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MULUNGUSHI UNIVERSITY

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SCHOOL OF BUSINESS STUDIES
DEPARTMENT OF LAW, LABOUR AND HUMAN RESOURCE

BLL211: LAW OF CON TRACT

Prepared by Fanuel K.M. Sumaili
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1 LAW OF CONTRACT

1.0. CONTRACT

A contract is an agreement between two or more parties that creates obligations on them that law will recognise and enforce. And the enforceability of the agreement arises from the moral premise that an individual who voluntarily assumes an obligation that creates expectations in others should fulfil that obligation. If he does not do so, the other party should be allowed to recover compensation for any loss or damage that he may suffer because of the non-fulfilment of the obligation so assumed.

For a contract to exist, usually one party must have made an offer, and the other must have accepted it. Once acceptance takes effect, a contract will usually be binding on both parties, and the rules of

offer and acceptance are typically used to pinpoint when a series of negotiations has passed that point, in order to decide whether the parties are obliged to fulfil their promises. There is generally no half-way house – negotiations have either crystallised into a binding contract, or they are not binding at all.

1.1.FACTORS AFFECTING FORMATION OF CONTRACT

Contractual agreements are of two types: **simple e.g.** Sale of goods and supply of services. These can be made orally, in writing, or by conduct; there is no specific form required. **Speciality** contracts, e.g. transfers of land and interests in land must comply with specific formalities to be valid. This category of contracts are sub-divided in three types namely, agreement which must be in the **form of a deed** such as transfer of an estate in land, agreements which must **be in writing** such as negotiable instruments; contracts for approval of credit; and contracts for the sale or disposition of certain interests in land and agreements which must be **evidenced in writing** such as guarantees.

1.2. CONTRACTS THAT MUST BE IN THE FORM OF A DEED

- Conveyancing of land always had to be in a deed, which was then “signed, sealed and delivered” to the other party.
- “Sealing” was applying sealing wax to a document, a requirement which was removed by the ***Law of Property (Miscellaneous Provisions) Act1989.***
- Now by s 1(2) of the 1989 Act for the deed to be valid it must:
  (a). be clear on the face that it is intended to act as a deed;
  (b). be validly executed
- By s 1(3) of the 1989 Act it will be validly executed if it is signed, the signature witnessed, and it is delivered as a deed.
- A deed is one method of ensuring that entirely gratuitous arrangements such as charitable gifts are legally enforceable.

1.3. CONTRACTS THAT MUST BE IN WRITING

- Contracts involving negotiable instruments (e.g. cheques). These were originally authorised by the **Bills of Exchange Act 1882** but are also governed by subsequent Acts.
- Contracts of approved credit. These are governed by Credit Act 1974 and 2006.
- Contracts for sale or other disposition of interest in land. This was formerly regulated by s 40 of the Law of Property Act 1925. Now such contracts must be in writing, incorporate all the terms agreed by the parties and be signed by or on behalf of each party

1.4. CONTRACTS NEEDING EVIDENCE IN WRITING TO BE VALID

- These were formerly governed by the Statute of Frauds1677. But with the repeal of s 40 Law Property Act 1925, the only contract falling within this category is a contract of guarantee.
- A contract of guarantee is a promise by one party made to a second party in respect of a debt owed to the second by a third party---- agreeing to stand those debts in the event of default by the third party debtor.
- A guarantee must be distinguished from an indemnity. A guarantor “stands in the shoes of the principal debtor”, the guarantee is only enforceable if evidenced in writing. An

indemnity on the other hand is an agreement to take on the debt of the debtor and therefore, is not covered by the 1677 Act.

1.5. Simple Contracts

All contracts which are not made under seal are simple contracts and our discussions here will mainly be concerned with simple contracts but special reference will be made, where appropriate, to specialities.

There are three fundamental elements in any **simple contract.** These are:

- **a)** **Agreement:** the parties must have reached, or be deemed to have reached, agreement.
- **b)** **Intention:** the parties must have intended, or be deemed to have intended to create legal relations.
- c) **Consideration:** Usually, according to the terms of an agreement, some advantage moves from one part to another. The giving of mutual advantages by the parties is the essence of a bargain. An advantage or benefit moving from one part to another is known as consideration

NOTE: There is no contract where any of these three elements is missing.

1.6. AGREEMENT

An agreement which is enforceable as a contract may be oral or in writing. This is because there is generally no legal requirement that an agreement should be in writing for it to be treated by law as a legally binding contract. As a result an agreement will be enforced by law as a contract even though it is not in writing at all. In fact the largest number of contracts are never in writing; they are oral. And the commonest type of oral contract is the purchase of goods in a grocery shop or the local flea market. Another contract that does not require to be in writing to be enforceable is a contract of employment. On the other hand, some agreements must, as a matter of law, be written to be enforceable. For example, a hire-purchase agreement is required by the Hire-Purchase Act to be in writing. Similarly, the Farmers' Stop-Order Act requires a farmer's stop-order to be in writing otherwise it will be unenforceable as such under the Act. And as will be shown later, a negotiable instrument too must be in writing.

There are, therefore four different ways in which an agreement may be made provided the parties are in communication:

a) In writing or
b) By word of mouth, or
c) By inference from the conduct of the parties and circumstances of the case, or
d) By any combination of the above modes.

And in deciding whether the parties have reached an agreement, courts will look for the existence of the following elements:

1.6.1. Offer

This can be described as an expression of willingness by one person (the offeror) to enter into a contract with another person (the offeree) made with the intention that it shall be binding on the

offeror as soon as it is accepted by the offeree. Although in the majority of cases the offer will be made by word (whether written or oral), it could also be made by conduct. As a result if the offeror's conduct is such as to induce a reasonable person to believe that he intends to be bound by his conduct once the offeree accepts it, an agreement will be considered to have been concluded between the two parties that the law will enforce as a contract if it is accompanied by other factors discussed below. Thus, if for example, a man goes into a shop picks up a bottle of Coke and walks to the paying counter with money in his hands which he puts on the counter, that will be an offer to buy the drink. Consequently if the shop attendant accepts the money in payment for the Coke, a contract will have been concluded between him and the shop for the sale of the Coke.

1.6.2. CHARACTER OF AN OFFER

A contract usually begins with an acceptance of an offer. An offer is a statement by one party, the offeror (the person making the offer), identifying terms of an agreement by which he/she is prepared to be bound if they are accepted by the offeree (the person to whom the offer is made.

1.6.3. Offer is straightforward if made in the form of a question: "will you buy my car for K5,000? The offeree responds positively and accepts or rejects the offer.

1.6.4. Not all contracts begin as simply as this. Often an offer is only made following an **invitation to treat---**passive conduct inviting the other party to make an offer.

By way of definition, **an offer is an undertaking by the offeror to be contractually bound in the event of a proper acceptance being made**. The offer must, therefore, be **clear, complete and final.**

<u>Scammel V Ouston</u> (1941), H.L.: O ordered a motor van from S 'On the understanding that the balance of the purchase price can be held on hire purchase terms over a period of two years."

HELD: the order (i.e. the offer) was so vague that it has no definite meaning. Further negotiations would be required before agreement could be reached.

An offer may be communicated in any manner whatsoever. Express words may be used, orally or in writing, or an offer may be implied from contract. An offer may be partly expressed and partly implied.

However it is necessary that an offer must be communicated. An offer has no validity unless and until it is communicated to the offeree so as to give the opportunity to *accept or reject*.

<u>Taylor V Laird</u> (1856): T threw up the command of L's ship during the course of a voyage. T then helped to work the ship home. He **claimed** ***to be paid for this work. HELD: Since T had not communicated his offer to do the work so as to give L the opportunity to accept or reject the offer there was no contract***

1.6.5. OFFERS TO THE PUBLIC AT LARGE

In most cases an offer will be made to a specific person – as when Wanga offers to sell a computer to Mumba. However, offers can be addressed to a group of people, or even to the general public. For example, a student may offer to sell his textbooks to anyone in the year below, or the owner of a lost dog may offer a reward to anyone who finds it.

In ***Carlill v Carbolic Smoke Ball Co (1893)*** the defendants were the manufacturers of "smoke balls" which they claimed could prevent flu. They published advertisements stating that if anyone used their smoke ball for a specified time and still caught flu, they would pay that person one hundred pounds, and to prove that they were serious about the claim, they had deposited one thousand pounds with their bankers.

Mrs. Carlill bought and used the smokeball, but nevertheless ended up with flu. She therefore claimed the one thousand pounds, which the company refused to pay. They argued that their advertisement could not give rise to a contract, since it was impossible to make a contract with the whole world, and that therefore, they were not legally bound to pay the money. This argument was rejected by the court, which held that the advertisement did constitute an offer to the whole world at large, which became a contract when it was accepted by Mrs. Carlill using the smokeball and getting flu. She was therefore entitled to the one hundred pounds.

A more recent illustration is provided by the Court of Appeal in ***Bowerman v Association of British Travel Agents Ltd (1996)***. A school had booked a skiing holiday with a tour operator which was a member of the Association of British Travel Agents (ABTA). All members of this association display a notice provided by ABTA which states:

Where holidays or other travel arrangements have not yet commenced at the time of failure (Of the tour operator), ABTA arranges for you to be reimbursed the money you have paid in respect of your holiday arrangements.

The tour operator became insolvent and cancelled the skiing holiday. The school was refunded the money they had paid for the holiday, but not the cost of the wasted travel insurance. The plaintiff brought an action against ABTA to seek reimbursement of the cost of this insurance. He argued, and the Court of Appeal agreed, that the ABTA notice constituted an offer which the customer accepted by contracting with an ABTA member.
A contract arising from an offer to the public at large, like that in ***Carlill,*** is usually a unilateral contract.

1.7.0. INVITATION TO TREAT
However it should be noted that not every apparent offer will be regarded as such by law. Some words or conduct which may appear to be offers are not offers at all. For example, an advertisement of goods for sale is not an offer of the goods for sale. Similarly, the display of goods in a shop window or on a shop shelf is also not an offer of the goods for sale. Again, the indication in a prospectus that shares of a company are available for purchase by members of the general public is not an offer of their sale. Law regards all these cases as mere invitations of offers or as invitations to treat. As a result, the offer is not by the person who displays the goods on the shelf or the shop window or who publishes the advertisement or prospectus but by the person who responds to it.

In other words, an invitation to treat is not an offer. An Invitation to treat is a first step in negotiations which may, or may not, be a prelude to a firm offer by one of the parties.

1.7.1. There are numerous examples of ***invitation to Treat.***

- Auctions—The lot displayed is the invitation to treat, the individual bids are offers, the fall of the auctioneer's hammer is acceptance (*British Car Auctions v Wright* (1972)).
- Self-service shopping--- display of goods is ***invitation to treat,*** a customer then selects goods and makes an offer to buy at the checkpoint, which is then accepted or not by the ***shopkeeper (Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd (1953)).***
- The same applies to goods displayed in shop windows (***Fisher v Bell (1961))*** on whether the display of a flick knife was unlawful under the ***Offensive Weapons Act.***
- Advertisements---the advertisement is the invitation to which a person responds by making an offer to buy (***Partridge v Crittenden (1968).***
- Catalogues, as for auctions, so a lot can be withdrawn without any consequences (***Harris v Nickerson, 1873)).***
- Invitation to Council tenants to buy their council houses or flats (***Gibson v Manchester City Council (1979).*** Tenders to provide goods or services—invitations to suppliers to offer a particular price for which they will provide the goods or services. The party inviting the bids then selects a bid (***Spencer v Harding (1870)).***
- Mere statement of price---merely stating an acceptable price does not make it an offer to sell, the other party must still offer to buy at the price (***Harvey v Facey)).***
- Sometimes precise wording is more important than context. While something seems more like an invitation to treat it may in fact have the effect of an offer, so that a positive response by the other party may well lead to a contract being formed.

1.7.2. The wording limits the people capable of responding:

(a). **Unilateral** offers (i.e. contained in advertisements, and otherwise seen as invitations to treat (e.g. rewards). An offeree is already defined in the reward (the person who they merely carry out the stated task (***Carllil v Carbolic Smoke Ball Co. (1893***))

(b). A statement of price made during negotiations indicating that an offer exists (***Biggs v Boyd Gibbins (1971)).***

(c). Competitive tendering, i.e. stating that the contract will be given to the bidder making The highest or lowest bid, in which case only that person can form the contract, and They accept by making the highest or lowest bid (*Harvela Investment Ltd v Royal Trust Co. of Canada)).*

Harris v. Nickerson (1873): N, an auctioneer, advertised that he would sell certain goods, including office furniture, on a specified date. H Attended the sale with the intention of buying some office furniture. N withdrew the office furniture from the sale. H claimed damages for breach of contract, contending that the advertisement was an offer which he had accepted by attending the sale. HELD: the advertisement was a mere statement of intention amounting to an invitation to treat.

Fisher V Bell (1960); B displayed in his shop window a flick knife behind which was a ticket bearing the words, "Ejector knife – 4s". He was charged with offering for sale a flick-knife,

contrary to the provisions of the ***Restriction of offensive weapons Act*****, *1959. HELD: the displaying of the flick-knife was merely an invitation to treat.***

1.7.3. Termination of an offer

An offer will not constitute an agreement unless it is accepted before it is terminated by the offeror. As a result where the offeree purports to accept an offer that has already been terminated, his 'acceptance' will not be valid to convert the offer into an agreement between him and the offeror. Under the law an offer may be terminated by:

a). An offer may come to an end because it has been **accepted,** in which case a contract is formed. Other than this an offer can end in one of the three ways:

b). By passage of time:

- because the time set for acceptance has passed;
- because a "reasonable time" has passed---it would be unfair to expect an offeror to indefinitely keep open an offer for sale of perishable goods. What is "reasonable is thus a question of fact in each case (***Ramsgate Victoria Hotel v Montefiore (1866)***

c). By failing to comply with a condition precedent (***Financings v Stimson 1962)) (e.g*** an offer of employment made subject to the production of a satisfactory reference or medical report)

d). Because of the death of either party.

- If the offeror dies and the offeree knows of this, it is unlikely that he/she will be able to acceptand bind the estate of the offeror to a contract
- If the offeree, however, accepts the offer in ignorance of the death of the offeror then a contract may be formed (Bradbury v Morgan 18621))
- If the offeree dies, then it is unlikely that the executors or administrators of the estate can accept on his/her behalf (***Reynolds v Atherton (1921)0.***

e). Counter-offer

Because a response to an offer must show that the offeree is assenting to the terms of the offer, where he varies the terms of the offer, he will not be regarded as accepting the offer but making a counter-offer which has the effect of terminating the original offer and creating a new one in its place. Thus if, for example, the offer is to supply 20,000 drums of bitumen within 3 weeks at the price of K2,000,000 but in response, the offeree undertakes to sell the goods in 2 months and at the price of K2,500,000, the offeree will be making a counter-offer. As a result unless the original offeror accepts the counter-offer, there will be no agreement between the two parties that can be enforced as a contract.

f). Rejection. A rejection of an offer by the offeree terminates the offer so that he can no longer accept it thereafter. The rejection may be express as where the offeree says to the offeror that he is not able to accept it or it may be implied from the fact that the offeree makes a counter-offer to it.

1.7.4. REVOCATION OF OFFERS

1.7.4. Generally, an offer may be revoked at any time before its acceptance. This rule applies even though the offer is expressed to be open for acceptance for a specified period of time. However to be effective, the revocation must, in general, be communicated to the offeree, i.e. it must be brought to his mind ***Byrne v Van Tienhoven (1880)***). Of course the communication need not come from the offeror; it suffices if the offeree knows from any reliable source that the offeror no longer intends to deal with him (***Dickinson v Dodds (1876)).*** Revocation refers to withdrawal of an offer. (***Routladge v Grant (1828)***.

1.7.5. A **Unilateral offer** cannot be withdrawn if the offeree is in the act of performing,since acceptance and performance and performance are one and the same thing (***Errington v Errington and Woods (1952)).***

1.8.0. ACCEPTANCE

An offer cannot constitute an agreement unless it is first accepted by the offeree. In other words, it is the combination of an offer and an acceptance that creates an agreement which will be enforced as a contract. Under the law of contract, an acceptance is defined as a ***final and unqualified expression of assent to the terms of an offer*.** Because a response to an offer must denote assent, where the offeree merely acknowledges the offer or indicates that he intends to place an order, there will be no acceptance. Similarly, *silence* by the offeree does not amount to acceptance of the offer addressed to him. This was the **issue** decided upon in ***Felthouse v Bindley (1862).*** In that case an uncle and his nephew had talked about the possible sale of the nephew's horse to the uncle, but there had been some confusion about the price. The uncle subsequently wrote to the nephew, offering to pay thirty pounds and fifteen shillings and saying, "If I hear no more about him, I consider the horse mine at that price." The nephew was on the point of selling off some of his property in an auction. He did not reply to the uncle's letter, but did tell the auctioneer to keep the horse out of the sale. The auctioneer forgot to do this, and the horse was sold. It was held that there was no contract between the uncle and the nephew. The court felt that the nephew's conduct in trying to keep the horse out of the sale did not necessarily imply that he intended to accept his uncle's offer – and so it was not clear that his silence in response to the offer was intended to constitute acceptance

It has been pointed out by the Court of Appeal in ***Re Selectmove Ltd (1995)*** that an acceptance by silence could be sufficient if it was the offeree who suggested that their silence would be sufficient. Thus in ***Felthouse,*** if the nephew had been the one to say that if his uncle heard nothing more he could treat the offer as accepted, there would have been a contract.

1.8.1. **THE 'BATTLE OF FORMS'**

1.8.2. Basing the contract on the counter-offer causes problems in commercial contracts based on parties' 'Standard forms'.

1.8.3. Parties may eventually contract after protracted negotiations, but is the final set of terms that are taken as binding on the parties.

1.8.4. The Courts may decide that there is no valid offer and acceptance and halt performance.

1.8.5. However, the Courts are reluctant to do so once performance has begun (***British Steel Corp v Cleveland Bridge & Engineering Co. (1984)***—although it is not merely the fact that one party has begun performance but the unequivocal conduct of the parties that indicates a binding agreement (RTS) *Flexible v Molkerei (2010).*

1.8.6. In *Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (1970)* Lord Denning suggested that 'if differences are irreconcilable, so that they are mutually contradictory, then the conflicting terms may have to be scrapped and replaced by a reasonable implication. However, most judges have refused to follow this suggestion.

1.8.7. Lord Lloyd has suggested that a contract can run with the vital terms agreed and some ancillary terms still to be agreed (***Pagnan SpA v Feed Products Ltd (1987).***

1.8.8. **THE ROLE OF ACCEPTANCE IN AGREEMENT**
1.8.9. A contract is not formed until an offer is accepted.
An agreement occurs when a "valid" acceptance follows a "valid" offer, and the contract is formed immediately on acceptance.
1.8.10. It is vital to establish that the response to the offer is in fact an acceptance and is properly communicated to the offeror.
1.8.11. **THE BASIC RULES OF ACCEPTANCE**
1.8.12. A valid acceptance is an intention to be bound by the terms of the offer, so it must:

- Be unequivocal and unconditional, and
- Correspond exactly with the terms of the offer--- the "**Mirror image" Rule**

1.8.13. An attempt to vary the terms of the offer **is a counter-offer** which is a rejection of the offer that is no longer open to acceptance (Hyde v Wrench (1840)).
1.8.14. A rejection of an ancillary subject may still be a counter-offer, although the main terms are accepted (Jones v David (1894)).
1.8.15. However a mere inquiry that does not vary the terms of the offer is not a counter-offer (Stevenson v McLean (1880))

1.8.16. <u>COMMUNICATION OF ACCEPTANCE</u>
Generally, an acceptance must be communicated to the offeror so that in the absence of that, there will be no contract. In other words, the acceptance must be brought to the offeror's notice. Accordingly, there is no contract where the offeree writes his acceptance of the offer on a piece of paper which he keeps to himself or where a company resolves to accept an application for shares but does not inform the applicant of the resolution.
The principle that acceptance must be communicated was settled in ***Entores Ltd v Miles Far East Corporation (1955)***. In that case Lord Denning explained that if A shouts an offer to B across a river but, just as B yells back an acceptance, a noisy aircraft flies over , preventing A from hearing B's reply, no contract has been made. A must be able to hear B's acceptance before it can take effect. The same would apply if the contract was made by telephone, and A failed to catch what B said because of interference on the line; there is no contract until A knows that B is accepting the offer. The principal reason for this rule is that, without it, people might be bound by a contract without knowing that their offers had been accepted, which would obviously create difficulties in all kinds of situations.

However in the following cases an acceptance may be effective even though it is not communicated to the offeror:

a) Where the offer itself expressly or impliedly waives the requirement of communication of acceptance. This will be the case where the offer invites acceptance by *conduct*, e.g. where an offer to supply goods is made by sending them to the offeree. In that case, the offer can be accepted by simply using them. Similarly, an offer to buy goods made by ordering them may be accepted by simply dispatching them to the offeree.

b) Where the contract is ***unilateral*****,** communication of acceptance is waived so that performance of the required act suffices without any previous notification of acceptance.

Thus, for instance, where the Police issues an advertisement promising to pay K1, 000 to any person who caught a named fugitive, anyone who catches the criminal would be entitled to receive the money even though he may not have communicated to the Police his prior acceptance of the offer of the reward.

1.8.17. COMMUNICATION OF ACCEPTANCE

1.8.18. There is no contract unless acceptance is communicated**.**

1.8.19. Only a genuine offeree can accept an offer, so an offer made without authority cannot be accepted (***Powell v Lee 1908).***

1.8.20. It follows that **silence** cannot amount to acceptance (***Felthouse v Bindley (1863)).***

- Acceptance can be construed from the conduct of the parties ***(Brogden v Metropolitan Railway Co (1877)).***
- But only if it can be objectively demonstrated to have been the intention of the offeree (***Day morris Associates v Voyce 2003)).***

1.8.21. In some situations communication can be waived (e.g. unilateral contracts or customary conduct between parties).

1.8.22. Generally, acceptance can be in any form, but if a specific form of acceptance is known to be required then acceptance must be in that form to be valid (***Champagn do commerce et Commissions S.A.R.L v Parkinson Stone Co. (1953)).***

1.8.23. Acceptance of a unilateral offer need not be communicated, because performance is the same as acceptance (Carllil v Carbolic Smoke Ball Co. (1893)).

1.8.24. In one situation the acceptance takes place **before** the offeror receives notification of it--- this is the "**postal rule."**

a). where the use of the post is the normal, anticipated method of acceptance the acceptance is valid and the contract formed when the letter is posted, not when it is received by the offeror (*Adaams v Lindsell (1818)).*

b). the rule applies where the letter of acceptance is received after notice of revocation of he offer is sent (***Henthorn v Fraser (1892)).***

c). .It can also apply even though the letter of acceptance is never received (***Household Fire Insurance Co. v Grant 1879)).***

1.8.25. The postal rule has limited application to modern communication technology.

- In ***Entores Ltd v Mikes Far East Corp (1955),*** offer and acceptance communicated by telex were valid because the method was so instantaneous that the parties were deemed to dealing as if face-to-face even though they were in different countries.
- The reason is that such forms of communication are usually instantaneous (***Brinkibon v Stahag Stahl)1983)).***
- The time when such forms of communication are used may cause problems in determining if a contract is made, as when a fax is sent out of office hours.

1.8.26. Now offer and acceptance in the case of electronic communication is governed by the ***Consumer Protection (Distance Selling) Regulations 2000.*** This gives the buyer the right to be informed of right to cancel within seven days, description, price, arrangements for payment and identity of the seller, and to be given written confirmation, without which a contract is not formed

1.8.27. <u>MODE OF COMMUNICATING ACCEPTANCE</u>

An offer requiring acceptance to be communicated to the offeror in a certain way, can generally be accepted only in that way. As a result if the offeror asks for the acceptance to be sent to a particular place, the acceptance will not bind him if it is sent elsewhere. Similarly, if the offeror asks for written acceptance, he will not be bound by an oral acceptance and vice versa.

a) Where performance constitutes acceptance. As indicated above, where the offeror is deemed to have included in his offer a term providing that complete performance by the offeree shall be a sufficient acceptance, then communication is not necessary. In such cases, the offeror is bound when the offeree performs whatever act is required of him according to the terms of the offer.

. (b) **Acceptance by Post.** Where post is deemed to be the proper means of communicating acceptance, the acceptance takes effect from the moment the letter of acceptance is properly posted. This rule applies even where the acceptance is delayed or lost in the post.

Henthorn V Fraser (1892): It was held that "where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind the post might be used as a means or communicating the acceptance of an offer, the acceptance is complete as soon as it is posted.

Household Fire Insurance Co. V Grant (1897): G applied for shares in the plaintiff company. The company sent a letter of allotment by post. But it never reached G. The company went into liquidation and the liquidator, on behalf of the company, sued for the balance outstanding on the shares. G contended that he was not bound to pay, since he had not received a reply to his offer to buy the shares. HELD: a contract was made at the moment the letter of allotment (i.e. the acceptance) was posted.

EFFECT OF THE POSTAL RULE

1. A postal acceptance can take effect when it is posted, even if it gets lost in the post and never reaches the offeror.
2. Where an acceptance is posted after the offeror posts a revocation of the offer, but before the revocation has been received, the acceptance will be binding (posted acceptances take effect on posting, posted revocations on communication). This point is illustrated by the cases of ***Byrne v Van Tienhoven (1880)*** and ***Henthorn v Fraser (1892).***
3. Where the postal rule applies, it seems unlikely that an offeree could revoke a postal acceptance by phone 9 or some other instant means of communication) before it arrives, though there is no English case on the point. A Scottish case, ***Dunmore v Alexander (1830*)**, does appear to allow such a revocation, but the courts views were only obiter on this point.

1,9.0. INTENTION TO CREATE A LEGAL CONTRACT

Intention to be bound is essential. The intention to create legal relations is an essential element in contract. Where no intention to be bound can be attributed to the parties, there is no contract. The test of intention is objective. The courts seek to give effect to the presumed intentions of the parties.

As far as intent to be bound is concerned, contracts can be divided into domestic and social agreements on the one hand and commercial or business transactions on the other. Where an agreement falls into a domestic or social category, there is a rebuttable presumption that the parties do not intend to create legal relations. The reverse applies in commercial or business agreements, where it is presumed that the parties do intend such agreements to be legally binding. Again, this principle can be rebutted if there is evidence that the parties did not intend their agreement to be legally enforceable.

1.9.1. SOCIAL AND DOMESTIC AGREEMENTS

Where a husband and wife who are living together as one household make an agreement, courts will assume that they do not intend to be legally bound, unless there is evidence to the contrary. In ***Balfour v Balfour (1919)*** the defendant was a civil servant stationed in Ceylon, now Sri Lanka. While the couple were on leave in England, Mrs. Balfour was taken ill, and it eventually became clear that her husband would have to return by himself. He promised to pay her a monthly maintenance allowance of thirty pounds. They later decided to separate, upon which the husband refused to make any more payments. The Court of Appeal decided he was not bound to pay the allowance because at the time the agreement was made there was no intention to create legal relations. When this type of agreement between husband and wife, said Lord Atkin, it was a family matter in which the courts really had no place to interfere.

However, where the parties enter into an agreement after they are already on separation, the courts would consider such agreements as intending to create legal relations. In ***Merritt v Merritt (1969)*** **Mr. Merritt** had left his wife to go and live with another woman, and subsequently met his wife to resolve various financial arrangements. Sitting in Mr. Merritt's car, they decided he would pay his wife forty pounds a month, out of which she was to pay the outstanding mortgage payments on their house; he would transfer the house to her sole ownership when the mortgage was paid off. Mrs. Merritt then refused to get out of the car until her husband had put the agreement in writing. Eventually he signed a piece of paper stating what they had agreed. The wife duly paid off the mortgage, but the husband then refused to transfer the ownership of the house to her. The Court of Appeal upheld the wife's claim. Lord Denning pointed out that the presumption applied in ***Balfour v Balfour*****,** that an agreement between husband and wife was a "family arrangement", was not valid where the parties had separated or were about to do so. In such circumstances the parties "do not rely on honourable undertakings", but "bargain keenly", and it could be safely presumed that any agreement between them was intended to be legally binding.

The US courts have shown themselves increasingly willing to give effect to domestic agreements, as shown by the case of
Morone v Morone (1980)**,** where an agreement between a cohabiting couple that the man would financially support the woman in return for her help in running their home and helping in his business was held to be binding.

1.9.2. AGREEMENTS BETWEEN PARENT AND CHILD

Agreements of a domestic nature between parents and children are also presumed not to be intended to be binding; again the presumption can be rebutted. In ***Jones v Padavatton (1969)*** the plaintiff was a resident of Trinidad. Her daughter had a secretarial job in Washington, but her mother wanted her to give it up and train to be a barrister in England. The mother therefore volunteered to give her daughter a monthly allowance for the duration of her bar allowance for the duration of her bar studies. The daughter accepted the offer and went to England. Later on the pair made a second agreement, under which the mother bought a house for the daughter to live in, and in which she could rent out rooms in order to support herself, instead of receiving the allowance. Neither agreement was ever put in writing. The daughter persistently failed to pass her bar examinations and, five years after the original bargain was made, they quarrelled, and her mother sought possession of the house. On the facts of the case, the majority of the Court of Appeal considered that neither of the agreements was intended to create legal relations. They were merely family arrangements in which both parties, who had been close at the time, were happy to trust each other to keep the bargain. The mother was therefore entitled to possession of the house.

1.9.3. SOCIAL AGREEMENTS

The presumption that an agreement is not intended to be legally binding is applied to social relationships between people who are not related. Again, it can be rebutted. In ***Simpkins v Pays (1955)*** the plaintiff enjoyed entering competitions run in Sunday newspapers. When he took lodgings in the defendant's house, she and her granddaughter began to do the competitions with him, sharing the cost of entry. The plaintiff filled in the forms in the name of the defendant, and she promised to share any winnings. Eventually one of the entries was successful, and the defendant won seven hundred and fifty pounds. The plaintiff claimed a third of the sum as his share of the prize, but the defendant refused, claiming that she had not intended to be legally bound by the agreement. The court upheld the plaintiff's claim, considering that they had all contributed to the competition with the expectation that any prize would be shared.

Similarly, in ***Peck v Lateu (1973)*** the court found an intention to create legal relations where two women had agreed to share any money won by either one of them at a bingo.

1.3.0. COMMERCIAL AGREEMENTS

In commercial and business agreements, there is a ***rebuttable presumption*** that the parties intended to create legal relations. Unless there is very clear contrary evidence, this presumption will not be rebutted. In ***Esso Petroleum Ltd v Customs and excise Commissioners (1976)*** Esso ran a sales promotion in which "coins" showing members of the England football squad for the 1970 World Cup were to be given free, one with every four gallons of petrol. The scheme was advertised by television and posters at filling stations. The case arose when for tax purposes it became necessary to decide whether or not there was a contract of sale – did a motorist who bought four gallons of petrol have a contractual right to one of the coins? The House of Lords held, by a majority, that the coins were not being sold, and so were not liable for tax, but that there was intent to create legal relations. Lord Simon pointed out that "the whole transaction took place in a setting of business relations," that it was undesirable to allow companies to make promises in

advertisements that they were not bound to keep, and that Esso knew that, despite the coins' negligible monetary value, they would be attractive to motorists and Esso would therefore derive considerable commercial benefit from the scheme.

In ***J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd (1976)*** the plaintiffs were machinery importers, who had regularly used the defendants, a firm of forwarding agents, to arrange transport of their goods. The machinery was prone to rust if stored on the deck, and so it had always been agreed that it would be carried below decks. In 1967, in the course of a "courtesy call" to the plaintiffs, the defendants' representative put forward the idea of carrying the goods by container transport, assuring them that their containers would always be kept below decks because of the rust problem (many container ships are designed to have the containers stacked on deck). The plaintiffs agreed to the change. About a year later, a container with one of the plaintiffs' machines inside was carried on deck instead of below, and, not being properly secured, fell overboard as the ship left port and was lost. The plaintiffs sued, and the defendants argued that the promise to store the containers below decks was not intended to be legally binding since it was made in the course of a courtesy call, was not related to any particular transaction, and its future duration was not specified. The Court of Appeal rejected this argument, saying that the background to the promise meant that intent to be contractually bound could be inferred: the parties had previously done business together, in which goods were always transported below decks, and the plaintiffs would not have agreed to the change in method if the promise had not been made.

The presumption that parties to a commercial agreement intend to create legal relations may be rebutted where the words of a contract, or an offer, suggest that legal intentions were not intended. There are three main situations where this will occur.

1.3.1. "MERE PUFFS"

Where an offer is extremely vague, or clearly not intended to be taken seriously, the law will not give its acceptance contractual effect. **In *Weeks v Tybald (1604)*** the defendant announced that he would give 100 pounds to any suitable man who would marry his daughter, but it was held that his words were not intended to be held seriously, and his promise was not legally binding.

This principle is sometimes used due to the extravagant language used in advertising and sales promotions, but only if there is no evidence of contractual intent. In ***Carllil v Carbolic Smoke Ball Co. (1893)*****,** discussed above, the defendants argued that this statement was " a mere puff", an advertising gimmick which was never intended to be taken seriously. This contention was rejected by the court, pointing out that the advertisement stated the company had deposited 1,000 pounds with their bankers "to show their sincerity," which was strong evidence that they had intended to be bound legally.

1.3.2. HONOUR CLAUSES

In ***Rose and Frank v Crompton Brothers (1923)*** the plaintiffs had been buying goods from the defendants for some time, and in 1913, the parties signed an agreement that this arrangement should continue for a specified period, with prices set for six months at a time. Though otherwise ordinary, the agreement contained one unusual term, the 'honourable pledge clause'. It stated:

“This agreement is not entered into...as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts...but is only a definite expression and record of the purpose and intention of the parties concerned to which they each honourably pledge themselves.” In 1919, the defendants terminated the agreement without giving the specified notice. The plaintiffs sued, making two separate claims. The first was for breach of agreement contained in the written document of July 1913 that the buying and selling arrangement would continue for a specified period. This claim was rejected by the court, which held that the wording of the agreement placed neither side under any obligation to go on giving and accepting orders. Scrutton LJ commented: “I can see no reason why, even in business matters, the parties should not intend to rely on each other’s good faith and honour, and exclude all idea of settling disputes by outside intervention....”

The second claim concerned non-delivery of goods, which had been ordered in accordance with the agreement, before it was terminated. This claim was upheld on the basis that when each individual order was placed and accepted, it constituted a new and separate contract, which was enforceable in its own right, without reference to the original document.

The same was the position in ***Appleson V. Littlewood Ltd (1939), C.A.: A sent in a football pools coupon containing a condition that it “shall not be attended by or give rise to any legal relationship, rights, duties, consequences.***
HELD: ***the condition was valid and the agreement was not binding.***

Similarly, where a football pools coupon states that it is “binding in honour only the pools company cannot be sued for payment by the winner. (***Jones v Vernon’s Pools (1938).***

1.3.3. AGREEMENT ‘SUBJECT TO CONTRACT’
Use of these words in an agreement is usually (though not always) taken to mean that the parties do not intend to be legally bound until formal contracts are exchanged. If the parties subsequently act upon the agreement, their conduct may be interpreted as amounting to an intention to create the final contract.
In **Confenti Records v Warner Music UK Ltd (2003*) The claimants owned the copyrights in a music track that the defendant wished to use in a compilation album. Terms were discussed between the parties and the defendant sent a fax to the claimants containing deal terms, but marked “subject to contract”. The claimants signed this and faxed it back. The court held that this did not amount to a contract. However, shortly afterwards, the claimants sent the defendant a copy of the track and an invoice stating that it was licensed for “three years non-exclusive”. The court held that this amounted to an offer which was accepted when the defendant started to record the album. It was therefore, too late for the claimants to subsequently withdraw the track, as there was already a binding contract.***

If the **consequences** of the promise are serious, the court may be prepared
To say that there was an intention to create legal relations. Further, an agreement containing financial arrangements between a spouse and a former spouse with the intention of creating legal relations between them and which is not contrary to public policy can be enforced in court.

WAKELING V. RIPLEY (1951)51 SR (NSW) 183
Facts: The defendant was a wealthy old man who lived in a large house in Sidney. The plaintiffs, his sister and her husband lived in England. The defendant wrote to the plaintiffs asking them to move to Sidney. He promised to provide them with a home and leave them all his property on his death. On the basis of his promise , they sold their home in England and the husband resigned his job. After the plaintiffs had lived with the defendant for over a year he quarrelled with them, sold the house and changed his will. The plaintiffs sued for breach of contract.
Issue: Where the consequences for the plaintiff of the defendant going back on their word are sufficiently serious, is this enough to rebut the presumption that the parties did not intend to create legal relations?
Decision: There was ample evidence to indicate that the parties did intend to enter into a binding and enforceable contract as 'the consequences for the plaintiffs were so serious…'.
Comment: The court looked at the seriousness of the consequences for the plaintiff where the defendant broke his promise. Another approach would be for the court to apply equitable principles, such as estoppel ,to prevent the defendant going back on his promise ,to provide relief.

Soulsbury v Soulsbury 2007
A divorced husband paid his former wife regular maintenance payments. She later agreed that in return for not receiving these payments she would be left one hundred thousand pounds by her former husband in his will. He subsequently became seriously ill and on the morning of his death he married the Defendant with whom he had been living for about eight years. The legal effect of the marriage was to revoke the will. The second wife, acting on behalf of her husband's estate, refused to pay the money to the first wife

Held: (CA) The agreement between the husband and his former wife was a valid enforceable contract. (2007) EWCA Civ 938

Each case has to be looked at on its own facts. For example, agreements to participate in competitions and lotteries often appear on their face to be nothing more than friendly arrangements between parties. However, in the event of a win, it would normally be assumed that the parties would have contemplated sharing the winnings.

1.4.0. <u>CONSIDERATION</u>
Although there may be a valid agreement constituted by an offer which is accepted, the agreement may not be enforced as a contract in the absence of 'consideration'. This is because, as a general rule, unless an agreement is made by a deed, it is not binding as a contract if not supported by 'consideration', i.e., 'something of value in the eyes of the law'. The basis of this rule is the fact that courts are not willing to enforce gratuitous promises as contracts.
For this purpose, consideration is either some benefit to the offeror or some detriment to the offeree. And usually, the detriment and benefit are the same thing looked at from different points of view. Thus payment by the buyer is consideration for the seller's delivery or promise of delivery of goods to the buyer and can be described either as a detriment to the buyer or as a benefit to the

seller. Conversely, delivery or promise of delivery by the seller is consideration for the buyer's payment or promise of payment and can thus be described either as a detriment to the seller or as a benefit to the buyer.
Of course, so long as there is some benefit of value to one party and some detriment or value to the other party, there will be consideration even though the two do not have equivalent monetary value. As a result, there will be sufficient consideration where Shire Bus Lines limited is sold for only K1!
However the two sides of the consideration must be given in exchange for each other. Thus, for instance, if the payment which is alleged to constitute consideration is given separately and well after the goods have already been delivered, the goods are said to amount to 'past consideration' which in law does not amount to consideration at all. For this reason, payment for past services is generally not contractually binding as valid consideration unless the services were rendered on the premise that the payment would be made at some future date.

2.1 RULES GOVERNING CONSIDERATION

Talking about consideration, we must also note that there are seven rules that govern consideration.

a) consideration must be real (or sufficient)
b) consideration need not be adequate
c) consideration must move from the promisee
d) consideration must not be past
e) consideration must not be illegal
f) consideration must not be vague
g) consideration must be possible of performance.

Rules (a) to (d) above are fundamental to the nature of consideration. Rules (e) to (g) may be regarded as auxiliary**.**

a) **Consideration must be real.** Consideration must have some value. It matters not how small that value is so long as it is worth something. Indeed, the word "value" is sometimes used to mean consideration. It follows that where a party performs an act which is merely a discharge of a pre-existing obligation, there is no consideration: but where a party does more than he was already bound to do, there may be consideration.

***Stilk V Myrick* (1809): the Captain of a ship promised his crew that if they shared between them the work of two seamen who had deserted the wages of the deserters would be shared out between them. HELD: the promise was not binding because the seamen gave no consideration: they were already contractually bound to do any extra work to complete the voyage.**

***Hartley V Ponsonby (1857*: A ship's crew had been seriously depleted by a number of desertions. The Captain promised the remaining crew members forty pounds extra pay if they would complete the voyage: HELD: the promise was binding. It was dangerous to put to sea in a ship so under-manned. The seamen were not obliged to do this under their contracts of services and were therefore, free to enter into a fresh contract for the remaining part of the voyage.**

Note: **the test is: "Did the party claiming to have given consideration do any more than he was already bound to do?**

b) **Consideration need not be adequate**: It is no part of the court's duty to assess the relative value of each party's contribution to the bargain. Once it is established that a bargain was freely reached, it will be presumed that each party stipulated according to his wishes and intentions at the time. There is no reason for example why a Mercedez Benz vehicle cannot be sold for our Zambian Kwacha K1,000. If the agreement was freely reached, the inadequacy of the price is immaterial to the existence of binding contracts.

c) **Consideration must move from the Promisee**: No stranger to the consideration may, sue on a contract. Any action for breach of contract must be brought by a party who gave consideration. For example: A B and C enter into an agreement under which A promises to do certain work for B if B will pay one million Kwacha to C. if A does the work, he can sue B on his promise; but C cannot sue for he gave no consideration B.

d) **Consideration must not be past**. Where one party has performed an act before the other party's promise was made, that act cannot be consideration to support the promise.

Thus A offers to drive B from Lusaka to Kabwe in his motor car. On arrival at Kabwe B promises A to pay Ninety thousand Kwacha the cost of the petrol. B's promise is not binding because the "consideration" for which it was given is past.

***Roscorla V Thomas* (1842): At T's request, R bought T's horse for thirty pounds. After the sale, T promised R that the horse was sound and free from vice. The horse proved to be vicious. HELD: There was no consideration to support T's promise and he was not bound. The sale itself could not be valuable consideration, for it was completed at the time the promise was given.**

2. CAPACITY

4.1.0.The Nature and Purpose of Capacity

This is perhaps, best described as **incapacity** as it concerns limits on a party's capacity to contract, or limitations imposed on the other party

4.1.1.Every person is assumed to have capacity to enter a contract, though certain groups are identified as lacking full capacity. This is to protect freedom of contract, so where a person lacks capacity it is to protect him/her from being taken advantage of.

4.1.2.Rules exist for three distinct natural persons.

(a). Minors---people under the age of 18

- This is the most important group
- Some contracts are enforceable against them, some are unenforceable, some can be made by the minor but avoided before the age 18 or a reasonable time.

(b). Drunkards---where a person is so intoxicated as to be unaware as to the quality of the Agreements made while drunk

(c). People suffering mental incapacity---either temporary or permanent, but the person is Presumed to be unaware of the quality of any agreement made while mentally ill.

4.1.3. Rules on capacity also cover non-natural persons---corporations with a separate legal personality, which can sue or be sued in their own name.

4.2.0.DRUNKENNES AND CAPACITY

4.2.1 A party who enters a contract while drunk may consider the contract unenforceable against him/her in certain circumstances.

- The party must not have known the quality of his/her actions at the time the contract was formed (*Gore v Gibson* (1845).
- The other party must have known of the intoxication.

4.2.2.The contract is voidable when the drunken party is sober

4.2.3. A party may ratify an agreement on becoming sober (Matthews v Baxter (1873))

4.2.4. By s 3 of the *Sale of Goods Act 1979,* even if the contract is enforceable (e.g. necessaries, if incapacitated by drink, one need only pay a reasonable price for goods delivered.

4.3.0. MENTALLY DISORDERED PEOPLE AND CAPACITY

4.3.1. Understanding of mental illness has increased in the last century

4.3.2. Numerous statutory rules have developed for the administration of the property of such people

4.3.3.Common law still mainly controls their contractual capacity.

4.3.3. The Court must first decide if, when the contract was formed, the person was incapable of understanding the quality of their act.

- So the contract is voidable by person lacking mental capacity **(*Imperial Loan Co, v Stone1892).***
- The other party must have known of the mental incapacity.

4.3.4. Contract made in the period of lucidity is binding on the mentally incapacitated person even if he/she becomes sick again.

4.3.5. By s 3 of the *Sale of Goods Act 1979,* in a contract for necessaries the person need only Association pay a reasonable price for goods already supplied, even if the other party is unaware of the mental illness.

4.4.0. CORPORATIONS AND CAPACITY

4.4.1. Corporations should not be confused with unincorporated associations (e.g. clubs where members are jointly or severally liable for contracts and the club can neither sue nor be sued.

4.4.2. A corporation has a separate legal capacity, but not being a natural person has limitations on its capacity determined by its method of creation.

4.4.3. A corporation will be formed in one of the three ways:

- By Royal Charter (e.g. the original trading companies, such as the East India Company) the capacity to contract will be dictated by the terms of the charter and is usually wide;
- By Statute (e.g. the nationalised industries which later became privatised) the capacity of the corporation is dictated by the wording of the statute creating it;

- By registration under the *Companies Act*---the capacity of the company is identified in the Constitution found in the memorandum of Association in the "Objects Clause".

4.4.4. Traditionally a company's capacity was regulated by the *ultra vires* doctrine (i.e. it could not act beyond its powers and act for purposes not identified in the objects clause (*Ashbury Railway Carriage Co. v Richie 1875))*

4.4.5. The *Ultra vires* doctrine is also applied to using ancillary power for improper purpose (*Introductions Ltd v National Provincial Bank Ltd (1970),* but see *Rolled Steel Products (Holdings)Ltd v British Steel Corporation 1985)*

4.4.6. Originally companies could plead their own *ultra vires* to defeat claims of parties contracting with them, since people were fixed with constructive notice of the objects clause

4.4.7. Section 35 of the Companies Act 1985 overcame this by stating that where a party deals with a company in good faith "any transaction decided on by the directors shall be deemed to be one which is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed to be free of any limitations in the memorandum".

4.4.8. Section 35 has also now been amended by s 108 of the *Companies Act 1989* and the *Companies Act 2006* which operates in three ways:

(a). It provides that an Act is not invalidated merely because it is beyond the company's Capacity:

- So third parties can enforce an agreement with the company;
- The company can enforce agreements against the third party;
- Shareholders may use injunctions to prevent *ultra vires* actions;
- Construction of the objects clause is wider so it can be drafted in wider terms than previously.

4.4.9. A new s 35A means a third party's knowledge of directors acting beyond their powers is not of itself bad faith.

4.4.10. A new s 35B removes the need to inquire whether or not the transaction is one allowed by the objects clause.

4.5.0. **CAPACITY AND MINORS' CONTRACTS**

4.5.1. THE BASIC PRINCIPLE OF MINORITY

4.5.2. The modern definition of minority is in the *Family Law Reform Act, 1969*

4.5.3. Under this Act the previous use of the word "infant" was abandoned and the age of majority reduced from 21 to 18.

4.5.4. The Act possibly reduced the significance of the area for a while by taking many people out of the scope of the rules

4.5.5. With the increased independence of young people the effect may have reduced.

4.6.0. THE CHARACTER AND PURPOSE OF RULES

4.6.1. As minors are less experienced, the law decides that they need protection from adults who would take advantage of them.

4.6.2. They are not prevented from making contracts, but the consequences for the other party may vary.

4.6.3. Minors' contracts fall into three basic categories:

- Valid contracts---those enforceable against a minor.
- Voidable contracts---those a minor may enter and possibly continue with, but also avoid or set aside.
- Void contracts---those that can never be enforced against the minor,so other parties will be reluctant to make them.

4.7.0. CONTRACTS VALID AND ENFORCEABLE AGAINST MINORS

4.7.1. These contain two distinct groups:

- Contracts for necessaries; and
- Contracts of service, training or education substantially for the benefit of the minor.

4.7.2. Contracts for necessaries:

a). Common law demands that a minor pays a reasonable price for necessaries actually delivered (*Chappel v Cooper*)

b). Necessary is clearly variable---as well as food and clothing it must include what is necessary to the particular minor.

- Necessary according to the minor's "station in life"; and
- Necessary for the minor's actual current needs

d). By s 3 Sale of Goods Act, 1979 a minor must only pay a reasonable price for goods actually delivered---which need not be the same as the agreed price.

e) Even if the contract is for necessaries the minor may not be bound by it if the contract terms are prejudicial to the minor's interests (*Fawcett v Smethurst (1914).*

4.7.3. Beneficial contracts of service or education

a). enforceable since the minor must be able to support himself, and school leaving age is 16, two years under majority;

b). nevertheless the minor is given protection;

c). so contract is only enforceable if substantially for the minor's benefit;

d). the fact that some terms are detrimental will not automatically invalidate the contract (*Clements* v *London and North Western Railway Co. (1894);*

e). but if generally detrimental to the minor's interests the contract is not enforceable *(De Francesco v Barnum (1890);*

f). contracts of service have included sporting contracts *(Doyle v White City Stadium Ltd (1935)* and also contracts for literary works *(Chaplin v Leslie Freurin (Publishers) Ltd (1966);*

g). since the minor needs to develop skills, as well as work, contracts for training, education and apprenticeship are also included (*Olsen v Corry (1936);*

h). If the minor has entered such a contract which is declared to be not for his/herbenefit then it is voidable by him/her.

4.7.4. CONTRACTS VOIDABLE BY MINORS

4.7.5. The common feature is that contracts can be long term, also known as contracts of continuous or recurring obligations

4.7.6. The law concludes that, while minors should be able to enter such contracts, they must also be allowed to back out of them before they reach majority, or within a reasonable time afterwards.

4.7.7. There are four types of contracts included in this category:

- Contracts to lease property
- Contracts to purchase shares in a company
- Contracts to enter a partnership; and
- Contracts of marriage settlement.

4.7.8. If the minor fails to repudiate and continues with the contract, he/she is bound by all the obligations arising from it.

4.7.9. Whether the minor has repudiated in time to avoid the contract is a question of fact in each case (*Edwards v Carter (1893).*

4.7.10. If the minor repudiates before any obligations arise, then the contract simply ceases at that point and the minor cannot be sued on any obligation arising at a later stage.

4.7.11. A minor may be bound by obligations arising before repudiation.

4.7.12. If the minor has transferred money under the agreement, this is not recoverable unless there is failure of consideration (*Steinberg v Scala (Leeds) Ltd (1923).*

4.7.13. However, money paid over by the minor may be recoverable if he/she has not received what was promised under the agreement (*Corpe v Overton (1833).*

4.8.0. **CONTRACT VOID AND UNENFORCEABLE AGAINST MINORS**

4.8.1. The law was previously regulated in the *Infants Relief Act, 1874.*

4.8.2. Its defects led to the passing of the *Minors' Contracts Act 1987,* which restored the comkon law on the area, subject to some modifications.

4.8.3. The basic principle is that any contract not under any of the two categories we have already discussed is void and unenforceable.

4.8.4. This has a number of consequences:

- A minor is less likely to be able to enter this final class of contracts, since prudent people will avoid making them
- While such contracts may not be enforceable against the minor, they will be enforceable against the other party to the contract.
- A minor can only recover money already paid over if there is a total failure of consideration on the other side.
- If the minor ratifies the contract after reaching 18, then it binds him/her, although ratification need not be express---continuing with the contract counts as *implied* ratification.

4.8.5. Contracts coming under this class are those formerly identified in s 1 *Infant Relief Act, 1874:*

- Loans of money
- Supply of goods and services other than necessaries
- Accounts states (IOUs)

4.8.6. Guarantees were originally unenforceable as, under the Infants Relief Act,m1874, a "guarantor stands in the shoes of the principal debtor"---if the contract was unenforceable against the minor, the same applied to the guarantor.

4.8.7. Since minors may need loans in modern times, s2 *Minors' Contracts Act 1987,* allows enforcement of guarantee, making loans more available to minors in need of them.

4.9.0. **EQUITY AND MINORS' CONTRACTS**

4.9.1. The rules protect minors from exploitation or being taken advantage of.

4.9.2. Other parties may need protection from unscrupulous minors who would take unfair advantage of the rules.

4.9.3. A party trying to recover property from a minor in an unenforceable contract might traditionally use equity for restitution of the property to prevent the minor's "unjust enrichment" (*R Leslie Ltd v Shell (1914*).

4.9.4. Equity has been replaced by s 3 *Minors' Contract Act 1987* by which property can be returned to the party dealing with the minor if "just and equitable" in the circumstances.

4.9.5. For this remedy, one must prove fraud on the minor's part.

5.0. THE CONTENTS OF A CONTRACT

When one party to a contract brings a court action against the other party it is often on the ground that the latter has failed to fulfil his obligation under the contract. Now whether a party to contract is under any contractual obligation depends on whether performance of that obligation is part of, or a term of, the contract. And a term of contract may be:

5.1 Express

A term of contract is express if it is orally agreed upon by the parties at the time of concluding the contract or is contained in a written document embodying the contract. In other words, these are statements made by which they intend to be bound.

5.2 Implied

A term may also be implied into a contract by the parties' agreement itself, by custom or by law. It is will be implied by conduct where even though they may not specifically have discussed it or agreed on it, they should, as reasonable people, be taken to have intended that it should be part of the contract. For instance, in a contract of employment, whether the parties specifically agree on it or not, it will be implied that the employee should not be paid his salary in full in any month if he is absent from work without permission or reasonable cause. Similarly, if it is customary in any industry that employees should receive a bonus at a certain point in time, that will be a term implied into their contracts of employment. Lastly, law implies a number of terms into specific contracts. For instance, it is an implied term in a contract for the sale of goods that the goods should fit for their intended use. Again, it is an implied term of a contract of employment that the employee should be entitled to a certain number of days every year as his annual leave.

5.3. Representations.

a). Before formation parties identify the basis on which they wish to contract.
b). Any statement of fact made at this stage is a "representation".
c). A term is a representation either expressly incorporated into the contract or implied by fact or law.
d). it is, therefore, distinguishable from other representations as it forms part of the contract and can be relied on.
e). Representations are of more or less significance to the parties.
f). The types of representations must be distinguished because the existence and character of liability depends on the type. (e.g. terms, mere representations misrepresentations, mere opinions, expert opinions trade puffs, and puffs with an attached promise.).

5.4. **The Nature of Terms.**
a). Terms are the content and subject matter of the contract.
b). Terms are binding obligations which the parties agree to perform in order for the contract to be complete.
c). If either party fails to comply with the obligations they have set themselves, there is a breach of contract and potential legal action.
d). Terms derive from negotiations preceding the formation of the contract, or may be inserted into the contract by other means.
e). In this way, terms can be:

- Expressly stated and incorporated into the contract by the parties themselves;
- Implied factually from the circumstances as being the presumed intention of the parties;
- Imputed into the contract by the process of the law for some other purpose (e.g. for consumer protection).

5.5. Incorporating express terms into the contract
a). Not all representations become terms of a contract
b). If the contract is written, it is easier to determine what is a term.
c). The Courts have devised tests to determine whether or not the representation is incorporated into the contract as a term.
d). If not, it may still be actionable misrepresentation if falsely stated.
e). Many factors can be considered in testing incorporation
5.5.1.. the importance attached to the representation by one party:

- The greater the importance attached, the more likely it is to be a term (***Birch v Paramount Estates (1956);***
- Particularly if the purpose is defeated; if the representation cannot be relied upon (***Couchman v Hill (1947)).***

5.5.2.. The level of expertise of the representor:

- If one party relies on the other party's skill and judgment, then it is likely to be a term (***Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd (1965))***
- But a representation made without skill or expertise is less likely to be a term (***Oscar Chess Ltd v Williams (1957)).***

5.5.3. The time span between representation and formation of the contract---a longer gap and the representation is unlikely to be seen as a term (***Routledge v McKay (1954)).***
5.5.4. Whether the representation was in a written agreement;
5,5,5. Whether a written agreement was signed---parties are taken to agree to every document they sign even if they do not read it (***L'Estrange v Graucob (1934)).***
5.5.6. A representation will not become a term unless the party subject to it was aware of it at the time of contracting ***(Olley v Marlborough Court Hotel Ltd (1949)).*** The term must be sufficiently drawn to the notice of the party subject to it to be relied on (***O'Brian v MGN Ltd (2001))***
5.5.7. In oral contract, terms from Standard Form contracts cannot be binding unless the buyer is made aware of them (***Lidl UK GmbH v Hertfors Foods Ltd (2001))***

5.6.1. The rule developed out of the recognition of the difficulties of supplying accurate proof of the terms of agreements.

5.6.2. Generally, oral or other similar evidence that appears to add to, vary, or even contradict the terms of a written agreement would not be recognised by common law.
5.6.3. The reasons for such a rule are relatively obvious and justifiable.

- If the contract was already in writing, it was presumed to contain everything that the parties agreed on, and any omissions were not intended to be included;
- Adding terms at a later stage only adds to uncertainty

5.6.4. The U.K. Law Commission considers the rule unworkable and a number of exceptions to the basic rule have developed:

- Custom or trade usage
- Evidence that shows that a contract will not operate until a specified event occurs ***(Pym v Campbell (1856)).***
- Evidence that shows that the contract is either void or voidable for misrepresentation, mistake or lack of capacity;
- Evidence that the written agreement is in error and that rectification should apply (Webster v Cecil (1861)).
- Evidence that shows that the written agreement was not the full and final reflection of the agreement (***J Evans & Son (Portsmouth) Ltd v Andreas Merzario Ltd (1976)).***

5.6.5. **THE PROCESS OF IMPLYING TERMS INTO A CONTRACT**
5.6.6. Contracting parties are deemed to include all the terms by which they wish to be bound, but sometimes terms are implied.
5.6.7. Terms are implied in one or two situations:
a). where, in a dispute, the Court is trying to give effect to the presumed, though unexpressed **intentions** of the parties---- these are called **terms implied by fact.;**
b). where the law demands that certain provisions are included in a contract irrespective of the wishes of the parties---**these are call terms implied by law.**

5.7.0 Terms implied by fact.
5.7.1. Court imply terms into a contract for various reasons including:
a). custom --- "a custom hardens into a right" (***Hutton v Warren (1836)).***
b). a trade practice or a professional custom (e,g. in contracts of marine insurance it is implied that premiums will be paid to the insurer even if the insured defaults);
c). to make sense of the agreement (Schawel v Reade (1913));
d). to conform with prior conduct (***Hillas v Arcos (1932); and***
c). to preserve "business efficacy" (***The Moorcock (1889)).***
5.7.2. The test of terms implied by fact is the "officious bystander test" of MacKinnon LJ in ***Lord Cross said it was what was necessary.***
something so obvious that it goes without saying; so that if while the parties were making their bargain, an officious bystander were to suggest some express provision they would testily suppress him with a common "Oh of course!"
5.7.3. There are two situations where the test cannot apply:

- If one party is unaware of the term (***Spring v Amalgamated Stevedores and Dockers Society (1956):***
- If it is uncertain if both parties would have agreed to the term (Shell (UK) Ltd v Lostock Garages Ltd (1977)).

5.7.4. In ***Liverpool City Council v Irwin (1976),*** Lord Denning said that the appropriate test was merely what was reasonable as between the parties. Lord Cross said it was what was necessary.

- The Court of Appeal has recently been prepared to accept the use of the "*Wednesbury reasonableness test"* in implying terms.***(Paragon Finance Plc v Nash (2001)).*** **See also the House of Lords approach in** *Equitable Life Assurance Society v HymAN (2000)).*
- It has also been decided the Court in implying terms should "recognise that… the existence the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations" (***Crossley v Faithful &Gould Holding Ltd 2004)).***

5.8.0. Terms implied by Common Law

5.8.1. Judges will on occasions will imply a term to regulate a particular type of agreement irrespective of the wishes of the parties.

5.8.2. They will do so because of the absence of statutory control of the area ***(Liverpool City Council v Irwin(1976)).***

5.9.0. Terms implied by Statute

5.9.1. Terms are implied by statute where government chooses to regulate certain types of agreements to protect weaker parties.

5.9.2. Terms are implied to redress inequality of bargaining strength.

5.9.3. Such terms are enforceable whatever the wishes of the parties.

5.9.4. Examples are employment and consumer contracts.

5.9.5. In the ***Sale of Goods Act 1979*** consumers are protected by the insertion of the following implied terms:

- By s 12 the implied condition as to title---that the seller has the right to sell the goods (***Rowland v Divall (1923))***
- By s 13 the implied condition that the goods correspond to any description given to them (***Beal vTaylor (1967)*** and *Moore v Landauer (1921))*
- By s 14(2)*the implied condition that the goods are of satisfactory quality*---which means that they should be fit for their normal purposes, free from blemishes and defects and durable (Rogers v Parish (Scarborough) Ltd (1987). Contrast this with the word "merchantable" under the previous law (***Kendall v Lillico (1969)).***
- By s 14 (3) the implied condition that the goods are fit for any purpose stated by the buyer---who is thus relying on the skill and judgement of the seller (***Priest v last (1903)*** and ***Grant v Australian Knitting Mills (1936));***
- By s 15 the implied condition that in goods sold by sample the bulk corresponds with the sample (***Godley v Perry (1960)).***

9.10.0. **The relative Significance of terms**

9.10 1. Inevitably certain terms are more significant to the contract than others; some are fundamental to the purpose of the contract while others are merely ancillary to the main purpose.

9.10.2. The Courts have traditionally distinguished them in two way:

- Their significance to satisfactory to the satisfactory completion of the contract;
- The available remedy or remedies if the term is breached.

9.10.3. On this basis the Courts have identified two types of terms:

a). **Conditions**---terms that “go to the root of the contract,” and are so fundamental that breach would render the contract meaningless. So remedies are for damages and/ or repudiation if appropriate(***Poussard v Spiers and Pond (1876)).***

b). **Warranties---**minor or ancillary terms and breach would not destroy the purpose of the contract itself, so the available remedy is an action in damages **only (*Bettini v Gye(1876)* .**

9.10.4. Statutory implied terms are identified either as conditions or warranties in the statute itself (e.g. implied conditions in ss12, 13,14(2), 14(3) and 15 of the ***Sale of Goods Act.*** This position (except s 12) is modified by s15A ***Sale and Supply of Goods Act 1994*** where, in a non-consumer contract, a breach which is slight in impact may be treated as breach of warranty.

9.10.5. Judges have rejected this strict categorisation in developing the concept of he “innominate term”, which aims for the remedy to be fair to both parties.

a). In ***Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (962),*** Lord Diplock identified that “some breaches will and others will not, give rise to an event which will deprive the party not in default of substantially the benefit he was intended to obtain from his contract” and the remedy given would “depend on the nature of the event to which the breach gives rise.”

b). So the Court should wait and see what the consequences of the breach are in deciding a remedy. (***Cehave N.V. v Bremer Handelsgesellschaft mbH (The Hansa-Nord (1976).***

c)Calling terms innominate is effective if the breach is purely technical (***Reardon Smith Line v Hansen- Tangen (1976))***

9.10 5. Court have, however, been prepared to ignore the process and classify terms as conditions, whatever the consequences of the breach, because the circumstances of the breach demand it (***Bunge Corporation v Tradax Export Corporation Panama (1980).***

9.11.0. **How Judges construe terms**

9.11.1. If a contract states that a term is a condition or warranty, then it is generally as simple as following that classification.

9.11.2. If the contract is silent, Judges will need to construe which classification is appropriate, which they do as follows:

a). In the case of a statutory implied term Judges follow the standard set by the law;

b). In the case of an express term where the parties have already classified he term, Judges will generally give effect to the expressed intention of the parties

c). In the case of express terms which are silent on their classification Judges will try to give effect to what they believe is the intention of the parties.

9.11.3. However, express classification may be inaccurate since a party can gain advantage by calling every term a condition. In this case Judges will construe a term according to how it really operates (***Schuler v Wickman Machine Tool Sales Ltd (1973))***

9.11.4. In deciding a classification Judges may use the commercial context as a guide (***Meredelanto CampaniaNaviera SA v Berghau-Handel GmbH (The Mihalis Angelos)(1970)***

9.11.5. What the parties intended must be established objectively from the “text under consideration and the relevant contextual scene” (***International Insurance Company Co (Publ) v FAI General Insurance Ltd* (2005).** This form of objective testing was used in ***Egan v Static Control Components (Europe) Ltd)2004).***

9.11.6. A Court will generally try to preserve certainty in commercial agreements whatever the expressed intentions of the parties (***Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Arts Ltd (1990).***

5.3.0 Implied Terms and Presumed Intentions

In order to discover the unexpressed intention of the parties, the courts may take notice of trade customs, the conduct of the parties, or the need to give "business efficacy" to a contract**.**

The Moorcock (1889). C.A. : there was a contract between the defendants, who owned a Thames-side wharf and jetty, and the plaintiff, by which it was provided that the plaintiff's vessel Moorcock should be unloaded and re-loaded at the defendants wharf. The Moorcock was, accordingly, moored alongside the wharf, but, as the tide fell, she took to the ground and sustained damage on the account of the unevenness of the river bed at that place. The plaintiff brought this action for damages for breach of contract.

HELD: there was an implied term in the contract that the defendants would take reasonable care to see that the berth was safe; that both parties must have known at the time of the agreement that if the ground was not safe the ship would be endangered when the tide ebbed; that there was a breach of the implied term.

5.3.1. Terms Implied on the Grounds of Statute

Certain statutes provide for the implication of terms in contracts. Students should take note that in these circumstances terms may be implied irrespective of the intentions of the parties, unless the statutory provision has been clearly excluded. By virtue of *ss. 12-15 o*f the ***Sale of Goods Act, 1893***, in contracts of sale of goods, there are implied terms which, in effect, reverse the common law rule of **Caveat Emptor** (let the buyer beware). Where the Act applies, it would be More accurate to say "let the seller beware." Section 55 provides, however, that the implied terms can be excluded if the parties so intend.

5.3.2. CONSTRUCTION OF A CONTRACT

The court will construe a contract as follows:

- Words are presumed to have their ordinary literal meaning; but legal technical terms are presumed to have their technical meaning.
- Where a contract is ambiguous, so that it may have either a legal or an illegal meaning, the legal meaning will be preferred
- Where the meaning of the word is not clear, or where two terms conflict, the intention of the parties will prevail. Thus an oral term may prevail over a contradictory written term:

Couchman v. Hill (1947).

- The contract will be construed most strongly against the party who drew it up. This is known as the contra proferentem rule, and is most important in connection with exemption clauses.

5.3.3. Conditions and warranties

A term of contract (whether express or implied) may be a condition of the contract or a mere warranty. Although whether it is one or the other may depend on how it is called by the parties in their agreement, often, that is not enough. This is because generally a condition is such an important term of contract that its breach by one party deprives the other of a substantial benefit of the contract so that he is entitled, if he so wishes, to regard himself as discharged from further performance of the contract. On the other hand, a warranty is a 'minor' term so that its breach does not entitle the innocent party to consider himself discharged from further performance of the

contract. For example, in a contract for the sale of a new car that the vehicle should be capable of self-propulsion will be a condition of the contract. As a result if the car cannot move, the buyer will be entitled to return the car and claim his money back, if the seller does not have a replacement car. However if the car has a minor scratch in the rear seat, that will be a breach of warranty for which the buyer may only recover damages from the seller, if he so wishes.

5.3.4. THE CONTENTS OF THE CONTRACT: EXEMPTION CLAUSES

An exemption clause is a contractual stipulation purporting to limit or exclude the liability of one of the parties in a contract or in tort. Where a standard form contract is used, it is not unusual for the party who drew it up to take advantage of his dominant position by including an exemption clause. Where a case turns on whether an exemption clause is binding, the ordinary rules are followed; e.g. the existence of the clause must be communicated to the other party, the circumstances must show an intention to be bound; the clause will be construed most strongly against the party seeking to take advantage of it. (The courts tend to lean against exemption clauses, following the *contra proferentem* rule)- this means the contract will be construed most strongly against the party who drew it.

5.4.0. Definition and scope of Exclusion clauses

5.4.1. An exclusion clause (exemption clause) is a term in a contract aiming to exclude the liability of the party inserting it from liability for his/.her contractual breaches, or even for torts.
5.4.2. A limitation clause restricts or limits the extent of the liability.
.bargaining strength.
5.4.4. There was previously no way of avoiding such clauses because of the maxim *Caveat Emptor (**let the buyer beware**)*---the other party had to try to negotiate a contract without the clause. Even the *Sale of Goods Act 1893* allowed for such clauses.
5.4.5. The late twentieth century saw moves towards consumer protection, with the Courts, statute and the European Union law developing methods to restrict the application of such clauses.
5.4.6. There are three elements to judicial recognition of exclusion clauses:

- The clause must be actually incorporated into the contract to show that it is part of the contract and to be relied upon;

- Other tests may be applied if appropriate.

5.5.0. **Incorporation of exclusion clauses**

5.5.1. Rules on incorporation are interchangeable with those for incorporation of terms generally**.**
5.5.2. Parties are generally bound by the terms of any agreement they have signed ***(L'Estrange v Graucob (1934).***
5.5.3. Parties are only bound by an exclusion clause of which they had express knowledge at the time the contract was formed (***Olley v Marlborough Court Hotel (1949)).***

- Parties who have previously contracted on the same terms are deemed to have express knowledge of the clause and so are bound by it (***Spurling v Bradsaw (1956)).***
- However, if past dealings were inconsistent, only actual knowledge of the clause is sufficient; it cannot be implied from the past dealings (***McCutcheon v MacBrayne (1964)).***
- The other party seeking to rely on the clause must have effectively brought it to the attention of the other party (***Parker v South Eastern Railway Co (1877)).***

- Handing over a ticket with reference to the clause on the back is insufficient notice (***Chappleton v Barry UDC (1952)).***
- Unspecific references to the document containing a clause may also be insufficient to incorporate the clause (***Dillon v Baltic Shipping Co Ltd (The Mikhail Lermontov (1991)).***
- The duty to give notice can be strictly interpreted. Particularly where the party subject to the clause has little opportunity to negotiate (***Thornton v Shoe Lane Parking (1971)).***
- Strict interpretation has also been applied to clauses that are merely onerous rather than excluding liability (***Intrfoto Picture Library v Stiletto Visual Programmes Ltd (1988)).***

5.5.4. **Construction of the contract**

5.**5.5**. A successfully incorporated clause can still fail on construction of the contract as a whole.

5.5.5. The ***Contra proferentem rule*** may apply (i.e. the phrasing of the clause is ambiguous (***Andrews Bros (Bournemouth) Ltd v Singer & Co (1934)).***

- Ambiguous expression in the clause works against the party including it in the contract (***Hollier v Rambler Motors (1972)).***
- The rule is not limited only to construction of exclusion clauses (***Vaswani v Italian Motor Cars Ltd (1996)).***
- Courts traditionally accepted clauses exempting liability for negligence if this was expressly indicated in the agreement (***Canada Steamship Lines Ltd v R (1952)).***
- Recently a less rigid approach has been taken, based on what the intention of the parties was at the time of contracting (***HIH Casualty and General Insurance v Chase Manhattan Bank 3003)).***

5,5.6. Clauses in standard form contracts may be strictly construed to invalidate them when the breach is serious (***Computer and System Engineering v John Lelliot Ltd (1991)).***

5.5 7. Originally, by the doctrine of "fundamental breach", an exclusion clause might be inoperable because breach of a fundamental term was said to be breach of the whole contract (***Karsales (Harrow) v Wallis (1956)).***

5.5.8. However this was destructive to freedom of contract, so it was not always applied (***Suisse Atlantique Societe d'Aramament Maritime SA v NV Rotterdamsche Kalen Centrale (The Suisse Atlantique case(1967)).***

5.5.9. Courts accepted that an exclusion clause or a limitation clause could be enforced if it was freely and genuinely agreed when the contract was formed **(*Photo Productions Ltd v Securicor Transport Ltd (1980)).***

5.5.10. Now, if bargaining strength is equal, even if a dramatic breach, if the clause is clear and unambiguous then it can be relied upon (***Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd (1983)).***

5.5.11. Nevertheless the Court of Appeal has recently identified that, where one clause accepting liability and one limiting or excluding liability for specific types of damage are mutually contradictory, even though one clause appears to cover the type of loss suffered, the clause may fail for ambiguity (***The University of Keele v Price Waterhouse (2004)).***

5.5.12. Since the ***Unfair Contract Terms Act 1977*** Courts might apply the test of "reasonableness" from the Act (***George Mitchell Ltd v Finney Lock Seeds Ltd (1983)).***

5.5.13. Courts are in any case reluctant to intervene where in standard forms is challenged but is based on well-known, long-standing trade practice (***Overland Shoes Ltd v Schenkers Ltd (1998)).***

5.6.0. Other limitations on the use of Exclusion Clauses

5.6.1**.** Oral misrepresentation about the scope of an exclusion clause in a written contract may invalidate the clause as it is the misrepresentation that is relied upon.

5.6.2. Terms (and exclusion clauses) can be overridden by oral promises made before the contract was formed (***J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd (1976).***

5.6.3. As can collateral undertakings (Webster v Higgin (1948)).

5.6.4. Generally, contracts only bind parties involved so that an exclusion clause will not protect a third party from liability (***Scruttons Ltd v Midland Silicones*** **Ltd (1962)).**

5.6.5. However, some inroads into this principle have allowed third parties to bring themselves within the scope of the exclusion (***New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd (The Eurymedon)(1975).***

5.7.0. ***Chapelton vs Barry U.D.C.*** **(1940) C.A:** The council hired out chairs and by the stack of chairs was a notice containing the terms of hire. C hired two chairs, paid his money and received two tickets which he put in his pocket. When C sat on one of the chairs, it broke and caused him injury. The chair was not fit for use. C sued the council for negligence and was met with the defence that the words printed on the back of his ticket included "The Council will not be liable for any accident or damage arising from hire of chairs".

> HELD: the terms of the contract of hire were contained in the notice by the stack of chairs. The ticket issued was a mere receipt; therefore, the writing on the back of it could not be included in the contract. The council could not rely on the exemption clause.

5.7.1 The courts will lean against exemption clauses and will not enforce them unless they are clearly intended to be binding terms.

6.1.0. **THIRD PARTY RIGHTS AND PRIVITY OF CONTRACT**

6.1.1. The Basic Rule and Its effects

6.1.2. Lord Haldane defined the basic rule in the modern form in ***DunlopPneumatic Tyre Co. Ltd v Selfridge & Co. Ltd (1915)*** in the following terms: "Only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* in a contract."

6.1.3. There are a number of consequences of the basic rule:

- A person receiving goods as a gift cannot sue personally in respect of defect in the goods.
- Purchasers of goods may sue for the defect but recover nominal damages only, having suffered no loss personally.
- Remedies such as specific performance may be unavailable
- The rule may mean that performance cannot be enforced even though it has been paid for (***Price v Easton (1833)).***
- The rule may have the effect of denying the express wishes of benefactors (***Tweddle v Atkinson (1861)).***
- A person could dishonour a commercial agreement he/she has made in which another party has legitimate expectation (***Dunlop Pneumatic Tyre Co v Selfridge & Co (1915)).***

6.2.0. PROBLEMS WITH THE PRIVITY RULE

6.2.1. The doctrine of privity is probably the most contentious of all rules of contract law.

6.2.2. The basic rule is that a person who is not a party to a contract can neither sue on it nor be sued under it

6.2.3. Many justifications have been made for the rule, but none is satisfactory:

- It is linked to the doctrine of consideration, so that a person can neither sue on nor be sued under a contract for which he/she has not provided consideration.
- It is said to be unfair to impose obligations on a person who has not expressly entered a contractual agreement
- It is argued that it would be unfair to sue on a contract under which he/she could not be sued.
- It is not possible to sue in contract law for purely gratuitous promise, which an agreement lacking privity on the part of one party could clearly be

6.2.4. The rule operates unfairly in certain circumstances:

- If a party is identified as gaining rights under a contract it is unfair not to allow that party to sue to enforce them.
- If third party rights in an agreement are not enforceable then a primary purpose of ther contract is being defeated.
- If a third party suffers loss under a breach of an agreement between two other parties he/she may get the innocent party to sue, but that party has suffered no loss and so can only recover nominal damages, not an amount covering the breach.

6.2.5. So the rule has been heavily criticised, with two consequences:

- The Courts have been prepared to accept a number of different exceptions to the basic rule;
- Parliament has legislated for the protection of third party rights in certain circumstances

6.2.6. EXCEPTIONS TO THE STRICT RULE

6.2.7. Statutory exceptions:

b). Examples of statutory exemptions include:

- Section 148 (7) ***Road Traffic Act 1988*** which requires drivers to have third party insurance. This can then be relied upon by other road users to whom they cause loss or injury, despite lack of privity.
- Section 11 ***Married Women Property Act 1882*** allowed a wife to claim on her husband's own life insurance policy.
- Section 33 of the Companies Act 2006, the "statutory contract" allows shareholders to sue their companies on rights gained as a shareholder

c). However, using statute other than for its true purpose to avoid the privity rule has failed (***Beswick v Beswick (1968)).***

6.2.8.The law of trusts.

a). Third parties have sued successfully (but in trust law, not in contract law) by showing that the contract creates a trust of property in their favour (***Gregory &Parker v Williams (1817)).***

b). Equity only intervenes if there is an express intention that the party claiming should receive the benefit (***Les Affreteurs Reunis SA v Walford (1919)(Walford case).***

c). Courts will only accept that a trust is created if the interest follows general trust rules (Green v Russell (1959)).

6.2.9. Restrictive covenants.

a). This is another equitable device whereby a person retains control to limit the use of land he/she has sold, even against subsequent purchasers of the land.

b). The restriction "runs with the land" and binds each subsequent purchaser, even though they were not parties to the original agreement (***Tulk v Moxhay (1848)).***

c). The device normally only operates in respect of land, so it could not apply to a price-fixing agreement with tobacconists (***Taddy v Sterious (1904)***) but see ***Lord Strathcona Steamship Co v Dominion Coal Co Ltd (1926).***

6.2.10. The rule in ***Dunlop v Lambert***

a). The rule stated that a remedy should be available despite the lack of privity where "no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it.

b). It has limited application, but was recently approved in an action by the assignee of the party in a contractwho was a fiduciary of the third party (***Darlington BC v Wiltshire Northern Ltd (1995)).*** But see the more recent restrictive approach in ***Alfred McAlpine Construction v Panatown Ltd (1998)).***

6.2.11. **Privity of estate in leases**

a). Covenants in leases are also enforceable between the original parties because they are also parties to the contract.

b). Therefore, the landlord can enforce such covenants against a party to whom the original tenant assigns the lease.

c). By ss141 and 142, ***Law of Property Act*** 1925 a new tenant can enforce covenants against the landlord, and a new landlord can enforce covenants against existing tenants.

d). A landlord cannot enforce covenants against a sub-tenant

6.2.12. **Procedural rules**

a). Courts have accepted a rule of procedure in avoiding privity

b). However, they have only accepted it where to do so actually corresponds rto the promise and because all of the parties are represented in the action (***Snelling v John Snelling (1973)).***

6.2.13. **Actions on behalf of a third party**

a). The so-called "holiday cases" allowed a contractor's family also to be represented in an award of damages despite their lack of privity (Jackson v Horizon Holidays Ltd (1975)).

b). However, the principle seems to be limited to holiday contracts (Wooder Investment Development Ltd v Wimpey Construction (UK) Ltd (1980)).

6.2.14. **Rights of third parties to rely on exclusion clauses**

a). Traditionally, a third party (e.g. a sub-contractor) could not rely on an exclusion clause even if the contract said that it could (***Scruttons Ltd v Midland Silicones Ltd (1962*****)).**

b). However, a different result was achieved where a third party was construed as having provided consideration even though not a party to the agreement **(*New Zealand ShippingCo. Ltd v A.M. Satterthwaite Co Ltd (The Eurymedon)(1975).***

6.2.14. **Collateral contracts**

a) Where a third party makes a collateral warranty on which formation of the contract depends then a party to the contract may sue on the promise, even though it was not made by a party to the contract (***Shanklin Pier Ltd v Detel Products Ltd (1951)).***

b). The logic of the principle is based on the benefit being gained by the party making the collateral promise.

6.2.15. **Agency, assignment and Negotiable instruments.**

a). These are the major and the most common exceptions.

b). An agent represents a principal and so can bind the principal to contracts made with the third party and vice versa, and can sue and be sued for breaches of the agency agreement.

c). Assignment is a specific system of transferring rights in certain property---the assignee then owns the property and can sue or be sued by a party who had a contractual link to the property despite the apparent lack of privity.
d). Negotiable instruments were a device of merchant trading first given statutory effect in the Bills of Exchange Act 1882---the most common from today is the cheque. It can be transferred from party to party by endorsement, etc and the new party gains all the rights in the property of the former owner and can sue or be sued on the instrument.

6.3.0. **STATUTORY INTERVENTION AND THE REFORM OF THE RULE**
6.3.1. General dissatisfaction with the rule is shown by Judges' willingness to accept so many different exceptions to it.
6.3.2. Since it makes it impossible to exercise third party rights that are absolutely legitimate and intended by the contract.
6.3.3. Reform was demanded by Judges and official reform bodies.
6.3.4. **Law Commission Paper No.121** concluded that there should be a "third party rule" in privity, but with certain reservations:

- It should not merely extend the exceptions to the rule;
- It should not merely prevent the doctrine from interfering with any third party rights since this would be too vague;
- It should make rights clearly intended in the contract itself to confer a benefit on the third party enforceable.

6.3.5. **Law Commission Report N0.242** included a draft Bill, now enacted as ***Contracts (Rights of Third Parties) Act, 1999.***
6.3.6. By s 1(1) "a person who is not party to a contract (a third party) may in his own right enforce a contract if:
a). the contract expressly provides that he may, or
b). subject to subsection (2) the contract purports to confer a benefit to a third party. This can be inferred from the facts (***Laemthong International Lines Co Ltd v Artis and Others (Laemthong Glory) (N0. 2) (2003).***
6.3.7. Section 1(2) states that s 1(1)(b) is unavailable if, "on the proper construction of the contract it appears that the parties did not intend the contract to be enforceable by the third party."
6.3.8. By s 1(3), the Act applies if the third party is identified in the contract by name or as a member of a class. The third party need not exist at the time the contract was formed. See ***Nisshing Shipping Co v Cleaves & Co Ltd (2003)*** where the Court recognised that s 1(2) places the burden on the party claiming that s 1(1)(b) does not apply to prove it.

Section 1(3) cannot apply where there is no express mention of at least a class of persons from whom the claimant is recognisable (***Avraamides and Another v Colwill and Another (2006)).***
6.3.9. **Important exceptions where the Act will not apply include:**

- Bills of exchange, promisory notes and negotiable instruments;
- The statutory contract under s33 ***Companies Act, 2006;***
- Contracts of employment;
- Agency contracts.

6.3.10. The Act will have a number of effects:

- Many third partys' rights gained under a contract will be enforceable

- Many exceptions to the doctrine become unnecessary (e.g. claimants in ***Beswick v Beswick, Tweddle v Atkinson, Jackosn v Horizon Hollidays*** etc would all have a valid claim under the Act because contracts in each case were creating an express right in their favour.
- Third parties will also find it much easier to rely on the protection of exclusion clauses that include them.
- Not all of the exceptions could fall within the Act (e.g. collateral contracts).
- Parties may simply exclude the Act and would still be caught by the doctrine.
- The exact scope of s 1(1)(b) will only be established in subsequent case law.