**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

Logic

Offer-

Acceptance-

Terms-

1. Terms too vague/uncertain?

2. Whether vague/uncertain term is an essential Term

-> No, then maybe still a contract.

-> Yes then no contract.

i. Price

ii. Standard

iii. Date …

3. Resolving machinery

i. Is there one?

ii. Is it broken down?

a. Is the machinery agreed by the parties essential and non-subsidiary?

Yes-> If the mechanism for the ascertainment of the purchase price broke down for whatever reason then the court **was able to substitute its own valuation by ordering an inquiry into the fair value** of the reversions (Talbot v Talbot [1968] Ch. 1).

No-> Contract not enforceable.

iii. Statutory Intervention: See below

iv. Severance: unimportant terms

v. Implication of Terms: parties have acted on the agreement, evincing consensus on all essential terms.

vi. Least favorable interpretation: American way.

4. Intention to create legal relation

i. Identify relationship

a. domestic(presumably not enforceable)

i. spouses living “in amity

ii. other familial relationships(mother and daughter)

b. social (presumably not enforceable)

i. agreement to take a walk together

ii. offer and acceptance of hospitality…

c. Commercial(strongly presumably enforceable)

5. Consideration

**Offer**

- Whether an offer is made is principally depends on whether the party **intends to be bound by the terms** that he has proposed to the other party.

- If yes -> offer, if no -> merely **a willingness to negotiate** the terms.

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

Two categories

Identify its existence **objectively** -> 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. ->**

- A mistake in a landlord’s letter to a tenant proposing a “current market rental value” (Centrovincial Estates plc v. Merchant Investors Assurance Company Ltd [1983] Com LR 158, Court of Appeal)

- 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))

**Mistake** in terms: 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.

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| Hartog  v.  Colin & Shields [1939] 3 All ER 566, King’s Bench Division  **Hare skins** | 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.  Held: 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. |
| Chwee Kin Keong v. Digilandmall.Com Pte Ltd [2004] 2 SLR(R) 594  **Printers** | 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  Held: 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”. |

**Offeror is the master of the bargain. Because offeror is vulnerable in the formation of a contract.**

Invitation to Treat: an invitation to bargain or negotiate. It is not an offer, you **cannot create contractual obligations** by accepting the terms of an invitation to treat, you **could make an offer** in response to an invitation to treat.

-> **Definiteness, Specificity, Completeness** distinguish an offer from an invitation to treat.

-> general rule of ItT applicable to : **displays of goods in shops | advertisements(bilateral contract) | auctions | tenders**

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| Invitation to treat(ItT) | |
| Gibson  v.  Manchester City Council [1979] 1 WLR 294  **Purchase Scheme(no offer)** | Facts:  - Plaintiff Gibson enquired as to the price the defendant was willing to sell the house under a purchase scheme and asked for details about mortgage facilities.  - Defendant replied with the requested details and ask the defendant to fill the formal application form if he is interested.  - Plaintiff completed and returned the application form, leaving the purchase price blank because he had questions about repairing the tarmac paths outside the house.  Upon receiving defendant’s answers to his queries, plaintiff wrote, stating “in view of your remarks I would be obliged if you will carry on with the  purchase as per my application already in your possession”.  - A political change resulted in the abrogation of the purchase scheme.  Plaintiff sued alleging that a contract had already been concluded between him and the defendant.  Held: No contract had been formed.  - Diplock L.J.: It is “quite impossible to construe this letter as a contractual offer capable of being converted into a legally enforceable open contract for the sale of land by Mr. Gibson’s written acceptance of it. The words ‘**may be prepared to sell’** are fatal to this; so is the **invitation**, not, be it noted, to accept the offer, but ‘to make formal application to buy’ upon the enclosed application form…” |
| Storer  v.  Manchester City Council [1979] 1 WLR 1403  **Purchase Scheme(offer)** | Facts:  - Plaintiff Storer participated in the same purchase scheme described in Gibson. Unlike Gibson, however, Storer advanced to the stage where the town clerk wrote to him, saying:  “Dear Sir: Sale of Council House. I understand you wish to purchase your council house and enclose the agreement for sale. If you will sign the agreement and return it to me I will send you the agreement signed on behalf of the corporation in exchange. From the enclosed list of solicitors, who are prepared to act for you and advise you on the purchase, please let me know the name of the firm that you select, as soon as possible”.  Held: A contract was formed when the plaintiff returned the form.  - “The corporation put forward to the tenant a simple form of agreement. The very object was to dispense with legal formalities. One of the formalities — exchange of contracts — was quite unnecessary. The contract was concluded by offer and acceptance…”  Although the date when plaintiff’s lease was to cease and his mortgage payments to begin was left blank, - - “the filling in of the date was just a matter of administrative tidying up, to be filled in by the town clerk with a suitable date for the changeover”. |
| Displays of Goods in Shops (usually ItT) | |
| Pharmaceutical Society of Great Britain  v.  Boots Cash Chemists [1953] 1 QB 401 | “[I]n the case of an ordinary shop, although goods are displayed and it is intended that customers  should go and choose what they want, the contract is not completed until, the customer having  indicated the articles which he needs, the shopkeeper, or someone on his behalf, accepts that offer. Then the contract is completed”. (Somervell L.J) |
| **Advertisements** of **unilateral contract** (more likely to be classified as an **offer**) | |
| Lefkowitz  v.  Great Minneapolis Surplus Stores Inc.  86 NW2d 689 (Minn. 1957)  单边广告 | Facts:  - Defendant advertised “1 Black Lapin Stole” for sale at $1, the time of the sale being “Saturday 9.a.m.,” - and the mode of the sale being “First Come First Served”.  - Plaintiff was the first person to present himself at the store at the appointed time.  - The store refused to sell the stole to the plaintiff, stating that by the ‘house rule,’ the offer was open to women only.  - Plaintiff sued to enforce the alleged contract.  Held: A contract was formed when the plaintiff turned up at the store.  - “[T]he offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller’s place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant”.  - The defendant had no right to impose “new and arbitrary” conditions once the published offer had been accepted. |
| **Carlill**  **v.**  **Carbolic Smoke Ball Company**  [1893] 1 QB 256, Court of Appeal | Facts:  - Defendant placed the following advertisement: “£100 reward will be paid by the Carbolic Smoke Ball  Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter”.  - Plaintiff, relying on the advertisement, bought and used the product as directed but subsequently caught influenza. She sued for the promised reward.  Held: The advertisement was an **offer** that the plaintiff accepted by using the carbolic smoke ball in the  manner directed.  - To the argument that the advertisement was too vague to constitute an offer. Read in context,  - the reward applied to future customers, not past customers  - the immunity is to last during the use of the ball  - To the argument that the advertisement was puff, the advertisement stated that £1,000 was deposited at the bank to “shew[] [their] sincerity in the matter”. |
| Tenders | |
| Blackpool and Fylde Aero Club Ltd v. Blackpool Borough Council [1990] 1 WLR 1195 | An invitation to tender is usually an invitation to negotiate and not an offer. But a contractual duty to consider properly submitted tenders could arise. |
| Auctions | |
| Barry v. Davies (Trading as  Heathcote Ball & Co.) [2000] 1 WLR 1962 | If there is a **reserve price**, the auctioneer, by inviting bids, is inviting offers. Bidders make offers and the highest offer is accepted on the fall of the hammer.\*  If there is **no reserve price**, the auctioneer is taken as making an offer to sell which is then accepted by the highest bidder.  \* incorporated in Sale of Goods Ordinance, s.60(2) |

**Termination** of an offer ->

- Rejection

- An offer that has been rejected is terminated and **cannot be later revived** by the offeree’s purported acceptance.

- Lapse of time

- An offer that specifies a time limit for acceptance cannot be accepted after the deadline has passed.

- An offer that does not specify a time limit for acceptance expires **after a reasonable time**

- Revocation

- An offer may be withdrawn **any time prior to acceptance**, provided such withdrawal is communicated to the offeree.

- An offer of a unilateral contract may **not be withdrawn** once the offeree has **commenced performance**

- Errington v. Errington & Woods [1893] 1 QB 256

- Father’s estate may not revoke offer once son and daughter-in-law had started making mortgage payments understanding the property would be transferred to them once the loan balance was paid off.

- The withdrawal of the offer does not have to be communicated **by the offeror.** An offeree may not form a contract by accepting an offer that he or she **knows through a third party** is no longer open. *Dickinson v. Dodds* (1876) 2 Ch D 463.

- Death or Supervening Incapacity

- Counter-offers

- A counter-offer by an offeree is **tantamount to a rejection** of the original offer. *Hyde v. Wrench* (1840) 3 Beav 334

- Caveat: Inquiry is different from counter-offer. *Stevenson, Jacques & Co v. Mclean* (1880) 5 QBD 346

- Counter-Offer: “I offer forty for delivery over two months”.

- Inquiry: “Please wire whether would accept forty for delivery over two

months, or if not, longest limit you would give”.

**]**

**Acceptance**: a final and unqualified expression of assent to the terms of an offer (Chitty on Contracts (2018))

-> An assent that

1) must be final, i.e. not tentative

2) must be **unqualified**, i.e. no conditions or variations

3) must be **objectively** manifested—subjective assent is neither necessary nor sufficient

4) may be expressed through conduct.

-> Acceptance “**subject to contract**” is **not unqualified**(hence no binding)

-> Reliance is at the parties’ own risk. *A.G. of Hong Kong v Humphrey’s Estate* (Queen’s Gardens) Ltd. [1987] 1 AC 114 (no contract despite government’s reliance in demolishing existing staff quarters and refitting developer’s flats)

-> However, StC **may be waived** if subsequent conduct demonstrates that the parties intended to be bound. *RTS Flexible Systems Limited v Molkerei Alois Muller Gmbh* [2010] UKSC 14. (while manufacturer initially proceeded based on a letter of intent, the parties eventually reached consensus on essential terms, performed and even varied the terms of their agreement)

**Communication** (a general rule: acceptances must be communicated to the offeror)

*Entores v Miles Far East Corporation* [1955] 2 QB 327 (Denning L.J.):

- “Suppose…that I shout an offer to a man across a river…but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment…”

- “Suppose…I make an offer to a man by telephone and, in the middle of his reply, the line goes ‘dead’ so that I do not hear his words of acceptance. There is no contract at that moment”

- “In all the instances…so far, the man who sends the message of acceptance known that it has not been received or he has reason to know. So he must repeat it. But suppose that he does not know…”.

Exception to the general rule of communication:

**Waiver** -> Note that waiver is more likely to be **implied** into a **unilateral** rather than bilateral contract. See Carlill v. Carbolic Smoke Ball Company.

The Postal Rule ->

- An acceptance is effective **when it is posted**, not when it is received—if ever!

Household Fire Insurance v Grant [1879] 4 Ex D 216

- The revocation of an offer is effective only when it is received.

- Hence, a contract is validly entered into if an offeree’s acceptance is posted before the offeror’s revocation is received. *Byrne & Co v Leon Van Tien Hoven & Co* [1880] 5 CPD 344.

- Instantaneous Communications(general rule applies)

- Fax or phone call(Instantaneous) -> Entores v Miles Far East Corp [1955] 2 QB 327 (contract formed in London where acceptance by telex was received and not in Amsterdam where telex was sent). See also *Brinkibon Ltd v Stahag Stahl* [1983] 2 AC 34*; Susanto Wing Sun Co Ltd v. Yung Chi Hardware Machinery Co Ltd* [1989] 2 HKC 504.

- The postal rule is an **exception** made to **faciltiate commercial transactions** where there is a **substantial interval of time** between when an acceptance is sent and when it is received.

- Email(varies)

*-> David Baxter Edward Thomas and Peter Sandford Gander v BPE Solicitors (postal rule does not applies)* [2010] EWHC 306 (Ch): “The ‘postal rule’ is an anomalous exception to the general rule, which is limited to its particular circumstances. It *does not apply to acceptances made by some “instantaneous” mode of communication* . . . in my view the same principle applies to communication by email, at least where the parties are conducting the matter by email, as the solicitors were in this case”.

-> Chwee Kin Keong v **Digilandmall.com Pte Ltd (**postal rule applies**)** [2004] 2 SLR 594; [2004] SGHC 71. Per Rajah JC “… unlike a fax or a telephone call, **[email] is not instantaneous**”.

-> **IN HK, Electronic Transactions Ordinance, s.19(2) provides:**

“Unless otherwise agreed between the originator and the addressee of an electronic record, the time of receipt of an electronic record is determined as follows – (a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs – (i) at the time when the electronic record is accepted by the designated information system; or (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record comes to the knowledge of the addressee; (b) if the addressee has not designated an information system, receipt occurs when the electronic record comes to the knowledge of the addressee”

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| **Postal rule** | |
| Holwell Securities Ltd  v.  Hughes  [1974] 1 WLR 155, Court of Appeal  **Unsuccessful (postal rule)** | Facts:  - Plaintiffs were granted an option to purchase land. The agreement with the defendant provided: “The  said option shall be exercisable **by notice in writing** to the [defendant] at any time within six months from the date hereof . . . ”.  - Plaintiffs sought to exercise this option. Despite being posted in the ordinary way, the letter never reached the defendant.  - Plaintiffs argue that the option was properly exercised and a contract for sale and purchase constituted at the time the letter was posted.  Held:  - The parties did contemplate the exercise of the option by mail, a prerequisite to invoking the postal rule.  - But the language of the contract nevertheless precludes application of the postal rule. As the option was to be exercised “by notice in writing to the [defendant],” the **mere act of posting the letter did not suffice**. |
| Justification of Postal rule | |
| Bryne & Co.  v.  Van Tiehnhoven & Co. (Lindley J) | Post office as **agent of the offeror** from the Lindley J: “When . . . these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or in other words, he has made the post office his agent to receive the acceptance and notification of it”. |
| Adams v. Lindsell (1818) 1 B& Ald 681 | Prevents an infinite loop |
|  | Favors offeree who may rely on the contract once acceptance has been posted |
|  | Assumption of risk by the offeror who could have specified alternative modes of communication |

**Prescribed Method** of Acceptance

The offeror may prescribe a method of acceptance. An offer may, however, be accepted by other methods if

- The alternative method is “**no less advantageous**” to the offeror

- here, it is necessary to discern the offeror’s purpose in prescribing the method of acceptance

- And the offeror has not made the form of acceptance mandatory, i.e. exclusive of all other methods

- Manchester Diocesan Council of Education v Commercial and General Investments Ltd [1970] 1 WLR 241

- Document was sent to the solicitor of the defendant, rather than the address given in the tender.

- Held: contract concluded. If the offeror wanted to create a **mandatory** acceptance method, this would need to be made clearly and explicitly to the other parties. An equally effective method of acceptance would be enough to form a valid contract.

**Silence** as Acceptance

- **Generally NO.** silence cannot be treated as acceptance. Because the offeror may not impose a duty to speak on the offeree.

- Still no even if **silence is the prescribed methods** of acceptance and the **offeree subjectively intends to** accept the offer. *Felthouse v Bindley* [1862] EWHC CP J35. – Objectively, silence is consistent with both acceptance and rejection.

- **Rare cases YES**, where silence might be taken as acceptance if subsequent course of dealing establishes there was a consensus.

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| **Silence as Acceptance(YES)** | |
| Brogden v. Metropolitan Railway Company (1877) 2 App. Cas. 666 | While defendants never communicated acceptance of contract for the purchase of coal, they **behaved as though a contract had been concluded**, ordering the maximum quantity under it and complaining about inexactness in the supply. |
| Rust v. Abbey Life Assurance Co. Ltd [1979] 2 Lloyd’s Rep. 334 | Plaintiff who received a property bond policy on terms different from those she proposed had previously handed over a cheque in defendant’s favour and neither did nor said anything for seven months. |

Acceptance in **Ignorance** of an Offer

- Generally NO. *Williams v. Carwardine* (1833) 5 C&P 566

- McKendrick argues that an exception should be made in the case of unilateral contracts, where the performance being asked for has been tendered.

- The rationale is that there is no detriment to the offeror or to the offeree.

– But if the person accepting the offer must also be motivated by it, then ignorance necessarily precludes acceptance. See R v. Clarke (1927) 40 CLR 227 (person on trial for murder gave information about the true perpetrator ‘exclusively in order to clear himself’)

Battle of Forms

1. Buyer asks seller for a quotation.

2. Seller quotes a price, accompanied by a list of terms and conditions.

3. Buyer places an order, attaching a different list of terms and conditions.

4. Seller delivers the goods and sends an invoice referencing its list of terms and conditions.

**Mirror image rule**, also referred to as an unequivocal and absolute acceptance requirement, states that an offer must be accepted exactly with no modifications. The offeror is the master of their own offer. An attempt to accept the offer on different terms instead creates a counter-offer, and this constitutes a rejection of the original offer

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| *Butler Machine Tool Co Ltd*  *v.*  *Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401, Court of Appeal | Facts:  - On May 23, 1969, the plaintiff sellers offered to defendant buyers a machine tool at a price of £75,535, for delivery in ten months. On the reverse of the quotation were 16 conditions, including:  - “All orders are accepted only upon and subject to the terms set out in our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the buyer’s order.”  - “Prices are based on present day costs of manufacture and design and having regard to the delivery quoted and uncertainty as to the cost of labour, materials etc. during the period of manufacture, we regret that we have no alternative but to make it a condition of acceptance of order that goods will be charged at prices ruling upon date of delivery.”  - Buyers replied four days later with an order that asked plaintiffs to “[p]lease supply on terms and conditions as below and overleaf.” The terms and conditions proposed by the buyers were different in various aspects from those of the quotation. In particular, the price variation clause was absent.  - On the foot of the order was a tear-off slip: “Acknowledgment: Please sign and return to Ex- Cell-O. We accept your order on the terms and conditions stated thereon—and undertake to deliver by—Date—signed.”  - On June 5, 1969, sellers replied to the buyers: “We have pleasure in acknowledging receipt of your official order dated May 27 covering the supply of one Butler Double Column Plane-Miller. This being delivered in accordance with our revised quotation of May 23 for delivery in 10/11 months, i.e., March/April 1970. We return herewith duly, completed your acknowledgment of order form.”  - The machine was ready around September 1970 and sellers sought to charge buyers an additional £2,892 due to the rise in cost between May 27, 1969, when the order was given, and April 1, 1970, when the machine ought to have been delivered. The buyers rejected the claim.  Held:  - The contract between the parties was **formed on the buyers’ terms** and conditions and did not include the price variation clause.  - The majority applies the **mirror image rule**.  - Sellers’ quotation of May 23, 1969, was an offer which was rejected by buyers’ order of May 27, 1969. This order was accepted in the two letters dated 4 and 5 June 1969, the latter enclosing the formal acknowledgement which said: “We accept your order on the terms and conditions stated thereon.”  – The reference to “[the sellers’] revised quotation of May 23” only identified the machinery and the price.  - Denning MR: “[O]ur traditional analysis of offer, counter-offer, rejection, acceptance and so forth is out of date . . . The better way is to look at all the documents passing between the parties—and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points—even though there may be differences between the forms and conditions printed on the back of them . . . Applying this guide, it will be found that in most cases when there is a ‘battle of forms,’ **there is a contract as soon as the last of the forms is sent** and **received without objection being taken to it** . . . The difficulty is to decide which form, or which part of which form, is a term or condition of the contract.”  - Last Shot: The party that puts forward the latest terms and conditions no objected to by the other party.  - First Shot: A buyer purporting to accept a seller’s offer should not be able to impose different terms and conditions “if the difference is so material that it would affect the price” unless the attention of the seller was drawn to such difference.  - Knock Out: The terms and conditions of both parties are to be “**construed together.”** If they cannot be “reconciled so as to give a harmonious result,” the conflicting terms do not form part of the contract and any gaps are filled by reasonable implication. |

**Terms Too Vague or Uncertain**

Generally speaking-> Where parties have omitted or glossed over key terms of their agreement, courts may find there to be no contract. Agreements that are vague, incomplete, or uncertain but have induced performance are especially difficult:

- on the one hand, courts are not keen to make a contract for the parties and impose obligations the parties did not contemplate;

- on the other hand, courts are also reluctant to deny the legal effect of agreements that the parties believed to be binding.

The resolution of such cases is fact-specific.

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| Terms too vauge/uncertain | |
| **May and Butcher Ltd**  v.  The King [1934] 2KB 17, House of Lords  **used tentage**  unduly restrictive approach and that it should be kept within narrow confines, if not overruled. | Facts:  - Suppliants alleged a contract with Controller of the Disposal Boards for the purchase of **used tentage**. In a letter dated 29 June 1921, the Controller wrote, stating that in consideration of a deposit of “£1,000 as security for the carrying out of this extended contract,” the Commission confirmed the sale “of the whole of the old tentage which may become available…up to and including December 31, 1921”. Among the terms:  - “The price or prices to be paid, and the date or dates on which payment is to be made by the purchasers to the Commission for such old tentage shall be agreed upon from time to time between the Commission and the purchasers as the quantities of the said old tentage become available for disposal, and are offered to the purchasers by the Commission”.  - “It is understood that all disputes . . . will be submitted to arbitration in accordance with the provisions of the Arbitration Act, 1889”.  - In a second letter dated 7 January 1922, the Disposals Controller confirmed the sale of tentage that might become available up to 31 March 1923: “the prices to be agreed upon between the Commission and the purchasers in accordance with the terms of clause 3 of the said earlier contract shall include delivery free on rail . . . nearest to the depots at which the said tentage may be lying . . .”  - In August 1922, after suppliants’ proposals were rejected by the Controller, the Disposals Board wrote stating that they considered themselves free of the agreement.  - Suppliants filed a petition of right claiming an injunction against the sale of the remaining tentage and compensation for the damage done to them.  Held: **No contract existed** because price was an essential term left uncertain. As such, there could not be a contract. Simply the agreement is simply an agreement to agree.  - **If there were no price term**, the Sales of Goods Act, 1893, would impute a reasonable price. **But** here, there was a **provision** that the **parties were to agree**.  - The general arbitration clause applied to disputes arising from the agreement. But here, there was a **failure to agree.** |
| **Scammell and Nephew Ltd**  v.  Ouston  [1941] AC 251, House of Lords  **Trade-in Commer Van/**  **Hire-purchase term.** | Facts:  - At an interview, defendants agreed to sell plaintiffs a Commer van for £268 and to take plaintiffs’ Bedford van at a trade-in value of £100.  - The next day, at defendants’ request, plaintiffs formalized this agreement in a letter which stated that “this order is given on the understanding that the balance of the purchase price can be had on **hire-purchase terms** over a period of 2 years”.  - The parties later had a disagreement over the condition of the Bedford van which defendants refused to take in part-exchange.  - Plaintiffs claimed damages for breach of contract.  Held: No contract existed because of the vagueness of the hire-purchase term.  - A hire-purchase contract is a contract of hire that gives the hirer an option to purchase if specified conditions are met. It is not a contract of sale.  - In addition, there are many varieties of hire-purchase contracts, differing as to termination, warranty of fitness, duties of repair, interest, etc, and there was no evidence to suggest that there were “well-known ‘usual terms’ in such a contract”. |
| Kwan Siu Man  v.  Yaacov Ozer [1999] 1 HKC 150  **Buying flat in lift** | Facts:  - The parties were tenant and landlord engaged in a dispute over possession. In 15 or 16 November 1991, they met by chance in the lift lobby of KY Mansion. Plaintiff agreed to purchase defendant’s flat for HK$ 4.25 million. No other terms relating to the sale of the property were discussed.  - They were “very clear as to the belief that it was for the lawyers to deal with all other formalities and…expected them to do so”.  - After some correspondence about, among other things, the completion date of the sale, defendant called off negotiations in mid-February 1992. Plaintiff sought to enforce the oral agreement of 15 or 16 November.  Held:  -No “open contract”\* arose from the oral agreement between the parties in the lift lobby.  -“[A]s is common knowledge in Hong Kong, the property market is highly volatile. Whatever might have been the position in England in the last century—when the concept of an “open contract” was first developed in a climate of a stable pound sterling and no inflation—in the Hong Kong of today, the date of completion is an essential term of any contract for the sale and purchase of land…”  \* Under the Conveyancing and Property Ordinance, contracts for the sale of real  property must be memorialized. As explained by Bokhary PJ, an open contract is “one  by which the vendor and purchaser simply agree upon the sale of an identified property  at a stated price. The general law of property, so the expression goes, would then have  to step in to supply all the other terms: including even the date for completion”. |
| Valid and Binding | |
| Hillas & Co Ltd v.  Arcos Ltd (1932) 147 LT 503, House of Lords  **fair specification** | Facts:  - In an agreement dated 21 May 1930, appellants agreed to buy from respondents “22,000 standards of softwood goods of fair specification over the season 1930”.  - One of the conditions, clause 9, provided that “Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5% on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before the 1st Jan. 1931”. Appellants purported to exercise the option on 22 December 1930 but respondents had already agreed to sell their entire output for the 1931 season to a third party.  - Appellants claimed breach of contract and damages.  Held: There is a valid and binding contract.  - “[T]he parties were both intimately acquainted with the course of business in the Russian softwood timber trade” and had successfully executed the sale of “22,000 standards of softwood goods of fair specification over the season 1930”.  - As to the goods to be sold under the option  - Clause 9 does not describe them but the words “softwood goods of fair specification” are necessarily implied.  - The phrase “of fair specification” is not uncertain “[r]eading the document of 21st May as a whole” and given evidence about the course of trade. |

**Resolving uncertainty**

-> Making Use of the **Criteria or Machinery** Agreed by the Parties

- **Resolution by One or Other of the Parties**.

- Paragon Finance plc v. Nash [2001] EWCA Civ 1466, [2002] 1 WLR 685 (contract gave lenders the power to set interest rates)

- **Resolution by a Third Party**

- Foley v. Classique Coaches [1934] 2 KB 1 (agreement for coach

company to purchase all fuel from filling station carried out for three years and arbitration clause covered price of petrol)

- F&G Sykes (Wessex) Ltd v. Fine Fare Ltd [1967] 1 Lloyd’s Rep 53

(agreement acted on and arbitration clause covered number of chicks to be provided to nominated growers after the first year)

-> If the **Agreed Machinery Breaks Down**

**-** The traditional rule was that the court **would not compel** the parties to operate the machinery. Neither would it substitute the parties’ machinery with its own. The contract would become **unenforceable**.

- The modern rule looks at **whether the machinery** agreed by the parties is **essential**

- *Sudbrook Trading Estate Ltd v. Eggleton* [1983] 1 AC 444, House of Lords (appointment of parties’ valuers not essential because agreement was for sale of the freehold reversions at fair value)

- *Gillatt v. Sky Television Ltd* [2000] 1 All ER (Comm) 461 (appointment of independent chartered accountant essential because there were several approaches to ascertaining the “open market value” of shares in a private company and the parties intended for the valuation to be determined by the independent chartered accountant, not the court)

-> Intervention of Statute

- In Hong Kong, Section 10 of the Sale of Goods Ordinance provides:

1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

2) Where the price is not determined in accordance with the foregoing provisions, the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

-> Severance

- The court may **sever** a vague or uncertain term from an agreement to render it enforceable, **especially where the term is unimportant.**

- Nicolene Ltd v. Simmonds [1953] 1 QB 543 (clause that “the usual conditions of acceptance apply” despite lack of such conditions between the parties was meaningless and could be ignored)

->Implication of Terms

- The court may **also imply reasonable terms** into an otherwise incomplete agreement especially where the **parties have acted on the agreement, evincing consensus on all essential terms.**

- Wells v. Devani [2019] UKSC 4, [2019] 2 WLR 617 (term that commission was payable on sale implied into oral agreement between estate agent and developer)

-> Least favourable interpretation(American case)

- *Mears v. Nationwide Mutual Insurance Company* 91 F.3d 1118 (8th Cir. 1996)

Facts:

- Plaintiff won a contest in which the stated prize was two Mercedes-Benz automobiles.

- Defendant argued, inter alia, that the contract was too indefinite to enforce because the models and conditions of the automobiles were not specified.

Held:

- “[W]hen a **minor ambiguity** exists in a contract, Arkansas law allows the complaining party to insist on the reasonable interpretation that is least favorable to him”.

- Plaintiff was owed two new Mercedes-Benz automobiles, of the least expensive make.

Intention to create legal relation

->Objective test: “in all these cases the court does not try to discover the intention by looking into the minds of the parties. It looks at the situation in which they were placed and asked itself: would reasonable people regard this agreement as intended to be binding?” Merritt v. Merritt [1970] 1 WLR 1211 (Denning M.R.)  
-> Two point to notice

- First, the parties may not have thought about the matter at the outset. Intention to create legal relations is imputed based on the nature of the relationship and context.

- Second, intention to create legal relations should not be confused for willingness to sue. Put differently, do not conflate enforceability and enforcement.

->Domestic Agreements

-Domestic agreements between spouses living “in amity” are presumed to be **legally unenforceable.** Balfour v. Balfour [1919] 2 KB 571

- Abstracting from the intention of the parties, policy reasons for this presumption are twofold

- to avoid judicial intrusion into intimate relationships

- to avoid overburdening the courts

- But the presumption is negated and may even be reversed in cases where the spouses are **separated** or **about to separate**. Merritt v. Merritt [1970] 1 WLR 1211

- The same reasoning applies to other familial relationships.

- Jones v. Padavatton [1969] 1 WLR 328 (agreement by mother to finance daughter’s legal studies in England)

->Social Agreements

- As with domestic agreements, social agreements are **presumed** to be **legally unenforceable**. Examples cited by Atkin L.J. in Balfour v. Balfour:

- agreement to take a walk together

- offer and acceptance of hospitality

- But this presumption is also **rebuttable**.

- Simpkins v. Pays [1955] 1 WLR 975 (agreement between housemates to jointly enter a competition and split the winnings legally enforceable)

->Commercial Agreements

- Commercial agreements are **strongly presumed** to be legally **enforceable**.

- *Edwards v. Skyways Ltd* [1964] 1 WLR 349 (“ex gratia” payment to a retrenched airline pilot legally enforceable)

- This presumption may be **rebutted** by **express stipulation** of the parties.

- *Rose and Frank Co. v. JR Crompton and Bros Ltd* [1925] AC 445 (no intention to create legal relations where agreement states that “it is **not** entered into . . . as a formal and legal agreement, and **shall not be subject** to legal jurisdiction in the Law Courts either of the United States or England…”)

- The presumption may also be rebutted **by the context** in which the alleged promise was made.

- *Blue v. Ashley* [2017] EWHC 1928 (Comm) (no intention to create legal relations where promise to pay an investment banker an exorbitant bonus was made by a shareholder in a bar in an “obviously jocular” tone, where the purpose of the meeting was not to discuss compensation, where the promise made no commercial sense, and where none of the witnesses thought the offer was serious)

**Consideration**

->Essence of consideration -> Reciprocal Transaction ->

“It is the essence of consideration, that…it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the…motive or inducement for furnishing the consideration. The root of the whole matter is the relation of **reciprocal conventional inducement**, each for the other, between consideration and promise”. Oliver Wendell Holmes, The Common Law (1881)

Requirement of Consideration

-A promisee must plead and prove that he or she

- has **given up** something of value

- or has **conferred something of value** on the promisor

in exchange for the promise he or she is trying to enforce.

- Otherwise, the promise is a nudum pactum(无约束力之契约) unenforceable at common law.

- A promise unsupported by consideration may nevertheless be enforceable if

- it is contained in a valid deed

- or promissory estoppel applies

Consideration in general

1) may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other”. Currie v. Misa (1875) LR 10 Ex 153 (Lush J)

2) means “**something which is of value in the eye of the law**”. Thomas v. Thomas [1842] 2 QB 851, 859

3) must be given **at the request of the promisor** in return for the promise.

Note that the law does **not** inquire into the **adequacy** of consideration, only its **sufficiency**.

**Benefit or detriment**

- Consideration can consist of a **benefit** to the **promisor** or a **detriment** to the **promisee**

- Bainbridge v. Firmstone (1838) 8 A & E 743 (plaintiffs gave sufficient consideration for defendant’s promise to return boilers in the same condition by **parting with possession**)

- The benefit or detriment does not actually have to be actual, **only legal.** The test is in this sense **value neutral**.

- Hamer v. Sidway, 124 N.Y. 538 (1891) (nephew who abstained from drinking, smoking, and gambling until he was 21 gave sufficient consideration for uncle’s promise of $5,000)

- The consideration must **move from the promisee (but not necessarily to the promisor).** This is related to the **notion of privity** in contract.

- Tweddle v. Atkinson [1861] EWHC QB J57 (plaintiff had not supplied consideration for deceased father in law’s promise of £200 because the written agreement was made between the latter and plaintiff’s father)

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| Chan Man Tin  v.  Cheng Leeky [2008] 3 HKLRD 593, Court of First Instance  **plain loyalty and chastity** | Facts:  - Defendant counterclaimed against plaintiff arguing that they had entered into an oral agreement for her to replace the plaintiff’s former girlfriend. Under the agreement, “in consideration of the plain loyalty and chastity” of the defendant, the plaintiff promised to provide the defendant with accommodation, material support and to “cohabit…and live happily together”.  - Defendant contended that when plaintiff emigrated to the United States, he failed to pay her the same separation fee which the latter’s former girlfriend had received and ceased to provide any financial support.  - Plaintiff denied any such agreement and argued that it was, in any event, unsupported by consideration.  Held: There was no consideration supplied by the defendant.  - “It is difficult to understand precisely what is meant by the pleaded consideration ‘plain loyalty and chastity’ of the defendant. But assuming this amounts to her remaining in cohabitation with Mr. Chan, providing no sexual favours to any other person, this has been held to be contra bonos mores(违背良好道德的) and unenforceable”.  - “The primary difficulty about [‘cohabit…and live happily together’] amounting to good consideration is that in its form as pleaded the commitment or promise comes from Mr. Chan. But that offends the basic premise that for a promise to be enforceable the consideration in respect of it must move from the promisee”. |
| **Chappell & Co Ltd**  **v.**  **The Nestlé Co Ltd**  **[1960] AC 87, House of Lords**  **milk chocolate bar wraps** | Facts:  - Plaintiffs were owners of the copyright in a song titled “Rockin’ Shoes”.  - Defendants were purveyors of chocolate who offered to sell gramophone records containing the song to anyone who sent in a postal order for 1s 6d together with three wrappers from their 6d milk chocolate bars.  - These wrappers were discarded by Nestlé on receipt.  - Section 8 of the Copyright Act 1956 permitted such records to be made for retail provided the copyright owner was given prior notice and paid a royalty of 6¼% of the “ordinary retail price”.  - Defendants notified plaintiffs that the “ordinary retail price” of the records would not exceed 1s 6d.  - Plaintiffs sued for copyright infringement, arguing that Section 8 was inapplicable because the “ordinary retail price” asserted by defendants did not take into account the three wrappers from the chocolate bars.  Held: The three wrappers were not a condition to entering into the bargain but were **part of the consideration for the bargain itself.**  - Reid L.J.: “It seems to me clear that the main intention of the offer was to induce people interested in this kind of music to buy (or perhaps get others to buy) chocolate which otherwise would not have been bought…It seems to me quite unrealistic to divorce the buying of the chocolate from the supplying of the records”.  - Somervell L.J.: “It is said that when received the wrappers are of no value to Nestlés. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A pepper-corn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. As the whole object of selling the records, if it was a sale, was to increase the sales of chocolate, it seems to me wrong not to treat the stipulated evidence of such sales as part of the consideration”.  - Simmonds L.J. (dissenting):  - The wrappers were of no value in and of themselves but were evidence of a successful marketing campaign. The person sending the wrappers may not have bought the chocolate bars himself or herself. Moreover, the purchase of chocolate bars is not necessarily part of the same transaction as the purchase of the record.  - The sending of a wrappers were a condition, not consideration. “What can be easier than for a manufacturer to limit his sales to those members of the public who fulfil the qualification of being this or doing that?” |

Legal Claims as consideration

- A parties who gives up a **good legal claim** in exchange for payment—or the promise of it—**supplies good consideration**.

- Generally speaking, the promisee’s relinquishment of a **bad or invalid claim** is **good consideration**. Cook v. Wright (1861) 1 B & S 559

- Exception: promisee knows his or her own claim to have no basis. Wade v. Simeon [1846] 2 CB 548

Past consideration

- Given that the idea underlying consideration is **mutual inducement**, the traditional position is that past consideration is not good consideration.

- Re McArdle [1951] Ch 669 (despite recital, no consideration given by promisee who completed alterations and improvements to house co-owned by promisors before promise to pay her was made)

- Cf. Lampleigh v. Braithwaite (1615) Hob 105 (although promisee had secured a royal pardon for the promisor before promise to pay was made, there was good consideration because the former acted upon a request by the latter)

Existing Duties

Given that the idea underlying consideration is mutual inducement, the traditional position is that

- the discharge of an existing duty to the promisor is not good **consideration**

- in particular, **part-payment** of a debt is not good consideration for full discharge of the debt

- Foakes v. Beer (1884) 9 App Cas 605 (even if creditor had agreed to forgo interest on judgment debt by accepting instalment payments, debtor had not supplied any consideration for the promise)

- Pinnel’s Case [1602] 5 Co Rep 117a: “**payment of a lesser sum** on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum: but the gift of a horse, hawk, or robe, etc. in satisfaction is good.

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| ***Stilk v Myrick (1809) 170 ER 1168***  ***Consideration*** | Facts:  A return voyage between London and the Baltics was in peril when two of the crew abandoned the ship. The seamen were due to receive wages of £5 per month during the voyage. The captain offered the remaining crew an equally divided share of the deserted seamen’s salary if they could return sail the ship to London with reduced crew. The ship was returned to London by the remaining seamen however, the additional payment was not made.  Held:  No contract concluded for want of consideration. |
| ***Pao On***  *v.*  *Lau Yiu Long*  [1980] AC 614, Privy Council  **Past consideration.**  **Shares** | Facts:   1. - Plaintiffs owned all shares in the Tsuen Wan Shing On company whose principal asset was the Wing On Building. Defendants were majority shareholders in a public-listed company called Fu Chip Investment which desired to acquire Shing On. 2. - On 27 February 1973, the parties agreed on a price of $10.5 million to be paid by allotment of $4.2 million newly issued $1 shares in Fu Chip at a deemed value of $2.50 each. At defendants’ request, the plaintiffs also covenanted not to sell or transfer 60% of the shares allotted to them on or before 30th April 1974. 3. - This covenant exposed plaintiffs to the risk of a drop in Fu Chip’s share price. The parties thus entered into a subsidiary agreement under which the defendants agreed to buy back the shares at $2.50 per share on or before the end of April 1974.   - However, this agreement allowed the defendants to gain from an increase in the share price of Fu Chip. When plaintiffs discovered this, they informed defendants they would not perform the main agreement unless the subsidiary agreement was cancelled and replaced by a guarantee which would become operative only if the share price of Fu Chip fell below $2.50.  - Defendants were anxious to complete the sale so as not to undermine confidence in the newly listed company and the guarantee was duly executed on 4 May 1973.  - Plaintiffs sought to enforce the guarantee against the defendants when the market price of Fu Chip share slumped. The defendants asserted *inter alia* lack of consideration and duress.  Held:  - The consideration recited in the guarantee, i.e. plaintiffs’ promises to Fu Chip to complete the sale of Shing On, to accept shares as the price of the sale, and not to sell 60% of these shares before 30th April 1974, was good.  - Scarman L.J.: “An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for a promise. The act must have been done at the promisor’s request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit; and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance”.  - Scarman L.J..: “[T]he consideration for the promise of indemnity, while it included the cancellation of the subsidiary agreement, was primarily the promise given by the Paos to the Laus, to perform their contract with Fu Chip, which included the undertaking not to sell 60% of the shares allotted to them before the 30th April 1974. Thus the real consideration for the indemnity was the promise to perform, or the performance of, the Paos’ pre-existing contractual obligations to Fu Chip. This promise was perfectly consistent with the consideration stated in the guarantee. Indeed, it reinforces it by imposing upon the Paos an obligation now owed to the Laus to do what, at Lau’s request, they had agreed with Fu Chip to do”. |
| *Couldery*  *v.*  *Bartrum(1881) 19 Ch D 394(JesselM.R.)*  Part payment | *“*According to English common law, a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, a canary, or a tomtit if he chose and that was accord and satisfaction, but by a most extraordinary peculiarity of the English common law, he could not take 19s 6d in the £–that was nudum pactum”.  *Pace* Jessel M.R., this is not a mystery. It follows from:   * 1. - the idea of consideration as mutual inducement   2. - the proposition that consideration must be sufficient but need not be adequate   3. - and the notion of a legal benefit or legal detriment |
| *Foakes v Beer (1883) LR 9 App Cas 605*  Part payment.  Was not mentioned by Roffey. | Facts:  The pair then entered an agreement whereby ‘in consideration’ of an initial payment of £500 and ‘on condition’ of six-monthly payments of £250 until the whole amount was repaid, she would not enforce her judgment against him. Foakes made these regular payments until the entire amount was repaid.  Held:  Part payment has no consideration. |
| ***Williams v. Roffey Bros & Nicholls (Contractors) Ltd***  *[1991] 1 QB 1, Court of Appeal*  **Pay more for existing duty.**  **Practical benefit/detriment** | Facts   1. - Plaintiff carpenter had entered into an agreement with defendant building contractors to refurbish the carpentry of 27 flats at a price of £20,000. 2. - After being paid £16,200 for performing some of the work, plaintiff ran into financial difficulties. The contract price was too low to be profitable for the plaintiff who had also failed to supervise his workmen adequately. 3. - Defendants were concerned because they would owe their employer liquidated damages if the project were not completed timely. To encourage plaintiff to press on, defendants promised him an additional payment of £10,300, £575 for each flat he completed.   Held: There is consideration.  Purchas L.J.: “It was…open to the plaintiff to be in deliberate breach of the contract in order to ‘cut his losses’ commercially. In normal circumstances the suggestion that a contracting party can rely upon his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought upon the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation…I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement”.  Russell L.J.: “The plaintiff had got into financial difficulties. The defendants…recognised the price that had been agreed originally with the plaintiff was less than…a reasonable price. There was a desire…to retain the services of the plaintiff so that the work could be completed without the need to employ another subcontractor. There was a further need to replace what had hitherto been a haphazard method of payment by a more formalised scheme involving the payment of a specified sum on the completion of each flat. These were all advantages accruing to the defendants which can fairly be said to have been in consideration of their undertaking to pay the additional £10,300”*.*  6 stages test by Glidewell L.J.:  Glidewell L.J.: Reviewing Ward v. Byham [1956] 1 WLR 496, Williams v. Williams [1957] 1 WLR 148 and Pao On v. Lau Yiu Long [1980] AC 614, “the present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A’s promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B’s promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding”*.*   * 1. - Here, defendant sought to “ensure that the plaintiff continued work and did not stop in breach of the subcontract”   2. - “avoid[] the penalty for delay”   3. - “avoid [] the trouble and expense of engaging other people to complete the carpentry work”   4. - “There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress”. |
| *In Re Selectmove*  [1995] 1 WLR 474, Court of Appeal  **Paying tax**  **Practical benefit** | Fact:  - Company facing financial difficulties alleged an agreement with the taxman to pay future tax and national insurance liabilities as they fell due and to pay off arrears at a rate of £1,000 per month.  - The company did in fact pay these liabilities as they occurred and also paid £7,000 in arrears.  - The government later demanded payment of arrears of £24,650 and sought to wind up the company. It argued that the agreement, even if made, was not enforceable for want of consideration.  Held: No consideration had been given to support the alleged agreement to defer payment of the arrears.  - Gibson L.J.: It was “submitted that an additional benefit to the Crown was conferred by the agreement in that the Crown stood to derive practical benefits therefrom: it was likely to recover more from not enforcing its debt against the company, which was known to be in financial difficulties, than from putting the company into liquidation…I see the force of the argument but the difficulty that I feel with that is that, if the principle of [*Roffey*] is to be extended to an obligation to make payment, it would in effect leave the principle in *Foakes v. Beer* without any application”.  - Note also that in *In Re Selectmove*, the company argued that it had implicitly promised to continue trading but the court rejected this contention as unsupported by the evidence. |
| ***MWB*** *Business Exchange Centres Ltd*  *v.*  *Rock Advertising Ltd*  [2016] EWCA Civ 553, [2017] QB 604, Court of Appeal  **Practical benefit successfu**l | Facts:   1. - Defendant occupied premises managed by the claimant under a license agreement. Defendant’s business struggled and by February 2012, it had accumulated £12,000 in license fee arrears, owed to the claimant. 2. - Defendant alleged it reached a compromise with the claimant to backload the payments due over the period from February to October 2012, such that the arrears would be paid off by the end of the calendar year. 3. - Claimant later exercised its right to lock defendant out of the premises and purported to terminate the license agreement between the parties. It argued that the compromise, even if made, was not enforceable for want of consideration 4. Held: The compromise was enforceable because claimant derived a practical benefit from it. 5. - Kitchin L.J.: “First MWB would recover some of the arrears immediately and would have some hope of recovering them all in due course. But second and more importantly, Rock would remain a licensee and continue to occupy the property with the result that it would not be left standing empty for some time at further loss to MWB”. |
| *Shadwell*  *v Shadwell*  *(1860) 9 C.B.N.S. 159.* | performance of a duty owed to a third party may be good consideration for a separate promisor’s promise.  Reaffirmed by Roffey and UBC. |

Conclusion on Consideration/Modern development

* Doctrinally, there is a distinction between
  + **Promises to pay more for the same**
    - A “practical benefit” may qualify as sufficient consideration.
    - But precise definition of “practical benefit” remains elusive and not every threat to breach counts as duress.
      * + *UBC (Construction) Ltd v. Sung Foo Kee Ltd* [1993] 2 HKLR 207, [1993] 2 HKC 458
  + **Promises to accept less for the same**
    - A “practical benefit” may qualify as sufficient consideration
    - But “practical benefit” here cannot be part payment or a promise of future payment.
      * + *Vinson Engineering Ltd v. Kin Shing Engineering (HK) Co Ltd* [2007] 5 HKC 268
  1. **Estoppel**

Anson on Contracts: “[A] person acts in reasonable reliance and to his or her detriment in the belief that he or she has or will acquire rights in or over the property of another in circumstances in which it is unconscionable for the property owner to deny the rights”.

- Crabb v. Arun DC [1976] Ch 179 (council estopped from denying right of access to road after owner who was assured of such access failed to reserve any right of way from the back plot of divided property when selling the front plot)

- Promissory estoppel could operate to make discharges or variations enforceable even in the absence of consideration.

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| *Central London Property Trust Ltd*  *v.*  ***High Trees House Ltd***  *[1947] 1 KB 130, King’s Bench Division*  **Leading case. PS** | Fact:  - In 1937, Central London Property Trust Ltd (CLPT) leased a block of flats in London to High Trees House Ltd (HTH) at £2,500 per year for 99 years. Due to the impact of World War II, there was a drastic under-occupancy of the flats in 1940. CLPT agreed to reduce the rent to £1,250. This halved rent was paid until the end of 1945. By then, London had largely recovered from the war and the flats were again fully occupied. CLPT then “friendly” claimed for the full rent for the last 2 quarters of 1945.    Held: CLPT could not go back on its promise to accept reduced rent for the period when the flats were not fully occupied. Once conditions went back to normal, the original agreement could be enforced and therefore the claim for full rent for the last quarters of 1945 was successful.  - “The courts have not gone so far as to give a cause of action in damages for the breach of [a bare promise made with the intent of creating legal relations, with the intent that it should be relied upon and which was in fact acted on], but they have refused to allow the party making it to act inconsistently with it”.  - As to the scope of the promise, it was “understood by all parties only to apply…when the flats were only partially let, and that it did not extend any further than that”.  -“[A] promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be **honoured**” |

Elements of PS

1. Clear promise

**Must be clear and unequivocal**

*Woodhouse A.C. Israel Cocoa Ltd v. Nigerian Product Marketing Co Ltd* [1972] AC 741 (no promissory estoppel because seller’s agreement to accept sterling rather than Nigerian pounds as originally stipulated in the contract was ambiguous as to the rate of exchange between the two currencies)

But does not need not be express and **may be implied**

***Hughes*** *v. Metropolitan Highway* (1877) 2 App Cas 439 (promissory estoppel where landlord asserted right to compel repairs within six month of notice which period expired shortly after his negotiations to purchase tenant’s leasehold interest broke down)

* 1. 2. Reliance on the promise

The promise must have **altered his or her position** based on the promise

*Alan & Co Ltd v. El Nasr Export & Import Co* [1972] 2 WLR 800 (Denning M.R.) (explaining that for promissory estoppel the promisee must have “acted on the belief induced by the other party”)

Detriment, though helpful, is not necessary

Compare ***Hughes***(detrimental reliance since promisee lost time to repair) with ***High Trees***(no detrimental reliance since promisee paid less rent than before)

Notice: The promisee’s reliance on the promise and the inequity in allowing the promisor to go back on the promise are **intimately related**.

* 1. 3. It must be inequitable for the promisor to go back on the promise.

D&C Builders Ltd v. Rees [1966] 2 QB 617 (not inequitable for promisor, a small building company, to resile from agreement to accept part payment in full satisfaction of debt as promisees had exploited its precarious financial situation)

The Post Chaser [1982] 1 All ER 19 (not inequitable for buyer to reject documents of ship after requesting the seller to forward them to the sub-buyer given the short amount of time that had elapsed and the absence of any prejudice to the seller)

MWB (not inequitable for promisor to go back on revised payment schedule for license fee arrears where amount paid by the promisee in accordance with revised schedule was due in any case, legal rights under the contract were re-asserted by the promisor after two days and no prejudice was suffered by the promisee) but succeed in finding consideration.

**Not a Sword**

* 1. Furthermore, under English law, promissory estoppel **cannot serve as an independent cause of action.**
  2. It may be used as a sword in the US and Australia.
  3. Some arguments for permitting promissory estoppel to be used as a sword

- no principled reason for distinguishing between bare promises made in the context of an existing legal relationship and those made outside one

- also, no principled reason why proprietary estoppel should give rise to a cause of action but not promissory estoppel

- does not undermine doctrine of consideration because it protects detrimental reliance.

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| *Combe v. Combe*  *[1951] 2 KB 215*  **PS not a sword** | Fact:  - A husband promised his wife an allowance of £100 a year, free of tax, after a decree nisi of divorce was pronounced but before it was made absolute. Although the husband never made any payments, the wife, in reliance upon this promise, did not apply to the Divorce Court for maintenance.    Held:  - As promissory estoppel does not give rise to an independent cause of action, the wife could only enforce the promise if she gave good consideration for it.  - There was no consideration for the promise because the husband did not request the wife to forebear and the wife could not have, in any case, given up her right to apply to the Divorce Court for maintenance. |
| *Luo Xing Juan*  *v.*  *Estate of Hui Shui See*  *[2009]12 HKCFAR 1*  PS as a sword? | Facts:  - Luo cohabited with the deceased in a property which she believed he owned. The two were engaged to be married. When the deceased proposed to Luo, he promised her a 35% interest in the property “to provide her with financial security”.  - She relied on this promise by continuing to reside with the deceased *de facto* as man and wife, foregoing employment opportunities and paying a HK$40,000 mortgage instalment on the flat.  - Luo was unaware that the property was owned by a company named Glory Rise. The deceased was the controlling shareholder of Glory Rise. When the deceased passed away, the deceased’s sister acting on behalf of the estate and as a director of Glory Rise caused the company to institute proceedings against Luo for possession of the property and mesne profits.  - Luo resisted the claims on the basis of rights allegedly acquired during her relationship with the deceased.  **Held (Ribeiro PJ)**   1. - “While it is necessary for the purposes of exposition to identify the separate elements of the doctrine, it should be borne in mind that when applying them to the facts, each element does not exist in its own watertight compartment to be kept separate from the others. Each element acquires its meaning and content in the context of other elements”. 2. - “In my view, understood in the abovementioned context, there was a clear and unequivocal promise made by the deceased to Miss Luo sufficient to found a promissory estoppel”.   - “The substance of the promise…was that the deceased would, as controlling shareholder of Glory Rise, secure for [Luo] a 35% interest in the value of the Property…and that, unless and until the Property was disposed of and her 35% entitlement duly provided for, [Luo] would have the security of being allowed to occupy it as her home without interference by the company. Put negatively, the deceased was promising to forgo exercising his legal powers (as controlling shareholder of Glory Rise) to cause the Property to be disposed of without [Luo] receiving a 35% share of the proceeds or to cause her to be evicted pending disposal”. |
| *Tool Metal Manufacturing Co Ltd*  *v.*  *Tungsten Electric Co Ltd*  *[1955] 1 WLR 761, House of Lords*  ***Suspensive or Extinctive?*** | Facts:  - Plaintiff licensed its patent to defendant for the manufacture of hard metal alloys. The contract provided for compensation to the licensor if the licensee sold more than a stipulated quantity of the licensed material.  - In 1942, the parties agreed to suspend enforcement of the compensation clause and contemplated making a new agreement post-war.  - In litigation spanning 1945 and 1946, plaintiff claimed to have revoked its suspension and to be entitled to compensation beginning 1 June 1945. Plaintiff’s claim failed because adequate notice had not been given. In 1950, plaintiff again claimed to be entitled to compensation, this time, beginning 1 January 1947.  Held:  Plaintiff had effectively revoked its promise to suspend its legal right and was entitled to the compensation claimed. The prior litigation gave the defendant notice that the temporary concession made by the plaintiff would not be extended, “that the suspensory period was at an end and were bound to put their house in order”.  Tucker L.J..: “It is, of course, clear…that there are some cases where the period of suspension clearly terminates on the happening of a certain event or the cessation of a previously existing state of affairs or on the lapse of a reasonable period thereafter. In such cases no intimation or notice of any kind may be necessary. But in other cases where there is nothing to fix the end of the period which may be dependent upon the will of the person who has given or made the concession, equity will no doubt require some notice or intimation together with a reasonable period for readjustment before the grantor is allowed to enforce his strict rights. No authority has been cited which binds your Lordships to hold that in all such cases the notice must take any particular form or specify a date for the termination of the suspensory period”. |

**Terms**

Representations and Terms

Representations: statements which merely induce the other party to form a contract

remedies: damages for misrepresentation and rescission in any case

Terms: statements which form part of the contract itself.

remedies: damages for breach, rescission if serious (and statutory controls).

How to distinguish?

**Objective test** (*Oscar Chess Ltd v Williams*[1957] 1 WLR 370) per Lord Denning: “the intention of the parties depends on their conduct, words and behaviour rather than on their thoughts.”

Indices:

* **importance of statement** (*Bannerman v White* (1861) 10 CB NS 844)
* **special knowledge** (*Dick Bentley v Harold Smith* [1965] 1 WLR 623)
* **verify truth of statement/ Warranty** (*Ecayv Godfrey*(1947) 80 Lloyd’s Rep 286, (*Schawel v Reade*))
* **Timing** (*Routledge v McKay [1954] 1 All E.R. 855.*)
* Where Agreement Later Reduced to Writing(Heilbut Symons & Co v Buckleton)

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| *Bannerman v White*  **Importance** | A statement is more likely to be regarded as a term if one of the parties stresses its  importance and makes it clear to the other party that it is crucial to a decision whether or  not to enter into a contract.  the parties negotiated the sale and purchase of some hops. The buyer asked if the hops had been cultivated using sulphur. He said he would not be interested in buying them if they were so cultivated. The seller stated that no sulphur had been used and the contract was formed. It later became apparent that sulphur had been used in the cultivation of the hops. The seller sued for the price but the buyer claimed he was entitled to reject the hops. The court found for the buyer. |
| *Dick Bentley Productions Ltd v Harold Smith*  *(Motors) Ltd*  **Special knowledge** | plaintiff asked the defendants, who were car dealers, to find him a “well-vetted” second-hand car. The defendants found a car which, they said, had done only 26,000 miles with a new engine. The plaintiff agreed to buy the car which, in fact, had done over 100,000 miles. There was no reference to mileage in the written contract of sale.  English Court of Appeal unanimously upheld the plaintiff’s claim for damages for breach of contract on the basis that the defendant’s statement as to mileage was a term of the contract. Lord Denning MR said that the defendants were in a position to know or at least and out the history of the car.  The decision in this case is no doubt “equitable”. There was clearly a misrepresentation by the defendants which would have fallen within section 2(1) of the Misrepresentation Act, 1967, passed soon after. Lord Denning“convert” the statement into a term given the inadequacy of the provision for damages for misrepresentation prior to the statute. |
| *Schawel v Reade*  ***verify truth of statement/* Warranty** | the parties were discussing the possible sale of the defendant’s horse for stud purposes. The plaintiff began to inspect the horse but the defendant said: “You need not look for anything: the horse is perfectly sound. If there was anything wrong with the horse I would tell you.” The plaintiff then ceased his inspection and, three weeks later, bought the horse which was totally unfit for stud purposes.  The House of Lords unanimously held that, in these circumstances, the defendant’s statement as to the soundness of the horse was a term of the contract.( Seller intended to take upon himself the responsibility of the soundness of the horse by making the quoted statement.) |
| *Ecay v Godfrey*  ***verify truth of statement/* Warranty** | The claimant, Ecay, contracted to purchase a sail boat for £750 from the defendant, Godfrey, who had considerably more expertise in boats. The defendant asserted that the boat was in reasonable condition, however he did nonetheless suggest that the purchasing claimant may wish to survey the boat for a better overview. The transaction was completed and it subsequently transpired that the boat was heavily flawed. The claimant thus sought to bring an action against the defendant for sale of a flawed vessel.  The Court held that the defendant’s remarks in regards to the boat’s ‘soundness’ were mere representations rather than a binding part of the agreement as the statement had not proved sufficiently absolute or indicative of intent for it to qualify as a contractual term. |
| *Routledge v McKay*  **Timing** | The seller of a motor cycle stated, on 23 October, that it was a 1942 model when it was, in fact, a 1930 model. The buyer referred to the log book as corroboration. On 30 October the same year, the formal contract of sale was concluded. It did not make any reference to the age of the motor cycle. It was held that the earlier statement was not a term of the contract but only a representation. The time gap of seven days was too long for the statement made to be a term. It was also significant that the seller made clear that he had no special knowledge of his own; that he got his information from elsewhere and was just passing it on. |

Express or implied terms

Express terms:

->Parol evidence rule(from Jacobs v Batavia & General Plantations [1924] 1 Ch 287)): When it is proved or admitted that the parties to a contract intended that all the express terms of their agreement should be recorded in a particular document or documents, evidence will be inadmissible (because irrelevant) if it is tendered only for the purpose of adding to, varying, subtracting from or contradicting the express terms of that contract conditions or warranties or innominate term.

-> Four Corners Doctrine: courts use to determine the meaning of a written instrument such as a contract as represented solely by its textual content.

-> Exception:

- Contract is vitiated—e.g., misrepresentation

- Additional terms—e.g., collateral terms/contracts

Collateral terms/contracts

- usually a single term contract

- Evidence may be admitted to show that a collateral (“running side by side”) contract was made before or at the time the written contract was made*.*

- The **consideration** for a collateral contract is, invariably, entering into the main contract in return for a “collateral” assurance.

- Whether there is a collateral contract(Mendelssohn v Normand Ltd[1970] 1 QB 177):

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| *Mendelssohn v Normand Ltd [1970] 1 QB 177*  **parked in a garage** | The Claimant parked in a garage owned and operated by the Defendant. There was a notice board in the car park which stipulated that the Defendant would ‘accept no liability for any loss of damage sustained by the vehicle, its accessories or contents howsoever caused’. This board was not obvious for drivers who drove into the car park but was obvious when the driver would exit the vehicle and go to pay for the parking. In addition, the Claimant had previously parked in the same garage. In this instance, an employee of the Defendant insisted that the Claimant should leave his car unlocked and assured the Claimant that he would lock it. However, valuables were subsequently stolen from the claimant’s car.  The court held in favour of the Claimant, observing that the Defendant had not done enough to bring the notice to the attention of his customers so as to successfully incorporate it into a contract with the Claimant.  “He may have seen the notice, but he had never read it. Such a notice is not imported into the contract unless it is brought home to the party so prominently that he must be taken to have known of it and agreed with it.” (Lord Denning) |

- objective test + assurance so strong that claimant would not have contracted

- distinct from test for representation—different remedies + overriding other express terms

- Today, Collateral terms = collateral contract. Sidestep parol evidence rule and add terms to contract (e.g., Curtis v Chemical Cleaning & Dyeing Co [1951] 1 KB 805)

Implied Terms: Traditionally courts have been reluctant to find such terms. This is in keeping with the **principle of freedom of contrac**t, which requires that it is for the parties to make the contract and not the courts.

Implication in fact

**- Business efficacy**

Test: In applying this test the court decides whether or not the contract would be unworkable

without such a term being implied into the contract.

Case: The Moorcock(parties had a contract for the hiring of a jetty for loading cargo. At low tide the plaintiff’s boat ran aground and was damaged. It was clear that the jetty was not safe for the purpose of the contract. There was no express term that the jetty was but the English Court of Appeal held that it was an implied term that the jetty should be fit for the basic purpose of the contract. This implied term was necessary to give the contract “business efficacy” and it could be assumed that the parties so intended)

- **officious bystander (Shirlaw v Southern Foundries (1926) Ltd.)**

Test: That which is implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common “Oh, of course”.

Note: A term will not be implied “in fact” into a contract if it would expressly contradict an express term.(*Lynch v Thorne*)

Implication in law—by statute, common law or custom

- **Common law**(parties may not be aware of these terms but the courts will imply such terms irrespective of the parties’ intentions.)

Test: Test is one of “necessity” and Policy considerations -> Crossley v Faithful & Gould

Holdings [2004] EWCA Civ 293:

whether term consistent with law

how term would affect parties

wider issues of fairness within society

Case: Liverpool City Council v Irwin (landlord has an obligation to take reasonable care to maintain the common parts of an apartment building, including the stairs and lifts). And *Malik v Bank of Credit and Commerce International SA (in liquidation)* (implied a term into a contract between an employer

and employee not to conduct a dishonest or corrupt business)

**- Statue**

SOGO: Sale of Goods Ordinance (Cap. 26):

s2A—dealing as a consumer

s15—sale by description: where goods are sold by description, the goods must correspond

with that description.s16—quality and fitness: goods must be of “merchantable quality”62 and, where appropriate, that goods must be “reasonably fit” for the buyer’s purpose

Note: An important defence under section 16(2) is that the condition of “merchantability” does not apply to those defects which have been “speci cally drawn to the buyer’s attention before the contract is made.”

Supply of Services (Implied Terms) Ordinance (Cap. 457):

s3—contracts for supply of services

s4—dealing as a consumer

s5—care and skill: the supplier will carry out services with reasonable care and skill.

s6—time of performance: no time is fixed in the contract there is an implied term that the service will be provided within a “reasonable time”

**- Custom**

Rationale: the parties did not express all of the terms of the agreement but only those necessary for this particular case; relying on regular trade customs and practices to complete the remainder of the terms.

Condition: the person arguing in favour of the inclusion of such a term has to show that the custom is well-established in that particular trade, industry or locality. The implied term must be consistent with any express term as it is within the parties’ powers to expressly exclude any customary term.

Case: *Hutton v Warren ->* it was proved by local custom that a tenant, on quitting in accordance with notice given by the landlord, was entitled to a fair allowance for the seeds and labour he had spent on the land. This was only proper, as the landlord could benefit from the results of the tenant’s endeavours.

Conditions, Warranties and Innominate Terms

Why it matters—remedies:

breach of condition—repudiation and damages

breach of warranty—damages

Basic distinction:

condition—**essential term**

warranty—**non-essential term**

Classification made by

By the parties—courts can override parties if unreasonable(*Schuler AG v Wickman Machine Tool Sales Ltd*)

By statute:

SOGO s12—“stipulations as to time of payment are not deemed to be of the essence of a contract of sale”

SOGO s16—“there is an implied condition that the goods supplied under the contract are of merchantable quality […]”

By precedent—e.g., time when vessel ready to load in voyage charterparties (The Mihalis Angelos [1971] 1 QB 164)

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| *Schuler AG v Wickman Machine Tool Sales Ltd*  **1400 visits.** | The respondents were given the sole selling rights for the products of the appellants (a German company) in England. It was described as a “condition” of the contract that the respondents should visit the six leading UK motor manufacturers each week for the four-and-a-half years’ duration of the contract. The respondents failed to make some of the visits and the appellants sought to terminate the contract. The respondents claimed that such termination was wrongful since, despite the word “condition”, the parties had not intended that a single breach of requirement for some 1,400 visits would entitle the appellants to terminate. By a majority of four to one, Lord Wilberforce dissenting, the House of Lords found for the respondents stating this is not a condition even the contract use the exact word.(If classification is made by the parties—courts can override parties if unreasonable) |
| *The Mihalis Angelos* | However, the classification of terms remains important in the interests of certainty.  A preference for certainty over flexibility has been expressed  The English Court of Appeal were urged to follow the Hong Kong Fir intermediate term approach but decided that the classification of terms into conditions and warranties still had a valuable role to play in certain types of contracts of which a charter party was one |

Innominate terms: terms which cannot be classed as conditions or warranties.

Rationale: there may be an intermediate class of terms which are not conditions but the breach of which might justify termination provided that the consequences of the breach are sufficiently serious.

If the effect is sufficiently serious, there will be a right to terminate the contract and sue for damages; if not, the right will be restricted to a claim for damages.

Concept of “Intermediate” first developed in the famous Hong Kong Fir Shipping case.

- Innocent party deprived of substantially the whole benefit under the contract

- High threshold (breach goes to root of contract—The Hansa Nord[1976] QB 44)

Guidelines under Grand China Logistics v Spar Shipping[2016] EWCA Civ982:

Classification is question of interpretation

Term innominate if various degrees of gravity of breach

Need to apply commercial approach

Innominate term, not condition, is default

Interpretation and exemption clause

Incorporation:” No exemption clause may operate unless it is “incorporated” as a term of the contract

between the “exemptor” and “exemptee”.

1. Signature: The basic rule is that if a party **signs** a contractual document — unless there is fraud, misrepresentation, or other vitiating factor such as duress or undue influence — he is bound by its terms

Case: L’Estrange v Graucob

Exception:

Misrepresentation

Other vitiating factors—duress, undue influence, mistake, etc.

Non-contractual character of signed document (Grogan v Robin Meredith Plant Hire [1996] CLC 1127)

2. Notice: Terms may be binding provided notice of such terms are brought to the notice of the other party. The party seeking to rely on the exemption clause need not show that he actually brought it to the notice of the other party but only that he took reasonable steps to bring it to the attention of the other party:

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| reasonableness | |
| Thompson v London, Midland and Scottish Railway  **Illiterate passenger** | The plaintiff who was injured on alighting from the train, allegedly by the defendants’ negligence, failed in her action for damages in the English Court of Appeal which held unanimously that the exemption clause was part of the plaintiff’s contract even though she was illiterate and was unaware of its existence. Note: would now be decided differently on statutory grounds(including L’Estrange) |
| *Parker v South Eastern Railway* [1877] 2 CPD 416 | cloakroom receipt stating “See back” (sufficient to inform?) |
| *PoseideonFreight v Davies Turner* [1996] 2 Lloyd’s Rep 388 | reference to terms “on the back” but such page not faxed |
| timing | |
| *Olley v Marlborough Court Ltd* | it was held that a notice in a hotel bedroom, which included a clause exempting liability for the loss of guests’ luggage, was not incorporated into the contract between the hotel and a guest. The contract had been made in the lobby of the hotel before the guest, the plaintiff, had entered her bedroom and before she had an opportunity to see the notice.  requisite notice must be given at or before the time the contract is concluded. |
| *Thornton v Shoe Lane*  *Parking Ltd.,* | the plaintiff wished to park his car in the defendants’ parking area. At the entrance was a notice stating: “All cars parked at owner’s risk.” The plaintiff paid a fee, obtained a ticket and drove in. On the ticket were further terms, which the plaintiff did not read, excluding the defendants’ liability for personal injury to customers. The plaintiff was subsequently injured, partly as a result of the defendants’ negligence and sued the defendants who attempted to rely on the further exemptions. The English Court of Appeal unanimously found for the plaintiff. It was held that the additional terms were ineffective as they had been brought to the plaintiff’s attention too late. |
| Nature of document | |
| *Chapeltonv Barry Urban District Council [1940] 1 KB 532—* | exclusion clause on ticket issued upon payment  BUDC had not, brought Claimant attention to the clause and they could not rely on it. |
| *Alexander v Railway Executive [1951] 2 All ER 442* | relevance of commercial practices |

3. Consistent course of dealing

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| *Henry Kendall v William Lillico [1969] 2 AC 31* | oral contract but parties had contracted more than 100 times over 3 years.  The clause had been successfully incorporated into the contract. |
| *McCutcheon v David MacBrayne[1964] 1 WLR 125* | parties had contracted 4 times before but no signature on this occasion  The clause had not been successfully incorporated into the contract.  when the plaintiff had sometimes been ask to sign the document and other times had not. There had been,  held the court, no “consistent” course of dealing. |
| *Hollier v Rambler Motors [1972] 2 QB 71* | telephone contract (no writing), contracted 3/4 times over 5 years.  Three or four occasions in five years was insufficient to amount to a course of dealing and the exclusion clause had not, therefore, been imported into the oral contract. |
| ***Spurling v Bradshaw*** | the parties, who had dealt with each other for many years, made a contract under which the plaintiff was to store barrels of the defendant’s orange juice. When the defendant later came to collect the barrels they were empty. The defendant refused to pay the storage charges and the plaintiff sued. The defendant counter-claimed for negligence but the plaintiffs successfully relied on a clause exempting them from liability for “loss or damage occasioned by . . . negligence, wrongful act or default.” The defendant had not received the document containing this clause until after the contract was concluded but he admitted to receiving a similar document often in the past. The English Court of Appeal unanimously held that the defendant was bound by the exemption clause.  Note, above situation is now affected by legislation and the relevant exemption clause purporting to exclude liability for negligence would be subject to a test of reasonableness |

4. Custom: Similar to consistent course of dealing

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| *British Crane Hire Corp v Ipswich Plant Hire [1975] QB 303* | parties contracted only twice previously but were of equal bargaining power and terms relied on were in use “in the trade”  the clause was deemed to be incorporated into the contract.  Where parties are of equal commercial bargaining power, the conditions usually contained within industry contracts would be successfully incorporated based on the common understanding of the parties. |

Onerous Terms：

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| Interfoto Pictures Library *Ltd. v Stiletto Visual Programmes Ltd* | defendants ordered photographic transparencies from the plaintiffs. It was a term of the contract, as stated on the delivery note, that the transparencies must be returned by a specified date and that a fee of £5  per day plus tax would be levied on late returns. The defendants were several weeks late, having not used the photos and forgotten about them. The plaintiffs sued for almost £4,000 based on the contractual term. The claim was rejected and a much lower sum substituted on the basis that the term was particularly onerous and could only operate if extra steps had been taken to bring it to the notice of the other party.  The clause here was not an exemption but the same “extra steps” principle would be equally applicable to “unusual or onerous” exemption clauses. |
| *Spurling v Bradshaw [1956] 1 WLR 461* | red hand rule:  “the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.” |

Interpretation: Basic approach ->unless the clause clearly and unambiguously protects the “exemptor” it will be construed against him.(*contra proferentem*)-> Transocean Drilling UK v Hut Group[2016] EWCA Civ372

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| *Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, at 912–13 (Lord Hoffmann)* | ICSPRINCIPLE 1: Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.”  ICSPRINCIPLE 2: “[The background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.”  ICSPRINCIPLE 3: “The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. […] The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life.”  ICSPRINCIPLES 4-5: “The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.” (Principle 4)  “[I]f one would […] conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.” (Principle 5)  Regarding 4-5  Language mistakes—“red ink” approach:  “When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. […] there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”  (Chartbrookv Persimmon Homes [2009] UKHL 38 [21]–[25])   * 1. **Ensuring business viability:**terms to be interpreted based on commercial common sense (*Rainy Sky v KookminBank*[2011] UKSC 50)   2. query whether judges well placed to ascertain commercial common sense (J Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (2017) 17 *Oxford University Commonwealth Law Journal* 301)   3. **Avoid unreasonable results:**most important principle of interpretation   4. example—*Lehman Bros v ExotixPartners*[2019] EWHC 2380 (Ch)   5. ////////   6. **Law Since ICS**   7. **textualism prevails where agreement is sophisticated**   8. **contextualism prevails where agreement informal**   9. Ensuring business viability:terms to be interpreted based on commercial common sense (Rainy Sky v KookminBank[2011] UKSC 50)   10. query whether judges well placed to ascertain commercial common sense (J Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (2017) 17 Oxford University Commonwealth Law Journal 301)   11. Avoid unreasonable results:most important principle of interpretation   12. example—Lehman Bros v ExotixPartners[2019] EWHC 2380 (Ch) |

**Fundamental Breach**

Idea**—parties cannot rely on exclusion clauses if it excludes liability that “goes to the root of the contract”**

* 1. **Rule of construction:** the more unreasonable the result, the less likely the clause enforceable. Very clear words necessary to exclude liability for fundamental breach

**Example—*Photo Production v Securicor Transport*[1980] AC 827**

**Negligent Liability**

Idea—clauses excluding liability for negligence **effective only if no other way to interpret them**

Why?—assumption that innocent party would have agreed to them

Impact of CECO—less compelling need to control construction of exclusion clauses

Evolution:

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| Canada Steamship Lines v The King [1952] AC 192 | * 1. **Three principles(Use one by one):**   2. 1. Does exclusion clause expressly refer to negligence liability?—“whatsoever or howsoever” are too wide to cover (*Shell Chemicals UK v P&O Roadtanks*[1995] 1 Lloyd’s Rep 297)   3. 2. If not, words wide enough to cover negligence liability?   4. -> if yes and clause limits (not excludes) liability—clause effective (*Mitchell v Lock* [1983] QB 284)   5. -> if yes and clause excludes liability—next question   6. 3. Can exemption cover liability other than negligence?   7. -> if no—clause effective   8. -> if yes—clause will cover non-negligence liability (*Dorset County Council v Southern Felt Roofing* (1990) 48 BLR 96)   READING DOWN CANADA STEAMSHIP  Cases not applying Canada Steamshipprinciples:  -> National Westminster Bank v Utrecht-America Finance [2001] CLC 1372  -> Mir Steel UK v Morris [2012] EWCA Civ1397  Persimmon Homes v Ove Arup and Partners [2017] EWCA Civ373:  - focus on natural meaning  - Canada Steamship principles more relevant to indemnity clauses  Triple Point Technology v PTT Public Co [2021] UKSC 29—“old and outmoded” |

consumer protection -- Control of Exemption Clauses Ordinance (CECO)-> Based on Unfair Contract Terms Act 1977

To which contracts does CECO apply?

B2B and B2C contracts

excluded:

exempted supply contracts (s16)

certain specific contracts under Schedule 1—e.g., insurance, land, employment

CECO’s ways to limit liability:

1. invalidate some exclusion clauses

2. subject others to control of reasonableness

Misrepresentation

Remedies:

Remedy in **termination**:

Term—repudiation only if serious breach

Representation—rescission for all cases

Remedy in **damages**:

Term—forward-looking

Representation—backward-looking

Availability of damages:

Common law—only if fraudulent misrepresentation

Misrepresentation Ordinance (Cap. 284)—widens availability beyond fraud

3 kinds of statements:

1. if false statement is **term** of the contract—action and damages for breach

2. if false statement is **representation**—action and damages for misrepresentation(See above, Oscar Chess Ltd,regarding how to distinguish)

3. if false representation mere ‘**puff’**—no action and no damages

Actionable statements:

Statements of fact

- By words or conduct—Walters v Morgan (1861) 3 DF & J 718 (nod, wink, smile, etc)

- May be implied—Spice Girls v Aprilia World Service[2002] EWCA Civ15: the participation of a pop music group in the making of an advertising film was held to constitute a representation that the group intended to stay together for the duration of the advertising contract. Since one of the group had already decided to leave there was held to be a misrepresentation by conduct.

Statements of law

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| **Pankhania v Hackney London Borough Council [2002] N.P.C. 123** | P brought a claim for damages for the misrepresentation at the point of sale by H, of commercial property that was used as a car park by NCP. The land was licenced to NCP in 1988. There was exclusive possession of the property for an agreed term which had the effect of creating a business tenancy agreement as per the Landlord and Tenant Act 1954. The documentation that had been created for sale, at an auction, referred to the land that suggested only a licence agreement was in place on the property, which could be terminated with three months’ notice. P purchased the property and found out this was not the case. P brought an action to claim for the misrepresentation of H.  The court allowed a claim for damages for misrepresentation against National Car Parks  who had claimed to be contractual licensees when in fact they were protected business  tenants. The court rejected the defendant’s argument that any false statements were as  to law, finding that, by analogy with Kleinwort Benson, this was now irrelevant |

Statements of intention

honest statement—*Kleinwort Benson Ltd v Malaysian Mining Corporation* [1989] 1 WLR 379 (representation on company policy)

dishonest statement—*Edgington v Fitzmaurice* (1885) 24 Ch D 459 (purpose of raising money)

|  |  |
| --- | --- |
| Edgington v Fitzmaurice (1885) 24 Ch D 459 | P brought a claim for damages for the misrepresentation at the point of sale by H, of commercial property that was used as a car park by NCP. The land was licenced to NCP in 1988. There was exclusive possession of the property for an agreed term which had the effect of creating a business tenancy agreement as per the Landlord and Tenant Act 1954. The documentation that had been created for sale, at an auction, referred to the land that suggested only a licence agreement was in place on the property, which could be terminated with three months’ notice. P purchased the property and found out this was not the case. P brought an action to claim for the misrepresentation of H.  The court held that the misstatement of the reasoning behind issuing the debentures was a material misstatement of fact and that the plaintiff had been influenced by this statement. On this basis, the directors were found liable for an action of deceit, despite the fact that the plaintiff had also been influenced by his own mistake regarding the debentures. |

Statements of opinion: in general not statements of fact and thus not actionable

-exception: dishonest + no reasonable basis for opinion:

court implies statement of fact that maker has reasonable basis for opinion (Brown v Raphael (1958) Ch 636)

but not actionable where parties have same knowledge (Bisset v Wilkinson [1927] AC 177)

Silence

Nogeneral duty of disclosure (*Keates v The Earl of Cadogan* (1851) 10 CB 591)

**Exceptions:**

- continuing statements of fact + knowledge of change (With v O’Flanagan[1936] Ch 575)

- half-truths (ClinicareLtd v Orchard Homes & Developments Ltd [2004] EWHC 1694)

- special relationships—insurance, fiduciary duties

Non-actionable statements: Puffs.

* + - advertising
    - laudatory statements by vendor

Exception: actionable if overlap with statements of opinion (Carlill v Carbolic Smoke Ball Co[1893] 1 QB 256)

**No chain of statements**

Representation made to

other party **directly**

third person with **intention** that it **reaches** other party—*Smith v Eric S Bush* [1990] 1 AC 831

Inducement: test

**General test—“but for” (*AssicurazioniGenerali v Arab Insuranc*e [2002] EWCA Civ1642)**

**Must representee make inquiries?**

No—Redgrave v Hurd (1881) 20 Ch D 1

Reasonable to discover truth—*Smith v Eric S Bush* [1990] 1 AC 831

Contributory negligence

* 1. **Test for fraudulent misrepresentation—“material influence” of representation (*Zurich Insurance v Hayward*[2016] UKSC 48)**
* That the defendant made a materially false misrepresentation; That this representation was intended to induce, and did induce, the contract.
  + statement must have been important for it to count as inducement
  + if statement material—inducement presumed
  + if statement not material—claimant to prove inducement (MuseprimeProperties Ltd v AdhillProperties Ltd(1991) 61 P & CR 111)
  + Exception—fraudulent misrepresentation (Smith v Kay(1859) 7 HLC 750)
* It is not necessary *as a* *matter of law* to prove that the representee believed that the representation was true, although the representee’s state of mind may be very relevant to the issue of inducement
* Questions of inducement and causation are questions of fact, there may be circumstances in which a representee may know that the representation is false but may be held to rely on the misrepresentation

**Rescission:**

Contracts affected by misrepresentation are voidable (≠ void)

Self-help remedy

Equitable remedy—discretionary

Similar to termination for breach—both bring contract to an end BUT

Different from termination for breach:

rescission terminates ab initio

termination for breach terminates only prospectively

Rescission takes effect when communicated—timing key in transfer of property to third parties

**BARS TO RESCISSION:**

**Developed at common law**

**s2 Misrepresentation Ordinance (Cap. 284) removes two bars to rescission:**

where misrepresentation becomes term

where contract is performed

**Remaining bars:**

**Impossibility of mutual restitution**

Rescission barred if return:

- to representee—never possible (services, Boyd & Forrest v GWSRHL 16 May 1912) or has become impossible (e.g., transfer of property, White v Garden(1851) 10 CB 919)

- to representor—not substantially possible (Vigersv Pike (1842) 8 Cl&F562)

- **Bar relaxed by unjust enrichment**

**Affirmation**

Claimant can decide if to rescind or affirm

Affirmation requires knowledge of facts giving rise to right to rescind

Affirmation can be implied by conduct:

continue to reside on leased premises (Kennard v Ashman(1894) 10 TLB 213)

order a chartered ship to sail (SK Shipping Europe v Capital VLCC [2022] EWCA Civ231)

Close relation to estoppel

**lapse of time**

- if fraud—frozen while claimant ignorant of misrepresentation (Armstrong v Jackson [1917] 2 KB 822)

- if no fraud—claimant must rescind within reasonable time (Cevizv Frawley [2021] EWHC 8 (Ch))

**Third-party rights**

innocent third party has given consideration to acquire interest in subject-matter of contract (e.g., transfer of property to third party)

**inequity**

s3(2) Misrepresentation Ordinance (Cap. 284)—courts may award damages in lieu of rescission

Only for non-fraudulent misrepresentation—aim to protect non-fraudulent misrepresentor from effect of trivial misrepresentations Example—William Sindall v Cambridgeshire County Council [1994] 1 WLR 1016

Damages in lieu of rescission

**s3(2) Misrepresentation Ordinance (Cap. 284)**

* + 1. **Requirements:**
    2. misrepresentation not made fraudulently
    3. claim for rescission available (i.e., not barred)
    4. claimant must have tried to rescind but court has denied rescission
    5. equitable to award damages instead of rescission

**Damages in addition to rescission**

**s3(1) Misrepresentation Ordinance (Cap. 284)**

* 1. **Requirements:**
  2. misrepresentation innocent + loss resulting from misrepresentation
  3. **defence**—representor has no reasonable grounds to believe and did not believe that facts represented are untrue
  4. **Burden to show reasonable belief is on representor**
  5. **s3(1) ≠ common law—equates innocent to fraudulent misrepresentation**

**At common law—cannot exclude liability for fraudulent misrepresentation (*S Pearson & Son v Dublin Corp*[1907] AC 351)**

* 1. **s4 Misrepresentation Ordinance (Cap. 284)—can exclude liability if reasonable under s3(1) CECO**
  2. no distinction between innocent and fraudulent
  3. same test as for all other exclusion clauses
  4. **Entire agreement clauses—do not stop a claim for misrepresentation but outside scope of s4 (*Watford Electronics v Sanderson* [2001] EWCA Civ317)**
  5. **No-reliance clauses—within scope of s4 (*First Tower Trustees Ltd v CDS*[2018] EWCA Civ1396)**