfilled, the offer terminates

Where the offer is made subject to a condition which is not fulfilled, the offer terminates. The condition may be implied. See *Financings Ltd v Stimson* (1962). In this case, the offeror purported to accept an offer to purchase a car after the car had been badly damaged.

2.7.3 Death: if the offeror dies, the offer may lapse

This is a point on which the cases divide. On the one hand, *Bradbury v Morgan* (1862) 158 ER 877 (Ex) held that the deceased offeror’s estate was liable on the offer of a guarantee after the death of the offeror. However, *obiter dicta* in *Dickinson v Dodds* (1876) state that death of either party terminated the offer because there could be no agreement. The best view is probably that a party cannot accept an offer once notified of the death of the offeror but that in certain circumstances the offer could be accepted in ignorance of death. The death of an offeree probably terminates the offer in that the offeree’s personal representatives could not purport to accept the offer.

2.7.4 Lapse of an offer

The offeror may set a time limit for acceptance; once this time has passed the offer lapses. In many cases, the offeror can revoke the offer before the time period lapses provided that the offer has not been accepted. See *Offord v Davies* (1862).

In cases in which no time period is stipulated for the offer, an offeree cannot make an offeror wait forever. The offeror is entitled to assume that acceptance will be made within a reasonable time period or not at all. What a reasonable time period is will depend upon the circumstances of the case. See *Ramsgate Victoria Hotel v Montefiore* [1866] LR 1 Ex 109.

SELF-ASSESSMENT QUESTIONS

1. Why can the offeror break his or her promise to keep the offer open for a stated time?
2. In a unilateral contract which is accepted by performance, when has the offeree started to perform the act (so as to prevent revocation by the offeror)? Does the offeror need to know of the performance?
3. How can the offeror inform all potential claimants that the offer of a reward has

been cancelled?

4. Will there be a contract if the offeree posts a letter rejecting the offer but then informs the offeror by telephone, before the letter arrives, that he accepts the offer?
5. What is the purpose of implying that the offer is subject to a condition?

Summary

Until an offer is accepted, there is no legal commitment upon either party. Up until acceptance, either party may change their mind subject to the next sentence. An offeror may not revoke a unilateral offer after performance has begun whenever the offeror has undertaken, perhaps impliedly, not to do so. An offeree may reject an offer prior to acceptance and may do so by making a counter offer.

- ▶ An unaccepted offer expires either:
 - ▶ at the end of any time period stipulated, or
 - ▶ within a reasonable time period where no time period is stipulated.
- ▶ An offer will lapse where it is made on an unfulfilled condition.
- ▶ An offer **may** lapse when the offeror dies.

FURTHER READING

- Halson, Chapter 3 'Agreement: offer and acceptance'.

EXAMINATION ADVICE

The detailed rules of offer and acceptance provide a ready source of problems and difficulties on which examiners can draw. Here are some examples.

- ▶ Is a particular statement an offer or an invitation to treat?
- ▶ Is there a counter-offer or is it merely an enquiry?
- ▶ When does a posted acceptance fall outside the postal rule?
- ▶ Was the offeror or offeree free to have second thoughts?
- ▶ When is a telephone call recorded on an answering machine actually received?
- ▶ When is an email received?

There are also several everyday transactions where the precise contractual analysis is not immediately apparent – the motorist filling up with petrol (gas), the passenger riding on a bus, the tourist buying a ticket for the Underground (subway) from a machine and so on. The fact that some of these problems are not covered by authority does not make them any less attractive to examiners – indeed, the opposite might well be the case. The key to most problems of offer and acceptance is the idea that the law should give effect to actual communication wherever possible.

SAMPLE EXAMINATION QUESTIONS

Question 1

Alice wrote to Bill offering to sell him a block of shares in Utopia Ltd. In her letter, which arrived on Tuesday, Alice asked Bill to 'let me know by next Saturday'. On Thursday Bill posted a reply accepting the offer. At 6pm on Friday he changed his mind and telephoned Alice. Alice was not there but her telephone answering machine recorded Bill's message stating that he wished to withdraw his acceptance.

On Monday Alice opened Bill's letter, which arrived that morning, and then played back the message on the machine.

Advise Alice.

Question 2

Cyril, a stamp dealer, had a rare Peruvian 5 cent blue for sale. He wrote to Davina, a collector who specialises in Peruvian stamps, asking whether she would be interested in purchasing it. Davina wrote in reply, 'I am willing to pay £500 for the "blue"; I will consider it mine at that price unless I hear to the contrary from you and will collect it from your shop on Friday next week.'

Advise Davina as to the legal position:

- a. if Cyril disregarded Davina's letter and sold the stamp to Eric for £600
- b. if Cyril put the stamp on one side in an envelope marked 'Sold to Davina' but Davina decided that she no longer wished to buy it.

Question 3

- a. On 1 January A writes to B saying, 'I am considering selling my horse, Philocretes, and I wonder whether you would like to buy him. I would expect to receive about £500 for him'. On 2 January B writes back, 'I accept your offer and will send you the money in a few days'. On 3 January A writes to B: 'Don't be ridiculous, I wasn't offering the horse for sale, and anyway I want £750 for him. To avoid misunderstanding, do not write back unless you do not want the horse at this price'. B was so annoyed on reading the first sentence that he tore up the letter without reading further and did not reply. Three weeks later A came round and demanded £750, offering to deliver the horse.

Advise B.

- b. Would your answer be any different if upon reading A's second letter B decided to purchase the horse for £750 and A now refuses to deliver it?

ADVICE ON ANSWERING THE QUESTIONS

It is important to break the question down into its constituent issues. You are considering each of these issues with a view to determining whether or not a contract has been formed. Bill will argue that he is not obliged to purchase the shares because no contract has been formed.

Communications must be considered chronologically because the proper legal analysis of a later communication will often depend upon that of a prior one. A communication from A to B cannot be an acceptance unless there has been a prior communication from B to A that constitutes an offer; a communication from A to B cannot be a counter offer unless B has previously made an offer to A. Sometimes it may not be possible to come to a firm conclusion as to the proper analysis of a communication, in which case two alternatives may need to be considered, of the type: if A's letter to B is an offer then B's reply may be an acceptance, but if A's letter to B is only an invitation to treat (negotiate) then B's reply may be a contractual offer, etc.

Question 1

The issues in this problem are:

- a. What is the effect of Alice writing to Bill to offer to sell him shares?
- b. What is the effect of Alice's stipulation as to the time the offer is open?
- c. What is the effect of Bill's posting a reply?
- d. What is the effect of Bill's change of mind? Is there effective communication when a message is left on an answering machine?
- e. Which of Bill's two communications is determinative?

When the issues are listed in this form it is apparent that the biggest issue is whether or not a contract has been formed. This is dependent upon whether Alice's offer has been accepted. This, in turn, depends upon whether Bill has communicated his acceptance or his rejection.

We will examine these issues in turn.

- a. Alice's letter appears to be an offer within the criteria of *Gibson v Manchester City Council* and *Storer v Manchester City Council*. You should outline these criteria and apply them to the facts – sometimes the designation of an 'offer' in a problem question or in everyday life turns out not to be an offer in the legal sense.
- b. Alice's stipulation that the offer is open for one week is not binding (apply the criteria in *Offord v Davies*) unless there is a separate binding contract to hold the offer open. There does not appear to be such a separate binding agreement.
- c. Because Bill posts his letter of acceptance, we need to consider whether or not the postal acceptance rules apply. Consider the criteria in *Household Fire Insurance v Grant*. Does the case apply here? In the circumstances, it probably does. Alice has initiated communications by post and thus probably contemplates that Bill will respond by post. In these circumstances, the acceptance is good when Bill posts the letter – it is at this point that a contract is formed. It does not matter that the letter does not arrive until Monday (at which point the offer will have expired, given Alice's stipulation as to the time period).

A possible counter argument to this is that Alice asked Bill to let her know by Saturday – and this 'let me know' means that there must be actual knowledge of his acceptance – that it must really be communicated. This necessity for actual communication means that Bill's acceptance is not good until Monday when Alice actually opens the letter. To apply this counter argument, one needs to consider the criteria set out in *Holwell Securities v Hughes*. One might also note that since that decision, courts are reluctant to extend the ambit of the postal acceptance rule.

- d. Bill changes his mind. Here there is no authority as to the effect of his change of mind. In addition, given the two possible positions in point (c) above, two possible outcomes exist. If the postal acceptance rules apply, then a contract has been formed and Bill's later change of mind cannot upset this arrangement. However, this seems a somewhat absurd result since Alice learns almost simultaneously of the acceptance and the rejection. Bill has attempted to reject the offer by a quicker form of communication than the post. In these circumstances, you could apply the reasoning of *Dunmore v Alexander* and state that no contract has been formed between the parties. In addition, given the reservations of the court in *Holwell Securities v Hughes*, it seems improbable that a court would rely upon the postal acceptance rule, an unpopular exception to the necessity for communication, to produce an absurd result. The second possible outcome here is that the postal acceptance rules never applied and no contract could be formed until Alice opened the letter. Since she received the rejection at almost the same time, she is no worse off (see reasoning above) by not having a contract. You might also wish to consider the application of the rules for instantaneous communications in *Entores v Miles Far East Corp* and *Brinkibon v Stahag Stahl* [1983] 2 AC 34. Should the communication made by telephone be deemed to have been the first received? If so, there is no contract.
- e. This is really the answer to the question. For the reasons stated above, the rejection should be determinative. Accordingly, no contract arises in this situation and Bill is not **obliged** to buy the shares in Utopia Ltd.

Question 2

Note at the outset that in two-part questions such as this you must answer **both** parts (unless clearly instructed that candidates are to answer **either** a or b).

Again, your approach should be to break down the question into its constituent parts:

- ▶ The effect of Cyril's letter – is it an offer or an invitation to treat?
- ▶ The effect of Davina's letter – is it an acceptance? Does the postal acceptance rule apply? Is Davina's letter a statement of intention?
- ▶ Is Davina's letter an offer? Can she waive the necessity for the communication of the acceptance?

By considering these issues, you can determine whether a contract has been formed or not. With respect to part (a), if a contract has been formed, then Cyril is in breach of this contract when he sells the stamp to Eric. You need to consider whether Cyril has made an offer – has he exhibited a willingness to commit on certain terms within *Storer v Manchester City Council* (1974)? Or is his communication an invitation to treat or a step in the negotiation of a contract? If his letter is an offer, it seems reasonable that he expects an acceptance by post and the postal acceptance rules will apply: *Household Fire Insurance v Grant* (1879).

On balance, it seems unlikely that his letter is an offer – it is phrased in terms that seek to elicit information and not to be binding upon further correspondence from Davina. Davina may have made an offer and waived the necessity for further communication – see *Felthouse v Bindley* (1862). It is, however, possible that either Davina never made an offer to buy the stamp (she was merely giving an indication of her top price) or that Cyril never accepted the offer. In these circumstances, no contract has been formed with Davina and Cyril is free to sell the stamp.

With regard to part (b), if Davina has (and can, given the law in this area – see *Felthouse v Bindley* (1862) and *Rust v Abbey Life* (1979)) made an offer, then Cyril has (if possible) accepted the offer when he takes the step of setting aside the stamp. In these circumstances, a contract has been formed and Davina is obliged to buy the stamp. There are, however, significant weaknesses in reaching this conclusion – primarily that she seems to be indicating the top price she would pay for the stamp and that if a broad interpretation is taken of *Felthouse v Bindley* (1862) (but this would be contrary to the *obiter dicta* in *Rust v Abbey Life*) she cannot waive the necessity for communication of the acceptance.

Question 3

A-B Jan 1 Is this an offer or an invitation to treat? You should define each and consider *Gibson v Manchester City Council* and *Storer v Manchester City Council*. On the authority of *Gibson* words such as ‘considering’, ‘wonder’, ‘expect’ are likely to be considered too equivocal to support the existence of an offer so this communication will be an invitation to treat.

B-A Jan 2 This is phrased as acceptance but the law looks to the substance not the form of communications. For example, in *Hyde v Wrench* a purported acceptance was held to amount to an offer only and in *Pickford v Celestica* [2003] EWCA Civ 1741 a purported acceptance was held to be a counter offer. Here the purported acceptance must be an offer to buy.

A-B Jan 3 This is a counter offer as it is substantially different to the previous offer, see *Hyde v Wrench*; it cannot be a ‘mere enquiry’ as in *Stevenson v McLean*.

Was this offer accepted? B’s silence cannot constitute acceptance: *Felthouse v Bindley*. If B’s silence amounted to acceptance then this would involve forcing a contract on an unwilling party. This is the wrong which the rule that silence should not amount to acceptance aims to avoid.

What if? In this variation the offeree B wants to waive the protection usually offered by the *Felthouse v Bindley* rule, so here B’s silence could constitute acceptance on the authority of *Rust v Abbey Life*.

Quick quiz

QUESTION 1

Which of the following statements provides the most appropriate definition of an offer in a contract?

- Where one party (A) offers the other party (B) the opportunity to enter into negotiations for the purchase of property.
- Where one party (A) puts a proposition to another party (B) which is coupled by

an indication that they (A) are willing to be held to that proposition.

- c. Where one party (A) sees an advert in a newspaper by (B) offering for sale a wild live bird.
- d. Where one party (A) thinks the other party (B) will accept a lower price for property that he is preparing to sell.
- e. Don't know.

QUESTION 2

How did Parker LJ in the case of *Fisher v Bell* (1961) explain the status of an article as part of a display in a shop window?

- a. Contract law has never been clearer as to the fact that any display in a shop window must constitute an offer. To decide otherwise would place shoppers in peril as it would entice them into shops to purchase goods, only to discover the goods were on sale for a different, probably higher, price.
- b. In the case of an ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until, the customer having indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer.
- c. It is perfectly clear that according to the ordinary law of contract the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.
- d. The display of goods constitute an offer which could not be accepted before the goods reach the cashier. Until then the customer is free to return an article to the shelf even though they have put it in the basket.
- e. Don't know.

QUESTION 3

Which of the following statements explains how the law of contract treats auction sales?

- a. The advertising of the auction sale is the point at which the contract begins. If the claimant presents themselves for auction to discover there is no longer any property for auction they can claim damages from the auctioneer for loss of expectation.
- b. Once the auction begins the auctioneer is bound to sell to the highest bidder even if the reserve price is not met.
- c. Once the auction has begun the highest bidder has the right to enforce the contract even if they acquire property for £200 which is actually worth £14,000.
- d. Once the auctioneer's hammer has fallen then the highest bidder has the first opportunity to enter into negotiations with the auctioneer as to what price they should pay for the property up for sale.
- e. Don't know.

QUESTION 4

Which of the following statements was specifically made by Bowen LJ in *Carlill v Carbolic Smoke Ball Co* (1893) and attempts to defeat claims in that case that the advertisement was an invitation to treat rather than an offer?

- a. Any act of the plaintiff from which the defendant gains any benefit or advantage, or any work, detriment, or inconvenience suffered by the plaintiff, provided such act is performed or such inconvenience sustained by the plaintiff, with the consent, express or implied of the defendant.

- b. In the advertisement cases ... there never was any problem with thinking that the advertisement was a promise to pay the money to the person who first gave information. The difficulty suggested was that it was a contract with all the world. But that of course was soon overruled.
- c. It follows from the nature of the thing that the performance of the condition is sufficient to acceptance without the notification of it and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection.
- d. I am of the opinion that an offer does not bind the person who makes it until it has been accepted, and its acceptance has been communicated to him or his agent.
- e. Don't know.

QUESTION 5

Which of the following statements about unilateral contracts are true?

- a. A unilateral offer can never be revoked after it has been made.
- b. Revocation of a unilateral offer is only effective if the offeree receives actual notice of revocation.
- c. Revocation of a unilateral offer is effective when the offeree receives actual notice of revocation and also if he does not but the offeror attempts to communicate the revocation by the same means used to publicise the original offer.
- d. Revocation of a unilateral offer is effective when the offeree receives actual notice of revocation and also if he does not but the offeror attempts to communicate the revocation by the same, or more effective, means used to publicise the original offer.
- e. A unilateral offer can never be revoked once the offeree has begun performance of the stipulated act.
- f. A unilateral offer cannot be revoked once the offeree has begun performance of the stipulated act whenever a term or collateral promise to that effect can be implied.

QUESTION 6

Which of the following statements is made by Denning LJ in *Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327 to explain the requirement, or not, of communication of an acceptance to an offer made in a contract?

- a. He who shouts loudest, shouts longest and if someone shouts their acceptance and the Concorde aeroplane flies over and their acceptance is muffled by the breaking of the sound barrier then that acceptance has still been delivered.
- b. To err is human, to forgive divine and just because the other party has faithfully conveyed the acceptance to the offer, if that acceptance is not communicated effectively, a contract is not formed.
- c. It appears to me that both legal principles, and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.

- d. **Suppose, for instance, that I shout an offer to a man across a river or courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says.**
- e. **Don't know.**

Answers to these questions can be found on the VLE.

Am I ready to move on?

You are ready to move on to the next chapter if, without referring to the subject module or textbook, you can answer the following questions:

1. What is a contractual offer?
2. What is the difference between a unilateral and a bilateral offer?
3. What is the difference between an offer and other communications?
4. How do you know when an offer has been communicated?
5. What is (and is not) a valid acceptance?
6. What is the necessity of communicating the acceptance?
7. What are the exceptions to the necessity of communicating the acceptance?
8. What occurs when the offeror stipulates a certain method of acceptance?
9. What happens to an offer which is not accepted?
10. When does an offer expire?

NOTES

Part I Requirements for the making of a contract

3 Consideration

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Introduction

The concept of 'consideration' is the principal way in which English courts decide whether an agreement that has resulted from the exchange of offer and acceptance (as explained in Chapter 2) should be legally enforceable. It is only where there is an element of mutuality about the exchange, with something being given by each side, that a promise to perform will be enforced. A promise to make a gift will not generally be treated as legally binding. It is the presence of consideration which makes this promise binding as a contract. It is possible to see consideration as an important indication that the parties intended their agreement to be legally binding as a contract. Although there is a separate requirement of an intention to create legal relations (discussed in Chapter 4), it is clear that historically this requirement was also fulfilled by the requirement of consideration. While the doctrine of consideration is crucial to English contract law, it has been applied with some flexibility in recent years. At common law a promise is only enforceable if supported by consideration.

A —————> **B**

A promises to paint B's garden fence. The promise to do this is consideration moving from A to B. For this to form the basis of a binding agreement there must be a promise from B, perhaps to pay A for the work, for this to be a binding agreement. There is then consideration moving from B to A.

In some circumstances, English courts will find that a promise given without consideration is legally binding and this chapter concludes with an examination of these instances. These instances are decided upon on the basis of the doctrine of 'promissory estoppel' and in this area the courts are concerned to protect the reasonable reliance of the party who has relied upon the promise. These instances arise where there is a variation of existing legal obligations.

LEARNING OBJECTIVES

This chapter introduces the doctrine and requirement of consideration to enable you to discuss and apply in problem analysis its key components (and supporting authority) including:

- ▶ **The basic definition of consideration.**
- ▶ **The significance of consideration to the English law of contract.**
- ▶ **The acts which the courts have recognised as sufficient to constitute good consideration.**
- ▶ **Situations where the performance of, or promise to perform, an existing obligation amount to consideration for a fresh promise.**
- ▶ **The definition of 'past consideration' and its exceptions.**
- ▶ **The role of consideration in the modification of existing contracts.**
- ▶ **The essential elements of the doctrine of 'promissory estoppel'.**
- ▶ **How the doctrine of promissory estoppel lead to the enforcement of some promises which are not supported by consideration.**

3.1 Consideration

ESSENTIAL READING

- McKendrick, Chapter 5 'Consideration and form' – Section 5.1 'Requirements of form', Section 5.20 'Reliance upon non-bargain promises', Section 5.21 'The role of consideration' and Section 5.29 'Conclusion: the future of consideration'.
- Poole, Chapter 4 'Enforceability of promises: consideration and promissory estoppel' – Section 1A 'What is consideration?'.

Consideration has been called the 'badge of enforceability' in agreements. This is particularly important where the agreement involves a promise to act in a particular way in the future. In exchanges where there is an immediate, simultaneous transfer of, for example, goods for money (as in most everyday shop purchases), the doctrine of consideration applies in theory but rarely causes any practical problems. This immediate exchange is sometimes referred to as executed consideration. However, if somebody says, for example, 'I will deliver these goods next Thursday' or 'I will pay you £1,000 on 1 January' (executory consideration) it becomes important to decide whether that promise is 'supported by consideration' (that is, something has been given or promised in exchange). A promise to make a gift at some time in the future will only be enforceable in English law in absence of consideration if put into a special form, that is, a 'deed'. (For the requirements of a valid deed, see s.1 of the Law of Property (Miscellaneous Provisions) Act 1989.) Where a promise for the future is not contained in a deed, then consideration becomes the normal requirement of enforceability.

3.1.1 The definition of consideration

ESSENTIAL READING

- McKendrick, Chapter 5 'Consideration and form' – Section 5.2 'Consideration defined' to Section 5.6 'Consideration must be sufficient but it need not be adequate' and Section 5.19 'Consideration must move from the promisee'.
- Poole, Chapter 4 'Enforceability of promises: consideration and promissory estoppel' – Section 1A 'What is consideration?' and Section 1B 'Consideration distinguished from a condition imposed on recipients of gifts'.

Look at the traditional definition of consideration as set out in *Currie v Misa* (1875):

a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.

You will see that it is based around the concept of a 'benefit' to the person making the promise (the promisor), or a 'detriment' to the person to whom the promise is made (the promisee). Either is sufficient to make the promise enforceable, though in many cases both will be present.

This is generally quite straightforward where one side performs its part of the agreement. This performance can be looked at as detriment to the party performing and a benefit to the other party, thus providing the consideration for the other party's promise. More difficulty arises where the agreement is wholly 'executory' (that is, it is made by an exchange of promises, and neither party has yet performed). It is clear that English law treats the **making** of a promise (as distinct from its performance) as capable of being consideration – see the statement of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1915) p.855. Thus, in a wholly executory (i.e. unperformed) contract, the making of the promise by each side is consideration for the promise made by the other side (so rendering both promises enforceable). This leads to a circular argument. A promise cannot be a detriment to the person making it (or a benefit to the person to whom it is made) unless it is enforceable. But it will only be enforceable if it constitutes such a detriment (or benefit). For this reason it is perhaps better to regard the doctrine of consideration as simply requiring 'mutuality' in the agreement (that is, something being offered by each side to it, the exchange principle) rather than trying to analyse it strictly in terms of 'benefits' and 'detriments'.

Another principle of consideration is that to be able to enforce a promise it must be proven that the promisee has provided consideration for that promise (*Tweddle v Atkinson*). This principle is closely linked to the doctrine of privity, as *Tweddle v Atkinson* is held to prove that consideration must move from the promisee but not necessarily to the promisor and that only those party to the contract can enforce the obligations of the contract. This is explored more fully in Chapter 11 but it is important to see the connection between the two principles.

ACTIVITY 3.1

Suppose that A arranges for B to clean A's windows, and promises to pay B £30 for this work. B does the work. How does the analysis of 'benefit' and 'detriment' apply in identifying the consideration supplied by B for A's promise of payment?

ACTIVITY 3.2

As in 3.1, but this time A pays the £30 immediately, and B promises to clean the windows next Tuesday. What is the consideration for B's promise?

ACTIVITY 3.3

As in 3.1, but A and B arrange for the windows to be cleaned next Tuesday, with A paying £30 on completion of the work. Suppose B does not turn up on Tuesday. Is B in breach of contract?

3.1.2 Consideration must be 'sufficient' but need not be 'adequate'

ESSENTIAL READING

- McKendrick, Chapter 5 'Consideration and form' – Section 5.6 'Consideration must be sufficient but it need not be adequate' to Section 5.9 'Compromise and forbearance to sue'.
- Poole, Chapter 4 'Enforceability of promises: consideration and promissory estoppel' – Section 1C 'Consideration must be sufficient but need not be adequate'.

These words can seem interchangeable at first glance but they actually mean something very different in this context. The requirement that consideration must be 'sufficient' means that what is being put forward must be something which the courts will recognise, or have recognised as legally capable of constituting consideration. The fact that it need not be 'adequate' indicates that the courts are not generally interested in whether there is a match in **value** between what is being offered by each party, so no need for proportionality. Thus in *Thomas v Thomas* (1842) the promise to pay £1 per annum rent was clearly 'sufficient' to support the promise of a right to live in a house: the payment of, or promise to pay, money is always going to be treated as being within the category of valid consideration. On the other hand, the fact that £1 per annum was not a commercial rent was irrelevant, because the courts do not concern themselves with issues of 'adequacy'.

Consider the case of *Chappell v Nestlé* (1960). You will see that Lord Somervell justifies the courts' approach to the issue of 'adequacy' by reference to 'freedom of contract': 'A contracting party can stipulate for what consideration he chooses'. The courts will not interfere just because it appears that a person has made a bad bargain. The person may have other, undisclosed, reasons for accepting consideration that appears inadequate. In the case of *Chappell v Nestlé* the reasoning was presumably that the requirement to send in the worthless wrappers would encourage more people to buy the company's chocolate.

It is sometimes suggested that consideration will not be sufficient if it has no economic value. This explains *White v Bluett* (1853) where a son's promise to stop complaining to his father about the distribution of the father's property was held to be incapable of amounting to consideration. But it is difficult to see that the wrappers in *Chappell v Nestlé* had any economic value either.

ACTIVITY 3.4

Read the case of *Ward v Byham* (1956). Identify the consideration supplied by the mother. Does the consideration meet the requirement of having economic value?

ACTIVITY 3.5

Read the case of *Edmonds v Lawson* (2000). What consideration was supplied by the pupil barrister? Does the consideration meet the requirement of having economic value?

3.1.3 Existing obligations as good consideration**ESSENTIAL READING**

- McKendrick, Chapter 5 'Consideration and form' – Section 5.10 'Performance of a duty imposed by law' to Section 5.18 'Past consideration'.
- Poole, Chapter 4 'Enforceability of promises: consideration and promissory estoppel' – Section 1C 'Consideration must be sufficient but need not be adequate' and Section 1D 'Part payment of a debt'.
- Chen-Wishart, M. 'Consideration: practical benefit and the Emperor's new clothes', in your study pack or Chen-Wishart, M. 'A bird in the hand: consideration and contract modifications', in your study pack.
- Luther, P. 'Campbell, Espinasse and the sailors: text and context in the common law' (1999) 19 *Legal Studies* 526.

There are three aspects to this topic, dealing with three different types of existing obligation which may be argued to constitute 'consideration'.

1. Obligations which arise under the law, independently of any contract.
2. Obligations which are owed under a contract with a third party.
3. Obligations to perform an existing obligation under a contract to the same contracting party.

The third situation is, essentially, concerned with the variation of existing contractual obligations as between the parties and the extent to which such variations can become binding.

These three situations will be considered in turn.

1. Obligations which arise under the law

An example of the first type of existing obligation would be where a public official (such as a firefighter or a police officer) agrees to carry out one or more of their duties in return for a promise of payment from a member of the public. In that situation the promise of payment will not generally be enforceable. This is either because there is no consideration for the promise (the public official is only carrying out an existing duty) or, more probably, because public policy generally suggests that the law should not encourage the opportunities for extortion that enforcing such a promise would create.

Where, however, the official does **more** than is required by the existing obligation, then the promise of payment **will** be enforceable, as shown by *Glasbrook Bros Ltd v Glamorgan CC* (1925). This position at common law is now, in relation to police services, enshrined in statute. Section 25 of the Police Act 1996 distinguishes between performing their duty of doing what is necessary to prevent crime for which they cannot charge and doing something else at the request of an individual for which they can charge. This provision and its identical predecessor has been considered in a number of cases concerning undertakings by football clubs to pay for police services on match days. In the latest case of *Leeds United FC v Chief Constable of West Yorkshire* [2013] EWCA Civ 113, the Court of Appeal held that the police were under a duty to prevent crime, maintain law and order and protect

property which extended to providing protection in the vicinity of land owned by the club. Consequently, the provision of police services in areas adjacent to the football ground which the club neither owned or controlled could not be charged for.

ACTIVITY 3.6

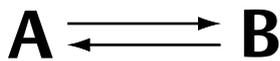
In *Collins v Godefroy* (1831), why was the promise of payment unenforceable?

ACTIVITY 3.7

In *Ward v Byham* (1956), why was the father's promise enforceable?

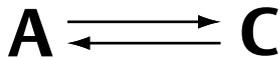
2. Obligations which are owed under a contract with a third party

In the second type of situation, which regards the performance of, or promise to perform, an existing obligation owed under a contract with a third party, the position is much more straightforward. The courts have consistently taken the view that this can provide good consideration for fresh promise. Thus it has been applied to the fulfilling of a promise to marry (*Shadwell v Shadwell* (1860) – such a promise at the time being legally binding) and to the unloading of goods by a firm of stevedores, despite the fact that the firm was already obliged to carry out this work under a contract with a third party (*The Eurymedon* (1975)). The Privy Council confirmed, in *Pao On v Lau Yiu Long* (1980), that the promise to perform an existing obligation owed to a third party can constitute good consideration.



A promises B to teach for one hour at the University.

B promises to pay £X for that teaching.



C, one of the university students, promises to pay £Y for the hour of teaching.

A agrees to do the teaching.

In this situation if A does the promised hour of teaching they can claim both £X from B and £Y from C. Although A has done no more than contractually obliged to do under the contract with B, this is held to be valid consideration for the promise by C to pay £Y.

The consideration from A can be seen as the 'detriment' of being open to liability for breach of contract to both B and C should A fail to perform.

3. Obligations to perform an existing obligation under a contract to the same contracting party

This is essentially where there is a variation to an existing contractual obligation between contracting parties – this is the most difficult to employ as consideration. This results from the fact that a principle which was clear, though impractical in some circumstances, has now been modified and the extent of this modification is unclear.

Performance of an existing obligation

The general rule in relation to the variation of existing obligation can be seen in the case of *Stilk v Myrick* (1809) (which you should read in full).



Figure 3.1 *Stilk* was contracted to work on a ship owned by Myrick

extra payment) become enforceable, their extra work constituting fresh consideration for the promise to pay extra (*Hartley v Ponsonby*).

Stilk v Myrick was long accepted as establishing the principle that the performance of an existing contractual obligation could never be good consideration for a fresh promise, to pay more in this case, from the person to whom the obligation was owed. The sailors' contract obliged them to sail the ship back home. Thus in bringing the ship back to London they were doing nothing more than they were already obliged to do under their original contract. This could not be good consideration for a promise of additional wages. Only if the sailors had done something over and beyond their existing obligation could the variation (the promise of

ACTIVITY 3.8

What other explanation can there be for the decision in *Stilk v Myrick*?

ACTIVITY 3.9

How can *Stilk v Myrick* be distinguished from the factually similar case of *Hartley v Ponsonby* (1857), where the recovery of additional payments was allowed?

However, this rule has now become less certain since the important decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991). This case raised the question of whether *Stilk v Myrick* could still be said to be good law. The plaintiff carpenters, in completing the work on the flats, appeared to be doing no more than they were already obliged to do under their contract with the defendants.

How could this constitute consideration for the defendants' promise of additional payment? The application of *Stilk v Myrick* would point to the promise being unenforceable.

Yet the Court of Appeal held that the plaintiffs should be able to recover the promised extra payments for the flats which they had completed. The Court came to this conclusion by giving consideration a wider meaning than had previously been thought appropriate. In particular, Glidewell LJ pointed to the 'practical benefits' that would be likely to accrue to the defendants from their promise of the additional money. They would be:

- ▶ ensuring that the plaintiffs continued work and did not leave the contract uncompleted
- ▶ avoiding a penalty clause which the defendants would have had to pay under their contract with the owners of the block of flats
- ▶ avoiding the trouble and expense of finding other carpenters to complete the work.

The problem is that very similar benefits to these could be said to have accrued to the captain of the ship in *Stilk v Myrick*. The main point of distinction between the cases then becomes the fact that no pressure was put on the defendants in *Williams v Roffey* to make the offer of additional payment. In other words, the alternative explanation for the decision in *Stilk v Myrick*, as outlined in the feedback to Activity 3.8, above, is given much greater significance. The effect is that it will be much easier in the future for those who act in response to a promise of extra payment, or some other benefit, by simply doing what they are already contracted to do, to enforce that promise (it is important to cross reference your reading here with Chapter 10 in relation to economic duress).

You should note that Glidewell LJ summarises the circumstances where, in his view, the 'practical benefit' approach will apply in six points, which relate very closely to the factual situation before the court and emphasise the need for the absence of economic duress or fraud.

The application of *Williams v Roffey* was held to apply when:

1. There was a contract for the supply of goods or services.
2. A was unable to perform as promised (which can include economic reasons).
3. B agreed to pay more.
4. B obtained a practical benefit from that promise (as outlined above).
5. There was no fraud or duress by A to obtain that promise.
6. If the above are satisfied then consideration is found.

There is no reason, however, why later courts should be restricted by these 'criteria' in applying the *Williams v Roffey* approach.

It was previously thought that *Williams v Roffey* had not affected the related rule that part payment of a debt can never discharge the debtor from the obligation to pay the balance – see *Re Selectmove* (1995). However, in *MWB Business Exchange Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 the Court of Appeal held that a property owner was bound by an oral agreement with the occupier who had failed to make payments as provided by the parties' original written agreement to accept a late payment and a revised schedule of further payments. It was said that the subsequent agreement conferred practical benefits upon the land owner who recovered some of the arrears immediately and benefitted because the premises would not now be left empty for a period. Arden LJ alone characterised the subsequent agreement as a 'collateral unilateral contract'. It was collateral because it was distinct from the original licence to occupy the premises agreed between the parties; it was unilateral because, so long as the licensee did an act i.e. occupied the premises and paid the renegotiated fees, the land owner would be bound by his promise to accept the deferral of the arrears.

Part payment of debt

This rule does not derive from *Stilk v Myrick* but from the House of Lords decision in *Foakes v Beer* (1884). As with the general rule about existing obligations, if something extra is done (for example, paying early, or giving goods rather than money), then the whole debt will be discharged (as held in *Pinnel's Case* (1602)). But in *Foakes v Beer* (1884) it was said that payment of less than is due on or after the date for payment will never provide consideration for a promise to forgo the balance. In *Foakes v Beer* the House of Lords held, with some reluctance, that the implication of the rule in *Pinnel's Case* was that Mrs Beer's promise to forgo the interest on a judgment debt, provided that Dr Foakes paid off the main debt by instalments, was unenforceable.

This common law rule has been regarded with some disfavour over the past 100 years and in some circumstances its effect can be avoided by the equitable doctrine of promissory estoppel (discussed below, at Section 3.2). It was seen above that it is further qualified by the interpretation of *Williams v Roffey* which was used by the Court of Appeal in *MWB Business Exchange Ltd v Rock Advertising Ltd* (2016) because in many situations it may be to the creditor's 'practical benefit' to get part of the debt, rather than to run the risk of receiving nothing at all. In such circumstances, the agreement to accept less will be supported by consideration and so will be contractually binding.

Some doubt surrounds the decision in *Williams v Roffey*. Most recently in *MWB Business Exchange Ltd v Rock Advertising Ltd* (2016) the Court of Appeal expanded its area of application when in the past the same court in *Re Selectmove* (1995) confined the ambit of the decision. Further, *South Caribbean Trading Ltd ('SCT') v Trafigura Beeher BV* (2004) Colman J doubted the correctness of the decision in *Williams v Roffey*. In particular, Colman J noted that the decision was inconsistent with the long-standing rule that consideration must move from the promisee.

ACTIVITY 3.10

Read the case of *Foakes v Beer*, preferably in the law reports – (1884) 9 App Cas 605 (although extracts do appear in Poole). Which of the judges expressed reluctance to come to the conclusion to which they felt the common law (as indicated by Pinnel's case) bound them? What was the reason for this reluctance?

ACTIVITY 3.11

Why do you think that in the past the Court of Appeal has been reluctant to overturn the decision in *Foakes v Beer*? Do more recent cases exhibit a more flexible approach?

3.1.4 Past consideration**ESSENTIAL READING**

- McKendrick Chapter 5 'Consideration and form' – Section 5.18 'Past consideration'.
- Poole, Chapter 4 'Enforceability of promises: Consideration and promissory estoppel' – Section 1C 'Consideration must be sufficient but need not be adequate'.

A further rule about the sufficiency of consideration states that generally the consideration must be given **after** the promise for which it is given to make it enforceable. A promise which is given only when the alleged consideration has been completed is unenforceable. The case of *Re McArdle* (1951) provides a good example. The plaintiff had carried out work refurbishing a house in which his brothers and sister had a beneficial interest. He then asked them to contribute towards the costs, which they agreed to do. It was held that this agreement was unenforceable, because the promise to pay was unsupported by consideration. The only consideration that the plaintiff could point to was his work on the house, but this had been completed before any promise of payment was made. It was therefore 'past consideration' and so not consideration at all.

As with many rules relating to consideration, there is an exception to the rule about past consideration. The circumstances in which a promise made after the acts constituting the consideration will be enforceable were thoroughly considered in *Pao On v Lau Yiu Long* (1979). Lord Scarman laid down three conditions which must be satisfied if the exception is to operate.

1. The act constituting the consideration must have been done at the promisor's request. (See, for example, *Lampleigh v Braithwaite* (1615).)
2. The parties must have understood that the work was to be paid for in some way, either by money or some other benefit. (See, for example, *Re Casey's Patents* (1892).)
3. The promise would be legally enforceable had it been made prior to the acts constituting the consideration.

The second of these conditions will be the most difficult to determine. The court will need to take an objective approach and decide what reasonable parties in this situation would have expected as regards the question of whether the work was done in the clear anticipation of payment.

ACTIVITY 3.12

Why was the approach taken in *Re Casey's Patents* not applied so as to allow the plaintiff to succeed in *Re McArdle*, since it was obvious that the improvement work would benefit all those with a beneficial interest in the house?

ACTIVITY 3.13

Jack works into the night to complete an important report for his boss, Lisa. Lisa is very pleased with the report and says 'I know you've worked very hard on this: I'll make sure there's an extra £200 in your pay at the end of the month'. Can Jack enforce this promise?

SELF-ASSESSMENT QUESTIONS

1. What is an 'executory' contract?
2. Is the performance of an existing obligation owed to a third party good consideration?
3. What principle relating to consideration is the House of Lords' decision in *Foakes v Beer* authority for?

Summary

The doctrine of consideration is the means by which English courts decide whether promises are enforceable. It generally requires the provision of some benefit to the promisor, or some detriment to the promisee, or both. The 'value' of the consideration is irrelevant, however. The performance of existing obligations will generally not amount to good consideration, unless the obligation is under a contract with a third party, or the promisee does more than the existing obligation requires. This rule is less strictly applied following *Williams v Roffey*. Part payment of a debt can never in itself be good consideration for a promise to discharge the balance. Consideration must not be 'past', unless it was requested, was done in the mutual expectation of payment and is otherwise valid as consideration.

FURTHER READING

- Anson, Chapter 4 'Consideration and promissory estoppel'.

3.2 Promissory estoppel

ESSENTIAL READING

- McKendrick, Chapter 5 'Consideration and form' – Section 5.22 'Estoppel' to Section 5.29 'Conclusion: the future of consideration'.
- Poole, Chapter 4 'Enforceability of promises: consideration and promissory estoppel' – Section 2 'Promissory estoppel'.

3.2.1 The equitable concept of promissory estoppel

The doctrine of promissory estoppel is concerned with the modification of existing contracts. The position under the classical common law of contract was that such modification would only be binding if consideration was supplied and a new contract formed. Thus in a contract to supply 50 tons of grain per month at £100 per ton for 5 years, if the buyer wanted to negotiate a reduction in the price to £90 per ton, because of falling grain prices, this could only be made binding if the buyer gave something in exchange (for example, agreeing to contribute to the costs of transportation). Alternatively the two parties could agree to terminate their original agreement entirely, and enter into a new one. The giving up of rights under the first agreement by both sides would have sufficient mutuality about it to satisfy the doctrine of consideration.

These procedures are a cumbersome way of dealing with the not uncommon situation where the parties to a continuing contract wish to modify their obligations in the light of changed circumstances. It is not surprising, therefore, that the equitable doctrine of promissory estoppel has developed to supplement the common law rules. This allows, in certain circumstances, promises to accept a modified performance of a contract to be binding, even in the absence of consideration.

The origin of the modern doctrine of promissory estoppel is found in older cases such as *Hughes v Metropolitan Railways* but was more widely developed in the judgment of Denning J (as he then was) in the case of *Central London Property Trust Ltd v High Trees House Ltd* (1947).

The facts of the case concerned the modification of the rent payable on a block of flats during the Second World War. The importance of the case, however, lies in the

statement of principle which Denning set out – to the effect that ‘a promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply’. Applying this principle, Denning held that a promise to accept a lower rent during the war years was binding on the landlord, despite the fact that the tenant had supplied no consideration for it. You should read this case in full.

The common law long recognised the concept of ‘estoppel by representation’. Such an estoppel only arises, however, in relation to a statement of existing fact, rather than a promise as to future action: see *Jorden v Money* (1854). The concept of ‘waiver’ had also been recognised by both the common law and equity as a means by which certain rights can be suspended, but then revived by appropriate notice. See, for example, *Hickman v Haynes* (1875), *Rickards v Oppenheim* (1950) and *Hughes v Metropolitan Railway* (1877). It was this last case upon which Denning J placed considerable reliance in his decision in *High Trees House*. The concept of waiver, however, had not applied to situations of part payment of debts. Note the suggestion of Arden LJ in *Collier v P & MJ Wright (Holdings) Ltd* (2007), based upon the *obiter dictum* of Denning J, that promissory estoppel has the effect of extinguishing the creditor’s right to the balance of a debt when he has accepted a part payment of the debt. Under the modern law the concept of waiver has been effectively subsumed within ‘promissory estoppel’.

3.2.2 The limitations on promissory estoppel

The doctrine of estoppel has been considered in a number of reported cases since 1947 and now has fairly clearly defined limits. A most valuable summary of the general effect of these cases was provided by Kitchin LJ in *MWB Business Exchange Ltd v Rock Advertising Ltd* (2016):

Drawing the threads together, it seems to me that all of these cases are best understood as illustrations of the broad principle that if one party to a contract makes a promise to the other that his legal rights under the contract will not be enforced or will be suspended and the other party in some way relies upon that promise, whether by altering his position or in any other way, then the party who might otherwise have enforced those rights will not be permitted to do so where it would be inequitable having regard to all of the circumstances.

Need for existing legal relationship

It is generally, though not universally, accepted that promissory estoppel operates to modify existing legal relationships, rather than to create new ones. The main proponent of the opposite view was Lord Denning himself who, in *Evenden v Guildford City FC* (1975), held that promissory estoppel could apply in a situation where there appeared to be no existing legal relationship at all between the parties.

Need for reliance

At the heart of the concept of promissory estoppel is the fact that the promisee has relied on the promise. It is this that provides the principal justification for enforcing the promise. The lessees of the property in *High Trees House* had paid the reduced rent in reliance on the promise from the owners that this would be acceptable. They had no doubt organised the rest of their business on the basis that they would not be expected to pay the full rent. It would therefore have been unfair and unreasonable to have forced them to comply with the original terms of their contract. It has sometimes been suggested that this reliance must be ‘detrimental’, but Denning consistently rejected this view (see, for example, *WJ Alan & Co v El Nasr* (1972)) and it now seems to be accepted that reliance itself is sufficient.

A ‘shield not a sword’

This is related to the first point (concerning the need for an existing relationship). The phrase derives from the case of *Combe v Combe* (1951). A wife was trying to sue her former husband for a promise to pay her maintenance. Although she had provided no consideration for this promise, at first instance she succeeded on the basis of

promissory estoppel. The Court of Appeal, however, including Lord Denning, held that promissory estoppel could not be used as the basis of a cause of action in this way. Its principal use was to provide protection for the promisee (as in *High Trees House* – providing the lessees with protection against an action for the payment of the full rent). As Lord Denning put it: consideration ‘remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.’

English courts have resisted attempts to found an action on a promissory estoppel. See *Baird Textile Holdings Ltd v Marks & Spencer Plc* (2001) although note the different approach taken by the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988).

Must be inequitable for the promisor to go back on the promise

The doctrine of promissory estoppel has its origins in equitable ‘waiver’. It is thus regarded as an equitable doctrine. The importance of this is that a judge is not obliged to apply the principle automatically, as soon as it is proved that there was a promise modifying an existing contract which has been relied on. There is a residual discretion whereby the judge can decide whether it is fair to allow the promise to be enforced. The way that this is usually stated is that it must be inequitable for the promisor to withdraw the promise. What does ‘inequitable’ mean? It will cover situations where the promisee has extracted the promise by taking advantage of the promisor. This was the case, for example, in *D & C Builders v Rees* (1966) where the promise of a firm of builders to accept part payment as fully discharging a debt owed for work done was held not to give rise to a promissory estoppel, because the debtor had taken advantage of the fact that she knew that the builders were desperate for cash. Impropriety is not necessary, however, as shown by *The Post Chaser* (1982), where the promise was withdrawn so quickly that the other side had suffered no disadvantage from their reliance on it. In those circumstances it was not inequitable to allow the promisor to escape from the promise.

Doctrine is generally suspensory

Whereas a contract modification which is supported by consideration will generally be of permanent effect, lasting for the duration of the contract, the same is not true of promissory estoppel. Sometimes the promise itself will be time limited. Thus in *High Trees House* it was accepted that the promise to take the reduced rent was only to be applicable while the Second World War continued. Once it came to an end, the original terms of the contract revived. In other cases, the promisor may be able to withdraw the promise by giving reasonable notice. This is what was done in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* (1955). To this extent, therefore, the doctrine is suspensory in its effect. While it is in operation, however, a promissory estoppel may extinguish rights, rather than delay their enforcement. In both *High Trees House* and the *Tool Metal Manufacturing* case it was accepted that the reduced payments made while the estoppel was in operation stood and the promisor could not recover the balance that would have been due under the original contract terms. More recently, however, it was said *obiter dicta* in *MWB Business Exchange Ltd v Rock Advertising Ltd* (2016) that even though a creditor accepts part payment of a debt by instalments it will not necessarily result in the ‘extinction’ of the creditor’s right to claim the balance of any instalment in respect of which part payment has been made.

Where ‘promise’ is prohibited by legislation

Evans v Amicus Healthcare Ltd (2003) concerned the use of embryos created by IVF prior to the breakdown of the couple’s relationship. The man wished the embryos to be destroyed, the woman to have the embryos used. In this context it was found, *inter alia*, that the man had not given such assurances to the woman as to create a promissory estoppel because the relevant legislation allowed him to withdraw his consent to the storage of the embryos at any time. This judgment contains an important discussion as to the current state of promissory estoppel and its possible future development.

A clear and unambiguous statement

Where the words used to make the statement claimed as the basis for a promissory estoppel were ambiguous and capable of being interpreted in several ways (including one which would not support the estoppel) then the words could not be said to found an estoppel unless the representee sought and obtained clarification of the statement. See *Kim v Chasewood Park Residents* [2013] EWCA Civ 239 and *Closegate Hotel Development (Durham) Ltd v McLean* [2013] EWHC 3237 (Ch).

ACTIVITY 3.14

Why was Denning's statement of principle in *High Trees House* seen as such a potentially radical development in the law?

ACTIVITY 3.15

Do you think that the doctrine of promissory estoppel is still needed, now that *Williams v Roffey* has made it much more likely that a modification of a contract will be found to be supported by consideration?

SELF-ASSESSMENT QUESTIONS

1. How does 'promissory estoppel' differ from common law estoppel, and from 'waiver'?
2. What is the meaning of the phrase 'a shield not a sword' in the context of promissory estoppel?
3. What important statement of principle did Denning J make in the case of *Central London Property Trust Ltd v High Trees House Ltd*?

Summary

Generally the modification of a contract requires consideration in order to be binding. The doctrine of promissory estoppel, however, provides that in certain circumstances a promise may be binding even though it is not supported by consideration. The main use of the doctrine has been in relation to the modification of contracts, but it is not clear whether it is limited in this way. The doctrine is only available as a shield, not a sword; there must have been reliance on the promise; it must be inequitable to allow the promisor to withdraw the promise; but it may well be possible to revive the original terms of the contract by giving reasonable notice.

FURTHER READING

- Anson, Chapter 4 'Consideration and promissory estoppel'.

SAMPLE EXAMINATION QUESTION

Simone owns five terraced houses which she is planning to rent to students. The houses all need complete electrical rewiring before they can be rented out. Simone engages Peter to do this work during August, at an overall cost of £5,000, payable on completion of the work. After rewiring two of the houses Peter finds that the work is more difficult than expected because of the age of the houses. On 20 August he tells Simone that he is using more materials than anticipated and that the work will take much longer than he originally thought. He asks for an extra £500 to cover the cost of additional materials. Simone agrees that she will add this to the £5,000. In addition, because she is anxious that the houses should be ready for occupation before the start of the university term, she says that she will pay an extra £1,000 if the work is completed by 15 September.

Peter completes the work by 15 September, but Simone says that she is now in financial difficulties. She asks Peter to accept £5,000 in full settlement of her account. He reluctantly agrees, but has now discovered that Simone's financial problems were less serious than she made out and wishes to recover the additional £1,500 he was promised.

Advise Peter.

ADVICE ON ANSWERING THE QUESTION

This question is concerned with the role of consideration in the modification of contracts, and the doctrine of promissory estoppel.

There are three separate issues which you will need to consider.

- ▶ Was Simone's promise to pay the extra £500 a binding variation of the contract?
- ▶ Was Simone's promise of an extra £1,000 if the work is completed by 15 September a binding variation of the contract?
- ▶ Is Peter's promise to take the £5,000 in full settlement binding on him?

The first two questions involve discussion of what amounts to consideration.

If Peter has provided consideration for Simone's promises, then he will be able to hold her to them. The answer to the third question will depend to some extent on the answer to the first two. If there has been no binding variation of the original contract, then Peter is not entitled to more than £5,000 in any case. If there has been a binding variation, then the question will arise as to whether he is precluded from recovering the extra money because of the doctrine of promissory estoppel.

As to the promised £500, you will need to consider whether the fact that Peter is buying additional materials is good consideration for this promise. Simone may argue that it was implicit in the original contract that the cost of all materials needed would be included in the £5,000. The fact that Peter has made an underestimate is not her responsibility. Similarly, in relation to the promised extra £1,000, is Peter doing any more than he is contractually obliged to do, in that it seems likely that the original contract was on the basis that the work was to be done by the end of August? In answering both these questions you will need to deal with the principle in *Stilk v Myrick* and the effect on this of *Williams v Roffey*. This will involve identifying any 'practical benefit' that Simone may have gained from her promises. If such a benefit can be identified and there is no suggestion of improper pressure being applied by Peter, then the variations of the contract will be binding on Simone. The effect of the subsequent decisions in cases such as *Re Selectmove*, *SCT v Traftigura* and *MWB Business Exchange Ltd v Rock Advertising Ltd* (2016) upon *Williams v Roffey* could also be considered.

In relation to the third issue, assuming that there has been a binding variation, you will need to decide whether *Foakes v Beer* applies (in which case Peter will be able to recover the £1,500), or whether Simone can argue that Peter is precluded from recovery by the doctrine of promissory estoppel. In relation to the latter issue, one of the matters which you will need to consider is whether promissory estoppel can apply in a situation of a debt of this kind, as opposed to money payable under continuing contracts such as those involved in *High Trees House* and *Tool Metal Manufacturing v Tungsten Electric*. You will also need to consider whether the fact that Simone may have not been fully truthful about her financial position may make it 'inequitable' for her to rely on promissory estoppel (see *D & C Builders v Rees*). The suggestion of Arden LJ in *Collier v P & MJ Wright (Holdings)* could also be considered.

Quick quiz

QUESTION 1

In *Currie v Misa* (1875) it was said that a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Which of the following statements best represents what this statement means?

- a. Consideration involves the signalling of equal exchange of goods to ensure that all contracts are fairly enforceable.
- b. Consideration allows all promises to be enforced by showing that one party was thoughtful about the other when they entered into negotiations.

- c. Consideration is some benefit accruing to one party or some detriment suffered by the other. It is a badge of enforceability.
- d. Consideration involves a profit being obtained by one party at the expense of the other. No exchange is required for the contract to be enforced.
- e. Don't know.

QUESTION 2

Which of the following scenarios, in light of the law on consideration, would most likely allow K, in contract law, to enforce a contract for a new mobile phone?

- a. J promises K a brand new mobile phone.
- b. J promises K a brand new mobile phone if he takes it out of the box that it came in.
- c. J promises K a brand new mobile phone for £5 which is far below its market value.
- d. J promises K a brand new mobile phone worth £150 because he gave him £150 worth of compact discs last year. K had no idea of this when he gave the compact discs to J.
- e. Don't know.

QUESTION 3

Which of the following statements represents the common law view of part payment of debt?

- a. If one party (A) suggests that (B) be let off part of the payment of an existing debt then (A) cannot then sue for recovery of that debt.
- b. If one party (A) suggests that (B) be let off part payment of an existing debt then (A) cannot sue for recovery of that debt before 25 years have passed.
- c. If one party (A) suggests that (B) be let off part payment of an existing debt then (A) can only sue for recovery of that debt if she can show that (B) was lying about his financial situation.
- d. If one party (A) suggests that (B) be let off part of the payment of an existing debt then (A) can sue for recovery of that debt.
- e. Don't know.

QUESTION 4

In the case of *The Eurymedon* (1975) Lord Wilberforce said: 'An agreement to do an act which the promisor is under an existing obligation to a third party to do may quite well amount to valid consideration and does so in the present case: the promise obtains the benefit of a direct obligation which he can enforce.' Which of the following scenarios best reflects this view?

Choose one answer.

- a. If a carpenter has a contract with a builder who has a contract with a homeowner to fit the kitchen in that house then if he receives £500 in addition to his original fee, just to get the job done on time, he will have provided sufficient consideration for this additional £500.
- b. If a carpenter has a contract with a homeowner to fit the kitchen in that house then if he receives £500 in addition to his original fee, just to get the job done on time, he will have provided sufficient consideration for this additional £500.
- c. If a carpenter has a contract with a builder who has a contract with a homeowner to fit the kitchen then any promise to give £500 would be unsupported by consideration and so not enforceable by the carpenter.

- d. If the carpenter has a contract with a builder and he finishes the fitting of the kitchen of the householder and the builder says 'I will give you a bonus for fitting the kitchen'. The builder later refuses.
- e. Don't know.

QUESTION 5

Which of the following statements is made by Russell LJ in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1990) to reflect the current view of the courts in the requirement of consideration in any contract?

Choose one answer.

- a. Consideration remains the cornerstone of English contract law. Any attempt to remove the requirement of its presence has always been defeated.
- b. It would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in this back handed way the doctrine of consideration.
- c. Consideration there must still be but, in my judgement, the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not unequal and where the finding of consideration reflects the true intention of the parties.
- d. If it be objected that the propositions above contravene the principle in *Stilk v Myrick*, I answer that in my view they do not: they refine and limit the application of that principle but they leave the principle unscathed.
- e. Don't know.

Answers to these questions can be found on the VLE.

Am I ready to move on?

You are ready to move on to the next chapter if, without referring to the subject guide or textbook, you can answer the following questions:

1. What are the essential elements of the concept of 'consideration'?
2. What is the significance of consideration to the English law of contract?
3. What types of behaviour will the courts treat as valid consideration?
4. In what situations will the performance of, or promise to perform, an existing obligation amount to consideration for a fresh promise?
5. What is the definition of 'past consideration'?
6. What is the role of consideration in the modification of existing contracts?
7. What are the essential elements of the doctrine of 'promissory estoppel'?
8. How does the doctrine of promissory estoppel lead to the enforcement of some promises which are not supported by consideration?

Part I Requirements for the making of a contract

4 Other formative requirements: intention, certainty and completeness

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Introduction

We have examined many of the basic requirements necessary for the formation of an enforceable contract: offer and acceptance (Chapter 2) and consideration (Chapter 3). To these requirements we must add three more:

1. That the parties intend to create legal relations;
2. That the terms of their agreement are certain and not vague; and
3. That their agreement is a complete agreement that does not need further development or clarification.

Once all of these requirements are present, courts will, in the absence of any vitiating elements, recognise an agreement as an enforceable contract. We will examine each of these new requirements in turn.

LEARNING OBJECTIVES

This chapter introduces the other formative requirements: intention to create legal relations, certainty and completeness to enable you to discuss and apply in problem analysis its key components (and supporting authority) including:

- ▶ **Why courts require an intention to create legal relations.**
- ▶ **The difference between domestic agreements and commercial agreements with regard to an intention to create legal relations.**
- ▶ **The key factors in determining whether or not an intention to create legal relations exists.**
- ▶ **What is meant by 'certainty of terms' and the difference between contracts where there is certainty of terms and those where there is not.**
- ▶ **Why courts insist upon certainty of terms.**
- ▶ **The concept of 'vagueness' in relation to contractual provisions.**
- ▶ **The rationale behind the requirement of contractual completeness.**
- ▶ **Whether, and if so when, a court may 'complete' an agreement.**

4.1 The intention to create legal relations

ESSENTIAL READING

- McKendrick, Chapter 6 'Intention to create legal relations'.
- Poole, Chapter 5 'Intention to be legally bound and capacity to contract' – Section 1 'Intention to be legally bound'.
- Hedley, S. 'Keeping contract in its place – *Balfour v Balfour* and the enforceability of informal agreements' (1985) 5 *Oxford Journal of Legal Studies* 391. This article can be found in HeinOnline using the Online Library.

In Chapter 2 we examined the importance of intention in relation to an offer: for a statement to be an offer, it must be made with the intention that it be binding upon acceptance. It is also essential that all the parties to an agreement have an intention to create legal relations. What this means is that the parties intend that legal consequences attach to their agreement. In short, the parties intend that the agreement will be binding with recourse to some external adjudicator (a court or arbitrator) for its enforceability. The necessity for intention is most evident in domestic and social agreements. These are agreements between friends (e.g. A agrees to host the bridge club at her house if B will bring the food to feed the club) or agreements made between family members (e.g. sister agrees with brother that she will not play her radio loudly if brother will keep his hamster securely in its cage). In this context there is generally an offer by one party, which is accepted by the other party and supported by **consideration**. So far, the agreement looks like an enforceable contract. The parties, however, probably do not intend a breach of the agreement to result in legal action. Their agreement lacks an intention to create legal relations and is thus not a contract because they did not intend it to be. The agreement has no legal effect at all.

Traditionally, the law has distinguished between **domestic and social** agreements and **commercial** agreements. In the case of domestic and social agreements, it is presumed that there is **not** an intention to create legal relations. In the case of commercial agreements, it is presumed that there **is** an intention to create legal relations.

In either instance, the facts of the case may displace the presumption the law would otherwise make. For example, it may be that when neighbour A agreed to mow neighbour B's lawn in exchange for the apples on B's apple tree, both parties intended that this agreement would be legally enforceable.

The determination of whether or not the parties intended to enter into legally binding relations is an objective one and context is all-important. What this means is that the courts will not examine the states of mind of the parties to the agreement (a subjective approach), but will ask whether or not reasonable parties to such an agreement would possess an intention to create legal relations. See *Edmonds v Lawson* [2000] EWCA Civ 69.

In *President of the Methodist Conference v Preston* [2013] UKSC 29 the Supreme Court held that it was necessary to consider the appointment of a Methodist minister in the context of the factual background. In so doing, the Court found that there was no contractual intention.

This objective approach applies regardless of whether the agreement is a social or domestic one or a commercial one.

Social and domestic agreements

The leading case is *Balfour v Balfour* [1919] 2 KB 571. Here, because the husband would be working overseas, he promised to pay his wife an amount of money each month. When the parties separated, the wife sued the husband for this monthly amount. The court refused to allow her action on the grounds that the agreement was not an enforceable contract because, at the outset of their agreement, it 'was not intended by either party to be attended by legal consequences'. The parties did not intend that

the agreement was one which could be sued upon. The judgment of Atkin LJ really seems to rest upon public policy arguments – that as a matter of policy, domestic agreements, commonly entered into, are outside the jurisdiction of the courts. His judgment also highlights a judicial concern that if such agreements could be litigated in the courts, the courts would soon be overwhelmed by such cases.

Similar reasoning was applied in the case of *Jones v Padavatton* [1969] 2 All ER 616 to find that the agreement between a mother and her adult child did not create a contract. See also *Coward v MIB* [1963] 1 QB 259 where the court found that an agreement to take a friend to work in exchange for petrol money was an arrangement which lacked contractual intention.

Increasingly in the modern world, domestic arrangements are beginning to take on a basis in contract law. *Balfour v Balfour* must be seen as a case which establishes a **rebuttable presumption**[†] that domestic agreements are not intended. An example of a situation in which the presumption was rebutted can be found in the decision in *Merritt v Merritt* [1970] 2 All ER 760. In this instance the spouses were already separated and the agreement was found to have an intention to create legal relations. A similar result followed in *Darke v Strout* [2003] EWCA Civ 176 as the court found that an agreement for child maintenance following the breakdown of a couple's relationship did not lack an intention to create legal relations given the formality of the letter. Nor could it be said to be unenforceable for want of consideration since the woman had, in entering the agreement, given up statutory rights to maintenance. In *Soulsbury v Soulsbury* [2007] EWCA Civ 969 the Court of Appeal found that there was an intention to create legal relations between two former spouses when one agreed to forego maintenance payments in return for a bequest in the other's will.

[†] A rebuttable presumption is a presumption made by courts as to a certain state of facts until the contrary is proved.

It can be seen that in many of these cases between spouses the usual presumption is rebutted after the breakdown of the marriage relationship. A modern development concerns the legal enforceability of an agreement that precedes, rather than follows, the entering of a marriage known as a pre-nuptial agreement (colloquially a 'pre-nup'). In *Radmacher v Granatino* [2010] UKSC 42 the Supreme Court upheld a decision that the husband was not entitled to an award of £5.5 million after the breakup of the marriage because such an award would give insufficient weight to the pre-nuptial agreement. This agreement acknowledged that neither party would acquire any benefit from the other's property during the marriage and its execution was a condition of a substantial transfer of family wealth to the wife. Lady Hale dissented, arguing that there remained important policy considerations sufficient to justify a different approach to agreements made before and after marriage.

When agreements are entered between non-family members with respect to what might be considered more trivial subjects such as the division of the proceeds of joint betting, the cases are less clear. In *Simpkins v Pays* [1955] 3 All ER 10 it was found that there was a contract where three co-habitees entered a competition together, whereas in *Wilson v Burnett* [2007] EWCA Civ 1170 it was held that there was no binding agreement to share bingo winnings.

ACTIVITY 4.1

Think of the last three promises you have made to friends or family. Did these promises form agreements intended as contracts? Why (or why not)?

ACTIVITY 4.2

How does *Simpkins v Pays* differ from *Coward v MIB*?

ACTIVITY 4.3

A and B are married to each other. They agree that A will make all the mortgage payments on the marital home and that B will pay all other household bills. This arrangement carries on for two years whereupon A refuses to make any more mortgage payments. Can B sue A?

ACTIVITY 4.4

A and B are married to each other. They agree that A will pay all the household expenses and that B will remain at home to care for their children. B subsequently takes up paid employment outside the home and another person cares for the children. Must A continue to pay the household expenses?

Commercial agreements

In relation to commercial agreements, courts will generally presume that an intention to create legal relations is present. See *Esso Petroleum Ltd v Commissioners of Customs and Excise* [1976] 1 All ER 117. This is an especially strong inference when the commercial context is an ongoing employment relationship (*Dresdner Kleinwort Ltd v Atrill* [2013] EWCA Civ 394).

Exceptionally, the facts may disprove such an intention. In a sale of land, agreements are normally made 'subject to contract'. This wording expressly displaces any presumption of contractual intention. In other situations, courts have found that the specific wording of the agreement in question displaced any contractual intention. See, for example:

- ▶ a comfort letter – *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* [1989] 1 All ER 785
- ▶ an honour clause – *Rose and Frank Company v JR Crompton and Brothers Ltd* [1925] AC 445.

In most cases where the parties deal at arm's length (**i.e. they have no existing ties of family, friendship or corporate structure**) the court will find a contractual intention. See *Edmonds v Lawson* (2000).

ACTIVITY 4.5

Why might a commercial party not want an agreement to be an enforceable contract? Is such an agreement of any practical value?

Summary

Ultimately, the question of contractual intention is one of fact. The agreement in question must be carefully scrutinised to determine the nature of the parties' agreement.

Without an intention to create legal relations, there will not be a contract.

SELF-ASSESSMENT QUESTIONS

1. To what extent are courts examining whether or not the parties intend to take any dispute to a court for resolution? To what extent are the courts determining whether or not the agreement has certain terms?
2. Are courts influenced by the reliance of one party upon the promise of another in determining that a contractual intention is present?
3. Is the reasoning of the judges in *Balfour v Balfour* and *Esso Petroleum v Commissioners of Customs and Excise* based on public policy considerations or on the intentions of the parties to the agreements?
4. What factors do courts consider important in negating contractual intention?

FURTHER READING

- Freeman, M. 'Contracting in the Haven: *Balfour v Balfour* revisited' in Halson, R. (ed.) *Exploring the boundaries of contract*. (London: Dartmouth Publishing Company, 1996) [ISBN 9781855217126].

4.2 Certainty of terms and vagueness

ESSENTIAL READING

- McKendrick, Chapter 4 'Certainty and agreement mistakes' – Section 4.1 'Certainty' and Section 4.2 'Vagueness'.
- Poole, Chapter 3 'Agreement Problems' – Section 1 'Certainty'.

An enforceable contract requires certainty of terms. That is to say, for an agreement to be a contract, it must be apparent what the terms of the contract are. If an important term is not settled, the agreement is not a contract.

A statement cannot be an offer unless it is sufficiently certain. In *Scammell v Ouston* [1941] AC 251 the court found that the agreement was not enforceable because the terms were uncertain and required further agreement between the parties (see the discussion in Chapter 2). Viscount Maugham explained that because the terms were uncertain, there was no real agreement (a *consensus ad idem*) between the parties. The underlying rationale for this area of law can be seen in that if the terms cannot be determined with certainty, there is no contract for the court to interpret. It is not the role of the court to create the terms of the contract – for this would be to impose a contract upon the parties. Courts will nonetheless try to give legal force to the parties' attempt to make a contract unless it is 'legally or practically impossible to give [it] any sensible content' (*Scammell v Dicker* [2005] EWCA Civ 405 at [30]). On this basis in *Durham Tees Valley Airport v bmibaby* (2010) it was held that an agreement to operate two aircraft from an airport for 10 years was not void for uncertainty because it did not specify a minimum number of passengers or flights.

In some circumstances, particularly where the parties have relied upon an agreement, courts will more readily imply or infer a term or find that the essentials of a contract have been established. This can be seen in the decision in *Hillas v Arcos* [1932] All ER 494. Here, the agreement had been relied upon and the court was able to infer the intention of the parties based upon the terms in their agreement and the usage in the trade. Similarly, in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* [2010] UKSC 14 agreement had been reached on all terms of 'economic significance' and performance commenced. The Supreme Court said that an objective interpretation of the parties' words and deeds suggested that they intended to enter a binding contract despite the fact that certain terms were not yet confirmed. Even if performance is almost complete and the parties throughout confidently expected to agree upon key terms, their actual failure to do so will mean that no contract comes into existence (*British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504).

ACTIVITY 4.6

You agree with Z that you will buy a shirt from Z's summer collection for £25. No size is specified in your agreement. Have you a contract? Explain.

ACTIVITY 4.7

What is the difference between the decisions in *Hillas* and *Scammell*? Are there convincing reasons for deciding these cases differently?

It may be that the agreement provides a mechanism, or machinery, to establish the term. In such a situation, there is certainty of terms. Thus, if interest on a loan is to be set at 1% above the Bank of England's base rate on a certain date, then this is a certain term. It cannot be stated at the outset of the contract what the interest rate is, but certainty of terms exists because, on the relevant date, the interest rate can be determined by an agreed mechanism.

There is a difference between a term which is meaningless and a term which has yet to be agreed. Where the term is meaningless, it can be ignored, leaving the contract as a whole enforceable. See *Nicolene Ltd v Simmonds* [1953] 1 QB 543.

Summary

If the terms of an agreement are uncertain or vague, courts will not find a contract exists. Courts will not create an agreement between the parties. In a number of circumstances, courts will use various devices to ensure that terms which might appear uncertain are, in fact, certain. It may be possible to determine what the term is from the usage in the trade. A vague or meaningless term may be ignored.

SELF-ASSESSMENT QUESTIONS

1. Would an agreement to 'use all reasonable endeavours' to achieve a certain objective be enforceable?
2. What are the arguments in favour of allowing a court to establish the essential terms of an agreement?

4.3 A complete agreement

ESSENTIAL READING

- McKendrick, Chapter 4 'Certainty and agreement mistakes' – Section 4.3 'Incompleteness'.
- Poole, Chapter 3 'Agreement problems' – Section 1C 'Incompleteness'.

To create an enforceable contract, parties must reach an agreement on all the major elements of their contract. The agreement must, in other words, be **complete**. There must be nothing left outstanding to be agreed upon at a later date. Completeness is an aspect of certainty of terms: unless an agreement is complete, a court is unable to state with certainty what agreement has been made between the parties. If there is no agreement on all of the essential elements of a bargain, there is no contract. There must be an agreement on matters such as price, either by fixing the price or establishing a mechanism to fix the price. What is essential in a contract will depend upon the nature of the contract. It is not possible to turn an incomplete bargain into a legally binding contract by merely adding together express and implied terms. Rather, a complete bargain must exist which may be supplemented by further implied terms *Wells v Devani* [2016] EWCA Civ 1106.

There is no such thing as an agreement to agree. In *Courtney & Fairbairn Ltd v Tolani Brothers (Hotels) Ltd* (1975) it was held that there was no contract where the parties had simply agreed to negotiate. Their agreement was not enforceable as a contract. In *Barbudev v European Cable Management Bulgaria EOOD* [2012] EWCA Civ 548 a communication offering investment on 'terms to be agreed' was said to be no more than an unenforceable 'agreement to agree'.

The reason for this probably lies in the practical consideration that if the agreement is incomplete, it is not for the court to complete the agreement because the court would then be creating, rather than interpreting, the contract. In *Walford v Miles* [1992] 2 AC 128 Lord Ackner noted that the parties to negotiations had diametrically opposed aims and so their opposing interests could not be reconciled sufficiently to support in Walford an implied obligation to continue to negotiate in good faith with a particular party. In contrast, an undertaking **not** to negotiate with third parties (called a 'lock-out' agreement) was, if for a fixed period, sufficiently certain to be enforceable (*Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327).

ACTIVITY 4.8

Your milkman leaves you a note to ask if you would like an order of bread at some point in the future. You reply that you would and you agree to pay his price of £1 per loaf. Is your agreement a contract? When will the bread be delivered?

ACTIVITY 4.9

You offer to pay £200,000 for a house 'subject to contract'. Although the house looks fabulous on a first viewing, subsequent inspection of it reveals that it suffers badly from damp. The vendor insists that you must buy the house as she has accepted your offer. Must you?

In some instances, legislation or case law will enable the court to add the necessary term to the agreement. An example of this can be seen in s.8(2) of the Sale of Goods Act 1979 which provides that where the price in a contract for the sale of goods has not been determined the buyer must pay a reasonable price. Where this occurs, the agreement can be completed and an enforceable contract exists.

In other instances, where the parties have acted in reliance upon what otherwise might be considered to be an incomplete agreement, courts have found that they were able to imply the necessary terms. For examples of this, see the decisions in *Foley v Classique Coaches Ltd* [1934] 2 KB 1 and *British Bank for Foreign Trade Ltd v Novinex Ltd* [1949] 1 KB 623. There are two different ways of rationalising what courts are doing in these instances.

- ▶ The first is that courts are protecting the parties' reasonable reliance upon an agreement
- ▶ The second is that, because the **parties** have relied upon the agreement, it is easier to imply with certainty what the parties would originally have agreed upon as the essential terms.

ACTIVITY 4.10

What elements have courts found essential in determining whether the agreement is complete? Why are these elements essential?

ACTIVITY 4.11

In what instances have courts been prepared to 'imply' or 'insert' what appears to be an otherwise missing essential element? Why was the court prepared to do this?

Summary

The agreement must contain all the essential terms necessary to execute the agreement with certainty. If the agreement does not contain all the necessary terms, it will not be an enforceable contract. Courts will not create the contract between the parties.

SELF-ASSESSMENT QUESTIONS

1. **Once the parties have begun to perform an agreement, are courts concerned to protect the reliance of the parties?**
2. **How do the previous dealings of the parties or the custom within a particular trade assist the court? See *Scammell v Ouston* (1941).**

EXAMINATION ADVICE

The matters considered in this chapter are unlikely to appear as a separate question on the examination paper. This does not mean that they are not important. They must be present in order to form an enforceable contract. The fact that the law insists upon their presence (and the circumstances in which the law 'creates' these elements) tells us a lot about the consensual nature of contract law.

For examination purposes, however, the matters covered in this chapter are likely to appear as issues in a larger question involving a bigger issue. You must think about how these smaller issues fit within the larger issue. Thus, for example, does an intention to create legal relations also indicate a greater problem with the adequacy of consideration?

When you read examination questions that refer to an agreement, check to see if the agreement is domestic or social in nature – will intention to create legal relations be an issue in the context of that question? A party seeking to avoid contractual liability may do so on the ground that there was no intention to create legal relations. Where the agreement is between commercial parties, consider whether or not there are factors which displace the presumption of intention.

With respect to ‘certainty’ and ‘completeness’, situations will arise where the words may be ambiguous. You must ask yourself whether this ambiguity creates a problem of certainty, or possibly a mistake.

Always check to make sure an agreement is complete. Is there anything essential which remains outstanding? If there is, can a court imply or infer what this term should be?

SAMPLE EXAMINATION QUESTION

A promises her son B £1,000 per month if he begins his engineering studies at university. A's brother, C, offers B a place in his house if B promises to finish his studies. B offers his girlfriend D £50 per month if she will drive him to the university each morning. Are any of these agreements enforceable?

ADVICE ON ANSWERING THE QUESTION

The best approach to an examination question of this nature is to break it down into its component parts. There are three agreements in question. Consider each in turn. Do not be afraid to use sub-headings to assist the clarity of your answer.

1. **Agreement between A and B** A is B's mother and automatically creates an issue of intention. You should consider the general nature of the test set out by Lord Atkin in *Balfour v Balfour*. Next, consider the similar facts of *Jones v Padavatton*. Without some element to distinguish it from *Jones*, it is likely that a court would reach the same outcome. Is such an element present? Note, however, the more general focus of intention (as opposed to the relationship of the parties) in *Edmonds v Lawson*.
2. **Agreement between C and B** C is B's uncle; again, intention to create legal relations becomes an issue. However, an uncle is one step removed from a parent or a spouse and courts might more readily infer such an intention. You need to consider what is established by the cases cited above in (1). An additional problem present here is that the agreement may not be certain in its terms. How long can B stay in the house? What part of the house can B occupy? How does *Scammell v Ouston* apply to this situation? This lack of certainty suggests that this is not a complete agreement. Is there a way for the court to infer what these terms (such as the length of B's tenure) are? See *Foley v Classique Coaches Ltd*.
3. **Agreement between B and D** D is B's girlfriend – the agreement thus occurs within a social context. In this sense, it is similar to *Coward v MIB*. Here, the House of Lords found that, in the absence of evidence to the contrary, they would be reluctant to infer that agreements to take one's friend to work in exchange for remuneration gave rise to a contract. The relationship lacked intention – neither party contemplated that they were entering into legal obligations. Note, however, Lord Cross's judgment in *Albert v MIB* – does it provide a ground for allowing that the B/D arrangement is a contract?

Quick quiz

QUESTION 1

Which of these statements was made by Denning LJ in *Merritt v Merritt* (1970) to indicate the view of the courts when deciding whether parties had an intention to create legal relations?

- a. A husband's word is his bond. Even if a man promises his wife flowers daily at the beginning of their marriage there is no reason why a wife could not sue on that promise 25 years later when all he brings her is complaints of the quality of her cleaning.
- b. Contracts should not be ... the sports of an idle hour, mere matters of pleasantries and badinage, never intended by the parties to have any serious effect whatever.
- c. It is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law [including] arrangements that are made between husband and wife.
- d. In all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asks itself would reasonable people regard this agreement as intended to be binding.
- e. Don't know.

QUESTION 2

Which of these statements best summarises the reasons why the House of Lords refused to enforce the husband's promise to his wife in *Balfour v Balfour* (1919)?

- a. The law does not interfere in the relations between family members and promises made between family members are binding, if at all, only as a matter of honour and not law.
- b. When the husband made the promise to his wife, the couple had not yet separated and the husband was not bound to pay his wife any money.
- c. When the husband promised to pay his wife an allowance he did so without any intention to create legal relations.
- d. When the husband promised to pay his wife an allowance he did so without any intention to create legal relations and his wife provided no consideration for his promise.
- e. Don't know.

QUESTION 3

In *Jones v Padavatton* (1969) Fenton Atkinson LJ found that the presumption against an intention to create legal relations in domestic agreements was not rebutted because:

- a. A promise by a parent to pay a child an allowance during the course of their studies was no more than a family arrangement not intended to give rise to legal consequences.
- b. The daughter provided no consideration to support her mother's promise to pay her an allowance during her studies.
- c. In examining the subsequent history of events between the mother and daughter, it was apparent that the parties had not exhibited an intention to create legal relations at the time the mother promised to fund the daughter's studies.

- d. While there was an intention to create legal relations when the mother's promise was made, the subsequent alterations in the 'method' by which the mother funded the daughter's studies removed this intention.
- e. Don't know.

QUESTION 4

Which of the following most accurately states the position in relation to uncertain and incomplete agreements?

- a. A court will never enforce an agreement which omits any term.
- b. Courts distinguish between executor agreements and partially executed agreements in determining whether an agreement is too uncertain to enforce.
- c. A court will never enforce an agreement which omits an essential term.
- d. Courts will not enforce an agreement unless all the terms are written.
- e. Don't know.

QUESTION 5

Which of the following is not a method by which a term, seemingly uncertain or vague, can be given certainty?

- a. That the parties agree that one of the parties resolve the issue.
- b. That the matter is resolved by legislation provision.
- c. That the agreement provides that the term be resolved by judicial decision.
- d. That the agreement provides that the resolution of a particular matter is determined by a third party to the contract.
- e. Don't know.

Answers to these questions can be found on the VLE.

Am I ready to move on?

You are ready to move on to the next chapter if, without referring to the subject module or textbook, you can answer the following questions:

1. What is meant by 'an intention to create legal relations'?
2. Why do courts require an intention to create legal relations?
3. What is the difference between domestic agreements and commercial agreements with regard to an intention to create legal relations?
4. What are the most important factors in determining whether or not an intention to create legal relations exists?
5. What is meant by 'certainty of terms'?
6. What is the difference between contracts where there is certainty of terms and those where there is not?
7. Why do courts require certainty of terms?
8. What is the concept of 'vagueness'?
9. Why must the agreement be complete?
10. In what circumstances can a court 'complete' an agreement?