Kampala International University Uganda

BACHELOR OF COMMERCE

MODULE 17

BUSINESS LAW

By

INTRODUCTION

The Business School/CODL's aim is to become a market leader in the cost-effective provision of quality business management education leading to awards of certificates, diplomas and degrees internationally recognized and professionally acceptable. Throughout its history the business school/CODL has run a series of programmes primarily focused on business and management, which has been consistently, reviewed every three to five

years to meet the contemporary needs of the market. The latest review was carried out in 2011 when the current curriculum was launched for six programmes: Business Administration, Bachelor of Commerce,

Businesses in the 21st century are experiencing profound challenges, which include the need to seek new market opportunities, develop new products that meet the changing demands of customers globally. The rapid growth of businesses and increasing transformations in the global economy has led not only to an increasing demand for specialists in the various management fields, but also to the need of a caliber of managers who are able to constantly adjust and innovate in the increasingly complex and volatile international business environment. It is upon this background that a modular system of teaching has been adopted to cope-up with the competitive environment of service delivery highly emphasizing on the concept of value for money.

The module enables a student to appreciate the concepts and examines the functions and roles of business in an organization. It presents a general overview and analysis of the main principles as a foundation for the more crystallized detailed description of policies, processes and practices, for purposes of setting ground for grooming the students in preparation for the challenging and dynamic field at the end of the course. For instance, accounting options seeks to provide answers to the need of management to maintain high and professional levels of competence in tracking, managing the inflows and outflows of resources in this volatile environment. It answers to the scientific managerial need for ensuring effective, efficient and productive use of resources and the ethical need for accountability and transparency.

The module explores various functional areas with accounting and finance, marketing and human resource management and examines in detail both conceptual and methodological tools that managers use to inform their decision making. Emphasis is placed on engaging with real life examples and applying course materials to specific familiar phenomena such as case studies. The main aims are to help students to understand the dynamics of today's business environment in the digital age.

Unit 1
Introduction To Business Law
1.1 Introduction

The word "law" is difficult to define, particularly as it is used in many different ways. It contains, however, the concepts of orderliness, universality and objectivity. It is concerned with behavior and not with causes, and either contains an element of inevitability, e.g. scientific laws, such as the laws of gravity, or of sanction, e.g. divine laws.

Some philosophers have postulated the existence of natural law by which they mean the Law of God which regulates the actions of mankind. This concept is often known as the principles of natural justice.

In the narrower concept of law, there must be a set of rules which can be applied objectively with someone to enforce them.

There have been many attempts to put these into a workable definition, some more successful than others. One of the better is that of

Salmond:

> *"Law consists of any principle which is recognized and enforced by the courts in the administration of justice ".*

Another, which is possibly superior to that of Salmond, since it has a slightly wider application, is that of

James:

> *"A body of rules for the guidance of human conduct which are imposed upon and enforced among the members of a given state"*

1.2 Classification of Laws

Salmond, after stating that law in its general sense includes any rule of action, says that it includes the following categories:

Imperative law

These are rules of action imposed on men by authority, e.g. by the state

Physical or scientific law

These are rules which formulate the uniformities of nature, e.g. the law of gravitation. You can distinguish them from man-made laws, in the sense that they merely state observations on a state of affairs that already exists.

Natural or moral law

These are rules formulating the principles of natural justice. This conception

of law is derived from Greek philosophy and Roman law, and has found more favour with Continental jurists than in English jurisprudence. It overlaps to some extent with physical or scientific law. In the English language, law and justice are two separate words, showing that we recognize them to be two separate things – a distinction that is not made in most other languages.

Conventional law

These are rules agreed upon by persons for the regulation of their conduct towards each other. Agreements entered into by, for example, the parties to a contract or members of a company (who agree to be bound by the rules of its Articles of Association) are enforceable under the law of the land. Other agreed systems of rules, e.g. the rules of a football club or the laws of chess, may not be enforceable by law.

Customary law

These are rules of action embodied in custom. We shall consider later the importance of custom in the development of the English legal system.

International law

These are rules which govern sovereign states in their relations with each other.

Civil law

This is the law of the state, as applied in the state's courts of justice. It is into this category that English law falls.

1.3 The Set of Rules

Law, then, must consist of a set of rules which are known or readily discoverable by those who must obey them. It is, of course, a maxim of English law that "ignorance of the law is no defence". However, this does not mean that each citizen is expected to know all the rules which are in force – which is clearly impossible – but that knowledge of them is available, since they are all published. The citizen, therefore, must have a

general idea of the principles upon which English law is built, e.g. rights of property, person, contract, and must be prepared to consult an expert in law for finer points, when necessary. A permitted defence of ignorance of the law would, clearly, make the administration of justice impossible.

Objectivity

"No man can read the thoughts of another" is a principle of wide application in law. Clearly, no authority can impose sanctions upon the thoughts of its subjects, although in some societies in the past this has been attempted. The law will recognise motives but only as far as they are apparent and can be imputed from the actions following them. In other words, it is with actions, and not with thoughts and feelings, that law is concerned.

Enforcement

It is essential, if law is to operate efficiently, that it should operate only within an area controlled by an effective government. This may vary for different laws, since there may be different authorities operating within the same area

Impartiality

Although it is not an essential component of law, in most civilised countries it is regarded as fundamental that the rules of law should apply to all citizens alike. This principle of impartiality is one of the principles of natural justice which has influenced law in particular.

The Rule of Law

The rule of law is an essential doctrine of the constitution. It is not a written code of rules but a general principle implicit in the common law which the courts will apply, unless some statute can be quoted modifying its application. It has three important aspects:No person can be punished except for a definite breach of the law, established in the ordinary law courts of the land.No person is above the law and everyone must bear the legal consequences of his/her own acts, i.e. there is equality before the law

Review Questions

1. The rule of law is an essential doctrine of the constitution.Discuss

Unit 2
Sources of Law

2.1 Customary Law

We have already referred to custom as a historical source of law. Customary law, which is the foundation of our common law, predominates at the beginning of all social history. Before the Norman Conquest, the various local laws were made up of rules of human conduct, established by usage, a administered in the popular courts by the freemen of the district.

Common law was long identified with customary law, even after the binding decisions of judges (precedents, or case law) had become the true bulk of English common law. Custom, in the legal sense, may be defined as:

> *those rules of human action established by usage which are adopted by the courts because they are followed by the political society as a whole or in part.*

We have seen how **Lord Mansfield** introduced into English law the *"general customs of the merchants".* Thus, the Law Merchant originated from custom and is now followed because this custom is embodied in many precedents, some of which are embodied in enacted law or statutes. In modern law, custom has been practically superseded by legislation, or statute law, which either legalises a custom or annuls it.

General Customs

There is a distinction between customs that are **general** and customs that are **particular** or **local.** The former prevail over the country as a whole and are effective as the common law. Certain requirements are necessary before a custom can become a particular source of law.

It must be reasonable – that is, it must conform to the general view of right and reason prevailing in the community. The courts are not at liberty to override a custom because it falls short of their own ideal of right and justice.

It should not be in conflict with statute law. No custom can take away the force of an Act of Parliament, which cannot be set aside by the development of a custom to the contrary.

It must be generally followed and observed as of right by the members of the community. Should members of a community consider themselves free to depart from the custom and thereby deny their obligation to accept it as binding, the custom has no legal significance.

Particular Customs

Particular customs need not be in conformity with common law, provided that they do not conflict with any other particular custom in the locality.

Mercantile customs were a form of particular custom, and have been accepted as a source of law generally. In their case, time immemorial yields to universality of usage. They are still a possible, though not frequent, source of law, and show that the Law Merchant is not dead.

You should note that any custom, general or particular, that fails to satisfy all of the essentials normally required, is not, thereby, debarred from having legal consequences. If the existence of any custom is proved as a fact, it definitely influences decisions on cases dealing with contracts or torts. Trade customs or usage need not be of antiquity. If recognised by the merchants, the courts will uphold it: ***Bechuanaland Exploration Co. v. The London Trading Bank (1898).***

2.2 Conventional Usage

Distinct from the two varieties of custom is a third type, which we may term **conventional usage.** This is not strictly "custom". A usage is an established practice, the effect of which is to incorporate, expressly or impliedly, a term in the contract between the parties concerned. There are usages particular to a special trade, or a special market. The law assumes that, in the absence of any expressed declaration to the contrary, the contracting parties intended to contract in reference to the established usages in the trade, which usages are binding as part of the contract. Therefore, the effect of any established usage is to add a binding term to the contract. Any such usage must be clearly established in the particular trade, and when once judicially recognised – by the courts – it cannot be changed by a later contradictory usage.

Advantages and Disadvantages of Custom

In comparison with statute law, custom has a number of disadvantages:

- It is not quickly made but requires time to evolve
- It is definite and therefore, more difficult to prove
- It is difficult to repeal, unless by statute
- Fresh customs are rare.

On the other hand, as a custom has evolved from a consensus of the people

following it, it is more likely to be generally acceptable, and ethically good. Generally speaking – that is, apart from the continued existence of a few purely local customs – the common law of the realm no longer consists of the common custom of the realm. Practically all the general customs have received judicial notice or parliamentary codification and they have, therefore, become either case law or statute law – see ***Magor and St. Mellons RDC v. Newport Corporation (1952) A C 189.***

2.3 Case Law

The old theory was that the common law was simply a type of customary law applicable to the whole kingdom; in fact, the term "law" was considered synonymous with the term "common custom". As we have seen, this identification was rescinded very early, as royal judges began to formulate a body of law built up on their decisions, which sometimes were, and sometimes were not, in accordance with particular or general customs. These duly recorded decisions, called **precedents,** are responsible for the bulk of English common law.

We may regard precedents as a distinguishing feature of English law, and also its real core. The term refers to those decisions of judges which are authoritative and binding. They are sometimes termed judiciary law; judicial precedents; precedents; case law; adjudication; but in all cases the term refers to the rule of conduct enshrined in the decision or judgment of a judge, or judges.
The current position is that courts are always bound by decisions of higher courts, and sometimes by those of courts of equal status.

Case law enjoys merit, in the sense that it is usually of finer workmanship than statute law, for the following reasons.

- Judges know more about the law than Members of Parliament
- When a judge is laying down new law in pronouncing his/her decision in an action, the judgment is based upon the concrete facts of the case. Parliament, on the other hand, legislates more for the future.

Advantages and Disadvantages of Case Law

We can now set out the comparative merits and defects

of case law. The **advantages** are:

- Case law is practical and concrete; this is because it is the product of a set of facts upon which a decision must be reached. It is not the result of academic theorising, but of actual everyday difficulties.
- It is more flexible than legislation. Further, because of its binding nature, people can regulate their conduct with confidence in its certainty
- It acts as the best preparation for statute law. Codifications such as the **Sale of Goods Act Cap 82** and the **Bills of Exchange Act 76** are the outcome of judicial decisions, and are models of statute law.
- Its detail is much richer than any code of law (but against this must be set its complexity).
- Unlike statute law, there is harmony between new precedents and existing law, which grow concurrently.

The disadvantages can be listed as follows:

- It is not made by the community but by the judges. However, Parliament can, and does, overrule judicial decisions, and the judges are strictly impartial and highly expert – probably more so than a body of legislators.
- As case law adds an increasing number of exceptions to unwanted rules, it is notorious for its bulk and complexity. It is a difficult form of law to handle but, as legislators now endeavour to anticipate judicial decisions, the statute law itself tends to become more bulky and involved, too.
- Case law is often criticised as being retrospective in effect or *"ex post facto".* Theoretically, of course, judicial decisions merely give effect to principles that have always existed in the body of the law. This peculiarity does not always operate fairly, for a decision may upset long-standing interests by its retrospective operation.
- Finally, it is difficult to disentangle that part of the judicial decision

which is strictly a binding source of law (the *ratio decidendi)* from "things said by the way",

2.4 Equity Law

Definition

We may define equity as

> *Those principles of natural justice administered at first by the King-in-Council, and later by the Chancellor, first as a member of that Council and afterwards as an independent judge, to correct and supplement the common law.*

It is, therefore, purely case law and its principles are essentially judicial but they were developed, you should remember, to mitigate the defects of other judiciary law.

Basis of Equity Law

The basis of the equity administered by the ecclesiastical Chancellors was conscience, and this led in some cases to principles and conclusions opposed to the rules of common law. Abstract justice could be done in individual cases, even though it meant dispensing with the law of the state. The seeds of friction between the Chancellor and the common law judges were sown and differences, in time, became acute.

Superiority of Equity

What was the weapon the Chancellor used when petitioned? If he considered the petitioner had a *"prima facie"* (straightforward) case, he issued a writ of subpoena, which was an order addressed to the defendant, requiring him to appear before the Chancellor and his Council on such a day, in his proper person, under a penalty of so much, to answer on oath what should be objected to him. When he appeared, the defendant was subjected to a searching examination on oath. The Chancellor dispensed with juries, and tried the whole case himself. The procedure was inquisitorial. If he decided in favour of the petitioner, he did not pronounce "guilty" but issued a decree ordering the defendant to perform certain acts, or to refrain from certain acts, such as insisting on his legal rights, under

penalty of imprisonment.

This procedure was much more flexible than the limited remedies afforded in the common law courts, with their highly technical system of writs, pleadings, juries to decide questions of fact, and the inflexible rule that a party to an action could not give evidence.

Thus, the Court of Equity was markedly superior in its procedure and remedies, and it is not surprising that it attracted much business with which it could not keep pace, despite the later appointment of a Master of the Rolls, and other staff, and the erection of new courts of equity. There were frequent complaints about the slow procedures and delays.

2.5 Equity and Common Law

Relationship of Equity and Common Law

The origin of the equitable system of granting injunctions can be traced to Henry VI's reign. By the time of Elizabeth I, the now popular Court of Chancery was at variance with the common law courts, and in the early 17th century a quarrel broke out between Chief Justice Coke of the Court of Common Pleas and Lord Ellesmere (the Lord Chancellor), on this subject of injunctions.

In 1616, James I supported the Chancellor, and laid down by statute that, **where the rules of common law and equity conflicted, the latter were to prevail.**

From that time, the rights of the Chancery were rarely disputed and it was a court of equal, and in some subjects, superior authority to the common law courts.

Thus, a more important stage in equity's development was begun. Previously, equity had been a set of principles, based on conscience, or Roman law, or canon law which assisted, supplemented or set aside the law in order to do justice in individual cases. Henceforth it tended to become a more settled system of rules, which supplemented the law in certain defined cases. Thus, the various rules of equity hardened into a definite body of legal doctrine, and by the 18th century the modern English system of equity was finally established.

Review Questions

1. Discuss and explain the different sources of law

Unit 3
Delegated Legislation

3.1 Introduction

Delegated legislation refers to the exercise of a legislative power, granted ultimately by Parliament, by a subordinate body such as a local authority, a public corporation, the Supreme Court

Many modern statutes confer authority upon persons and bodies to issue regulations which are legally binding and which, if disobeyed, may involve those disregarding them in some penalty. A characteristic of such delegated legislation, however, is that it is only exercised by consent of Parliament, and the powers may be repealed or withdrawn at any time.

Moreover, the exercise of delegated legislation is very strictly interpreted by the courts, which have power to declare regulations so made as *"ultra vires"* (beyond the powers granted) if they do not fall within the statute granting them.

3.2 Advantages of Delegated legislation

- Parliament does not have the time to give to minute details of legislation.
- Technical or scientific matters are often better dealt with by experts employed by the government departments than by Members of Parliament.
- Greater flexibility is provided for unseen contingencies and such legislation is of great value in an emergency, such as the outbreak of war.
- It affords an opportunity for experiment; if a Minister issues an order and it is found unsatisfactory, it can be withdrawn at once.

- ***Disadvantages***

- The executive tends to get beyond the control of the legislature.
- It intensifies the tendency towards bureaucracy.
- There is a tendency towards undue interference with the liberty of the subject.
- Delegated legislation is attacked as weakening one of the principles of the rule of law. The law-making function is removed from

Parliament, which is directly answerable to the electorate, and placed in the hands of unaccountable officials.

3.3 Control over Delegated Legislation

The volume and complexity of Statutory Instruments – there are about 2,000 Statutory Instruments made annually – raise complex issues of public awareness and democratic control. Control is exercised through two bodies – Parliament and the courts.

At the beginning of each session, Parliament appoints a joint Select Committee to scrutinise all new Instruments and report on any requiring special attention, perhaps through having retrospective effect or raising wider issues, such as compulsory helmets for motor cyclists.

Most parent Acts stipulate that Statutory Instruments made under them shall be laid before Parliament. They may further stipulate that Parliament may block the Instrument before it comes into operation by one of two procedures. **Affirmative resolution procedure** normally means that unless there is a resolution of both Houses approving the Instrument within a certain time – frequently 28 days – of it being laid before Parliament, it will not come into force. The more common practice is to proceed by way of **negative resolution procedure.** Unless a motion to annul the Instrument is passed within 40 days, the Statutory Instrument will come into force

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Review Questions

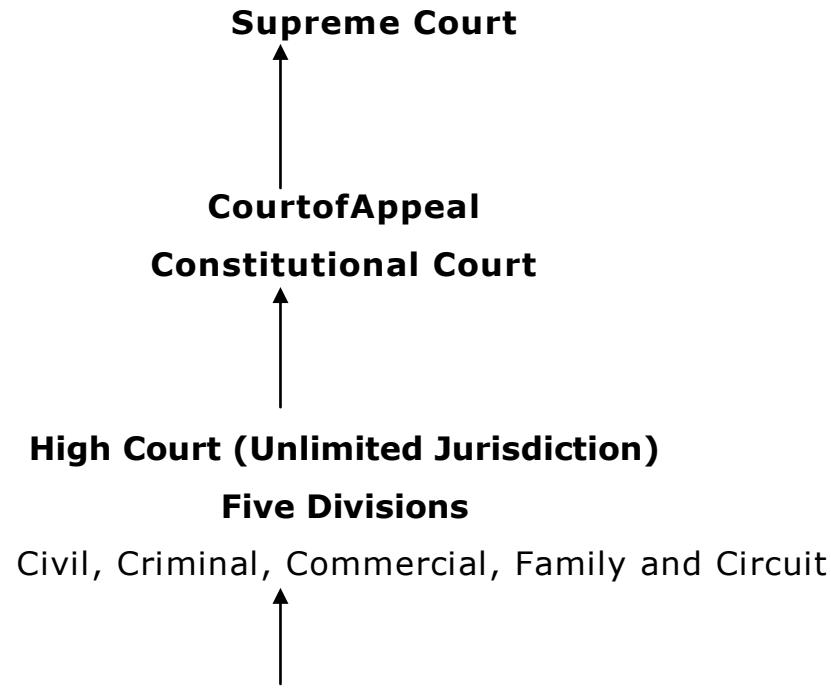
Unit 4

Enactment of Laws (The Process of Legislation) Under Principal Legislation

4.1 Courts and the Court System in Uganda

The Judiciary is an independent organ of government entrusted to administer justice through courts of judicature including the Supreme Court, the Court of Appeal, the High Court and other courts or tribunals established by Parliament. Subordinate Courts include Magistrates Courts, Local Council Courts, courts for marriage, divorce, inheritance of property and guardianship, and tribunals such as those established under the Land Act (Cap 227), Communications Act (Cap 106) and Electricity Act (Cap 145). The relationship between the different courts is illustrated in the pyramid below. In addition, Uganda also makes

Extensive use of the military courts system, which is also in some cases used to charge civilians



The functions of the Judiciary are;

- To adjudicate civil and criminal cases

- To interpret the Constitution and the laws
- To promote human rights, social justice and morality

The judiciary is established under Chapter eight of the constitution. The constitution states that judicial power is derived from the people and shall be exercised by the courts in the name of the people and in conformity with law and with the values, norms and aspirations of the people. It also sets out principles that the courts are to follow when deciding cases:

- Justice must be done to all irrespective of their social or economic status;
- Justice must not be delayed;
- Adequate compensation must be awarded to victims of wrongs;
- Reconciliation between parties should be promoted and

Substantive justice must be administered without undue regard to technicalities

4.2 Structure of the Judiciary

As shown above Uganda has a pyramidal judicial structure with the Supreme Court, the Court of Appeal and the High Court of Uganda being superior courts of record.

Supreme Court

The Supreme Court stands out at the top of the judicial pyramid as a final court of Appeal in Uganda. With one exception, it only decides cases on appeal from lower courts.Judicial Tribunals

The Supreme Court is constituted by the Chief Justice and not less than six Justices. Five Justices are sufficient to hear most cases, but when hearing appeals from decisions of the Court of Appeal, a full bench of seven justices has to be present. The decisions of the Supreme Court form precedents that all lower courts are required to follow.

Court of Appeal / Constitutional Court

The Court Appeal is a child of the 1995 Constitution. It is an interposition between the Supreme Court and the High Court and as the titles suggests has appellate jurisdiction over the High Court. It is not a Court of first instance and has no original jurisdiction, except when it hears constitutional cases. In that case it sits as a Constitutional Court, in accordance with the constitution, which requires that: *"Any question as to the interpretation of the Constitution shall be determined by the Court of Appeal sitting as the Constitutional Court."*

The Court of Appeal consist of: the Deputy Chief Justice and such number of Justices of Appeal not being less than seven as Parliament may by law prescribe.

Cases coming before the Court of Appeal may be decided by a single Justice. Any person dissatisfied with the decision of a single Justice of Appeal is, however, entitled to have the matter determined by a bench of three Justices of Appeal, which may confirm, vary or reverse the decision. Most case decided by the Court of Appeal can also be appealed to the Supreme Court, but the Court of Appeal is the final court in election petitions filed after Parliamentary elections or elections provided for by the Local Government Act. When deciding cases as a Constitutional Court it sits with a bench of five justices.

High Court

The High Court of Uganda is the third court of record in order of hierarchy and has unlimited original jurisdiction, which means that it can try any case of any value or crime of any magnitude.

Appeals from all Magistrates Courts go to the High Court. The High Court is headed by the Honourable Principal Judge who is responsible for the administration of the court and has supervisory powers over Magistrate's courts.

The High Court has five Divisions: the Civil Division, the Commercial Division, the Family Division, the Land Division and the Criminal Division. Most of the business of the High Court is conducted at its headquarters in

Kampala, but with the decentralisation of the High Court, its services are now obtained at its circuits at Fort Portal, Gulu, Jinja, Masaka, Mbale, Mbarara and Nakawa. There are plans to create more circuits in the nearby future.

Magistrates Courts

Magistrate's Courts handle the bulk of civil and criminal cases in Uganda. There are three levels of Magistrates courts: Chief Magistrates, Magistrates Grade I and Magistrates Grade II. These are subordinate courts whose decisions are subject to review by the High Court. Presently the country is divided into 26 Chief Magisterial areas administered by Chief Magistrates who have general powers of supervision over all magisterial courts within the area of their jurisdiction.

Local Council (Executive Committee) Courts

These are established under the Executive Committees (Judicial Powers) Act. They basically entertain light civil matters that arise out of daily activities in their areas of jurisdiction and matters arising out of infringement of byelaws duly made under the Local Government Act. The Executive Committee Court is duly constituted when it is sitting with not less than five members. There are three levels of the Committee courts – "sub county" (level 3), "parish" (level 2) and "village" and appeals from the highest of the Committees, (Sub County executive) lie to the Chief Magistrate and, if the appeal involves a substantial question of law or appears to have caused a substantial Miscarriage of justice, to the High

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Review Questions

1. Explain the compostion of the court system in Uganda

Unit 5
Contract Law
5.1 Introduction

What Is A Contract?

The whole essence of business life is the making of contracts – contracts to perform work; contracts to buy and sell; contracts to make something; or to employ someone; or to use something. We must, therefore, know what a contract **is,** and **when we have one.**

A contract is an **agreement** between **two or more people.** Every contract is an agreement – but not every agreement is a contract. Two people agree about something to be done. They are called "the parties". First, the subject of their agreement may be such that neither of them has the remotest intention that any legal consequences should flow from it. For example, you invite someone to dinner and she says "Yes, I would love to come". You have an agreement. However, if she just does not turn up, neither of you would expect to hurry round to court and sue for the cost of the wasted food! So, the first essential of a contract is that the parties should intend their agreement to have **legal consequences.**

In the second place, the agreement reached may have certain aspects about it which make it such that the law will not enforce it. In other words, although it is a contract, it is not a **valid** contract.

Per Treitel: *"A contract maybe defined as an agreement which is either enforced by law or recognised by law as affecting the legal rights or duties of the parties. The law of contract is, therefore, primarily concerned with three questions: Is there an agreement? Is it one which should be legally recognised or enforced? Or, in other words, what remedies are available to the injured party when a contract has been broken?"*

There are **seven** essential elements of a legally enforceable contract.

(1) Agreement – i.e. offer and acceptance

(2) Intention – to create legal relations

(3) Consideration – As a general rule the law will not enforce gratuitous promises, i.e. those, which are not supported by consideration, e.g. putting down a deposit on a car.

(4) Contractual capacity – Each party must have the power to legally bind himself contractually by the agreement – minors [people under the age of 18] and people who are either drunk (i.e. results in the contract been flawed on the grounds of undue influence) or insane have limitations placed on their power to contract.

(5) Form – The general rule is that a contract may be in any form whatsoever. Thus, most contracts are valid irrespective of whether they have been made orally, in writing or even implied by conduct, as in ***Carlill v. Carbolic Smoke Ball Co. (1893).*** Certain contracts must be in writing by virtue of an Act of Parliament, including:

- Bills of exchange (e.g. cheques) and promissory notes (e.g. bank notes)
- Regulated consumer agreements (e.g. a hire purchase agreement)
- Legal assignments of debts (i.e. the signing over of a creditor's right to payment)
- Contracts for the sale or other dispositions of land
- Certain contracts must be evidenced by writing (although the contract itself may be oral). The main example here is a contract of guarantee – such a contract cannot be enforced unless the person giving the guarantee has given some written evidence of his agreement.

(6) Legality i.e. the contract must not be illegal. An example of an illegal contract would be one for the supply of illegal drugs such as cocaine or heroin.

(7) True consent – i.e. there must be no vitiating factors such as duress or undue influence.

5.2 Classification of Contracts

There are *two* classes of contract – contracts under seal (or specialty contracts) and simple contracts.

(a) Contracts under seal

These form an overriding exception to the rule that, unless a contract is required by statute to be in writing or evidenced by it, it is equally valid

if merely oral. Contracts under seal were, originally, those of a more important nature, and the formalities required of "signing, sealing, and delivering" were designed to impress on people the solemnity of the transaction. Nowadays, these formalities have largely disappeared, but such a contract should still contain the words *"signed, sealed and delivered ",* and it is usual (but not necessary) to impress on it a red adhesive wafer in place of the seal.

Contracts under seal, usually called "deeds" – technically "specialties" – can be used for any contracts but they **must** be used for:

- Contracts where there is no "consideration" – e.g. a gift is legally enforceable only if it is given under seal
- Conveyances of land
- Leases of over three years.

(b) Simple contracts

These are all other contracts, whether in writing or parol

Contracts "Uberrimae Fidei"

Contracts *"uberrimae fidei"* (of the utmost good faith) are those in which it is essential that there is a complete and honest exchange of information of all material facts between the parties. The best examples of such contracts are those relating to insurance. Here, the insurer must be supplied with all the material facts by the insured party before he/she accepts the risk.

Other examples of such contracts are those relating to title in contracts for the sale of land (as regards title only), contracts to subscribe for shares in companies, contracts of family arrangement, and contracts made between persons who have previously entered into contracts of suretyship and partnership.

If full disclosure of the facts is not made, the other party has the right to rescind the contract, and damages may be claimed for any negligent misstatements.

The case of ***Woolcott v. Sun Alliance & London Insurance Ltd (1978)*** illustrates the principle of *uberrimae fidei* in insurance contracts.

The claimant, Mr Woolcott, who had a conviction for robbery, was in September 1972 granted an advance of £12,000 by the Bristol and West Building Society, to whom the defendant insurers had issued a block policy of fire insurance. No question was asked by the building society about Mr Woolcott's moral character.

The advance having been granted, the names of the society and claimant as mortgagee and mortgagor, respectively, were noted in separate record sheets which, as between the building society and the insurers, were declared to be incorporated in, and to form part of, the policy. A fire occurred on 16 August 1974, as a result of which the property was destroyed. The defendant insurers satisfied the building society's claim of £12,000, the amount of their interest as mortgagees, but refused to meet Mr Woolcott's claim on the ground that he had not disclosed either to the insurers or to the society material facts known to him, namely his previous convictions.

The court accepted the evidence of the underwriters called to give evidence, that the *"criminal record of an assured can affect the moral hazard which insurers have to assess".*

On the duty to disclose, the court relied strongly on the judgment of J MacKenna in ***Lambert v. Co-operative Insurance Society Ltd (1976),*** where the learned judge said:

> *"Everyone agrees that the assured is under a duty of disclosure and that the duty is the same when he is applying for a renewal as it is when he is applying for the original policy .... There are, at least in theory, four possible rules or tests Uwhich I shall state. One, the duty is to disclose such facts only as the particular assured believes to be material. Two, it is to disclose such facts as a reasonable man would believe to be material. Three, it is to disclose such facts as the particular insurer believe to be material. Four, it is to disclose such*

facts as a reasonable or prudent insurer would have treated as material."

The court **held** that the proper test in the case was the fourth test: the claimant had a duty to disclose his criminal record, and that duty was not affected by the absence of a proposal form.

Review Questions

1. Explain the seven essential elements of a legally enforceable contract

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Unit 6
The Formation of Contracts
6.1 Introduction

Offer

Offer and acceptance are the two elements of a binding agreement. To this end, the courts are concerned with the objective appearance of an agreement rather than the fact of agreement i.e. the parties to a contract are judged on what they said and did rather than on what they intended. The standard is that of the reasonable man.

As you can imagine, a number of rules have been developed to regulate and assist in the determination of whether a valid offer and/or acceptance has been made.

What is an Offer?

In the words of Treital an offer is:

> *"An expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed".*

The usual definition of an offer is a promise, capable of acceptance, to be bound on particular terms. The first consequence to note from this definition is that the promise to be accepted must not be too vague. The classic case on this point is ***Scammel v. Ouston (1941)*** where the courts refused to enforce a sale stated to be made 'on hire purchase terms', because, neither the rate of interest, nor the period of repayment, nor the number of instalments were stated.

The fundamental feature of an offer is that it expresses a definite willingness to be bound by a contract on the part of the person making the offer. The offer sets out the terms upon which the offeror is willing to enter into contractual relations with the offeree.

As soon as it has been accepted by the offeree, a legally binding contract has been entered into, and failure to perform what has been promised will result in breach of contract.

An offer may be made to a particular person or to a group of people or even the world at large following the decision in ***Carlill v. Carbolic Smoke Ball Co. (1893).*** If the offer is restricted then only the people to whom it is addressed may accept it; but if the offer is made to the public at large, it can be accepted by anyone as evidenced by ***Carlill.*** In this case the company manufactured a patent "smoke ball" which, it claimed, prevented influenza. It advertised in the press that it would pay £100 to anyone who contracted influenza after taking one of its smoke balls. Mrs Carlill read the advertisement, bought a smoke ball from the chemist, and used it as directed. However, she promptly got influenza, and she sued the company for the promised sum of £100. The company claimed that it was a "mere puff", and not meant to be taken seriously.

HELD: The promise to pay £100 was a valid offer to the world at large. Mrs Carlill had accepted by complying with the conditions, and was entitled to the money.

Pre-requisites of a valid offer

There are **five** pre-requisites of a valid offer. To be valid, an 'offer' **must be:**

(1) Clear, definite and unequivocal. The 'offer' must represent a definite and unequivocal statement of willingness to be bound in contract i.e. it must not be flawed by vitiating factors such as duress or undue influence. Moreover it cannot be vague or uncertain in its interpretation. An 'offer' to sell someone a particular car for £5,000 will be an 'offer'. But a statement that a person may sell one of his cars for about £5,000' will not constitute an 'offer' for it is uncertain and vague. It is for the parties to make their intentions clear.

Consequently, the courts will not enforce

- Vague agreements: Scammel v. Ouston (1941) or
- Incomplete agreements: Walford v. Miles (1992). In this case the courts refused to enforce an 'agreement to negotiate in good faith', 'an agreement to make an agreement' will always be void.

(2) One that the offeror intends to be bound by. There must be a clear

intention of willingness at the time the contract is made to be bound by the 'offer'. All the offeree has to do is accept the terms as laid down by the offeror and the contract will be complete. The offeror must not be merely negotiating: ***Gibson v. Manchester City Council (1979).*** In this case the Council had sent a letter to Gibson stating 'The corporation may be prepared to sell the house to you at a purchase price of £2,725.' This was held not to be an 'offer', capable of acceptance by Gibson [the letter merely constituted an 'invitation to treat' i.e. it was inviting Gibson to make an offer to buy the property from the Council.

(3) Made to a person, a group of persons or the whole world at large. An example of an offer being made to the whole world is provided by the leading contract case of ***Carlill v. Carbolic Smoke Ball Co. (1893).***

(4) Communicated by the offeror, so that the offeree may either accept or reject it i.e. a person cannot accept an offer of which he has no knowledge. In order to be valid the offer must actually reach the person to whom it was made to be capable of acceptance i.e. the offeree must know of its existence as evidenced by the case of ***R v. Clarke (1927).*** In this case the Government of Western Australia offered a free pardon to the accomplices of certain murderers if they gave evidence that would lead to their arrest and convictions. Clarke provided the information but admitted that he was not aware of the reward at the time he gave the information to the authorities. The court held that he could not claim the reward of a free pardon because he was not aware of the 'offer' at the time he gave the information.

(5) Open when it is accepted i.e. still in force. That is it must still be in force at the time when the offeree accepts it. It is important to note that when an offer has terminated it is no longer capable of acceptance by the offeree.

Until such time as **al**l of the above conditions are present the 'offer' will not be valid and as such is incapable of acceptance by the offeree.

There are many instances of "invitations to treat".

A shopkeeper (or supermarket) displaying goods marked at a certain price is inviting the public to make an offer. The price tag is merely an indication of the price that is likely to be accepted. "He does not bind himself to sell at that price, or at all": ***Timothy v. Simpson (1834); Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd (1952)***

What happens is that, in a shop or supermarket, the act of taking goods off the shelf contractually means nothing. However, putting them down in front of the shopkeeper or cashier constitutes an offer to buy (at the named price, unless otherwise stated in the offer). Ringing up the price on the till, for example, constitutes acceptance.

In **Spencer v. Harding (1870),** it was **held** that "an invitation to tender is not, normally, an offer, unless accompanied by words indicating that the highest or lowest tender will be accepted". However, in **Blackpool & Fylde Aero Club Ltd v. Blackpool Borough Council (1990)** it was **held** that an invitation to tender could

constitute an offer to consider the merits of the tender – along with any other tenders.

6.2 Termination of an Offer

An offer, once made, does not remain open for acceptance indefinitely. It can terminate for a number of reasons and once terminated, it is no longer capable of being accepted. An offer terminates in **five** different ways:

(1) By death

An offer will terminate on the death of the:

- Offeror where the offer was of a personal nature or
- Offeree: ***Reynolds v. Atherton (1921).*** In this case Warrington LJ was of the opinion that an offer ceases, by operation of law, on the death of the offeree.

The better view is, probably, that it is terminated only if the offeree is aware of the fact, unless the personality of the offeror is an essential ingredient of the matter.

(2) By the occurrence of a condition

The condition may be express or implied: ***Financings Ltd v. Stimson (1962).*** In this case the defendant, on 16 March, saw at the premises of X, a dealer, a motor car advertised for £350. He wished to obtain it on hire purchase and signed a form provided by X. The form was that of the plaintiffs, Financings Ltd, a finance company, and stated: *"This 'agreement' shall be binding on [the plaintiffs] only upon signature on behalf of the plaintiffs".* On 18 March the defendant paid the first instalment of £70 and took away the car. On 20 March dissatisfied with it, the defendant returned it to X, saying that he was ready to forfeit his £70. On 24 March the car was stolen from X's premises, but was recovered badly damaged. On 25 March, in ignorance of these facts, the plaintiff signed the 'agreement'. When the plaintiffs subsequently discovered what had happened, they sold the car for £240 and sued the defendant for breach of the hire purchase contract. The Court of Appeal gave judgement for the defendant. The so-called 'agreement' was in truth an offer by the defendant to make a contract with the plaintiff. But it was subject to the implied condition that the car remained, until the moment of acceptance, in substantially the same state as at the moment of the offer. As Donovan LJ asked in the present case: *"Who would offer to purchase a car on terms that, if it were severely damaged before the offer was accepted, he, the offeror, would pay the bill?"*

(3) By rejection

Rejection can either be outright (express or implied) or in the form of a 'counter-offer: if acceptance is not a mirror image of the offer then it will amount to a counter-offer, and will terminate the original offer: ***Hyde v. Wrench (1840).*** In this case the defendant offered to sell a farm for £1,000. The plaintiff said he would only give him £950 for it. It

was held that this constituted a counter-offer, which terminated the original offer, which was therefore no longer open for acceptance.

(4) By lapse of time

If the offer is stated to be open only for a specified time period it will expire (lapse) after this time – where there is no specific time period mentioned by the offeror the offer will lapse after a reasonable length of time. In the event of a dispute about the duration of an offer the court will determine what is reasonable – what is reasonable is a question of fact to be decided in each case on its merits. An offer may lapse and thus be incapable of being accepted because of passage of time:

If no time is stipulated, after a reasonable time: ***Ramsgate Victoria Hotel Co. v. Montefiore (1866).*** In this case an attempt to accept an offer to buy shares after 5 months failed, as the offer had clearly lapsed.

(5) **By revocation** (or cancellation)

The offeror may revoke the offer at any time prior to acceptance: ***Routledge v. Grant (1828).*** Grant offered to buy Routledge's house and gave him 6 weeks to accept the offer. However, within that period, he withdrew the offer. It was held that Grant was entitled to withdraw the offer at any time before acceptance and upon withdrawal, Routledge could no longer create a contract purporting to accept it.

It should be noted that, unless an offer specifically states that it is irrevocable, or that it will remain open for a definite stated time, it can be withdrawn at any time before it has been accepted – provided, that is, that the revocation has been communicated to the offeree: ***Byrne v. Van Tienhoven (1880).***

That is the general rule. However, difficulties can arise. For instance, if the acceptance of an offer involves the doing of some act (acceptance by conduct), can the offer be withdrawn when the act has been partially completed? According to the strict rule, the answer should be

"yes" – but, fortunately common sense has prevailed. The classic example is in ***Rogers v. Snow (1573):*** if one man offers another £100 if he will go to York, can the offer be withdrawn when the traveller is halfway there? Much judicial ink has been used to explain this but the generally accepted solution is that the acceptance is complete once the offeree has commenced the performance, but the offeror is not bound to pay until it has been completed. In ***Errington v. Errington (1952),*** a father promised his son and daughter-in-law that a house in which they lived should be theirs as soon as they had paid off the mortgage. To his knowledge, they started paying the instalments. He then purported to revoke the offer.

The Jugde had this to say:

> *"The father's promise was a unilateral contract, a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and 'unperformed'."*

6.3 Acceptance in the law of contract

Acceptance is the unconditional assent to all the terms of the offer. There are a couple of pointsto be borne in mind atthisstage

The offeror can require any form of acceptance, whether it be oral, written or inferred from the conduct of the parties e.g. in ***Carlill v. Carbolic Smoke Ball Co.(1 893)*** where Mrs Carlill was held to have accepted the company's offer by using the smoke ball in the prescribed manner.

Acceptance is not effective unless it is communicated to the offeror. ***Felthouse v. Bindley (1862).*** *In this case the* plaintiff, Paul Felthouse, wrote to his nephew, John, on 2 February, offering to buy his horse for £30 15s, and added, *"If I hear no more about him, I consider the horse mine at that price."* The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was going to sell his stock, that the horse was to be kept out of the sale. The defendant inadvertently sold the horse to a 3rd party at an

auction on 25 February and the plaintiff sued him. The court held that the plaintiff's action must fail as there had been no acceptance of his offer to buy the horse before 25 February.

Pre-requisites of a valid acceptance

There are **four** pre-requisites of a valid acceptance. It must be:

(1) Made while the offer is still in force: ***Routledge v. Grant (1828)***

(2) Made by the offeree or his authorised agent: ***Powell v. Lee (1908)***

(3) Clear, absolute and unqualified i.e. exactly match the terms of the offer: If any alteration is made or anything added, then this will be a counter offer: ***Hyde v. Wrench (1840)***

(4) Communicated to the offeror either orally, in writing or by conduct; **unless** acceptance by conduct (as in ***Carlill)*** is appropriate or the postal rule applies. The postal rule states that the communication of acceptance will be complete and effective at the point when the letter of acceptance is posted or placed into the hands of the relevant postal authorities **not** when it is received: ***Adams v. Lindsell (1818).*** It is possible for the offeror to expressly or impliedly reject 'The Postal Rule'.

In ***Adams v. Lindsell (1818),*** on 2 September, D sent a letter offering to sell P some wool, and he requested an answer by post. The letter was misdirected, and it did not reach P until 5 September. He accepted the same day. Had the offer been properly directed, an answer should have been received by 7 September – so, on 8 September, D sold the wool to someone else. P's acceptance arrived on 9 September.

HELD: The contract was formed on 5 September, when P's acceptance was posted. D was, therefore, in breach of contract.

However, the so-called "parol rule" is not absolute and, in circumstances where a contrary intention is indicated, it will be ignored.

6.4 Communication of Acceptance

The main rules regarding communication of acceptance are as follows.

(1) It must be carried out by the offeror or his authorised agent: ***Powell v. Lee (1908).***

(2) Acceptance is not effective unless and until it is communicated to the offeror: ***Entores Ltd v. Miles Far East Corporation (1955)*** following the reasoning of ***Entores*** where an acceptance message is left on an answer machine acceptance is not communicated unless and until it is heard by the offeror. Also, linking in with other modern communication methods when a person sends an e-mail to indicate their acceptance, of an offer, acceptance does not take place unless and until the e-mail concerned has been read by the recipient.

(3) An offeror may not state that silence shall amount to acceptance: ***Felthouse v. Bindley (1862).***

(4) Communication of acceptance by post is subject to the postal rule: ***Adams v. Lindsell (1818).*** The postal rule states that the communication of acceptance will be complete and effective at the point when the letter of acceptance is posted or placed into the hands of the relevant postal authorities (hence the need in such cases to sent documentation by registered post). In accordance with the postal rule, acceptance occurs when a letter is posted, not when it is received, in direct contrast to revocation of an offer. Moreover, it is irrelevant that the letter is lost in the post – this will not prevent the application of the postal rule by the courts: ***Household Fire Insurance Co v. Grant (1876).***

In ***Brogden v. Metropolitan Railway Co. (1877),*** Mr Brogden had supplied coal to the company without any formal agreement. It was then suggested that the parties should have a written contract. So, the company's agent drew up a draft which he sent to Mr Brogden with a request to fill in certain blanks. Mr Brogden duly did this, and signed and returned the draft – but after having made certain alterations. The agent put the agreement in a drawer and forgot about it. Coal was supplied on the stated terms – then a dispute arose.

HELD: The return of the draft as altered was a counter-offer. The acceptance of this counter-offer was never communicated to Mr Brogden – so *prima facie,* no contract was formed. However, acceptance could, on the facts, be inferred, as the subsequent supply of coal on the terms of the document amounted to acceptance by conduct.

If an acceptance is given verbally or by telephone, or a written document is handed to the offeror, no problem of when the acceptance is communicated can arise. However, if acceptance is made by post, what then? Is it valid when posted, or when received? There has to be a rule, and for no particular reason English law says that a postal

acceptance is complete and the contract binding, when the letter is posted or handed to the postal authorities. This means that, should the letter of acceptance be lost or delayed in the post, this does not affect the validity of the contract.

(5) Acceptance may be in the form of express words or implied by conduct: ***Carlill v. Carbolic Smoke Ball Co (1893).***

(6) Acceptance must be communicated in the precise way stipulated by the offeror unless an equally quick, efficient or reliable method is chosen e.g. via e-mail instead of facsimile. If the offeror suggests a particular form of acceptance, but does not insist upon this, then another equally effective method of acceptance will suffice: ***Manchester Diocesan Council for Education v. Commercial and Central Investments Ltd (1969).*** Conversely, if no particular method of acceptance is prescribed, the form of communication will depend on the nature of the offer and the circumstances in which it is made. If the offeree requires his offer to be accepted in a particular manner, then acceptance must accord with these requirements.

Review Questions

1. Use relevant case and examples explain and show the pre-requisites of a valid offer
2. Explain using cases the factors that leed to the termination of an offer

Unit 7

Consideration

7.1 Introduction

We have seen that "consideration" is an essential element of a valid contract in English law. In certain other jurisdictions, this is not the case; however, historically, the common law of England has always viewed a contract as a bargain. **Both sides** must give something. The only exception to this rule is in the case of contracts under seal – "specialty" contracts. These do not require to be supported by consideration in order that they may be enforced by the courts.

A number of rules have grown up in the doctrine of consideration and in practice, in commercial contracts consideration is invariably present. The subject is a favourite

Definitions

There are various types of consideration – "good", "valuable", "nominal", and "bad". In order to be valid, consideration must be both "good" and "valuable". **Valuable consideration** is where some benefit is given or some detriment suffered. It is only consideration which is valuable in the eyes of the law which is sufficient to support a valid contract – although it must also be good, in the sense that it is not forbidden, or "bad".

A definition given in ***Currie v. Misa (1875)*** was as follows:

> *"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."*

A shorter but less precise definition given by Sir Frederick Pollock, which has been approved by the House of Lords, is:

> *"The price for which the promise is bought".*

So, the essential feature is that there must be either some benefit accruing to the "promisor" (that is, the person who **makes** a promise) or some detriment accruing to the "promisee" (the person who **receives** a

promise). Usually, the benefit and the detriment are the same thing, looked at from the different viewpoints of the parties. If I buy a book from you for £1, then £1 is a benefit to you and a detriment to me. On the other hand, the book is a detriment to you (because you no longer have it) and a benefit to me.

7.2 Types of Consideration

There are **three** types of consideration.

(a) Executory consideration

This occurs where the parties exchange promises. For example, *"I promise to pay you £100 provided you promise to service my car".* The contract comes into existence from the moment the promises are exchanged, but its performance remains in the future. To this end, executory literally means *'yet to be done'.*

(b) Executed consideration

This type of consideration arises when one party to a contract has performed his side of the deal and the other party has yet to perform his or her side of the deal. For example, acceptance of a unilateral offer to the world at large as in ***Carlill v. Carbolic Smoke Ball Co. (1893).***

(c) Past consideration

Past consideration is not good consideration as demonstrated by ***Re McArdle (1951).*** In this case a number of children were entitled to a house on the death of their mother. Whilst the mother was still alive the son and his wife had lived with her, and the wife had made various improvements to the house. The children later promised that they would pay the wife £488 for the work she had done.

It was held that as the work had been completed at the time when the promise was given, it was past consideration. Consequently, the later promise to pay her £488 for the work she had done on their mother's house could not be enforced.

7.3 Principles Governing Consideration

Consideration is governed by **three** main principles:

(a) Consideration need not be adequate but must have some value.

The courts do not, in general, ask whether 'adequate value' has been given in return for the promise or whether the agreement is harsh or one-sided. This is what is meant by saying that 'consideration need not be adequate'.

In ***Chappell & Co. Ltd v. Nestlé Co. Ltd (1960),*** Nestlé manufactured chocolate. As a promotional gimmick, the company offered to sell a gramophone record to anyone who applied, for the sum of 1s 6d (7½p) **plus** three of the wrappers from its bars of chocolate. The wrappers themselves were of insignificant value and on receipt they were, in fact, thrown away by Nestlé.

HELD: The wrappers formed part of the consideration for the sale of the records.

Where the consideration, although of some value, is insignificant in relation to the transaction, it is called "nominal consideration".

In ***Pitt v. PHH Asset Management Ltd (1994),*** a property known as The Cottage was advertised for sale at £205,000. There were two persons interested in purchasing it, Mr Pitt, the claimant and a Miss Buckle. They entered into a "contract race" for the property. Mr Pitt made an offer of £200,000, subject to contract, which was refused upon receipt of an improved offer of £210,000 from Miss Buckle. The following day Mr Pitt telephoned the handling estate agent and advised him that he would seek an injunction to prevent the sale to Miss Buckle and that he was able to exchange contracts as soon as the agent wanted.

The agent referred the matter to his principal, the defendant company, who owned the property and thereafter told Mr Pitt that the sale to him at £200,000 could proceed, subject to contract and that no other offer would be considered provided contracts were exchanged within 14 days. Despite this "lock-out" agreement, the property was sold to Miss Buckle thereafter at £210,000.

HELD: The claimant, Mr Pitt, was entitled to damages for breach of the "lock-out" agreement, even though the sale was subject to contract. The agreement was a contract not to negotiate with anyone except Mr Pitt for 14 days, the consideration being the withdrawal of his threat to seek an injunction and the commitment by Mr Pitt to an exchange of contracts within 14 days to bind the sale.However, it should be noted that, although consideration need not be adequate, it must be real. It must be **capable of being quantified** and having its value estimated by the law.

Two examples of consideration, which is **not** real and therefore, not good are: z "In consideration of natural love and affection": **Bret v. J S (1600)**

A promise by a son that, if his father would release him from a debt, the son would cease to bore his father with his complaints: **White v. Bluett (1853)**

Consideration that is **impossible to give or perform** is also not good; likewise, consideration that is discretionary. If the promisee can perform his side of the bargain "if he likes", or "unless he changes his mind ", consideration is not good.

On the other hand, an undertaking by a manufacturer to sell his entire output to one buyer was **held** to be binding, notwithstanding the fact that the manufacturer did not bind himself to have any output: ***Donnell v. Bennett (1883)***

(b) Consideration must not be past

This category does not usually count as valid consideration i.e. it is insufficient to make any agreement which is based on it a legally binding contract. Normally consideration is provided either at the time of the creation of the contract or at a later date. However, in the case of past consideration the action is performed before the promise that it is supposed to be the consideration for. Such action is not sufficient to support a promise, as consideration cannot consist of any action already wholly performed before the promise was made. A party to a contract cannot use a past act as a basis for consideration. Therefore, if

one party performs an act for another and only receives a promise of payment after the act is completed, the past act would be past consideration.

The classic situation involving past consideration is illustrated by the case of ***Re McArdle (1951).*** The buyer of an article cannot sue on a guarantee given by the seller after the contract of sale has been made. The consideration for the promise of guarantee is past.

In ***Roscorla v. Thomas (1842)*** it was **held** that the seller's guarantee that the horse sold to the buyer was *"sound and free from vice"* could not be enforced against him since it had been given **after** the sale had been concluded. In other words, the guarantee did not form part of the consideration for the sale of the horse.

A similar principle applies where a person agrees to perform some service for another and **after** the work has been completed the second person agrees to pay for the service. The courts would have little hesitation in saying that since the service had been performed **before** there had been any mention of payment the consideration was past and the promise unenforceable.

(c) Consideration must be sufficient

The rule is consideration need not be adequate but it must be 'sufficient' i.e. it must have some value in the eyes of the law. It is up to the parties themselves to decide the terms of their contract as the court's will not intervene to require equality in the value exchanged, as long as the agreement concerned has been freely entered into as evidenced by the case of ***Thomas v. Thomas (1842).*** In this case the executors of a man's will promised to let his widow live in his house, in return for rent of £1 per year. It was held that £1 per year was 'sufficient consideration' to validate the contract, although it did not represent adequate rent in economic terms.

Consideration Must "Move" from the Promisee

This rule means that a person can enforce a promise only if she can show that **she herself** gave the consideration for it. However, the consideration

in the sense that it is a detriment to the promisee does not have to benefit the promisor. The detriment by itself is sufficient.

In ***Tweddle v. Atkinson (1861),*** two young people got married. Afterwards, their respective fathers entered into an agreement whereby they both would pay a sum of money to the husband, who should have the right to sue for the sums. Both fathers subsequently died. The husband then sued the executors of one of them for the sum due.

HELD: No consideration had **moved from the husband –** so, the promise to pay was, as far as he was concerned, gratuitous.

Conversely, if the consideration is a benefit to the promisor, this does not mean that the promisee need necessarily suffer a detriment. However, because of the rule that it must move from the promisee, if the benefit to the promisor was, in fact, provided by some third party, then the promisee cannot sue upon it.

Forbearance to Sue as Consideration

A promise to refrain from suing either a debtor or a third person may be sufficient consideration to support a promise of some act or thing by the debtor or the third person, as the case may be. This need not involve a waiver or a compromise of the ultimate right of action against them. A temporary forbearance may suffice.

In ***Alliance Bank v. Broom (1864),*** Broom was asked to give security for money advanced to him by the bank. He promised to assign some documents of title to goods but failed to do so. The bank sued for specific performance – i.e. an order compelling Broom to assign the securities.

HELD: The bank was entitled to the order. Although it had not promised that it would not sue for the debt, the act of **requesting security** did, in effect, give Broom the benefit of some measure of forbearance, which he would not otherwise have had. This forbearance, albeit unquantifiable in time, was sufficient consideration for the promise to assign the documents

I*s the Performance of an Existing Statutory Duty Sufficient Consideration?*

In certain circumstances only, the performance of an existing duty can be good consideration to support a further promise. In general, if a person has a legal obligation to do a certain thing, the doing of that very thing can neither be a detriment to him/her nor a benefit to a promisor. ***Collins v. Godefroy (1831)***

Is the Performance of an Existing Public Duty Sufficient Consideration?

In this situation, performance beyond that already legally required is capable of amounting to sufficient consideration: ***Harris v. Sheffield United Football Club (1987)***

Is the Performance of an Existing Contractual Duty Sufficient Consideration?

Generally speaking, no. The reason for this is that consideration cannot be present if the promisee merely performs an obligation that he/she is already bound by contract to perform.

> ***Stilk v. Myrick (1809)***
>
> Two seamen deserted from a ship. The captain was unable to replace them so he promised the remaining crew that he would share out with them the wages of the deserters, if they would work the ship back to London. However, when the ship eventually reached London, the owners refused to make the promised payment.
>
> **HELD:** That the captain's promise could not be legally enforced as the sailors had only done what they were already obliged to do by their contracts of employment.

Review Questions

Unit 8
The Intention to Create Legal Relations

8.1 Inroduction

The courts will not enforce any contract unless it is clear that the parties intended to be legally bound by their agreement. It is presumed that this is the intention in normal commercial contracts and that it is not the intention in respect of domestic and social agreements. However, each of these presumptions is rebuttable.

Commercial Agreements

In all commercial agreements, the presumption is that the parties **intend** to create legal relations.

With these agreements there is a strong presumption that the parties intend to enter into a legally binding agreement in consequence of their dealings. However, in commercial situations the presumption is so strong that it will usually take express words to the contrary to avoid its operation as demonstrated by the case of ***Frank Co v. Crompton Bros (1925)***

8.2 Domestic and Social Agreements

In all domestic & social agreements, the presumption is that the parties **do not intend** to create legal relations.

With these agreements the presumption is that the parties do not intend to create legal relations when they exchange promises. From the outset it is essential to realise that the intention **not** to create legal relations in such relationships is only a presumption and that, as with all presumptions, it may be rebutted by the actual facts and circumstances of a particular case.

Rarely, if ever, do social agreements give rise to the implication that legal consequences were intended. The winner of a golf competition had no legal right to the prize, because no one connected with the competition intended such results to flow from the entry of competitors: ***Lens v. Devonshire Club (1914).***

In the case of agreements between members of a family, some are and others are not intended to have legal consequences. There is no reason why a husband cannot contract with his wife, or a father with his son. However,

on the other hand, such pacts are frequently not meant to have this effect. It is, obviously, much easier to imply contractual intent in an agreement between two commercial organisations operating at "arm's length" than it is between immediate members of a family. As always, if the situation is not expressly stated, the court has to construe the agreement, and all the circumstances surrounding it.

In ***Balfour v. Balfour (1919),*** the wife of a man working in Ceylon had to remain in England for medical reasons. Her husband promised to pay her an allowance of £30 a month.

HELD: The agreement was not intended to have legal force (also, the wife had not provided any consideration for the promise).

Review Questions

Unit 10
Capacity to Contract
10.1 Introduction

In general, anybody over the age of 18, who, at the time, is sober and mentally unimpaired, is capable of contracting.

This also applies to corporations which can contract in exactly the same way as living persons – but, of course, they must do it through the agency of a human being. A corporation can contract under its corporate seal or by parol.

However, certain categories of person have no capacity (or only limited capacity) to contract. ***Minors***

By the **Family Law Reform Act 1969,** a minor is a person under the age of 18 years. She becomes adult at the beginning of her 18th birthday – i.e. at one minute past midnight.

There are two circumstances in which contracts with a minor may be unenforceable:

Most contracts with a minor are "voidable" at her option. That is to say, she **but not the other party,** has the right not to be bound by the contract. To be voidable, she must repudiate the contract during her minority, or within a reasonable time after reaching her majority. If not, the contract will become binding.

This category covers the majority of contracts into which a minor enters, except those mentioned below. So, it is at the minor's option whether she wishes to be bound by her contract or not.

In ***Smith v. King (1892),*** a minor became liable to a firm of brokers for £547. After he reached his majority (then 21)the firm sued, and he compromised by giving two bills of exchange for £50. One of the bills was endorsed to Mr Smith, who took it in ignorance of the circumstances.

HELD: The debt was contracted during minority and, so, it was voidable.

Some contracts are, by statute, unenforceable against a minor. For example, under the **Consumer Credit Act 1974** it is an offence to

send literature to a minor inviting him/her to borrow money or obtain goods or services on credit. An exception to this general rule exists where the money borrowed has been used for the purchase of necessaries (see below). In this case the lender can recover such part of the loan as was actually spent on necessaries.

However, contracts for "necessaries" **are** binding on a minor. Necessaries are those things a person immediately needs, such as food; drink; clothing; accommodation; medicines. Necessaries are not confined to those things which are absolutely required to keep him alive but they extend to all such things as are reasonably necessary for him in the station in life to which he belongs. They exclude luxuries, and also a surplus of necessary items (e.g. a contract to buy two shirts would, probably, be binding but one for a dozen would not be.)

In ***Nash v. Inman (1908)*** the claimant was a West End tailor and the defendant was a minor undergraduate at Trinity College, Cambridge. The claimant sued the minor for the price of various items of clothing, including eleven fancy waistcoats. It was proved that the defendant was well supplied with such clothes when the claimant delivered the clothing in question. Accordingly, the claimant's action failed because he had not established that the clothes supplied were necessaries.

Other contracts binding on a minor are those which are beneficial for him/her, such as contracts of apprenticeship or service, or education.

Mentally-disordered and Drunken Persons

Except for contracts for necessaries, contracts are not binding on such persons, unless they specifically ratify them during a lucid period (in the case of a mentally disordered person) or when sober

10.2Contract Regulation

Privity of Contract

It is a fundamental principle of law that two people cannot by a contract impose liabilities on, or bind, a third party; nor can anybody have rights or obligations imposed upon him/her by a contract, unless he/she is a party to it. This principle is called **privity of contract.** Sometimes, this rule can

cause absurdities or injustice, and in appropriate cases the law has found ways around it. However, the general principle is of great importance. Let us state it in another way. Only the **parties to a contract** can enjoy rights or acquire obligations under that contract. Again, there have been repeated suggestions that a named third party would be able to take the benefit of the contract. However, in ***Midland Silicones v. Scruttons (1962)*** a sub-contractor had to pay the full loss to the owner of goods. A limitation in both his and the main contract did not help him against someone **he** had no contract with.

The application of the rule takes two forms: ***Attempts to Confer Rights on Third Parties***

The problem usually arises when third parties attempt to sue to enforce rights they think they have acquired under a contract to which they are not a party. The law will not permit them to sue.

In ***Price v. Easton (1833),*** a man owed Price a sum of money. He agreed with Easton that he would work for him, if Easton would pay off his debt to Price. The work was duly done but Easton failed to pay Price. Consequently, Price sued Easton.

HELD: Price could not recover the money, because he was not a party to the contract for work.

At this early stage of the development of the doctrine, it could be – and, indeed, was – argued that the reason why Price could not sue was because he had provided no consideration. However, the case of ***Tweddle v. Atkinson (1861)*** established that the question of consideration was immaterial. The rule of privity of contract stood on its own two feet. In that case, as we saw earlier, the respective fathers of a husband and wife made a contract between themselves to each pay the husband a sum of money. They further agreed that the husband should have the right to sue if one of them defaulted. The father of the wife died without having paid, and the husband sued his executor. It was **held** that he could not do so. The judge said:

"It is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit".

In ***Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd (1915),*** Lord Haldane restated the rule as follows:

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it".

The leading authority in more recent years is ***Beswick v. Beswick (1968).*** A coal merchant made over his business to his nephew. As part of the deal, the nephew promised that he would pay an annuity to the uncle's widow after his death. The uncle died, and the nephew failed to pay the annuity. The widow then sued in two capacities – in the first place, in her own right and, second, as administratrix of the uncle's estate. It was **held** that she could not sue in the first capacity, as she was no party to the contract. She could, however, sue as administratrix of the estate, and get an order for specific performance of the contract.

Exceptions to and Avoidance of the
Privity Rule Collateral contracts

In an effort to avoid the privity rule causing either an absurdity or injustice, the courts will, sometimes, imply a "collateral" contract between a third party and one of the parties to the main contract. A collateral contract is one that is separate from, but substantially in respect of the same subject-matter as, the main contract.

In ***Shanklin Pier v. Detel Products Ltd (1951),*** P employed contractors to paint a pier. Detel approached P and represented to him that the company's paint would last for seven years. On the strength of this representation, P instructed the contractors to buy Detel's paint for the job. In practice, it lasted only three months.

HELD: Although the contract for the supply of paint was between the contractor and Detel, a collateral contract would be implied between Detel and P that the paint would last for seven years.

As will be apparent to you, had the privity rule been strictly applied, P would have no right of action against Detel. Also, as the contract for

painting the pier did not contain a warranty that it would last any particular time, P would have no rights against the contractor. Even if P did have such a right, Detel's misrepresentation was made to P. So, the contractor would have no rights against Detel in respect of it.

The device of implied collateral contract ensured that justice was done. A problem can, however, arise over consideration in such collateral contracts. In the Detel case, the consideration for Detel's promise that the paint would last seven years was P's instruction to the contractor to buy Detel's paint.

10.3 Mistake

The subject of "mistakes" in contracts, and how they affect the validity or otherwise of the bargain, is one of the most illogical areas of contract law. Many of the cases turn on fine distinctions. As a generalisation, if you make a mistake in entering into a contract, that is your bad luck – you must suffer the consequences. However, there are certain types of mistake which the law recognises as affecting the agreement. In some instances, common law will declare that a mistake has served to nullify the consent, and so made the contract void *"ab initio",* or as if it had never been made. In others, equity will step in to allow the contract to be rectified or rescinded, or to act as a defence to a request for an order of "specific performance" of the contract (you will remember that specific performance is a court order compelling the guilty party to execute the contract according to its terms).

At common law, there are two basic types of mistake which may serve to render the contract void: **common mistake** (where both parties have made the error) and **unilateral mistake** (where only one of them has).

C ommon Mistake

Where the mistake is shared by both parties, it may mean that there is no true agreement or *"consensus ad idem".* There is agreement of a sort but it is based on a false assumption, hence common law may declare the contract

void on the grounds that the agreement is not a true consensus.***Bell v. Lever Bros Ltd (1932).***

Couturier v. Hastie (1856), the parties contracted for a cargo of corn which was believed to be in a ship bound from Greece to England. In fact, before the date of the sale, the corn had rapidly deteriorated, and the ship had put in to Tunis and sold the cargo for what it would fetch.**HELD:** The contract was void because of mistake as to the existence of the subject matter

10.4 Viatiating Factors

Misrepresentation

A **representation** is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes inducing the contract. If a person is misled into entering a contract by an untrue statement or representation, made by the other party before or at the time of making the contract, then the party who has been deceived may have a right of redress. Such an untrue statement is called a **misrepresentation.**

Note that a person's actions or behaviour may amount to a misrepresentation. In ***Walters v. Morgan (1861)*** the court stated that *"a single word or ... a nod or a wink, or a shake of the head, or a smile"* intended to induce a person *"to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold"* will constitute misrepresentation.

Rules

There are four rules which decide whether a particular statement is a misrepresentation such as to allow of redress and, if it is, what that redress may be.

In the first place, in order to constitute a misrepresentation, the statement must be one of **fact,** either past or present. Statements of law or of opinion cannot be misrepresentations, nor can statements of intention which are not carried out. Second, the representation must **induce** the

contract. In the third place, it must be **addressed** to the party misled. Lastly, it must be **false** or **untrue.**

Let us examine these requirements in more detail. **(a) Statement of fact**

In negotiating a contract, all sorts of statements are made. Some are "mere puffs" not intended to be taken seriously. A good example of this is *"probably the best lager in the world ".*

Others are expressions of opinion.

In ***Anderson v. Pacific Fire Marine Insurance Co. Ltd (1872),*** a shipping company effecting an insurance policy wrote to the company and stated that in the ship's master's opinion a certain anchorage was good. The vessel was later lost at that anchorage.

HELD: The letter was not a representation of fact, but merely of opinion.

Expressions of intent do not constitute misrepresentations, unless they are false statements of the intentions of the party making them. If a person says "I intend to do something" and at the time of making the statement she genuinely does so intend, then even if she breaks her promise, it will not constitute a misrepresentation of fact. But if she says it, with the intention at the time of breaking the promise, then she is misrepresenting a fact, and legal consequences flow from it. The fact she has falsely stated is the state of her mind. As Lord Justice Bowen remarked in ***Edgington v. Fitzmaurice (1885)***.

(b) The statement must induce the contract

If a false statement is made to which the other party pays no attention, or which does not in any way influence him, then this does not affect the validity of the contract. The degree of inducement does not have to be total but the party deceived must, to some material extent, have been influenced by the statement into making the contract.

In ***Horsfall v. Thomas (1862),*** Horsfall manufactured a gun for Thomas, which had a defect making it worthless. Horsfall tried to conceal this by inserting a metal plug in the defective part.

Thomas never inspected the weapon and, when he used it, it blew up.

HELD: As Thomas never inspected the gun, the attempted concealment of the defect did not affect his mind and did not induce him to accept the weapon.

(c) The statement must be addressed to the party misled

Unless the untrue statement was either made to the other party or it was made to another person in the knowledge and with the intent that that person should pass it on to the other party, it does not affect the validity of the contract.

In ***Peek v. Gurney (1873),*** a company issued a false prospectus inviting applications for shares. Mr Peek purchased shares, not direct from the company but from a person to whom they had been allotted.

HELD: The prospectus was not addressed to Mr Peek; therefore, he could not repudiate the contract on grounds of misrepresentation.

(d) The statement must be untrue

This is not quite as obvious as it sounds. In English law, there is no general duty for one party to acquaint the other of all the relevant facts. Unless the contract is one of those which are *"uberrimae fidei"* (of utmost good faith) the principle of *"caveat emptor"* (let the buyer beware) applies to contracts generally – not merely to those for sale of goods. Hence, mere silence does not constitute a misrepresentation. A positive untrue statement must have been made.

In ***Keates v. Cadogan (1851),*** Lord Cadogan let a house to Keates. He knew that the house was required for immediate occupation. The house was in a ruinous condition.

HELD: There had been no false statement made, and no warranty, express or implied, that the house was fit for occupation.

Types of Misrepresentation

There are **three** different types of misrepresentation that can be made, and their effects on the contract are different. Damages can always be recovered and, in certain circumstances, the contract can also be avoided

by the innocent party. The question is partly decided by common law, and partly by virtue of the **Misrepresentation Act 1967.**

(a) **Fraudulent misrepresentation** This occurs where an untrue statement is made knowingly or without belief in its truth.
In ***Derry v. Peek (1889***

(b) Negligent misrepresentation

A false statement is made "negligently" when it is made carelessly, or without reasonable grounds for believing it to be true. As you will appreciate, the distinction between fraud and negligence can be a fine one. However, broadly speaking, a misstatement is negligent if it was merely carelessly made, but it is fraudulent if it is made with evil intent or recklessly.

(c) Innocent misrepresentation

This type of false statement is one which was made neither fraudulently nor negligently.

10.5Undue Influence

A contract is voidable at the option of the innocent party if it was entered into as a result of undue influence.

Duress

If a person is coerced into making a contract by fear for his own physical wellbeing or that of his immediate family, or for the safety of the goods, or – on rare occasions – for his economic profits, this is called "duress". The coercion may be either actual or threatened. The so-called contract is void.

(a) Duress to the person

This consists of actual or threatened violence to the person, or imprisonment. It can be either in respect of a party to the contract or in respect of her immediate family. The degree of threat necessary varies with the physical or mental state of the person threatened. In other words, the test is a **subjective** one. If the person was in a state of

(c) fear, whether reasonably so or not, then this will suffice to permit her to avoid a contract she was coerced into making as a result of the threats of or actual physical violence or imprisonment. Imprisonment, in this sense, does not necessarily mean being thrown into gaol. It also means loss of liberty, e.g. by being locked in a room.

In ***Mutual Finance Co. Ltd v. John Wetton & Sons Ltd (1937),*** a family company was induced to give a guarantee for a debt by threats to prosecute a member of the family for the forgery of a previous guarantee. At the time, the coercers knew that the father of the alleged forger was in a delicate state of health.

HELD: The guarantee would be set

(b) aside. **Duress of goods**

This is actual or threatened unlawful detention of goods. This type of duress does not, at common law, entitle a party to avoid a contract entered into as a result of the duress but, in equity, it entitles him/her to recover any money paid in order to secure the release of the goods.

In ***Maskell v. Homer (1915),*** tolls were paid on goods as a result of the threat of seizure. The tolls were unlawfully demanded.

HELD: The money could be recovered. **Economic duress**

The threat of loss of profits if a contract is not made is called "economic duress". It has only fairly recently been recognised by the law as a possible cause for avoiding a contract, and the law on economic duress is not yet fully developed.

The proposition is that if a person is induced to enter into a contract by fear of loss if he/she does not agree to the contract, this may constitute actionable duress. However, the degree of coercion must be substantial. In ***Pao On v. Lau Yiu (1979),*** the Privy Council said:

> *"There is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided the basis of such recognition is that the duress must amount to coercion of will which vitiates consent. It must be shown that the*

payment made or the contract entered into was not a voluntary act. "

This case was an unusually complicated one from Hong Kong, and it hinges on factors other than duress. However, a good example is ***North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd – "the Atlantic Baron" (1978).***

Undue Influence

Undue influence is said to exist where one person has a special relationship with another and, as a result of this relationship, that other is induced to enter into a contract to his/her disadvantage.

in the matter.

10.6 Discharge of Acontract

Discharge by Agreement

You would think that, as a contract comes into existence only by agreement, its discharge, or ending, could equally easily be effected by agreement. Up to a point, this is true but, in the same way as there are various technical rules governing the valid formation of the contract, so there are rules, some rather artificial, governing its **discharge.**

There are **four** ways in which a contract can be discharged by agreement: by "release"; by "accord and satisfaction", by "rescission" and by some provision contained in the contract itself

Discharge Bybreach

Earlier we defined the difference between "conditions" and "warranties" – a condition being a term of the contract which is fundamental, and breach of which entitles the injured party to rescind the contract. The contract is, therefore, discharged by breach. What this means is that the injured party is discharged from the necessity for further performance by reason of the breach of contract by the other.

The innocent party is not bound to rescind in the event of breach of a condition by the other; he has the **option.** He can rescind and claim damages or he can affirm the contract and carry on with his own performance. If he does affirm it, he is still able to claim damages for any loss resulting from the breach. In other words, he is electing to treat the condition breached as if it were a warranty.

In ***Poussard v. Spiers and Pond (1876)*** the plaintiff, an actress, agreed to play the leading role in an operetta to be produced by the defendants. Owing to illness she could not attend the last rehearsal or the first four performances and when she offered to take her part in the fifth performance the defendants refused. The plaintiff sued for wrongful dismissal, but the court said her participation in the first four performances **was a condition fundamental** to the contract and its breach by the plaintiff entitled the defendants to treat the contract as terminated.

If you look at the question from the other side, the person guilty of such a breach giving rise to a right of rescission brings this about in one of **three** ways: by renouncing her obligations to perform, by creating a situation whereby it is impossible for her to perform or by a complete or partial failure to perform her obligations.

Renunciation

If one of the parties, by his words or his actions, makes it plain that he has no intention of performing or continuing to perform his side of the bargain, he is said to renounce the contract.

In order to justify the innocent party then treating the contract as discharged, the renunciation must be substantially complete. A mere refusal to carry out a part is not sufficient, unless that part is an essential element of the contract. The test is: "Would a reasonable person conclude from his/her words or deeds that he/she no longer intended to be bound by the terms of the contract?"***Federal Commerce v. Molena Alpha (1979).***

Failure of Performance

In the event that one party fails to perform, whether wholly or partially, this may entitle the other to treat the contract as discharged. Whether or not he/she can depends on the extent and importance of the failure. Once again, the question is: "Did the failure to perform amount to a breach of a condition or a warranty?

DISCHARGE BY FRUSTRATION

Introduction

So far, we have talked about contracts being discharged by agreement and by breach, in other words, as a result of some act or neglect on the part of one or both parties. The last category in which a contract can be discharged arises by operation of law and not by any volition of either party. It is called "frustration".

If some event occurs which is not the fault of either party and which could not reasonably have been foreseen, which so alters the whole character of the bargain as to make it a **totally different thing** from that intended, the contract may be discharged by frustration. a fresh contract after the old one has been discharged by operation of law.

In ***Paradine v. Jane (1646),*** a man was ejected from his leased farm by an alien army and forcibly prevented from making the profits out of which the rent could be paid. His landlord sued for the rent.

HELD: He must still pay the rent.

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In ***Taylor v. Caldwell (1863),*** the parties agreed that Caldwell should hire a music hall on four specified nights for concerts. After the contract was made but before the first night, the hall was burnt down.

HELD: Caldwell was not liable to damages. A term must be implied into the contract that the parties would be excused if performance became impossible, without the fault of the contractor, through the destruction of the subject matter.

Shortly afterwards, this concept of destruction of the subject matter was extended to the frustration of the adventure.

Legal Consequences of Frustration

At common law, if a contract is frustrated, it is not thereby made void *ab initio.* All that frustration does is forthwith to release both parties from any further performance. Originally, the loss lay where it fell. For instance, in one of the "coronation cases" we referred to previously, ***Chandler v. Webster (1904),*** the deposit paid for the rooms was irrecoverable. It was only the balance of rent due that did not have to be paid.***Fibrosa Spolka Akcyjma v. Fairbairn Lawson Combe Barbour Ltd (1943).***

10.7Remedies for Breach of Contract

Damages – General

The principal remedy for breach of contract is an award of damages. Hence, an appreciation of the nature and purposes of damages is important.

The essential point is that damages are **compensation** to the injured party for the loss she has suffered as a result of the other party's breach of contract, the object being to place her in the same position as she would have been in had the contract been properly performed. Damages are not a punishment, nor are they a means of intimidating a party into properly performing by fear of a penalty.

In ***Malik and Others v. Bank of Credit and Commerce International SA (1995),*** the claimants had held senior positions as employees of the defendant bank at its various branches. They were made redundant when the bank was forced into liquidation following discovery of large-scale fraud at director level within the bank and were unable to secure work within the financial services industry. They accordingly sought compensation for breach of an implied term within their contracts of employment that their employers would so conduct their business that no stigma would become attached to its employees.

HELD: The claimants' claim related to harm done to their existing reputations and could not succeed.

The court stated, "... *damages are not recoverable in contract for damage to or loss of an existing reputation"* because such damage or loss is not attributable to a failure to provide consideration for an aspect of the employment contract. ***Withers v. General Theatre Corp. Ltd (1993).***

A duty to mitigate or minimise the loss is often presumed by the courts, although the burden of proving that the claimant has not done so is placed on the defendant. The emphasis, however, is on what is **"reasonable"** in the circumstances. If, for example, a claimant in reasonably attempting to mitigate her loss actually makes it worse, she will not be penalised for her actions. She will be able to recover her actual loss even though she herself has increased it.

In ***Abrahams v. Performing Rights Society (1995),*** the claimant was employed on a five-year contract, under which he was entitled to two years' notice of termination of employment, or an equivalent payment in lieu of notice if his employment was terminated at the end of the five-year period.

HELD: The provisions of the old contract, relating to notice and payment in lieu, applied to the two year contract of employment. As the defendant had elected to terminate the contract before the end of the two year period, it was bound to pay the claimant the amount due in lieu of notice for the remainder of that period. The claimant had a contractual entitlement to this payment and there was no duty on him to mitigate his losses by seeking employment elsewhere for the remainder of the period.

Specific Performance and Injunction

These two orders are equitable remedies which can be sought if damages would not provide an adequate remedy. "Specific performance" is an order by the court compelling one party to perform the contract in accordance with its terms. It is a **positive** remedy. An injunction is **negative.** It commands a party not to commit a threatened breach of contract.

In ***Jaggard v. Sawyer (1995*** it was **HELD:** An injunction is an equitable remedy granted in the discretion of the court and if the claimant delays instituting proceedings until it is too late, an injunction will be refused. This was the case here, because the construction of the new house had reached

an advanced stage before the applicant took steps to lodge proceedings for an injunction. Her only remedy was in damages for the failure by the defendant to secure release of the covenants to enable the owner of the new house to use the private estate road for access purposes.

Review Questions

1. Cisting relevant cases discuss and explain the factors affecting the validity of acontract

Unit 11
The Law of Sale Of Goods

11.1 Introduction

The law relating to sale of goods is principally governed by the **Sale of Goods Act (SOGA), Cap 82.**

The general principles that relate to contracts e.g. offer, acceptance, consideration, etc. apply to a contract of sale of goods and the parties are free to agree on the terms which will govern their relationship. The SOGA however lays down certain terms intended to protect a party to the contract as well as rules of general application where the parties fail to provide for contingencies which may interrupt the smooth performance of a contract of sale e.g. destruction of things sold before delivery.

Definition and Nature of a Contract of Sale of Goods

S.2, SOGA defines a ***"contract of sale of goods"*** as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.

From the definition, the following are the essential characteristics of a contract of sale of goods;

1. ***Parties;*** There must be two distinct parties to a contract of sale of goods, that is, a buyer and a seller.
2. ***Transfer of property;*** In this context, "property" means ownership. A mere transfer of possession of the goods will not suffice; the seller must either transfer or agree to transfer the property in the goods to the buyer in order to constitute a contract of sale of goods.
3. ***Goods;*** The subject matter of the contract must be "goods"

which are defined under **S.1 (h)** to include all chatters personal other than things in action and money, and all em blem ents, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. ***"Chattels" –*** movable property

"Emblements" - cultivated growing crops which are produced annually.

"Things in action" - actionable claims e.g. a bill of exchange; these, together with money are excluded from the definition of goods.

4. ***The price;*** Consideration for a contract of sale of goods must be money and its called the price
5. ***Involves either "a sale or an agreement to sell";*** Where the property in the goods is immediately transferred from the seller to the buyer at the time of making the contract, the contract is a sale. E.g. a sale over a counter in a shop. Its an executed contract.

On the other hand, where the transfer of property in goods is to take place at a future time or subject to a condition to be fulfilled thereafter, then the contract is **"an agreement to sell."** Its an executory contract. An agreement to sell becomes a sale when the time lapses or upon fulfillment of the condition subject to which the property in the goods was to be transferred **(See S.2 (4).**

6. ***No formalities to be observed;*** There are no formalities

prescribed under the SOGA to be fulfilled, in order for a valid contract of sale to be concluded. The contract may be oral or written or both or it may be implied from the circumstances.

The following are the consequences which flow from a sale and an agreement to sell;

(a) ***Transfer of property (ownership);*** In a "sale", property in the goods passes to the buyer at the time of making the contract, with the result that the seller ceases to be the owner of the goods while the buyer becomes the owner thereof and the buyer acquires a *"jus in rem"* i.e. a right to enjoy the goods against the whole world. Whereas in "an agreement to sell", the property in the goods is not transferred to the buyer at the time of the contract, with the result that the parties acquire only a *"jus in personam"* i.e. a right to either the buyer or the seller against the other for any default in fulfilling his part of the agreement.

Passing of Risk of Loss; The general rule is that unless otherwise agreed, the risk of loss prima facie passes with property; i.e. goods remain at the seller¶s risk until the property therein is transferred, whereupon the goods are held at the buyer¶s risk. Thus, in case of a "sale, if the goods are destroyed, the loss falls on the buyer, even though he may never have taken possession of them. On the other hand, in the case of "an agreement to sale", the loss will be borne by the seller even though the goods are in possession of the buyer.

Effect/Consequences of Breach; In case of a "sale", if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller cansue for the price, even though the goods are

still in his (sellers) possession. Whereas in the case of "an agreement to sell", if the buyer fails to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the buyers possession.

Right of Resale; In case of a "sale", the property passes to the buyer and as such, the seller in possession of the goods after sale cannot resell them. If he does so, the subsequent buyer who has knowledge of the previous sale does not acquire a title to the goods and the original buyer can sue as ow ner of the goods and recover them from the third person/subsequent buyer. The original buyer can also sue the seller for breach of contract or in tort for conversion. H ow ever, the right to recover the goods from the third person is lost if the subsequent buyer had bought the goods bonafide [in good faith] and without notice of the previous sale. **See S.25.**

In "an agreement to sell", the property in the goods remains w i th the seller w i th the result that the seller can dispose of the goods as he wishes and the original buyer can only sue the seller for breach of contract. Under the circumstances, the subsequent buyer acquires a good title to the goods, (irrespective) whether or not he had knowledge of the previous sale.

Insolvency of buyer before payment for the goods; In case of a sale, "the seller" will be required to deliver up the goods to the official receiver, whereas in the case of "an agreement to sell", the seller may refuse to deliver the goods to the official receiver unless they have been paid for.

Insolvency of seller before delivering the goods but after the buyer has already paid the price; I n case of a "sale", the

buyer would, in the circumstances, be entitled to recover the goods from the official receiver since the property in the goods rests with him. However, in case of "an agreement to sell", the buyer would only be able to claim as a creditor but he cannot claim the goods because property in them still rests with the seller.

11.2 A Sale Contract Distinguished From Other Types of Contracts

(a) Contract of Bailment:

This is a transaction whereby goods are delivered by one party, known as the bailor to another, known as the bailee for some purpose on terms that require the bailee to hold the goods and ultimately redeliver them to the bailor in accordance with the given instructions.

In a bailment, as distinguished from a sale, the property in the goods is not intended to pass upon delivery of the goods. Accordingly, the bailee has no right whatsoever to deal with the goods as though he were the owner thereof.

(b) Distinction with a hire-purchase contract;

Although a contract of hire purchase is similar to a contract of sale, and indeed the object of a hire purchase contract is to sell goods, the two are capable of being distinguished. Under a hire purchase agreement, the goods are delivered to the hire purchaser for his use at the time of the agreement but the owner of the goods agrees to transfer the property in the goods to the hire purchaser

only when a certain fixed number of installments of the price are paid by the hirer. Thus, in a hire purchase agreement, there is no agreement to buy but there is a bailment of the goods coupled with an option to purchase them which option may or may not be exercised. The following are the main points of distinction between a sale and a hire purchase;

1. Whereas in a sale property in the goods is transferred to the buyer at the time of the contract, under a hire purchase transaction the property in the goods only passes to the hire purchaser upon payment of the last installment.
2. In a sale, the position of a buyer is that of owner of the goods while under hire purchase the position of the hire purchaser is that of a bailee until payment of the last installments.
3. The buyer under a sale cannot terminate the contract and he is bound to pay the price of the goods whereas the hirer under hire purchase may, if he so wishes, terminate the contract by returning the goods to the owner without any liability to pay the remaining installments.
4. The seller, under a sale, takes the risk of any loss resulting from insolvency of the buyer. In the case of hire purchase however, the owner takes no such risk because if the hirer fails to pay an installment, the owner has the right to take back the goods.
5. In the case of a sale, the buyer can pass a good title where he sells to a bonafide purchaser but in a hire-purchase, the hirer cannot sell and where he sells, he

cannot pass any title even to a bonafide purchaser.

Contract of Sale and Barter:

Whereas under a sale contract the consideration must be money, barter involves consensual exchange of goods for goods between two parties. Barter does not involve any money.

In ***Aldridge V Johnstone*** (1957) 7 E & B 855; there was a contract which involved exchange of 52 bullocks with 100 quarters of barley and the difference in value was to be paid out in money. This transaction was held to be a contract of sale.

In determining whether the transaction is a barter exchange or a sale, courts will norm ally consider whether the money constitutes the substantial part of the consideration. Court may also look at the intention of the parties.

Contract of Sale and Supply of Services:

Contracts for supply of services involve use of skill and labour. The major distinction between the two lies in their legal effects; if the contract is a sale of goods, the implied duties under the SOGA are incorporated in the contract and these are duties of strict liability whereby the seller is made responsible for defects in the goods, even in the absence of negligence. On the other hand, if the contract is for the supply of services, then in so far as the services supplied are concerned, the suppliers duties are generally those of due care only i.e. services must be carried out with reasonable care and skill.

In ***Perlmutter V Beth David Hospital*** (1955)123, N.E 2d.792; The plaintiff obtained a blood transfusion from the defendant hospital. U nfortunately, the blood was contaminated with a jaundice virus which defect according to expert evidence was not detectable by any scientific test at the time. The plaintiff suffered injury and he was a private paying patient who was charged a separate amount for the blood supplied. The plaintiff claimed that the blood had therefore been sold to him and that the defendant was liable for the defects in the blood which now constituted goods. It¶s held that the transaction was one of services only and that the supply of the blood was merely incidental to the said supply of services

11.3 Terms of A Contract Of Sale Of Goods

Conditions and warranties:

A sale of goods contract contains several terms regarding the description and quality of goods, the price and mode of payment, the time and place of delivery etc. However these terms differ in terms of importance. Accordingly, terms are divided into conditions and warranties.

A **condition** is a stipulation which is essential to the main purpose of the contract, the breach of which gives the aggrieved party a right to repudiate the contract. In addition, the aggrieved party may maintain an action for damages for loss suffered due to non-performance of the other party¶s obligation.

A **warranty** on the other is a stipulation which is collateral to the main purpose of the contract and breach of which gives the

aggrieved party a right to sue for damages only, and not to repudiate the contract.

Note that there are no hard and fast rules in determining whether a stipulation is a condition or a warranty. In fact **S.12 (2)** provides that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract.

Also **note** that a buyer has a right to waive a condition or to treat a breach of condition as breach of warranty under **S.12 (1)** as a result of which the buyer loses his right to rescind the contract.

Express and Implied Terms;

Terms of a contract may either be express or implied; *Express terms* are those which are inserted in the contract at the will of the parties, while *implied terms* are those presumed to exist in a contract by operation of law even though they have not been provided for/stipulated by the parties in the contract. However, implied terms may be negatived or varied by express agreement or by course of dealing between the parties or by usage of trade - **S.54, SOGA.**

11.4 Implied Conditions

Note: Implied terms are generally duties imposed upon the seller by law; the law incorporates/implies the following conditions into every contract of sale of goods:

1. C**ondition as to title;** In every contract of sale of goods, the seller implies that in case of a sale, the seller has the right to sell the goods, and that in the case of an agreement to sell, the seller will have a right to sell the goods at the time when the property is to pass - **S.14 (a).** A seller will have a right to sell if he/she is the owner of the goods or the agent of the owner. So if the seller¶s title turns out to be defective, the buyer is entitled to reject the goods and recover the price. In ***Rowland V Divall (1923)2K.B 500 CA*** the buyer of a car discovered that the car had been stolen before it had come into the seller¶s possession. Consequently, the vehicle was returned to the original owner. The buyer sued on the implied condition as to title seeking to recover the full price which he had paid for the car, irrespective of the fact that he had used it for 4 months. It was ***held*** that there was a breach of the implied condition under S.14. The seller had no title and the buyer who had paid to become the full owner of the car had therefore received nothing from him. That theres a complete failure of consideration and the full purchase price was recoverable and the fact that the buyer had enjoyed the use of the car for 4 months was not a benefit conferred by the seller under the contract.

2. Condition in a sale by description; W here there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description - **S.14.** The description may be in terms of the quality, quantity, packaging, model, manufacturer, etc. ***Lord Blackburn in Bowes V Shand (1877)2 A.C 455*** had this to say;

"If you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is diferent in any respect, it is not the article bargained for and the other party is not bound to take it."

It should be noted that the fact that the buyer has examined the goods will not affect his right to reject them, if the deviation of the goods from the description is such as which could not have been discovered by casual examination. In ***Beale V Tailor (1967)1 W.L.R 1193,*** the defendant advertised his car for sale as a "Herald, convertible, 1961" and the plaintiff bought the car after examination. He later discovered that the car was in fact made of two parts which had been welded together, only one of which was from a 1961 model. The issue was whether the buyer who had fully examined the car had bought by description or whether he had bought a specific thing. It was ***held*** that the sale was by description and the words ***"1961 Herald"*** formed part of the contractual description. The seller was accordingly bound to sell goods fitting the description.

3. Condition in a sale by sample;

A contract of sale is said to be a sale by sample where there is a term in the contract, express or implied to that effect. In the case of contract of sale by sample, that is; where goods are to be supplied according to a sample agreed upon. Section 6 provides that the following conditions are implied;

- that the bulk shall correspond with the sample in quality;
- that the buyer shall have a reasonable opportunity of

comparing the bulk with the sample;

- that the goods must be free from any defect rendering them unmarchantable, which would not be apparent on reasonable examination of the sample, i.e., if the defect is apparent, that is if it is easily discoverable by the exercise of ordinary care and the buyer takes delivery after inspection, there is no breach of implied condition and the buyer has no remedy.

In ***Jaferali Abdul V Jan Mohammed 18 ACA 21;*** there was sale of 22 cases of plates by auction. The auctioneer raised up a plate and said "this is a sample" and that the intending purchasers could inspect the goods in the auction room. It was later discovered that many of the plates were broken and the issue was whether this was a sale by sample. It was ***held*** that this was a sale by sample and that in the circumstances; the seller did not accord the buyer a reasonable opportunity to examine the goods which amounted to a violation of the provisions of the Act.

In Drummond & Sons V Van Ingen (188 7)AIC 284, so m e m ix ed w o rsted coatings were sold by sample. The goods when supplied corresponded to the sample but it was found that owing to a latent defect in the cloth, coats made out of it would not stand ordinary wear and were therefore unsaleable. The same defect existed in the sample also but could not be defected on reasonable examination. It was ***held*** that the buyer was entitled to reject the cloth.

4. **Condition where a sale is by both sample and**

description; S.4 provides that if goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond with both the sample and the description. In ***Nichol V Godts (1854) 10 EX 191,*** the plaintiff agreed to sell so m e oil described as "foreign refined rape oil ", warranted only eq u al to sam pl e. The oil supplied, though corresponded with the sample, was adulterated with hemp oil. It was held that since the oil supplied was not in accordance with the description, the buyer was entitled to reject the same.

5. **Condition as to fitness for purpose; By** virtue of **S.15 (a),** an implied condition

is deemed to exist on the part of the seller, that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them, provided the following conditions are fulfilled;

(i) the buyer should have expressly or impliedly made known to the seller the particular purpose for which the goods are required;

(ii) the buyer should rely on the seller¶s skill and judgment;

(iii) the goods sold must be of a description in which the seller deals, in the ordinary course of his business, whether he is the manufacture or not.

If the goods to be supplied can be used for several purposes, the buyer must expressly make known to the seller the specific purpose for which he needs the goods. In ***Re Andrew Yule & Co. (1932) A.I.R. 879,*** a buyer ordered for Hessian cloth which is generally used for packing purposes, without specifying the purpose for which he wanted it. The cloth was supplied but the

buyer found it unsuitable for packing food products because it had an unusual smell. It was held that the buyer had no right to reject the cloth since it was generally suitable for packing purposes. The buyer ought to have disclosed his particular purpose to the seller in order to make him liable for the breach of implied condition as to fitness.

However, where goods are fit for one particular purpose, only or if the purpose of the goods is by implication, ascertainable from the nature of the goods, then the purpose need not be expressly told to the seller who is deemed to know the purpose by implication. In ***Priest V Last (1838)4 M&W.399,*** a draper who had no special knowledge of hot water bottles went to a shop of a chemist and asked for a hot water bottle. He was shown an American rubber bottle which he bought. The bottle, though meant for hot water could not stand boiling water. Accordingly, the bottle burst after a few days while it was being used by the buyer's wife and she got injured. It was found that the bottle was not fit for use as a hot water bottle. It was ***held*** that since the bottle could be used only for one particular purpose, there was a breach of implied condition as to fitness and the seller was liable to pay damages

It should **further** be **note**d that the implied condition as to fitness applies only in case of sale of goods to a normal buyer. If the buyer is suffering from an abnormality such as an allergy, he must make such abnormality known to the seller, otherwise the seller will be discharged. He won¶t be liable for any injury suffered. I n **Griffith Y Peter Conway Ltd ……..,** The plaintiff contracted

dermatitis from wearing a tweed coat which she had bought from the defendant. The ***issue*** was whether the plaintiff had made her purpose clear to the seller so as to be able to sue or reject the goods for not conforming to the purpose. It was ***held*** that since she had sensitive skin and the coat was not known to cause that disease among the normal skin users, she had failed to make known to the seller the purpose for which the coat was required in the relevant sense.

Sale Under Patent or trade name; the proviso to **S.15(a)** is to the effect that in case of a contract for sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose. This is so because under such circumstances, the buyer does not rely on the seller´s skill and judgment but relies on the good reputation which the goods have acquired and buys on the strength of that reputation. The seller´s duty therefore is limited to supplying the goods of the same trade name as demanded by the buyer. There is no implied condition as to fitness for any particular purpose.

However, the condition as to fitness will still apply if the buyer relies on the seller´s skill and judgment as regards suitability of the goods for a particular purpose made known to the seller, even though the goods are described by their trade name.

6. Condition as to merchantability - S.15 (b)

S.15(b) provides that there is an implied condition that goods shall be of merchantable quality. The seller may only be in breach of this condition where the following requirements are fulfilled;

- the goods must be bought by description
- the seller should be a dealer in goods of that description, whether he be the manufacturer or not; and
- the buyer must not have any opportunity of examining the goods or the goods should have some latent defect which is not apparent on reasonable examination of the goods.

The term ***"merchantable quality"*** is not defined in the text. However, ***Manning J in Doola Singh & Sons V The Uganda Foundry & Machinery Works 12 EACA*** 33 said;

"The phrase "merchantable quality" must in its context be used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably, would, after full examination, accept it under the circumstances of the case in performance of his ofer to buy that article".

The facts of the case are that the defendant had sold a saw bench to the plaintiffs, which seized after it had been installed and it had worked for 5 minutes. This was because the seller had carelessly assembled it and had used wrong components. ***Manning J.*** had this to say;

"This is a case of a seller who deals in goods of this particular description and there is an implied condition that the goods supplied by him shall be of merchantable quality. The proviso to the sub-section clearly does not apply as prior to delivery there

was no opportunity for such examination by the appellant of the parts as would have revealed defects therein…. This is not a case of a saw- bench being no saw-bench at all but a case in which the material parts of the machine are not of merchantable quality."

Illustration for talent defect; *Grant V Australian Knitting Mills Ltd (1936) A.C. 85;* under wears which were supplied contained excessive sulphide chemical which could cause skin disease to a person wearing them next to the skin. It was held that because of such defect, the under wears were not of merchantable quality and the buyer was entitled to reject them.

Implied Warranties:

1. Warrant of quiet possession;

S.13 (b) provides that in a contract of sale, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. Where such quiet possession is disturbed in any way by a person having a superior right than that of the seller, the buyer would be entitled to claim dam ages from the seller. However, note that this warrant may be regarded as an extension of the implied condition to title, since disturbance of quiet possession is likely to arise only where the seller¶s title to goods is defective.

2. Warranty of freedom from encumbrances;

S.13(c) further provides that in a contract of sale, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. If the buyer discovers afterwards that the goods are subject to a charge which he/she has to discharge, there would be breach of an implied warranty and the buyer would be entitled to damages. E.g. where goods sold had been previously pledged and then sold off before satisfaction of the pledge amount or where the goods are sold subject to a lien which was not known to the buyer. E.g. a car from a garage whose repair expenses are not yet paid

Note: All the above implied terms are duties imposed by law upon the seller and in addition to the above, the seller also has the following duties;

(a) Duty to deliver the goods;

S.27 imposes a duty on the seller to deliver the goods.

S.1 (d) defines "delivery" to mean voluntary transfer of possession from one person to another. Delivery may take any of the following forms;

(i) Physical transfer of the actual goods;

(ii) Handing over to the buyer the means of control over the goods, e.g. where car keys or keys to a warehouse where the goods are kept are handed over to the buyer.

(iii) Delivery by attornment e.g. where the seller gives the buyer a delivery order or warrant for goods stored in

a warehouse. Note that the person in charge of the warehouse must accept the order or warrant.

(iv) Delivery of documents of title to buyer e.g. the Bill of Lading, or warehouse certificate. In ***Biddle Bros Ltd V E. Clemens (1911) 1 K.B 934,*** the House of Lords stated that delivery of a bill of lading operates as a symbolic delivery of goods.

(v)

(vi) Where the goods at the time of sale are in possession of a third party and such third party acknowledges to the buyer that he holds the goods on his behalf.

Delivery to the buyer¶s agent or to the carrier. **S.33(2)** provides that where the seller is authorized or required to send the goods to the buyer, delivery of the goods to the carrier for purposes of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer. The seller is required, under S.33(2) to make a contract with a carrier on behalf of the buyer as may be reasonable, having regarding to the nature of the goods and the circumstances of the case

In ***Galbraith & Grant Ltd V Block (1922) 2 K.B. 255;*** there was delivery of wine to the defendant¶s premises as requested. The wine was signed for by a person at the premises and it was ***held*** that if the goods were received by a respectable person who had access to the premises then there was effective delivery and therefore the loss fell on the buyer.

In ***Badische V Basle Chemicals Works (1893)AC 2004;*** the buyer requested that the goods be sent through the poster and it

was held that the contract of sale was completed by delivery to the post office.

Note: S.29 (1) provides that whether it is for the buyer to take possession of goods or for the seller to send them is a question depending on the construction of the contract. The section further provides that the place of delivery is the sellers¶ place of business or his residence. However, where the contract is for sale of specific goods [i.e. ***goods which are identified and agreed upon at the time the contract is made],*** which to the knowledge of the parties, when the contract is made, are in some other place, then that place is the place of delivery.

The **relevance of delivery** is provided for under ***S.29*** which provides that payment and delivery are prima facie concurrent conditions i.e. the seller must be willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Time of delivery; *S.11* provides that whether a stipulation as to time is of the essence depends on the terms of the contract. In ***Hartley V Hyman (1920) 3K.B. 475 Lord Maccardic*** stated that in ordinary commercial contracts of sale of goods, the rule

clearly is that time is prima facie of the essence with respect to delivery and therefore if time for delivery is fixed by the contract, failure to deliver at that time will amount to a breach of condition, entitling the buyer to exercise his right to reject the goods.

S.29 (2) provides that where the seller is bound to send the goods to the buyer but no time for sending them is fixed, the seller is bound to send within a reasonable time, while **S.29(4)** provides that delivery is ineffectual unless made at a reasonable hour.

What is a reasonable hour depends on the circumstances of the case.

(b) **Duty to deliver the right quantity;** The seller has a duty to deliver goods of the right quantity.

S.30(1) provides that where the seller delivers to the buyer a quantity of goods less than what he contracted to sell, the buyer may reject them but if the buyer accepts the goods, he must pay for them at the contract rate.

S.30(2) provides that where the seller delivers a quantity larger than that contracted for, the buyer may reject the excess or he may reject the whole. Where the buyer accepts the whole of the goods delivered, he must pay for them at the contract rate.

Further, **S.30(3)** gives the buyer an option to reject the goods where they are delivered, mixed with goods of a different description not included in the contract, although the buyer may accept goods conforming to the contract and reject the rest.

11.6 Duties of the Buyer

The primary duties of the buyer are to take delivery of the goods when tendered and to pay the price in accordance with the terms of the contract. ***S.37*** provides that when the seller is ready and willing to deliver the goods and requests the buyer to take delivery of the goods, and the buyer does not, within a reasonable time after such request, take delivery of the goods, from the dependants an automatic slot-machine for cigarettes. The plaintiff signed the agreement to pay in installments without reading it and it contained an exemption clause excluding liability for breach of warranty or condition, in regrettably small print. The machine proved faulty and the plaintiff purported to terminate the contract for breach of condition. It was ***held*** that she could not do so as she was bound by the exemption clause which had effectively excluded all liability on the part of the seller.

he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. However, the seller would still have a right to take action against the buyer where refusal or neglect to take delivery amounts to a repudiation of the contract. In **Demby Hamilton & Co. Ltd V. Barden (1949) 1 ALLER 435** B contracted to purchase 30 tones of apple juice from S. S made juice out of the apples, amounting to 30 tones and kept it in casks, ready for delivery. Upon delivery of a few casks, B refused to take further deliveries. The juice became putrid and had to be disposed off. It was held that although property in the goods was still with S, the loss had to be born by B.***S.9*** provides that the price may be fixed by the contract, or may be left to be fixed in a manner thereby agreed or it may be determined by the

course of dealing between the parties. Where the price is not determined in accordance with the foregoing provisions, then the buyer must pay a reasonable price and what is reasonable depends on the circumstances of a particular case.

11.7 Exclusion of Seller's Liability

The law imposes liability on a seller where the seller does not comply with any of the implied terms. However, **S.4** provides that where any right, duty or liability would arise under a contract of sale, by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties or by usage if such usage is such as would bind both parties. This provision is the basis for incorporation of exclusion clauses under contracts, whose effect is to negate terms that would normally be implied in favour of the buyers. The section promotes freedom of contact with the effect that when parties have agreed on terms of a contsract, the Courts should let those terms stand. **L'Estrange V Grautob (1934) 2 K.B 688**

Review Questions

1. Discuss and Eplain the express and implied conditions under the Sale of Goods Act
2. Using relevant case, distinguish between asale of goods contract from other business contracts

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