CONTRACT LAW

A contract is an agreement enforceable at law between two or more parties. Such an agreement gives rise to obligations enforced or recognised by law and only exists when legally capable persons have reached agreement. The law of contract is substantially judge-made, meaning that it has been developed over many years from the rulings of judges in different cases. Although contracts are essential to business transactions and it is commercial agreements which account for the majority of cases in case law, the same law applies equally to simple contracts, such as when a person purchases a newspaper in a newsagents. In other words, the value of the contract is irrelevant. The obligations in law of the shopkeeper are exactly the same as the obligations of parties to contracts between large corporations worth considerable sums.

The primary characteristic of a binding contract is one of bargain. This is where one party gives or promises to give something in return for something given or promised by another, and all parties expect that such promises will be enforced by the courts. In general therefore, a contract is usually the result of a negotiated bargain.

Agreement may be reached in a number of ways, so that a contract can be formed spontaneously, i.e. where the parties meet face to face, by telephone or other 'instant' electronic means, such as email, or it may be in written form if that is what the parties have agreed. It may also be formed by inference, where one party makes an offer and the other party carries out some act to indicate acceptance. A legally binding contract does not have to be in writing to exist. The person purchasing the newspaper enters into a spontaneous contract with the shopkeeper. However, it is common for more formal business agreements to be in writing, even though by law they do not have to be so.

There are some exceptions to this rule. Certain contracts can only be enforced if they have been reduced into written form, or in some cases, evidenced in writing, even if the agreement was first reached 'spontaneously'. Some examples are; hire purchase agreements, contracts for the sale of land, guarantees given in relation to a debt and other such contracts in certain circumstances. Specific statutory provisions have established such cases, and many have resulted from recent consumer protection measures. The purpose is to provide protection for weaker parties against those in a stronger economic position. Contracts involving consumers specifically are covered under the Sale of Goods Act (1893) and the Sale of Goods and Supply of Services Act (1980), in addition to the Consumer Credit Act (1995) and are covered in a later module.

Essential Elements of a Contract

In order for a contract to be valid, and therefore binding on the parties, there are certain essential elements. These are defined as (a) offer, (b) acceptance, (c)

consideration, and (d) intention. Offer and acceptance are so closely linked that they are frequently treated as one single element instead of two, as you cannot have agreement without both of these elements.

Since a contract is an agreement, it follows that, in order for such agreement to be reached, there must be an offer made by one party which is unequivocally accepted by another party or parties. An offer is therefore only equal to one half of the agreement.

1. OFFER:

An offer may be defined as a clear and unambiguous statement of the terms upon which the offeror (the person making the offer) is willing to contract, should the person or persons to whom the offer is addressed decide to accept. The terms of the offer must be clear, certain and complete. The offer must be communicated to the other party. The offer may be made by written or spoken words, or inferred by the conduct of the parties. Furthermore, the offer must be intended as such before a contract can arise.

It is important to distinguish an offer from a statement made without intending that a contract result if the person to whom it is made indicates his assent to those terms. Such statements are often called an "**invitation to treat**" (an offer to receive offers). In such a case the courts often view the response itself to be an offer, which can in turn be accepted or rejected.

Display of goods:

Minister for Industry and Commerce v Pim (1966): A coat was displayed in a shop window with a notice declaring the cash price and indicating that credit terms were available.
Held – to display goods with a price tag is not to offer them for sale. This display constitutes an invitation to treat, an action tantamount to inviting offers from members of the public.

Pharmaceutical Society v Boots Cash Chemists (1953): The English Court of Appeal held that when a shopper takes goods from a shelf, he does not accept an offer made by the shopkeeper when he displays the goods. The acts of taking the goods and approaching the cash register constitute an offer by the prospective purchaser which is accepted by the cashier.

Advertisements:
In most cases an advertisement is considered to be an invitation to treat so if an advertisement for goods appears in the newspaper, a person writing to order those goods cannot sue in contract if the vendor replies that he is out of stock and cannot meet the order.

An advertisement will, however, be considered to be an offer if the court is convinced that it is seriously intended to be binding should persons come forward prepared to act on it. Such contracts are known as **unilateral contracts**:

Carlill v Carbolic Smoke Ball (1893)

The defendants manufactured a proprietary medicine, which was advertised to be so efficient that should anyone catch influenza after purchasing and using it, they would be entitled to £100. As a mark of the manufacturers' sincerity, the advertisement continued, £1,000 was deposited with a bank to meet any claims. Mrs. Carlill read the advertisement, used the medicine but caught influenza nevertheless.

Held – The advertisement was a valid offer which had been accepted, and Mrs. Carlill was entitled to the £100 agreed.

Principles of the *Carlill* Case:

- An advertisement will be considered to be an offer if the court is convinced that it is seriously intended to be binding should persons come forward prepared to act on it.
- Such contracts are known as ***unilateral*** contracts and are usually considered to have been made to the world at large. In normal cases where a contract exists both parties are bound and the contract is known as a ***bilateral*** contract.
- A unilateral contract may bind the party issuing the advertisement without creating any concurrent obligation upon any other person.
- This advertisement included offer and acceptance – the offer was made by the defendant and acceptance was inferred by the conduct of the plaintiff.
- It also included intention, evidenced by depositing a sum of money in a bank account, clearly indicating their intention to be legally bound.
- And finally, it included consideration. In this case, the promise of the defendant to pay a sum of money and in return, consideration was inferred by the plaintiff when she carried out the act stipulated by the defendant.

Irish Case: ***Tansey v The College of Occupational Therapists (1986)***

In this case, the plaintiff unsuccessfully tried to build a contract between herself and the defendant by utilizing the ***Carlill*** case. Ms. Tansey had enrolled at a college in the hope that she would successfully complete a course of study which would result in a Diploma awarded by the defendant. Upon enrolment she was given a handbook which stated that students had a right to sit two repeat examinations if unsuccessful. However, the repeat rule had already been revised to allow for only one repeat and the handbook, which was simply a guide to the course, had not been updated. In this case, the plaintiff failed in her attempt to show that the handbook contained the terms of the contract, including the offer which she accepted. The courts rejected this submission, holding that ***Carlill*** did not assist the plaintiff because she was not aware of any offer made by the defendant when she enrolled in the college in respect of multiple rights to re-sit examinations. In other words, she had already entered into the contract before she was given the handbook.

2. ACCEPTANCE:

Acceptance may be defined as a final and unequivocal expression of agreement to the terms of an offer. In legal terms, the parties must be '***ad idem***', meaning that they

must agree on the essential point. Acceptance may be oral, written or implied from conduct. It must be clear, and unqualified and must ***exactly*** match the offer.

Acceptance may take place by performing a stipulated or requested action if the offer is a unilateral contract ***(Carlill v Carbolic Smoke Ball***)
Also see ***Billings v Arnott*** for a similar ruling.

If the response by the offeree is not a clear and unconditional acceptance of the offer, the response itself may be described as a **counter-offer**, which in turn may be accepted or ignored by the person to whom it is addressed:

Swan v Miller (1921)

The defendants offered to sell their interest in a lease for £4,750. The plaintiffs replied that they would pay £4,450.
Held – The response to the defendants offer was a counter-offer and as such was not itself capable of producing a binding contract.

If an offer is met with a counter-offer then this response has the same effect as a rejection of the first offer. If the counter-offer is in turn refused, the initial offer cannot now be accepted. When a counter-offer is accepted, it then becomes a valid offer and the original offer is negated. The person who made the count-offer is now the offeror, and the person accepting is the offeree.

Communication of acceptance:

Once it is established that the offeree intends to accept the offer, he generally has to go further and communicate his acceptance to the offeror. The offeror may dispense with or waive the need for communication. This is impliedly the case when the offer is an offer to enter into a unilateral contract e.g. Mrs. Carlill did not have to inform the Carbolic Smoke Co. that she intended to purchase and use their medicine. For acceptance to be effective, the general rule is that the offeror is bound when he *learns* from the offeree of his acceptance. At that moment a contract springs into existence.

'Postal Rule':

The general rule, which determines that a contract comes into existence when the offeror learns of acceptance, does not apply where the parties intend that acceptance is to be communicated by post, neither party stipulating that acceptance is only to be valid when the offeror receives notification thereof. The so-called 'postal rule' indicates that a contract is concluded when the offeree posts the letter of acceptance.

The 'postal rule' has been criticised as it can lead to injustices:

Household Fire Insurance v Grant (1879)

Grant issued an offer to take an insurance policy. The plaintiff company posted acceptance. Although the letter never arrived, Grant was held liable to pay the premiums.

TERMINATION OF AN OFFER:

There must be some duration for which an offer or counter-offer stands and is open to acceptance by the offeree leading to a contract. This duration must be at least long enough to give the offeree an opportunity to reply to the offer.

An offer may be incapable of producing a contract for a number of reasons:

(a) Revocation:

An offer can be revoked or withdrawn at any time before it is validity accepted. For revocation to be effective, the offeror need only show that at the time of the purported acceptance the offeree knows the subject matter is no longer available to the offeree.

Case: *Dickinson v Dodds (1876)*

Dodds offered to sell his house to Dickenson for an agreed sum. The offer was to remain open until Friday June 12th 9.00 am. On the Thursday, Dickinson was told that the house may have been sold to a third party. This information was communicated by a person not authorised by Dodds. Dickinson handed a letter of acceptance to Dodds before the deadline.

The Court of Appeal held that because Dickinson had notice of the sale, even if the informant was not the offeror or an authorised agent, the offer then became incapable of acceptance. Dickinson could not obtain either the property or damages.

The essence of this ruling is that Dickinson did not actually accept the offer made, therefore the parties did not reach agreement. The owner was within his rights to sell the property to anyone who accepted his offer.

Rejection of an offer:

A refusal to accept the offer will make it impossible for the offeree, in the absence of a fresh offer, to change his mind and later accept. Also, if a counter-offer is made by the offeree in response to an offer, this has the effect of destroying the first offer ***(Swan v Miller).***

Lapse of time:

If the offeree does not respond quickly to the offer, he may find his tardiness will prevent him from being able to accept the offer. The offeror may expressly stipulate that the offer is for immediate acceptance. Otherwise, acceptance must take place within a reasonable time. Even though the offeree, Dodds, in the above case did not delay unduly, the offer still remained open during the time he took to consider whether or not he would accept.

3. CONSIDERATION:

A person cannot sue on a simple contract unless they can show that they gave, or promised to give, some advantage to the party they wish to sue, in exchange for what that party promised in return i.e. the price or money. The doctrine of consideration is based on the principle of bargain, which is fundamental to a contract. At first sight, there is no reason why the Irish courts should refuse to enforce a promise. However, in reality, this would make all promises enforceable, and no legal system would be able to enforce a promise simply upon proof that it was made.

English law developed on the principle of '***quid pro quo'***, which literally means a promise for a promise. A promise is only enforceable in law if the promisee provided something in exchange. This is recognized in law as mutuality of obligation and simply means that each party to a contract is under a legal duty to the other; each has made a promise and each is an obliger.

In simple terms, mutuality means that consideration must be real and it must be sufficient. A good example of consideration can be found in the Carlill case, where the plaintiff had to carry out an act stipulated in the advertisement issued by the defendant, i.e. to purchase a product and to take it as prescribed in the advertisement. In return, the defendant promised to pay a sum of money if the product did not do as promised. It is important to understand that consideration does not always mean money, although this is the most common form of consideration in the case of buyers.

The courts will recognize consideration once it is real and/or sufficient. Money is real, i.e. has a real value, therefore it will be considered sufficient, no matter how small the sum. For example, if I promise to give my friend my car on her next birthday, this promise would not be enforced by the courts as it represents a gift as my friend has not promised anything in return. If however I offer to give her my car for €10 and she accepts, then we have reached agreement and there is consideration, and that consideration is sufficient, even though it may not be adequate.

Adequacy of Consideration:

If the terms of the bargain are unduly favourable to one of the parties in the sense that the price paid by him is disproportionate to that which he obtains in return, the consideration may be said to be **inadequate**. However, the courts will not investigate the adequacy of consideration – if the bargain is an honest one it will be enforced, even if one party gets more from the bargain than the other. Thus, in the example above, the consideration of €10 for my car, which incidentally is worth several thousands, may not be adequate, but the courts are not concerned about the adequacy of consideration. They will not act as negotiators – that is up to the parties themselves. They will only enforce the contract if the consideration is sufficient.

The attitude of the courts in earlier times was summed up in ***Grogan v Cooke (1812)*** as follows:

"If there be a fair and bona fide consideration, the court will not enter minutely into it, and see that it is full and ample."

However, in more recent times the courts have investigated contracts where there is an obvious imbalance between the parties. This is particularly the case where one party is known to be in a much stronger economic position, and also where one party is a consumer. Although there are rulings in such cases that are binding, most of the new rules concerning adequacy of consideration have been established under statutory legislation, and in particular, under consumer law. In contract law, the majority of cases determine only the sufficiency of consideration. Exceptions arise only in certain circumstances, such as when one party is mentally incapable of looking after business affairs or is unable to fully understand the transaction. In such cases, the law provides some protection for the weaker party.

What exactly is sufficient consideration is sometimes unclear, however, the following case is a good example from case law where the courts ruled that the consideration was not sufficient:

O' Neill v Murphy (1935)

A builder executed work for the parish next to the one in which he resided; it was argued that the builder had agreed to do the work in consideration of prayers being said for his intentions.
Held (Northern Ireland Court of Appeal) – there was no consideration in law for the builder's work.

Thus, prayers are not deemed to be real and valuable consideration in the eyes of the law.

4. INTENTION TO CREATE LEGAL RELATIONS:

Negotiations which meet the requirements of offer, acceptance and consideration may still fail to be enforceable at common law as a contract, where no intention to be bound can be attributed to the parties. The test of intention is objective (reasonable person test). The courts seek to give effect to the intentions of the parties, whether expressed or presumed.

In business and commercial matters, an intention to be legally bound is readily implied. If a party to a business agreement wishes to assert that legal relations were not intended when the agreement was entered, the onus is on him to show that no legal relations were intended and the onus is a heavy one.

In social and family relations, the opposite presumption is made. Thus, a distinction must be made between agreements of a commercial kind and agreements of a domestic kind. The leading case in English law is ***Balfour v Balfour (1919)***, where the court ruled that an agreement between husband and wife was merely a domestic

agreement and was not intended to be legally binding. However, in ***Courtney v Courtney (1923)***, the court ruled that husband and wife may enter into a legally binding contract if they have been living apart. This allowed for separation agreements to be recognized and enforced and was the forerunner to divorce agreements.

Subject to Contract:

Where some agreements are concerned one or both of the parties may use the term 'subject to contract'. For example, where two or more parties conclude negotiations for the sale of land or property, either or both of them may wish to protect themselves by stipulating that in certain instances, the agreement will not be binding. The owner in such cases may want to reserve for himself the right to accept a better offer. On the other hand, the purchaser may need to be sure that he will have the purchase price agreed, for example, securing a mortgage, and may therefore permit himself to withdraw from the agreement without being held liable for breach of contract.

TERMS OF A CONTRACT:

The terms of a contract are its contents and these determine the extent to which the parties are in agreement. Accordingly, the terms of a contract define the rights and obligations arising from the contract.

Contractual terms may be expressed or implied:

(a) Express Terms – are express statements made by the parties and by which they intended to be bound.
(b) Implied Terms – are those implied by the law through:
Common Law; Statute; Constitution; Custom.

Express terms:

Not every express statement made will form part of the contract. A distinction must be drawn between representations that do not have contractual effect from those that do:

1. Statements made, but which the parties did not intend to be binding terms. These statements are known as "**mere representations**".
2. Statements by which the parties intended to be bound and have contractual effect are described as "**warranties**" or "**conditions**".

Condition – is a vital term of a contract, breach of which entitles the injured party to rescind the contract. The injured party may recover damages for losses incurred.

Warranty – is a minor term subsidiary to the main purpose of a contract, breach of which merely entitles the injured party to claim damages.

Parties are bound by the statements by which they intended themselves to be bound. The courts discover intention by the application of an objective test (reasonable person test).

In seeking to discover if the parties intended to be bound, the courts will take into account any factor which appears to be relevant. An important factor is the time of the making of the statement. If it was made at the time of the contract it is more likely to be a term of the contract than if it was made early in the negotiations:

Routledge v McKay (1954)

B bought a motorcycle from S by private sale. A week before the sale S told B in good faith that it was a 1941-2 model. The written memo of the sale did not mention the year of the model. The motorcycle was a 1930 model and B sued S for breach of contract.
Held – The oral statement as to the year of the model was a mere representation and not a term of the contract as the statement was made a week before the sale and it was not included in the written memo.

McGuinness v Hunter (1853)

The defendant, who owned a horse, told the plaintiff, a prospective purchaser, "the horse is alright and I know nothing wrong about him". The plaintiff purchased the horse which soon afterwards died.
Held – the statement "the horse is alright" amounted to a warranty.

Implied Terms:

There is a general presumption that the parties have expressed, orally or in writing, every material term which they intend should govern their contract. However, there are circumstances where terms will be implied through the operation of law:

Terms implied at Common Law: although the courts have the power to imply terms, they must exercise this power with care. The courts have no role in acting as contract makers.
The test applied by the courts is known as the '**officious bystander**' **test**: if a term is so obvious that it goes without saying that the bargain is subject to this unstated term, then it will be included in the contract. The court must find that both parties had the term in mind when they made the contract.

This officious bystander test has been widened by the '**business efficacy**' test which allows the courts to imply terms to give effectiveness to business transactions, but only if the term to be implied was intended by the parties.

Terms implied under Statute: Certain terms will be implied into the contract under Statute e.g. implied obligations arising under the Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980: obligations requiring the seller of goods to supply goods which are of merchantable quality and which are fit for the purpose for which they are intended.

Terms implied under the Constitution: e.g. Article 40.3 has been held to require that procedures established to reach decisions which affect the rights or liabilities of citizens must be fair. Other principles of natural justice enshrined in the Constitution are audi alteram partem ('hear the other side') and nemo iudex in sua causa ('you cannot be a judge in your own cause').

Terms implied by Custom: customs within a trade or industry can become part of the contract. For a custom to be established, there must be an element of notoriety or general acquiescence to it:

O' Reilly v Irish Press (1937)

Plaintiff alleged that there was a custom in the print industry that chief sub-editors in a newspaper were entitled to 6 months notice.
Held - No such custom was established by the plaintiff.

Exclusion/Exemption Clauses:

An exclusion clause is a contract term which purports to limit or exclude obligations which would otherwise attach to one of the parties of the contract.

The court will not construe an exclusion clause unless it is satisfied beyond doubt that the clause is an integral term of the contract. Difficulties arise when it is clear that the party against whom the clause is inserted has not read the exemption clause.

The courts apply a reasonableness test - the courts have regard to the circumstances which were, or ought reasonably to have been, known to the parties when the contract was made:

Richardson Spence & Co. v Rowntree (1894)

The plaintiff was a passenger on a steamer travelling from Liverpool to Philadelphia. The plaintiff was given a folded ticket, no writing being visible in this form. The ticket, when opened, had a great many conditions, one of which limited liability for personal injury or loss of baggage to $100. The plaintiff never read the ticket. The plaintiff was injured while on the vessel.

Held (House of Lords) – the defendants could not rely on the exemption clause.

Where an exclusion clause is contained in a mass of small print in standard form conditions put forward by one party, the question whether the exclusion clause is binding depends on whether it was brought sufficiently to the attention of the other party.

If the party relying on the clause wants to be sure that the clause will be incorporated into the contract, he should obtain the signature of the other party to a contract document setting out the term. On signature the other party will be bound, even if the document is unread and the terms are set out in miniscule print.

A general rule is that notice of a limiting clause, given after the contract is concluded, cannot bind the other party:

Thornton v Shoe Lane Parking Ltd. (1971)

The plaintiff was using the defendant's multi-storey car park. Entry was through an automatic barrier, the barrier being operated through a ticket machine. While the ticket contained a notice that the ticket was issued subject to conditions displayed on the premises, actual notice of the terms could only be given to members of the public after entry into the car park.

Held – the terms displayed on the premises did not form part of the contract as communication of these terms was after the contract had been formed.

INVALIDITY OF A CONTRACT

MISTAKE:

In general a mistake will not affect the validity of a contract, however, there are exceptions when the mistake is fundamental. Mistakes fall into one of the three following classes:

(a) Common Mistake:

Common mistake occurs where both parties to an agreement are suffering from the same misapprehension. An example of common mistake would be where X agrees to sell certain goods to Y, and at the time of the agreement, the goods have perished unknown to both parties.

(b) Mutual Mistake:

This is where both parties are at cross-purposes. Both of them make a mistake but each of them makes a different mistake e.g. A agrees to sell a horse to B, and A intends to sell his white horse, while B thought he was agreeing to buy A's grey horse.

(c) Unilateral Mistake:

This is where only one party makes a mistake and where the other party is aware of or should be aware of that mistake.

1. The mistake must be a **mistake of fact** and not a **mistake of law**. This means that a mistaken interpretation of a document or of the general law is not

operative. This is simply an application of the rule that ignorance of the law is no excuse.

2. Not all mistakes of fact bring the contract to an end – a mistake must be **fundamental** to the contract objectively speaking before the courts will declare the contract void (never existed) for mistake e.g.

A mistake as to **the existence of the subject matter** (the goods the contract is about) of the contract brings the contract to an end. If at the time of the contract and unknown to the parties, the subject matter of the contract is not in existence, there can be no contract:

Couturier v Hastie (1852)

There was a contract for the sale of a cargo of corn. Unknown to the buyer and seller, the ship's captain had been forced to sell his cargo as it had fermented in the hold.

Held – there was no contract as the subject matter of the contract i.e. the corn, was not in existence at the time of the contract.

In addition to mistake as to the existence of the subject matter, a mistake as to the existence of a person or a relationship essential to the whole transaction will also be considered fundamental enough to operate at common law. For example, if people who are not married enter into a separation agreement believing they are, then the agreement will be void. Similarly, if a life insurance policy is taken out in the mistaken belief that the person is still alive, the contract will also be void.

MISREPRESENTATION:

A misrepresentation is made when one contracting party has uttered a statement of material fact which is untrue. **Types of Misrepresentation:**

Misrepresentations are classified for the purposes of ascertaining what remedies are available as: fraudulent, innocent or negligent.

(a) Fraudulent Misrepresentation: occurs where it can be shown that a false misrepresentation has been made knowingly or without believing it to be true, or recklessly not caring whether it is true or false.

(b) Innocent Misrepresentation: occurs where the party making the false statement is in fact making it honestly, believing it to be true with reasonable grounds for that belief.

(c) Negligent Misrepresentation: occurs where the party making the false statement makes it in the belief that it is true but without reasonable grounds for that belief.

Non est Factum

Literally translated means 'this is not my deed'. This plea was initially confined to cases where a blind or illiterate person signed the contract after its effect had been misrepresented to him. The plea has been expanded so as to become available to all persons who signed a contract without fully understanding its effects, or which turned out to be different to that which they had assumed or had been told they were signing. If successful, the contract is void and not merely voidable.

The principle established in law is that in such cases, consent to the contract is effectively absent. The party who signs under a fundamental error does not actually sign his agreement, consequently, there is no contract.

Remedies:

In all cases of misrepresentation, the injured party may have the contract rescinded (i.e. no longer exists), or refuse to carry out their part of the contract. In the case of fraudulent and negligent misrepresentation, the injured party may also be awarded damages.

DURESS:

Duress at common law occurs where a party enters a contract under violence or threatened violence to himself or to his immediate family; or where he is threatened with false imprisonment; or where he is threatened with the dishonour of a member of his family. Coercion of this kind is legal duress when it is exercised by another party to the contract, or by the agent of another party, or by any person to the knowledge of another party. A person who has been induced to enter a contract by duress is entitled to avoid it.

The common law doctrine is narrow and in general the court will ask whether the pressure exerted was such as to destroy the free will of one of the parties to the contract.

Smelter Corporation of Ireland v O' Driscoll (1977)

The plaintiff co. had obtained an option to purchase the defendant's land which had been given by the defendant reluctantly after he had been told that if he did not sell directly to the plaintiffs, Cork County Council would make a compulsory purchase order on the land. In fact, the County Council did not intend to purchase the land but O' Driscoll entered the contract feeling that he had no alternative but to give the option to the co.

Held (Supreme Court) - the transaction could not be enforced as O' Driscoll had entered into it on the basis that he was going to lose his land one was or the other and could not be said to have consented to the agreement.

UNDUE INFLUENCE:

Because of the narrow limits of the common law doctrine of duress, equity has developed a more flexible approach and will set aside contracts where satisfied that there was no free, independent and informed consent to a transaction. It is principally used in situations where there is some inequality between the parties, where someone is in a position to influence the will of another or to abuse him because of a stronger character. It is not necessary to show that there was a threat of violence or actual violence for the doctrine to operate.

There is a rebuttable presumption of undue influence where a fiduciary or confidential relationship exists between contracting parties e.g. solicitor and client; doctor and patient; parent and child; guardian and ward. It does not normally arise in the case of husband and wife. Evidence required to rebut the presumption will vary according to the circumstances, but is usually necessary to show:

(a) that the consideration moving from the dominant party was at least adequate;

(b) that the plaintiff had the benefit of competent, independent advice, in the light of full disclosure of all material facts;

Where there is no presumption of undue influence, the courts can still hold that there has been undue influence **as a matter of fact** (facts of the case) and in these circumstances the onus of proof is on the party alleging the undue influence. Circumstances which have given rise to such a finding by the court are those where there has been a manifest inadequacy of consideration, where there has been a disparity of age, position or influence between the parties to the transaction, and when one party has nothing to gain from the relationship.

O' Flanagan v Ray-Ger Ltd. (1983)

Mr. O' Flanagan and Mr. Pope were the only two directors of Ray-Ger Ltd and an agreement was entered into between them providing that on the death of one of them the other would be entitled to take up all the deceased person's share. Most of the negotiations for this transaction had taken place in pubs, and Mr. O' Flanagan was suffering from a terminal disease of which Mr. Pope was aware. Soon after the agreement was entered into, Mr. O' Flanagan died and his widow sought to have the transaction set aside.

Held – the transaction was one entered into as a result of undue influence and that it could not be enforced by the court. Mr. Pope had a strong and forceful personality and had exercised considerable influence amounting to domination of the deceased.

CAPACITY TO CONTRACT:

In law, persons may be natural or artificial. Natural persons are human beings; artificial persons are corporations.

(a) Natural Persons: The general rule is that all natural persons have full contractual capacity. But there are exceptions in the case of minors, drunken persons, insane persons and convicts.
(b) Corporations: The contractual capacity of a corporation depends on the manner in which it was created.

Minors:

Age of Majority Act 1985 – Section 2 provides:

"Where a person has not attained the age of twenty-one years prior to the commencement of the Act, he shall attain full age –

(a) On such commencement if he has attained the age of eighteen years or is or has been married, or
(b) After such commencement when he attains the age of eighteen years, or in case he marries before attaining that age, upon his marriage."

A person below the age of capacity may be referred to as an infant or as a minor.

The general rule at common law is that an infant's contract is voidable. That means certain contracts are valid unless repudiated by the minor. Other contracts are voidable in the sense that unless the minor completes the transaction within a reasonable time after coming of age, the transaction does not bind him.

Necessaries and Beneficial Contracts of Service:

There are exceptions to the rule in relation to minors in certain circumstances. This is firstly where necessaries are involved, and secondly in the case of beneficial contracts of service. Necessaries are defined in the ***Sale of Goods Act (1893)*** as goods suitable to the condition in life of such infant or minor, or to his actual requirements at the time of the sale or delivery. This allows minors to purchase items of nominal values in a shop or engage in other minor transactions. Luxuries and items of amusement are not capable of being classified as necessaries. Cars are not normally considered to be necessaries, however, they could be considered so in cases where the vehicle was required to transport a minor to and from work, and provided there was not adequate public transport available. In every case, it will depend on the circumstances.

The most common examples of beneficial contracts of service are contracts of apprenticeship. A minor is legally capable of entering into such agreements, provided it is for his benefit. Such a contract would be voidable if it required the minor to sign acceptance to carry out work without sufficient remuneration.

Insane or Drunken Persons:

Where a person who is drunk or insane, and thus does not understand what he is doing, enters into a contract, the contract is voidable at his option, provided that the

other party knew of his condition. The burden of proving that the other party knew that he was drunk or insane at the time of entering the contract is on the person relying on the disability. See note under misrepresentation earlier.

Corporation:

Any company incorporated under the Companies Acts has only those powers conferred on it by its Memorandum of Association. Any act done outside those powers is void in law and is described as an **ultra vires** act.

If a contract is ultra vires the company, it cannot be ratified by the company e.g. a building company may have the power to acquire land to build, construct, lay pipes etc. If these are its stated objects the company does not have the power to manufacture cars.

Where the powers in the memorandum of association are drafted very widely, the court will only have regard to the main objects of a company. Any powers exercised by the company must have the effect of advancing the main objects of the company.

The effect of the ultra vires doctrine is to prevent a third party dealing with the company from suing on a contract if that contract is not made within the company's power. The harshness of this rule has been modified by Section 8 of the Companies Act 1963 which provides that a third party dealing with the company who is no "actually aware" that an act is ultra vires is entitled to rely on the transaction.

REMEDIES FOR BREACH OF CONTRACT:

There are various remedies for breach of contract. The usual remedy is monetary compensation in the form of unliquidated damages. The other (less usual) remedies may be available according to the circumstances.

(a) Damages:

Every breach of contract will give rise to an action for damages. If the breach is minor i.e. a breach of warranty, then the injured party must continue with the contract but may bring an action for damages.

If he has suffered no loss from breach of warranty, he will only receive nominal damages. Such damages are only awarded in order to acknowledge that a legal entitlement has been infringed.

Types of Damages:

(a) Liquidated Damages:

The parties to a contract may agree in the contract that, in the case of a breach, the damages shall be fixed at a sum certain, or to be calculated in a certain manner. Such damages are known as **liquidated damages**. If a court is satisfied that liquidated damages as specified in a contract are reasonable then in any action taken by an injured party to such a contract, the courts will normally uphold the amount of damages.

(b) Unliquidated Damages:

Where a plaintiff claims damages for breach of contract, it is the function of the court to assess the money value of the loss suffered, and to award this sum as damages. The test that the courts apply on deciding how much is to be given to an injured party by way of damages is to award that sum that would put the plaintiff in a position that he would have been in had the contract been performed. This is called the doctrine of Restitution. Compensation, not punishment of the contract-breaker, is the object of damages.

Remoteness of loss and measure of damages:

A party in breach of contract is not liable to compensate the innocent party for all loss arising from the breach. He will not have to compensate the injured party for loss which is too **remote**. The rules to be applied:

(a) Damages are only recoverable if the loss can be said to flow naturally from the breach.
(b) If the damages are unusual, damages are recoverable if it can be shown that the defendant knew or ought to have known that the loss would ensue from the breach.

This test was applied in the case:

Victoria Laundry Ltd v Newman Industries Ltd (1949)

The plaintiffs who were launderers and dyers, decided to extend their business, and with this end in view, purchased a large boiler from the defendants. The defendants knew at the time of the contract that the plaintiffs were launderers and dyers and that they required the boiler for the purposes of their business. They were also aware that the plaintiffs required the boiler for immediate use. But the defendants did not know at the time of the contract exactly how the plaintiffs intended to use the boiler in their business. The defendants, in breach of contract, delayed delivery of the boiler for five months. The plaintiffs brought an action for damages. The plaintiffs argued that they could have taken on a large number of new customers and had to turn down a number of lucrative contracts.

Held – there was ample means of knowledge on the part of the defendants that business loss of some sort would be likely to result to the plaintiffs from the defendants' default in performing the contract. The test is whether the loss which resulted was reasonably foreseeable (by the reasonable man) and in this case it was. It is not necessary that the defendants actually asked themselves what loss would result as a result of their default.

Duty to mitigate the loss:

Where one party has suffered loss resulting from the other party's breach of contract, the injured party should take reasonable steps to minimize the loss. Any failure to mitigate the loss will be taken into account by the court in its assessment of damages, and the injured party will be penalized to that extent.

(b) Specific Performance:

A decree of specific performance is issued by the court to the defendant, requiring him to carry out his undertaking (part of the contract) exactly according to the terms of the contract. Specific performance is an equitable remedy and is available only where there is no adequate remedy at common law or under a statute. Generally, this means that specific performance is available only where the payment of a sum of money would not be an adequate remedy e.g. breach of a contract for the sale of land.

The granting or withholding of a decree of specific performance is in the discretion of the court. The discretion is, however, exercised on certain well-established principles:

(a) Specific performance will never be granted where damages are appropriate and adequate.
(b) The court will take into account the conduct of the plaintiff, for he who comes to equity must come with clean hands.
(c) The action must be brought with reasonable promptness i.e. must not delay.
(d) Specific performance will not be awarded where it would cause undue hardship on the defendant.

(c) Injunction:

An injunction may be either mandatory or prohibitory.

(1) A **mandatory injunction** is a court order for a person to perform a definite act.
(2) A **prohibitory injunction** is a court order restraining a person from doing something which is unlawful.

An injunction will not be given where damages would be an adequate remedy or where the court could not properly supervise the enforcement of its order.

(d) Rescission:

The injured party may rescind the contract upon breach of a condition. This remedy terminates the rights and obligations of both parties to the contract at the time of

rescission. The parties will be returned to their former position. The purpose of rescission is to release the parties from the contract. Where rescission is allowed by the court, any benefits received must be restored by the parties to the contract. If the injured party is unable to restore the benefits received under the contract, the right of rescission may be lost and the injured party may have to be content with damages.

Case Studies

When reviewing case studies, the first step is always to determine whether or not a contract exists in the first place, and if so, if it is in fact a valid contract that could be held to be legally binding.

Sample Case Study 1

Paddy in Dublin wrote to Mary in Cork offering to sell her his Mercedes car for €15,000. On receiving Paddy's offer, Mary telephoned him to say she would like to accept the offer. But because there was such a large sum of money involved, and because there were one or two more interested parties, Paddy said he wanted Mary to confirm her acceptance in writing. He said if he received her acceptance the next day (Friday), he would go ahead with the sale at €15,000.

Mary immediately wrote out her acceptance letter and posted it to Paddy in Dublin, using the standard post. Paddy received it the following morning at 11am. On Thursday evening however, Paddy had received a better offer from a local guy, and he had written to Mary to withdraw his offer. This letter missed the last collection and was not received by Mary on Friday morning.

Discuss.

The above is an outline of the facts of this case. You will never have sufficient information in order to complete your assessment of the case, so you must make some assumptions. However, you should always distinguish assumptions from facts when presenting your case.

Before you attempt to answer a question of this nature, you should always start by sketching out an answer plan.

The following is an example of an answer plan:

A contract is a legally binding agreement recognized by the courts. In order to establish the existence of a contract, we must first establish the existence of an agreement. Once established, the next step is to establish the remaining two essential elements.

- The essential elements of a contract are:
    - Offer – determine if the offer is valid
    - acceptance - offer & acceptance combine to show agreement
    - consideration – must be sufficient and must be on both sides
    - intention – all parties must have legal capacity to contract

And more specifically:

- distinguish offer from invitation to treat and also from counter-offer
- acceptance by telephone (verbal acceptance)
- the Postal Rule – does it apply to offer and/or acceptance and to revocation of an offer?
- the definition of a unilateral contract – distinguish from bilateral
- revocation of offers in bilateral and unilateral contracts
- lapse of time
- capacity to contract – review exceptions
- similar cases
- breach of contract
- remedies

In addition to the above points, you should also make a list of any ***relevant cases*** that you might be able to use to support your points. As you answer the questions raised, you can refer to the list and use the principles from the case in the appropriate places.

Because contract law is based primarily on precedent and the rulings in prior cases, citing relevant cases is essential in attempting any case study.

Your answer to this question might include the following points:

1. It is not necessary for this contract to be in writing, so Mary's verbal acceptance is legally binding. This is known as spontaneous acceptance. The definition of a contract suggests that this is potentially a valid contract. However, we need to review Paddy's specific request for the acceptance to be put in writing
2. There is offer – Paddy's original letter to Mary
3. There is acceptance – Mary's telephone call, or her letter of acceptance, whichever came first. In this case, because it was a condition of the agreement, it would seem that acceptance occurred when Mary posted the letter
4. There is consideration – Mary's promise to pay €15,000 in return for Paddy's promise of the car.
5. The consideration appears adequate, although this is not a legal requirement. The price agreed is the price set by the owner
6. The consideration is sufficient – the car in exchange for the price agreed
7. There is an intention to create legal relations – we must assume that both Paddy and Mary possess the legal capacity to enter into a contract – as the product is a car, then we can assume that neither of them are minors. As drivers, we can also assume that they are not excluded for any other reason, such as mental capacity etc. As far as we know they are not related so we can assume this is not a familial or social agreement. ***Age of Majority Act (1985)*** defines a minor as being under the age of eighteen years and unmarried. Based on our assumptions, we can conclude that Paddy and Mary are not minors, and all adult persons posses the legal capacity to enter into a legally binding contract.
8. As all essential elements are present, a valid contract has been formed.
9. There was no undue delay between offer and acceptance, therefore time lapse is not relevant here.
10. Can the contract be unilateral? In order for it to be unilateral, the offer must not be addressed to anyone in particular. In this case, Paddy wrote to Mary offering to sell his car to her for €15,000. This offer was clearly made to Mary

only, therefore the contract which ensued when Mary accepted this offer would appear to be a bilateral contract. This is supported by the ruling in the famous case ***Carlill v Carbolic Smoke Ball Company (1893)*** where it was held that an offer can be made to the public at large provided the other essential elements are present, i.e. intention and consideration, and such an offer results in a unilateral contract when accepted. There are only two parties involved in this case and acceptance by the offeree was clear and matched exactly the offer made by the offeror. The similarity with the ***Carlill*** case is that Paddy's offer was conditional – i.e. it required Mary to carry out a specific act, which was to post a letter of acceptance. But it is not possible to revoke a unilateral offer as it cannot be addressed to anyone in particular, therefore we can conclude that this is not a unilateral offer from which a unilateral contract would ensue.

11. We also need to establish that it was a definite offer and not an invitation to treat. It seems reasonable to treat this as a definite offer in this instance, as the exchanges between Paddy and Mary, starting with his offer letter, seemed to clearly indicate a willingness to enter into an agreement. It was not an offer to invite offers, as was the case in ***Pharmaceutical Society v Boots Cash Chemists (1953),*** where the goods were on display and invited offers from the public.
12. Again, in reviewing the ***Carbolic Smoke Ball*** case***,*** we can draw similar conclusions. Paddy said 'if you send me your acceptance in writing by tomorrow, I will sell you the car at the agreed price'. So Paddy clearly intends to enter a legally binding contract. Mary, on the other hand, has a choice to accept or not accept before the contract becomes binding for her. However, Paddy has introduced a condition that the acceptance must be in writing. In doing so, he has introduced an additional term into the agreement. This requires Mary to carry out a specific act before agreement can be reached. Although she had earlier accepted the offer verbally, Paddy's condition means that acceptance occurred only when the letter of acceptance was posted and not during their telephone conversation. Provided Mary posted her acceptance letter before Paddy posted the revocation letter, then the contract between Paddy and Mary is legally binding. This is because of the 'postal rule', and is supported by ***Household Fire Insurance v Grant (1879).***
13. Up to the time she posted the letter of acceptance, Mary was in a position to either accept or reject the offer. On this issue, there are similarities with the ***Carlill*** case. Had she not posted her acceptance on Thursday, then Paddy would have been within his rights to revoke the offer as the car which is the subject matter of the agreement was still available for sale, right up until the offer was accepted on Paddy's terms.
14. As it happens, Mary decided to go ahead with the contract and posted her letter of acceptance. The rule then applies, that acceptance takes effect on posting the letter. This was the exact point when agreement was reached, and therefore the point when the contract was formed.
15. Now the question is did Paddy's letter of revocation supersede Mary's letter of acceptance? It does not appear to be so, because Mary's letter of acceptance was posted first and also received first. Paddy's attempted withdrawal is therefore not effective and the contract is legally binding on both parties.
16. Finally, we can conclude that Paddy is in breach of contract and that Mary will have a remedy available to her. She would be within her right to enforce the

contract as it is legally binding. The most appropriate remedy in this instance may be 'specific performance', however, she should review all possible remedies.

In this suggested answer, I have listed and numbered the relevant points. In answering this type of question as an assignment or in the written exam, you would simply write a short paragraph on each point. Some of the points are not fully developed, but that is for you to do when completing your assignment. The purpose of illustrating the answer in this way is to help you to see the number of valid points you could make about this case. There are more points that could be made and more cases that could be referred to, however, these are the principal points in this case. You can achieve higher marks for additional points and for working additional cases into your answers, provided that they are ***revelant***. You will also achieve higher marks if you develop all points fully.

Citing Case-law

When referring to cases, ***there is no need to restate all the details of the case***, just mention the points of law or the rulings that are relevant to the present case. Always highlight or underline cases and give the correct title. Also quote the year of the case. If you show the full title of a case at the start or in your answer plan, then you can refer to the case using an abbreviated title if it arises anywhere else in your answer. For example, in the above case I raised the Carlill case in point 10 and quoted the full title, but after that I simply referred to it as the Carlill case. There is no need to repeat the full title more than once – thereafter a case may be referred to by the plaintiff's name.

You should now be able to complete the last questions in your workbook, same rules apply.