LAW 233

LAW OF CONTRACT 1

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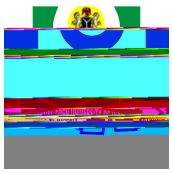

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MODULE 1 NATURE OF CONTRACT AND FORMATION OF CONTRACT

Unit 1 Nature of contract
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UNIT 1 NATURE OF CONTRACT

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1.0 INTRODUCTION

You may not be able to arrive at any universally acceptable definition of law, but you can describe it to an acceptable standard. Also, you have already learned that 'law', however we may define it, is an inescapable factor in our lives and we are obliged to conform to whatever 'rules' our particular society has imposed upon us. The law of contract is an integral part of those rules and the Nigerian Legal System, pervasive and to a greater or lesser degree, 'omnipresent'. It is, literally, everywhere in our lives. The relationship we enjoy with our employers; your status with NOUN as a learner on this course; the holiday you have booked with your travel agent; trips on the business venture you have formed with your colleagues; the clothes you frequently drop off at the laundry – these and a myriad of other examples all typify an underlying contractual element that much of the time we take for granted. Common buying and selling, any article whatever in the market, shop or roadside or boarding buses or taxi-cabs have contractual elements.

How then, in general terms, can we gain a more enlightened view of this aspect of the law that represents such an important aspect of our lives? How can we understand better the laws of contract that are particularly

applicable to the commercial world in which we function? And now, in particular, can we acquire the requisite knowledge and skills needed to handle the Activities, Assignments and the Final Examination?

This course is designed to provide as much as possible, a comprehensive study of the contract as you are studying for accreditation in a legal capacity. Hence, you need to acquire a reasonable knowledge of some of the key principles of Contract Law, Consequently, you will be expected to demonstrate skill in recognizing and implementing a preliminary analysis of a given legal problem and offer suitable advisory or drafting skill in the self Assessment Exercises.

We have attempted to cover selected areas of the law we consider particularly important to the Law of Contract in general. Furthermore, we have on occasion taken one aspect of the law (such as promissory estoppel, exclusion clauses and misrepresentation) and spent time in demonstrating the position at Common Law and Statute.

In your study you may encounter a balance of 'practical elements' (the 'rules' to which we will sometimes reservedly refer) and a more 'global' examination of how the law is developing on a broader scale. In this latter regard, we hope to impart to you an appreciation of how the law develops, together with the underlying impetus – practical, equitable or otherwise – that brings about these changes.

The objects of the material are threefold:

- To enhance your knowledge of key aspects of law of Contract
- To outline a resource base of information about legal development past and present.
- To provide you with practice in legal reasoning, by way of Self Assessment Exercises and Tutor-marked Assignments. By working through the exercises, you will acquire the skills needed to score high marks in the Assignments and the Final Examination.

In unit 2, you will learn to appreciate that the law only recognizes and enforces agreements which, upon their formation, exhibit certain essential characteristics – the building blocks' of a contract. In addition to the underlying presumptions that contracts have (for example, those which are not contracts at all, but merely social agreements), you will study the principles surrounding their formation: intention, offer and acceptance, consideration, capacity and illegality. These are factors which are fundamental to the formation of a contract.

You will then examine how failure to comply with the rules governing the formation of a contract will render it potentially ineffective to a greater or lesser degree. You will learn the distinction between void, voidable and unenforceable contracts and the impact that trade usage, business efficacy and previous business dealing may have in the relationship between the parties. You will study clauses related to restraint of trade in relation to employment, the sale of a business, and agreements to fix prices.

The terms of a contract, which are inherent in all contractual dealings, are also studied, both implied and express. You will encounter the difficulties related to conditions and warranties and the respective remedies to which a party may be entitled in the event of a breach.

As an example of an express term in a contract, you will study exclusion, or exemption clauses, in which a party attempts to limit its liability in the event of a breach of its obligations. Underlying these various concepts and principles, you will begin to appreciate that the law of Nigeria is an often subtle mix of common law and equitable considerations, as modified by statutory enactments.

However, before you commence reading, we would like to make a few comments regarding the content of Self Assessment Exercises, Tutor Marked Assignments and the Final Examination. In all the questions you are asked to cover, you will be given both 'single issue' problems, and problems where there may be two or more issues. Sometimes, we will identify the issues for you; more often than not, you will have to spot them for yourself. If you fail to spot the issue or issues, then clearly you are facing a serious problem in arriving at an appropriate answer.

2.0 OBJECTIVES

When you have studied this course, you should be able to:

- Outline the underlying presumptions of contract as distinct from social agreements.
- Outline the elements, which constitute a contract: intention, offer and acceptance, consideration and promissory estoppel, capacity and illegality, and public policy.
- Describe privity of contract and its relationship to agency law.
- Explain the distinction between contracts which are void, voidable and unenforceable.
- Describe restrictive covenants and their relevance to employment, sales of business and agreements to fix prices.

- Examine further the terms of a contract – implied and express – and their relevance to conditions, warranties and innominate terms.
- Explain the significance of exclusion or exemption clauses at Common Law and by Statute.

CHARACTERISTICS OF A CONTRACT

We will examine the following:

- How do we identify a contract and confirm that one exists?
- How does the contract, if indeed it exists, operate and protect the parties?
- How do we enforce the contract if something goes wrong?

Consider these aspects very carefully as they offer an appropriate 'shorthand' route to the underlying aspects of what represents a vast area of the contract law. As we have already noted in the Overview to this Unit, contract law is the foundation upon which Commercial Law rests.

Although this may seem a case of putting the cart before the horse, pay particular attention to the third point that has been made. How do we enforce the contract if something goes wrong; or alternatively, what 'remedies' are available to the injured party if indeed something has 'gone wrong' and the other participants in this contracting process refuse to cooperate? This rule is crucial to the Law of Contract and it is analogous to when you are feeling ill and seek medical help. In the latter case, you hope your family doctor will be able to prescribe a 'remedy' and make you feel better. In other words, when you consult your lawyer, you hope he or she, depending on the merits of your case, will be able to obtain a suitable remedy.

To complete this analogy in contract law, the parties have recourse to the legal process if one is in default. We will study this concept in more detail. In the meantime, bear in mind that ideally, parties to a contract want nothing more than a successful conclusion to whatever it is they have agreed upon as the particular subject matter. In short, both hope that the contract will be 'performed'. Neither wants something to 'go wrong' and have to resort to our adversarial process of litigation in the courts. Unfortunately, although most contracts are successfully concluded, we live in a world that is far from perfect and parties to a given contract do not always behave themselves. And sometimes, as you will see, an innocent party in a breached contract may emerge in worse shape than the defaulting party, a concept known as unjust enrichment.

When there is a contractual dispute, as you will see from the cases you read, the parties are obliged to seek help in the courts, in which case someone will win – and someone will lose. The parties to a dispute may often settle differences by settlement out of court; in which case the matter will not be 'reported' and we will be denied the opportunity to extricate a point of law that might help us in our studies.

Remedies therefore constitute a not always pleasant culmination of a dispute between individuals, between corporations and between individuals and corporations and sometimes between individual or corporation and the State. Keep this in mind as you proceed with consideration of our first 'rule' of contract: does one exist?

3.0 MAIN CONTENT

3.1 Is There A Contract?

Before we examine what is commonly referred to as the 'elements' of a contract, there are underlying presumptions upon which this analysis is based and which you will encounter in this and other units:

- There are countless 'agreements' which are part of our daily lives (to take a holiday, or to meet for dinner at 7.00 pm Friday) but these are largely 'social' and do not constitute a legal obligation which is enforceable in law.
- A contract in the legal sense is a form of agreement which a particular State will recognize as legally binding.
- In our Common Law System, we subscribe to the concept of 'freedom of contract'; that is, parties to an agreement are completely free to lay down their respective rights and obligations, provided of course they comply with existing laws or other 'rules' which the particular society has prescribed.
- There is a presumption, not always considered by the courts, that consumers (and we are all 'consumers') possess an unequal bargaining position in their dealing with the world of commerce. (How much bargaining power do you have with your bank when you apply for a loan?)
- There is a presumption that in commercial agreements, say between the XYZ Bank Plc and the Nigerian Government, that the parties occupy equal bargaining power and as such they intend to be bound in law by whatever it is they have agreed upon. In other words, they have entered into a legally binding contract.

Keep these concepts in the back of your mind as you work your way through the course and the various cases to which you will be referred.

3.2 What Constitutes A Contract?

By now, you should understand that legally binding contracts provide the basis for commercial transactions as well as performing a significant role in various 'private arrangements between individuals: buying and selling a flat or purchasing a new car or a tube of toothpaste.

Remember you are about to study the "rules" about: what constitutes a contract? Consider the word 'rule' carefully, as there really are no 'rules' to the Law of Contract in Common Law or any other aspect of the law. There are concepts and principles certainly, and if there are rules, they are frequently refined by exceptions. But they are not rules in a finite, empirical sense. In the previous section we referred to the concept of 'freedom of contract'" the inherent right which individuals may apply to the contracting process. Is freedom of contract a rule? Certainly no if, among other things, we consider unequal bargaining power as a factor, to name only one.

3.3 Speciality and Simple Contracts

In reality, the common law stipulates that very few contracts need some formal, rigid requirement. For example, 'speciality' contracts must be entered into by a deed evidenced by the parties signing under seal. And as these tend to be rare, you can virtually ignore them for the purposes of this course. Therefore you will realize that the vast majority of contracts require no formality: they can be oral, or in writing, which is why perhaps lawyers tend to say, 'Get it in writing!'. This concepts is rendered even more difficult when you encounter cases in which the decision in court turned not on what was said between the parties, or what was written down, but by their conduct.

3.4 The 'Building Blocks' Of a Contract

With the comments noted above, let us turn to the 'building blocks' of a contract. As we have encountered before, in trying to define 'law' and pinpoint the sources in Nigeria the preferred approach is not to seek a concrete, definitive conclusion but to take an overview, encompassing all of the points made, plus certain prescribed elements which we will now outline.

This is the prelude to our analysis of just what constitutes a contract; that is, an agreement made between parties who truly intend to be legally bound in their relationship.

The ‘constituent’ elements of a contract vary from writer to writer. Do not be disturbed by this apparent inconsistency. Writers have broken down the building blocks of a contract into seven parts:

- Intention to create legal relations;
- Offer and acceptance;
- Consideration;
- Privity of contract;
- Capacity;
- Legality; and
- Genuine consent of the parties.

Some writers have replaced privity of contract and legality with:

- The requirement of written formalities in some cases; and
- The contract must not be contrary to public policy.

And some legal texts are more economical and place emphasis on three prime concepts:

- The need for an agreement between the parties;
- Intention; and
- Consideration.

We point out these apparent anomalies not in an effort to confuse, but rather to emphasis the vast area which our law embraces and the different perspectives from which it is perceived. We will study all these aspects of the contracting process as we work our way through this course.

3.5 Freedom of Contract

Before starting our analysis of the elements, which constitute a contract, let us examine a phrase you have already encountered: “freedom of contract”.

An eminent judge, Sir George Jessel MR., expressed ‘freedom of contract’ in this way:

If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice.

One may ask how valid this is today in the hurly barley of Nigeria's commercial environment.

It can now be argued that this lofty and entirely commendable ideal has been gradually eroded over the years in the face of the onslaught of an increasingly commercial, complex world. Freedom of contract is workable only if the parties to a potential contract have equal bargaining power; failing that, the concept, is indeed a myth. We have already mentioned the bargaining power an average individual has – or lacks – when negotiating a line of credit with a large bank. Later, we study some cases in which the inherent power of a major financial institution is abused to the detriment of the individual.

At appropriate time in the course, references are made to anactments, which have incorporated into them both common law and statutory provisions which imply certain terms designed to protect the individual: The sale of Goods Act and The Companies and Allied Matters Act, 1990 to name two. Later we will study in more details this important concept of terms which are frequently 'implied' at Common Law, as well as those which have been expressly incorporated into the statute.

SELF ASSESSMENT EXERCISE

i) Distinguish between 'agreement' and 'contract'.
ii) Outline four 'constituent elements' of a contract.

You are now ready to examine the first of the essential contractual elements by which we can assess whether or not a legally binding agreement exists, as distinct from an agreement where the parties are not legally bound to each other.

4.0 CONCLUSION

We have had an introduction into the law of Contract and have discussed in a nutshell, the elements that constitute a contract. You also identified two classes – specialty and simple contract as well as the notion of freedom of contract in the hurly barley of Nigeria's commercial environment today.

5.0 SUMMARY

In this unit you have been offered a bird-eye view of what contract law is all about. You can now define and describe the term "Contract". With what you have learnt about contract, you are able to identify a contract when you meet with any.

You have studied the building blocks of a contract: intention, offer and acceptance, consideration, capacity and illegality.

You have learned to balance all these concepts within the common law foundation that we have, as parties to a contract, freedom of contract. Consider whether or not this is a myth in today's sophisticated business world where the parties all too often have unequal bargaining power, a concept you will examine in more detail later.

Finally, you studied the terms of a contract and the importance of remedies which might be available to an injured party when a term has been breached: has it become a condition of the contract as distinct from a warranty? This critical area of contract law – remedies – will also be taken up in details in the subsequent units. Finally in this unit, you studied exclusion or exemption clauses and the way in which parties to a contract can exclude their potential liability for negligence or faulty performance of their obligations. As with many other areas of the law, you have seen how the underlying principles are a blend of common law and equitable approaches, coupled with statutory intervention, as in this case of the Companies and Allied Matters Act 1990.

Let us now move on to the Law of Contract: vitiating factors, discharge and remedies.

6.0 TUTOR MARKED ASSIGNMENT

"If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justices" per Sir Goerge Jessel, MR: Discuss

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UNIT 2 FORMATION OF CONTRACT

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1.0 INTRODUCTION

You have already established that the parties to a contract must intend that they should be legally bound. There must be a minimum of two parties to this arrangement as the foundation of the law is that a person cannot contract with him-or herself. *Henderson V. Ashwood* (1894). Although most contracts have two parties, this is not necessarily so. For example, in a guarantee or indemnity, there are three parties: the lender, the debtor and the guarantor or indemnifier. Most of the cases you will study will have two parties who are in conflict and have approached the court in search of an appropriate remedy.

2.0 OBJECTIVES

When you have read this unit, you should be able to:

- Identify offer and acceptance
- State when offer is accepted,

- State when offer terminates

3.0 MAIN CONTENT

3.1 Social Arrangements and Business Agreements

Although you have gathered that it is often difficult to formulate 'rules' in your study of law in general and the law of contract in particular, we are from time to time in a position, where we can make an unqualified assertion which is not subject to some exception. In examining the tricky concept of intention, the courts have established that agreements fall into two distinct categories:

- 'Social' or domestic arrangements or agreements, usually made between friends or family members (a father's promise to take his son to a concert); and
- business or commercial agreements which totally exclude those agreements which are 'social' or 'domestic' in nature. An example is the Nigerian Government's agreement with ABC organization to build a cultural centre in FCT, Abuja.

We must point out that both these statements represent what we call a 'presumption', a word you will frequently encounter in your legal studies. In other words, it is 'presumed' (or assumed) that social agreements are not intended to create legally binding obligations. Agreements between two business executives or two corporations are so presumed to have that intention of being legally binding. However, in both examples, the intention or the lack of it can be 'rebutted' or disproved so that the end result is quite the opposite.

An example of a social contract is pounded in the case of **Balfour V Balfour** (1919). In that case a husband on leaving England for Ceylon agreed to give his wife in England, some £30 per month but defaulted. The wife shed unsuccessfully because such agreement has sonal in nature and not legally enforceable. Also see **Rose & Frank Co. V. Crompton Bros Ltd** and **Appleson V. Littlewood Ltd.** *In Wu Chiu Kuen V. Chu Shui ching (1991)* the Plaintiff successfully secured in court his right to a 50% share in the winnings he had accumulated with the Defendant. There was no agreement between both parties to split their winnings and there was no such contract. But the Defendant had made a 'gratuitous' promise without consideration to Plaintiff that he would share his winnings. Consideration' is a critical element of a contract, but the judge found difficulty in establishing one between parties. Luckily for the Plaintiff, and rightly so, the judge ruled that there was between them an intention to create legal relations and thus split the winnings if $100,000.00. In *Simpking V Pays (1955)*, the three parties – the Plaintiff, Defendant and Defendants grand daughter had a

social/domestic arrangement for their joint participation in a Sunday newspaper fashion competition. The defendant and grand daughter required to hand over to the Plaintiff's one-third of the winnings. The court awarded him fair share.

Note also that the common law principle allows a party to walk away from a transaction, which is "SUBJECT TO CONTRACT". These three words mean there is no contract until one has validly entered into a contract.

3.2 Offer and Acceptance

An offer is a promise to do or refrain from doing some specific thing in the future – willingness to enter into a contract on specified terms made in a way that would lead a reasonable person to understand that an acceptance, will result in a binding contract.

3.2.1 Offer or Invitation to Treat?

The formation of an agreement is usually the result of an offer being made by one party (the offeror) to another party, (the offeree). An unconditional acceptance by the latter is needed if a contract is to be formed. A clear-cut example of this process is when the offeror tenders money at the check-out counter of a supermarket in exchange for certain goods he/she wishes to purchase. This raises consideration of the distinction between an offer and an invitation to treat (that is, an invitation to make an offer). Read the following cases carefully as you will find that this distinction is not always clear.

The case of the *Pharmaceutical Society of Great Britain V. Boots Cash Chemist (Southern) Ltd (1953)* confirmed the principle that goods on supermarket shelves are not an offer by the shopkeeper but an invitation to treat. The transaction is complete not when the goods are placed in the customer's basket but when the money is presented at the checkout and is accepted by the cashier. Based on this principle, elementary as it may seem, a storekeeper is under no legal obligation to sell his goods to you (admittedly a poor business practice!).

Newspaper advertisements are similarly invitations to treat and not offers. The famous *Carlill V. Carbolic smoke Ball Company (1893)* appears to contradict this as it was argued for the Defendant that the advertisement they published in the press was an invitation to treat. The court disagreed, stating that the advertisement was to the whole world and moreover, Mrs. Carlill followed the usage instructions and as such she had accepted and performed the contract.

With respect to the specific nature of offer and acceptance, we can outline the following points to aid you in your studies:

Although an offer may be made to only one individual, it can also be made to a group of people or literally to the world at large: the Smokeball case.

Generally speaking, an offer can only be accepted by the person to whom it was made viz a specific offer to a specific person. This concept can lead to a series of complicated case dealing with mistaken identity, an area which we have insufficient space to examine. Mistake takes up an inordinate amount of space in average text books or course, but not in real life.

An offer must be certain and concise in its terms and communicated to the offeree. Uncertainty in this regard will not lead to the formation of a contract. Reference to a contract for sale 'on hire-purchase terms' was not clear enough to be clearly accepted as there are no established 'hire-purchase' terms: *Scammel (G) and Nephew Ltd V. Ouston. (1941).*

A precise offer will not create a contract unless the offeree knows such an offer exists. Acceptance cannot exist in the abstract.

The offer and the acceptance must correspond and be on 'all fours' with one another; if not, there can be no consenus *ad idem* (of the same mind; an agreement as to the same thing). *In Raffles V. Wichelhaus, (1864)* the shipping arrangements made between the parties did not comply with this requirement. A void contract (that is, no contract) resulted when it was discovered that two ships named 'Peerless' left Bombay on the same day (amazing but true!); the offeror intended one, the offeree the other. No consensus, no contract, held the court.

An offer is interpreted according to an **objective** intention of parties – i.e. the intention of the reasonable person in the position of the offeree: *controversial Estates V. Merchant Investors Assurance Co. (1983)*

In *Storer V Manchester City Cornal (1974)*. Defendants decided to sell houses to sitting tenants, and Plaintiff entered into agreement with the defendants. Defendant subsequently declined to sell and Plaintiff sued. The appellate court found that Defendants had sent the Plaintiff a communication that they intended would be binding upon his acceptance. All the Plaintiff need to do to bind himself was to sign the document and return. Held: there was a binding contract.

In *Gibson v. Manchester City Council (1979)* the facts are essentially the same except that the defendant sent to the Plaintiff a document asking

him to make a formal invitation to buy. The Defendant also stated that they "may be prepared to sell" the house him. Plaintiff signed the document and returned it but Defendant denied there was any offer. The house of Lords held that the words "may be prepared to sell" are fatal.

Another difference is that in Storers case there was agreement as to price. In Gibson's car, there was not.

3.2.2 Termination of an Offer

- the lapse of time;
- the offeror revoking the offer;
- the offeree rejecting the offer;
- the death of either the offeror or the offeree.

Some offers are left 'open' for a specific period of time, in which case it will terminate on a certain date. If there is no time limit stated, then the offer remains open for a 'reasonable period', 'reasonable' being based on the circumstances and subject matter of the contract. Some offers are 'irrevocable' for a certain time period, during which the offeror cannot withdraw the offer until that date. However, in these circumstances, for the offeror's offer to be irrevocable, some consideration (a concept we will later examine) will be paid by the offeree for the privilege of 'tying the offeror's hands so that the offer cannot be withdrawn or offered to someone else. This type of offer is usually referred to as an option. Having read the various cases so far outlined you should be able to analyse the following general principles:

- parties may change their minds, and withdraw from negotiation before contract has been formed: *Oxford V. Davies 1862 and Routledge V Grant (1828)*
- Revocation of an offer by the offeror, subject to the following material in this unit, may be revoked at any time before acceptance by the offeree and it must be communicated to the offeree: *Byrne V. Van Tienhoven (1880).*
- Personal communication by the offeror to the offeree is not necessary, unlike the need for communication of acceptance by the offeree to the offeror. In other words, revocation can be communicated by a third person provided the offeree is aware of it: *Dickenson V Dodds (1876).*
- A 'counter-offer' by either party changes the respective rights of the parties quite differently.
- If a condition in an offer is not fulfilled the offer remains unaccepted F*inancings Ltd V. Stimson (1962)*

3.2.3 Negotiation or a Request for Further Information?

If an offeree responds to the offeror with an 'acceptance' that is not precisely within the ambit of the offer, then that response clearly cannot be an acceptance. In this case, the offeror can change the terms yet again but not in conformity with the offeree's proposal or can simply walk away and reject the counter-offer. For example: A offers to sell B his Toyota Calmtry Car for N550,000.00. B says, 'The price is acceptable. Deliver it to my flat next Wednesday.' Here, by introducing a new term (delivery), B has not accepted A's offer and has made a counter-offer.

Both parties in what is a classic negotiation or counter-offer situation can technically have this 'triple' option as offers and counter-offers flow between them: - accept the amended proposal, - amend the amended proposal, or - simply walk away. -And once a counter-offer is 'on the table', if it is rejected, neither is legally bound to accept an offer: there can be no 'back-tracking' unless of course the parties agree.

Whether a party is 'negotiating' or merely requesting further clarification of the offeror's offer can precipitate immense difficulties in the perception that the parties have of each offer's conduct and if the matter goes to court, it may well prove a costly exercise for one of them.

Acceptance of an offer is just that: 'acceptance' is a final, unqualified expression of an intention to be legally bound by the terms of the offer. This apparently clear-cut statement of the law is not as clear-cut as it might appear. For example, how do you differentiate between whether a statement made by the offeree is a counter-offer, or a 'request for further information' (that is, clarification of precisely just what it is the offeror is offering), or is indeed an expression of this legal scenario: Please read the following three cases: *Hyde V Wrench, (1840) Stevenson V Mclean (1880),* and *Northland Airland Limited V Dennis Ferranti Meters limited (1970).*

In *Hyde V. Wrench*, there was a clear counter-offer rejecting the offeror's offer; in *Stevenson V. Mclean*, the courts held that the plaintiff's telegram was a request for information and the offer remained 'open' thereby binding the Defendants' and in *Northland airland Limited V. Denis Perrant, Meters Limited,* the Court of Appeal held that that the second Northland telegram was a counter-offer and not an acceptance.

If the actions and intentions of the parties are difficult to analyse, as illustrated in these three cases, then further confusion can arise when we consider a general principle of law that a person is bound by what he/she

signs even if he/she does not bother to read it. This concept is compounded by the inherent differences in interpretation of language adopted. Thus, a plaintiff may not be entitled to have by order dispute heard in the courts, but by arbitration of parties had earlier so agreed between them.

3.2.4 Communication of Acceptance and the Postal Rule

Communication of an acceptance to the offeror is needed: if the telephone lines go dead on an acceptance call, then there is no contract: *Entores V Miles Far East Company***.** (1955) Communication of an acceptance is subject to several provisos:

1) The performance of some act may eliminate the need for communication; for example, reporting to the Nigeria Police that you have found Musas' dog for which he has advertised a reward.
2) The 'postal rule' is still with us: communication of your acceptance to the offeror is not necessary as the acceptance is effective at the time the letter is dropped in the post box. In a vast country like Nigeria, where the post is extremely slow, this may be a risky way to conduct business; but nonetheless, it remains 'good law'. The rule however does not apply to revocation: the posted revocation notice would have to be communicated to the offeree. This means that an acceptance might 'beat' a revocation even if the revocation was posted (but not delivered) before his/her acceptance was dropped in the box. This rule does not apply to faxes, which must be placed in the hands of the recipient. The parties can further avoid the implications of postal acceptance by stipulating the manner in which all their communication can be made.

SELF ASSESSMENT EXERCISE

i) Musa, an antiques dealer in Wuse, Abuja, displays a Portrait of Queen Amina in his window, markedN20,000. Jennifer walks in places N20,000 on the counter and asks for the portrait. Musa says, "sorry, Display purposes only, Not for sale". Advise Jennifer.

   Would your advice be different if musa were running his shop on a self-service basis and Jennifer placed the vase at the cash register and tendered her N20,000?

ii) Adamu examines an expensive European car in a Allen Avenue showroom and asks Billy, the salesman, to hold it for 24 hours while he dicusses the purchase with his wife. The next morning,

after he has obtained her approval, he leaves for the showroom. In a traffic jam in Ikeja area, he sees his friend Dare driving the car he was going to buy. Dare says he bought the car the evening before. Adamu rushes to the showroom where Billy confirms the sale. Can Adamu successfully sue him and /or the showroom owner?

4.0 CONCLUSION

In this unit, you learnt about offer and acceptance. Your attention was drawn to situation and cases that will enable you to decide whether: a particular statement is offer or invitation to treat, or whether a communication is a counter offer or an inquiry. You also learnt about the Postal Rule and exceptions to it. You can now thrill yourself with the implication of telephone calls and E-mail communication for contract formation. Well done. Now we have to move on to consider a very fundamental concept of consideration. Let's go.

5.0 SUMMARY

We must now move away from the complexities of offer and acceptance as it is now time to analyse another fundamental essential element of the contracting process: consideration. Before them. Note the following additional information.

To say there is a contract means that the parties have voluntarily assumed liabilities with regard to each other. Communications which lack requisite intention are not offers, examples.

- statement of intention: *Harris V. Nickerson* (1873)
- statement which supplies information: *Harvey V facy (1893)*
- Invitation to treat: Pharmaceutical society V Boots (1953); Fisher V Bell (1961), Thornton V shoe Lane parking (1971)
- Advert: *Partridge v Crittenden* (1968) see contrary view in *Carlill V carbolic smoke Ball Co (1893)*
- Request for tenders: Harvela Investments Ltd. Royal trust Co of Canada Ltd (1985)
- Auctioneers request for bids: Warlow V Itamson (1859), Barry V Daries (2000)

You remember that we said that an offer must be communicated if it has to be effective. Similarly, if there must be a contract, there must be an acceptance of offer. Acceptance may be words or by conduct. *Brogdan V Metropolitan Bailway Co* (1871), *Hyde V. Wrench (1840) Stevenson*, *Sacquen & Co v Mclean* (1880) *Butter Machine Tool V Ex-cell-o* (1979)

Note also that there are exception to the rule that acceptance must be communicated examples:

1) Where offer waves the requirement of communication: *Carlill V Carbolic Smoke Ball co and Falthouse V Bindley*
2) The postal acceptance Rule: *Adams V Lindsell* (1818), *Householeld Fire Insurance V Grant* (1879). The postal rule is displaced when offeror does not intend that it will apply: *Holwell Securities V. Hughes (1974).* The Courts are relunctant to extend the postal rule: *Entores V Miles Far East Corp* (1955) and *Brinkibon Ltd V Stahas Stah I (1982)*

6.0 TUTOR MARKED ASSIGNMENT

1. State the rules relating to offer and acceptance which apply to contract made by post.

2. Consideration may be executory or executed, but it must not be past.

   Explain this statement with reference to decided cases.

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 CONSIDERATION

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1.0 INTRODUCTION

A Contract is a bargain and except it is under seal, it must contain *element of quid quo pro* (meaning something in return for something else) this element of bargain is a valuable consideration and the principle factor that guides the court in deciding whether there is mutuality of exchange, which is legally enforceable. Consideration gives to a bargain the "badge of enforceability (Mc Kendrich). It is therefore a concept of utmost importance in the study of law of contract.

2.0 OBJECTIVES

When you shall have read this unit, you should be able to:

- Define the term "Consideration"
- Demonstrate a good knowledge of the element of the concept and significance of consideration
- State the types/classes of consideration
- Distinguish past consideration

3.0 MAIN CONTENT

3.1 Definition

The basis of the common law of contract, is **bargain**, and a person who wishes to enforce a given contract must show that he or she has given

consideration. In other words, to enforce a broken promise made by B to A, A must show that he or she has paid some price for that broken promise. This is the essence of consideration.

Consideration, has been defined as follows:

a valuable consideration in the sense of the Law may consist either in 'Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other': *Currie V. Misa (1875)*

In practical terms, a unilateral or 'one-way' promise ('I promise to pay you N500,000 on your next birthday') is not binding on the promisor unless that promise has been given some form of consideration. Consideration may be either:

a) Positive: e.g. Promise to give, to pay, to do….., or
b) Negative: to e.g. promise not to do something one is entitled to do; to suffer a forbearance or loss.

An act or forbearance of one party or the promise thereof is the price for which the promise of the other is bought and the promise thus given for value is enforceable: *Dunlop Pneumatic Tyre Co ltd V. Selfrdge & Co ltd.*

For the purposes of illustrating this important concept, we will ignore the fact that certain promises made under a deed – and signed, sealed and delivered – do not require consideration in the strict *Currie V Misa.*

The principle stated above is relatively easy to understand but its practical application, based on past cases on the subject, can raise difficulties. Sometimes a court will enforce a promise unsupported by consideration, which the promisee has relied on and has acted on to his/ her detriment. (See promissory estoppel, later). That said, the common law principle surrounding the doctrine of consideration can be broadly stated as follows.

3.2 'Nominal' Consideration

Consideration does not have to 'equal' the value of what is being 'bought' or exchanged; hence the law will accept traditional cola nut, bottle of snappe, a peppercorn or other 'nominal' consideration: *Midland Bank Trust Co. V Green* (1981) in which a £40, 000 farm was validly purchased for £50. It suffices that the consideration is capable of being valued, and not merely moral. Acts that spring from natural love or anse from moral or social duty do not constitute valuable

consideration: ***Thomas V. Thomas (1842).*** In this case, it was held that a promise to pay £1 per annum rent was sufficient consideration for a promise of a right to/live in a house. *See also Ward V. Byham* (1956); *Edmonds V. Lawson* (2000).

3.3 Past Consideration

Past consideration is not consideration at all: it describes an act which would normally be sufficient to support the promise it was said to support, but did not. This may often appear morally incorrect. If I break my promise made after I came back and the cleaning had not been requested by me, I am not bound. See the important cases of *Pinnel (1602) and foakes V. Beer (1884).*

Already, you have learnt three rules of consideration:

1) That a consideration must be valuable and not merely moral
2) That it must have some legal value (i.e. it must be sufficient) but need not be "adequate"
3) That consideration must not be past.

SELF ASSESSMENT EXERCISES 1

Illustrate with decided cases each of the three rules of consideration you have learnt.

3.4 Further Rules of Consideration

Let us proceed with the discussion of additional rules regarding the element of consideration in the law of contract.

Consideration must be real and genuine. The court would not allow the following promises.

a) Promise which is palpably impossible to fulfill
b) Promise that is vague and uncertain
c) Promise or further promise to person if an obligation in an already existing agreement **(Shadwell V. Shadwell)**
d) Discharge of a sum done by payment of a lesser sum than full discharge *(Foakes V Beer and Pinnels case).*

(a) and (b) need not present any difficulties The law is anxious that each party to the bargain obtain what he/she has bargained for. See *White v. Bluett (1853).*

We shall elaborate a little more on (c). The question as to whether or not an existing obligation is good consideration may arise in the following forms.

a) Obligations which arise under the law independently of any contract.

An example is where a police officer or public official agrees to carry out one or more of their duties in return for a promise of payment from a member of the public. Generally a promise or performance by such public official or police officer is a bad consideration and hence unenforceable. To hold otherwise would not only encourage opportunities for extortion, as the public official was merely carrying out an existing obligation, but also offend public policy.

Where, however, the public official or police officer does more than is required by the existing obligation, then the promise will be valid consideration and hence enforceable. See *Glasbrook Bros Ltd V. Glamorgan CC. (1925), Collins V. Gadefroy (1831), Ward V Byham (1956).*

b) Obligation which are owed under a contract with a third party. The Judicial Committee of the Privy Council has confirmed that the promise to perform the existing consideration in situation which as this as well as actual performance can constitute good consideration. See *Pao on V. Lau Yiu Long* (1980). Also *Shadwell V. Shadwell* (1860*); the Eury medon* (1975).

c) Obligations which exist under a contract with a person who has made a new promise for which the existing obligation is alleged to provide good consideration. This is a more problematic area. First it is concerned with variation of existing contractual obligation between parties. Often the extent is such variation is unclear. Note the principle of law that the performance of existing
contractual obligation can newer be good consideration for a fresh promise from a person to whom the obligation was owed.

SELF ASSESSMENT EXERCISE 2

Distinguish the following cases:

1) *Stilk V. Myrick (1809),*
2) *Williams V. Roffey Bros of Nicholls (Contractors) Ltd* (1991)
3) *Hartly V. Ponsonby* (1857)

Other fundamental principle of consideration are that consideration must not only move from the promisee (see *Danlop Rineumatic Tyre co Ltd V. Selfridge & Co Ltd)*, it must also be lawful. As we have already seen a consideration must not be past. *Pinnels case, Roscorla V. Thomas, Wilkinson V. Oliviera, Foakes V Beer*

3.5 Critique of Performance of Existing Duties

There can be no consideration when a person promises to perform what is an existing public duty or obligation, although the courts are not always consistent on this point: *Ward V Byham. (1857).* There, Byham's promise to pay support for his lover's illegitimate child was upheld even though he had an obligation at law (under the English National Assistance Act, 1948) to do so; the promise he made was consideration, and furthermore, the mother had promised that in return for the allowance she would look after the child.

Consideration can also be found in a promise to perform a duty which is already owed under a contract to the same promisee. If B is already contracted to perform something for A, and A promises something more if B will perform that promise or repeat the promise, then the price for A's further promise is B's promise or performance of an act B was already obliged to do. However, some of the older cases conflict on this point: *Hartley V Ponsonby (1857).* In this case, the captain of a ship promised its crew members additional wages to sail home as the vessel was undermanned as the result of deserters who 'jumped ship'. This promise was upheld as the seamen had 'gone beyond the call of duty' by manning an unseaworthy ship. In *Stilk V Myrick (1809)* in not dissimilar circumstances, the captain promised to divide the deserters' wages among those who remained on board to sail home. Here the promise was not held enforceable as there was no consideration: the remaining crew members were merely performing what they were obliged to do.

3.6 Executory and Executed Consideration

Past consideration can be contrasted with (ii) executory consideration; e.g. where A and B exchange mutual promises which have yet to be carried out and (ii) executed consideration where A offers a reward of N1,000 for the return of his lost dog and B returns the dog. In this case, A's promise to pay the reward, which is still executory, is not backed by any promise made by B but does become executed consideration at the time he delivers A's dog to A.

The law treats making of a promise (as distinct from its performance as a consideration.

SELF ASSESSMENT EXERCISE 3

Distinguish between a 'promise' and 'performance' of a promise by reference to decided cases.

But if A sells a car to B and after the transaction is complete, A promises B to replace the tyres with new ones, then B cannot successfully sue A for breaking the promise. A's second promise is not part of the original bargain. Note that the rule regarding past consideration is not applicable to holders for value of cheques and bills of exchange, an important aspect of commercial law which is not examined in this course.

3.7 New Approaches to Consideration

Although these underlying principles of consideration remain at the essence of the law of contract and have been tested over the years by judicial precedent, you will appreciate from *Stilk V Myrick and Gartley V Ponsonby* that the law is not necessarily as consistent as an idealist would like. One of these principles is that the parties to a contract must be under some obligation to pay and perform (consideration), and in some cases endorse what appears to be a 'bending of the rules'. To illustrate this, we give two examples: the cases of *Williams V. Roffey Bros and Nicholls (Contractors)* 1990 and *Central Property Trust Ltd. V. High Trees House Ltd (1947)*. Study these cases carefully and you will see later that, in their own way, they challenge the more conventional approach to consideration. In so doing, it may ultimately have widespread application in the conduct of some business situations.

In *Williams V. Roffey Bros and Nicholls (Contractors)*, Williams, the sub-contracting carpenter on a block of flats being built by Roffey Bros., convinced them that they should pay him an additional sum of money for work he was already obliged to carry out. Williams was in financial difficulty but significantly, Roffey Bros. faced a penalty if they did not complete the project on time. This was crucial to the Court of Appeal's decision to order the contractor to pay Williams the additional money when they refused to do so. In other words, it was a benefit to Roffey Bros. to have the contract completed on time.

Also significant to this ruling is the fact that the court could find no evidence of economic duress or fraud in the parties' business dealings. Therefore consideration was established by the benefit received by Roffey Bros. in meeting their contractual obligations and thereby avoiding a financial penalty. This was balanced by their promise to pay Williams an additional sum to complete his work on time.

We now turn to an interesting example of how a well-established common law principle – in this case, consideration – can be modified by equity and create something known as '**promissory estoppel'.** We have covered this particular topic in some detail as it will provide you with some insight into how our law develops over the years.

3.8 Common Law and Equity: Accord and Satisfaction

Carefully consider the judges' ruling in the *Williams case* before you examine the *High Tree case* which we referred to earlier. Consider this well-established common law concept: that the payment of a smaller sum for a larger debt does not amount to a discharge of the difference between what was paid and the amount still owing. Read *Pinnel's case* (1602), which outlines this concept. Pinnel sued a man called Coe for what amounts to about $1,000 at present exchange rates, due on November 11, 1600. Coe fought the case on the grounds that Pinnel had accepted $650 as 'full payment' of the debt on October 1. Although Pinnel succeeded on a technicality, the case established two principles:

i) Payment of a lesser sum (for a larger amount) on the date it is due does not discharge the debtor's obligation to pay the full amount.

ii) Payment at the creditor's request of a lesser amount before the due date is good consideration for the creditor's promise to receive early payment (though less than he/she is due) as this is a benefit to him/her balanced against the corresponding detriment of the debtor to pay earlier than he/she was obliged.

Although the first principle above was criticized (at least one reason being that it was not entirely fair to the debtor), the House of Lords approved it in *Foakes V Beer*, (1884). Accordingly the common law doctrine via *Pinnel's Case* of 'accord and satisfaction' established the following: if A owes B N1, 000 and B agrees to discharge A's obligation by accepting N650 then A must:

a) obtain the agreement ('accord') of B;
b) provide B with some consideration ('satisfaction') for relinquishing his/her right to full payment of N1,000, unless such a release is under seal.

In practical terms, as the years passed, the application of the somewhat inflexible rule of Pinnel's Case meant that it could be relaxed on certain occasions:

- When debtor and creditor are disputing the sum owed: if the creditor accepts a lesser amount, then the debt is discharged.

- When the manner or terms of payment are changed from the original obligation by way of 'substituted performance'; say, payment of a pen for a monetary debt or payment of a Nigeria Naira loan. The rational here is that it may be difficult to assess the true value of what is being given in substituted performance for the original debt.
- Paying a smaller amount before the larger amount is due (the second 'arm' in Pinnel's Case).
- Where several creditors agree that their collective debt could be paid off on the basis of, say, 60 kobo in the N1.00, this is good discharge. Although clearly, payment of a smaller sum, the consideration is the joint agreement between creditors and debtor the former will not exercise their full rights to recover the debt.
- Payment of a smaller debt by a third party (not the debtor) is a good discharge: **Welby V. Drake (1825).**

A final comment on 'substituted performance': *In Goddard V. O' Brien* (1880) the court had ruled that payment by cheque (as distinct from cash) for a lesser amount was a good discharge of the debt (possibly because not everyone had a bank account in those days). This was generally accepted as the law until 1965 when Lord Denning declared in *D & C Builders Ltd V. Rees, (1965)* (a case you will read later) that this view was wrong as 'no sensible distinction could be drawn between the payment of a lesser sum by cash and the payment of it by cheque'.

4.0 CONCLUSION

In this unit you have considered a fundamental element of contract – consideration. We have demonstrated its essential elements and significance, certain important decided case have been indicated to guide you as to what behavior the courts are likely to accept or refuse as valid consideration. The incidence of past consideration has also been alluded to, the importance of which cannot be sufficiently stressed. You will be better of if you read it again before you proceed further. You are advised to attempt the self Assessment Exercises and Tutor marked Assignment.

5.0 SUMMARY

Consideration in its widest sense is the reason, motive, or inducement by which a man is moved to bind himself by an agreement. It is not for nothing that he consents to impose an obligation upon himself or to abandon or transfer a right. It is in consideration if such and such a fact that he agrees to bear new burdens or to forgo the benefits which the law already allows him. The concern of the law is that each party to a contract obtains what he/she bargained for. Consideration may be

positive or negative, executory or executed. It must be valuable, sufficient. Real and genuine, lawful, and must not be past.

6.0 TUTOR MARKED ASSIGNMENT

1) Distinguish between a "promise" and "performance" of a promise by reference to decided case
2) Explain the term promissory estoppel
3) Distinguish Executed and Executory consideration
4) Is past Consideration a consideration in Law? Explain

7.0 REFERENCES/FURTHER READINGS

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MODULE 2 OTHER ELEMENTS OF CONTRACT

Unit 1 Promissory Estoppel
Unit 2 Privity of contract,
Unit 3 Illegality and Public Policy

UNIT 1 PROMISSORY ESTOPPEL

CONTENTS

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3.0 Main Content
  3.1 Promissory Estoppel
  3.2 Central London Property Trust Ltd V. The High Tree House Ltd (1947)
  3.3 Plaintiff's Argument
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  3.5 Court findings
  3.6 The Doctrine Summarized
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

1.0 INTRODUCTION

A debtor who pays a smaller sum in satisfaction of the complete debt is not making a full discharge. If B owes N100.00 to C, and with content of C pays N80.00 in full discharge of the debt, the payment of N80.00 by B and acceptance by C is not a full discharge. B is still liable to C to the extent of a balance of N20.00. The reason is that this is no consideration by C to support B's offer to forego the remaining N20.00 and C may still sue B for it, unless the agreement is under seal. Consider the rule again. Do you think this is fair to B? Why should C, after giving B the impression that N80 is sufficient to pay off the debt, come back claiming N20 balance? You may well consider this indeed unfair, and perhaps Charles Dickens was right when he described the law as an "ass".

But that is the law as laid down in *Pinnels case in 1602* and confirmed in the case of *Foakes V Beer (1884).* Over the past 100 years, the principle has been regarded with some disfaviour and it is our concern in this unit.

2.0 OBJECTIVES

When you shall have read the unit, you should be able to:

- describe the situation where the performance of, or promise to perform an existing obligation will amount to consideration Define past consideration
- Demonstrate knowledge of the exception to *Pinnel's rule.*

3.0 MAIN CONTENT

3.1 Promissory Estoppel

This is the principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promissor should have reasonably expected the promisee to rely on the promise and act on the promise to his or her detriment. The doctrine is equitable in origin and nature and it arose to provide remedy through the enforcement of a gratuitous promise. Promissory estoppel is distinct from equitable estoppel in that the representation at issue is promissory rather than a representation of fact (*Jordan V. Money (1854)* Promissory estoppel and estoppel by contact are two entirely distinct theories. The common law and equity recognize the concept of "Waiver" as a means by which certain right can be suspected but such suspension can be lifted upon appropriate notice so as to revive the suspended rights. *Hickman V. Hayne* (1875), *Richard V. Oppenhaim* (1950) and Hughes V. *Metropolitan Railway* (1877). It would appear that the concept of waiver has been effectively subsumed within "promissory estoppel"

However the origin of the modern doctrine of promissory estoppel is to be found in the judgment of Denninge J (as he then was) in the case of central London Property Trust Ltd. V. High Trees House Ltd (1947). This is one of the very important case you are advised to read in full.

3.2 Central London Property Trust Ltd V High Tree House Ltd: (1947)

The facts if this case are briefly outlined as follows:

In 1937, the Plaintiff granted to the Defendant (a subsidiary company of the Plaintiff), a 99-year lease on a block of flats in London. The lease was under seal and the annual rental was £2,500. By 1939 when World War II was underway, the Defendant realized that it could not maintain the rental payments as many tenants had left the flats to avoid the bombing that the city was undergoing. In January 1940, the Plaintiff

and the Defendant entered into a new agreement whereby the annual rental was reduced by 50% to £1,250. This amount was duly paid until 1945 when the war ended, by which time the flats were fully rented with some tenants then paying more rent to the Defendant than they were originally paying.

In September 1945, the Plaintiff entered into friendly negotiations with the Defendant and, by letter, claimed the full rental for two quarters commencing September and December based on the original annual lease rental of £2,500. They also claimed arrears of £7,916 representing £2,500 - £1,250 back to January 1940 when the rental was reduced.

As an exercise in the common law at work, let us briefly summarize the arguments presented by the lawyers for the Plaintiff and the Defendant.

3.3 The Plaintiff's Argument

- The original 1937 lease for 99 years was under seal and could not be varied by a subsequent parol agreement, a common law doctrine you will later encounter which states, generally speaking, that where there is a written contract, the courts will not hear extrinsic (or parol) evidence (outside the writing) to add to, vary or contradict the written agreement, or by subsequent agreement not under seal. This is some times referred to as Parol evidence rule (PER)
- If there was a fresh agreement then it was void (did not exist) as it was made without consideration and, in any event, had only been entered into on a temporary basis because of wartime conditions which, in turn, had improved by late 1944/early 1945.
- If the Plaintiff was estopped from denying a new agreement, then such estoppel only applied during the period that the difficult conditions existed.

3.4 The Defendant's Argument

- The second agreement was in writing and the rental reduction duly approved in the Plaintiff's corporate Minute Book.
- Although there was probably no consideration in the common law sense, the second agreement was of a type that a court of equity would enforce, if it could be shown that the parties intended to give contractual efficacy (effect) to that to which they had agreed.
- The Defendant's rental had been reduced by agreement to enable them to run their business during the difficult times and the agreement, as such, was binding on the parties.

- It can rely on the doctrine of estoppel as in the *Re William Porter of Co. Ltd* (1937) and they had rearranged their business affairs so that the Plaintiff was estopped from claiming any rent over £1,250 per year for the entire term of the lease (99 years), and any right the Plaintiff might have had for the original annual rental had been waived by the subsequent letter of September 1945.

3.5 The Court Finding

Denning J (as he then was) held as follows:

- where parties enter into an agreement intended to create legal relations between them and one party makes a promise to the other, which he/she knows will be acted on and is indeed acted on, then the Court will treat the promise as binding on the promisor (the Plaintiff in this case). This will be to the extent that it will not allow him/her to act inconsistently with it even if that promise is not supported by consideration in the strict sense, and the effect of the arrangement which is made is to vary the terms of such a contract under seal by one of a lesser value.
- The arrangement made between the Plaintiff and the Defendant in January 1940 was one which fell within the above category and accordingly the agreement to reduce the rental was binding on the Plaintiff but it only remained operative so long as the conditions which gave rise to it existed (the war).
- Effective in 1945, the Plaintiff was entitled to resume the full annual rental of £2,500; in other words, the agreement to accept a reduced rental of £1,250 from January 1940 to then was binding.

This raises the issue of whether the doctrine could merely suspend the rights under the new agreement or extinguish them. In High Trees, the Court did both: it suspended the Plaintiff's right to receive the full rental from January 1940 to September 1945 and this therefore extinguish their right for that period, to recover the 50% rental reduction. On the other hand, the Defendant wanted the reduction to continue for the fully 99-year term of the original lease. They failed in this regard.

In conclusion, Lord Denning cited the *Hughes V Metropolitan Railway (1877) and Jorden V Money (1854):* 'In my opinion, the time has now come for the validity of such a promise to be recognized'. Therefore under the somewhat extreme conditions which you have now studied, it consideration.

We have deliberately spent considerable time on the aspect of consideration and the doctrine of promissory estoppel as it is an illustration of the 'law in action': how the foundation of the common

law principle of the need for consideration to support a contract is subsequently modified by equity. Consideration remains with us; but so, to a lesser degree, does the concept of estoppel.

3.6 The Doctrine Summarized

As you analyse the foundation upon which the High Trees case is based, you perhaps may feel that all of it is nothing more than a technical commercial terms, the decision's implication can be summarized as follows:

- The well-established doctrine that there can be no contract without consideration can, under exceptional circumstances, be waived and indeed has been so waived.
- There can also be a similar relaxation of the common law concept that payment of a smaller Sum for a larger debt does not discharge it (Pinnel's Case). This too under certain circumstances can be modified in situations, say, where a promise to accept a smaller sum was obtained by duress.
- There can be enforceable non-bargain promises, i.e. promises not supported by consideration where, as Lord Denning stated, 'a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply'.
- There must be an existing legal relationship in place which is not being altered; generally, but not necessarily, there will be a contract.
- The party trying to enforce the promise must have relied on and taken some action (paying lower rent in High Trees). This is something known as detrimental reliance.
- The concept is a 'shield not a sword'' that is, it may be used as a defence (by the Defendant in High Trees) to an action and not in itself a cause of action. See also *Combe V Combe (1951)*

The judge hearing a particular case can exercise his/her discretion in whether the requirements of the doctrine have been met: will it be inequitable to refuse to enforce a promise that has been made?

Please note the limitations on the doctrine of promissory estoppel, namely:

i. There must be an existing legal relationship. But see contrary view in *Evenden V. Guildford City FC (1975)*
ii. Need for reliance by promisee on the promise. The suggestion that reliance must be "detrimental" has been rejected by legal authority. See *W.J. Allan V Co El Nasr (1972)*
iii. It is a shield, not a sword. See *Combe V Combe (1951)*

iv. Must be inequitable for the promisor to go back on his promise: See *D & C Builders V Rees (1966)*, The Post Chaser (1982)
v. Doctrine is generally suspensory and is generally not of permanent effect. See *Tool Metal Manufacturing Co Ltd V Tungsten Electric Co Ltd (1935)*
vi. Where "promise" is prohibited by legislation. See *Evans V. Amicus Health case Ltd (2003)*

4.0 CONCLUSION

Promissory estoppel is sometimes referred to as 'quasi-estoppel' (the 'quasi' meaning 'as if' or 'apparent' or having some resemblance to but lacking some requisite) or simply estoppel.

Estoppel is a rule of evidence (and not a **cause of action**) preventing a person from denying the truth of a statement he has made previously, or the existence of facts, which he had led another to believe under the doctrine of promissory estoppel. Where X, by **words or conduct** makes to Y an **unambiguous representation** by promise or assurance concerning his (X's) future actions, intended to affect the legal relationship between X and Y, and Y alters his position in **reliance** on it, X will not be allowed to act inconsistently with the representation:

This definition adequately describes this difficult concept. Pay particular attention to certain 'buzz' words, as they form an integral part of your study of contract law: **cause of action, words or conduct unambiguous representation** and **reliance.** All of these words will appear at some time or other in the material you are encountering in this course.

SELF ASSESSMENT EXERCISE

Consider the relevance to the High trees Case.

5.0 SUMMARY

The high Trees case shows a new approach to the rule that payment of a lesser sum will not act as a discharge for payment of the full amount. It is based on the condition that the party excised full payment has acted in a certain way relying on the promise made by the other party. Had the defendant company not acted on the reduction in rent by themselves reducing the rent of the flats, there would have been no grounds on which equity could base its support for the defendants. The main use of the doctrine has been in relation to the modification of contracts, but it is not certain whether it is limited in this way. The doctrine is equitable, a shield, and available while there is reliance on the promise and is

inequitable to allow the promisor to withdraw his/her promise. It was possible to revive the original terms of the contract by giving reasonable notice.

6.0 TUTOR-MARKED ASSIGNMENT

1. Explain the essential elements as well as limitations of the doctrine of promissory estoppel.
2. Explain how the doctrine of promissory estoppel leads to the enforcement of some promise, which are not supported by consideration.

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UNIT 2 PRIVITY OF CAPACITY

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1.0 INTRODUCTION

The law would not permit a contract to impose a duty or confer a benefit on a person who is not a party to it. The reason is that agreement or a bargain is private to parties to it. The doctrine of privity of contract is not about what may be necessary to form a contract nor is it concerned about the contents of a contract. Its concern is "who can enforce a contract". In the law of contract, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitium tertio* arising by way of contract. It has no room for a busy body. Another is that only the parties to a contract can derive rights and obligations from their contract. These two principles constitute the doctrine of privity of contract, which forms the focus of this unit.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Define or describe what the doctrine of privity of contract is
- Explain the two aspects of the doctrine of privity
- Illustrate the difficulties to which the doctrine of privity gives rise.
- Discuss the strengths and weaknesses of the doctrine of privity.

3.0 MAIN CONTENT

3.1 Privity of Contract

The doctrine of privity is simple: X and Y enter into an agreement in which they confer benefits or obligations upon Z, a stranger to the agreement. Can Z receive the benefits or incur the obligation? The doctrine of privity says "No", and that is it. (See *Tweddle V Atkenson*).

You should by now have grasped the complexities of consideration and be capable of analyzing whether or not it exists in certain situations raised in the cases you have read. Normally, but not always, the contractual process involves two parties and with respect to consideration, the promisee will provide that to the promisor. However, what if the promisor directs that the promisee's undertaking should be received by someone else? Say, A promises to pay B provided B will perform a service for C. Can B, by performing that service to C, guarantee that he will be entitled to recover from A? Here, the answer is 'yes', because in law, when a promisee furnishes consideration, it need not move to the promisor, provided the consideration moves at the promisor's request, as in the example above with A, B and C.

These concepts form the foundation of the doctrine of **privity of contract** that the legal relationship between the parties to a contract is exclusive to them and only those who are privy (the parties) can sue or be sued, thereby participating in the benefits of the contract and being subject to its burdens. A and B agree that A will pay C N2 million if B agrees to pay C (B's son) N1 million. C to marry A's daughter. In writing, it was further agreed that C could recover from A and B in the courts upon default, which there was. C sued A. C's action failed as there was, in the agreement, no consideration between A and C regarding A's promise to pay the N2 million, *(Tweddle V. Alkinson (1861)*. Note how this principle was applied by the House of Lords in *Beswick V Beswick* (1968).

If Isah buys a new BMW from Globe Motors Ltd. and the car is defective, Isah will be unsuccessful if he sues the manufacturer as there is no privity between them; his remedy lies with Globe Motors Ltd. This simple example raises two points.

- First, that in practice, manufacturers give warranties which would protect Isah

- secondly, and more importantly, the relationship between the three parties (Isah, BMW and Globe Motors Ltd) embraces

aspects of the Common Law concept of agency, which is a critical factor in Commercial and Corporate Law.

It should be obvious to you by now that the doctrine of privity conflicts with and seeks to defeat the intentions of the parties to a contract. In some cases it may probably cause also some substantial injustice. Consider the following cases.

i. *Dunlop Pneumatic Tyre V. Selfridge & Co* (1915)
ii. *Seruttons V. Midland Silicones* (1962)
iii. *Beswick V. Beswick* (1968)

Cases like these justify innovation or devices directed at circumventing the application of the doctrine. Interpretation and employment of these strategies have brought about exceptions to the rules to which we shall now turn.

3.1.1 Exceptions to the Privity Rule

- The legal principles which you encounter in this course, provide the basis for your understanding of the law; however, as you have already learned, they are not necessarily etched in stone, and what appears to be a solid principle is often subject to exceptions. Take privity of contract as an example: you have just seen that basically only the parties to a particular contract have any rights or obligations to it. But there are exceptions or modifications to this concept, for example"

- in the equitable concept of **trust,** where A holds legal title of the property or land of B but is holding it as trustee for the beneficial or real owner, C. Ultimately, if A refuses to honour the trust and hand the property to C, C can proceed against A.

- in **insurance** matters, a person who contracts with an insurer to pay the proceeds to the family of the insured when he/she dies and third parties (not privy to the insurance contract between the insurer and the insured) can also sue on a fire insurance policy (**Conveyancing and Property Law**).

- In the **assignment** or transfer of contractual rights and obligations to a third party. A's receipt of monies on a debt owed him by B does not need B's consent if he chooses to transfer the payments to his wife. But B's obligation to pay A would require A's consent if B suddenly wants C to pay his debt to A.

- **Negotiable instruments** (Bills of Exchange, cheques and promissory notes) constitute an important part of the world of commerce, of which only passing reference can be made in this course.

  Consider these exceptions of the privity to contract rule before considering the concept of **agency,** which has long occupied a place of vital importance in the business world. We can only introduce you to this, yet another vast body of common law. A detailed examination of the law of agency is beyond the scope of this course but it is important to business in both common law and civil jurisdictions. In Nigeria, for example, the employment of an intermediary or agent (**comprador**) has been standard practice for many years in almost any transaction of significance (including the arrangement of marriages). However, we will mention it very briefly:

3.2 Agency

Strictly speaking, agency is not an exception to the privity of contract rule. As one who negotiates a contract with a third party on behalf of a principal an agent creats rights and liabilities that exist solely between the third party and the principal. In other words, once the contract is in place, the agent 'drops out', the agent's work on that particular contract being over.

A 'true legal agency' is an individual, which the law recognizes as being capable of creating a contract which is binding on a principal and the third party with whom the agent has dealt. This is the essence of 'pure' agency, a point which is made to distinguish it from other forms of agency, which do not attain the same status in the eyes of the law. These are often referred to as **'commercial agents'** and include:

- **An automobile agency or dealership** – not a true legal agency partly because there is no privity of contract between a car buyer and the car manufacturer. The dealer does not act as 'agent' for either the manufacturer or the customer.

- **An advertising agency** – also not a true legal agency as it places, say, advertising space on behalf of its clients and for which it is reimbursed.

- **A travel agent** – this raises complex and interesting concepts as it has varying degrees of responsibility to its customers but also to the tour operators with whom it may deal, often in faraway destinations. The Judicial Committee of the Privity Council

examined the complexities of both contract law and negligence in case of *Wong Mee Wan V. Kwan Kin Travel services Ltd* and other cases. In that case a Hong Kong schoolgirl was fatally injured in a boating accident on a lake in the PRC. The Privy Council held that the Hong Kong tour operator be held responsible for the two PRC defendants, which acted as its agents in the operation of the tour; that is, it had a duty to use reasonable skill and care in selecting its agents.

These and other 'agents', then (including insurance brokers and agents, and sole agents) who buy goods from the manufacturer for re-sale to the customer, within the provisions of the Sale of Goods Act, are not true agents. A true agent must:

- follow its principal's instructions strictly;
- avoid conflicts of interest;
- maintain confidentiality of its principal's business affairs and not disclose that information to the principal's competitors;
- maintain proper accounting records;
- disclose to his/her principal any personal interest which might influence his/her decision-making.

Carefully bear in mind these five aspects of an agent's obligations to his/her principal as you will later learn their applicability, among other things, in his/her fiduciary (or good faith) duties and in relation to ratification (approval) of a contract and apparent authority.

The following reading is brief but it introduces you to one of the elements of a contract – capacity – together with the important concept of contracts which are void, voidable and unenforceable, all of which we will cover in this section of the unit.

3.3 Capacity

Capacity is the right recognized by law wherein a person may enter into a binding agreement

You have already considered in unit 1 the importance of 'freedom of contract'. An adult with full mental capacibility has capacity to enter into a contract. However, in some cases, this important doctrine may not exist; say, when there is a large discrepancy in the bargaining power of the parties. Another potential threat to this principle is that certain persons may be exploited if they lack maturity or competent understanding. Once again legal capacity is a creature of both Common Law and Statute; and both have prima-facie excluded certain persons from having full contractual capacity. For example, a person who is

considered a minor (often referred to as an 'infant') lacks that requisite capacity whilst under the age of 18. Over the years, the Common Law has protected people of unsound mind and drunkards who enter into contracts. Individuals who fall into any of these categories lack full capacity to enter into a legally binding agreement. But what if an infant, or a mentally ill person or drunkard does enter into a contract? This raises some interesting concepts: the difference between void, voidable and unenforceable contracts, and the extent to which such arrangements may be binding on the individual who lacks legal capacity.

As we proceed in the unit, you should pay particular attention to issues of

- Contracts for necessaries
- Beneficial contracts of service
- void, voidable and unenforceable contracts particularly voidable contracts
- Money had and received pursuant to non-binding contract
- Effects of the infants Relief Act.

We have noted that every 'Legal person' may enter a contract but certain circumstances may deprive the following either wholly or partly of the capacity to enter into contract:

Infants
Married women
Persons of unsound mind
Drunken persons
Aliens
Foreign Heads of Government and their Representatives
Corporations.

3.3.1 Void, Voidable, Enforceable Contract

Let us return to the important concepts of Void, Voidable and Unenforceable Contracts. We turn first to the distinction between a void and voidable contract. This is quite crucial to your study of Contract law, particularly when you study misrepresentation and other aspects which some legal textbooks describe as 'vitiating' factors or flaws in the contracting process.

a) Void Contracts

State simply, a **void** contract is not a contract; it does not exist. Strictly speaking then, this is a contradiction in terms or a 'paradox; in truth there is no contract at all. *See Faircett V. Star Car Sales Ltd, (1960).*

For that reason it is often referred to as **void ab initio**, or from the beginning. There can be no rights or obligations flowing from a void contract. However, as you will learn later, special considerations may be applied by the courts, depending on the circumstances by which a 'contract' is to be void.

b) Voidable Contract

On the other hand, a **voidable** contract has an 'optional' quality in that the contract is valid and stays that way unless one or both parties decide to rescind or avoid the contract. In other words a voidable contract exists, but which one party has a right to set aside or render void. Rescission is an equitable remedy. For example, if A and B have agreed to buy and sell a flat on January 15 and the flat is totally destroyed on January 14, then the contract is void as its subject matter no longer exists. However, if there is insurance available whereby there is sufficient money to restore it, then the parties may therefore mutually agree to complete the contract on July 15, when the restoration work is finished. In other words, the contract is voidable at the parties option.

c) UnEnforceale Contract

Finally, in addition to these key elements of void and voidable contracts, there are also contracts which are deemed to be **unenforceable.** These are contracts which are not void or voidable. In fact, they are perfectly 'good' but the courts will not help either party to sue on them or seek a remedy under the judicial process. A contract of guarantee need not necessarily be in writing, but it will not be enforceable in court if the terms of the guarantee have not been expressly written by the guarantor or his/her agent.

Briefly, the courts will not enforce agreements which are:

- void by statute or ordinance;
- unenforceable by some statute or ordinance;
- against public policy;
- illegal;
- entered into under duress or undue influence or some other vitiating circumstance.

We will discuss some of these concepts later

SELF ASSESSMENT EXERCISE 1

i. Discuss which, if any, of the following transactions entered into by an infant are legally binding upon majority

   a) an engagement to marry
   b) acceptance by him of bill of exchange
   c) an apprentice deed
   d) purchase of shares in a company in respect of which he has been placed on the register.

ii. What contracts are declared "Void" by the Infant Relief Act, and what is the effect of this declaration?

3.3.2 Reminder of Learning Outcomes

At this stage, you should be able to:

i. Explain contracts which bind the infant, e.g.
   - contract of necessaries: *Peters V. Fleming, Nash V Inmam*
   - contracts of service and of apprentices: *Roberts V. Eray*
   - contract of marriage

ii. Identify contracts prohibited by the infant Relief Act:
   - Void Contracts
     i. Contracts for repayment of money lent or to be lent
     ii. Contract for goods supplied or to be supplied other than contract for necessaries
     iii. Account stated.

   - Upon majority, a debt contract cannot be revived by promise or ratification
   - Voidable contracts are binding until repudiated, e.g.
     i. purchase of shares in a company
     ii. partnership agreement
     iii. agreement for lease of goods obtained by fraudulent misrepresentation; but goods are recoverable provided they are still in infants possession.

3.3.3 Parties Lacking Legal Capacity

Turning our attention once more to contracts entered into between parties who lack legal capacity: An infant (or minor) who agrees with a department store to buy N10,000 worth of computer software is legally in an interesting position. Is the contract valid, void, voidable or unenforceable?

At Common Law, he/she would only be obliged to pay for the software if they are deemed 'necessaries'. The textbooks reveal dozens of cases which attempt to define what is a 'necessary'. The problem is that what may be a necessary to one person may not be a 'necessary' to another. Sale of Goods Act provides as follows:

> Where necessaries are sold and delivered to an infant or minor, or to a person who, by reason of mental capacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefore. See *Nash V. Inmam (1908).* Also *Peters V. Fleming* (1840) on the effect of the minors condition in life.

Sales of Goods Act provided the law but saly neglected to define the term "necessary"

Hence, if the goods – or services – in question are 'necessary to the infant's condition in life' then the department store can obtain a reasonable price for the software, but not N10,000: *Nash V. Inmam (1908).* Hence the agreement between the infant (or mentally ill person or drunkard) and the store starts off being void, remains voidable to the extent that the infant can choose to pay what is due under the contract and, if they are necessaries, it is enforceable by the store to the extent of a reasonable price.

SELF ASSESSMENT EXERCISE 2

What special rules apply to the contractual capacity of:

i. Infants
ii. Limited companies
iii. Corporations incorporated by charter.

3.3.4 'Necessary' to Life?

Distinguish between 'necessaries' and 'necessities'. We are concerned with necessaries – i.e. goods which are suitable to the minor's condition in life and his actual requirement.

The rule regarding necessaries is also applicable to contracts entered into in which the person lacking legal capacity contracts to purchase certain personal and beneficial services: medical attention or apprenticeships and education or training, to name a few. In assessing whether the nature of these contracts is beneficial to the infant, the courts would examine the entire contract as distinct from deciding that certain clauses do not appear to be so. *(*See *Doyle V. White City Stadium*

Ltd. (1938). We will examine the significance of an 'entire' contract in due course.

Necessaries include services: Beneficial contracts of services may be, in certain cases, another form of necessaries. See *Roberts Raray (1913).*

You will recall when you studied 'consideration' that there are executed contracts (an infant marches into the store and collects the software, promising to pay within a week) and executory contracts (where he/she merely orders the software for delivery in one week). In the latter instance, he/she can, being an infant, change his/her mind and repudiate (reject) the contract and the store will have no recourse against him/her. However, if the subject matter is a contract for services, he/she may not be so lucky and the store may successfully proceed against him/her. In one case, an infant contracted to go on a world tour with a professional billiards player in order to improve his game. He repudiated the agreement before he left on the tour. The professional successfully obtained damages from him. *(Roberts V. Gray (1913)*

In Common Law, there was little distinction between infants on the one hand and mentally ill and drunken (intoxicated) or drugged person on the other, in terms of their overall capacity to contract. In the latter, the contract is voidable on their part but the onus is on them to show that at the time the contract was made they were not aware of what they were doing and the other contracting party must have realized that. In an Australian case (*Blomley V. Ryan (1956)* the Plaintiff sought to enforce the sale of a farm in which the Defendant, who was drunk at the time the contract was made, agreed on a price that was well under the market value. The action failed as it was shown that the Defendant, to the Plaintiff's knowledge, was incapable of forming a rational decision although he was aware of the general nature of the transaction.

Sales of necessaries to the mentally incompetent or drunken or drugged persons are covered in the same way as infants in the Sales of Goods Act. In addition, the Mental Health Act may formally deprive a person of his or her contractual capacity. Other individuals and bodies corporate, who similarly lose this right to a greater or lesser degree, are bankrupts; company directors acting *ultra vires* (outside their power, a concept you will study in company Law); aliens (foreign nationals in a time of war); and prisoners.

Finally, we should note that at Common Law, married women lacked contractual capacity and upon marriage, all property vested in the husband, *(Eastwood V. Jenyon (1840).* Happily (for women), statutory enactments have eliminated this discrimination. Now a married woman has the power to contract on her own responsibility in all respects as if

she was a fame **sole**, and may hold property on her own, sue and be sued independently of her husband both in contract and in tort.

SELF ASSESSMENT EXERCISE 3

i) What is the essential difference between a 'true legal agency' and individuals and businesses which may describe themselves as 'agents' say travel or advertising agents?

ii) Young Henry, 17, orders three Italian suits from his tailor in Johnson Mart and when later asked by the proprietor to come in and pick them up, he says, 'I've change my mind. I don't want them. 'What is the legal position?

Would your answer be different if Henry had agreed to improve his French language and had contracted to travel to the Republic of Benin withMfom, a well-known linguistics teacher, to do so?

4.0 CONCLUSION

In this unit we learnt about the doctrine of privity of contract, incapacity to enter into contract, contracts for necessaries, beneficial contracts of service, void, voidable and unenforceable contracts and recovery of property paid or handed over in a non-binding contract. You are now in a position say what the doctrine of privity is about, explain its two aspects with illustrations and by reference to decided cases. Similarly you can establish what contracts for necessaries and beneficial contracts of service are and why trading contracts are treated differently from contracts of employment.

5.0 SUMMARY

We discussed the doctrine of privity and capacity to make contracts in this unit. These are two aspects of doctrine of privity:

i. That only parties to a contract are bound by it.
ii. That only parties to a contract can derive rights and benefits from it.

Note the exception to the rule

On the other, we saw that minority is not a defence in a contract of necessaries and for this purpose, necessaries may either be goods or a contract for services. A contract of employment is binding on a minor if as a whole, it is beneficial to him. Examples are contracts of

apprenticeship training, or employment and professional engagements. Trading contracts are excluded from this category.

6.0 TUTOR MARKED ASSIGNMENT

1) a) what is the position of a minor who purchases and pays for non-necessary goods but who now wants to cancel the transaction

   b) Distinguish between the contracts which have been performed and those which are still executory

   c) Has a supplier any prospect of recovering the goods from the minor?

2) Explain the doctrine of **ultra vires** as far as applicable to the contractual capacity of a corporation. Whose a corporation enters into a contract ultra vires, can it later ratify the contract?

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UNIT 3 ILLEGALITY AND PUBLIC POLICY

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1.0 INTRODUCTION

The general rule is that there is a presumption that every contract is valid and the law will normally support rather than invalidate a contract. This presupposes, however that the contract, in the first place has a legal purpose. This is expressed in the legal maxim: *ex turpi causa non oritur action* which means: "no right of action can spring from something which is wrongful (i.e. illegal)". To this general rule, there are exceptions. This is the topic we shall learn in the first part of this unit. It is rather a difficult subject, difficult because

i. There is no single form of illegality
ii. It is external to the contract itself
iii. It covers a wide range of different areas
iv. It defiles categorization
v. Its effects are different
vi. The situation in which it arise also vary profoundly
vii. Contracts contrary to public policy are illegal, but "public policy" is ill-defined and is always changing in nature.

But the topic is important as it affects not only contracts to commit crimes or promote immorality but also contracts which are performed illegally or which are not formed in accordance with the procedure prescribed by statute.

We will turn our attention once more to the principle of 'freedom of contract' to which we have referred on several occasions. Contrary to this underlying foundation of the law of contract, there are occasions where the courts will refuse to enforce certain contracts and no assistance whatsoever will be given to parties who attempt to rely on them. This occurs in two broad areas: where a contract is completely illegal (either at Common Law or by an Ordinance or Subsidiary Legislation); or where the courts declare a contract void as being against public policy. These underlying elements of what constitutes a legally binding contract are covered in the next section of this unit.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Distinguish between
  - Contracts which are illegal in formation
  - Contracts which are illegal in performance
- Understand the consequences of a finding that a contract is illegal
- Understand the impact of public policy on illegality and vice versa.

3.1 Illegality and Public Policy

For our present purpose, let us classify illegal contracts into two:-

3.1.1 Contract declared unlawful by statute, namely

a) Contracts involving betting
b) Contract of Money Lending
c) Contracts made by unregistered firm
d) Contracts declared void by the Restrictive Trade Practices Act.

3.1.2 Contract Illegal at Common Law

a) Contracts to commit a crime (*Alexander V Ray Son, 1936*)
b) Contracts which are contrary to public Policy: *Beresford V. Royal Exchange Assurance 1938*,
c) Contract in restraint of trade.

Let us classify illegal contracts in another way now.

3.1.3 Illegal contracts as formed

a) Contract to commit a crime. These contracts are void *ab initio*

3.1.4 Illegal contracts as performed

b) Contract to deliver goods in a vehicle driven by a driver who over-loaded and drove recklessly. The contract is legal in its formation but illegal in its performance.

Where the object or purpose of a contract is the commission or carrying out of a crime, clearly that contract is illegal' in its strictest sense. But this is the extreme end of the spectrum we are currently discussing, and to describe a contract as 'illegal' does not necessarily mean criminal. 'Milder' areas do exist; such as a situation where a particular ordinance is passed to protect tenants, and A and B enter into an agreement which favours A, the landlord. Then this would be deemed illegal only on the landlord's side because the purpose of the ordinance is to protect tenants.

This concept raises the following points:

1) There can be illegality in the formation or making of the contract.
2) There can be illegality in the purpose or performance of the contract.

A contract may be illegal on the part of both parties to it, or merely one party. 'Two-sided' illegality occurs when Seller A and Buyer B agree to ship goods to Nigeria without paying excise tax. 'One-sided' illegality occurs when A agrees to hire from B a limousine that A intends to use as the get-away vehicle in a bank robbery. Note that the hiring of the car itself is not illegal. Where two parties enter into an agreement they know has an illegal purpose, then neither party can recover from each other when the contract is breached.

3.2 Illegality at Common Law and By Statute

As already noted, the formation of a contract between A and B to rob a bank would be illegal as would the commission of the crime. Many strictly common law situations in this area (an agreement made between A and B to murder C) have been modified by Statute over the years. Nigeria is certainly no exception as there are dozens of Statutes and related Subordinate Legislations, many of which are designed to have an impact on human behaviour. Violation of these myriad of statutory provisions has civil consequences that are not always clearly defined. This means that a statutes may have the result of making a contract void or unenforceable by one or both parties, but not necessarily illegal.

Sometimes, contravention of a Statute (e.g. Banking Act) will expressly state that the contract itself remains valid. Many such Statutes deal with

licensing: driving a motor vehicle, operating a hawker stall or selling alcohol in a restaurant. In this regard, the position in Nigeria appears that legislation dealing with this form of licensing is directed at the regulation of trade, and in some cases, failure to have a licence could well render a particular transaction invalid. An unlicensed society has been held to be unlawful and monies due under its constitution were not recoverable.

3.3 Public Policy

The common law tends to distinguish between contracts which are strictly illegal and those which are void for public policy. In Nigeria in addition to these common law considerations, statutory implications play an important role. It is therefore a common law offence to bribe a public official to procure a benefit from the Government, and a contract directed to that end would clearly be unenforceable *(R. V. Whitaker (1914))*. On the other hand, this type of conduct is prohibited in the Criminal Code and the Penal Code, which make it an offence for Government or public servants to solicit or accept advantages and bribes.

'Public policy' is a broad concept and, like many other aspects of the law, may mean different things to different people at different times or even at the same time. Often, judges will take into account considerations of public policy. One must consider whether a particular contract is against the interests of the community at large. Sometimes this is not an easy task. In common law, freedom of marriage is considered to be in the public interest and a promise never to marry would be void. A line of cases in England involving prostitution provides interesting reading on just what is considered 'pubic policy'. Space does not enable us to reprint these precedents, but the following may provide an insight into our judicial approach:

> The court had to consider a claim for the price of shark fin's soup delivered to a brothel. It was held that the consumption of the soup, not in itself objectionable, could not offset the fact that the service at the premises would be enhanced. The contract was considered illegal. See also *Pearce V Brooks (1866), Franco V. Bolton (1797).*

However, as already noted, whilst the courts may not approve of a contract which is against public policy, they are not treated as severely as a contract which prima facie (on the face of it) is illegal. One marked difference between these two forms of contract (bearing in mind an illegal contract is void and hence does not exist) is that in matters of public policy, money paid and property transferred may be recoverable;

It is safe to regard contract which offend public policy as belonging to a class of its own. Some of the contracts which was declared illegal by reason of public policy some time ago, may be decided differently to-day in the light of changing public conceptions of morality.

Compare the following cases.

Herman V Charlesworth [1905] 2 KB 123: the Plaintiff successfully recovered a 'marriage brokerage' fee when the Defendant failed to introduce her to suitable, eligible husband. That is not so with an illegal contract. See *Pearce V. Brooke (1866) and Franco Bellon (1797)*, *Lowe V. Peers* (1768)

Courts are suspicious of contracts which tend to restrain administration of justice or oust the jurisdiction of courts: *R.V Andrews* (1973). *Elliot V. Richardson* (1870)

3.4 Effects of Illegality

The court has made a definite pronouncement on the effects of illegality: "the general rule is that where you cannot severe the illegal from the legal part, the contract is altogether void; but where you can severe them, whether the illegality be created by statute or by the common law you may reject the bad part and retain the good": *Pickering V. Ilfracombe Railway Co.*

The court will not enforce an illegal contract, but may provide an "innocent party" with a remedy. See *strongman (1945) Ltd V. Sincock* (1955); *Shelley V. Paddock* (1980)

Where one party is unaware of the illegal nature of a contract and he/she rescinds immediately upon being aware before these has been performance, he/she may avoid the contract and recover on it.

Where a legal contract is used for an illegal purpose.

- Neither can enforce it or recover on it if both are aware of the illegal purpose
- The right of the other party depends on whether or not he/she knew of the illegality
- one who is completely innocent of the illegality e.g.
  a) Refuse to be bound
  b) Enforce the terms
  c) Sue on it

Mason V. Clarke

- Generally the court will not permit recovery under an illegal contract *Holman V. Johnson (1775)*
- Money paid or goods supplied under an illegal or void contract cannot be recovered except in the following circumstances

    a) Innocent party may recover where parties are in **pari delicto: kiriri Cotton Ltd V. Dewani (1960)**
    b) Where the part repents of the illegal purpose before it is performed Kearly V. Thomson (1890)
    c) Where claim for repayment does not rely on any way on the illegal transaction

- A party who has performed knowingly an illegal act as consideration may not rely on performances of his/her part of the contract to support a claim on the original contract. *Parkinson V. College of Ambulance Ltd, Harrison; Bowmakers Ltd. V. Barnet Instruments Ltd (1945), Tinsley V. Milligan (1994).*

3.5 Reforms of Illegality Principle

The Law Commission, (UK) has purposed the following reform on the effects of illegality:

- That court should possess a discretion to "decide whether or not to enforce an illegal transaction, to recognize that property rights have been transferred or created by it or to allow benefits conferred under it to be recovered" except where Statutes expressly prohibit the transaction.

4.0 CONCLUSION

You have learnt of situation in which a court may find that a contract is tainted with illegality because it offends against public policy. You also learnt about the consequences of such illegality. The UK Law Commission has proposed some amendment to these area of the law of contract. Do you agree with the recommendation?

5.0 SUMMARY

Contracts, which affend public policy are illegal, but the categories are not static because public policy itself is not. The result is that some cases that have been declared illegal by reason of illegality some time ago may likely now he decided differently. Generally, contracts which are tainted with illegality are unenforceable. In some cases, however,

and especially where parties are not in *pari delicto*, the public policy consideration in preventing illegal contracts may be outweighed by the desire to prevent one party from retaining a benefit which constitutes an unjust enrichment.

6.0 TUTOR MARKED ASSIGNMENT

Summarize the law on illegality and public policy and propose an amendment of the Law to your Law Reform Commission. Support your recommendation with decided cases.

7.0 REFERENCES/FURTHER READINGS

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MODULE 3 CONTENTS OF A CONTRACT

Unit 1 Terms: covenant, Usage, business Efficacy and Implications
Unit 2 Terms: Conditions, Warranties & other Clauses
Unit 3 Terms Exclusion (Exception) Clauses

UNIT 1 TERMS: COVENANT, USAGE, BUSINESS EFFICACY AND IMPLICATIONS

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    3.3.1 Trade Usage
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1.0 INTRODUCTION

In the previous Units you learnt about what contract is all about and the various development in the field. This unit introduces you to the subject matter of "terms of contract" as well as the analysis of the various approaches.

2.0 OBJECTIVES

At the end of this unit you should be able to:

- Identify the subject matter of the terms of contract
- Differentiate between the various approaches to the terms of contract

3.0 MAIN CONTENT

3.1 Terms of the Contract (I): Business Implications

You have now completed the first part of this course dealing with the law of contract and what elements are needed to create one. You have examined a situation where the parties thought they had completed the contractual process but in reality, their 'contract' was void: it did not exist. You have also looked at the distinction between this and a voidable contract, and an unenforceable contract. You have looked at the contract in more 'global' sense and considered those that may be illegal, either in their creation or in their performance, as distinct from encounter from time to time in the material which follows.

Accordingly, you are now ready to commence a detailed examination of the terms of a given contract. Every contract must have 'terms' and they may range from the most elementary to the highly complex. As an introduction to this important topic of contract law, we will examine them within the context of the business world: the role 'terms' play in employment contracts and in the sale of an enterprise. We will also discuss the relevance of trade usage, business efficacy and previous business dealings.

Critical to any contract are its 'terms'. As we will see in this part of the unit, contractual terms are limitless and can be expressly state without ambiguity or uncertainty, or they can be implied by common law or statute or by trade custom. Let us first examine a category of terms which are referred to as restrictive covenants (in business) and contracts which are in restraint of trade.

3.2 Restrictive Covenants, Contracts in restraint of Trade

Generally speaking and notwithstanding our 'freedom of contract' principle and the sheer volume of commerce in Nigeria contracts freely entered into between willing parties and which are in restraint of trade are against public policy. Many of these 'restrictive' covenants are found in employment contracts, and often manifest themselves as 'non-competition' clauses in which an employee may agree with his or her employer as follows:

- not to enter into competition with the employer for a certain period of time following termination of the contract;
- not to solicit the employer's customers or clients either during employment or for a certain period after termination of the contract;

- not to induce the employees to leave the employer's business within a specified period of time after leaving the employment;
- not to disclose confidential information or other aspects of the employer's business to third parties.

In addition to employment contracts, other clauses of the type listed above can be found in contracts for the sale of a business, in contracts between suppliers of goods and services, and *solus* or 'tied-sales' agreements in which a retailer promises to see only supplier's brand of goods.

Let us briefly summarize the key considerations, which give rise to the fact that trade restraints as listed above are prima facie, void at common law. See *Nordenfelt V. Maxion Nordenfelt & Sons Ammunition Co Ltd* (1894).

3.2.1 General Considerations

The presumption that restraint of trade contracts are void can be rebutted if it can be shown that they are reasonably in the interests of both parties and the public at large. This reasonableness between the parties depends on whether the person benefiting from the restrictions has some legitimate reason for imposing it (for example, trade interest is protected), and whether it is reasonable for the other person to comply with it. Factors for consideration in the concept of reasonableness include:

- The nature of the restraint (e.g. is an employee prohibited from working in his/her occupation?);
- The time period (one year? Two year?);
- The geographical area. (radius of 2, 10 15 miles, city or state etc)

a) EMPLOYMENT

The employer, when enforcing a restrictive covenant in an employee's contract, must show that it is no wider than necessary to protect that interest. Where a Stockbroker working for the Plaintiff signed a three-year non-competition clause and after 11 months left the firm with about 17 of the Plaintiff's employees, the Judge in an action to enforce the covenant, agreed that the risk of the Defendant setting up his own brokerage was a real one and that the nature of the business was highly personal; however, he ruled that three years was too long and therefore the clause was not enforceable. A similar clause that prevented Ms Buchana from working anywhere in what was then 'the Colony' as a hairdresser for one year, was held void. The Court of Appeal had no

difficulty with the time limit but refused to prohibit her from working as a hairdresser in the Colony.

b) SALE OF A BUSINESS

As already noted, in assessing 'reasonableness' within this area of the law, the courts tend to be more strict with contracts formed between two businesses than clauses which attempt to bind employers and employees. Agreements between suppliers to fix prices on goods and regulate supplies are largely regulated by statute, e.g. the Restrictive Trade Practices Act The legislative thrust in various jurisdictions has been that such agreements are presumed void unless it can be shown that such an agreement is beneficial to both parties and in the public interest. There is no specific regulatory control of a comparable in Nigeria, and in the case of a dispute, resort would have to be made to the Common Law along the lines of the "reasonableness" test in restraint of trade cases.

As you have already learned, most business agreements are intended by the parties to be a contract and hence binding on them. Difficulties may arise in enforcing a contract when in fact is no 'contract' to start with. And at the end of the last section, you briefly examined some specific contract clause between parties to a contract who wish to restrain the other's trading activity. This now leads us into the two last topics in this unit, the first dealing with trade; the second expanding this material into an overall discussion of contract terms in general and examining various problems which can be encountered.

SELF ASSESSMENT EXERCISE

i) Rauf agrees to pay Edosa N50,000 if Edosa will arrange to have Rauf's brother enter United States of America from Spain without going through immigration control. The brother arrives safely but Rauf refuses to pay Edosa N50,000. can Edosa successfully sue Rauf? Give reasons for your answer.

ii) What general presumptions govern contracts in restraint of trade? Give two examples.

3.3 Trade Usage, Business Efficacy and Previous Business Dealings

You have spent considerable time in assessing given situations, and upon the basis of your understanding of the requirement for certain essential elements, you can establish whether or not a contract exists. Part of this complicated weave of concepts are the 'terms' which can be expressed in writing or orally. Unfortunately it is not always easy to

identify which term or terms are intended to contractually bind the parties. In this regard, the opinion has been expressed that there is a spectrum, or sliding scale (of terms) rather than a series of recognized categories.

We will study this in more detail in the final section of this unit, but you should already be aware that contractual terms differ in importance and may be easily identified in a complicated, ten-page written agreement; but less so in a small cash sale where goods and money are exchanged and in which terms may be virtually non-existent.

In the example of trade restraint clauses entered into between the parties in the previous section, such clauses are clearly ascertainable:

> A agrees with B that upon termination of the contract, B will not solicit A's clients for a period of one year, within a geographic area of five miles of the premises.

And if the parties in their business dealing express in writing that:

> 'This agreement is not entered into, nor is this memorandum written, as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts either of the United States or England…

Then the courts may well, as the House of Lords did, in *Rose and Frank V. Crompton* (1975) rule that the parties clearly intended not to be contractually bound.

Interestingly enough, the parties there had also agreed that their lack of intention to be legally bound was partly based on their past business dealings with each other, thus taking into account that the courts, in the absence of an express term, will imply a term in at least three situations:

a) trade usage;
b) business efficacy;
c) previous business dealings.

3.3.1 Trade Usage

Terms may not necessarily be incorporated into a contract, and although not expressed by the parties, the courts will sometimes acknowledge a given custom or common practice in a particular industry or trade. In *British Crane Hire Corporation Ltd V. Ipswich Plant Hire Ltd,* (1975) the hirer of an earth-moving crane, on the basis of trade convention or custom, was held liable for the salvage costs when it sank in marshes.,

no express agreement on this aspect of the contract had been entered into, in writing or orally.

For the courts to take due notice of particular custom in a particular trade or industry, it must clearly be shown that:

a) the custom being relied on is well established, certain and reasonable;
b) everyone in that industry would intend that such an implied clause was to apply;
c) it may not contradict any existing legislation;
d) it will bind a party who is unaware of such custom or trade usage; In other words, if the custom is well-known to 'everyone' in the trade, 'constructive' notice (in which one is deemed to know a certain fact, even if that is not the case) will apply as distinct from 'actual' notice.

From time to time in this course, you will encounter the concept of constructive notice, which basically says in law that if you are ignorant of a particular piece of knowledge, that will not help you if you ought to have known about it. Hence, some of the cases you may read will assert that the '**defendant knew, or ought reasonably to have known'** In company law, you will encounter constructive notice with respect to documents which are registered, say in the Companies Registry. As they are in the public domain, you are deemed to have read them even if you have not. That said, you will learn that the concept in this latter regard has been abolished or extremely modified by the Companies and Allied Matters Act, 1990.

3.3.2 Business Efficacy

This arises where the courts in a business dispute attempt to give the 'desired effect' to a term in a contract which is not explicitly stated or is completely absent. Does this error or omission render the contract nonsensical from a commercial standpoint? In the *Moorcock (1889)* the owners of a docking wharf on the River Thames agreed to berth there for the purpose of unloading its cargo. Both parties knew the vessel would be grounded at low tide but the owners of Moorcock were not aware that in addition to mud and silt on the river bed, which they accepted, there were also exposed rocks which ultimately damaged it. The contract did not refer to this contingency. The ship owner successfully sued the wharf owner on the basis of business efficacy; that it was implied in the contract that the river bed would be safe, at least to the extent that reasonable care could be provided.

3.3.3 Previous Business Dealings

You will recall that in the *Rose and Frank V Compton (1975)*, the parties were saying that partly as the result of their past business dealings with each other, they did not intend their agreement to be legally binding. The reverse of this is where past business dealings between the same two parties will be implied. Hence, if A and B have for the past five years dealt with each other on particular terms but for some reason, one or more of the terms is omitted from the present contract, then in appropriate cases, the courts will enforce it by implication. In *Hillas & Co. Ltd V Arcos (1932)* a purchase and sales of timber contract between the parties referred to '22,000 standards of soft wood (Russian) of fair specification over the season 1930'. An option clause also allowed the Plaintiff (buyer) to take up to an additional 100,000 standards in 1931.

Despite the rather inexact specification, the parties bought and sold the timber during 1930, but when the Plaintiffs exercised the 100,000 option, the Defendants refused to deliver as the specification was too vague to bind the parties. The House of Lords held in favour of the Plaintiffs, stating that although the specification was to a certain extent vague, the parties encountered no serious difficulty in carrying out the 1930 order and there was no reason to believe the option for 1931 could not be similarly carried out.

You will note that the concept of 'previous dealings' between the parties may also be a deciding factor in the case of exclusion or exemption clauses in which one party may enforce a term in a contract in which he or she is attempting to exclude or limit in some way liability for a breach in that contract. We will briefly examine this later in this section.

4.0 CONCLUSION

This unit marks the beginning of our discourse on 'terms' of a contract. Because it is not possible to provide for every situation, other business relationship between parties have to be considered when interpreting the intention of parties to a contract. Hence such matters of business implication, Trade Usage and business efficacy among others, which you have learnt in this unit. It is better that the contract succeeds than it perishes.

5.0 SUMMARY

You have discussed terms of a contract where parties are unequal, the court may sometimes restrictive covenants in contracts.

6.0 TUTOR-MARKED ASSIGNMENT

1) 'The courts will on occasion acknowledge a particular trade custom as being an implied term of the contract': The British Crane Hire case. Comment on this statement and outline the tests the courts apply when establishing 'trade usage' or 'common practice'.

2) Bee-Bee, an importer, enters into a one-year contract with Chukwu, who operates a games outlet in Awka which state the following:

   Bee-Bee agrees to supply to Chukwu for a one-year period commencing January 1, 2006 to December 31, 2006 inclusive, five hundred boxes of assorted widgets for a total sale price of N500,000. And provided further that Bee-Bee shall have the option to purchase a further one thousand (1,000) boxes of widgets on or after January 1, 2007 for a further period of one year, provided that such notice to exercise the option shall be made on or before that date'.

   Bee-Bee provides Chukwu with five hundred boxes of widgets through 2006 and Chukwu, on December 30, sends written notice to Bee-Bee that he wishes to exercise his option to purchase the 1,000 boxes of widgets. Bee-Bee contracts Chukwu and says: 'No delivery. The agreement is too vague. What the devil is a widget?

   Is Bee-Bee obliged to complete the order? Give reasons for your answer.

7.0 REFERENCES/FURTHER READINGS

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UNIT 2 TERMS, CONDITIONS, WARRANTIES AND OTHER CLAUSES

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1.0 INTRODUCTION

You have learned the importance of the terms in a contract and that without them, there is no contract. The parties then must agree on something, whether it be a simple 'goods/cash and carry' transaction or a complicated 20-page technology transfer agreement. The law acknowledges that no one is perfect, and even the parties to a contract who are very clear and precise as to what each is agreeing, may well find themselves in dispute over a particular clause. This final material studies this in further detail and expands upon the business implications of terms which you encountered in the last section.

2.0 OBJECTIVES

At the end of the Unit, you should be able to:

- understand the essence of terms in a contract
- differentiate between conditions and warranties
- identify appropriate remedy in each perbanler breach

3.0 MAIN CONTENT

3.1 Express Terms

Here is an excellent example of express terms. Nou Electronics orders a computer-testing machine for N20 million to be delivered on July 1,

2006; both the price and the delivery date are clearly express terms. In addition, Omatek also undertakes to install the equipment and train the staff. If Omatek fails to deliver until July 3, can Nou Electronics successfully bring an action against Omatek? In general terms, the answer to that is "yes", as Nou Electronics will argue that the delivery date was an express term and hence Omatek was in breach of their contract. However, Omatek may well argue that being two days late is not critical to the overall intent of their agreement, and is a mere warranty that does not substantially effect the sale and purchase o the machine.

So this raises the first issue: did the express term (delivery July 1) go to the very heart, or 'root' of the contract? Nou Electronics will argue 'yes' in which case what is its remedy? Assuming its position is correct, that it is a condition, then its remedies are rescission and a claim for damages.

What is a two-day delay in delivery worth? We will study the courts' approach to this later. Meanwhile, Omatek will of course argue that being two days late is no big deal, a warranty entitling Nou Electronics to damages, but not rescission. Both parties of course have their own viewpoint, and by now, you should also be forming your own opinions in these cases.

However, this is academic as Nou Electronics has accepted delivery of the equipment, which would still not prevent it from making a claim based on the delay. But now, the second issue is that Omatek has neglected to install the machine and train the staff, a delay which ran from July 2 to October. During this time, Nou Electronics presumably lost considerable business revenue. Now what is the measure, or quantum of Nou Electronics' potential damages? And moreover, is Omatek assuming that he does finally complete his contractual obligation, entitled to something for his efforts?

You have then, in this relatively simply, hypothetical scenario, at least four issues: conditions, warranties, partial performance and remedies all of which we will examine in due course.

In summary then, although it is relatively simple to identify an 'express' term ('delivery date, July 1' and 'sale price, N20 million) the parties may well have differing views on the impact that a breach of such a term has on the contract. And if that is not bad enough, what about contracts where the terms are not so clear, not 'express', but implied?

Therefore, let us turn to the subject of implied terms in common law and by statute.

3.1.1 Implied Terms by Statute, Common Law and the Courts

In the world of commerce, it should be noted that terms of a contract, even if not expressly stated by the parties, may be implied by a Common Law principle such as trade usage, as in the *British Crane Hire Corporation case* we mentioned in the previous section. In addition, in some areas, there has been statutory intervention in which certain trade practices have been codified, as for example in Sales of Goods Act. In this Act there are four 'consumer' sections in which certain terms by implication are an integral part of every contract of the sale of goods to a consumer:

- Part A – the seller has the right to sell goods.
- Part B – the goods correspond with the description
- Part C – the goods are of merchantable quality.
- Part D – in sale by sample, the bulk of the goods will correspond to the sample and the buyer will have a reasonable opportunity to compare the bulk of the goods with the sample and check that the goods will not be unmerchantable.

In these four instances, the consumer enjoys protection to the extent that even though the seller has made no representations (examined in unit 3) regarding ownership of the goods, their description, their merchantability and their corresponding to a sample, these aspects are there by implication, and by the Sales of Goods Act. The retailer cannot exclude them in a typical sale.

The sale of goods is an integral part of commercial law and space precludes us from pursuing this aspect in any detail. However, you should be aware that the 'protection' we have referred to varies in accordance with the relationship and status of the parties: the sale can be a consumer sale as between the retailer and the consumer, or it can be between two private individuals, or between the wholesaler and the retailer. Consequently, in some instances it may be possible to exclude the provisions of the Sales of Goods Act; for example, in a wholesaler/retailer transaction, provided it is fair and reasonable. This will be examined at the end of the unit. And in a private seller/private buyer transaction, only the right to sell and sale by description are implied.

At **common law,** commercial practice has led to the evolution of these and many other terms which are implied in a myriad of relationships, of which we will name only three:

a) **The bank/customer relationship** – both parties have implied duties to each other, particularly the bank's obligations to the customer.
b) **Employment contracts** – the employer is obliged to provide safe working conditions for the employees, among others, and it is implied that the employee will use reasonable care and skill in the execution of his/her duties.
c) **The landlord/tenant relationship** – it is implied in the relationship between the parties that the premises 'are reasonably fit for human habitation'.

Finally, you have learned that the courts may imply terms into a contract which is in dispute. We refer to the consideration of trade usage, business efficacy and previous business dealings, which you encountered in the last section.

Do not forget that although this section has talked about 'statute' and 'common law' as though they are distinct entities, nothing could be further from the truth. In the 'real world', in employment, for example, there is a subtle blend of these two leading components of English law. In facing an employment dispute, reference will have to be made to both the labour law and common law principles, many of which will not be found in the Act. And you have already learned that in examining a company's director's conduct, recourse will again be necessary to the common law as the Companies & Allied Matter Act may not necessarily provide the guidance you need.

It is now time to turn our attention to some of the issues raised in hypothetical Nou Electronics case, in which, among other things, we were trying to assess the importance of the delivery date of the equipment on July 1. This leads us into the next topic of this unit.

3.2 Conditions, Warranties and Innominate Terms

You have two broad principles to consider from the material you are about to read: how do we distinguish between terms in a contract which go to its very heart (its 'root') as distinct from those that do not. Once that problem has been solved and one party to the contract to a greater or lesser degree is at fault, what remedies would a court of law award to the injured party? You will not be surprised to learn that these questions are often not easily answered. Consider therefore the situation in two old English cases which illustrate these complexities.

In *Bettini V Gye (1876)*, the Plaintiff was contractually bound to sing with the Defendant's company from March 30 to July 13, 1875. There was no scheduled programme for the Plaintiff but she agreed to be in London six days before March 30 in order to rehearse. Illness prevented

her from being there and the Defendant refused her services although she could have completed the schedule. The Plaintiff succeeded as the Court decided that the failure to attend rehearsals did not go to the root of the contract.

In another case involving a singer, *Poussard V. Spiers & Pond* (1876) the Plaintiff's wife was hired by the Defendant to play in an opera beginning November 14, 1874 for three months. The Plaintiff's wife attended the rehearsals but was too ill to attend the gala opening on November 28. The Defendant used an understudy for that night and until December 15. The Plaintiff's wife said she was fit to resume singing on December 4, but the Defendant refused to accept her services. The Court held that the Plaintiff's wife had breached her contract and that the Defendant was justified in terminating her services.

Thus in both cases, the Plaintiffs had breached their obligations to the Defendants, but in the first it was a breach of warranty; in the second, it was a breach of condition, and hence much more serious. What effect then does a court ruling on these points have on the respective remedies awarded the successful party? These can be summarized as follows:

a) **Breach of a condition** of a contract entitles the injured party to rescind or terminate the contract, or alternatively, continue with the contract and sue for damages for any loss that might have been suffered.

b) **Breach of a warranty** does not entitle the injured party to rescind or terminate the contract but merely sue for damages for any loss suffered.

As you can see, it is important to distinguish between a condition and a warranty as it has a considerable effect on the remedies which are available in the event of breach. Sometimes it is easy to make this distinction by the phrasing of the terms, or the nature of the parties' conduct. But in the complex commercial world, undertakings between the parties are so inter-related that the seriousness of a breach can only be assessed after the breach has occurred.
The modern judicial view on this difficult point of law is that it is meaningless to try to 'slot' terms of a contract into 'conditions' and 'warranties' even if the parties describe them as such, as to do so may lead to a party being awarded an inappropriate remedy. Consequently, in some cases, the judges have ruled that despite terminology it is easier to consider the consequences of the breach rather than the significance. In this regard, now consider the following.

3.3 Innominate Terms

Suppose as a contract, the seaworthiness of a vessel was an issue. Part of the contract said the owners would '**maintain her in a thoroughly efficient state in hull and machinery during service'.** The hirer of the vessel did not have continuous use of the ship as it had to be docked and was not seaworthy for about 20 weeks. The Plaintiff owner would be in breach of the clause but the Defendant hirer would not be allowed to terminate the contract, as it was not a condition that had been breached.

The test put forward by Lord Diplock was that if the innocent party has been deprived of most of the benefit he/she expected to get from the contract, then it is a breach of condition; if that is not so, then it is a breach of warranty. Terms subjected to this test are known as 'innominate' (no name) terms, and unless a term is clearly a condition or a warranty, the contract must be looked at in its entirety and a court will ask the questions that Lord Diplock asked.

At this juncture let us briefly examine three types of contract clauses, which are common in today's business world: conditions precedent, conditions subsequent, and exclusion or exemption clauses. Before we do this, complete this exercise.

SELF ASSESSMENT EXERCISE

Distinguish between a condition, a warranty and an 'innominate' term.

3.4 Conditions Precedent and Subsequent

In the previous section of this unit, you studied an important distinction between conditions and warranties in a contract and the subsequent development of the courts in awarding remedies in the event of breach. In this regard, you have briefly considered this judicial approach in the formation of innominate terms.

Now we will encounter two forms of conditions which, are not conditions at all and are not a term of the contract: conditions subsequent and conditions precedent. These are conditions independent of the contract and influence its very existence. Put simply, a **condition precedent** is a happening or event, agreed upon between the parties, by which there is no contract unless the stated happening or event occurs.

Often the later will involve the parties obtaining some form of approval or licence as in *Pym V Campbell* (1856), where the Defendants agreed to buy a share in an invention owned by the Plaintiff. They further agreed that their agreement would not be binding unless the invention was

approved by the Plaintiff's engineer. It was not approved and the Defendant's action against the Plaintiff failed as their agreement to obtain the approval was a condition precedent and hence there was no contract. This is a much more clear-cut situation than where the parties are negotiating a contract and say, 'Let's work out the details if we get our licence. Then, if the licence is granted, they must still agree as to the contract terms.

On the other hand, a **condition subsequent** occurs when an existing contract is in place but will cease to bind the parties or allow one party to rescind, if some happening or even occurs. In *Head V Tattersall, (1870)*, it was agreed between the parties that if the horse, the subject of the contract, did not meet expectations within a certain period of time, it could be returned to the owner. The horse did not meet its contractual description and was successfully returned to the seller. Another example could be an employment contract in which the employee is employed on the basis of a condition subsequent that he passes his engineering examinations. If he fails, then the employer can treat the contract as terminated.

4.0 CONCLUSION

A term may be a condition or a warranty; express or implied. A condition is very important and a breach may entitle the other to rescind the contract. A breach of a warrant entitles the other only to damages.

5.0 SUMMARY

We have discussed the essence of terms; conditions, warranties, innominate terms. We differentiated between condition precedent and conditions subsequent, with illustrations. It does immense good to replicate this.

6.0 TUTOR-MARKED ASSIGNMENT

Write short notes on each of the four implied consumer rights under the sales of Goods Act.

7.0 REFERENCES.FURTHER READINGS

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UNIT 3 Exclusion (Exemption) Clauses

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1.0 INTRODUCTION

Freedom of contract is a judicial concept that contracts are based on mutual agreements and a result of free choice unhampered by external control. It implies that parties to it have the right to bind themselves legally. They equally enjoy the right to insert what clause or clauses they please exempting themselves from liability from one breach or another or even from a total breach. Problems often arise where one party lay failed to avert his mind to such clauses, or where the clauses are sudden or in standard form contracts and this is what we are about to learn.

2.0 OBJECTIVES

When you shall have read this unit, you should be able to:

- Understand the circumstances under which one party to a contract may seek to escape some obligations in certain events.
- Demonstrate an understanding of the governing rules.

3.0 MAIN CONTENT

3.1 Exclusion (Exemption) Clauses

The principle of freedom of contract assumes that within reason, the parties are able to negotiate freely any terms they may deem fit. As we have stated before, this may not be possible if one party has far stronger bargaining power than the other; for example, one party in the sale of

goods may have a monopoly over the supply of those goods, or financial institution may impose an excessive rate of interest on a loan where the borrower is in serious financial trouble. In these examples, it can be argued that there is no genuine bargaining and it is quite common for us to be obliged to sign 'standard form' contracts which we are obliged to accept as they stand. Within this background, contracting 'exemption' clauses) in which one party attempts to limit or totally exclude liability if something goes wrong in the contractual relationship.

This topic is another prime example of the blending of common law rule with subsequent legislation. In their simplest form, exemption clauses are everywhere: on laundry and parking lot receipts, on transportation slips (ships and buses), and on chairlifts which take\ you to the top of a mountain peak. Hence, in common law, there is a long line of so-called **'ticket' cases.** These are typified by situations in which the courts assess whether or not, among other things, a passenger on a ship (perhaps injured by a crew-member's negligence) is entitled to recover damages from the ship owner who claims 'protection' by an exemption clause on all passengers' tickets.

3.2 The Common Law Approach

In *Olley V. Marlbrough Court Ltd* (1949), a Mr. and Mrs. Olley checked into the Defendant's hotel. In their room was a notice excluding the Defendant's liability for loss of guests' belongings. Some of the Olleys' personal goods were stolen by an employee of the Defendant, who pleaded the exemption clause. The argument failed as one of the common law principles state that the clause must be incorporated into the contract. This was not the case here as the contract between the Plaintiffs and the Defendant had been made at the front desk when the Plaintiffs registered. From this often confusing array of cases, the broad common law principles upon which exemption clause are based can be outlined as follows:

a) A person is bound by the terms of the contract he/she sign, even though he/she has not bothered to read them, unless there is some vitiating element. See *L'Estrange V f Graucob Ltd* (1934), where the clause was "regrettably small print.
b) The exemption clause must be incorporated into the contract at the time the contract is made.
c) Reasonable notice of the exemption clause must be given to the other party. The party relying on the clause has the burden of establishing that he/she took such reasonable steps to draw it to the other's attention: Parker V South Eastern Raily C., (1877)
d) It is difficult for a plaintiff to set aside an exemption clause if there has been a history of past dealing between the parties; (that

is, there ha been some form of continuing relationship and this relationship is a question of fact).

e) Broadly speaking, the common law approach is that the clause is effective if the party relying on it can show that it was incorporated into the contract, the other party relied on it and it was clearly worded.

Let us now examine statutory intervention to the common law in Nigeria

3.3 The 'Reasonableness Test'

As you have already learned, the common law is still important even if an Act has been passed, sometimes to 'tidy up' uncertainty which may arise in judicial precedent. Two types of contracts have to distinguished.

1) Contract between a business and a consumer, or private customer; and
2) Contract between a business and a business.

Note that transactions may occur between two individuals dealing with each other privately outside the business world, but we will not deal with this in this section of the unit.

3.4 Exclusion Clauses and the Consumer

In the event of a dispute between a business which is relying on an exclusion clause, and the customer, Reasonable Test applies which is essentially a restatement of the principles found in common law cases. it takes into account, among other things, the following:

a) the strength of the bargaining power of the parties, including alternative means by which the customer's requirements could have been met;
b) whether the customer was induced into accepting the term or whether he/she had an alternative choice to enter into a similar contract with another business;
c) whether the customer knew or reasonably ought to have known of the existence and extent of the term, having regard, among others, to trade custom or a previous course of dealing;
d) whether the goods had special features which were there at the request of the customer.

In a contract, for example, involving a cargo, receipt of the cargo carrier of the seller who shipped frozen chickpeas by lorry. The issue may arise whether the clause extended beyond the goods themselves to the lorry

carrying the goods. If the latter were the case, then the above guidelines would be applicable. If the seller had no control over the transportation, which was the purchaser's own lorry, then the exclusion would be careful with the word 'consumer'. We are all consumers in the generally accepted meaning of the word.

A party to a contract 'deals as consumer' in relation to another party if:

a) He neither makes the contract in the course of a business nor holds himself out as doing so;
b) The other party does make the contract in the course of a business; and
c) In the case of a contract governed by the law of sale of goods the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

A statute may define 'consumer' in its own terms and confer varying degree of protection. In addition, the 'reasonableness' test will apply in the situations many of us encounter in our daily lives: dropping a suit off at the laundry, parking a car having it serviced, and checking into a hotel, to name a few.

SELF ASSESSMENT EXERCISE

i. What is generally the purpose of exemption clauses in contracts?
ii. In what circumstances are since clauses enforced by the courts?

3.5 Exclusion Clause and Business Parties

As you are aware, many business contracts (that is, between two business parties) are executed on standard forms and sometimes on a 'take it or leave it' basis. The law also acknowledges that parties who contract in this manner are to be differentiated from those who negotiate and draft their own 'tailor-made' requirements. It is more likely, then, that in a standard form contract, there may well be unequal bargaining power between the parties; consequently, as you saw in the guidelines, the weaker party is afforded some protection.

Also of significance is that a person cannot completely exclude or restrict his or her liability for negligence insofar as the clause in question complies with the reasonableness test. It should also be pointed out that under no circumstances can a party, by an exemption clause, exclude potential liability for death or personal injury. However, clause which attempt to exclude liability for financial loss or property damage will be subject to the reasonableness test.

In *Photo Production Ltd V. Securicor Transport Ltd.* (1980), the Plaintiff's factory was burned down as the result of the negligence of an employee of the Defendant security company. The House of Lords held that the Defendant was protected by the parties' exemption clause even though the employee setting fire to the premises constituted a fundamental breach of their contract.

This approach was cited in a recent Ontario case of *Fraser Jewelers (1982) Ltd V. Dominion Electric Protection C. et al* (1997) in which the Defendant, also a security firm, had contracted with the Plaintiff jeweler to maintain a protective burglar alarm system on its premises. The exemption clause limited the Defendant's financial liability for loss, damage or injury sustained by a failure in the service or equipment. The premises were robbed and the Defendant's employee did not respond quickly enough. The Plaintiff claimed the CDN$50,000 loss it had suffered. The Ontario Court of Appeal ('OCA') held that the exemption clause was binding between the parties and the Defendant was not liable.

As another example of how cases are argued in court, we will review the arguments presented by the Plaintiff's lawyers and the Court's ultimate response. You will spot several references to legal issues which you are studying.

A) The Plaintiff argued

a) It had not read the agreement.
b) The exclusion clause had not been pointed out to it.
c) The failure of the Defendant's alarm system was a fundamental breach of their contract.

B) The Court of Appeal's response was

a) A fundamental breach must, among other things, serve to substantially deprive the Plaintiff of the benefit of the contract. No such breach occurred as the parties had dealt with each other for two years and worked with each other right up to the trial.
b) As business executive signing an agreement is presumed to be aware of the terms therein and intended the company to be bound *(L. Estrange V f Graucob Ltd)*
c) The language of the exemption clause was clear and unambiguous. It should be, prima facie, enforced according to its true meaning and seen in the light of the entire agreement, not to be unacceptable commercial practice.

d) That the parties may have a different bargaining power does not in itself render an agreement unconscionable or unenforceable and entitle the party to repudiate the contract.

4.0 CONCLUSION

Parties are free to enter into whatever bargain they please and product themselves. The court may not interfere if parties are equal, and may where one party is in a stronger negotiating position. It is important that the document containing the exclusion clause must be a contractual document. It is not an excuse that the document was not read, provided it has been signed by the party. Where it is not signed, he has to be put on notice. Ambiguity in an exclusion clause interpresated against the party relying on it. A stranger cannot take advantage of an exclusion clause.

5.0 SUMMARY

In this unit you have learnt about the Common Law, statutory and Judicial approach to exclusion (exemption) clauses. We have referred to the case of *Olley V. Malborongh Court Ltd* (1949) *IKB 532 Chapelton V. Barry* (1951) *IKB 805 CA Coutis V Chemical Cleaning & Dyeing Co.* (1951) 1 AER 631, and the Nigerian cases of *Akinsanya V. VBA* (1986) and *Narumal Ltd V. Niger Benne Transport Corp* (1989). We hope you are able to identity the reasoning of the court in each case.

6.0 TUTOR MARKED ASSIGNMENT

Deolu pays N100 as entrance fee at the turnstiles of Eko Private Park, which is a mini-zoo. He is strolling along ten minute later when an aggressive monkey escapes from its compound and bites him severely on the leg. A park keeper has negligently failed to lock the gate after feeding the inmates. There is a framed notice on the compound exempting the park authorities ‘from any and all injury caused to visitors whether attributable to its negligence or not’.

Can Deolu successfully sue Eko’s Private Park for the injuries he sustained as a result of the park’s negligence?

7.0 REFERENCES/FURTHER READINGS

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