


# Introduction to the English Legal System

## Contract Law

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## 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

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## 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

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**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- Offer remains valid for reasonable length of time, unless rejected, counter offer, death or withdrawn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

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**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

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**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

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**Formation**  
Offer and Acceptance V

- 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

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**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

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**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

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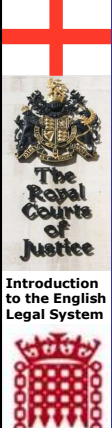
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**Formation  
Capacity**

- Minors (below 18) are bound only by contracts for necessities
  - SoGA 1979 s 3(2): goods suitable to the condition in life of the minor ... and his actual requirements"
  - Are goods capable of being necessities in law?
  - Are they actually necessities 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

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**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 o 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

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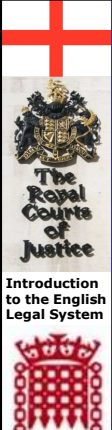
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**Formation  
Consideration I**

- 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)

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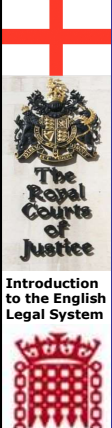
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### Formation Consideration II

- Consideration need not benefit promisee: detriment of promisor
- Executory consideration: pro-mise 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

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### 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

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### 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
  - Promisee acted in reliance on the promise
  - Inequitable to enforce strict legal rights
  - Future rights not destroyed
  - A shield and not a sword

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### 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

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### Contract Terms

#### Express Terms

#### Oral terms

- Importance of statement
- Special knowledge and skill
- Timing
- Strength of inducement
- Writing displaces oral statement

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### 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.

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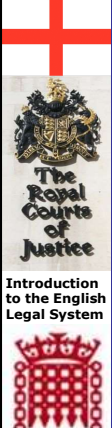
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**Contract Terms**  
Express Terms

**Interpretation**

- Intention of the parties by objective approach
- No extrinsic evidence
- matrix of fact

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**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 suppress him with a common 'Oh, of course!'"*
- **Business efficacy test**  
-To make contract work  
*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

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**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**

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**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

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**Contract Terms**  
Unfair Contract Terms

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

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**Contract Terms**  
Unfair Contract Terms

**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

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### 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

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### 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)

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### 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.

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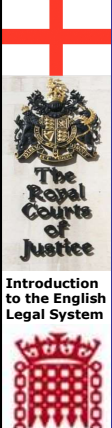
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**Vitiating Factors  
Misrepresentation**

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

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**Vitiating Factors  
Misrepresentation**

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

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**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)

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**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

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**Vitiating Factors**  
**Duress**

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

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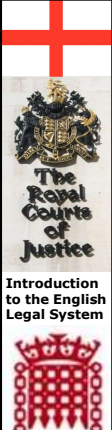
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**Vitiating Factors**  
**Undue Influence**

- **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

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The Royal Courts of Justice

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## 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

Promisor  $\xrightarrow{\text{contract}}$  promisee  
 ↙ right  
 Third party

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The Royal Courts of Justice

Introduction to the English Legal System

## 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

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The Royal Courts of Justice

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## Discharge of Contract Overview

- Performance
- Agreement
- Breach
- Frustration

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**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

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**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

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**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

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**Remedies**

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

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**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

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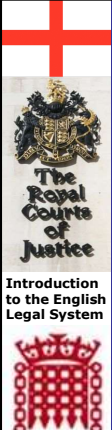
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**Remedies**  
**Damages**

- 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)

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**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

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**Extinction**

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

End of Contract section.

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**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

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