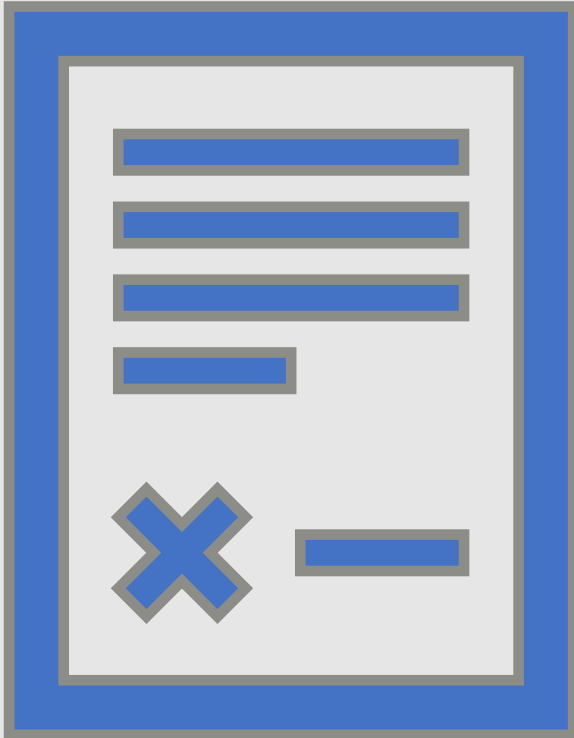


THE LAW OF CONTRACT



HKU | LAW

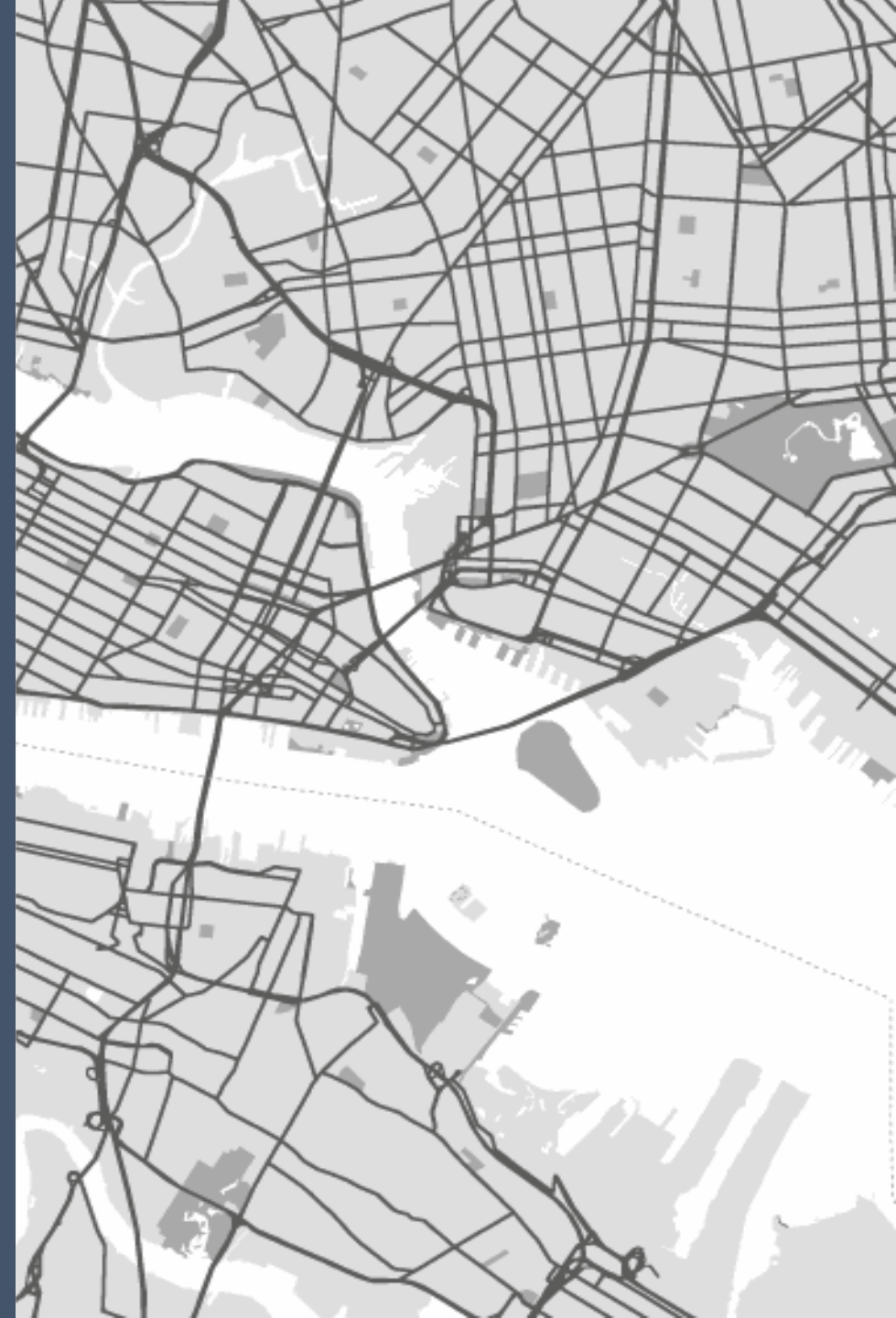
Lecture 1: Introduction

Benjamin M. Chen

2 September 2024

Plan for Today

- Course Outline
- The Logic of the Common Law
- The Nature of Contractual Obligations
- Contract Formation
 - Offer





COURSE OUTLINE

Syllabus

Semester 1	
Topic 1	Offer and Acceptance Intention to Create Legal Relations
Topic 2	Consideration and Promissory Estoppel
Topic 3	Terms and Interpretation
Topic 4	Exemption of Liability
Topic 5	Misrepresentation

The topics to be covered by each lecture are listed in the Teaching Schedule posted on Moodle.

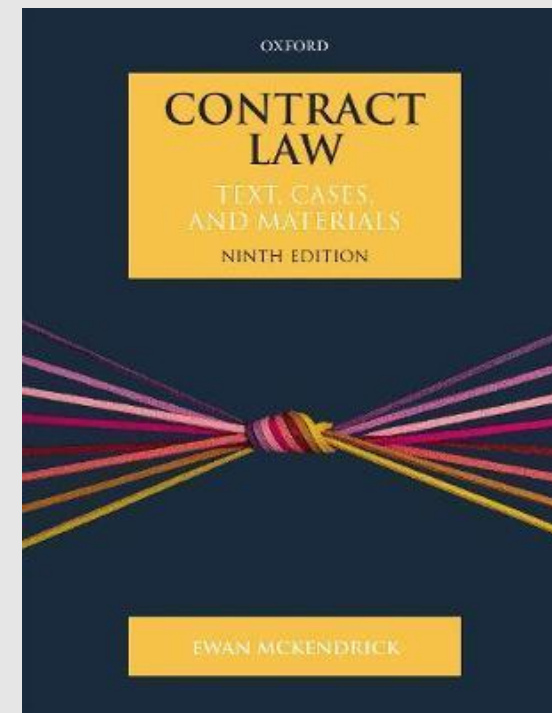
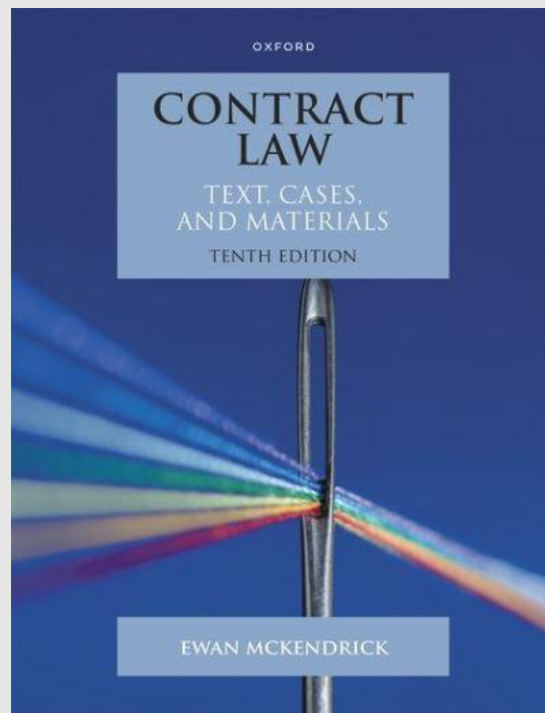
Syllabus

Semester 2	
Topic 1	Mistake
Topic 2	Frustration
Topic 3	Duress, Undue Influence
Topic 4	Termination and Affirmation
Topic 5	Remedies

The topics to be covered by each lecture are listed in the Teaching Schedule posted on Moodle.

Texts and Materials

The required textbook for the course is Ewan McKendrick, *Contract Law: Text, Cases, and Materials*, (Oxford University Press, 10th ed. 2022).



Texts and Materials

You may also wish to consult the following references:

- Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2d ed. 2020)
- Jack A. Beatson et al, *Anson on Contracts* (Oxford University Press, 31st ed. 2020)
- Hugh Beale, *Chitty on Contracts* (London: Sweet and Maxwell, 35th ed. 2023)

Please note that *Chitty on Contracts* is available through the university's subscription to Westlaw Asia.

Teaching Methods

Seminars

- Seminars in Semester 1 take place on Mondays, from 9:30 a.m. to 12:20 p.m.
- Lectures will cover key rules, principles, and cases.
- Please prepare for lectures by reading the assigned materials for the topic.
These materials are listed on the Moodle Reading List.
- At the end of every topic, we will discuss some tutorial questions. These questions will be distributed through Moodle. Please prepare your answers in advance of class.
- No private audio or visual recording of the seminars is permitted without prior approval of the instructor.

Teaching Methods

Class Participation

- We will discuss, dissect, and debate the course materials as a class.
- Everyone is welcome to participate but students on call for a particular day should be prepared to engage in dialogue about the readings.
- The group assignments are as follows:

	Group 1	Group 2	Group 3	Group 4
Surname	Chen to Lam	Lee to Ma	Meng to Winarto	Wong to Zhong

Assessment

Overall Weight	Component
Semester 1	
5%	Class Participation
40%	Mid-Year Examination
Semester 2	
5%	Class Participation
50%	Final Examination



Examinations

Mid-Year Examination in December 2024

- Open-book examination
- Exact date to be confirmed

Final-Examination in May 2025

- Open-book examination
- Exact date to be confirmed

Grading Criteria

Letter	Description	Criteria
A	Excellent	Ability to identify fine points of distinction, critical examination of academic commentaries and the merits and demerits of the law, cogent reasoning and succinct presentation
B	Good	Ability to identify major issues, familiarity with academic commentary, reasonable arguments
C	Satisfactory	Limited knowledge and reasoning, simplistic application of principles to facts, inability to distinguish or closely analyze cases
D	Weak	In addition to the features of a C-range grade, some confusion of concepts, evidence of unfamiliarity with recent and relevant authority
F	Failing	Commission of fundamental errors, for example inability to distinguish between majority and minority judgments



THE LOGIC OF THE COMMON LAW

Legal Sources in Hong Kong

Under Article 8 of the Basic Law,

The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

Under Article 17 of the Basic Law,

The Hong Kong Special Administrative Region shall be vested with legislative power...

Legal Sources in Hong Kong

Under Article 18 of the Basic Law,

The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region...

Some of the major sources of contract law in Hong Kong today are

- legislation of the Hong Kong SAR
- the common law and rules of equity; and
- Chinese customary law

Legal Sources in Hong Kong

The primary focus of this course is on the common law of contracts and the rules of equity

- general contractual rules and doctrines are supplied by the common law and principles of equity
- where transactions in a particular sphere of human activity are regulated, the applicable rules and doctrines are usually organized and taught separately from the law of contracts. For example
 - landlords and tenants → land law
 - employers and employees → employment law
 - businesses and consumers → consumer law

The Common Law

The term “common law” has various meanings:

- as opposed to statutory law, it is judge-made law or precedent
- as opposed to equity, it is law that was traditionally applied in the common law courts of England as opposed to the Court of Chancery
- as opposed to civil law, it is a legal system where cases make law

Stare Decisis

The Doctrine of Stare Decisis

- *Stare decisis et quia non movere*: To stand by things decided and not to disturb that which is settled
- Cases decided by a superior court are binding on inferior courts in the hierarchy.
- Cases that are decided by an inferior court are not binding on a superior court, but they are persuasive.
- Cases that are decided by a court in another hierarchy jurisdiction are persuasive.

Stare Decisis

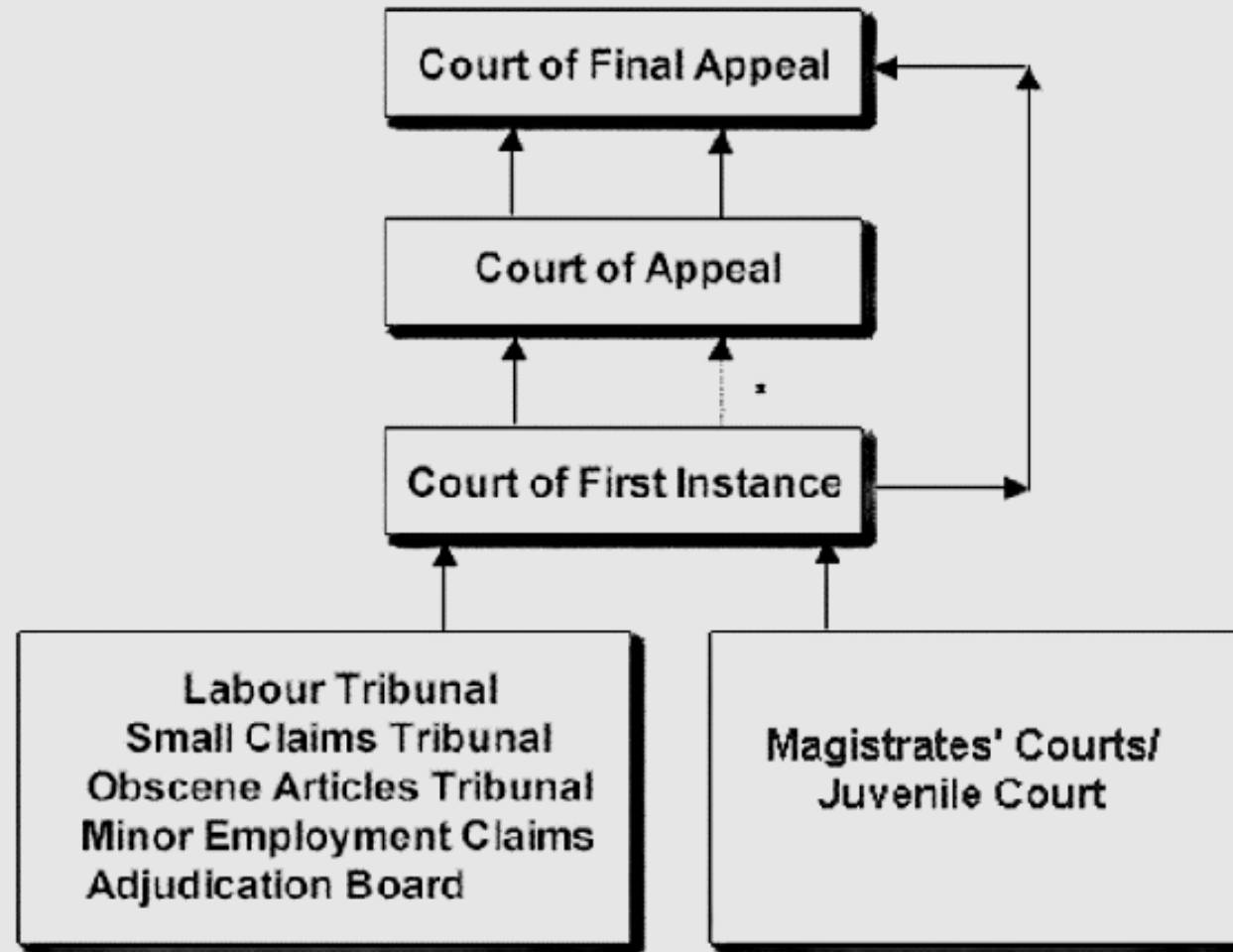
Rationales for Stare Decisis

- Fairness
- Certainty
- Predictability
- Efficiency



The first appeal.

Hong Kong Judiciary



English Case Law in Hong Kong

Under Section 3 of the Application of English Law Ordinance (AELO),

- 1) *the common law and the rules of equity shall be in force in Hong Kong:*
 - a) *so far as they are applicable to the circumstances of Hong Kong or its inhabitants*
 - b) *subject to any modifications as such circumstances may require*
 - c) *subject to any amendment thereof (whenever made) by*
 - i. *any Order in Council which applies to Hong Kong;*
 - ii. *any Act which applies to Hong Kong;*
 - iii. *any Ordinance*

The AELO was passed in colonial Hong Kong in 1966 but not adopted as a law of the Hong Kong SAR when it returned to Chinese sovereignty in 1997.

English Case Law in Hong Kong

- Prior to 1 July 1997, courts in Hong Kong were bound by the English common law and its rules of equity (insofar as they are applicable to local circumstances)
- Since the Basic Law provides for the maintenance of the common law and rules of equity previously in force,
 - Pre-1997 decisions of the Privy Council on Hong Kong appeals are binding on Hong Kong Courts except the Court of Final Appeal
 - Pre-1997 decisions of the House of Lords and the Privy Council on non-Hong Kong appeals do not theoretically bind Hong Kong courts but have great persuasive force

Solicitor v. Law Society of Hong Kong [2008] 2 HKC 1

English Case Law in Hong Kong

- Since the ALEO was not adopted as a law of the Hong Kong SAR,
 - Post-1997 decisions of the Privy Council and House of Lords are not binding on Hong Kong courts but would be “treated with great respect”.
Solicitor v. Law Society of Hong Kong [2008] 2 HKC 1
- In addition,
 - Article 84 of the Basic Law provides that courts in Hong Kong “may refer to precedents of other common law jurisdictions”.
 - But as a matter of practice, Hong Kong courts look primarily to English cases to interpret and articulate the law of contracts.

Precedent

“It must be observed that at the Common Law not every opinion expressed by a judge forms a Judicial Precedent. In order that an opinion may have the weight of a precedent, two things must concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter dictum”.

John Chipman Gray, *The Nature and Source of Law* (1921)

Precedent

Ratio Decidendi

“Any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his decision, having regard to the line of reasoning adopted by him”.

Rupert Cross, *Precedent in English Law* (1977)

“A precedent, therefore, is any judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large”.

John Salmond, *Jurisprudence* (1924)

Precedent

Obiter Dictum



Obiter dicta are “statements of opinion upon the law and its values and principles in their bearing on the instant decision, statements which in some way go beyond the point or points necessary to be settled in deciding the case”.

Neil MacCormick, *Legal Reasoning and Legal Theory* (1978)

It “is a truism...that dicta are of varying degrees of persuasiveness...Dicta of the highest degree of persuasiveness may often, for all practical purposes, be indistinguishable from pronouncements which must be treated as ratio”.

Rupert Cross, *Precedent in English Law* (1977)

The Quest for the Ratio

“[T]he final step is to determine whether or not it is a binding precedent for some succeeding case in which the facts are prima facie similar. This involves a double analysis. We must first state the material facts in the precedent case and then attempt to find the material ones in the second one. If these are identical, then the first case is a binding precedent for the second, and the court must reach the same conclusion as it did in the first one”.

Arthur Goodhart, *Essays in Jurisprudence and the Common Law* (1931)

The Quest for the Ratio

[PRIVY COUNCIL.]

J. C.* HARVEY AND ANOTHER PLAINTIFFS ;
1893
July 4, 29. AND
FACEY AND OTHERS DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF JAMAICA.

Contract—Negotiation by Telegram—Incompleteness—Acceptance of offer not proved.

Where the appellants telegraphed, “Will you sell us B. H. P ? Telegraph lowest cash price,” and the respondent telegraphed in reply, “Lowest price for B. H. P. £900,” and then the appellants telegraphed, “We agree to buy B. H. P. for £900 asked by you. Please send us your title-deed in order that we may get early possession,” but received no reply :—

Held, that there was no contract. The final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance to which must be expressed and could not be implied.

The Quest for the Ratio

“The first telegram asks two questions. The first question is as to the willingness of L. M. Facey to sell to the appellants; the second question asks the lowest price, and the word ‘Telegraph’ is in its collocation addressed to that second question only. L. M. Facey replied to the second question only, and gives his lowest price . . . Their Lordships are of opinion that the mere statement of the lowest price at which the vendor would sell contains no implied contract to sell at that price to the persons making the inquiry”.

The Quest for the Ratio

“The appellants **are solicitors** carrying on business in partnership at Kingston, and it appears that in the beginning of October, 1891, **negotiations took place between the respondent L. M. Facey and the Mayor and Council of Kingston for the sale of the property in question, that Facey had offered to sell it to them for the sum of £900, that the offer was discussed by the council at their meeting on the 6th of October, 1891, and the consideration of its acceptance deferred; that on the 7th of October, 1891, L. M. Facey was travelling in the train from Kingston to Porus,** and that the appellants caused a telegram to be sent after him from Kingston addressed to him ‘on the train for Porus,’ in the following words : ‘**Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid;**’ that **on the same day L. M. Facey replied by telegram to the appellants in the following words: ‘Lowest price for Bumper Hall Pen £900’;** that on the same day the appellants replied to the last-mentioned telegram by a telegram addressed to L. M. Facey ‘on train at Porus’ in the words following: ‘We agree to buy Bumper Hall Pen for the sum of nine hundred pounds asked by you. Please send us your title deed in order that we may get early possession.’ The above telegrams were duly received by the appellants and by L. M. Facey”.

The Quest for the Ratio

“It is impossible to devise formulae for determining the ratio decidendi of a case”.

Rupert Cross, *Precedent in English Law* (1977)

“Talk of finding the ratio decidendi of a case obscures the fact that the process of interpreting cases is not like a hunt for buried treasure, but typically involves an element of choice from a range of possibilities”.

William Twining and David Miers, *How to Do Things with Rules* (1999)



Continuity and Change

Common law judges “proceed from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science”.

Lord Wright, “The Study of the Law” (1938)

54 *LQR* 185

Change and Continuity

“The change, as they were made in this case or that, may not have seemed momentous in the making. The result, however, when the process was prolonged throughout the years, has been not merely to supplement or modify; it has been to revolutionize and transform . . . Nothing is stable. Nothing is absolute. All is fluid and changeable

In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die”.

Benjamin Cardozo, *The Nature of the Judicial Process* (1921)

Change and Continuity

“Reason is the life of the law, nay the common law itself is nothing else but reason”.

Edward Coke,
The First Part of the Institutes of the Laws of England (1628)

“The life of the law has not been logic; it has been experience”.

Oliver Wendell Holmes, *The Common Law* (1881)

Given June 3. october 1816

Home System,
old Law.

**THE NATURE OF
CONTRACTUAL OBLIGATIONS**

THE NATURE OF CONTRACTUAL OBLIGATIONS

The Subject Matter

■ Definition

- Chitty on Contracts:
 - 26th ed. (1989): *“a promise or set of promises which the law will enforce”*.
 - 2nd ed. (1834): *“an agreement giving rise to obligations which are enforced or recognised by law”*.
- American Restatement Second of Contracts (1981): *“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”*.

■ Characteristics

- Contractual obligations are voluntarily assumed
- Contractual obligations are legally enforceable, even in the absence of fault

Why Enforce Promises

What justifies the state's invocation of its coercive powers to enforce private bargains?

Economic Theory

- An exchange, voluntarily entered into, makes the parties better off.*
- Welfare-improving exchanges, however, might not occur if parties are uncertain about their partners' willingness to perform when the time comes.
- By enforcing bargained-for exchanges, contract law enhances social welfare.

*This argument does not apply only to exchanges but also to joint projects.



Why Enforce Promises

“If it was a matter of hunting a deer, everyone well realized that he must remain faithful to his post; but if a hare happened to pass within reach of one of them, we cannot doubt that he would have gone off in pursuit of it without scruple . . .”

J.J. Rousseau, *A Discourse on Inequality* (1755)

Why Enforce Promises



Why Enforce Promises

What justifies the state's invocation of its coercive powers to enforce private bargains?

Moral Theory

- A promisee has a moral right to performance by the promisor.
- The promisor who fails to perform wrongs the promisee and is thereby liable to make good any harm arising from breach.
- By enforcing bargained-for exchanges, contract law dispenses corrective justice.

Freedom of Contract

- Market Ideology: Competitive Exchange
 - Security of transactions is to be promoted.
 - Parties should know where they stand.
 - The role of contract law is to facilitate commerce.
- Individualist Ideology: Bargaining as Equals
 - Parties should be free to choose each other—or not—as contractual partners.
 - Parties should be free to choose their own terms.

Sanctity of Contract

Centrovincial Estates plc v. Merchant Investors Assurance Company Ltd

[1983] Com LR 158, Court of Appeal

Facts

- Plaintiffs let premises to defendants for a term running from 1 December 1978 to 24 December 1989 at a yearly rental of £68,320, payable from 25 December 1978 and subject to a rent review from 25 December 1982.
- On 22 June 1982, plaintiffs proposed a “current market rental value” of £65,000. Defendant replied on 23 June, agreeing. Plaintiffs received defendant’s reply on 28 June and immediately telephoned to inform defendant that the letter of 22 June erroneously stated a value of £65,000 instead of £126,000.
- Plaintiffs sued for declaratory relief.

Sanctity of Contract

Issue

- Plaintiffs argued, among other things, that defendant had not altered its position in reliance on the 22 June letter.
- The proposed “current market rental value” of £65,000 was lower than the prevailing rental of £68,320. Hence, under a provision of the rental contract, the yearly rent would not be adjusted.

Held (Slade L.J.)

- “Where the nature of an offer is to enter into a bilateral contract, the contract becomes binding when the offeree gives the requested promise to the promisor in the manner contemplated by the offer...it is nothing to the point that the offeree may not have changed his position beyond giving the promise requested of him”.

Limits on Contract

Both the common law and statutes regulate the freedom of contract. For example:

- unenforceability of illegal contracts
- anti-discrimination laws
- anti-trust laws

And the common law relieves a promisor of her duty to perform in certain circumstances, for example:

- mistake
- frustration

The Ages of English Contract Law

The Classical Period: 1770 to 1870

- Theories of natural law and philosophy of laissez-faire dominated
- Justice consisted of the strict enforcement of private bargains
- The law of contracts defined the law of obligations
 - Reluctance to impose obligations on those who had not voluntarily assumed them
 - Where obligations were imposed, they were said to be voluntarily assumed

The Ages of English Contract Law

1870 to 1980

- A return to greater paternalism and regulation of private bargains precipitated by
 - the problem of externalities in an industrial economy
 - lack of choice and understanding in the making of contracts
 - monopolies
 - standard-form contracts
 - exemption clauses
- This resulted in
 - legislatively specified obligations for some kinds of contracts
 - the expansion of general limits and defenses to contractual obligations
 - duress, undue influence, mistake
 - a change in the way existing law was understood, from implicit agreement to public policy

The Ages of English Contract Law

The Contemporary Period: 1980 to the present

- A resurgence of ideas and principles from the classical period, bolstered by freer markets and the law and economics movement
 - Standard form contracts are not the cause of unequal bargaining power. Rather, they reduce transaction costs.
 - Exemption clauses are not an evasion of responsibility. Rather, they allocate risk.
 - Insofar as there are disparities in income and wealth, these are to be addressed through the tax system.
- At the same time, arguments for intervention continue to hold sway
 - No market is perfectly competitive.
 - Regulation does not only protect the weak but also facilitates contracting.

Policy Tensions Shaping Contract Law

Values and emphasis identified with 'classical' contract law: Freedom of contract	Values and emphasis identified with 'modern' contract law: Limits on freedom of contract
1. Freedom and autonomy	1. Limits on freedom and autonomy
2. Minimal legal intervention	2. Regulation and channelling of contracting
3. Equality	3. Responding to inequality
4. Negotiated contracts	4. Standard form contracts
5. Assumed fairness of exchanges	5. Unfairness of some exchanges
6. Discrete contracts; self-interested individualism	6. Relational contracts; cooperation, trust
7. Literal interpretation	7. Contextual interpretation
8. Rules	8. Discretionary Standards
9. General law	9. Specialisation and differentiation



OFFER AND ACCEPTANCE

Contract Formation

A *bilateral* contract arises when a promise is exchanged for a promise.



A *unilateral* contract arises when a promise is exchanged for an act.

拾獲重酬
HK\$30,000
Lost Dog Reward



唐狗女 CiCi 於5月27日 - 錦田水尾村走失
當時沒頸帶NoCollar, 如有消息請立刻至電
IF SPOT OR FOUND, PLEASE CALL
6283 0669 / 9181 1221 / 9662 2655 / 9727 6180

Contract Formation

- (1) Offer made by one party
- (2) Offer accepted by the other party
- (3) The parties intended to create a legal relation
- (4) The terms of the contract are sufficiently certain and capable of being enforced
- (5) There is consideration on both sides

Offer

“An offer is an expression of willingness to contract on specified terms made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed”.

Air Transworld Ltd v Bombardier Inc [2012] EWHC 243 (Comm),
[2012] 1 Lloyd's Rep. 349

The Objective Test

The existence of an offer is judged objectively, rather than subjectively:

- The legal issue is not the alleged offeror's state of mind but how a reasonable person would have understood the alleged offeror's words or conduct
- Examples:
 - A mistake in a landlord's letter to a tenant proposing a "current market rental value" (*Centrovincial Estates*)
 - An intoxicated farmer signing a note for the sale of his property on the back of a restaurant receipt, apparently in jest (*Lucy v. Zehmer*, 196 Va. 493 (1954))

The Objective Test

YE OLDE VIRGINIAN RESTAURANT
OFFICE OF THE CLERK OF THE SUPREME COURT
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
NO. 1000
DATE 2/21/66

DEBIT CREDIT TOTAL

CHASE D.C. SLIP

[P. 1001]

[March]

We hereby agree to
Sell To W. O. Lucy
the Ferguson farm
complete for \$50,000.00
title satisfactory to buyer
J. R. Johnson

“We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer”.

The Objective Test

The objective test notwithstanding, an alleged offeree is not entitled to take advantage of a mistake *in the terms of the offer* that he or she knew—or should have known—about.

Why?



Snapping Up

Hartog v. Colin & Shields

[1939] 3 All ER 566, King's Bench Division



Facts

- The parties corresponded about the sale of Argentine hare skins, prices being quoted on a per-piece basis.
- Then on 23 November, defendants quoted a price of 10,000 winter hares at 10d per lb, 10,000 half-hares at 6d per lb, and 10,000 summer hares at 5d per lb.
- Defendant's previous offer for winter hares, made on 3 November, was 10d per piece. 100 skins equal 16 kilos, so a lb of hare skins is approximately three pieces.
- Plaintiffs sued to enforce the offer of 23 November.

Snapping Up

Hartog v. Colin & Shields

[1939] 3 All ER 566, King's Bench Division

Held (Singleton J)

- No contract was concluded.
- “I am satisfied that it was a mistake on the part of the defendants or their servants which caused the offer to go forward in that way, and I am satisfied that anyone with any knowledge of the trade must have realized that there was a mistake”.
 - The quoted price was much lower than that of twenty days ago.
 - The manner of quotation differed from anything that preceded it.



Snapping Up

Chwee Kin Keong v. Digilandmall.Com Pte Ltd [2004] 2 SLR(R) 594



Facts

- ☐ Listed price of commercial laser printers on defendant's website was mistakenly altered from S\$3,854 to S\$66.
- ☐ 4000 printers were ordered before defendant realized its mistake.
- ☐ Plaintiffs who had ordered 1,606 printers sued to enforce the alleged contract.

Snapping Up

Chwee Kin Keong v. Digilandmall.Com Pte Ltd [2004] 2 SLR(R) 594

Held (Rajah JC)

- ❑ No contract was concluded.
- ❑ Plaintiffs “were fully conscious that an unfortunate and egregious mistake had indeed been made by the defendant”.
 - There was a “stark gaping difference between the price posting and the market price” of printers.
 - Plaintiffs were “well-educated professionals”.
 - The orders were placed “in the dead of the night” with “indecent haste”.
 - Emails exchanged between the plaintiffs demonstrated they were “clearly anxious to place their orders before the defendant took steps to correct the error”.

Assignments and Readings

■ Next Seminar

- Date: 9 September 2024
- Topic: Offer and Acceptance
- Readings: McKendrick, pages 79 to 119
- Optional Cases:
 - *Roley v. Google LLC*, Case No. 18-cv-07537-BLF (N.D. Cal. Mar. 22, 2021)
 - *B2C2 Ltd v. Quoine Pte Ltd* [2019] SGHC(1) 3