

## DISADVANTAGES OF ARBITRATION

The following are some of the disadvantages of arbitration as a dispute resolution method.

### 1 More Expensive.

Perhaps, the greatest disadvantage of arbitration as an alternative dispute resolution method is that it is generally more expensive, to the disputants, than the normal court litigation. This is because all the cost of the process (like payment of the arbitrators and other associated cost like accommodation, transport) are borne entirely by the parties.

This is unlike litigation where the state bears most of the cost of the process and parties pay only relatively minimal cost.

### 2 Enforcement.

Another draw back of arbitration as a dispute resolution method is that it does not have direct enforcement machinery for its award. Where an award is not obeyed or respected, an aggrieved disputant would have to apply to the normal courts to enforce the award. In doing so, some of the advantages of the arbitration process especially confidentiality and speed would be lost.

This is in contrast with the situation with regular litigation where the state's machinery of enforcement is available to enforce any court judgement

## CHAPTER TWO

### LAW OF CONTRACT

#### What is a Contract

A contract may be defined as a legally enforceable agreement. It is an agreement that will give rise to legally enforceable obligations<sup>1</sup>. It is an agreement the court would enforce<sup>2</sup>.

#### Classification

One way of classifying contracts is into *Formal* and *Simple* Contracts.

A *formal contract* is a contract made by deed. It is also known as a contract under seal or a Speciality Contract<sup>3</sup>.

All other contracts are simple contract, whether they are in writing or entered into orally.

Contracts can also be classified into *Express* and *Implied* contracts

A contract is described as *Express* when the terms of the contract are clearly stated and agreed upon. In this case, all the material terms of the contract will usually be clearly spelt out in the agreement.

However, in the case of *Implied* contracts, the terms are not expressly stated. The court, in such circumstance, will normally construe the existence of a contract from the conduct of the Parties to the agreement.<sup>4</sup>

<sup>1</sup> It is an agreement which the parties intend would have legal consequences

<sup>2</sup> It has been said that some promises create only "an agreement" while some create "a contract" in which promises create legal obligations to perform them

<sup>3</sup> This is a kind of contract that is expressed as signed sealed and delivered. The limitation period for specialty contracts is 12 years unlike 6 years for Simple contracts.

<sup>4</sup> See *B. Stabilini and co Ltd v Obasi*

Contracts may also be classified as *bilateral* and *unilateral*.

A *bilateral* contract consists of an exchange of promises- one party promising to do something in exchange for the promise of the other party.

A *unilateral* contract is a contract that imposes an obligation only on the promisor. The promisee is not bound and will not be liable if he fails to exercise the option given to him.

#### REQUIREMENTS FOR FORMATION OF A CONTRACT.

A contract is a legally enforceable agreement. From this definition it becomes obvious that not all agreements are regarded as contracts.

For an agreement to be a contract, the following elements must be present:<sup>5</sup> (a) Offer (b) Acceptance (c) Consideration (d) Capacity to contract and (e) Intention to create legal relations.

The elements would now be considered.

#### **1. OFFER**

For a contract to exist there has to be an offer from one party to another party.

An offer may be defined as a definite undertaking or proposal, by one person to enter into a legally binding agreement provided certain specified terms are accepted.

The person making the offer is known as the *offeror* while the person to whom the offer is made is the *offeree*.

There is no limit to the number of people to whom an offer can be made to. An offer may be made to a specified person or to a group of persons or to the whole world as for example by way of advertisement. It was decided in the case of *Carlill v Carbolic*

*Smoke Ball Company* that an offer may be made to the whole world and in such case, a contract comes into existence between the offeror and the person(s) responding to the offer and accepting it.<sup>6</sup>

#### Invitation To Treat (as distinguished from an Offer)

Before an offer can become binding on acceptance, it must be definitely clear and final. If it is merely a preliminary move, (in negotiations), which may or may not lead to a contract, it is not an offer but an *invitation to treat*.

A person making an offer becomes liable to anyone, who (while the offer is still valid), accepts or performs the terms of the offer. But, in an invitation to treat, the "offeror" is merely feeling his way and has not made a commitment to be bound. Such a person is actually making a statement that he is willing to negotiate a contract (and in effect inviting the other party to make an offer).

An invitation to treat is not an offer and is not capable of an acceptance that will result in a contract.

There are numerous examples of situations involving invitation to treat. These include; Auctions<sup>7</sup>; Invitation for tenders, display of goods in shelves. See the case of *Pharmaceutical Society of Great Britain v Boots Cash Chemist*. In this case, goods were sold in B's shop under the self-service system. Customers selected their purchases from shelves on which goods were displayed, put them into a basket supplied by B and took them to the cash desk where they paid the price. It was held that by display of the goods, the

<sup>6</sup> In that case, a company offered a reward of £100 to anyone who contracted influenza after using the company's medicinal product, (the smoke ball) as prescribed. The company further stated that it had lodged £1000 with its bankers "showing our sincerity in this matter". The plaintiff used the smoke ball as prescribed, but notwithstanding contracted influenza. The Company refused to pay her. She sued to claim the £100. The company raised a number of defences, but the one relevant here is the defence that there was no valid offer since the offer was made to the whole world. The court held that the company was bound to pay as a valid offer may be made to the whole world which would ripen into a contract with anyone who comes forward to perform the conditions set down in the offer.

<sup>7</sup> An auctioneer's request for bids is not an offer but an invitation to treat. The actual offer is made by the bidder and such offer is accepted when the auctioneer's hammer falls

company was not making an "offer" to sell but that it is the customers who, by picking the goods, make an offer to buy. The contract was made, not when the customer puts the goods in the basket, but when the cashier accepts the offer to buy by receiving the price.

### When does an offer become effective

An offer becomes effective when it reaches the offeree. Therefore, a person cannot be purporting to accept an offer that he is unaware of. For example, A offers, (by an advertisement), a reward for anyone who finds his purse. B finding the purse returns it to A without having heard of the offer of A. In this circumstance, B is not entitled, by right, to the reward.<sup>8</sup>

### Termination of Offer

An offer would terminate (and therefore no more available for acceptance) under any of the following circumstances;

- On the death of either the offeror or offeree.
- By non-acceptance within the time prescribed for acceptance. If there is no time prescribed for acceptance, an offer would lapse if not accepted within a reasonable time.<sup>9</sup>
- On the rejection of the offer. An offer is rejected if the offeree communicates rejection or if the offeree accepts the offer subject to conditions or in attempting to accept an offer modifies the terms of the offer (that is, makes a Counter Offer).
- Upon proper revocation of the offer by the offeror.

As a general rule, an offer may be revoked at anytime before acceptance.<sup>10</sup>

<sup>8</sup> In *Taylor v Laird* a seaman helped to navigate a ship home but before sailing wrote to the owners telling them of his intention and asking a particular wage for his services. The owners did not receive the letter of offer until the ship was nearly home. It was held that the owners had no reasonable opportunity to accept or reject the offer, therefore the seaman could not compel them to pay his wages for navigating the ship.

<sup>9</sup> What constitutes a reasonable time would depend on the circumstance of each case.

<sup>10</sup> Note that once an offer has been properly accepted, it can no more be revoked.

In a situation where an offeror has promised to keep an offer open till a certain period, such offeror may still revoke the offer before the expiration of that time promised. If, however, the promise to keep the offer open was supported by some consideration given by the offeree, then the offeror cannot validly revoke that offer before the expiration of the stated period. If he does this, he would have committed a breach of contract.

Revocation of an offer is *not effective until the notice of revocation reaches the offeree*. See the case of *Henthorn v Fraser*. In this case, F handed to H a written option on some property at £750. The next day, F posted a withdrawal of the offer. This was posted between 12 noon and 1 p.m and did not reach H until after 5 p.m. In the meantime, H at 3.50p.m had posted an acceptance. It was held that F's revocation was of no effect until it actually reached H; and *did not* operate from the time of posting it; and that a binding contract was made from the moment of the posting of H's acceptance.<sup>11</sup>

## 2. ACCEPTANCE

To crystallise into a contract, an offer must be validly accepted. Acceptance may be loosely defined as the assent by the offeree to the terms of the offer as proposed by the offeror.

By accepting an offer, the Offeree springs a contract into existence. The acceptance must be done while the offer is still in force (that

<sup>11</sup> Note that, it appears that it is not absolutely required that the offeror must personally communicate the revocation to the Offeree. It is still a valid revocation if the offeree learns of the revocation from a source which he believes to be reliable. See the case of *Dickinson v Dodds*. In that case, X agreed to sell property to Y by a document that stated, "this offer to be left over until Friday 9.00 am". On Thursday, X contracted to sell the property to Z. Y heard of this from B and on Friday at 7 am he delivered to X an acceptance of the Offer. It was held that Y could not accept X's offer after he knew it has been revoked by the sale of the property to Z.

is, before the offer lapses or is revoked). Once an offer has been validly accepted, the offer becomes irrevocable.

Note the following in respect of acceptance of an offer.

(i) *Acceptance must not be qualified*- to constitute a valid acceptance; the offeree must *unequivocally* and *unconditionally* assent to the terms as proposed by the Offeror. An Offeror who wishes to accept an offer must do so unconditionally. Where, for example, the offer had laid down how the offer is to be accepted, the acceptance must comply with the Offeror's requirement otherwise such 'acceptance' will not be valid.

If the acceptance is conditional or the offeree includes any fresh term, then his expression of assent amounts to a COUNTER OFFER which in turn requires to be accepted by the person who made the original offer.<sup>12</sup> A counter offer or qualified acceptance cannot give rise to a binding agreement between the parties.

The effect of a Counter Offer is that it destroys the original offer. So that once a counter offer is made, the original offer lapses and the counter offer operate as a new offer (by the original offeree to the original offeror). See the case of *Neale v Merrett*. In that case, M, offered land to N at £280. N replied accepting and enclosing £80 with a promise to pay the balance by monthly instalments of £50 each. It was held that there was no contract since the acceptance of the offer was qualified.<sup>13</sup>

A situation where there is a counter offer must be distinguished from a situation where the offeree merely seeks for information to enable him make up his mind in respect of the offer. Such request

<sup>12</sup> Note the statement by Niki Tobi (JSC) in *Orient Bank (Nig) Ltd v Bilante Int Ltd* at pg 84 that "while a letter of acceptance may not necessarily be and is not usually word for word, paragraph for paragraph, punctuation for punctuation with a letter of offer, it must agree with the subject matter of the offer to the extent that a court of law will find no difficulty in identifying a point of agreement".

<sup>13</sup> See also the cases of *Hyde v Wrench*; *Oni v Communication Associates Ltd*.

for information is *not* and should not be treated as a Counter Offer. See for example, the case of *Stevenson v McLean*. In this case, the defendant offered, on Saturday, to sell to the plaintiff "3800 tons of iron at 40s net cash per ton, offer open till Monday". Early on Monday, the Plaintiffs telegraphed to the defendant as follows, "Please wire whether you would accept 40s for delivery over 2 months or if not, longest limit you would give". No reply was received and so by telegram sent at 1.34p.m on the same day, the Plaintiff accepted the offer to sell at 40s net. Meanwhile, the defendant had sold the iron to a third party and informed the Plaintiff of this by a telegram dispatched at 1.25pm. The telegrams crossed. Plaintiff sued to recover damages for breach of contract. It was held that the plaintiff had by its first telegram not made a Counter Offer but had addressed to the defendant a "mere inquiry" which should not have been treated as a rejection of the offer.

(ii) If an offeror stipulates a preferred method of acceptance or makes the use of a particular method a condition for acceptance, then acceptance by any other method, would generally not be binding on the offeror. See the case of *Orient Bank (Nig) Ltd v Bilante Int Ltd*. In this case an offeror as part of a series of negotiations made an offer by letter and concluded the letter by stating, "Kindly confirm the above agreement reached at today's meeting by signing and returning the duplicate copy of this letter". The court held that, as there was no evidence that the offeree signed and returned the duplicate of the letter, there was no acceptance of the offer, therefore, there was no contract between the parties.<sup>14</sup>

<sup>14</sup> See also the case of *Afolabi v Polymera Industries Ltd*. In that case, the plaintiff was offered by letter a position as agent of the defendant. The letter stated that "will you please read, study carefully and sign the duplicate copy attached signifying your acceptance to all points listed above and return at your earliest convenience for records". There was no evidence that the plaintiff ever returned the signed duplicate copy. It was held by the court that the letter of the defendant (that is the offer) had set out the manner in which the offer should be accepted to make a binding contract and since the plaintiff could not prove that he returned the signed duplicate copy, there was no valid acceptance of the offer.

If however, an offer does not expressly or impliedly stipulate a method of acceptance, then it appears that an offeree may accept the offer by the same method by which the offer was made to him or by any other reasonable means.

(iii) In respect of offers that need to be acted upon, communication of acceptance to the Offeror is unnecessary unless, of course, the offer stipulates that communication of acceptance is required. In *Carlill v Carbolic Smoke Ball Co Ltd*<sup>16</sup>, one of the defences raised by the defendant company was that the plaintiff had not notified the company of her acceptance of the offer before using the product. This argument was rejected by the court.<sup>16</sup> It was also held in *F.G.N & 6 ors v Zebra Energy Ltd*, that it is now settled law that the offer to enter into a unilateral contract is accepted on commencement of performance even though completion is a condition precedent to the offeror's liability to perform his promise.

A mere mental acceptance of an offer is not sufficient to constitute a valid acceptance of the offer. The acceptance must have been communicated. See the case of *Felthouse v Bindley*. In this case, F had written to X offering to buy X horse for £30. He added that "if I do not hear from you I would consider the horse mine at that price". X actually intended to accept the offer and he informed the Auctioneer who was holding the horse for sale that the horse had been sold to F. However the horse was inadvertently sold by the Auctioneer. F sued the Auctioneer for damages for conversion but the court held that F have never been the owner of the horse since his offer had not been expressly accepted by X.

<sup>16</sup> Op cited

<sup>17</sup> On the basis that in this kind of contracts (known as unilateral contracts), the communication of acceptance is unnecessary unless the offeror expressly or impliedly indicated that communication of acceptance is required. Therefore performance of the condition in the offer was a sufficient communication of acceptance. Apart from cases of unilateral contracts, as above, the such communication. See for example the case of *Felthouse v Bindley*

(iv) subject to the express or implied terms in an offer, where an acceptance is made by post, acceptance becomes effective the moment the letter (properly addressed and stamped) is posted. Where however acceptance is by instantaneous means of communication, (like telephone, telex, verbal, e-mail, fax etc) acceptance is effective only when the notice of acceptance reaches the offeror and not merely when it was transmitted.

See the cases of *Household Fire Insurance Co Ltd v Grant*; and *Entore v Miles Far East Corporation*. In Grant's case, G applied for shares in a company. A letter of allotment was posted but never reached G. It was held that G's offer had been validly accepted. In Entore's case, an offer was made by telex in London to the defendant in Amsterdam and the defendant accepted the offer by a telex dispatch to London from Amsterdam. It was held that the acceptance was made in London (where it reached the offeror).

Note that parties may vary the general rule stated above. For example, if acceptance is to be by post, the offeror might state in his offer that "acceptance by post must reach the offeror by Monday" or "acceptance shall be by post to reach offeror by Monday". This would clearly indicate that the offeror is not going by the general rule and that, in this particular case, he would be bound only by acceptance that actually reaches him by Monday. See, on this point, the case of *Holwell Securities Ltd v Hughes*. In that case, the defendant granted a six month option to the Plaintiff to purchase a certain property. The offer stipulated that the option was to be accepted "by notice in writing" to the defendant. The Plaintiff sent a written acceptance by ordinary post but this was never received by the defendant. The Court rejected the claim by the plaintiff that he had made a valid acceptance as soon as the letter exercising the option was posted. According to the court, acceptance in this case became valid from the time that the letter reached the defendant and not at the time of posting.

(vii) an acceptance made subject to a condition, cannot create a binding agreement unless and until that condition is fulfilled. A

"provisional acceptance", indicates that the acceptance is not to be binding until another act had been performed. An "acceptance subject to contract" indicates that the parties are not to be bound until a formal contract is drawn up and signed- so that until this is done, either party may withdraw from the agreement. In *Chillingworth v Esche*, C and D signed an agreement for the purchase of a house by D "subject to a proper contract" to be prepared by C's solicitors. Consequently, a contract was prepared by C's solicitors and approved by D's solicitors but D refused to sign it. It was held that there was no contract.

### 3. CONSIDERATION

It is a principle of Nigerian Law that an agreement (except where made under seal) must be supported by consideration if it is to be legally enforceable.

Where a promise, which is not under seal, is not supported by a consideration, the promise is a gratuitous promise and cannot be enforced as a binding agreement.<sup>17</sup>

Consideration may be defined as the benefit or promise received by a party in exchange for the benefit or promise conferred on the other party.

In *Currie v Misa*, consideration was defined as some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other party in exchange for a promise given or received. Consideration may further be loosely defined as the price for which the other party's promise or act was bought.<sup>18</sup>

A plaintiff could establish the presence of consideration in any of two ways - either that he had conferred a benefit upon the

<sup>17</sup> The view of the law is that a person who wants a promise/agreement to be enforced must demonstrate that he contributed to such agreement. Such Contribution is referred to as the party's consideration.

<sup>18</sup> *Udechukwu v Ngene and ors*

defendant (or on someone else at the instance of the defendant) return for which the defendant's promise was given or that he himself had incurred a detriment in exchange for the defendant's promise.

#### Executed or Executory or Past Consideration

An *executed* consideration is an act done by one party in exchange for a promise or an act by the other party. An *executory* consideration, on the other hand, is a promise made by one party in exchange for an act or promise by the other party.

When an act constituting the consideration is completely performed, the consideration is *executed*. But if the consideration takes the form of a promise to be performed in the future, the consideration is *executory*. For example, A receives ₦500 today from B in exchange for which he promised to deliver some goods next week. In this case, B's consideration is executed while A's consideration is executory. On the other hand, if A promises to deliver goods next week and B promises to pay for the goods when they are delivered, the consideration of either party is *executory*<sup>19</sup>.

A party to a contract can rely on either *executory* or *executed* consideration to enforce a contract.

A *past consideration* is consideration which has been completed or exhausted before the new promise (which is now sought to be enforced) was made. Past consideration cannot support a contract.

Past consideration should be distinguished from *executed* consideration. In *executed* consideration, the consideration was given contemporaneously with the promise (that is now intended to be enforced). But in *past* consideration, the consideration had been given and completed, before the promise was made.

<sup>19</sup> Executed consideration may be viewed as some value already given while *executory* consideration consists of value which is to be given later.

A person cannot rely on a past consideration to enforce a contract. See the case of *Re Mc Ardle*. In this case, a testator left a house jointly to his children. The wife of one of the children, who was living in the house with her husband, spent some money in making improvements on the house. Later on, the other children jointly signed a document agreeing to pay her £488 for expenses in improving the house. It was held that the promise was not binding on the children. The wife had completed the works on the building before the promise to repay her was made. Her consideration was therefore past.<sup>20</sup>

#### Consideration must be sufficient but need not be adequate

An important principle in deciding whether or not there is a valid consideration for a contract is that *Consideration must be sufficient* but it *need not* be adequate.

A valid consideration must have some value but it need not be adequate or equivalent to its counterpart.

A moral obligation would not constitute consideration. But as long as the consideration offered by the parties has some value in law, the court would not bother with enquiring whether the parties got an equal bargain. So that, in the absence of fraud, a party would be bound by his agreement as long as he got what he bargained for even if it turned out that he made a bad bargain.

See the case of *Haigh v Brooks*. In this case, A promised to pay certain bills if B would hand over some guarantee documents to him. At that time, A thought that the guarantees would be enforced against him. When B handed over the documents, it turned out that they were actually unenforceable against A. In view of this, A then refused to pay the bills as promised on the ground that he was

<sup>20</sup> See also the cases of *Roscorla v Thomas*; *Akenzia II, Oba of Benin v Benin Div Council*. Note however that if services are rendered under circumstances, which raised an implication of a promise to pay for the services, the subsequent promise to pay a certain amount would be enforceable.

getting in return worthless documents. It was held that since A had received what he asked for, there was consideration for his promise although the guarantee documents were of a *scarcely* value than he had thought.

See also the case of *Younis v Chidiak*. In this case the Plaintiff/Appellant lent a sum of money to the 2<sup>nd</sup> respondent. The cheques issued by the latter in repayment were all dishonoured. In order to avoid criminal prosecution, the 2<sup>nd</sup> respondent offered to repay the debt by instalment and the 1<sup>st</sup> respondent agreed to guarantee the repayment in this manner. When the 2<sup>nd</sup> respondent failed to repay as agreed the appellant sued the 1<sup>st</sup> respondent for the money. The 1<sup>st</sup> respondent pleaded lack of consideration. It was held that the appellant had furnished sufficient consideration by his forbearance to sue.

In deciding whether consideration is sufficient or not, the following is to be noted;

#### (i) *Consideration must not be illegal*

The courts would not enforce a contract where the consideration relied on by one of the parties is illegal.

This principle is contained in Latin maxim '*ex turpi causa non oritur action*'.<sup>21</sup>

See for example the case of *Chief A.N. Onyinde v G.E. Orieke*. In this case, the Plaintiff claimed from the defendant the price of goods sold and delivered to the defendant in 1968 which price was to have been paid in the Biafran currency. The defendant denied liability on the grounds that the contract was illegal and unenforceable since Biafran currency was illegal by virtue of the Central bank (currency conversion) Decree 1968 and that the consideration for the contract was therefore illegal. It was held that

<sup>21</sup> That is a cause of action cannot rise from an illegal act.

a contract is illegal if the consideration or promise involves doing something illegal.

(ii) *A promise to perform an existing obligation is not sufficient consideration.*

It would not be sufficient consideration if a person merely does something which he has an existing legal duty to do or if he does something which amounts to fulfilling an existing contract with the promisee.

See the case of *Foakes v Beer*. In this case, Mrs. Beer obtained judgment against Dr. Foakes for £2090. Dr. Foakes asked for time to pay and the parties agreed that Mrs. Beer would forego the interest which would normally have been payable on the outstanding judgment debt. After Dr. Foakes had paid off the debt, Mrs. Beer sued him for interest on the judgment debt. Dr. Foakes raised the issue of the agreement but the court held that the promise of Dr. Foakes to pay a debt, which he already had an obligation to pay, was not sufficient consideration for the promise of Mrs. Beer to forego the interest.<sup>22</sup>

However, it has been held that if the existing contractual obligation is owed to a third party, then performing it or a promise to perform it would be sufficient consideration. See for example, *Scotson v Pegg*. In this case, S promised to deliver to a third party, X, or to his order a cargo of coal on board a ship belonging to himself. X then made an order in favour of P. P thereafter made an agreement with S that if S would deliver the coal to him, he would in turn unload and discharge the coal at a fixed rate each day from the date the ship is ready for discharge. P failed in his agreement to unload, and when S sued him he contended that S had furnished no consideration for his own (P's) promise since S was already under

<sup>22</sup> Note that the practical effect of this rule has been reduced by the doctrine of promissory estoppel as recognised in the case of *Central London Property Trust v High Trees House* popularly called the "High Trees case". Nigerian application of the doctrine include cases like *Tika Tore Press v Abina; and Offiong v African Development Corporation Ltd.*

a contract to deliver the coal to him. Judgment was given in favour of S.<sup>23</sup>

Also if a person does something that is different from what he has an obligation to do, like a debtor paying a debt earlier than the due date or a person going beyond what he is legally obliged to do would have offered sufficient consideration.

See the case of *Glassbrook v Glamorgan Council*. In this case, the owners of a coal mine at which there was a strike applied to the local police to protect the mine and its machinery from damage by the strikers. The police were of the opinion that they could control the situation by a mobile force, which would be rushed to the mine sufficiently on time to curb any disturbance. The owners of the mine were however not comfortable with the police proposal and they agreed to bear the expense of stationing a detachment of policemen at the premises for the duration of the strike. Subsequently, the owners of the mine refused to pay arguing that the police had merely been performing its statutory duty. It was held that the police were entitled to the money as they had done more than was required of them under their statutory duty.

(iii) *Consideration must not be past.*

A past consideration is not good enough to support a contract.

(iv) *Consideration must move from the promisee.*

Only a person who has furnished consideration may sue on a promise. A person who has not given any consideration cannot sue on a promise even if the promise was made for his benefit<sup>24</sup>. A person seeking to enforce a simple contract in court must show that he himself has given consideration in return for the promise he is seeking to enforce.<sup>25</sup>

<sup>23</sup> See also *Shadwell v Shadwell*

<sup>24</sup> This rule is based on the doctrine that a stranger to a contract cannot sue on the contract.

<sup>25</sup> This is sometimes referred to as the doctrine of privity of contract which stipulates that only a party to a contract can sue to enforce the contract.

See the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*. The facts of this leading case was as follows: Dunlop who were wholesale tyre manufacturers sold tyres to X under a contract whereby X agreed not to sell the tyres below Dunlop's recommended retail price and as Dunlop's agent to obtain a similar agreement from other parties to which X may sell to. X sold tyres to Selfridge who agreed with X not to sell below the price. Selfridge broke the contract and Dunlop sued for its breach. It was held that Dunlop could not enforce the contract because no consideration moved from them.

In *Tweddle v Atkinson* A was about to marry B. Before the marriage, it was agreed between A's father and B's father that on the wedding day each of them would pay £100 to A. The bridegroom's father paid his own share but B's father did not pay before his death. The bridegroom now sued the estate of B's father for the promised money. The court held that as A (the bridegroom) had not been a party to the contract he could not sue to enforce it. See also the case of *Beswick v Beswick*, the facts of which are as follows; Peter, a coal merchant entered into a written contract with his nephew John, under which Peter sold his business to John. The contract provided that after the death of Peter, the nephew should pay the widow (who was not a party to the agreement) an annuity of £5 a week. Peter died and the nephew refused to pay her. It was held that the widow could not enforce the agreement in her personal capacity, as she was not a party to the contract (though she may be entitled to the amount as an administrator of Peter's estate).<sup>26</sup>

<sup>26</sup> See also *Gbadamosi v Mbakwe; LSADPC and anr v Nigerian Land and Sea foods Ltd*. In Gbadamosi's case, the plaintiff sued the defendants in his (plaintiff's) name for recovery of a debt granted to the defendant. From evidence, it was clear that the loan was granted to the defendant by the plaintiff (as Treasurer of the Action Group) a political party. It was held that under the circumstances the claim failed as the plaintiff has not offered any consideration. It was stated in *Makwe v Nwukor* that a contract affects only the parties thereto and cannot be enforced by or against a person who is not a party to it.

#### 4 CAPACITY

Before there is a valid contract, the parties to the agreement must have the capacity to enter into that type of contract.<sup>27</sup> The capacity of infants, drunk and insane persons and corporations to enter into contracts would now be considered.

##### A Infants

An infant, for purpose of contractual capacity, is a person who is below the age of 21 years.<sup>28</sup>

The law governing the capacity of infants to contract has the aim of protecting the infant from adults who may seek to take advantage of the infant's youthful inexperience. Of course, the law tries to prevent as far as possible, situations where infants would take undue advantage of the privilege offered to him by the law.

Contracts entered into by an infant may be classified into the following;

###### (i) Contracts valid and binding on an infant.

These are contracts whereby an infant (a) contracts for the supply of necessaries or (b) contracts for education, training or apprenticeship.

(a) Necessaries are goods suitable to the condition of such infant in life and to his requirement at the time of sale and delivery.<sup>29</sup> The infant would be bound by the contract for supply of necessities only if the goods are necessities at the time of the contract. In addition, at the time the goods are supplied, the goods must not be goods that the infant is already adequately provided with. See, for example, *Nash v Inman*. In this case, an infant undergraduate of Cambridge bought eleven fancy waistcoats from N. It was found,

<sup>27</sup> Capacity to enter into contract relates to legal ability to acquire rights and incur obligations envisaged by the agreement.

<sup>28</sup> This is the common law position, which is still applicable to Nigeria.

<sup>29</sup> From this it is clear that beyond basic food and clothing, certain things would be necessities for one infant but not necessities for another infant.

in evidence, that at that time, the infant was adequately provided with coats. The court held that the infant was not liable to pay for the coats.

Note however, that goods supplied to an infant for the purpose of trading are not necessaries. So that if an infant carries on business such infant would not be liable on contracts made by him in the course of the business

Note also that where necessaries are supplied to an infant, the infant would be liable to pay a reasonable price.<sup>30</sup>

(b) Contracts by which an infant receives education, instruction in an art or trade are all binding on him provided that the contract is on the whole beneficial to the infant.<sup>31</sup>

#### (ii) Contracts voidable at the option of the infant

These are contracts by which an infant acquires interest of a permanent or long-term nature in a subject matter and which imposes continuous rights and liabilities on the infant. Examples of these are contracts of partnership, lease, and membership of incorporated companies.<sup>32</sup>

Such contracts are voidable at the option of the infant but would be binding on the infant after he attains full age except he repudiates the contract within a reasonable time of attaining full age. In *Davies v Beynon-Harris*, an infant took a lease of a flat shortly before he attained adulthood, and three years later he was sued for the rent, which was, then in arrears. It was held that the infant was liable as the lease was binding on him unless he had repudiated it within a reasonable time of attaining his adulthood.

<sup>30</sup> See section 4(1) Sale of Goods Act, cap 174 Laws of Lagos State 1994. This may not necessarily be the contract price

<sup>31</sup> See *International Correspondence Schools v Ayres* where an infant was held liable to pay for tuition supplied by the plaintiffs, as it was beneficial to him. See also the cases of *Doyle v White City Stadium*; and *Chaplin v Leslie*.

<sup>32</sup> See however, section 80 of Companies and Allied Matters Act (Cap 58 LFN 1990) that stipulates that the age at which a person may become a member of a company is 18 years.

It appears, however, that repudiation of such contract by an infant has no retroactive effect and the infant would not be able to recover money he has paid under the contract unless there has been a total failure of consideration. See the case of the *Steinberg v Scala (Leeds), Ltd.* In this case, the plaintiff, an infant, took shares in the defendant company, paid the amount, which was due on allotment and the first call. Later while still an infant, she repudiated the contract and wanted her money back. It was held that she could rightly repudiate and have her name removed from the company's share register (and thereby not liable for future calls), but that she could not recover back the money she had paid since she had got something of value (that is the shares).

#### (iii) Contract void against an infant

These are contracts entered into by an infant for the repayment of money lent<sup>33</sup> or to be lent, or contracts for goods supplied other than necessaries.

Also a contract made at full age to pay a loan contracted during infancy is void.

In addition, any contract of guarantee by an adult of any of the above transactions is void. See *Coutts v Browne-Lecky*. In this case, B, a minor, had an overdraft with his bank. X and Y guaranteed it. The bank sued X and Y for payment. It was held that since the loan by the bank to B was void, X and Y were not liable under the guarantee<sup>34</sup>

It appears however, that an infant could enforce such contracts against an adult party even though it could not be enforced against the infant himself.

<sup>33</sup> See the Infant Relief Act 1874

<sup>34</sup> It should be pointed out that it is immaterial that the person dealing with the infant was mistaken or even misled by the infant about the true age of the infant. See *Leslie v Sheill*, where S an infant who fraudulently induced L to lend him some money by lying about his age was held not liable to repay the loan.

### Drunk and Insane Persons

A contract entered into by a drunk or insane person is voidable at his option provided he can show that, (at the time he entered into the contract), he was so affected by his state that he did not appreciate what he was doing and that the other party knew about it.<sup>35</sup>

### 5. INTENTION TO CREATE LEGAL RELATIONS

To constitute a contract, the parties must intend expressly or impliedly, that their agreement should give rise to legally enforceable obligations. (If parties have expressly or impliedly indicated that they do not wish that their agreement should be legally binding on them, the court would not interfere to enforce such contracts).

Even in commercial agreement, parties may agree that their agreement should not be legally enforceable. This may arise for example by describing their agreement as a 'Memorandum of understanding' (M.O.U) or as 'binding in Honour only' or 'a Gentleman's agreement' or 'not subject to litigation'. In such cases, the courts would not interfere to enforce such agreement. See the case of *Amadi v Pool House Group and Nigeria Pools Co.* In this case, the plaintiff made a pool's stake. The contract stated that "it is a basic condition of the sending in and acceptance of every coupon that it is intended and agreed that the contract of the pool and anything done in connection thereon...shall not be attended or give rise to any legal relationship or be legally enforceable or the subject of litigation but all such arrangements, agreements and transactions are binding in honour only". The court held that under that circumstance, a person who has a grudge against the conduct of the other party could not sue.

<sup>35</sup> A drunk or insane person supplied with necessities may however be compelled to pay a reasonable price for it.

In respect of cases where the parties have not expressly or impliedly stated an intention to create or not to create legally binding obligations, the court would have to decide if, from the circumstances, the contract is intended to be legally binding.

In considering the issue of intention to create legal relationship, agreements are loosely classified into *domestic/social agreement* and *commercial agreements*.

In domestic/ social agreements, the court would presume that the parties do not wish to create legal relations - that is, that they did not intend by their agreement to create legally binding obligations. See *Balfour v Balfour*. In this case, a husband who was a civil servant in Ceylon came to England with his wife. When he had to return to Ceylon, he promised his wife, who on doctor's advice had to remain in England, a house-hold allowance of £30 a month until she joined him in Ceylon. The wife agreed. The husband sent the money, as promised, for some time and then stopped sending it. Later the parties separated and the wife sued for the unpaid allowance. It was held that domestic agreements such as theirs were *not* agreements that the courts would interfere to enforce. This is because the parties are presumed, under the circumstances, not to intend to create legal relations by their agreement.<sup>36</sup>

This presumption may of course be rebutted. In addition, if parties in a domestic/social relationship had, expressly or impliedly, indicated an intention to create a legally enforceable agreement, the courts would enforce such agreement.

See for example the cases of *Merritt v Merritt* the facts, which are, follows; a husband had formed an attachment to another woman and the couple intended to separate. They negotiated in the

<sup>36</sup> See also *Jones v Padavatton*, and *Spellman v Spellman*. In Jones's case, a woman who had lived in Trinidad wanted her daughter to study for the English bar and after completing her studies to practice as a lawyer in Trinidad. At a time when mother and daughter were very close, the mother bought a house in London to enable the daughter reside during her studies. Later, differences arose and the mother claimed possession of the house. It was held that arrangement relating to the house was made without contractual intent and the mother was entitled to the possession of the house.

husband's car about some arrangement for the future. Before the wife left the car, she insisted that the husband give her a written statement according to which, in consideration of her paying the mortgage on the family home, (which was in the name of her husband) he would transfer the house unto her sole ownership. The wife paid the mortgage and asked for the transfer of the house. The husband contended that the court should not interfere, as theirs was a domestic agreement not intended to create legal relations. It was held that the rule in Balfour's case did not apply. That in the present case, the bond of domestic amity was practically gone; that parties negotiated at arms length as they had decided to separate and reasonable persons would regard their agreement as intended to be binding at law. The court concluded that it would enforce the agreement.

In commercial agreement, however, the court would presume that parties intended to create legal relations unless there is something in the agreement that points otherwise<sup>17</sup>.

### TERMS OF CONTRACT

The respective undertakings and promises contained in the contract are known as the terms of the contract. There are *express terms* and *implied terms* of contract.

Express terms are terms specifically agreed to by the parties.

Implied terms are those terms, (which even though were not specifically agreed upon by the parties), would be read into the agreement as if the parties had agreed to it.

Terms are implied into a contract;

- (i) By law - for example, the Sale of Goods Act and the Hire Purchase Act imply certain terms into all contracts to which they relate.<sup>18</sup>

<sup>17</sup> See, for example, *Carll v Carbolic Smoke ball Co Ltd.*

(ii) By custom or usage of a particular trade. A contract may accept ~~or terms that are recognized by custom or usage even~~ such term has not been expressly mentioned in the contract. This would be so ~~presumed~~, of course, that term has not been expressly or implicitly excluded by the contract.

See for example, the case of *British crane hire Corp. v Ipswich Plant Hire*. Here the plaintiff and defendant were both in the business of hiring out heavy earth moving equipment. The defendants, who were at that time, engaged in some drainage works, arranged by telephone for draglines crane from the plaintiffs. Although the fee was agreed, nothing was said about conditions of hire. The plaintiff in accordance with usual practice sent a printed form of agreement to the defendants for signature. Before the form was signed, the crane without anyone's fault sank in marshy ground. Under the terms in the printed (but unsigned form) which was similar to the one used by all firms in the crane hire business including the defendants, hirers were liable to indemnify owners against liability in the sort of situation that had occurred. The defendants however contended that such term was not incorporated in their contract. The court held that the term had been incorporated. That both parties were in the trade and the defendant knew that firms in the plant hire trade always imposed such terms.

- (ii) By the courts, to give the contract business efficacy.

These are terms implied by the courts in order to enable the contract to be performed in the manner, which must have been contemplated by the parties at the times of the contract. See the case of *Okotete v Electricity Corporation of Nigeria*. In this case, the plaintiff was engaged by the defendants to carry out "bush clearing" along the Warri-Ughelli road for the purpose of extension

<sup>18</sup> See for example, section 13 of Sale of Goods Law cap 174 Laws of Lagos State 1994 and Section 4(1) of Hire Purchase Act cap 169 LFN 1990.

electricity supply to Ughelli. The defendants intended, to the knowledge of the plaintiff, to install electric poles and cables along the cleared path. After carrying out the assignment, the plaintiff claimed extra payment for felling of trees along the routes on the grounds that 'bush clearing' did not cover the felling of trees. The court held that although the contract did not expressly stipulate that the plaintiff were to cut down the trees on the route, there was an implied term to that effect.

Note, however, that except where statute provides otherwise, an implied term would generally not override an express term of a contract. For example in *Gottschalk v Elder Dempster & Co Ltd.*, by a contract for carriage of goods by sea as contained in the Bill of Lading, the defendants undertook to convey some packages from Liverpool to the plaintiffs in Lagos. Although the defendants safely delivered the packages in the Custom's shed on arrival, one of the packages was missing when plaintiff finally took delivery. The plaintiff sued the defendants for the loss. According to the bill of lading, the defendant's liability ceases as soon as the goods were discharged. However the plaintiff sought to introduce and rely on a custom of the port according to which the defendants' liability would have continued even after the discharge of the goods. It was held that "no evidence of custom can override the terms of a written contract"

Terms of contract may also be classified into *Conditions* or *Warranties*

**Conditions** – A condition is a vital term of a contract that goes to the root of the contract. A breach of a condition entitles the injured party to repudiate the contract and sue for damages.

**Warranties** – These are terms of a contract that do not go to the root of the contract. A breach of warranty gives the injured party a right

to claim damages but does not entitle him to repudiate the contract.<sup>29</sup>

Note however that whether a term is a Condition or a Warranty depends on the circumstances of each case—that is, the place of that term in that contract.

A term may be a condition in one contract but be a warranty in another contract, given a different set of circumstances. In *Bettini v Gye*, B agreed to sing for G, the director of the Italian Opera in England during certain dates and agreed to arrive in London six days before the commencement of the engagement for rehearsals. B arrived only 2 days before the commencement and G thereupon repudiated the contract. It was held that the term breached was (under the circumstance) not a condition and the contract cannot be repudiated because of a breach of that term.

#### EXEMPTION CLAUSES.

In line with the principle of freedom of contract, the parties to a contract may agree that in certain event one of them shall be exempted totally or partially from liabilities that are imposed by law or the contract. This is done by an appropriately worded clause or term in the contract. Such terms are referred to as exclusion or exemption clauses or terms in the contract.

Except where the exemption clause goes against public policy or against any law, the courts would generally give effect to exemption clause as agreed to by the parties.

However in order to be effective, an exemption clause **must form part** of the contract (of the parties). The rule in determining

<sup>29</sup> Of course, if there has been a breach of condition, an injured party can treat such breach as a breach of warranty (that is, take the contract as it was performed and sue for damages only, instead of repudiating the contract.)

whether an exemption clause forms part of a contract or not is as follows:

(i) If the clause is contained in a document signed by the party who is adversely affected by the exemption clause, then such exemption clause would be considered as forming part of the contract and would bind that party, (even if such party never read it before signing). See *L'Estrange v Groucob*. In this case, the plaintiff bought a Cigarette vending machine from the defendants. She signed, (without reading), a document that contained a number of clauses in small print among which was an exemption clause. The plaintiff argued that she was not bound by the clause, as she had not read it. The court held that the clause was binding on her.

(ii) If the clause is not contained in a document signed, but its existence was brought to the attention of the party *before or at the time* the contract was entered into, the exemption clause would be binding.

However, if the clause was introduced after the contract was concluded then it cannot be effective.

See the case of *Olley v Marlborough Court*. In this case, the plaintiff and her husband took a room in a hotel owned by the defendants. At the reception desk, they were asked to pay for a week in advance. They paid and went to their room and found a notice exempting the hotel from liability for loss or theft of articles unless handed over to the managers for safekeeping. The plaintiff's fur coat was stolen from the plaintiff's room. When the plaintiff sued, the defendants sought to rely on the exemption clause contained in the notice in the room. It was held that the defendants were liable as the contract was concluded at the reception desk and the terms of the notice in the bedroom was not incorporated in it.<sup>40</sup>

<sup>40</sup> Decisions along this line was also arrived at in *Chapelton v Barry UDC*; and *Thornton v Shoe Lane Parking Ltd.*

### Inoperative Exemption Clauses

Sometimes, even when an exemption clause forms part of a contract, it may nevertheless be held *inoperative* by the court. Situations where inoperative exemption clauses would arise include:<sup>41</sup>

- (i) If the party signing the contractual document, (containing the exemption clause), signs as a result of the fraud or misrepresentation of its effect to him by the other party. See *Curtis v chemical cleaning and dyeing Co Ltd.*
- (ii) If the party seeking to take advantage of the exemption clause had acted outside the four walls of the contract (that is, if he has done what was outside the contemplation of the parties when the contract was being entered into). See the case of *Davies v Collins*.
- (iii) If a party seeking the protection of the exemption clause had committed a breach of a fundamental term of the contract.<sup>42</sup>

### VITIATING FACTORS IN CONTRACT

#### A. MISTAKE

Mistake occurs when a party to a contract alleges that he entered into the contract under some misunderstanding or misapprehension about a state of affairs.

Mistake may be divided roughly into *Common Mistake*, *Mutual Mistake* and *Unilateral Mistake*.

#### Common Mistake

This occurs where each party knows the intention of the other party and accepts it. However an assumption underlying their agreement as it affects the subject matter of the contract is wrong.

<sup>41</sup> That is the exemption clause would not protect the party trying to rely on it

<sup>42</sup> See *Ogwu v Leventis Motors* and also *Boshali v Allied Commercial Exporters Ltd*

general rule, the existence of common mistake would not affect the validity of a contract. See for example, *Leaf v International Galleries Ltd* the facts of which were as follows; L bought from G a painting which both mistakenly believed to be by Constable, a great artist and of great value. Later L discovered that it was made by an unknown artist and comparatively worthless. It was held that L could not void the contract as his mistake related only to the quality of the subject matter of the contract.<sup>43</sup>

However, if the mistake relates to title or mistake as to existence of subject matter of the contract, then the contract would be void.

*Mistake as to title* would occur when a person, for example, buys a property which actually belongs to him. See *Abraham v Oluwa*. In this case the Plaintiff bought a parcel of land from one Savage in 1917. Savage himself had earlier bought it from someone else but no conveyance was executed. The defendant who was a judgment creditor of one Olotu wrongly thought that the land belonged to Olotu and attached it under a writ of *fifa*. The plaintiff fearing that he had no title to the property bid for and bought it when the defendant auctioned it. Subsequently on obtaining legal advice that his title to the land had all along been valid, the plaintiff brought an action to set aside the sale agreement and to get a refund of the purchase money on the ground of mutual mistake. It was held that under the circumstance, the contract of sale was void and the plaintiff was entitled to a refund of his money.

*Mistake as to the existence of subject matter* would occur where the subject matter of the contract had, without the knowledge of either party, been destroyed as at the time the contract was entered into or had never existed at all. In this case, the contract is void. In *Trickland v Turner*, for example, a contract to take an annuity on a person who, unknown to both parties, was already dead was held void. See also *Coutrier v Hastie*. In that case, A and B entered into a contract for the sale of corn, which was on board a ship, unknown to both of them, however, the Master of the ship had sold

See also the case of *Bell v Lever Brothers*

the corn on reaching a port of call because of the bad condition of the corn. The contract was held void.<sup>44</sup> Also, in *Galloway v Galloway*, a husband and wife entered into a separation agreement under which the husband promised to make a weekly allowance to his wife. Subsequently, it was discovered that the parties had never been married although they had always believed themselves to be married. It was held that the separation agreement was void as the state of affairs (the marriage) which both parties considered to be the basis of their agreement did not exist.

### Mutual Mistake

In this situation, there is outward appearance of an agreement between the parties when in fact the parties have not really agreed on the issue. Each party is mistaken as to the other party's intention or undertaking but neither knows that he has been misunderstood. That is, the parties to the contract were at cross purposes since unknown to each other they are thinking about different things.

In this situation, whether the contract would be void or not would depend on how a "reasonable" man would construe the agreement. If a reasonable man would be able to infer an agreement, the court would hold the parties to one of the bargains; otherwise the court would hold that there was no agreement and the contract void. See *Raffles v Wichelhaus*. In this case, A contracted to buy a cargo of cotton from B which was to arrive "ex peerless" from Bombay. It turned out that there were 2 ships with the name "Peerless" which sailed from Bombay. A thought the cotton would arrive by the October 'peerless' while B thought that it was the one arriving in

<sup>44</sup> Similar decision was reached by the Court of Appeal in the case of *Knight, Frank & Rutley v A.G. Kano State*. In this case, the Kano State Government entered into a contract with the appellant to enable the State government to charge and collect tenement rates. The government made an initial part payment to the appellant which partly performed the contract by preparing and submitting a provisional valuation list. It was later discovered that the subject matter of the contract was the constitutional responsibility of the local government councils. Consequently the state government repudiated the contract. It was held that where the subject matter of a contract has, without the knowledge of either party ceased to exist or never existed before the contract was made, the contract will as a general rule be void on ground of mistake.

December. It was held that the contract was void for mutual mistake.

### Unilateral Mistake

Here only one party is mistaken and the other party knows (or is presumed to know) about the mistake.

Unilateral mistake could be Mistake as to the identity of the person with whom the contract was entered into or mistake as to document signed.

#### (a) *Mistaken identity*<sup>45</sup>

This is a situation where, for example, one enters into a contract with a different person from the person one intends to contract with.

Where there is a mistake as to the identity of the person with whom one contracts, the contract would be *void* if the identity of that person is *material* to the contract. But the contract would only be *voidable* if the identity of the person is not material to the contract. See the case of *Phillips v Brooks* and compare with the case of *Ingram v Little*.

In *Phillips v Brooks*, N went into a jewellers' shop and presented himself as Sir X, a person of credit and reputation. The jeweller sold a ring to him for which N gave a Cheque purporting to be signed by Sir X. The Cheque was a forgery. Meanwhile, N had pawned the ring. It was held that the contract between N and the jeweller was voidable and therefore the pawnbroker had a good

title to the ring (as the contract had not been made void at the N pawned it).

In *Ingram v Little*, A with 2 others were joint owners of a car, which they advertised for sale. X agreed to buy it and was about writing out a cheque when A told him that the sale was cancelled, as they wanted cash for the car. X then informed A (falsely) that he was a certain H, a reputable businessman who lived at a certain address. When A made enquiries at the local post office, she was told that a certain H, a reputable businessman lives at the address supplied by X. Thereupon, X was allowed to go away with the car in exchange for the Cheque. X later sold the car to L who bought without knowledge of the fraud by X. The cheque was dishonoured. In an action to recover the car from L, it was held that the owners of the car intended to sell only to H and not to X and so the contract between them and X was void (and therefore that they could recover the car from L)<sup>46</sup>.

#### (b) *Document mistakenly signed*

As a general rule, a person is bound by a document that he has signed. However, sometimes, a person may seek to avoid the legal consequence of a document that he has signed on the grounds that he signed the document by mistake. Such a person would plead "NON EST FACTUM" - that is, "this is not my deed".

For a plea of *non est factum* to succeed, the person must show:

- (i) that the document he signed is *different in nature* from the document he intended to sign (see *Saunders v Anglia building society*)<sup>47</sup> and (ii) that he was *not negligent* in signing the document<sup>48</sup>

<sup>45</sup> The question of mistaken identity often becomes very important, for example, where goods have been acquired and then passed on to an innocent third party. If the first contract is void, the innocent third party would not acquire any valid title. But if the first contract is only voidable then the innocent third party who acquires the goods before the contracted is avoided or made void would get a good title.

<sup>46</sup> Note that as a general rule, a voidable contract may be rescinded without actual communication to, or repossession from the party whose title is being voided if such communication is made impossible, as it often is the case, because the fraudster had absconded

<sup>47</sup> Also known as *Galilee v Lee*;

<sup>48</sup> See *Foster v Markinon*.

In *Saunders's case*, G intended to give her nephew her house on condition that he would allow her to live there for life. She knew that her nephew intended to raise money on the house and that Lee, Lee and the nephew asked her to sign a document. She had broken her spectacles and when she asked what the document was about, she was told it was a deed of gift of the house to her nephew. She signed the document in that belief. The document was in fact an assignment of the house by G to Lee for £3,000, which Lee never paid nor intended to pay. Thereupon Lee mortgaged the house to the defendants. In an action to void the transfer to Lee on grounds of mistake, it was held that G could not plead *non est factum* and could not recover the title deeds of the house from the defendants to whom it had been mortgaged on the ground that what she signed was not different in *nature* from what she intended to sign.

In *Foster v Mackinnon*, M, an old man of feeble sight endorsed a bill of exchange thinking it was a guarantee. It was held that, as he was not negligent in indorsing the bill, he was not liable on the bill<sup>49</sup>.

It has been noted, in a case, that a literate person of full age, capacity and understanding who signs a document is presumed to understand what he appended his signature upon. Whatever that document says and undertakes is binding on him and a plea of *non est factum* does not usually avail him<sup>50</sup>.

<sup>49</sup> Note, that the plea of "non est factum" is not available to a person who signs a document in blank and asks someone else to fill it in since it would be taken that he has accepted to be bound by whatever is filled in.

<sup>50</sup> *Raymond Iyang & 2 ors v Engineer Dr Maurice A Ebong*.

## B MISREPRESENTATION

A misrepresentation is an untrue statement of fact made by one party, which induces the other party to enter into the contract.

Misrepresentation may be *Innocent misrepresentation*, *negligent misrepresentation*, or *fraudulent misrepresentation*.

Innocent misrepresentation: This is an untrue statement made by a person who honestly believes that the statement was true. The only remedy available to an injured party in this case is rescission of the contract. The rescission must, however, be done within a reasonable time<sup>51</sup>.

Fraudulent Misrepresentation: This occurs when a person makes an untrue statement either knowing that it is false or without having any basis for believing it to be true. The remedy available for an injured party is a right to rescind the contract and sue for damages.

Negligent Misrepresentation: This occurs when a person makes an untrue statement negligently. This kind of misrepresentation was upheld in *Hedley Byrne Ltd. v Heller & Partners Ltd.* The remedy available for an injured party in this case is a right to rescind the contract and sue for damages.

<sup>51</sup> See *Leaf v International Galleries Ltd.* In addition, rescission is only possible where the parties can be returned to their previous or starting position. (that is, restitution in integrum)

## C DURESS AND UNDUE INFLUENCE

Duress is the unlawful pressure by threat which induces one party to enter into a contract without freedom of choice because of fear that the threatened wrongful act will be carried out.

If a person enters into a contract under duress or undue influence, the contract would be voidable at the option of that person.

Duress here means entering into a contract under some threat.<sup>52</sup> In the case of *UTC v Hauri*, the plaintiff brought an action to enforce an undertaking by the defendant not to set up a motor workshop in competition with the workshop of the plaintiff, his former employer. It was revealed, in evidence that the undertaking was obtained from the defendant under duress after the termination of his employment with the plaintiff. This was achieved by simply withholding the defendant's salary and other benefits until he signed the undertaking. The court held the contract was not binding on him.

Also instructive is the case of *Williams v Bayley*, the facts of which were as follows; a son gave his bank several promissory notes upon which he had forged his father's signature. At a meeting between the banker, the father and the son to resolve the problem, the banker made it clear that he had the power to prosecute the son for forgery and that there would be great consequences and serious repercussions affecting the liberty and future of the son. Frightened by the implication and in order to avoid the threat to his son's liberty and future, the father executed a mortgage in favour of the bank in return for the delivery to him of the forged promissory notes. It was held that the mortgage was invalid on the ground that undue pressure had been exerted on the father (by the bank).

<sup>52</sup> The threat may be physical or threat to economic interest

## *Undue influence<sup>53</sup>*

Undue influence has been described as a state of mind of a person who has been subdued to an improper persuasion and machination in such a way that he is overpowered and consequently induced to do or not to do an act which he would otherwise do or not do of his free will. It has been described as a product of the abuse or misuse of the confidence reposed in someone who is able to put some pressure on or take unfair advantage of another<sup>54</sup>.

There is the equitable doctrine that where a person enters into a contract (or makes a disposition of property) under such circumstances that show or give rise to a presumption that he has not been allowed to exercise a free judgement in the matter, the court would set the contract aside on his application. Such presumption usually arises in case where the parties stand in a relationship implying mutual confidence- for example parent and child: guardian and ward: trustee and beneficiary: legal adviser and client. Of course, such presumption may be rebutted by showing that the transaction was, in fact, reasonable and in good faith and that the party had opportunity of independent advice.

However, a person who wishes to void a contract because of duress or undue influence must take steps to void it within a reasonable time of leaving the sphere of the duress or undue influence. See the case of *Allcard v Skinner*. In that case, the plaintiff was introduced by her spiritual adviser to a mother Superior of a religious Order. She joined the Order and on the advice of her mother Superior and in line with the dictates of the religious Order, she gave all her properties to the religious order to enable her become a sister. She remained a sister for 8 years and left the order. Six years after this, she brought an action to set aside the gift of her property to the Order. The court held that, although in giving out the property she

<sup>53</sup> The law recognises that because of closeness of relationships, age, physical or mental conditions, the will of a person to contract may be manipulated

<sup>54</sup> *Dikko Yusufu v Obasanjo*

... under undue influence, her action would, nevertheless, because she had unduly delayed in taking steps to set aside the gift.

## DISCHARGE OF CONTRACT

The discharge of a contract means, in general, that the contractual relationship between the two parties has come to an end and the parties are freed from their obligations to each other thereafter. That is, the contract ceases to be operative and all rights and obligations which had existed under the contract, become extinguished.

A contract would be discharged in the following ways.

(1) By Performance: - this means that parties to the contract have fully performed their obligations under it. Parties are, thereafter, discharged from the obligations of the contract. Performance that would discharge a contract is the performance as per its exact terms.

(2) By Agreement: - since a contract comes into existence by agreement, it can also be discharged by agreement between the parties. A later agreement by the parties to an original contract to extinguish the rights and obligations that the original contract has created is itself a binding contract.

Agreement to discharge a contract may also be by way of accord and satisfaction; or substitution of a new agreement for the old one.

(3) Discharge by Breach: - Strictly speaking, a breach of contract by one party does terminate the contract. However, where the breach is a breach of condition in the contract, the innocent party has a right to rescind the contract if he wishes. This would discharge him from the contract

Breach of contract may also be an anticipatory breach. That is, where a party gives indication before the time of performance that he would not perform the contract as anticipated. See the case of *Nigerian Supplies Manufacturing Co. Ltd. v Nigerian Broadcasting Corporation*. In this case, the defendant company took a lease of a property for a 5 year term beginning 15<sup>th</sup> January 1962 from the plaintiff with an option to renew for a further term of 5 years exercisable by notice in writing two years before the end of the original term. Sometime about 30/10/64, the Director General of the defendant wrote to the plaintiff exercising the option. However on 31/12/64, he again wrote saying that the board of the defendant corporation had refused to ratify the exercise of the option by him and purportedly withdrew the exercise of the option. The plaintiff sued. The court held that the December 31<sup>st</sup> letter was an attempted repudiation of the contract, which the plaintiff could have treated forthwith as an anticipatory breach, and sue immediately (or alternatively the plaintiff could have waited till the expected date of performance and then sue for breach of contract).<sup>55</sup>

(4) Discharge by Frustration: - A contract would be frustrated, if, after its formation a change of circumstances occurs (without the fault of either party), which makes it legally, physically or commercially impossible to fulfil the contract.

A contract would not be frustrated merely because it has become more difficult or expensive to perform. See the case of *Davis Contractors Ltd v Fareham UDC* the facts of which were as follows; X contracted to build for Y 78 houses in 8 months for £92,000. It was impossible to meet the contractual date and rises in cost added £17,000 to X's bill. There was no clause in the contract to cover this eventuality. The time actually taken by X to complete the houses was 22 months. X claimed that the original contract was frustrated by impossibility and sued for £109,000 on quantum meruit basis. It was held that the contract was not frustrated and

<sup>55</sup> See also *African Songs Ltd v Sunday Adeniyi*

therefore X had no claim. It was the opinion of the court that X should have foreseen his troubles and inserted a clause into the contract to cover them

From decided cases, contracts have been held to be frustrated when:

- the subject matter was requisitioned by the government
- on the destruction of the subject matter necessary for the performance of the contract<sup>56</sup>
- subsequent illegality of the subject matter of the contract and
- the non-occurrence of an event which the parties have assumed would occur<sup>57</sup>

When a contract is frustrated, the following consequences follow;

At Common law (which is still applicable in states in the former Northern and Eastern Regions of Nigeria), when a contract is frustrated, money that has become payable is still payable and money already paid is not recoverable.

However, in States in the old Western Region of Nigeria, this Common law position has been altered by Statute. For example, the Law Reform (contracts) Law Lagos State provides<sup>58</sup> that where a contract is frustrated, money payable ceases to be payable and money already paid can be recovered (though the court may allow a party who has incurred expenses towards the performance of the contract to claim on a quantum meruit basis for such expenses)<sup>59</sup>.

(5) Discharge by a Provision in the contract:- The contract may contain a term which provides for the discharge of the contract on the non fulfilment of a condition or on the happening of an event or on the exercise by one or either of the parties of a power to

<sup>56</sup> *Taylor v Cardwell*

<sup>57</sup> See for example the 'Coronation' cases .

<sup>58</sup> In section 4 Cap 114 Laws of Lagos State 1994

<sup>59</sup> But where parties had made provisions for consequences in the event that occurred, then the provision of the Act would not apply

terminate the contract. When such happens, the contract becomes terminated.

## REMEDIES FOR BREACH OF CONTRACT

When a contract is breached, the injured party has the following remedies:

1. Sue for damages: The breach of contract always entitles the injured party to bring an action to recover damages. That is asking for monetary compensation for the loss he has suffered as a result of the breach of contract.

Once a party to a contract satisfactorily establishes that the other party has committed a breach of contract, such a party would be entitled to damages.

Damages means monetary award for the breach of contract. It has been stated<sup>60</sup> that the object of awarding damages for breach of contract is to put the injured party (so far as money can do it) in the same position as if the contract had been performed<sup>61</sup>

Note also that it has been held that a plaintiff must take reasonable steps to mitigate his loss consequent upon the defendant's breach of contract and such plaintiff cannot recover damages for any such loss which he could have avoided but has failed through unreasonable action or inaction to avoid.<sup>62</sup>

2. Where there has been a breach of a condition in a contract, the injured or complaining party may treat the contract as rescinded

<sup>60</sup> *Universal Vulcanising Nig Ltd v Ijesha United Trading and Transport Co Ltd* at pg 412. It was also stated by the Court of Appeal in *Union Bank Ltd v Chukwulo Charles Ogboh* that the basis of damages in contract is putting the injured party in *restitutio in integrum*-a position he would have been if the contract was not breached and *not restitutio in opulentiam*, giving him a windfall

<sup>61</sup> Note that sometimes the parties may agree in advance to fix the amount payable as damages by either party in the event of a breach of contract. If such amount is considered a genuine pre-estimate of the loss that would be suffered in the event of a breach of contract ( known as liquidated damages) the court would enforce such agreement.

<sup>62</sup> See *Obaike v Benue Cement Co plc*.

and refuse further performance. (However, in this case he may be obliged to return any benefits he has received under the contract).<sup>63</sup>

3. The injured party may sue on a *Quantum Meruit* basis. When there is a breach of contract, the injured party may treat the contract as discharged. Where this happens he, if he has incurred expenses under the contract, is entitled to bring an action for compensation for expenses incurred (or work done) towards the performance of the contract. This is called a quantum meruit claim (literally meaning 'as much as it is worth') - that is, instead of suing for damages, he may claim payment for what he has done under the contract. It is an alternative remedy for breach of contract where a claim for damages is not appropriate.

4. Specific Performance: This is an equitable remedy consisting of an order of the court directing a defaulting party to perform his obligations according to the terms of the contract - that is, it compels the party at fault to carry out the contract as originally agreed. This remedy is not granted as of right<sup>64</sup>.

The courts would as a general rule only grant an order of specific performance

- where monetary compensation (i.e. damages) would not be an adequate remedy for the injured party<sup>65</sup>.
- in contracts of personal service (like in ordinary master and servant relationship)<sup>66</sup> or
- in situations where an innocent third party has acquired an interest in the subject matter of the contract or where the

<sup>63</sup> Note too that if the breach has been a breach of a term considered a warranty (and not a condition) then, this is not an available option - the injured party has to sue for damages. Rescission is an equitable remedy that must be exercised without undue delay. It would not be available if there had been an undue delay or if an innocent third party has acquired an interest in the contract or if the parties cannot be restored to their original positions.

<sup>64</sup> This is unlike the remedy of damages. A plaintiff who is refused the order will still be left with his remedy under common law which is mainly damages. See *Universal Vulcanising Nig Ltd v Ijeshua United Trading and Transport Co Ltd and 6 others*

<sup>65</sup> See *African Songs Ltd v Sunny Ade*. See also *Godfrey Isievivore v NEPA* where the court stated that 'the court will not foist an employee on an unwilling employer or make an order of specific performance of an ordinary contract of service'.

party in breach has no control over the subject matter of the contract<sup>67</sup>.

In addition, a person seeking an order of specific performance must show that conditions precedent to the enforcement of the contract has been fulfilled and that he has either performed all the terms of the contract which ought to be performed by him or he is willing ready and willing to perform them.<sup>68</sup>

5. Injunction: An injunction is an equitable order by the court restraining a person to whom it is directed from doing the things specified in the order or requiring the person to perform specified acts. The court would grant such orders to restrain a party from repetition or continuance of the breach of contract (called prohibitive injunction) or which compels him to do something (called mandatory injunction).<sup>69</sup>

It has been stated that "where a party to a contract with his eyes open contracts not to do something or do a particular thing and then proceeds to commit a breach of it, if the breach is a continuing one, he can be stopped by injunction from continuing to do the thing irrespective of whether damages will be adequate to compensate the party injured by the breach".<sup>70</sup>

An order of injunction would not be granted where:

- the court is of the opinion that the award of damages (monetary compensation) would be an adequate remedy or
- where there would be need for constant supervision by the court to determine whether the order is being obeyed or

<sup>67</sup> For example, in *Mohammed v Klargest Nig. Ltd*, the Supreme Court held that specific performance cannot be ordered against a person who entered into an agreement to sell land/house which he does not own.

<sup>68</sup> See *Best Nigeria Ltd v Blackwood Hodge Nig Ltd and 2 others*

<sup>69</sup> An injunction restraining the continuance of an act is called a prohibitive injunction while that requiring the performance of an act is called a mandatory injunction. As a general rule, an injunction would not be granted in circumstances where an order of specific performance would have been refused. Injunctions are particularly useful where the breach is threatened or where the breach is a continuing breach

<sup>70</sup> See *Gee Nig Ltd v Contact (Overseas) Ltd*