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OF LONDON** | INTERNATIONAL
PROGRAMMES

Elements of the law of contract

Catharine MacMillan
Richard Stone

This subject guide was prepared for the University of London International Programmes by:

- ▶ Catharine MacMillan BA (Victoria), LLB (Queen's, Canada), LLM (Cantab), Lecturer in Law, School of Law, Queen Mary, University of London

and

- ▶ Richard Stone LLB (Soton), LLM (Hull), Barrister, Professor and Head of Law, Lincoln Law School, University of Lincoln.

In the 2004 edition of this guide Catharine MacMillan was primarily responsible for Chapters 1–2, 4–5, 7–8, 10–14 and 16–17. Richard Stone was primarily responsible for Chapters 3, 6, 9 and 15. Catharine MacMillan was responsible for the 2009 and 2012 revisions.

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1 Introduction and general principles

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Introduction

This subject guide is designed to help you to study the **Elements of the Law of Contract** in England and Wales. This guide is not a textbook and it must not be taken as a substitute for reading the texts, cases, statutes and journals referred to in it. The purpose of the guide is to take you through each topic in the syllabus for **Elements of the Law of Contract** in a way which will help you to understand contract law. The guide is intended to 'wrap around' the recommended textbooks and casebook. It provides an outline of the major issues presented in this subject. Each chapter presents the most important aspects of the topic and provides guidance as to essential and further reading. Each chapter also provides you with activities to test your understanding of the topic and self-assessment exercises designed to assist your progress. Feedback to many of these activities is available at the back of this guide. There are also sample examination questions, with appropriate feedback, which will assist you in your examination preparation.

In the study of contract law, it is essential to try to gain an understanding of the principles of law – what the law is trying to do in response to particular issues – rather than the rote memorisation of rules and cases. This means you may need to read passages or chapters in the guide (and the relevant suggested reading materials) several times in order to understand the principles of law being covered.

In this guide we have taken account of all materials available up to January, 2012.

LEARNING OUTCOMES

By the end of this subject guide and the relevant reading, you should be able to:

- ▶ **demonstrate a thorough working knowledge of contract law: the syllabus aims to give you a good working knowledge of the elements of contract law and the theory underlying it**
- ▶ **understand contract case law: you should develop the ability to understand contract cases, that is to say the importance of the issues in a case and how the court has resolved the issues**
- ▶ **apply the cases: you should be able to apply the case law to a given issue**
- ▶ **understand statutes: you should develop the ability to interpret a statute; you should also be able to understand the interrelationship between the statute and the relevant common law**
- ▶ **apply the statutes: you should be able to apply the statutes to a given issue.**

Each chapter lists specific learning outcomes to be achieved in relation to the material covered in that chapter. There is a 'Reflect and review' section at the end of each chapter to help you monitor your progress.

1.1 Studying the law of contract

As already stated, this guide is not a textbook. It must not be taken as a substitute for reading the texts, cases, statutes and journals. Its purpose is to take you through each topic in the syllabus for **Elements of the Law of Contract** in a way which will help you to understand contract law. It provides an outline of the major issues presented in this subject. It will also help you prepare to answer the kind of questions the examination paper is likely to contain. Note, however, that no topic will necessarily be included in any particular examination and that some are more likely to appear than others. The Examiners are bound only by the syllabus and not by anything said in – or omitted from – this guide.

What do we mean by ‘taking you through’ a topic? Very simply it is to spell out what problems or difficulties the law is seeking to provide a solution for and to give a structured guide to the materials (textbooks, cases and statutes). You must read these in order to appreciate how English law has dealt with the issues and to judge how satisfactory the solutions are in terms of overall policy.

How to use this subject guide

Each chapter begins with a general introduction to the topic covered and the learning outcomes you should achieve within that chapter.

Following that, the topic is divided into subsections. Each subsection provides a reference to the recommended readings in McKendrick’s textbook and Poole’s casebook (see 1.2 below). At a minimum, you should read these; in many cases you will probably find that you need to re-read them. It is often difficult to grasp some legal principles and most students find that they need to re-apply themselves to some topics.

In addition, at the end of each chapter, there are recommendations for useful further readings. This will always cover the relevant chapter in *Anson’s law of contract*. You may find it desirable to review this textbook from time to time because it is often easier to grasp a point that you have found difficult when it is explained in a different fashion. Recommended readings are also included in the **Elements of the Law of Contract** study pack.

At the end of each subsection, the learning outcomes are again provided to enable you to test your progress. Throughout each chapter, self-assessment questions and learning activities are provided. Feedback is also given with regard to the learning activities to allow you to check your comprehension of a particular matter. You will find this process most helpful if you answer the question before you check the feedback (rather than simply reading the question and then checking the feedback). This is because the object of your studies is to understand, rather than memorise, the law. At the end of each chapter, some advice is given with regard to possible examination questions on this topic. The fact that this constitutes advice about **possible** examination questions cannot be stressed enough.

The reasons for studying the principles of the law of contract are readily apparent: contracts are the foundation of commercial activities of all kinds and of many ‘everyday’ transactions as well. Many specialist areas of law are built on this foundation. It also presents an ideal opportunity for students to take the first steps towards developing the essential skills of understanding judgments and interpreting statutes.

The importance of case law

It cannot be too strongly emphasised that this is a **case law subject**. What the Examiners will be seeking to test is your understanding of how the judges in the leading cases have formulated and refined the relevant principles of law. You should attempt to read the important cases. The Online Library (which you can access through the student portal) will give you access to the relevant cases.

There are no shortcuts to understanding the development of the case law. If the job is to be well done, it will be time consuming. Individuals vary, obviously, but it would probably be exceptional to cover the whole syllabus thoroughly in less than 200–250 hours of study.

1.2 Reading

You should begin your reading with this subject guide. Start at the beginning and work through the guide sequentially, reading the textbook and doing the activities as directed. It may be tempting to start with, say, illegality or incapacity, but this is not a good idea. The subject builds on the basic foundations, without which particular topics later in the subject cannot be understood.

You will also derive assistance from the selected readings provided in the Elements of the Law of Contract study pack and the Newsletters on the **Elements of the Law of Contract** section on the Laws VLE.

1.2.1 Books for everyday use

The main text for this subject is:

- McKendrick, E. *Contract law*. (London: Palgrave Macmillan, 2011) ninth edition [ISBN 9780230285699].

This text forms the foundation text for this subject. It is advisable to read and re-read this text to allow the material to be thoroughly understood.

You should also buy a casebook. This guide is structured around:

- Poole, J. *Casebook on contract law*. (Oxford: Oxford University Press, 2012) eleventh edition [ISBN 9780199699483].

You will find it most beneficial to refer from time to time to the more advanced texts set out in the next section.

1.2.2 More advanced books

The more detailed textbook currently considered to be best suited to the needs of students on the International Programme is:

- Beatson, J., A. Burrows and J. Cartwright *Anson's law of contract*. (Oxford: Oxford University Press, 2010) twenty-ninth edition [ISBN 9780199282470].[†]

You may also wish to consult a more detailed casebook. Here the choice lies between:

- Beale, H.G., W.D. Bishop and M.P. Furmston *Contract – cases and materials*. (London: Butterworths, 2007) fifth edition [ISBN 0199287368].
- McKendrick, E. *Contract law: text, cases and materials*. (Oxford: Oxford University Press, 2012) fifth edition [ISBN 9780199699384].
- Brownsword, R. *Smith & Thomas: A casebook on contract*. (London: Sweet & Maxwell, 2009) twelfth edition [ISBN 9781847034175].

It is not suggested that you purchase the books mentioned in this section: they should be available for reference in your college or other library.

[†] In this subject guide this text is referred to simply as 'Anson'.

1.2.3 Statute books

You should also make sure you have an up-to-date statute book. Under the *Regulations* you are allowed to take **one** authorised statute book into the examination room.

Information about the statute books and other materials that you are permitted to use in the examination is printed in the current *Regulations*, which you should refer to.

Please note that you are allowed to underline or highlight text in these documents – but you are **not allowed to write notes etc.** on them. See also *Learning skills for law* for further guidance on these matters and the *Regulations* for the LLB.

1.2.4 Other books

- Treitel, G.H. and E. Peel *The law of contract*. (London: Sweet and Maxwell, 2011) thirteenth edition [ISBN 9781847039217].
- Furmston, M.P. *Cheshire, Fifoot and Furmston's law of contract*. (Oxford: Oxford University Press, 2012) sixteenth edition [ISBN 9780199568345].

At the other end of the scale, many shorter books have been published in recent years aimed at the student market. If you are using McKendrick and Poole, you will generally not find that there is much benefit to be gained from these other works. However, for the particular purpose of practising the art of writing examination answers, you may find it helpful to have:

- McVea, H. and P. Cumper *Exam skills for law students*. (Oxford: Oxford University Press, 2006) second edition [ISBN 9780199283095].

But do not be misled into thinking that this will provide you with 'model answers' which can be learned by heart and reproduced from memory in the examination. Every examination question requires a specific answer and 'pre-packaged' answers do not serve the purpose.

References to the recommended books in the guide

This guide is designed for use in conjunction with McKendrick's textbook and Poole's casebook. The readings in this subject guide were set around the ninth edition of McKendrick's textbook and the eleventh edition of Poole's casebook. In the event that you have a later edition of the textbook, (i.e. a new edition of the textbook publishes before the next edition of this subject guide), the subject headings, set out in the readings, should refer to the relevant portion of a later textbook. For example:

ESSENTIAL READING

- McKendrick, Chapter 11: 'Exclusion clauses' – Section 11.7 'Fundamental breach'.
- Poole, Chapter 8: 'Breach of contract' – Section 2 'The consequences of breach'.

1.2.5 Other sources of information

Journals

It is useful to consult journals regularly to improve your understanding of the law and to be aware of recent developments in the law. Journals which may prove useful to you for their articles and case notes are:

- Cambridge Law Journal
- Journal of Contract Law
- Law Quarterly Review
- Lloyd's Maritime and Commercial Law Quarterly
- Modern Law Review
- New Law Journal.

Do not worry if you come across material that you do not understand: you simply need to re-read it and think about it.

Online resources

As mentioned earlier, you will find a great deal of useful material on the Laws Virtual Learning Environment (VLE) and Online Library. These are both accessed through the student portal at <http://my.londonexternal.ac.uk>

The Online Library provides access to cases, statutes and journals as well as professional legal databases such as LexisNexis, Westlaw and Justis. These will allow you to read and analyse most of the cases discussed in this guide and the relevant materials.

Students are also able to access newsletters on the VLE that deal with matters of contemporary interest.

Use of the internet provides the external student with a great deal of information, as a great deal of legal material is available over the Internet. Whilst the sites change on an almost monthly basis, some useful ones at the time of writing this guide are:

- ▶ www.parliament.the-stationery-office.co.uk
contains full texts of the House of Lords' judgments
- ▶ www.legislation.gov.uk/ukpga
provides the full text of UK Acts back to 1991
- ▶ www.parliament.uk
the sitemap for the Parliament of the United Kingdom, which will provide you with access to a range of legislative information
- ▶ www.lawcom.gov.uk
the Law Commission's website; this provides information about law reform.

In addition to these sites, a growing number of private publishers provide legal information and case updates. A site where useful information about recent cases and developments in the law can be found is:

- ▶ www.bailii.org
Bailii is a freely available website which provides access to case law legislation and also provides a recent decisions list (www.bailii.org/recent-decisions.html) and lists new cases of interest (www.bailii.org/cases_of_interest.html).

1.3 Method of working

Remember that your main objective is to understand the principles that have been laid down in the leading cases and to learn how to apply those principles to a given set of facts. As a rule of thumb, leading cases for this purpose may be defined as those which are included in the relevant sections of McKendrick and Poole, together with any other (generally more recent) cases cited in this subject guide. At a more practical level the leading cases are those which Examiners would probably expect the well-prepared candidate to know about. In the nature of things, just as different lecturers will refer to a different selection of cases, there can be no absolutely definitive list of such cases. However there will always be agreement on the importance of many of the cases and in general terms, 'core' cases are named in the guide. Space is limited and omission from the guide should not be taken to mean that a case is not worth knowing.

It is suggested that the study of the cases should be approached in the following steps.

1. Read the relevant section of this subject guide.
2. Read the relevant passages of McKendrick's textbook and Poole's casebook – it may also be advisable to examine some cases in full following this.
3. Re-read the relevant passages in McKendrick.
4. Attempt to answer the relevant activities or self-assessment questions.
5. Repeat this process for each section of the subject guide.

A further description of the process in each of these steps is set out in further detail below.

Step 1

Start with the relevant section of this subject guide – this will give an idea of the points you need to look for. Take one section at a time – do not try to digest several at once. Examine the learning outcomes: these are the matters you need to master in relation to each chapter and subsection within the guide.

Step 2

Read the textbook passage referred to. Look in particular for the cases upon which the author places special emphasis.

Read the cases in the casebook (together with any others mentioned in the subject guide – particularly the more recent ones. You should generally be able to find the case on the Online Library.

The importance of reading the primary materials of the law – cases and legislation – cannot be overemphasised. Learn as much as possible about each case. Make a special effort to remember the correct names of the parties, the court which decided the case – particularly if it is a Supreme Court or Court of Appeal decision – the essential facts, the *ratio decidendi* and any important *obiter dicta*. It is also important to note any other striking features, such as, for example, the existence of a strong dissenting judgment, the overruling of previous authority or apparent inconsistency with other cases. It is most important that you understand not only **what** the court has decided but also **why** it has decided that. Knowing ‘the rules’ is not enough: it is essential to study the judgments and understand the reasoning which led the court in a particular case to uphold the arguments of the successful party and reject the contentions put forward – no doubt persuasively – on behalf of the unsuccessful party. It is also important to be critical when studying the cases: ask yourself whether the result produces injustice or inconvenience; whether there are any situations in which you would not want the result to apply and, if so, how they could be distinguished. If it is an older case, you should also ask yourself whether the reasoning has been overtaken by changes in social and commercial life generally. Lastly, pay attention to the impact of other cases in the area. How strong is an authority in light of subsequent decisions?

Step 3

Read the textbook passage again and ask yourself, ‘Does the book’s statement of the effect of the cases correspond with my impression of them?’ If it does not, read the cases again.

Step 4

You will find activities and self-assessment questions throughout the guide. These are intended not only to build up your knowledge of the material but also to provide you with an opportunity to measure your knowledge and understanding of the particular section. An activity demands you to think about a particular question and prepare an answer which extends beyond a simple ‘yes’ or ‘no’. Feedback is provided for these activities at the end of the guide. Self-assessment questions are designed to test your memory of the material which you have covered. No feedback is provided for these questions as they have simple answers available in the textbook or casebook. With both forms of exercises, you will find that your knowledge is enhanced if you complete the exercises as you encounter them in the particular section. You will note that each chapter of McKendrick also includes some exercises for self-assessment: completing these will further develop your legal knowledge and skills.

Step 5

Repeat the process for each section of the chapter in turn.

1.4 Some issues in the law of contract

1.4.1 Statutes

Although most of the syllabus deals only with principles developed by the courts, there are also a few statutory provisions which need to be considered because they contain rules affecting contracts generally. For the purposes of the suggested method of working, you should approach each relevant section of a statute as if it were a leading case and make a special effort to get to know the precise wording of crucial phrases as well as any cases in which the section has been interpreted and applied. Remember that in English law it is the judges who decide what Parliament meant by the words of the statute.

In general, you are not expected to display knowledge of statutes dealing with particular types of contract, such as the Consumer Credit Act 1974. (Some parts of the Sale of Goods Act 1979 are an exception to this, however see Chapter 5: 'The terms of the contract', section 5.2.)

1.4.2 European Union law

The syllabus refers to the inclusion of relevant European Union legislation. At the present time the most significant part of the general law of contract which is directly affected by European law is that dealing with unfair terms. (This is covered in Chapter 6: 'The regulation of the terms of the contract', section 6.3.) Other directives which are important to the general law of contract are Directive 2000/31/EC on Electronic Commerce OJ 2000 L 178/1 and Council Directive 94/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees OJ L 171 7.7.99.

1.4.3 The 'consensus' theory of contract and objective interpretation

In the past, many writers and courts placed much emphasis on the need for a 'meeting of minds' or '*consensus ad idem*' for the making of contracts. This reliance on actual intention was an expression of *laissez-faire* philosophies and a belief in unfettered freedom of contract. This subjective approach to the making of contracts has now largely been abandoned, though its influence can still be detected in certain rules. In general, what matters today is not what meaning a party actually intended to convey by his words or conduct, but what meaning a **reasonable person** in the other party's position would have understood him to be conveying. This is known as the process of 'objective interpretation'.

1.4.4 Finding 'the intention of the parties'

You will soon discover that, in spite of the disappearance of the subjective approach to the making of contracts, the law frequently uses 'the intention of the parties' as a test for resolving difficulties. It is most important to appreciate that this does not refer to the parties' actual intentions – which may well have been conflicting – but to the 'proper inference' from the facts as a whole **as to what would have been the intentions of a reasonable person in the position of the parties**. When deciding what is the 'proper' inference a judge has considerable room for manoeuvre and is in reality reaching a conclusion based upon the justice of the case as much as upon any inference in the strict sense. For an instructive illustration of this process see the judgment of Denning LJ in *Oscar Chess v Williams* (1957) – in Poole's casebook – where the court had to decide whether a warranty was intended. Note that Lord Denning defines the test by reference to 'an intelligent bystander', but it is clear that it is the court's responsibility to draw the inference and that the intelligent bystander is merely an alias for the judge.

1.4.5 Law and equity

At one time in England and Wales, there were two separate court systems which dealt with contract cases: courts of equity and courts of common law. In the latter part of the nineteenth century, these two courts were amalgamated and one court dealt with both law and equity. Equity had developed its own principles, considerations and remedies to contractual problems. Equity is said to supplement the common law where it is deficient. In the course of studying contract law you will see many equitable principles in place (see, for example, estoppel and undue influence). Equitable intervention in a contractual problem is based on the conscience of the parties; accordingly, equitable relief is discretionary and it is bound by a distinct series of considerations. An example of such a consideration (sometimes referred to as a maxim) is that 'he who comes to equity must come with clean hands'; that is to say, he who seeks equitable relief must himself not be guilty of some form of misconduct or sharp practice. You will see the particular restrictions placed upon the granting of equitable relief as you proceed through the subject guide (see, for example, rescission for misrepresentation).

1.5 Plan of the subject guide

In line with the order of topics in the syllabus, the guide is structured as follows.

- ▶ Part I of the guide deals first with the requirements for the making of a contract (Chapters 2, 3 and 4).
- ▶ Part II deals with the content of a contract and some of the regulations of the terms of a contract (Chapters 5 and 6).
- ▶ Part III deals with the capacity to contract – the emphasis placed is upon minors' contracts (Chapter 7).
- ▶ Part IV deals with vitiating elements in the formation of a contract (Chapters 8, 9 and 10).
- ▶ Part V deals with the question of who can enforce the terms of a contract (Chapter 11).
- ▶ Part VI deals with illegality and public policy (Chapters 12 and 13).
- ▶ Part VII deals with the discharge of a contract (Chapters 14 and 15).
- ▶ Part VIII deals with remedies for a breach of contract (Chapters 16 and 17).

Topics not included in the syllabus

Although the following topics are touched upon in the recommended books (and covered in some detail in the larger books), they are excluded from the present syllabus.

- ▶ Requirements as to the form of contracts.
- ▶ Gaming and wagering contracts.
- ▶ Assignment (including negotiability).
- ▶ Agency.

1.6 Format of the examination paper

Important: the information and advice given in the following section are based on the examination structure used at the time this guide was written. However, the University can alter the format, style or requirements of an examination paper without notice. Because of this we strongly advise you to check the rubric/instructions on the paper you actually sit.

Past examination papers can be a useful pointer to the type of questions which future papers will probably include, but you should take care not to read too much into the style and format of past papers. Remember that, in this as in other subjects, the Examiners may change the format from year to year – for example, by requiring a different number of questions to be answered, by splitting a paper into Part A and Part B (with some questions to be answered from each part) or by making some questions compulsory. You must always read and comply with the instructions for the particular paper you are taking. The annual *Student Handbook* will normally give advance warning of changes in the format of question papers, but the Examiners will have no sympathy with a candidate who does not read the instructions properly.

1.6.1 'Spotting' questions

As we mentioned at the beginning of this Introduction, there is no guarantee that there will be a question on any particular topic in any given examination paper. It is a mistake, therefore, to assume that topic A is so important that the Examiners are bound to set a question on it. You should bear this in mind when deciding how many topics you need to have thoroughly revised as you go into the examination. It is also worth noting that questions may easily involve more than one topic.

1.6.2 Examination technique in general

Make the most of your knowledge by observing a few simple rules:

1. Write legibly, using a good dark pen. If necessary, write more slowly than normal to improve legibility – the time lost will be amply repaid by not having an irritated Examiner.
2. Complete the required number of questions, including all parts of questions with two or more parts.
3. Plan your time so that you spend about the same amount of time on each question. One of the worst mistakes you can make is to overrun on the first two answers: you are not likely to improve much on the quality of those answers and you will only increase the pressure and tension while you are trying to finish the other questions with inadequate time remaining.
4. Read the questions very carefully looking for hints as to the particular issues the Examiners hope you will discuss. Think about what the Examiners are asking you to do: what is the question about? It is not the **quantity** you write but how well you analyse the question and identify the relevant issues that will determine the quality of your answers. Do not waste time repeating the facts of the question or setting out the whole of the law on a topic when the question is only about part of it. **Irrelevant material not only earns no marks but actually detracts from the quality of the answer as a whole.**
5. Remember above all that the Examiners are particularly interested in how well you know the case law: always try to argue from **named** cases. Avoid merely listing a lot of case names: select the most relevant cases and show how and to what extent each one supports your argument. State the facts briefly, say which court decided the case (especially if it is a Court of Appeal or Supreme Court decision) and indicate the process of reasoning which led the judges to decide the case in the way they did. (For example, did they decline to follow an earlier decision and, if so, why?) Even an 'essay' question will be looking for this sort of discussion of the case law.
6. It is very important to plan out your answer in a rough form (on separate pages) before you begin to write your answer. An essential technique is to write out a 'shopping list' of the points – and the cases – which you intend to cover. If there is a significant chronology in the question, make a list of the sequence of events with their dates/times. You should develop a logical order of presenting your points: many points will have to precede others. Ideally your lists should be on a piece of paper that you can refer to **at all times** while writing the answer without having to

turn over pages in the answer book. If you do not make such lists, or do not have them where you can easily refer to them, you are bound to forget something.

7. Remember that arguments – the exploration of possibilities – are more important than conclusions, so you should not feel obliged to come down too firmly on one side nor should you be inhibited by the fact that you are not sure what the ‘correct’ answer is. It is in the nature of the English system of judicial precedent that there is nearly always room for argument about the scope of a previous ruling, even by the House of Lords, so that it is quite possible, even likely, that more than one view is tenable. It is far better to put forward a reasoned submission which the Examiners may perhaps disagree with than to try and dodge the issue by saying – as surprisingly many candidates do – ‘As the law is unclear (or, the authorities are conflicting) it will be for the court to decide’.

Make sure that you answer the question which the Examiners have asked. Think carefully about what the question asks of you and provide an answer to that question – not to a related (or even worse, unrelated) topic.

Enjoy your studies – and good luck.

NOTES

Part I Requirements for the making of a contract

2 Offer and acceptance

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Introduction

The law of contract is about the enforcement of promises. Not all promises are enforced by courts. To enforce a set of promises, or an agreement, courts look for the presence of certain elements. When these elements are present a court will find that the agreement is a contract. This is a somewhat artificial process. To a certain extent, courts will find that some agreements **simply look like contracts** and they then reason backward – and find the elements necessary to form a contract.

As a student you need to be aware of the elements required to constitute an enforceable contract.

To say that we have a contract means that the parties have **voluntarily assumed liabilities with regard to each other**. The process of agreement begins with an offer. For a contract to be formed, this offer must be unconditionally accepted. The law imposes various requirements as to the communication of the offer and the acceptance. Once there has been a valid communication of the acceptance, the law requires that certain other elements (covered in Chapters 3 and 4 of this guide) are present.

If these elements are not present, a court will not find that a contract exists between the parties. In the absence of a contract, neither party will be bound to the tentative promises or agreements they have made. It is thus of critical importance to determine whether or not a contract has been formed.

LEARNING OUTCOMES

By the end of this chapter and the relevant reading, you should be able to:

- ▶ explain what an offer is
- ▶ distinguish between an offer and other communications
- ▶ state when an offer has been communicated
- ▶ explain what a valid acceptance is (and is not)
- ▶ illustrate the necessity of communicating the acceptance
- ▶ indicate what the exceptions are to the necessity of communicating the acceptance
- ▶ explain what occurs when the offeror stipulates a certain method of acceptance
- ▶ state what happens to an offer which is not accepted
- ▶ illustrate when an offer expires.

2.1 The offer

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.1 'Offer and invitation to treat' to Section 3.7 'Acceptance'.
- Poole, Chapter 2: 'Agreement' – Section 1 'Subjectivity versus objectivity' to Section 4 'Acceptance'.

It is important to understand that it is not the subjective intentions of the parties that determine the legal effect of their words or actions but the objective inference from them. That is to say, the offer is interpreted according to an objective intention – the interpretation the reasonable person in the position of the offeree would place upon the statement or action of the offeror. This is crucial in answering the basic question 'what is an offer?' See *Centrovincial Estates v Merchant Investors Assurance Company* (1983) regarding the objective requirement.

An offer is an expression of willingness to contract on certain terms. It must be made with the **intention** that it will become **binding** upon acceptance. There must be no further negotiations or discussions required. The nature of an offer is encapsulated by two cases involving the same defendant, Manchester City Council. The Council decided to sell houses that it owned to sitting tenants. In two cases, the claimants entered into agreements with the Council. The Council then resolved **not** to sell housing unless it was contractually bound to do so. In these two cases the question arose as to whether or not the Council had entered into a contract.

In one case, *Storer v Manchester City Council* (1974), the Court of Appeal found that there was a binding contract. The Council had sent Storer a communication that they intended would be binding upon his acceptance. All Storer had to do to bind himself to the later sale was to sign the document and return it.

In contrast, however, in *Gibson v Manchester City Council* (1979), the Council sent Gibson a document which asked him to make a formal invitation to buy and stated that the Council 'may be prepared to sell' the house to him. Gibson signed the document and returned it. The House of Lords held that a contract had not been concluded because the Council had not made an offer capable of being accepted. Lord Diplock stated:

The words 'may be prepared to sell' are fatal... so is the invitation, not, be it noted, to accept the offer, but 'to make formal application to buy' on the enclosed application form. It is... a letter setting out the financial terms on which it may be the council would be prepared to consider a sale and purchase in due course.

An important distinction between the two cases is that in *Storer's* case there was an agreement as to price, but in *Gibson's* case there was not. In *Gibson's* case, important terms still needed to be determined.

It is very important to realise from the outset that not all communications will be offers. They will lack the requisite intention to be bound upon acceptance. If they are not offers, what are they? At this point, we will distinguish an offer from other steps in the negotiation process. Other steps in the negotiation process might include a statement of intention, a supply of information or an invitation to treat. We will examine these in turn.

2.1.1 A statement of intention

In this instance, one party states that he **intends** to do something. This differs from an offer in that he is not stating that he **will** do something. The case of *Harris v Nickerson* (1873) illustrates this point. The auctioneer's advertisement was a statement that he intended to sell certain items; it was not an offer that he **would** sell the items.

2.1.2 A supply of information

In this instance, one party provides information to another party. He supplies the information to enlighten the other party. The statement is not intended to be acted upon. See *Harvey v Facey* (1893) where one party telegraphed, in response to the query of the other, what the lowest price was that he would accept for his property.

2.1.3 An invitation to treat

This is a puzzling term. An invitation to treat is an indication of a willingness to conduct business. It is an invitation to make an offer or to commence negotiations. Courts have considered whether or not a communication was an offer or an invitation to treat in a wide variety of circumstances.

You should examine the following instances where courts have found that the communication was not an offer but an invitation to treat.

- a. A **display of goods** is generally an invitation to treat.

See *Pharmaceutical Society v Boots* (1953) (note the rationale behind treating the display as an invitation to treat rather than as an offer) and *Fisher v Bell* (1961). In contrast, where the display is made by a machine, the display will probably be an offer (*Thornton v Shoe Lane Parking* (1971)).

ACTIVITY 2.1

Your local grocery shop places a leaflet through your letterbox. On the leaflet is printed 'Tomorrow only, oranges are at a special low, low price of 9p/kilo'.

Has the grocery shop made you an offer? If you visit the shop, must they sell you oranges at this price?

- b. An **advertisement** is an invitation to treat.



See *Partridge v Crittenden* (1968) – the advertisement of a bilateral contract. The form of the contract will give rise to different results – *Carlill v Carbolic Smoke Ball Company* (1893) decided that an advertisement was a unilateral offer.

Figure 2.1 Partridge advertised 'Bramblefinch cocks, Bramblefinch hens, 25s ea'

ACTIVITY 2.2

How were the facts of *Carlill v Carbolic Smoke Ball Company* different from the usual situation involving an advertisement?

- a. A **request for tenders** is an invitation to treat and the tender is the offer. See *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* (1985).

Note, however, that the invitation to treat may contain an implied undertaking to consider all conforming tenders, as in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* (1990).

- b. An **auctioneer's request for bids** is an invitation to treat.

The bid is an offer; when the auctioneer brings his hammer down he has accepted the offer. In the case of auctions without a reserve price, the auctioneer enters into a collateral (or separate) contract. The nature of the collateral contract is that the auctioneer will accept the highest bid. See *Warlow v Harrison* (1859) and *Barry v Davies* (2000).



Figure 2.2 The advertisement for Carbolic Smoke Balls

SELF-ASSESSMENT QUESTIONS

1. How does an invitation to treat differ from an offer?
2. Does a railway or airline timetable constitute an offer?
3. How do courts treat the display of goods in a shop window differently from a display in an automated machine?

Summary

A contract begins with an offer. The offer is an expression of willingness to contract on certain terms. It allows the other party to accept the offer and provides the basis of the agreement. An offer exists whenever the objective inference from the offeror's words or conduct is that she intends to commit herself legally to the terms she proposes. This commitment occurs without the necessity for further negotiations. Many communications will lack this necessary intention and thus will not be offers. They may be statements of intention, supplies of information or invitations to treat. Although the distinction between an offer and other steps in the negotiating process is easy to state in theory, in practice, difficult cases arise.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcomes:

- ▶ explain what an offer is
- ▶ distinguish between an offer and other communications (e.g. an invitation to treat, a request for information, a statement of intention).

USEFUL FURTHER READING

- Anson, Chapter 2.
- Unger, J. (1953) 'Self-service shops and the law of contract', 16 MLR 369.
- Winfield (1939) 'Some aspects of offer and acceptance', 55 LQR 499.

2.2 Communication of the offer

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.9 'Acceptance in ignorance of the offer'.
- Poole, Chapter 2: 'Agreement' – Section 4C 'Acceptance must be made in response to the offer'.

To be effective an offer must be communicated: there can be no acceptance of the offer without knowledge of the offer. The reason for this requirement is that if we say that a contract is an agreed bargain, there can be no agreement without knowledge. There can be no 'meeting of the minds' if one mind is unaware of the other. Stated another way, an acceptance cannot 'mirror' an offer if the acceptance is made in ignorance of the offer.

The authorities are, however, divided on the need to communicate the offer. In *Gibbons v Proctor* (1891) a policeman was allowed to recover a reward when he sent information in ignorance of the offer of reward. The better view is thought to be expressed in the Australian case of *R v Clarke* (1927):

there cannot be assent without knowledge of the offer; and ignorance of the offer is the same thing whether it is due to never hearing of it or forgetting it after hearing.

The case of *Tinn v Hoffman* (1873) deals with the problem of cross-offers.

ACTIVITY 2.3

Was the decision in *R v Clarke* influenced by the consensus theory of contract? Should it have been?

ACTIVITY 2.4

How might the decision have been different if Clarke had been a poor but honest widow?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcome:

- ▶ state when an offer has been communicated.

USEFUL FURTHER READING

- Anson, Chapter 2.

2.3 Acceptance of the offer

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.7 'Acceptance'.
- Poole, Chapter 2: 'Agreement' – Section 4 'Acceptance'.

For a contract to be formed, there must be an acceptance of the offer. The acceptance must be an agreement to each of the terms of the offer. It is sometimes said that the acceptance must be a 'mirror image' of the offer.

The acceptance can be by words or by conduct. See *Brogden v Metropolitan Railway Company* (1871), where the offeree accepted the offer by performance.

Acceptance occurs when the offeree's words or conduct give rise to the objective inference that the offeree assents to the offeror's terms: *Day Morris Associates v Voyce* (2003).

If the offeree attempts to add new terms when accepting, this is a counter-offer and not an acceptance. A counter-offer implies a rejection of the original offer, which is thereby destroyed and cannot subsequently be accepted. See *Hyde v Wrench* (1840).

Where the offeree queries the offer and seeks more information, this is neither an acceptance nor a rejection and the original offer stands. See *Stevenson, Jacques & Co v McLean* (1880).

In some cases, the parties will attempt to contract on (differing) standard forms. In this instance, there will be a 'battle of the forms' with offers and counter-offers passing to and fro. The Court of Appeal has held that the 'last shot' wins this 'battle of the forms'. See *Butler Machine Tool v Ex-Cell-o* (1979) and *Tekdata Interconnections Ltd v Amphenol Ltd* (2009).

ACTIVITY 2.5

A wrote to B offering 300 bags of cement at £10 per bag. B wrote in reply that she was very interested but needed to know whether it was Premium Quality cement.

The following morning, soon after A read B's letter, B heard a rumour that the price of cement was about to rise. She immediately sent a fax to A stating, 'Accept your price of £10 for Premium Quality'. Assuming that the cement actually is Premium Quality, is there a contract? If so, does the price include delivery? Explain your reasoning.

ACTIVITY 2.6

What is the position under the 'last shot rule' if, after the exchange of forms, the seller fails to deliver the goods?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcome:

- ▶ explain what a valid acceptance is (and is not).

USEFUL FURTHER READING

- Anson, Chapter 2.

2.4 Communication of the acceptance

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.8 'Communication of the acceptance', and Section 3.10 'Prescribed method of acceptance' to Section 3.14 'Termination of the offer'.
- Poole, Chapter 2: 'Agreement' – Section 4D 'Communication of the acceptance to the offeror'.

The general rule is that acceptance is not effective until it is communicated to the offeror. This is sometimes expressed by saying that the acceptance cannot be made through silence. See *Felthouse v Bindley* (1862). The offeror cannot waive communication if that would be to the detriment of the offeree. This rule is not, however, an absolute rule (see *Vitol SA v Norelf Ltd* (1996)).

ACTIVITY 2.7

You offer to buy a kilo of oranges from your local shop for 9p. Nothing further is said, nor do you receive any written correspondence. The next day, however, a kilo of oranges arrives at your house from the local shop. Is there a valid acceptance of the contract? Has there been a communication of the acceptance?

See *Brogden v Metropolitan Railway Company* (1871).

The general rule is displaced in the case of a unilateral contract. A unilateral contract is one where one party makes an offer to pay another if that other party performs some act or refrains from some act. The other party need make no promise to do the act or refrain from the act. In these cases, acceptance of the offer occurs through performance and there is no need to communicate acceptance in advance of

performance. An example of the offer of a unilateral contract is an offer of a reward for the return of a lost cat.

In the case of *Carlill v Carbolic Smoke Ball Company* (1893) it was established that performance is the acceptance of the offer and there is no need to communicate the attempt to perform. Communication of the acceptance is waived because it would be unreasonable of the offeror to rely on the absence of a communication which would have been superfluous or which no reasonable person would expect to be made.

SELF-ASSESSMENT QUESTIONS

1. What was the detriment to the offeree in *Felthouse v Bindley*?
2. Could an offeror use this case to avoid liability?

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcome:

- ▶ illustrate the necessity of communicating the acceptance.

USEFUL FURTHER READING

- Anson, Chapter 2.

2.5 Exceptions to the need for communication of the acceptance

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.12 'Exceptions to the rule requiring communication'.
- Poole, Chapter 2: 'Agreement' – Section 4D 'Communication of the acceptance to the offeror'.

As we saw above, the general rule is that for an acceptance to be valid it must be communicated to the offeror. It must be brought to the offeror's attention. To this general rule there are certain exceptions – situations where the law does not require communication of the acceptance. One such exception concerning unilateral contracts was considered above. The other principal exception is the postal acceptance rule.

2.5.1 Where the offeror has waived the requirement of communication

As we have seen above, in certain circumstances the offeror may waive the necessity for communication. This is what occurred in *Carlill v Carbolic Smoke Ball Co.*

A weakness to this exception is that it appears to be of limited application where there is a bilateral contract. In *Felthouse v Bindley*, the argument can be made that the uncle had clearly waived any need for the nephew to communicate his acceptance of the offer and yet the court held that the offer had not been accepted.

2.5.2 The postal acceptance rule

Communication by post gives rise to special practical difficulties. An offer is posted. The offeree receives the offer and posts her acceptance. The letter of acceptance will take several days to arrive. At what point is the acceptance good? If one waits until the offeror receives the letter, how will the offeree know when this is? The offeree has known from the time she posted the letter that she has accepted the offer. There is also the occasional problem of the letter that never arrives at its destination.

To overcome these problems, the courts devised an exception to the general requirement of communication (which would have been that the acceptance is only good when the letter arrives). The exception was devised in the cases of *Adams v Lindsell* (1818) and *Household Fire Insurance v Grant* (1879).

These decisions establish the 'postal acceptance rule', that is, that acceptance is complete when posted. This puts the risk of delay and loss on the offeror. It is important to understand that the rule is an **exception** to the general rule requiring communication.

The postal acceptance rule will only prevail in certain circumstances. It will prevail where use of the post was reasonably contemplated by the parties or stipulated by the offeror. See *Household Fire Insurance v Grant* (1879).

It may be that the post is the only reasonable form of communication available. See *Henthorn v Fraser* (1892).

The postal acceptance rule will not allow a contract to be concluded by posting the acceptance where the letter is incorrectly addressed by the offeree. The offer may accept the risk of delay occasioned by the post but not the carelessness of the offeree: *LJ Korbetis v Transgrain Shipping BV* (2005).

The operation of the postal acceptance rules creates practical difficulties. The greatest problem is that contracts can be formed without the offeror being aware of the contract. For example, an offeror makes an offer. Unbeknown to him, the offeree accepts. The offeror then revokes the offer before receiving the postal acceptance. The offeror contracts with another party over the same matter – and then receives the postal acceptance from the original offeree. The offeror is now in breach of his contract with the original offeree.

Partly because of these problems and partly because of technological advances (the post is no longer a such crucial method of communication), courts seem to be confining the scope of the postal acceptance rule. This is a rationale behind the decision in *Holwell Securities v Hughes* (1974). In this case, the postal acceptance rule did not apply because the offeror did not intend that it would apply. While this case is authority for the proposition that the terms of an offer must be met for acceptance to be valid, it also illustrates the reservations modern courts have over the postal acceptance rule.

As modern forms of communication such as fax and email have become almost instantaneous, courts have shown a marked reluctance to extend the postal acceptance rule to these new forms of communication. However, in an early case involving a telegram, a form of the postal acceptance rule was applied. See *Bruner v Moore* (1903).

In later cases involving telexes, the courts refused to extend the application of the postal acceptance rules. See *Entores v Miles Far East Corp* (1955) and *Brinkibon Ltd v Stahag Stahl* (1982).

These cases are also important for the principles they establish with respect to instantaneous forms of communication.

English contract law awaits a case involving an almost instantaneous communication – such as a fax or an email. It is clear that a contract can be formed through such mediums (see, for example, *Allianz Insurance Co-Egypt v Aigaion Insurance Co SA* (2008)). Because of the technology involved in both these forms of communication they are not entirely instantaneous. An email, in particular, may take some time to arrive at its destination, depending upon the route it takes to its recipient. As Poole has suggested there are two possible approaches to the email communication of the acceptance: postal analogy or receipt rule.

ACTIVITY 2.8

What rules do you think courts should adopt for communication by fax or email?

SELF-ASSESSMENT QUESTIONS

1. What reasons have been given by the courts for the postal acceptance rule?
2. A posts a letter offering to clean B's house. B posts a letter accepting A's offer. Later in the day, B's house burns down and B now no longer needs a house

cleaner. B immediately posts a letter to A rejecting A's offer. Both of B's letters arrive at the same time. Is there a contract or not? See *Countess of Dunmore v Alexander* (1830).

3. In what circumstances will the postal acceptance rules not operate?
4. When, if ever, can an offeror waive the need for communication?

Summary

For a contract to be formed, the acceptance of an offer must be communicated. There are exceptions to this general rule. The most significant of these exceptions is the postal acceptance rule. The postal acceptance rule is, however, something of an anachronism in the modern world and is unlikely to be extended in future cases.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcome:

- ▶ indicate what the exceptions are to the necessity of communicating the acceptance.

USEFUL FURTHER READING

- Anson, Chapter 2.
- Hudson, A. (1966) 'Retraction of letters of acceptance', 82 LQR 169.
- Gardner, S. (1992) 'Trashing with Trollope: a deconstruction of the postal rules', 12 OJLS 170.

2.6 Method of acceptance

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.10 'Prescribed method of acceptance'.
- Poole, Chapter 2: 'Agreement' – Section 4B 'The offeror prescribes the method of acceptance'.

Sometimes an offeror may stipulate that acceptance is to be made using a specific method. See *Eliason v Henshaw* (1819) and *Manchester Diocesan Council for Education v Commercial and General Investments* (1970).

In other cases the required method for communicating acceptance may also be inferred from the making of the offer. See *Quenerduaine v Cole* (1883).

The problem that arises is this: if the offeree uses another method of acceptance, does this acceptance create a contract? The answer is that if the other method used is no less advantageous to the offeror, the acceptance is good and a contract is formed. This is the result unless the offeror stipulates a certain method of acceptance **and** further stipulates that only this method of acceptance is good. See *Manchester Diocesan Council for Education v Commercial and General Investments* (1970).

SELF-ASSESSMENT QUESTIONS

1. Where a method of acceptance has been prescribed by the offeror:
 - a. May the offeree choose to use another (equally effective) method of communicating his acceptance?
 - b. What does equally effective mean?
 - c. Whose interest should prevail?
2. Can an offer made by fax be accepted by letter?

Summary

If an offeror intends that a certain method of acceptance is to be used, he must stipulate this method **and** that only an acceptance using this method is to be used. If he only stipulates a method, an offeree can use another method provided that the other method is no less advantageous than the method stipulated.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcome:

- ▶ explain what occurs when the offeror stipulates a certain method of acceptance.

USEFUL FURTHER READING

- Anson, Chapter 2.

2.7 The end of an unaccepted offer

ESSENTIAL READING

- McKendrick, Chapter 3: 'Offer and acceptance' – Section 3.14 'Termination of the offer'.
- Poole, Chapter 2: 'Agreement' – Section 5 'Revocation of an offer'.

Offers do not exist indefinitely, open for an indeterminate time awaiting acceptance. Indeed, some offers may never be accepted. What we will consider at the conclusion of this chapter is what happens to an offer before it has been accepted. There is no legal commitment until a contract has been concluded by the acceptance of an offer.

2.7.1 Change of mind

Because there is no legal commitment until a contract has been formed, either party may change their mind and withdraw from negotiations. See *Offord v Davies* (1862) and *Routledge v Grant* (1828).

In situations where an offeror has stipulated that the offer will be open for a certain time period, he or she can nevertheless withdraw the offer within this time period. This will not be the case, however, where the offeror is obliged (by a separate binding collateral contract) to keep the offer open for a specified period of time.

For the revocation of an offer to be effective, there must be actual communication of the revocation. See *Byrne v van Tienhoven* (1880).

It is not necessary for revocation to be communicated by the offeror. Communication to the offeree through a reliable source is sufficient. See *Dickinson v Dodds* (1876).

ACTIVITY 2.9

Your neighbour offers to sell you her car for £10,000. She tells you to 'think about it and let me know by Monday'. On Saturday, she puts a note under your door to say 'forget it – I want to keep my car'. Can she do this? Explain.

By what process must the offeror of a unilateral contract revoke his offer? The problem of an appropriate process exists when the offer is made to the world. In this situation, what must the offeror do to alert 'the world'? English law provides no answer to this question, but see *Shuey v USA* (1875).

If the offeree rejects an offer, it is at an end. See *Hyde v Wrench* (1840).

Different problems arise when it is the offeree who changes his or her mind. For example, if after posting a letter of acceptance, the offeree informs the offeror by telephone, before the letter arrives, that they reject the offer, should the act of posting an acceptance prevail over the information actually conveyed to the offeror? In the absence of English cases the books refer to a number of cases from other jurisdictions – see *Dunmore v Alexander* (1830) (Scotland) and *Wenkheim v Arndt* (1873) (New

Zealand) but when citing them, it is important to emphasise that they are not binding – and indeed have very little persuasive authority. The question must therefore be answered primarily as a matter of principle. Treitel suggests that ‘the issue is whether the offeror would be unjustly prejudiced by allowing the offeree to rely on the subsequent revocation’.

2.7.2 If a condition in the offer is not fulfilled, the offer terminates

Where the offer is made subject to a condition which is not fulfilled, the offer terminates. The condition may be implied. See *Financings Ltd v Stimson* (1962). In this case, the offeror purported to accept an offer to purchase a car after the car had been badly damaged.

2.7.3 Death: if the offeror dies, the offer may lapse

Again, a point on which the cases divide. On the one hand, *Bradbury v Morgan* (1862) 158 ER 877 (Ex) held that the deceased offeror’s estate was liable on the offer of a guarantee after the death of the offeror. However, *obiter dicta* in *Dickinson v Dodds* (1876) state that death of either party terminated the offer because there could be no agreement. The best view is probably that a party cannot accept an offer once notified of the death of the offeror but that in certain circumstances the offer could be accepted in ignorance of death. The death of an offeree probably terminates the offer in that the offeree’s personal representatives could not purport to accept the offer.

2.7.4 Lapse of an offer

The offeror may set a time limit for acceptance; once this time has passed the offer lapses. In many cases, the offeror can revoke the offer before the time period lapses provided that the offer has not been accepted. See *Offord v Davies* (1862).

In cases in which no time period is stipulated for the offer, an offeree cannot make an offeror wait forever. The offeror is entitled to assume that acceptance will be made within a reasonable time period or not at all. What a reasonable time period is will depend upon the circumstances of the case. See *Ramsgate Victoria Hotel v Montefiore* (1866).

SELF-ASSESSMENT QUESTIONS

1. Why can the offeror break his or her promise to keep the offer open for a stated time?
2. In a unilateral contract which is accepted by performance, when has the offeree started to perform the act (so as to prevent revocation by the offeror)? Does the offeror need to know of the performance?
3. How can the offeror inform all potential claimants that the offer of a reward has been cancelled?
4. Will there be a contract if the offeree posts a letter rejecting the offer but then informs the offeror by telephone, before the letter arrives, that he accepts the offer?
5. What is the purpose of implying that the offer is subject to a condition?

Summary

Until an offer is accepted, there is no legal commitment upon either party. Up until acceptance, either party may change their mind. An offeror may revoke an offer or an offeree may reject an offer.

- ▶ An unaccepted offer expires either:
 - ▶ at the end of any time period stipulated, or
 - ▶ within a reasonable time period where no time period is stipulated.

- ▶ An offer will lapse where it is made on an unfulfilled condition.
- ▶ An offer **may** lapse when the offeror dies.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to achieve the following learning outcomes:

- ▶ state what happens to an offer which is not accepted
- ▶ illustrate when an offer expires.

USEFUL FURTHER READING

- Anson, Chapter 2.

EXAMINATION ADVICE

The detailed rules of offer and acceptance provide a ready source of problems and difficulties on which Examiners can draw. Here are some examples.

- ▶ Is a particular statement an offer or an invitation to treat?
- ▶ Is there a counter-offer or is it merely an enquiry?
- ▶ When does a posted acceptance fall outside the postal rule?
- ▶ Was the offeror or offeree free to have second thoughts?
- ▶ When is a telephone call recorded on an answering machine actually received?
- ▶ When is an email received?

There are also several everyday transactions where the precise contractual analysis is not immediately apparent – the motorist filling up with petrol (gas), the passenger riding on a bus, the tourist buying a ticket for the Underground (subway) from a machine and so on. The fact that some of these problems are not covered by authority does not make them any less attractive to Examiners – indeed, the opposite might well be the case. The key to most problems of offer and acceptance is the idea that the law should give effect to actual communication wherever possible.

SAMPLE EXAMINATION QUESTIONS

Question 1 Alice wrote to Bill offering to sell him a block of shares in Utopia Ltd. In her letter, which arrived on Tuesday, Alice asked Bill to 'let me know by next Saturday'. On Thursday Bill posted a reply accepting the offer. At 6pm on Friday he changed his mind and telephoned Alice. Alice was not there but her telephone answering machine recorded Bill's message stating that he wished to withdraw his acceptance.

On Monday Alice opened Bill's letter, which arrived that morning, and then played back the message on the machine.

Advise Alice.

Question 2 Cyril, a stamp dealer, had a rare Peruvian 5 cent blue for sale. He wrote to Davina, a collector who specialises in Peruvian stamps, asking whether she would be interested in purchasing it. Davina wrote in reply, 'I am willing to pay £500 for the "blue"; I will consider it mine at that price unless I hear to the contrary from you and will collect it from your shop on Friday next week.'

Advise Davina as to the legal position:

- a. if Cyril disregarded Davina's letter and sold the stamp to Eric for £600
- b. if Cyril put the stamp on one side in an envelope marked 'Sold to Davina' but Davina decided that she no longer wished to buy it.

ADVICE ON ANSWERING THE QUESTIONS

Question 1 It is important to break the question down into its constituent issues. You are considering each of these issues with a view to determining whether or not a

contract has been formed. Bill will argue that he is not obliged to purchase the shares because no contract has been formed.

The issues are:

- a. What is the effect of Alice writing to Bill to offer to sell him shares?
- b. What is the effect of Alice's stipulation as to the time the offer is open?
- c. What is the effect of Bill's posting a reply?
- d. What is the effect of Bill's change of mind? Is there effective communication when a message is left on an answering machine?
- e. Which of Bill's two communications is determinative?

When the issues are listed in this form it is apparent that the biggest issue is whether or not a contract has been formed. This is dependent upon whether Alice's offer has been accepted. This, in turn, depends upon whether Bill has communicated his acceptance or his rejection.

We will examine these issues in turn.

- a. Alice's letter appears to be an offer within the criteria of *Gibson v Manchester City Council* and *Storer v Manchester City Council*. You should outline these criteria and apply them to the facts – sometimes the designation of an 'offer' in a problem question or in everyday life turns out not to be an offer in the legal sense.
- b. Alice's stipulation that the offer is open for one week is not binding (apply the criteria in *Offord v Davies*) unless there is a separate binding contract to hold the offer open. There does not appear to be such a separate binding agreement.
- c. Because Bill posts his letter of acceptance, we need to consider whether or not the postal acceptance rules apply. Consider the criteria in *Household Fire Insurance v Grant*. Does the case apply here? In the circumstances, it probably does. Alice has initiated communications by post and thus probably contemplates that Bill will respond by post. In these circumstances, the acceptance is good when Bill posts the letter – it is at this point that a contract is formed. It does not matter that the letter does not arrive until Monday (at which point the offer will have expired, given Alice's stipulation as to the time period).

A possible counter argument to this is that Alice asked Bill to let her know by Saturday – and this 'let me know' means that there must be actual knowledge of his acceptance – that it must really be communicated. This necessity for actual communication means that Bill's acceptance is not good until Monday when Alice actually opens the letter. To apply this counter argument, one needs to consider the criteria set out in *Holwell Securities v Hughes*. One might also note that since that decision, courts are reluctant to extend the ambit of the postal acceptance rule.

- d. Bill changes his mind. Here there is no authority as to the effect of his change of mind. In addition, given the two possible positions in point (c) above, two possible outcomes exist. If the postal acceptance rules apply, then a contract has been formed and Bill's later change of mind cannot upset this arrangement. However, this seems a somewhat absurd result since Alice learns almost simultaneously of the acceptance and the rejection. Bill has attempted to reject the offer by a quicker form of communication than the post. In these circumstances, you could apply the reasoning of *Dunmore v Alexander* and state that no contract has been formed between the parties. In addition, given the reservations of the court in *Holwell Securities v Hughes*, it seems improbable that a court would rely upon the postal acceptance rule, an unpopular exception to the necessity for communication, to produce an absurd result. The second possible outcome here is that the postal acceptance rules never applied and no contract could be formed until Alice opened the letter. Since she received the rejection at almost the same time, she is no worse off (see reasoning above) by not having a contract. You might also wish to consider the application of the rules for instantaneous

communications in *Entores v Miles Far East Corp* and *Brinkibon v Stahag Stahl*. Should the communication made by telephone be deemed to have been the first received? If so, there is no contract.

- e. This is really the answer to the question. For the reasons stated above, the rejection should be determinative. Accordingly, no contract arises in this situation and Bill is not **obliged** to buy the shares in Utopia Ltd.

Question 2 Note at the outset that in two-part questions such as this you must answer **both** parts (unless clearly instructed that candidates are to answer **either** a or b).

Again, your approach should be to break down the question into its constituent parts:

- ▶ The effect of Cyril's letter – is it an offer or an invitation to treat?
- ▶ The effect of Davina's letter – is it an acceptance? Does the postal acceptance rule apply? Is Davina's letter a statement of intention?
- ▶ Is Davina's letter an offer? Can she waive the necessity for the communication of the acceptance?

By considering these issues, you can determine whether a contract has been formed or not. With respect to part (a), if a contract has been formed, then Cyril is in breach of this contract when he sells the stamp to Eric. You need to consider whether Cyril has made an offer – has he exhibited a willingness to commit on certain terms within *Storer v Manchester City Council* (1974)? Or is his communication an invitation to treat or a step in the negotiation of a contract? If his letter is an offer, it seems reasonable that he expects an acceptance by post and the postal acceptance rules will apply: *Household Fire Insurance v Grant* (1879).

On balance, it seems unlikely that his letter is an offer – it is phrased in terms that seek to elicit information and not to be binding upon further correspondence from Davina. Davina may have made an offer and waived the necessity for further communication – see *Felthouse v Bindley* (1862). It is, however, possible that either Davina never made an offer to buy the stamp (she was merely giving an indication of her top price) or that Cyril never accepted the offer. In these circumstances, no contract has been formed with Davina and Cyril is free to sell the stamp.

With regard to part (b), if Davina has (and can, given the law in this area – see *Felthouse v Bindley* (1862)) made an offer, then Cyril has (if possible) accepted the offer when he takes the step of setting aside the stamp. In these circumstances, a contract has been formed and Davina is obliged to buy the stamp. There are, however, significant weaknesses in reaching this conclusion – primarily that she seems to be indicating the top price she would pay for the stamp and that following *Felthouse v Bindley* (1862) she cannot waive the necessity for communication of the acceptance.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain what an offer is.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can distinguish between an offer and other communications.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state when an offer has been communicated.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain what a valid acceptance is (and is not).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can illustrate the necessity of communicating the acceptance.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can indicate what the exceptions are to the necessity of communicating the acceptance.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain what occurs when the offeror stipulates a certain method of acceptance.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state what happens to an offer which is not accepted.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can illustrate when an offer expires.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
2.1 The offer	<input type="checkbox"/>	<input type="checkbox"/>
2.2 Communication of the offer	<input type="checkbox"/>	<input type="checkbox"/>
2.3 Acceptance of the offer	<input type="checkbox"/>	<input type="checkbox"/>
2.4 Communication of the acceptance	<input type="checkbox"/>	<input type="checkbox"/>
2.5 Exceptions to the need for communication of the acceptance	<input type="checkbox"/>	<input type="checkbox"/>
2.6 Method of acceptance	<input type="checkbox"/>	<input type="checkbox"/>
2.7 The end of an unaccepted offer	<input type="checkbox"/>	<input type="checkbox"/>

Part I Requirements for the making of a contract

3 Consideration

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Introduction

The concept of 'consideration' is the principal way in which English courts decide whether an agreement that has resulted from the exchange of offer and acceptance (as explained in Chapter 2) should be legally enforceable. It is only where there is an element of mutuality about the exchange, with something being given by each side, that a promise to perform will be enforced. A promise to make a gift will not generally be treated as legally binding. It is the presence of consideration which makes this promise binding as a contract. It is possible to see consideration as an important indication that the parties intended their agreement to be legally binding as a contract. Although there is a separate requirement of an intention to create legal relations (discussed in Chapter 4), it is clear that historically this requirement was also fulfilled by the requirement of consideration. While the doctrine of consideration is crucial to English contract law, it has been applied with some flexibility in recent years. In some circumstances, English courts will find that a promise given without consideration is legally binding and this chapter concludes with an examination of these instances. These instances are decided upon on the basis of the doctrine of 'promissory estoppel' and in this area the courts are concerned to protect the reasonable reliance of the party who has relied upon the promise. These instances arise where there is a variation of existing legal obligations.

LEARNING OUTCOMES

By the end of this chapter and the relevant reading, you should be able to:

- ▶ state the essential elements of the concept of 'consideration'
- ▶ explain the significance of consideration to the English law of contract
- ▶ give examples of the types of behaviour which the courts will, or will not, treat as valid consideration
- ▶ describe the situations where the performance of, or promise to perform, an existing obligation will amount to consideration for a fresh promise
- ▶ define 'past consideration'
- ▶ explain the role of consideration in the modification of existing contracts
- ▶ state the essential elements of the doctrine of 'promissory estoppel'
- ▶ explain how the doctrine of promissory estoppel leads to the enforcement of some promises which are not supported by consideration.

3.1 Consideration

ESSENTIAL READING

- McKendrick, Chapter 5: 'Consideration and form' – Section 5.1 'Requirements of form', Section 5.20 'Reliance upon non-bargain promises', Section 5.21 'The role of consideration' and Section 5.29 'Conclusion: the future of consideration'.
- Poole, Chapter 4: 'Enforceability of promises: consideration and promissory estoppel' – Section 1A 'What is consideration?'.

Consideration gives the 'badge of enforceability' to agreements. This is particularly important where the agreement involves a promise to act in a particular way in the future. In exchanges where there is an immediate, simultaneous transfer of, for example, goods for money (as in most everyday shop purchases), the doctrine of consideration applies in theory but rarely causes any practical problems. It is where somebody says, for example, 'I will deliver these goods next Thursday' or 'I will pay you £1,000 on 1 January' that it becomes important to decide whether that promise is 'supported by consideration' (that is, something has been given or promised in exchange). A promise to make a gift at some time in the future will only be enforceable in English law in absence of consideration if put into a special form, that is, a 'deed'. (For the requirements of a valid deed, see Law of Property (Miscellaneous Provisions) Act 1989.) Where a promise for the future is not contained in a deed, then consideration becomes the normal requirement of enforceability.

3.1.1 The definition of consideration

ESSENTIAL READING

- McKendrick, Chapter 5: 'Consideration and form' – Section 5.2 'Consideration defined' to Section 5.6 'Consideration must be sufficient but it need not be adequate' and Section 5.19 'Consideration must move from the promisee'.
- Poole, Chapter 4: 'Enforceability of promises: consideration and promissory estoppel' – Section 1A 'What is consideration?' and Section 1B 'Consideration distinguished from a condition imposed on recipients of gifts'.

Look at the traditional definition of consideration as set out in *Currie v Misa* (1875):

a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other.

You will see that it is based around the concept of a 'benefit' to the person making the promise (the promisor), or a 'detriment' to the person to whom the promise is made (the promisee). Either is sufficient to make the promise enforceable, though in many cases both will be present.

This is generally quite straightforward where one side performs its part of the agreement. This performance can be looked at as detriment to the party performing and a benefit to the other party, thus providing the consideration for the other party's promise. More difficulty arises where the agreement is wholly 'executory' (that is, it is made by an exchange of promises, and neither party has yet performed). It is clear that English law treats the **making** of a promise (as distinct from its performance) as capable of being consideration – see the statement of Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1915) p.855. Thus, in a wholly executory contract, the making of the promise by each side is consideration for the promise made by the other side (so rendering both promises enforceable). This leads to a circular argument. A promise cannot be a detriment to the person making it (or a benefit to the person to whom it is made) unless it is enforceable. But it will only be enforceable if it constitutes such a detriment (or benefit). For this reason it is perhaps better to regard the doctrine of consideration as simply requiring 'mutuality' in the agreement (that is, something being offered by each side to it) rather than trying to analyse it strictly in terms of 'benefits' and 'detriments'.

Consideration must move from the promisee but not necessarily to the promisor.

ACTIVITY 3.1

Suppose that A arranges for B to clean A's windows, and promises to pay B £30 for this work. B does the work. How does the analysis of 'benefit' and 'detriment' apply in identifying the consideration supplied by B for A's promises of payment?

ACTIVITY 3.2

As in 3.1, but this time A pays the £30 immediately, and B promises to clean the windows next Tuesday. What is the consideration for B's promise?

ACTIVITY 3.3

As in 3.1, but A and B arrange for the windows to be cleaned next Tuesday, with A paying £30 on completion of the work. Suppose B does not turn up on Tuesday. Is B in breach of contract?

3.1.2 Consideration must be 'sufficient' but need not be 'adequate'**ESSENTIAL READING**

- McKendrick, Chapter 5: 'Consideration and form' – Section 5.6 'Consideration must be sufficient but it need not be adequate' to Section 5.9 'Compromise and forbearance to sue'.
- Poole, Chapter 4: 'Enforceability of promises: consideration and promissory estoppel' – Section 1C 'Consideration must be sufficient but need not be adequate'.

The requirement that consideration must be 'sufficient' means that what is being put forward must be something which the courts will recognise as legally capable of constituting consideration. The fact that it need not be 'adequate' indicates that the courts are not generally interested in whether there is a match in **value** between what is being offered by each party. Thus in *Thomas v Thomas* (1842) the promise to pay £1 per annum rent was clearly 'sufficient' to support the promise of a right to live in a house: the payment of, or promise to pay, money is always going to be treated as being within the category of valid consideration. On the other hand, the fact that £1 per annum was not a commercial rent was irrelevant, because the courts do not concern themselves with issues of 'adequacy'.

Consider the case of *Chappell v Nestlé* (1960). You will see that Lord Somervell justifies the courts' approach to the issue of 'adequacy' by reference to 'freedom of contract': 'A contracting party can stipulate for what consideration he chooses'. The courts will not interfere just because it appears that a person has made a bad bargain. The person may have other, undisclosed, reasons for accepting consideration that appears inadequate. In the case of *Chappell v Nestlé* the reasoning was presumably that the requirement to send in the worthless wrappers would encourage more people to buy the company's chocolate.

It is sometimes suggested that consideration will not be sufficient if it has no economic value. This explains *White v Bluett* (1853) where a son's promise to stop complaining to his father about the distribution of the father's property was held to be incapable of amounting to consideration. But it is difficult to see that the wrappers in *Chappell v Nestlé* had any economic value either.

ACTIVITY 3.4

Read the case of *Ward v Byham* (1956). Identify the consideration supplied by the mother. Does the consideration meet the requirement of having economic value?

ACTIVITY 3.5

Read the case of *Edmonds v Lawson* (2000). What consideration was supplied by the pupil barrister? Does the consideration meet the requirement of having economic value?

3.1.3 Existing obligations as good consideration

ESSENTIAL READING

- McKendrick, Chapter 5: 'Consideration and form' – Section 5.10 'Performance of a duty imposed by law' to Section 5.18 'Past considerations'.
- Poole, Chapter 4: 'Enforceability of promises: consideration and promissory estoppel' – Section 1C 'Consideration must be sufficient but need not be adequate' and Section 1D 'Part payment of a debt'.
- Chen-Wishart, M. 'Consideration: practical benefit and the Emperor's new clothes', Elements of the Law of Contract study pack.
- Luther, P. 'Campbell, Espinasse and the sailors: text and context in the common law' (1999) 19 *Legal Studies* 526.

There are three aspects to this topic, dealing with three different types of existing obligation which may be argued to constitute 'consideration'.

1. Obligations which arise under the law, independently of any contract.
2. Obligations which are owed under a contract with a third party.
3. Obligations which exist under a contract with a person who has made a new promise, for which the existing obligation is alleged to provide good consideration.

The third situation is, essentially, concerned with the variation of existing contractual obligations as between the parties and the extent to which such variations can become binding.

These three situations will be considered in turn.

An example of the first type of existing obligation would be where a public official (such as a firefighter or a police officer) agrees to carry out one or more of their duties in return for a promise of payment from a member of the public. In that situation the promise of payment will not generally be enforceable. This is either because there is no consideration for the promise (the public official is only carrying out an existing duty) or, more probably, because public policy generally suggests that the law should not encourage the opportunities for extortion that enforcing such a promise would create.

Where, however, the official does **more** than is required by the existing obligation, then the promise of payment **will** be enforceable, as shown by *Glasbrook Bros Ltd v Glamorgan CC* (1925).

ACTIVITY 3.6

In *Collins v Godefroy* (1831), why was the promise of payment unenforceable?

ACTIVITY 3.7

In *Ward v Byham* (1956), why was the father's promise enforceable?

In the second type of situation, which regards the performance of, or promise to perform, an existing obligation owed under a contract with a third party, the position is much more straightforward. The courts have consistently taken the view that this can provide good consideration for fresh promise. Thus it has been applied to the fulfilling of a promise to marry (*Shadwell v Shadwell* (1860) – such a promise at the time being legally binding) and to the unloading of goods by a firm of stevedores, despite the fact that the firm was already obliged to carry out this work under a contract with a third party (*The Eurymedon* (1975)). The Privy Council confirmed, in *Pao On v Lau Yiu Long* (1980), that the promise to perform an existing obligation owed to a third party can constitute good consideration.

The third type of existing obligation – that owed under a contract with the party making the new promise – is the most difficult to employ as consideration. This results from the fact that a principle which was clear, though impractical in some circumstances, has now been modified and the extent of this modification is unclear.

There are two particular cases on this area which it is important you should read in full – *Stilk v Myrick* (1809) and *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991).



Stilk v Myrick was long accepted as establishing the principle that the performance of an existing contractual obligation could never be good consideration for a fresh promise from the person to whom the obligation was owed. The sailors' contract obliged them to sail the ship back home. Thus in bringing the ship back to London they were doing nothing more than they were already obliged to do under their original contract. This could not be good consideration for a promise of additional wages.

Figure 3.1 *Stilk* was contracted to work on a ship owned by *Myrick*

ACTIVITY 3.8

What other explanation can there be for the decision in *Stilk v Myrick*?

ACTIVITY 3.9

How can *Stilk v Myrick* be distinguished from the factually similar case of *Hartley v Ponsonby* (1857), where the recovery of additional payments was allowed?

The Court of Appeal's decision in *Williams v Roffey* raised the question of whether *Stilk v Myrick* could still be said to be good law. The plaintiff carpenters, in completing the work on the flats, appeared to be doing no more than they were already obliged to do under their contract with the defendants.

How could this constitute consideration for the defendants' promise of additional payment? The application of *Stilk v Myrick* would point to the promise being unenforceable.

Yet the Court of Appeal held that the plaintiffs should be able to recover the promised extra payments for the flats which they had completed. The Court came to this conclusion by giving consideration a wider meaning than had previously been thought appropriate. In particular, Glidewell LJ pointed to the 'practical benefits' that would be likely to accrue to the defendants from their promise of the additional money. They would be:

- ▶ ensuring that the plaintiffs continued work and did not leave the contract uncompleted
- ▶ avoiding a penalty clause which the defendants would have had to pay under their contract with the owners of the block of flats
- ▶ avoiding the trouble and expense of finding other carpenters to complete the work.

The problem is that very similar benefits to these could be said to have accrued to the captain of the ship in *Stilk v Myrick*. The main point of distinction between the cases then becomes the fact that no pressure was put on the defendants in *Williams v Roffey* to make the offer of additional payment. In other words, the alternative explanation for the decision in *Stilk v Myrick*, as outlined in the feedback to Activity 3.8, above, is given much greater significance. The effect is that it will be much easier in the future

for those who act in response to a promise of extra payment, or some other benefit, by simply doing what they are already contracted to do, to enforce that promise.

You should note that Glidewell LJ summarises the circumstances where, in his view, the ‘practical benefit’ approach will apply in six points, which relate very closely to the factual situation before the court and emphasise the need for the absence of economic duress or fraud. There is no reason, however, why later courts should be restricted by these ‘criteria’ in applying the *Williams v Roffey* approach.

Williams v Roffey has not affected the related rule that part payment of a debt can never discharge the debtor from the obligation to pay the balance. This rule does not derive from *Stilk v Myrick* but from the House of Lords decision in *Foakes v Beer* (1884). As with the general rule about existing obligations, if something extra is done (for example, paying early, or giving goods rather than money), then the whole debt will be discharged (as held in *Pinnel’s Case* (1602)). But payment of less than is due on or after the date for payment will never provide consideration for a promise to forgo the balance. In *Foakes v Beer* the House of Lords held, with some reluctance, that the implication of the rule in *Pinnel’s Case* was that Mrs Beer’s promise to forgo the interest on a judgment debt, provided that Dr Foakes paid off the main debt by instalments, was unenforceable.

This rule has been regarded with some disfavour over the past 100 years and in some circumstances its effect can be avoided by the doctrine of promissory estoppel (discussed below, at 3.2). It might have been thought that the extension of the scope of consideration in *Williams v Roffey* would have provided the opportunity for a revised view of *Foakes v Beer*. After all, in many situations it may be to the creditor’s ‘practical benefit’ to get part of the debt, rather than to run the risk of receiving nothing at all. In *Re Selectmove* (1995), however, the Court of Appeal held that *Williams v Roffey* had no impact on the *Foakes v Beer* principle. That principle has also subsequently been confirmed by the Court of Appeal in *Ferguson v Davies* (1997).

Some doubt attends the decision in *Williams v Roffey*. A differently constituted Court of Appeal in *Re Selectmove* (1995) confined the ambit of the decision and in *South Caribbean Trading Ltd (‘SCT’) v Trafigura Beeher BV* (2004) Colman J doubted the correctness of the decision in *Williams v Roffey*. In particular, Colman J noted that the decision was inconsistent with the long-standing rule that consideration must move from the promisee.

ACTIVITY 3.10

Read the case of *Foakes v Beer*, preferably in the law reports – (1884) 9 App Cas 605 (although extracts do appear in Poole). Which of the judges expressed reluctance to come to the conclusion to which they felt the common law (as indicated by *Pinnel’s case*) bound them? What was the reason for this reluctance?

ACTIVITY 3.11

Why do you think that the Court of Appeal has been reluctant to overturn the decision in *Foakes v Beer*?

3.1.4 Past consideration

ESSENTIAL READING

- McKendrick Chapter 5: ‘Consideration and form’ – Section 5.18 ‘Past consideration’.
- Poole, Chapter 4: ‘Enforceability of promises: Consideration and promissory estoppel’ – Section 1C ‘Consideration must be sufficient but need not be adequate’.

A further rule about the sufficiency of consideration states that generally the consideration must be given **after** the promise for which it is given to make it enforceable. A promise which is given only when the alleged consideration has been completed is unenforceable. The case of *Re McArdle* (1951) provides a good example. The plaintiff had carried out work refurbishing a house in which his brothers and sister

had a beneficial interest. He then asked them to contribute towards the costs, which they agreed to do. It was held that this agreement was unenforceable, because the promise to pay was unsupported by consideration. The only consideration that the plaintiff could point to was his work on the house, but this had been completed before any promise of payment was made. It was therefore 'past consideration' and so not consideration at all.

As with many rules relating to consideration, there is an exception to the rule about past consideration. The circumstances in which a promise made after the acts constituting the consideration will be enforceable were thoroughly considered in *Pao On v Lau Yiu Long* (1979). Lord Scarman laid down three conditions which must be satisfied if the exception is to operate.

1. The act constituting the consideration must have been done at the promisor's request. (See, for example, *Lampleigh v Braithwait* (1615).)
2. The parties must have understood that the work was to be paid for in some way, either by money or some other benefit. (See, for example, *Re Casey's Patents* (1892).)
3. The promise would be legally enforceable had it been made prior to the acts constituting the consideration.

The second of these conditions will be the most difficult to determine. The court will need to take an objective approach and decide what reasonable parties in this situation would have expected as regards the question of whether the work was done in the clear anticipation of payment.

ACTIVITY 3.12

Why was the approach taken in *Re Casey's Patents* not applied so as to allow the plaintiff to succeed in *Re McArdle*, since it was obvious that the improvement work would benefit all those with a beneficial interest in the house?

ACTIVITY 3.13

Jack works into the night to complete an important report for his boss, Lisa. Lisa is very pleased with the report and says 'I know you've worked very hard on this: I'll make sure there's an extra £200 in your pay at the end of the month'. Can Jack enforce this promise?

SELF-ASSESSMENT QUESTIONS

1. What is an 'executory' contract?
2. Is the performance of an existing obligation owed to a third party good consideration?
3. What principle relating to consideration is the House of Lords' decision in *Foakes v Beer* authority for?

Summary

The doctrine of consideration is the means by which English courts decide whether promises are enforceable. It generally requires the provision of some benefit to the promisor, or some detriment to the promisee, or both. The 'value' of the consideration is irrelevant, however. The performance of existing obligations will generally not amount to good consideration, unless the obligation is under a contract with a third party, or the promisee does more than the existing obligation requires. This rule is less strictly applied following *Williams v Roffey*. Part payment of a debt can never in itself be good consideration for a promise to discharge the balance. Consideration must not be 'past', unless it was requested, was done in the mutual expectation of payment and is otherwise valid as consideration.

REMINDER OF LEARNING OUTCOMES

By this stage, you should be able to:

- ▶ state the essential elements of the concept of 'consideration'
- ▶ explain the significance of consideration to the English law of contract
- ▶ give examples of the types of behaviour which the courts will, or will not, treat as valid consideration
- ▶ describe the situations where the performance of, or promise to perform, an existing obligation will amount to consideration for a fresh promise
- ▶ define 'past consideration'.

USEFUL FURTHER READING

- Anson, Chapter 4.

3.2 Promissory estoppel

ESSENTIAL READING

- McKendrick, Chapter 5: 'Consideration and form' – Section 5.22 'Estoppel' to Section 5.29 'Conclusion: the future of consideration'.
- Poole, Chapter 4: 'Enforceability of promises: consideration and promissory estoppel' – Section 2 'Promissory estoppel'.

3.2.1 The concept of promissory estoppel

The doctrine of promissory estoppel is concerned with the modification of existing contracts. The position under the classical common law of contract was that such modification would only be binding if consideration was supplied and a new contract formed. Thus in a contract to supply 50 tons of grain per month at £100 per ton for 5 years, if the buyer wanted to negotiate a reduction in the price to £90 per ton, because of falling grain prices, this could only be made binding if the buyer gave something in exchange (for example, agreeing to contribute to the costs of transportation). Alternatively the two parties could agree to terminate their original agreement entirely, and enter into a new one. The giving up of rights under the first agreement by both sides would have sufficient mutuality about it to satisfy the doctrine of consideration.

These procedures are a cumbersome way of dealing with the not uncommon situation where the parties to a continuing contract wish to modify their obligations in the light of changed circumstances. It is not surprising, therefore, that the equitable doctrine of promissory estoppel has developed to supplement the common law rules. This allows, in certain circumstances, promises to accept a modified performance of a contract to be binding, even in the absence of consideration.

The origin of the modern doctrine of promissory estoppel is to be found in the judgment of Denning J (as he then was) in the case of *Central London Property Trust Ltd v High Trees House Ltd* (1947).

The facts of the case concerned the modification of the rent payable on a block of flats during the Second World War. The importance of the case, however, lies in the statement of principle which Denning set out – to the effect that 'a promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply'. Applying this principle, Denning held that a promise to accept a lower rent during the war years was binding on the landlord, despite the fact that the tenant had supplied no consideration for it. You should read this case in full.

The common law recognises the concept of 'estoppel by representation'. Such an estoppel only arises, however, in relation to a statement of existing fact, rather than a promise as to future action: see *Jorden v Money* (1854). The concept of 'waiver' has been recognised by both the common law and equity as a means by which certain rights

can be suspended, but then revived by appropriate notice. See, for example, *Hickman v Haynes* (1875), *Rickards v Oppenheim* (1950) and *Hughes v Metropolitan Railway* (1877). It was this last case upon which Denning J placed considerable reliance in his decision in *High Trees House*. The concept of waiver, however, had not applied to situations of part payment of debts. Note the suggestion of Arden LJ in *Collier v P. & M.J. Wright (Holdings) Ltd* (2007), based upon the *obiter dictum* of Denning J, that promissory estoppel has the effect of extinguishing the creditor's right to the balance of a debt when he has accepted a part payment of the debt. Under the modern law the concept of waiver has been effectively subsumed within 'promissory estoppel'.

3.2.2 The limitations on promissory estoppel

The doctrine of estoppel has been considered in a number of reported cases since 1947 and now has fairly clearly defined limits. There are six points which must be considered.

Need for existing legal relationship

It is generally, though not universally, accepted that promissory estoppel operates to modify existing legal relationships, rather than to create new ones. The main proponent of the opposite view is Lord Denning himself who, in *Evenden v Guildford City FC* (1975), held that promissory estoppel could apply in a situation where there appeared to be no existing legal relationship at all between the parties.

Need for reliance

At the heart of the concept of promissory estoppel is the fact that the promisee has relied on the promise. It is this that provides the principal justification for enforcing the promise. The lessees of the property in *High Trees* had paid the reduced rent in reliance on the promise from the owners that this would be acceptable. They had no doubt organised the rest of their business on the basis that they would not be expected to pay the full rent. It would therefore have been unfair and unreasonable to have forced them to comply with the original terms of their contract. It has sometimes been suggested that this reliance must be 'detrimental', but Denning consistently rejected this view (see, for example, *WJ Alan & Co v El Nasr* (1972)) and it now seems to be accepted that reliance itself is sufficient.

A 'shield not a sword'

This is related to the first point (concerning the need for an existing relationship). The phrase derives from the case of *Combe v Combe* (1951). A wife was trying to sue her former husband for a promise to pay her maintenance. Although she had provided no consideration for this promise, at first instance she succeeded on the basis of promissory estoppel. The Court of Appeal, however, including Lord Denning, held that promissory estoppel could not be used as the basis of a cause of action in this way. Its principal use was to provide protection for the promisee (as in *High Trees* – providing the lessees with protection against an action for the payment of the full rent). As Lord Denning put it: consideration 'remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.'

English courts have resisted attempts to found an action on a promissory estoppel. See *Baird Textile Holdings Ltd v Marks & Spencer Plc* (2001) although note the different approach taken by the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* (1988).

Must be inequitable for the promisor to go back on the promise

The doctrine of promissory estoppel has its origins in equitable 'waiver'. It is thus regarded as an equitable doctrine. The importance of this is that a judge is not obliged to apply the principle automatically, as soon as it is proved that there was a promise

modifying an existing contract which has been relied on. There is a residual discretion whereby the judge can decide whether it is fair to allow the promise to be enforced. The way that this is usually stated is that it must be inequitable for the promisor to withdraw the promise. What does 'inequitable' mean? It will cover situations where the promisee has extracted the promise by taking advantage of the promisor. This was the case, for example, in *D & C Builders v Rees* (1966) where the promise of a firm of builders to accept part payment as fully discharging a debt owed for work done was held not to give rise to a promissory estoppel, because the debtor had taken advantage of the fact that she knew that the builders were desperate for cash. Impropriety is not necessary, however, as shown by *The Post Chaser* (1982), where the promise was withdrawn so quickly that the other side had suffered no disadvantage from their reliance on it. In those circumstances it was not inequitable to allow the promisor to escape from the promise.

Doctrine is generally suspensory

Whereas a contract modification which is supported by consideration will generally be of permanent effect, lasting for the duration of the contract, the same is not true of promissory estoppel. Sometimes the promise itself will be time limited. Thus in *High Trees* it was accepted that the promise to take the reduced rent was only to be applicable while the Second World War continued. Once it came to an end, the original terms of the contract revived. In other cases, the promisor may be able to withdraw the promise by giving reasonable notice. This is what was done in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* (1955). To this extent, therefore, the doctrine is suspensory in its effect. While it is in operation, however, a promissory estoppel may extinguish rights, rather than delay their enforcement. In both *High Trees* and the *Tool Metal Manufacturing* case it was accepted that the reduced payments made while the estoppel was in operation stood and the promisor could not recover the balance that would have been due under the original contract terms.

Where 'promise' is prohibited by legislation

Evans v Amicus Healthcare Ltd (2003) concerned the use of embryos created by IVF prior to the breakdown of the couple's relationship. The man wished the embryos to be destroyed, the woman to have the embryos used. In this context it was found, *inter alia*, that the man had not given such assurances to the woman as to create a promissory estoppel because the relevant legislation allowed him to withdraw his consent to the storage of the embryos at any time. This judgement contains an important discussion as to the current state of promissory estoppel and its possible future development.

ACTIVITY 3.14

Why was Denning's statement of principle in *High Trees House* seen as such a potentially radical development in the law?

ACTIVITY 3.15

Do you think that the doctrine of promissory estoppel is still needed, now that *Williams v Roffey* has made it much more likely that a modification of a contract will be found to be supported by consideration?

SELF-ASSESSMENT QUESTIONS

1. How does 'promissory estoppel' differ from common law estoppel, and from 'waiver'?
2. What is the meaning of the phrase 'a shield not a sword' in the context of promissory estoppel?
3. What important statement of principle did Denning J make in the case of *Central London Property Trust Ltd v High Trees House Ltd*?

Summary

Generally the modification of a contract requires consideration in order to be binding. The doctrine of promissory estoppel, however, provides that in certain circumstances a promise may be binding even though it is not supported by consideration. The main use of the doctrine has been in relation to the modification of contracts, but it is not clear whether it is limited in this way. The doctrine is only available as a shield, not a sword; there must have been reliance on the promise; it must be inequitable to allow the promisor to withdraw the promise; but it may well be possible to revive the original terms of the contract by giving reasonable notice.

REMINDER OF LEARNING OUTCOMES

By this stage, you should be able to:

- ▶ explain the role of consideration in the modification of existing contracts
- ▶ state the essential elements of the doctrine of 'promissory estoppel'
- ▶ explain how the doctrine of promissory estoppel leads to the enforcement of some promises which are not supported by consideration.

USEFUL FURTHER READING

- Anson, Chapter 4.

SAMPLE EXAMINATION QUESTION

Simone owns five terraced houses which she is planning to rent to students. The houses all need complete electrical rewiring before they can be rented out. Simone engages Peter to do this work during August, at an overall cost of £5,000, payable on completion of the work. After rewiring two of the houses Peter finds that the work is more difficult than expected because of the age of the houses. On 20 August he tells Simone that he is using more materials than anticipated and that the work will take much longer than he originally thought. He asks for an extra £500 to cover the cost of additional materials. Simone agrees that she will add this to the £5,000. In addition, because she is anxious that the houses should be ready for occupation before the start of the university term, she says that she will pay an extra £1,000 if the work is completed by 15 September.

Peter completes the work by 15 September, but Simone says that she is now in financial difficulties. She asks Peter to accept £5,000 in full settlement of her account. He reluctantly agrees, but has now discovered that Simone's financial problems were less serious than she made out and wishes to recover the additional £1,500 he was promised.

Advise Peter.

ADVICE ON ANSWERING THE SAMPLE EXAMINATION QUESTION

This question is concerned with the role of consideration in the modification of contracts, and the doctrine of promissory estoppel.

There are three separate issues which you will need to consider.

- ▶ Was Simone's promise to pay the extra £500 a binding variation of the contract?
- ▶ Was Simone's promise of an extra £1,000 if the work is completed by 15 September a binding variation of the contract?
- ▶ Is Peter's promise to take the £5,000 in full settlement binding on him?

The first two questions involve discussion of what amounts to consideration.

If Peter has provided consideration for Simone's promises, then he will be able to hold her to them. The answer to the third question will depend to some extent on the answer to the first two. If there has been no binding variation of the original contract, then Peter is not entitled to more than £5,000 in any case. If there has been a binding variation, then the question will arise as to whether he is precluded from recovering the extra money because of the doctrine of promissory estoppel.

As to the promised £500, you will need to consider whether the fact that Peter is buying additional materials is good consideration for this promise. Simone may argue that it was implicit in the original contract that the cost of all materials needed would be included in the £5,000. The fact that Peter has made an underestimate is not her responsibility. Similarly, in relation to the promised extra £1,000, is Peter doing any more than he is contractually obliged to do, in that it seems likely that the original contract was on the basis that the work was to be done by the end of August? In answering both these questions you will need to deal with the principle in *Stilk v Myrick* and the effect on this of *Williams v Roffey*. This will involve identifying any 'practical benefit' that Simone may have gained from her promises. If such a benefit can be identified and there is no suggestion of improper pressure being applied by Peter, then the variations of the contract will be binding on Simone. The effect of the subsequent decisions in cases such as *Re Selectmove* and *SCT v Trafigura* upon *Williams v Roffey* could also be considered.

In relation to the third issue, assuming that there has been a binding variation, you will need to decide whether *Foakes v Beer* applies (in which case Peter will be able to recover the £1,500), or whether Simone can argue that Peter is precluded from recovery by the doctrine of promissory estoppel. In relation to the latter issue, one of the matters which you will need to consider is whether promissory estoppel can apply in a situation of a debt of this kind, as opposed to money payable under continuing contracts such as those involved in *High Trees* and *Tool Metal Manufacturing v Tungsten Electric*. You will also need to consider whether the fact that Simone may have not been fully truthful about her financial position may make it 'inequitable' for her to rely on promissory estoppel (see *D & C Builders v Rees*). The suggestion of Arden LJ in *Collier v P & MJ Wright (Holdings)* could also be considered.

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can state the essential elements of the concept of 'consideration'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain the significance of consideration to the English law of contract.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can give examples of the types of behaviour which the courts will, or will not, treat as valid consideration.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can describe the situations where the performance of, or promise to perform, an existing obligation will amount to consideration for a fresh promise.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can define 'past consideration'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain the role of consideration in the modification of existing contracts.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state the essential elements of the doctrine of 'promissory estoppel'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain how the doctrine of promissory estoppel leads to the enforcement of some promises which are not supported by consideration.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
3.1 Consideration	<input type="checkbox"/>	<input type="checkbox"/>
3.2 Promissory estoppel	<input type="checkbox"/>	<input type="checkbox"/>

Part I Requirements for the making of a contract

4 Other formative requirements: intention, certainty and completeness

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Introduction

We have examined many of the basic requirements necessary for the formation of an enforceable contract: offer and acceptance (Chapter 2) and consideration (Chapter 3). To these requirements we must add three more:

1. That the parties intend to create legal relations;
2. That the terms of their agreement are certain and not vague; and
3. That their agreement is a complete agreement that does not need further development or clarification.

Once all of these requirements are present, courts will, in the absence of any vitiating elements, recognise an agreement as an enforceable contract. We will examine each of these new requirements in turn.

LEARNING OUTCOMES

By the end of this chapter and the relevant reading, you should be able to:

- ▶ explain what is meant by 'an intention to create legal relations'
- ▶ state why courts require an intention to create legal relations
- ▶ compare domestic agreements and commercial agreements with regard to an intention to create legal relations
- ▶ illustrate the most important factors in determining whether or not an intention to create legal relations exists
- ▶ explain what is meant by 'certainty of terms'
- ▶ compare contracts where there is certainty of terms with those where there is not
- ▶ state why courts require certainty of terms
- ▶ provide a basic statement of the concept of 'vagueness'
- ▶ establish the necessity for finding a complete agreement
- ▶ understand why the agreement must be complete
- ▶ provide the circumstances in which a court can 'complete' an agreement.

4.1 The intention to create legal relations

ESSENTIAL READING

- McKendrick, Chapter 6: 'Intention to create legal relations'.
- Poole, Chapter 5: 'Intention to be legally bound and capacity to contract' – Section 1 'Intention to be legally bound'.
- Hedley, S. 'Keeping contract in its place – *Balfour v Balfour* and the enforceability of informal agreements', Elements of the Law of Contract study pack.

In Chapter 2 we examined the importance of intention in relation to an offer: for a statement to be an offer, it must be made with the intention that it be binding upon acceptance. It is also essential that all the parties to an agreement have an intention to create legal relations. What this means is that the parties intend that legal consequences attach to their agreement. In short, the parties intend that the agreement will be binding with recourse to some external adjudicator (a court or arbitrator) for its enforceability. The necessity for intention is most evident in domestic and social agreements. These are agreements between friends (e.g. A agrees to host the bridge club at her house if B will bring the food to feed the club) or agreements made between family members (e.g. sister agrees with brother that she will not play her radio loudly if brother will keep his hamster securely in its cage). In this context there is generally an offer by one party, which is accepted by the other party and supported by **consideration**. So far, the agreement looks like an enforceable contract. The parties, however, probably do not intend a breach of the agreement to result in legal action. Their agreement lacks an intention to create legal relations and is thus not a contract because they did not intend it to be. The agreement has no legal effect at all.



Figure 4.1

Traditionally, the law has distinguished between **domestic and social** agreements and **commercial** agreements. In the case of domestic and social agreements, it is presumed that there is **not** an intention to create legal relations. In the case of commercial agreements, it is presumed that there **is** an intention to create legal relations.

In either instance, the facts of the case may displace the presumption the law would otherwise make. For example, it may be that when neighbour A agreed to mow neighbour B's lawn in exchange for the apples on B's apple tree, both parties

intended that this agreement would be legally enforceable.

The determination of whether or not the parties intended to enter into legally binding relations is an objective one and context is all-important. What this means is that the courts will not examine the states of mind of the parties to the agreement (a subjective approach), but will ask whether or not reasonable parties to such an agreement would possess an intention to create legal relations. See *Edmonds v Lawson* (2000).

This objective approach applies regardless of whether the agreement is a social or domestic one or a commercial one.

Social and domestic agreements

The leading case is *Balfour v Balfour* (1919). Here, because the husband would be working overseas, he promised to pay his wife an amount of money each month. When the parties separated, the wife sued the husband for this monthly amount. The court refused to allow her action on the grounds that the agreement was not an enforceable contract because, at the outset of their agreement, it 'was not intended by either party to be attended by legal consequences'. The parties did not intend that the agreement was one which could be sued upon. The judgment of Atkin LJ really seems to rest upon public policy arguments – that as a matter of policy, domestic agreements, commonly entered into, are outside the jurisdiction of the courts. His judgment also highlights a judicial concern that if such agreements could be litigated in the courts, the courts would soon be overwhelmed by such cases.

Similar reasoning was applied in the case of *Jones v Padavatton* (1969) to find that the agreement between a mother and her adult child did not create a contract. See also *Coward v MIB* (1962) where the court found that an agreement to take a friend to work in exchange for petrol money was an arrangement which lacked contractual intention.

Increasingly in the modern world, domestic arrangements are beginning to take on a basis in contract law. *Balfour v Balfour* must be seen as a case which establishes a **rebuttable presumption**[†] that domestic agreements are not intended. An example of a situation in which the presumption was rebutted can be found in the decision in *Merritt v Merritt* (1970). In this instance the spouses were already separated and the agreement was found to have an intention to create legal relations. A similar result followed in *Darke v Strout* [2003] EWCA Civ 176 as the court found that an agreement for child maintenance following the breakdown of a couple's relationship did not lack an intention to create legal relations given the formality of the letter. Nor could it be said to be unenforceable for want of consideration since the woman had, in entering the agreement, given up statutory rights to maintenance. In *Soulsbury v Soulsbury* (2007) the Court of Appeal found that there was an intention to create legal relations between two former spouses when one agreed to forego maintenance payments in return for a bequest in the other's will.

In addition, in *Simpkins v Pays* (1955) it was found that there was a contract where three co-habitees entered a competition together.

[†] A rebuttable presumption is a presumption made by courts as to a certain state of facts until the contrary is proved.

ACTIVITY 4.1

Think of the last three promises you have made to friends or family. Did these promises form agreements intended as contracts? Why (or why not)?

ACTIVITY 4.2

How does *Simpkins v Pays* differ from *Coward v MIB*?

ACTIVITY 4.3

A and B are married to each other. They agree that A will make all the mortgage payments on the marital home and that B will pay all other household bills. This arrangement carries on for two years whereupon A refuses to make any more mortgage payments. Can B sue A?

ACTIVITY 4.4

A and B are married to each other. They agree that A will pay all the household expenses and that B will remain at home to care for their children. B subsequently takes up paid employment outside the home and another person cares for the children. Must A continue to pay the household expenses?

Commercial agreements

In relation to commercial agreements, courts will generally presume that an intention to create legal relations is present. See *Esso Petroleum Ltd v Commissioners of Customs and Excise* (1976).

Exceptionally, the facts may disprove such an intention. In a sale of land, agreements are normally made 'subject to contract'. This wording expressly displaces any presumption of contractual intention. In other situations, courts have found that the specific wording of the agreement in question displaced any contractual intention. See, for example:

- ▶ a comfort letter – *Kleinwort Benson Ltd v Malaysia Mining Corporation Berhad* (1989)
- ▶ an honour clause – *Rose and Frank Company v J.R. Crompton and Brothers Ltd* (1925).

In most cases where the parties deal at arm's length (**i.e. they have no existing ties of family, friendship or corporate structure**) the court will find a contractual intention. See *Edmonds v Lawson* (2000).

ACTIVITY 4.5

Why might a commercial party not want an agreement to be an enforceable contract? Is such an agreement of any practical value?

Summary

Ultimately, the question of contractual intention is one of fact. The agreement in question must be carefully scrutinised to determine the nature of the parties' agreement.

Without an intention to create legal relations, there will not be a contract.

SELF-ASSESSMENT QUESTIONS

1. To what extent are courts examining whether or not the parties intend to take any dispute to a court for resolution? To what extent are the courts determining whether or not the agreement has certain terms?
2. Are courts influenced by the reliance of one party upon the promise of another in determining that a contractual intention is present?
3. Is the reasoning of the judges in *Balfour v Balfour* and *Esso Petroleum v Commissioners of Customs and Excise* based on public policy considerations or on the intentions of the parties to the agreements?
4. What factors do courts consider important in negating contractual intention?

USEFUL FURTHER READING

- Anson, Chapter 2.

4.2 Certainty of terms and vagueness

ESSENTIAL READING

- McKendrick, Chapter 4: 'Certainty and agreement mistakes' – Section 4.1 'Certainty' and Section 4.2 'Vagueness'.
- Poole, Chapter 3: 'Agreement Problems' – Section 1 'Certainty'.

An enforceable contract requires certainty of terms. That is to say, for an agreement to be a contract, it must be apparent what the terms of the contract are. If an important term is not settled, the agreement is not a contract.

In *Scammell v Ouston* (1941) the court found that the agreement was not enforceable because the terms were uncertain and required further agreement between the parties. Viscount Maugham explained that because the terms were uncertain, there was no real agreement (*a consensus ad idem*)[†] between the parties. The underlying rationale for this area of law can be seen in that if the terms cannot be determined with certainty, there is no contract for the court to interpret. It is not the role of the court to create the terms of the contract – for this would be to impose a contract upon the parties.

In some circumstances, particularly where the parties have relied upon an agreement, courts will more readily imply or infer a term. This can be seen in the decision in *Hillas v Arcos* (1932). Here, the agreement had been relied upon and the court was able to infer the intention of the parties based upon the terms in their agreement and the usage in the trade.

ACTIVITY 4.6

You agree with Z that you will buy a shirt from Z's summer collection for £25. No size is specified in your agreement. Have you a contract? Explain.

ACTIVITY 4.7

What is the difference between the decisions in *Hillas* and *Scammell*? Are there convincing reasons for deciding these cases differently?

It may be that the agreement provides a mechanism, or machinery, to establish the term. In such a situation, there is certainty of terms. Thus, if interest on a loan is to be set at 1% above the Bank of England's base rate on a certain date, then this is a certain term. It cannot be stated at the outset of the contract what the interest rate is, but certainty of terms exists because, on the relevant date, the interest rate can be determined by an agreed mechanism.

There is a difference between a term which is meaningless and a term which has yet to be agreed. Where the term is meaningless, it can be ignored, leaving the contract as a whole enforceable. See *Nicolene Ltd v Simmonds* (1953).

Summary

If the terms of an agreement are uncertain or vague, courts will not find a contract exists. Courts will not create an agreement between the parties. In a number of circumstances, courts will use various devices to ensure that terms which might appear uncertain are, in fact, certain. It may be possible to determine what the term is from the usage in the trade. A vague or meaningless term may be ignored.

SELF-ASSESSMENT QUESTIONS

1. Would an agreement to 'use all reasonable endeavours' to achieve a certain objective be enforceable?
2. What are the arguments in favour of allowing a court to establish the essential terms of an agreement?

USEFUL FURTHER READING

- Anson, Chapter 2.

4.3 A complete agreement

ESSENTIAL READING

- McKendrick, Chapter 4: 'Certainty and agreement mistakes' – Section 4.3 'Incompleteness'.
- Poole, Chapter 3: 'Agreement problems' – Section 1C 'Incompleteness'.

To create an enforceable contract, parties must reach an agreement on all the major elements of their contract. The agreement must, in other words, be **complete**. There must be nothing left outstanding to be agreed upon at a later date. Completeness is an aspect of certainty of terms: unless an agreement is complete, a court is unable to state with certainty what agreement has been made between the parties. If there is no agreement on all of the essential elements of a bargain, there is no contract. There must be an agreement on matters such as price, either by fixing the price or establishing a mechanism to fix the price. What is essential in a contract will depend upon the nature of the contract.

There is no such thing as an agreement to agree. In *Courtney & Fairbairn Ltd v Tolani Brothers (Hotels) Ltd* (1975) it was held that there was no contract where the parties had simply agreed to negotiate. Their agreement was not enforceable as a contract.

The reason for this probably lies in the practical consideration that if the agreement is incomplete, it is not for the court to complete the agreement because the court would then be creating, rather than interpreting, the contract.

ACTIVITY 4.8

Your milkman leaves you a note to ask if you would like an order of bread at some point in the future. You reply that you would and you agree to pay his price of £1 per loaf. Is your agreement a contract? When will the bread be delivered?

ACTIVITY 4.9

You offer to pay £200,000 for a house 'subject to contract'. Although the house looks fabulous on a first viewing, subsequent inspection of it reveals that it suffers badly from damp. The vendor insists that you must buy the house as she has accepted your offer. Must you?

In some instances, legislation or case law will enable the court to add the necessary term to the agreement. An example of this can be seen in s.15(2) of the Sale of Goods Act 1979 which provides that where the price in a contract for the sale of goods has not been determined the buyer must pay a reasonable price. Where this occurs, the agreement can be completed and an enforceable contract exists.

In other instances, where the parties have acted in reliance upon what otherwise might be considered to be an incomplete agreement, courts have found that they were able to imply the necessary terms. For examples of this, see the decisions in *Foley v Classique Coaches Ltd* (1934) and *British Bank for Foreign Trade Ltd v Novinex Ltd* (1949). There are two different ways of rationalising what courts are doing in these instances.

- ▶ The first is that courts are protecting the parties' reasonable reliance upon an agreement
- ▶ The second is that, because the **parties** have relied upon the agreement, it is easier to imply with certainty what the parties would originally have agreed upon as the essential terms.

ACTIVITY 4.10

What elements have courts found essential in determining whether the agreement is complete? Why are these elements essential?

ACTIVITY 4.11

In what instances have courts been prepared to 'imply' or 'insert' what appears to be an otherwise missing essential element? Why was the court prepared to do this?

Summary

The agreement must contain all the essential terms necessary to execute the agreement with certainty. If the agreement does not contain all the necessary terms, it will not be an enforceable contract. Courts will not create the contract between the parties.

SELF-ASSESSMENT QUESTIONS

1. Once the parties have begun to perform an agreement, are courts concerned to protect the reliance of the parties?
2. How do the previous dealings of the parties or the custom within a particular trade assist the court? See *Scammell v Ouston* (1941).

USEFUL FURTHER READING

- Anson, Chapter 2.

EXAMINATION ADVICE

The matters considered in this chapter are unlikely to appear as a separate question on the examination paper. This does not mean that they are not important. They must be present in order to form an enforceable contract. The fact that the law insists upon their presence (and the circumstances in which the law 'creates' these elements) tells us a lot about the consensual nature of contract law.

For examination purposes, however, the matters covered in this chapter are likely to appear as issues in a larger question involving a bigger issue. You must think about how these smaller issues fit within the larger issue. Thus, for example, does an intention to create legal relations also indicate a greater problem with the adequacy of consideration?

When you read examination questions that refer to an agreement, check to see if the agreement is domestic or social in nature – will intention to create legal relations be an issue in the context of that question? A party seeking to avoid contractual liability may do so on the ground that there was no intention to create legal relations. Where the agreement is between commercial parties, consider whether or not there are factors which displace the presumption of intention.

With respect to 'certainty' and 'completeness', situations will arise where the words may be ambiguous. You must ask yourself whether this ambiguity creates a problem of certainty, or possibly a mistake.

Always check to make sure an agreement is complete. Is there anything essential which remains outstanding? If there is, can a court imply or infer what this term should be?

SAMPLE EXAMINATION QUESTION

A promises her son B £1,000 per month if he begins his engineering studies at university. A's brother, C, offers B a place in his house if B promises to finish his studies. B offers his girlfriend D £50 per month if she will drive him to the university each morning. Are any of these agreements enforceable?

ADVICE ON ANSWERING THIS QUESTION

The best approach to an examination question of this nature is to break it down into its component parts. There are three agreements in question. Consider each in turn. Do not be afraid to use sub-headings to assist the clarity of your answer.

1. **Agreement between A and B** A is B's mother and automatically creates an issue of intention. You should consider the general nature of the test set out by Lord Atkin in *Balfour v Balfour*. Next, consider the similar facts of *Jones v Padavatton*. Without some element to distinguish it from *Jones*, it is likely that a court would reach the same outcome. Is such an element present? Note, however, the more general focus of intention (as opposed to the relationship of the parties) in *Edmonds v Lawson*.
2. **Agreement between C and B** C is B's uncle; again, intention to create legal relations becomes an issue. However, an uncle is one step removed from a parent or a spouse and courts might more readily infer such an intention. You need to consider what is established by the cases cited above in (1). An additional problem present here is that the agreement may not be certain in its terms. How long can B stay in the house? What part of the house can B occupy? How does *Scammell v Ouston* apply to this situation? This lack of certainty suggests that this is not a complete agreement. Is there a way for the court to infer what these terms (such as the length of B's tenure) are? See *Foley v Classique Coaches Ltd*.
3. **Agreement between B and D** D is B's girlfriend – the agreement thus occurs within a social context. In this sense, it is similar to *Coward v MIB*. Here, the House of Lords found that, in the absence of evidence to the contrary, they would be reluctant to infer that agreements to take one's friend to work in exchange for remuneration gave rise to a contract. The relationship lacked intention – neither party contemplated that they were entering into legal obligations. Note, however,

Lord Cross's judgment in *Albert v MIB* – does it provide a ground for allowing that the B/D arrangement is a contract?

Reflect and review

Look through the points listed below. Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain what is meant by 'an intention to create legal relations'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state why courts require an intention to create legal relations.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can compare domestic agreements and commercial agreements with regard to an intention to create legal relations.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can illustrate the most important factors in determining whether or not an intention to create legal relations exists.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain what is meant by 'certainty of terms'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can compare contracts where there is certainty of terms with those where there is not.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can state why courts require certainty of terms.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can provide a basic statement of the concept of 'vagueness'.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can establish the necessity for finding a complete agreement.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I understand why the agreement must be complete.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can provide the circumstances in which a court can 'complete' an agreement.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
4.1 The intention to create legal relations	<input type="checkbox"/>	<input type="checkbox"/>
4.2 Certainty of terms and vagueness	<input type="checkbox"/>	<input type="checkbox"/>
4.3 A complete agreement	<input type="checkbox"/>	<input type="checkbox"/>