Introduction to the English Legal System

Contract Law
Christopher Bisping

Overview
- Formation of Contracts
  - Offer/acceptance - Certainty
  - Consideration - Capacity - Formalities
  - Intention to Create Legal Relations
- Contents of Contracts
  - Express and implied terms
  - Conditions, warranties and innominate terms
  - Unfair terms
- Vitiating Factors
  - Misrepresentation - Mistake - Illegality
  - Duress and undue influence
- Third Parties
- Discharge and Remedies
  - Discharge by performance, frustration, breach, agreement
  - Remedies: damages, specific performance, other remedies

Formation
Offer and Acceptance I
- Offeror (makes offer)
  - offeree (receives offer)
- Offers to public at large, see. *Carlill v Carbolic Smoke Ball Co Ltd* (1893)
- Invitations to treat, such as advertisements
- *Quaere* for timetables and tickets
Formation
Offer and Acceptance II

- Offer remains valid for reasonable length of time, unless rejected, counter offer, death or withdrawn
  - At any time before acceptance
  - Must be communicated
  - No part-performance in unilateral contracts

Formation
Offer and Acceptance III

- Acceptance = unconditional agreement to all terms
- may be inferred from conduct
- Mere silence not sufficient
- Battle of the forms
- Must be communicated, unless waived by offer, conduct may be sufficient

Formation
Offer and Acceptance IV

The Postal Rule
- Acceptance takes effect when posted (not only when received)
- Applicable to other means of non-instantaneous communication? (telegram)
- Quaere for fax, e-mail, text message
- Use of post must be reasonable
- Can be excluded in offer (“…must be received…”)
- Not applicable if letter insufficiently or wrongly addressed
- Effects:
  - contract despite acceptance never delivered
  - revocation of offer not possible after acceptance was posted
  - acceptance cannot be revoked
Formation
Offer and Acceptance

- Auction: bid is offer, fall of hammer is acceptance
- Tenders
- Rules applied very strictly for sale of land
  - Sale subject to contract
  - Exchange of contracts

Formation
Certainty

- Vague and incomplete agreements are not contracts
- Courts do not make contracts for the parties!
- Fluctuations may need to be provided for on basis of later clarification
- Terms implied by statute
- Officious bystander test

Formation
Intention to Create Legal Relations

- Objectively assessed whether parties intended to be bound
- Social and domestic agreements: presumption against
- Commercial agreements: presumption in favour
Formation
Capacity

- Minors (below 18) are bound only by contracts for necessaries
  - SoGA 1979 s 3(2): goods suitable to the condition in life of the minor... and his actual requirements
  - Are goods capable of being necessaries in law?
  - Are they actually necessaries in the present case?
- Other contract are voidable by the minor, i.e. bind other party only
- Mental incapacity: contract valid unless
  - Person cannot understand nature of transaction and
  - Other party knows this

Formation
Formalities

- Principle: no form required
- By deed: formal document signed in front of witnesses
  - Leases of more than 3 years (LPA 1925)
  - Where there is no consideration
- In writing:
  - Transfer of shares in ltd.
  - Bills of exchange, cheques, prom. Notes
  - Consumer credit agreements (CCA 1974)
  - Sale of land (LPA 1989)
- Evidenced in writing:
  - Contract may be oral
  - Written evidence required, Statute of Frauds 1677
  - Electronic Communications Act 2000
    - Incorporates EU E-Commerce directive

Formation
Consideration I

- Consideration: each party must give something in return for their gain
- Contract not binding without (i.e. gratuitous promise)
- Can be promise in return
- Quid pro quo
- Dunlop v Selfridge (1915):
  plaintiff must show that he bought the defendant’s promise by doing, giving or promising something in return for it
- Reason for enforcement of promises, justice of the case (Prof. Atiyah)
Formation
Consideration II

- Consideration need not benefit promisee: detriment of promisor
- Executory consideration: promise to do something in future
- Executed consideration: already performed at time of contracting
- Consideration must not be past
- Consideration must be sufficient, but need not be adequate
- Consideration must be of economic value

Formation
Consideration III

Performance of an Existing duty
- Existing duty not consideration
- Existing Public duty
- Existing contractual duty
  - Classic position
    - Stilk v Myrick (1809) – no cons.
    - Hartley v Ponsonby (1857) – cons.
  - Modern law
    - Williams v Roffey (1990) for goods and services - consideration
    - Pinnel’s case (1602) for payment of debts – no consideration
    - Existing duty to third party - consideration

Formation
Promissory Estoppel

- Promissory Estoppel: developed in equity
  - Hughes v Metropolitan Railway Co (1877)
  - Central London Property Trust v High Trees House Ltd (1947)
  - Promise not to enforce a right
  - Promissee acted in reliance on the promise
  - Inequitable to enforce strict legal rights
  - Future rights not destroyed
  - A shield and not a sword
Contract Terms
Express Terms

• Representation: statement that is not part of contract
• Term: statement that is part of contract
• Legal consequence: misrepresentation and breach of contract

Contract Terms
Express Terms

Oral terms
• Importance of statement
• Special knowledge and skill
• Timing
• Strength of inducement
• Writing displaces oral statement

Contract Terms
Express Terms

Written terms
• incorporation by
  – signature
  – reasonable notice
  – Previous course of dealing
• Parol Evidence Rule
  – Extrinsic evidence not admissible
  – various exceptions: rectification, partially in writing, implied terms, custom, etc.
Contract Terms
Express Terms

**Interpretation**
- Intention of the parties by objective approach
- No extrinsic evidence
- Matrix of fact

---

Contract Terms
Implied Terms

**Terms implied in fact**
- Officious bystander test
  Shirlaw v Southern Foundries (1926): “…something so obvious that it goes without saying … if while the parties were making their bargain, an officious bystander were to suggest some express provision … they would testily supply suppressing him with a common ‘Oh, of course!’”
- Business efficacy test
  Reigate v Union Manufacturing Co (1918): “necessary in the business sense to give efficacy to the contract … if at the time the contract was being negotiated someone had said to the parties: ‘What will happen in such a case?’ they would both have replied: ‘Of course so and so will happen, we did not trouble to say that; it is too clear.’
- Both tests subjective

---

Contract Terms
Implied Terms

**Terms implied in law**
- Terms dictated by law irrespective of parties’ intention
- Based on common law or statute e.g. Sale of Goods Act 1979, Unfair Contract Terms Act 1977, Consumer Rights Act 2015

**Terms impl. by custom/usage**

**Entire agreement clause**
Contract Terms

Importance of Terms

- Conditions
  - Very important terms
  - Breach is repudiation of contract, i.e. no performance required
  - Damages
- Warranties
  - Less important terms
  - damages
- Innominate terms
  - Breach can have more or less important consequences

Unfair Contract Terms

- Exemption clauses
  - Exclusion clauses
  - Limitation clauses
- Common Law control
- Statutory Control

Common Law controls

- Incorporation
  - By signature
  - By reasonable notice
    - Time of notice
    - Form of notice
    - Effect of the clause
  - By previous course of dealing
- Interpretation
  - Contra proferentem
Contract Terms
Unfair Contract Terms

Statutory controls
• Unfair Contract Terms Act 1977
  – Dealing as consumer, s 12
  – Limitation clauses only
    • Negligence, s 2
    • Non-performance, s 3
    • Indemnity clauses, s 4
    • Guarantees of consumer goods, s 5
    • Misrepresentation, s 8
  – Reasonableness

Contract Terms
Unfair Contract Terms

Statutory controls
• Unfair Terms in Consumer Contracts Regulations 1999
  – Sellers/suppliers – consumers
    (any natural person . . . acting for purposes outside his trade, business or profession”)
  – Not individually negotiated, r 5(3)
  – Fairness (not for core terms or adequacy of price/remuneration, if expressed in plain, intelligible language)

Contract Terms
Unfair Contract Terms

Statutory controls
• Consumer Rights Act 2015, pt II
  • Exercise: Spot the difference!
  – CRA 2015 s2(3) “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.
  – BGB §13: Verbraucher ist jede natürliche Person, die ein Rechtsgeschäft zu Zwecken abschließt, die überwiegend weder ihrer gewerblichen noch ihrer selbständigen beruflichen Tätigkeit zugerechnet werden können.
Vitiating Factors
Misrepresentation

- Untrue statement of fact
  - Caveat emptor (buyer beware!), except:
    - Utmost good faith (*uberrimae fidei*)
    - Subsequent falsity
    - Partial revelation
    - Fiduciary relationship
- Inducement

Vitiating Factors
Misrepresentation

- Types:
  - Fraudulent misrep. (tort of deceit)
  - Negligent misrepresentation
  - Innocent misrepresentation
- Remedies
  - Rescission: contract voidable
  - Indemnity payment
  - Damages (tort measure, remoteness)

Vitiating Factors
Mistake

- Objective principle
- Mistake must precede contract
- Mistake must induce contract
- Mistake of fact or law
- Types:
  - Common (identical/shared/mutual)
    - Contract void if mistake fundamental
  - Cross-purpose (non-identical) mistake (negating consent)

Introduction to the English Legal System
Vitiating Factors

Illegality
- Illegal at time of formation
  - Effect: no contract
- Illegal mode of performance
  - No contract if both knew, otherwise innocent party can enforce
- Violation of legal rules
  - Restraint of trade
  - Breach of legislation
- Breach of public policy

Duress
- Pressure on party
- Pressure illegitimate
- Inducement
- No real choice
- Innocent party protested

Undue Influence
- Type 1: Actual UI - proven that contract was result of UI
- Type 2: Presumed
  - Type 2A: Pre-existing relationship of trust and confidence
    - Parent/child - religious adviser/disciple
    - Guardian/ward - trustee/beneficiary
    - Solicitor/client - doctor/patient
  - Type 2B: proven relationship of trust
  - Contract manifestly disadvantageous to part who places trust in the other
  - Problem: third party involvement
Third Parties

- Privity of contract: only parties to a contract have rights and duties under it
- Contracts (Rights of Third Parties) Act 1999
  - Explicit contractual right for third party, s 1(1)(a)
  - Purported benefit to third party, s 1(1)(b)
  - Changes require consent of third party, s 2
  - Promisor has same defences against third party as against promisee, incl. Set-off

Third Parties

- Exceptions under statutes (for insurance)
- Common Law exceptions
  - Agency (even for undisclosed principals)
  - Assignment (incl. negotiability)
  - Damages on behalf of others
  - Collateral contracts
- Does privity rule make sense?
  - Pro: free will, lack of reciprocal rights, no restriction on contracting parties' rights, no enforceability for gratuitous promises, opens the floodgates
  - Contra: extended litigation, irrational, against intention of parties, unjust enrichment, justifiable reliance, international

Discharge of Contract

Overview

- Performance
- Agreement
- Breach
- Frustration
Discharge of Contract
Performance
• Entire performance rule:
  – Exact match of terms of contract
  – Substantial performance
  – Voluntary acceptance of part perf.
  – Prevention of completion by other party
  – Breach of term relating to time
• Vicarious performance

Discharge of Contract
Frustration
• Event making performance
  – impossible
  – illegal
  – Radically different from agreement, frustration of purpose
• Not applicable
  – Provided for in contract
  – Foreseen or foreseeable events
  – Fault of one party (self-induced)
  – Contract only made more onerous

Discharge of Contract
Breach of Contract
• Actual breach
• Anticipatory breach
• Defence: lawful excuse
• Effect:
  – Damages
  – May be discharged up
    • Repudiation
    • Breach of condition
    • Serious breach of innominate term
    • Choice of innocent party
Remedies

• Common Law remedies
  – Damages
  – Action for agreed sum
• Equitable remedies
  – Specific performance
  – Injunction
• Remedies agreed by parties
  – Liquidated damages
  – Penalty clause

Remedies
Damages

• Compensation for pecuniary loss
• Non-pecuniary loss only if
  – Contract where whole purpose is pleasure, relaxation and peace of mind
  – Contract where major object is pleasure, relaxation and peace of mind
  – Mental suffering caused by physical inconvenience
• Causation (but for-test)
• Remoteness
• Mitigation

Remedies
Damages

• Calculating loss
  – Expectation loss
  – Reliance Loss
• Claimant’s choice, except
  – Bad bargain rule
  – Expectation loss too speculative
• Quantification
  – Market price rule
  – Cost of cure
  – Loss of opportunity
Action for agreed sum (= price)
## Remedies

### Specific Performance
- Discretionary if common law remedy (damages) inadequate
- Court order to perform contract
- No hardship to defendant
- Not if contract obtained unfairly
- Unsuitable contracts

### Injunction

### Extinction
- Time bar: 6 years after cause of action accrued (deed: 12 years)

---

End of Contract section.

### Remedies

#### Agreed by Parties
- Liquidated damages: based on actual loss - valid
- Penalty clause: not based on actual loss – invalid
- Law amended in *Beavis v Parking Eye* (2015) – other reasonable interests can justify amount stipulated

---

Extinction