

# The Law of Contract

Weeks 1 & 2



# Before we start...

- Four topics within Law component of MGT388
  - Contract Law
  - Intellectual Property (IP) Law
  - Law of Torts (Negligence)
  - Environmental Law
- Assessment
  - Online test in Week 4 – Contract (5%)
  - Online test in Week 8 – Intellectual Property (5%)
  - Final exam (40%)



# Why is English contract law relevant to me?

- Basis for much of the world's global business
  - Stable
  - Certain
  - Accessible
  - Responsive to changing nature of co
- Professional development & accre
- Change of career (GDL/MA Law)
- Personal awareness –
  - Have you entered into a contract to



# The English Legal System (how law is made)

- Common law jurisdiction
  - Statute/Legislation
  - 'Judge made law' – legal precedent based on:
    - '*Like facts*' - *Stilk v Myrick* (1809); *Hartley v Ponsonby* (1857)
    - Hierarchy of the courts
- Historic impact of UK -> Approx. 60 countries legal systems are based on common law or incorporate common law (e.g. USA, India, Malaysia)



# Contract regards civil not criminal Law

- Criminal law
  - Rules are set out by society for all our benefit
  - Legal action brought by the state (CPS)
  - Any fines imposed in relation to an infringement are paid to the state.
- Civil law
  - Legal action is brought by the individual who feels that they have suffered
  - Action is brought against the party perceived as having done them wrong.
  - Any sum of *damages* identified as payable by the court goes to the party bringing the action.



# Contract regards private not public law

- Public law
  - Concerns public sector in undertaking its public functions (Foster v British Gas)
- Private law
  - But even public sector organisations must enter into private contracts
    - Hospital buying paper and pens
    - Council paying construction firm to build new school



# The importance of privity

- Generally, only the parties to the contract can enforce it in court
- This reflects a *personal* interest in the contract
  - Note: statutory exceptions exist
  - Note: a contract may be assigned (passed on) as property (and so becomes a *proprietary* interest).



# Common law not equity

- ‘Judge made law’
  - Common Law (rule based) = certainty
  - Equity (discretionary) = use court’s discretion to address injustice
- Contract law is generally rule based – you know where you stand
- But equity is significant in ‘pockets’ of contract law e.g.
  - Estoppel – court may find contract exists in absence of consideration
  - Specific Performance -





# Finding the law of contract

- Common law
  - The strength of an *authority* will depend upon it having like facts to the case in hand and generally that it was decided in a higher court.
  - The question of what amounts to 'like facts' is not always easy
  - Two very able advocates trying to persuade the court that the strength of authority supports their case rather than the opposition
- Statute
- Standard terms and conditions? -



# Why enter into a contract?

- Facilitate exchange/make bargains
- Plan commercial relationship
- Provide certainty
  - Parties to contract design obligations in contract so understand them
  - May help avoid disputes
  - May provide framework for settling disputes
    - eg identify circumstances where it will be appropriate to go to arbitration or mediation
    - e.g set out financial penalties to be paid in the event of certain failings.



# What is a contract?

- “An agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of contracting parties” (Trietel, 2003)
- “A contract is essentially an agreement which is freely entered into on terms that are freely negotiated” Stuart-Smith LJ in *W v Essex CC* [1998] 3 All ER 111 at p 128
- A contract may be oral or written (except in contracts for land)



# Why are contracts enforced by the law?

- “***Pacta sunt servanda***” – promises are made to be kept; contracts are made to be performed.
- The parties have *voluntarily* designed and taken on board their obligations so one party should not be able to go back on their promise
- (Note: it *is* morally acceptable for *both* parties to agree to bring the contract to an end)



# How are contracts enforced by law?

- The term 'enforced' can be misleading
- Court *may* award specific performance but very unlikely
- Normal method of enforcement (remedy) - award of damages
- Calculation of damages - courts try to calculate sum of money which will put the 'wronged' party in the position that they would have been if the contract had been successfully completed
  - (Note: very exceptionally this may lead to 'specific performance')



# Essential components of a valid contract

1. Offer
2. Acceptance
3. Consideration
4. Intention to create legal relations
5. Certainty



# 1. Offer

- An unequivocal indication of a willingness to be legally bound by a promise if the terms of the offer are met - includes all the essential terms
  - Note: There is an indication of an 'Intention to create legal relations' at this stage either expressly or otherwise
- An offer may be made to a specific person, a group of people, or to the whole world - Carlill v Carbolic Smoke Ball Co. (1893)
- Offer can be bilateral or unilateral - Carlill v Carbolic Smoke Ball Co. (1893)



# Not an 'offer'

- **Price lists**
  - *see limited stock argument*
- **Advertisements** (generally)
  - But unilateral contract may exist – as in *Carlill v Carbolic Smoke Ball Co* (1893).
  - An advert can form unilateral contract if:
    - It is in sufficient detail to form basis of a contract & communicates a willingness to be bound.
    - In *Carlill* the promise of the reward and the statement that ‘as a mark of their sincerity’ money had been placed in a bank account was viewed by the court as providing the above
- **Window/shop displays**
  - shopkeeper retains the ability to say ‘no’ in relation to age specific goods.





# Not an 'offer' (cont.)

- An invitation to tender
  - We can not just say “yes”
  - Essentially an invitation for other parties to *submit* offers
  - Note: if invitation to tender promises to remain open for a period of time, the parties who reply have the right for their tender to be considered - *Blackpool & Fylde Aero Club v Blackpool Corp.* (1990)



## 2. Acceptance

- Absolute and unequivocal
  - “a final unqualified expression of assent to all the terms of an offer” (Trietel)
  - Any attempt to vary terms = counter-offer (not acceptance)
  - A counter offer kills the original offer - Hyde v Wrench (1840)
- Must be communicated
  - Mere silence is not sufficient (say nothing and do nothing)
  - Conduct (doing something) may be sufficient to constitute acceptance
  - Exception is the ‘postal rules’



## 2. Acceptance (cont.)

- An offer may be terminated at any point up until acceptance (Routledge v Grant)
- An offer will lapse after a 'reasonable' time
- An offer will lapse on the failure of a condition precedent
- An offer will lapse on the death of the offerer.... maybe!

# 3. Consideration

- “The price one pays for another’s promise” – Pollock
- Not necessarily ‘cash’ - *Chapell v Nestle* (1960)
- “A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other” *Currie v Misa* (1875)
- “An act or forbearance ... or the promise thereof” - Pollock
- Must be sufficient but not necessarily adequate – i.e. no need to be at market value – as contracts are entered voluntarily
  - i.e. can be good or bad bargain (unless adverse pressure is present)



# 3. No Consideration

- ‘Past consideration is no consideration’
- Performance of an existing public duty - generally no consideration
- Performance of an existing contractual duty - generally not consideration
  - Contrast *Stilk v Myrick* (1809) and *Hartley v Ponsonby* (1857) – key difference was the proportion of the crew that were missing and the ramifications in relation to hard work and danger i.e. not merely an existing duty.
  - **BUT** *Williams v Roffey* [1990] 1 All ER 512 –consideration is capable of being far more subtle than we might at first think. This case related to the question of consideration in relation to variation of terms after a contract has been agreed rather than the agreement in the first place.



# Exception to requirement for consideration

- Speciality contracts by deed
  - An exception to the requirement for consideration are contracts by deed (a document made under seal)
  - If a gift is made within a deed, it may be enforceable as what is known as a *speciality* (as opposed to a *simple*) contract
  - Contracts by deed are rare and very much the exception!

# 4. Intention to create legal relations

- Assessed objectively
  - Sensible as parties now in dispute
  - Court considers what arrangement looks like from the outside
- Rebuttable presumptions - allows court to take a short cut/save resources
  - Business context = intention is presumed
  - Social/family context = no intention is presumed



# 5. Certainty

- The less certain the facts/law, the greater the likelihood of dispute
- Only certain types of contract are required to be in writing (e.g. land) but the more significant a contract the more sense there is in putting it in writing
- 'New Engineering Contracts' (NECs) provide uniform approach across the industry and so aid certainty
- Has performance of the contract begun?





# The contents of a contract

- Express terms – contained in the offer (the other party selects to accept, reject, or vary the terms by way of a counter offer)
- Implied terms – court *may* retrospectively imply terms into a contract
  - Not simply to make contract ‘fair’ (impedes upon freedom of contract)
  - But will not imply a term if ‘unfair’ to do so



# When will the court imply a term?

- Common practice in the geographical area or industry
- In light of consistent and repeated previous dealings
- The 'officious bystander' test - would it have been so obvious that a term had been assumed had we asked the question of the parties at the time that they concluded their agreement? - *Shirlaw v Southern Foundries* (1926).



# Exclusion & Limitation Clauses

- In addition to terms providing positive obligations, contracts may also include terms excluding or limiting liability
- Parties therefore may agree to exclude or limit liability for a parties action/inaction in certain set of circumstances – reflects voluntary nature of freedom of contract
- Excluding liability for negligence requires thought and a precise application of words.



# Restrictions on Exclusion & Limitation Clauses

- **Unfair Contract Terms Act 1977**

- Where the Act applies any attempt to exclude liability for death or personal injury resulting from negligence is prohibited (this doesn't just apply to contracts but would also extend to site notices etc.)
- In relation to other damage (i.e. not death/personal injury) the question may rest upon what is reasonable under the Act.



# How a contract can be discharged – tbc!

- Performance of contract
- By agreement of contractual parties
- Breach of contract
- Frustration of contract
- Contract is voidable due to conduct of a contracting party

