Contracts Act, 1960 (Act 25)

PRELIMINARY MATTERS

- Law of contract is the branch of law that governs the effort to achieve and carry out voluntary agreement
  - E.g. sale, hire purchase, mortgage, lease, marriage
- A contract is a promise or a set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty. **[The American Restatement (Second) of Contracts 1981]**
  - Promise either connotes statement or undertaking about existing facts or future performance of an obligation.
- Central notion of a contract is the concept of a bargain
  - A bargain is an agreement between 2 or more persons to exchange promises or to exchange a promise for a performance
  - Bare or naked promise i.e. promise for which nothing has been given or promised in exchange is unenforceable as a contract. **[Bolton v Madden]**
- Contract is basically the outward manifestation of agreement between parties.

THE OBJECTIVE TEST

Smith v Hughes (Lord Blackburn): "if whatever a man's real intentions may be, he so conducts himself that a reasonable man would believe that he was asserting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms"

- Court does not look at the mental state of the parties i.e. their actual state of mind whether there was a "consensus ad idem"
- Courts apply the objective test where there is a disparity between a person's actual intentions and the objective and reasonable meaning of his words and conduct.
  - the court imputes to the parties an intention corresponding to the reasonable and objective meaning of their words or conduct and enforces the contract in that sense.

PY Atta v Kingsman: Lease mistakenly written as an assignment instead of sublease but honoured as sublease for 5 years prior to disagreement. Held (by SC): in considering every agreement, the paramount consideration was what the parties themselves intended or desired to have contained in the agreement.

i. Where there is no ambiguity in the words or conducts of the parties, the D will not be allowed to avoid performance simply by alleging that he had made a mistake.

Tampling v James: mistakenly bid for a property "ship inn" thinking it was three plots instead of one at an auction.

ii. Where the terms suffer from such latent ambiguity that it is impossible to determine objectively what the contract relates to and is innocently accepted in a sense different from that which is intended by the offeror, then the court would hold that there is no contract because there is no correspondence between offer and acceptance

Raffles v Wichelhaus: "ex-peerless from Bombay" one in October and the other in September. (case never went to trial so no actual outcome known)

  - Even if the ambiguity in the terms of the offer was the result of one party's negligence, there will be no contract if the parties are at cross purposes

Falck v Williams: sent telegram rendered ambiguous because of lack of punctuation.

iii. Where one party is misled by the conduct of the other party into misunderstanding the nature of the offer, the party whose conduct misled the other cannot enforce the contract in the sense in which he intended.

Scriven Bros v Hindley & co: sale of Russian tow and hemp at an auction. Both lots sold under the same shipping mark though they never arrived by the same ship.

iv. Where the offeree knows that the offer as stated does not represent the real intention of the offeror but seeks to take advantage of the error, the court will not allow the offeree to enforce the contract in that mistaken sense.
  - the court will apply the subjective test to ascertain the actual intentions of the parties)

Hartog v Colin & Shields: contract to buy and sell quality of Argentine hare skins. Price mistakenly quoted price per pound instead of piece.

v. The court would not be concerned with one party's unilateral undisclosed private misconceptions about the quality of the subject matter of a contract as long as such misconceptions was not caused by the other party's words or conduct.

vi. Where the parties are agreed on the same terms with respect to the subject matter, they would be bound by the contract even if they both have in mind some misunderstanding or mistaken assumption about the quality of the subject matter.
  - Apparent contracts must be upheld to ensure certainty in commercial practice.

Fredrick Rose v Pim: mistaken belief that horse beans were "feveroles".

ELEMENTS OF A CONTRACT

1. OFFER

- an offer is an indication in words or by conduct by an offeror that he or she is prepared to be bound by a contract in the terms expressed in the offer, if the offeree communicates to the offeror his or her acceptance of those terms.
  - may be made to an individual, group, class or persons or the world at large

NTHC Ltd v Antwi: offer by company to buy house revoked when P left the company. Held: offer is definite & final and does not leave any significant terms open for further negotiations.

Types of offer

i. Standing offer: where a buyer agrees to be supplied by a seller as and when they need the goods and services. In which case every purchase is treated as a separate contract

Great Northern Railway v Witham: tender and acceptance by D to supply specified articles from time to time to P. D refused to supply in an instance.

ii. Bilateral offer: promise in exchange of a return promise

iii. Unilateral offer: Only offeror makes a promise in exchange for the performance of a stipulated act
  - Offeror becomes contractually bound to fulfil his promise after offeror does the act

iv. General offer: made to public at large or to a particular person by way of public notice (offer to the whole world)

Carlil v Carbolic Smokeball: payment to anyone who contracts influenza after using their smokeball in accordance with prescribed instructions.

  - Offeree must know of the existence of the offer before performing the stipulated act

INVITATION TO TREAT

- ITT is a statement of intention and constitutes an attempt to initiate the bargaining process by soliciting or attracting offers from the party to whom it is addressed.
- It is not made with the intention that it is to become binding as it is accepted by the other party. **[Gibson v Manchester City Council]**

NTHC v Antwi: ITT is distinguished from an offer because of its lack of finality

Forms of ITT

i. Tender notice: it entails no express or implied promise to accept the highest bidder.
  - The tender is what constitutes the offer.

ii. Display of article with price on it in a shop window
  - **Fisher v. Bell** – Flick knife

iii. Display of goods in a self-service shop
  - Display of goods with sufficient intention could be considered as an offer.

iv. Advertisement in newspapers advertising the availability of goods.

Partridge v. Crittendon: advert with name of birds and price. Charged with offering for sale wild live bird.

  - The wording of the advertisement will determine whether it is construed as an offer.
  - Unilateral offer made by way of advertisement would qualify as a contractual offer.

v. Issue or circulation of price lists or catalogues advertising the availability of goods

AUCTION SALES

Auction Sales Act, 1989 (PNDCL 230)
Section 4(1) Sale of Goods Act, 1962 (Act 137)

- A notice advertising an auction is an invitation to treat
- There must be a clear notice announcing the sale containing a clear description of the goods to be sold including particulars of quantity and quality **[Section 13]**
- Auctioneer must show particulars or conditions of sale i.e. whether goods are to be sold at a reserved price, and whether the vendor has a right to bid. **[Section 17]**

- **Rules of Offer & Acceptance**
  - When goods are to be auctioned in lots, each lot is the subject matter of a separate contract
  - When the auctioneer solicits for bids, it's an ITT
  - When bidders put in their bids, they are making an offer
  - The auctioneer must show that he has accepted the offer by hitting the gavel or in any other customary manner
  - The bidder can revoke his offer/bid any time before acceptance

- **Sale Subject to Reserve Price**
  - Reserve price: specific price below which vendor will not sell
  - The sale will not be completed if the highest bid is lower than the reserve amount, notwithstanding the auctioneer knocking it down by mistake.
  - The seller is allowed to make one public bid, usually at the start of the auction **[Section 4 of Act 137]**

- **Sale Not Subject to Reserve Price**
  - Means no minimum price
  - Seller or his agents are not allowed to bid. **[Section 17]**
  - Highest bidder will be entitled to buy the goods at the price bid even if the sum bid is equivalent to the value of the goods. **[Section 14]**

REVOCATION OF OFFERS

- An offer may be revoked any time before acceptance. **[Payne v. Cave]**
- Where an offeror **promises to keep an offer open** for a specified period of time, that may not become invalid for want of consideration. **[Section 8(1)]**
- Where a party responds to an offer by varying its terms, it is a counteroffer and it revokes the initial offer. **[Hyde v Wrench]**
  - Where a party is seeking for additional information about the terms of the contract, it is not a counteroffer but a mere enquiry. **[Stevenson, Jacques & Co v. McLean]**
- An offer may be terminated due to lapse of specified time or reasonable time.
- When an offer is revoked, the offeree must be notified in order for it to become effective. **[Byrne v Leon van Tienhoven]**
  - A general offer may be revoked through the same channel as it was made
  - Where revocation is communicated by a reliable third party, it is deemed effective. **[Dickenson v Dodds]**

NOTES ON OFFER

- The courts may imply a second offer from a unilateral offer if the offeree has provided valuable consideration but has not completed the act which indicates his acceptance.

Errington v. Errington: father purchases house in his name for his name and promises that it will become their property if they pay off the rest of the instalments

- An offeree must perform the act stipulated before he can enforce the terms of a unilateral contract.
- A requirements contract is one in which the promisor undertakes to buy all his requirements of particular services
- A court may be able to hold that there is a contract even though it is difficult or impossible to analyse the transaction in terms of offer and acceptance.

Clarke v Earl Dunraven: correspondence as a whole and the conduct of the parties will be looked at to see whether the parties have come to an agreement on everything that was material.

2. ACCEPTANCE

- Acceptance is the final, unqualified expression of assent to the terms in an offer
- Acceptance can be inferred from conduct

Brogden v Metropolitan Railway: amended contract to include arbitrator. Contract not completely executed but parties adhered to the terms.

- There must be physical evidence of acceptance as well as communication of acceptance to the offeror.
- A contract is formed at the place where acceptance is communicated to or received by the offeror. **[Entores Ltd v. Miles Far East Corp]**
- Acceptance must be communicated by the offeror or his authorised agent

Powell v Lee: member of school appointment committee informed person he had been given headmaster position before the school communicated to him that he had not been accepted.

- Exceptions to communication of acceptance is where the offeror expressly or impliedly waives the right **[Carlill v Carbolic Smokeball]**
- **Postal Rule:** When an acceptance is sent by post, it becomes legally binding as soon as a properly addressed letter is handed in at the post office

Adams v Lindsell: P sent his acceptance of offer sent by letter to buy wool on Sep 5. The offeror received on 9th by which time wool sold.

- Postal rule applies to telegrams as soon as the telegram is handed in for transmission to the addressee
- Acceptances sent by Email become effective as soon as they enter an information processing system outside the control of the originator or his agents. **[Section 18, Electronic Transactions Act, 2008 (Act 772)]**
- **Prescription of mode of acceptance**
- Where the offeror prescribes the method of acceptance, the offeree must comply and acceptance in any other form will normally not be binding on the offeror.

Financings Ltd v. Stimpson – acceptance was to be by signing hire purchase forms. P hadn't signed so D not bound

- Where a particular method of acceptance has been prescribed but does not exclude all others, any mode of acceptance which is no less advantageous may be used
- Where the method of acceptance is to be in a specific manner, no other method of acceptance will be acceptable
- An offeror cannot unilaterally impose silence as a method of acceptance. **[Felthouse v. Bindley]**

3. CONSIDERATION

- Consideration means an act, counter promise or forbearance on the part of a promisee in exchange for a promise. **[Dunlop Pneumatic Tyres v Selfridges]**
- Consideration + offer + acceptance = the indivisible trinity
- Consideration need not be adequate in order for the courts to enforce
  - In the absence of any vitiating factor as long as the promisor gets what he asks for in return for his promise, he is deemed to have received adequate consideration and is bound by the contract so made. **[Adjabeng v Kwabla]**

SUFFICIENCY OF CONSIDERATION

- Consideration must be sufficient
- Sufficiency of consideration is guided by a number of rules developed by the common law courts to ensure that the act of promise satisfies the definition of consideration and is capable in law of supporting an enforceable contract.

i. **Past Consideration:** is where a promise is given for an act which was performed fully before the promise and which made no reference to the promise when it was being performed.
   - At common law, past consideration is not sufficient consideration to enforce a contract **[Re Mcardle]**

   Exceptions:
   - Where the prior act or service is done at the express command of the promisor without a promise to pay at that point, and the promisor subsequently makes a promise to pay for the acts, such a promise is enforceable and the act, although done in the past, will constitute sufficient consideration **[Lampleigh v Brathwait]**
   - Where an act is done in a business setting with the intention that it will be paid for, the act is sufficient consideration for a promise to pay for it in future. **[Re Casey's]**

ii. **Forbearance**: refers to restraining from doing what one has a right to do
- Generally, forbearing or promising to forbear from exercising a right is sufficient consideration for another promise. **[Delle & Delle v Owusu-Afriyie]**

iii. **Promise to waive payment of a debt or part of a debt** or the performance of a contractual of legal obligation is not be invalid as a contract only for want of consideration [**S. 8(2)]**

iv. **Pre-existing Contractual Obligations [Section 9]**
- A promise to perform a pre-existing legal duty in return for a promise is sufficient consideration
- A promise to perform or performance of a pre-existing contractual obligation already owed to the promisor in return for another promise is sufficient consideration for another promise.

- Consideration needs not move from the promisee at all times; hence a promisee can sue on a promise if the consideration for that promise was provided by a third party. [**Sec 10]**

PROMISSORY ESTOPPEL
- Arises where parties to an existing contract enter into a subsequent agreement whereby one party agrees to suspend his strict contractual rights under the existing contract for a limited period of time without the provision of fresh consideration by the promisee.
- Such agreements or arrangements involve the modification of an existing contract
- Although it is not binding in common law as it is treated as gratuitous and unenforceable it is binding in equity under the doctrine of promissory estoppel.

- **In order to plead promissory estoppel:**
  i. There must be an existing contract with recurrent obligations**. [High Trees Case]**
  ii. There must be an express promise not to insist on legal rights.
  iii. The party relying on the doctrine must show that:
  - The promise was made;
  - Intended to be binding;
  - Intended to induce him to act;
  - and that he in fact acted upon it
    [**Hughes v Metropolitan Railway]**
  iv. The other party must show that in reliance of the promise he did or refrained from taking steps he otherwise would have taken**. [Allan & Co v El Nasr]**;
  v. The circumstances must be inequitable. **[D&C Builders v Rees]**

- Promissory estoppel only suspends a right and does not wholly extinguish the promisor's rights
- It does not create entirely new rights where none existed
- The doctrine of promissory estoppel is a defence not a cause of action. It's a shield not a sword. **[Combe v Combe]**
- An agreement to forbear from instituting legal proceedings to enforce a legal or equitable right is sufficient consideration for a promise to pay a debt already incurred.

INTENTION TO CREATE LEGAL RELATION
- Independent element in formation of a contract which must be proved
- It is a question of inference drawn by the courts based on the nature of the agreement, the surrounding circumstances and objective construction of parties' words and actions.

COMMERCIAL AGREEMENTS
- There is a presumption that when parties enter into an agreement in a commercial or business setting, there is an intention to create legal relations. **[Edwards v Skyviews Ltd]**
- Where parties in a commercial agreement expressly state that they do not intend to create legal relations, the courts will not enforce such contracts [**Rose & Frank Co v Crompton Bros]**
- Where parties in a commercial agreement do not expressly state that they do not intend to create legal relations, the courts will infer from their conduct and the terms of the agreement if the indeed intended to create legal relations. **[Hammond v Ainooson]**

SOCIAL OR DOMESTIC SETTING
- Generally, there is a rebuttable presumption that when parties enter into an agreement in a social or domestic setting, there is no intention to create legal relations. **[Coward v Motor Insurers Bureau]**
- Where a husband and wife enter into an agreement, it is presumed that they do not intend to create legal relations.
- Presumption is dispensed with if they are not living together in amity. **[Balfour v Balfour]**
- In Ghana married woman **under customary law** is capable of suing her husband in contract and in torts as she could sue any other person. **[Acheampong v Acheampong]**
- Generally, when a parent enters into an agreement with a child, it is presumed that they do not intend to create legal relations
- When an agreement is entered into in a domestic setting between parties who are not related in any way, the courts will look at the type of agreement and the conduct of the parties to determine if they intended to create legal relations or not.

CAPACITY TO CONTRACT

1. MINORS
- The minimum age for enforcing contractual relations under common law is 21 years.
- Definitions
- Infant defined as
  - a natural person not above 21 years. **[Section 32, Interpretation Act, 1960]**
  - a natural person not above 21 years or any other age declared from time to time by enactment. **[Company's Act, 1963 (Act 179)]**
- Child means a person below the age of 18 years
  Article 28 // Children's Act, 1998 (Act 560)
- At common law, when an infant enters into an agreement with an adult, the agreement cannot be enforced against the infant but it can be enforced against the adult party.

CONTRACTS BINDING ON MINOR.
1. **Contract for necessaries:** Necessaries are goods suitable for the condition in life of the infant and to his actual requirements at the time of delivery. **[Section 2(3) SGA; Nash v Inman]**

2. **Beneficial contract of service:** including agreement to learn a trade so far as the agreement is not prejudicial against the interests of the infant.
- Trading contracts are not binding no matter how beneficial. **[Fawcett v Smethurst]**
- Where the terms of an agreement are onerous, it will not be enforced against the infant, even if it is valid.
  [De Francesco v Barnum]

3. **Voidable contract:** contracts binding on the infant unless and until he repudiates the contract during his minority or within a reasonable time after attaining the age of majority.
- E.g.: Purchase of Shares, marriage settlement, Leases/Purchase of Land **(Section 12 of Conveyancing Decree)**
- When an infant repudiates a voidable contract, he is liable for all the obligations incurred prior to the repudiation unless he can prove a failure of consideration. **[Steinberg v Scala]**

- Generally, a person who lends money to an infant cannot recover it at law.
- The person can recover in equity that part of the money actually used for the purchase of necessaries.
- Students who take loans under the Student Loan Scheme are conclusively deemed and treated as being of full age at the time of the formation of the contract. **[Student Loans Scheme, 1992 (PNDCL 276)]**
- Minors are generally liable for their torts.
- Where the cause of action arises directly out of contract which is not binding on the infant, he is not liable for the tort.
- Where the breach consists of doing an act which is not contemplated by the contract, or an act which falls outside the scope of the contract the minor will be liable for the tort
- An infant cannot bring an action for specific performance against an adult party unless he has completely performed his side of the bargain such that there will be nothing the other party the other party might possibly ask the court to specifically enforce. **[Lartey v Bannerman]**
- An infant cannot bring an action directly or by himself before the courts.
- He must

- sue by a next friend represented by a lawyer, or
- Be sued through guardian ad litem

[Order 5, High Court (Civil Procedure) Rules, 2004]

2. MENTALLY INCOMPETENT

- A lunatic is
- a person of unsound mind,
- a mentally incompetent person,
- an insane person
- or one who is not compos mentis4
- A plea of insanity must satisfy the twin test of:
  i. Unsound mind i.e. that at the time of contracting he was incapable of understanding the nature if the contract due to his mental disability
  ii. Knowledge of the fact by the other contracting party i.e. that the party knew or ought to have known. **[Imperial Loan v Stone]**
- The burden of proof lies on the mentally incapacitated party
- Where a contract is entered into by a mentally incompetent person, the contract is voidable at the instance of that person
- An insane person is liable for contracts made during lucid moments, even when his disability is not known by the other party. **[Selby v. Jackson]**

3. INTOXICATED PERSONS

- Where an intoxicated person enters into an agreement, it is voidable until he ratifies it. **[Matthews v Baxter]**
- A mentally incompetent or intoxicated person is liable for necessaries supplied to him, where the supplier expects the goods to be paid for, whether or not the supplier was aware of his disability. **[Re Rhodes]**

TERMS OF CONTRACT

- When a statement forms an integral part of the contract, it's said to be a term of the contract such that when it's breached, the innocent party can sue for damages for breach of contract.
- A party can only sue for damages for breach of contract if the statement is a term of the contract.
- Mere representation: A statement which induces the other party to enter into the contract but which does not form a part of the contract itself.
- If turns out to be false, the innocent party may be entitled to certain remedies but he cannot sue for a breach of contract.
- A contract may be wholly written, wholly oral or partly written and partly oral. **[Section 11]**

Test for Ascertaining the Terms of an oral contract

- The courts look to see whether, considering all the circumstances a reasonable third party would assume that the party making the statement intended it to a term of the contract or not

i. Relative means of knowledge of the parties:

- Where one party has expertise or superior knowledge about the subject matter of the contract, it is reasonable to infer that the statement should constitute a term of the contract.
- where both parties have same means of knowledge about the matter, it is improbable that a statement by any of them will qualify as a term.
- Where a party with superior knowledge expresses an opinion on a matter, the fact of his superior knowledge or means of knowledge may result in the inference that he was warranting that he had reasonable grounds for the opinion expressed

Esso Petroleum v Mardon: representative of petroleum company claimed petrol station could throughput of petrol at 200k gallons

ii. Reliance on statement at the time of contracting:

- If A is relying on B's statement at the time of contracting and B knows this, it is likely to be held as a term of the contract.
- the shorter the interval between when the statement is made and the time of contracting, the more likely it is that the statement is being relied on

Bannerman v White: in course of negotiation the purchase of hops buyer asked if there was sulphur in them and said he would not ask for price if there was. Hops turned out to have sulphur.

iii. Reduction of terms into writing:

- Where any oral term is excluded, it's inferred that the parties did not intend it to be a term

iv. Means of verification

COLLATERAL CONTRACT

- A collateral contract is a contract which exists side by side with another contract, the consideration for which is the entering into of the other contract

De Lasalle v Guildford: tenant refused to hand over his counterpart of a lease until he had the landlord's oral assurance that the drains were in good order.

- It may be contrary to the terms in the substantive contract

City and Westminster Properties v Mudd – landlords agreed to allow T sleep on premises although lease had a covenant not to use the premises for any purposes other than trade.

- The principle may be applied even where the party receiving the assurance or collateral promise is not party to the main contract entered into.

PAROLE EVIDENCE RULE

- Where the parties have formally recorded the whole of their agreement in writing, the written document prima facie, is taken to be the whole contract
- Parole Evidence Rule: Generally, no extrinsic evidence will be admitted to add, vary or contradict the terms of the written agreement. **[Wilson v Brobbey]**

Exceptions: Oral or extrinsic evidence may be admissible:

1. To show that a written agreement is not an agreement
2. To show when a contract is intended to start to operate

Pym v Campbell: P entered into a written contract with C to sell an interest in an invention. The court allowed C to include the oral terms of acknowledgement that the sale was subject to an inspection and approval by an engineer. The engineer did not approve the invention.

3. To prove the existence of a custom or trade usage which should apply to the contract

Hutton v Warren: tenant was by custom entitled to labour and cost of seeds upon quitting

4. To establish evidence of a vitiating factor such as a mistake, misrepresentation, duress, fraud, etc

Curtis v Chemical Cleaning & Dyeing Co: employee told customer the disclaimer was for sequins only.

5. To establish a plea of non est factum
6. To establish the existence of a collateral contract
7. To explain a word in a written document which is ambiguous.

Robertson v Jackson: it was unclear what ship's 'turn to deliver' meant

8. When a written document is incomplete because it was not intended to contain all the terms of the agreement, extrinsic evidence will be admitted to fill the gaps.
9. Where it is shown that a written document which was intended to record a previous oral contract does not accurately reflect the contents of the oral agreement. **[Joscelyne v Nissen]**

SIGNED CONTRACT

- Where a document containing contractual terms is signed, in the absence of fraud or misrepresentation, the party signing is bound by the terms and it is wholly immaterial whether he read the document or not

Inusah v DHL Worldwide Express: P read and signed an air bill which limited the company's liability to $100. He lost $1500 and sued.

- Where a party who is seeking to rely on a contractual clause in a written agreement is guilty of misrepresenting its effect to the other party, he may be precluded from relying on the clause, even when the other party has signed the contractual agreement. **[Curtis v Chemical Cleaning & Dyeing Co.]**

DOCTRINE OF NON EST FACTUM

- It is not [my] deed
- Where a party is misled into executing a document which is fundamentally different from what he intended to execute, and where he has not been negligent in signing, he can plead the defence of non est factum to avoid the enforcement of the document.

Lewis v Clay: D was induced to sign a promissory note upon deception by his friend that he was witnessing a signature

- applies to all persons who are permanently or temporarily unable, through no fault of theirs to have a real understanding of the effect of a document without explanation

ILLITERATE PERSONS & WRITTEN CONTRACTS

- Under Ghanaian law, there is no presumption that an illiterate person appreciates or understand the meaning and effect of a legal instrument simply because he signed or put his mark on it.
- An illiterate will not be bound by a document he signs unless it can be shown that the literate party explained the contents to him.
  - If the literate party does not discharge this duty in good faith the contract is void.

Atta Kwamin v Kufour – English gold prospector drafts lease, which effect was that the land rights of P's predecessor given up for £300. All Africans involved in the transaction were illiterate. P claimed that they did not intend to surrender rights but only to confirm lease granted.

Held (Lord Denning): "where a person of full age signs a contract in his own language, his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it. But there is no presumption that a native African who cannot read or write has appreciated the meaning and effect of an English instrument.

- Every person writing a letter or other document on behalf of an illiterate person shall clearly and correctly read over and explain such letter to the illiterate;
  - The illiterate is to make his mark at the foot of the document;
  - literate party must clearly write his name and address on the letter as the writer

[Section 4, Illiterates' Protection Ordinance (CAP 262)]

UTC Ltd v Tetteh & Others: 2nd D, a near illiterate, induced to sign a guarantee agreement in the belief that he was witnessing a signature. He pled non est factum. P could not prove that the document was read over to D or that he appreciated its meaning and effect

CLASSIFICATION OF TERMS

- Terms of a contract may be classified into conditions, warranties or innominate terms

[Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd]

- **Condition**: a term of the contract which is so essential to the very nature of the contract that its breach entitles the injured party to rescind the contract and sue for damages.
  [Bannerman v White: sulphur]

- **Warranty**: a subsidiary term in a contract whose breach will only entitle the injured party to sue for damages.
  - Breach does not go to the root of the contract as such the injured party cannot repudiate the contract based only on that breach.

Bettini v Gye: lead singer in D's opera. Contract stated that she was to be present for rehearsals 6 days to event, but she came 3 days instead

- **Innominate/ intermediate term**: one not pre-classified. The court considers the consequences of its breach after it has occurred to determine if it is serious enough to be repudiated or not.

Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd: breach was for 20 weeks, ship had 20 more months hence contract not to be terminated but damages sought;

IMPLIED TERMS

- Where a term is not expressly stated, it may be implied from the contract by the court by custom, statute or by course of dealing.

1. Implied by Court

- The court in certain restricted circumstances imply certain terms into a contract if it is necessary to give it business efficacy.
- The term will only be implied if upon the evidence it must be taken to have been naturally intended by the parties to form a part of the contract and was necessary to give business efficacy to the contract.
- It will not be implied merely because it is reasonable to do so or would improve the contract.

The Moorcock: court held that the parties must have intended to contract on the basic that the ground was safe for the vessel at low tide and therefore implied a term that the berth was reasonably safe for loading and unloading.

2. Implied by Custom

- The court may admit evidence of customary practice, that is familiar to all those who engage in a particular trade or business, and give effect to them in interpreting the contract even though the parties have not expressly stated those terms.
- The court must be satisfied that the custom or usage is notorious, well-known, certain and reasonable and does not contradict the intention of the parties

3. Implied by Statute

- Statutes or legislative enactments which mandatorily imply certain terms into certain contracts for policy reasons
  - E.g. Sale of goods Act; Hire Purchase Act; Mortgages Act; Conveyancing Act

STANDARD FORM CONTRACTS

- **Standard form contract:** a contract the terms of which are often set out in a printed form and used as a standard contractual document with little or no variation in contracts of a certain kind
- It is prepared by one party and offered to clients or customers in a "take it or leave it" basis
- Battle of forms arises where each party purports to contract with reference to his own set of standard terms and these terms conflict.
  - The court's task is to determine whether the parties have entered into a contract and if so, what are the terms.

Butler Machine v Ex-Cell O Corp: The offer to sell the machine on terms provided by Butler was destroyed by the counter offer made by Ex-Cell-O. Therefore, the price variation clause was not part of the contract. The contract was concluded on Ex-Cell-O's terms since Butler signed the acknowledgement slip accepting those terms. Where there is a battle of the forms whereby each party submits their own terms the last shot rule applies whereby a contract is concluded on the terms submitted by the party who is the last to communicate those terms before performance of the contract commences.

EXEMPTION CLAUSES

- Feature of standard form contract
- Contractual terms which purport to limit or exclude the liabilities of one party which may arise under the contract
- The court must satisfy itself that the clause is an integral part of the contract
- Where the other party signed the contract, he is generally bound by it.
- Where the document is not signed but merely delivered, it must be shown that the terms of the contract were adequately brought to the notice of the other party.
- Whether or not sufficient notice has been given is a question of fact based on the evidentiary circumstances i.e. the circumstances and the situation of the parties.

Broad Guidelines on Incorporation of Exclusion Clauses

i. Party seeking to rely on the clause must show that he took reasonable steps to draw the other party's attention to the printed conditions.
  - Reasonable notice will be deemed to not be given where conditions or exclusion clause is
    - printed on the back without any reference on the face of the document.
    - Obliterated by a stamp, faded or otherwise illegible

ii. Where the clause is exceptionally far reaching or unusual in that class of contract the other party must show that he took special measures to bring it to the notice of the other part.

Thornton v shoe Lane Parking (Lord Denning) "In order to give sufficient notice it would need to be in red ink with a red hand pointing to it-something equally startling:

iii. The party relying on the notice must show that the notice was given before or at the time the contract was entered into not after.

Olley v Marlborough Court: Disclaimer shown after P had booked and entered the room did not suffice.

iv. Document containing the clause must be one which can be properly described as a contractual document i.e. it must be one which a reasonable person would expect to contain the conditions of the contract.

v. Where there has been a consistent course of dealing between the parties of such a nature that any reasonable person would know that one party invariably intends to contract on specific terms, the other party will be bound by those terms in the particular transaction.

Contra Proferentum Rule of Interpretation

- The courts adopt a defensive approach and apply this special rule of interpretation
- Generally, it is the responsibility of the party relying on the clause to show that the words used are sufficiently explicit to exclude his liability for the event which has occurred.
- If the words are in any way ambiguous, they will be construed in favour of the other party.

Exclusion of Liability for Negligence

- Where a contracting party seeks to exclude liability for his own negligence, the courts apply a very strict approach in the interpretation of the clause.
- Generally, an exclusion clause will not be construed as excluding a party's liability for his negligence unless the clause expressly or by necessary implication covers such liability. **[Canada Steamship Lines v The King]**
  - Where the exemption clause does not expressly refer to (the tort of) negligence in addition to his strict liability in contract, the court may hold that the clause is effective only to exclude the defendant's strict liability in contract leaving the defendant liable in negligence
- Where the party seeking to rely on the exclusion clause misrepresents the meaning or effect of the clause, the clause will not operate to exclude his liability except to the extent of what was represented to the other party. **[Curtis v Chemical Cleaning]**

Doctrine of Fundamental Breach of Contract

- A fundamental term is one which underlies the whole contract such that where it is not complied with the performance becomes totally different from what the contract contemplated.

Nichol v Godts: foreign refined rape oil turned out to be not foreign refined. "If a man contracts to buy something, he ought not to have something else delivered to him" Pollock C.B

- A person who has committed a breach of a fundamental term of contract would not be entitled to rely on any exclusion clause in the contract to exclude his liability for such breach

Test of Reasonableness

- Generally, the court will not allow a party to rely on an exemption or limitation clause in circumstances in which it would be unfair and unreasonable to allow such reliance.
- In applying the test of reasonableness, the court looks at the general circumstances of the case incl.:
  - Whether there was equal bargaining power between the parties
  - Nature of the breach
  - Efficiency of the arrangement

George Mitchell v Finney Lock Seeds: cabbage seeds turned out to be some other seeds not fit for human consumption.

PRIVITY OF CONTRACT -Section 5 & 6

- Under Ghanaian law, a person may enforce benefits conferred on him/her under a contract even though s/he was not a party to the contract. **[Section 10]**
  - Modifies the common law in **Tweddle v Atkinson**
- For third party rights to be enforceable the benefit conferred on the third party must have been within the contemplation of the parties to the contract.
  [Section 5(1); Ejura Farms v Hartley]
- Where a third party has an enforceable right under Section 5, such right cannot be taken away by the two parties to the contract agreeing to rescind or vary the contract once the third party has acted to his prejudice in reliance on the contract unless the party consents. **[Sect 6]**
  - All defences, set-offs and counterclaims that are available against the promisee may be set up by the promisor in a suit against him by the third-party beneficiary of his promise e.g. fraud or misrepresentation [**Memorandum; Section 6]**."

Exceptions:

- Sect 5(1) does not apply to Section 5(2) of Act 25
- **Incidental Benefits:** the fact that the third party stands to gain a benefit is not enough. It must be established that the parties to the contract in fact contemplated benefitting the third party.
  - The intention must be evident in the contract either expressly or by necessary implications.

  [Memorandum to Contracts Bill]
- Any provision in a contract designed for the purpose of resale price maintenance
  - i.e. provision from a manufacturer which binds wholesalers and its retailers not to sell product below a certain fixed price. **[Dunlop Pneumatic Tyre v Selfridge]**
- Provision in a contract purporting to exclude or restrict liability of a person who is not party to the contract.

VITIATING FACTORS

- Legally recognized factors, which make an apparent contract lose its validity when it comes to its enforcement.
- A contract is deemed to be vitiated or invalidated if it is found that there are factors, which negate or nullify the apparent consent of one or both of the parties.
- A contract which is unenforceable could be
  - **Void ab initio:** i.e. a complete legal nullity. It does not confer any rights or impose any obligations on the parties and has retrospective effect.
  - **Voidable**: one which is valid unless and until it is avoided or set aside by the party entitled to do so.

1. MISTAKE

- To be mistaken, is to be wrong as to a matter of fact which influences the formation or the making of a contract.
- For mistake to have any effect at all on a contract the mistake must be one which existed at the time the contract was concluded.
  - i.e. the assumption made by the parties must have been factually wrong at the time the contract was concluded.

Amalgamated Investment & Property Ltd. v. John Walker: during a sale of a bonded warehouse and bottling factory for occupation or redevelopment P asked whether the building was listed as a special building of historic interest. D responded in the negative as it was case at the time of contracting. The building was placed on a statutory list of buildings of historic interest a day after the contract was signed. The property value dropped and the plaintiffs brought an action to have the contract rescinded on the ground of common mistake.
Held: that in determining the effect of the mistake on the contract, the critical date was the date on which the contract was signed. On that date the parties believed that the building was not listed as one of special interest and that assumption was in fact true. There was no operative mistake at the time the contract was concluded.

MISTAKE AT COMMON LAW

- At common law, mistake operates such as to negate or nullify consent thus rendering the contract void ab initio.
- Where a contract is deemed to be void on grounds of mistake, a third party cannot acquire any valid interest under such contract even if he acquired the interest for value, in good faith and without notice of the fact that the contract under which he derived his title was void.

3 Kinds of Mistake

1. Mutual Mistake (Mistake as to the Terms of the Contract)

- Exists where although to all outward appearances the parties are agreed, there is in fact no genuine consensus between them because one party makes an offer to the other, which the other accepts in a different sense from that intended by the offeror.
- The courts apply the objective test to determine whether an agreement can be inferred from the facts or not.
- Circumstances where mutual mistake may operate to negate consent and render the contract is void.

i. *Where the words used are patently ambiguous or rendered ambiguous by surrounding circumstances.* **[Raffles v. Wichelhaus; Scriven Bros v Hindley**]

ii. *Where the offeree knows that the offeror's offer does not represent his real intention* **[Hartog v. Colin and Shields;**

2. Unilateral Mistake (Mistake as to the identity of a contracting party.

- Arises where only one of the parties contracts under a mistake. The other party is usually aware of the mistake of the first party and he makes no mistake himself.

- The general rule is that when a person makes an offer to a particular party/person only that person can accept the offer. Another person cannot accept the offer and constitute himself as a contracting party with the offeror who never intended to deal with him.

Boulton v. Jones: Jones made an order addressed to the former owner of the company B had taken over against the right of set off he had with same. B supplied the goods without informing J that he had taken over the company. J subsequently refused to pay for the goods supplied by B. Held: the order had been addressed personally to Brocklehurst and so Jones was not required to pay for the goods. *NB: there was a personal element because of the right of set off J had against the former owner.

- **Mistake as to the identity of a contracting party** arises where one party has in mind a definite identifiable person with whom he intends to contract but ends up contracting with someone else usually through the fraud of that person.
  - Typically arises where, a rogue will normally induce the owner of goods to sell the goods to him by fraudulently misrepresenting himself to him as another person.
- Possible outcomes:
  - Where it is established the contract is void. Consequently, the rogue got no title and the innocent third party also did not acquire a title because of the principle of *nemo dat quod non habet*. (You cannot give what you do not have).
  - where it is not established the resulting contract is voidable on grounds of misrepresentation. It means the rogue got a voidable title. If the owner takes steps to rescind / avoid the contract the rogue's title becomes void.

Establishing Mistake as to identity: To prove mistake as to identity of the contracting party the party pleading mistake must generally establish the following: That:

i. He intended to contract with a definite identifiable person other than the person with whom he has apparently made a contract
  - It must be shown that the mistake was related to the identity of the contracting party and not his attributes i.e. believing that he was contracting with C not B and not that B was credit worthy.

ii. At the time of entry into the contract, he regarded the identity of the other contracting party as a matter of crucial importance

iii. He took reasonable steps to verify the identity of that party.

Cundy v. Lindsay: a rogue named Blenkarn, who hired a room nearby an established company Blenkiron & Co. Made an order for a large quantity of handkerchiefs and Lindsay honoured the order believing it was coming from the established company. It was held that the contract was void.

Contracts Inter Praesentes

- Where the parties deal with each other face to face or contract in each other's presence, with one party fraudulently misrepresenting himself to be another existing person, there is a strong presumption that the offeror intended to contract with the person who was physically present and no one else.

Phillips v. Brooks: Rogue walked into a shop and picked some pearls and a ring claiming to be a known Sir George Bullough with the corresponding address which was checked by the shop owners. It was held by the court that contract was voidable on the basis of fraudulent misrepresentation. The court held that the presumption applied to the facts and that even though the Ps believed that the person to whom they handed the ring was Sir George Bullough, nevertheless they intended to contract with the person whom came into their shop, who they identified by ***sight and hearing.***

- **Rebutting the presumption** (i.e. Circumstances where the apparent contract will be void):
- Where the rogue dishonestly claims to be acting as agent to another person (a supposed principal),

Hardman v. Booth: P visited the offices of Gandell & Co. and met the rogue, who purported to act on behalf of the firm even though he had no authority to act on its behalf. P supplied the goods, which were intercepted by the rogue and sold to an innocent 3rd party. P sued to recover the goods from the 3rd party. The court held that there was no contract between the plaintiff and the rogue since the contract was not made with him personally but rather with the company. And since he did not have the authority to bind the firm in any way the apparent contract made between Edward Gandell and the owners was void even though they transacted face to face. The plaintiffs could recover the goods from the third party.

[also **Shogun Finance Ltd. v. Hudson**]

3. Common Mistake

- Arises where two parties have in fact reached agreement but that agreement is based on a fundamental mistaken assumption which is shared by both parties.
- Generally, at common law, a common mistake will operate to render a contract void if it is such that it eliminates the very subject-matter of the contract. Or if it empties the agreement of all its contents.

3 Kinds of Common Mistake:

i. Mistake as to the Existence of the Subject Matter (*Res extincta*)

- Arises where unknown to the parties, the subject matter of the contract at the time the contract is made has perished or is otherwise non-existent

Couturier v. Hastie: Cargo of corn that went bad on the ship before the contract was entered into unknown to both parties. Held: the court agreed with the buyer that the goods did not exist at the time the contract was entered into the buyer was not liable to pay for the corn.

- **Section 9 of SGA (Act 137)** places an obligation on every seller of specific goods to ensure the goods he says he is selling are in existence at the time when the title is to pass.

ii. Mistake as to Title (*Res sua*)

- Arises where a person agrees to purchase property which unknown to himself and the seller is already owned by the buyer.

Cooper v. Phibbs: Sale of salmon fishery. Both parties believed that B was the owner of the fishery but it turned out that A was already the owner. The contract was held to be a nullity. However, to ensure justice to the lessee, the court in granting the order of rescission, ordered that the respondent should have a lien on the fishery for the money which they had spent on improving it.

- Only arises where the person purporting to buy the property is actually the owner of the property.
- **Section 10 (1) SGA:** places an obligation on every seller to ensure that he has the right to sell the goods that he is selling.

iii. Mistake as to the Quality of the Subject-Matter

- Generally, if the parties are clearly agreed on the same terms with respect to the same subject matter, the courts are most reluctant to declare a contract void simply because the parties were mistaken as to the quality of the subject matter.

Bell v. Lever Brothers: Lever Brothers entered into compensation contract with the appellants after deciding to terminate the employment contract not knowing they had breached their employment contracts by engaging in business on their account without disclosing the profits. Held: even though there was a mistake on the part of both parties as to the quality or nature of the employment contract, the mistake was not sufficiently fundamental as to render the contract void.

Per Lord Atkin: Mistake as to the quality of the thing contracted for will not nullify consent unless:
  - It is the mistake of both parties
  - And it is a mistake as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.

iv. Mistake as to the possibility of performance of the contract

- A mistake may be sufficiently fundamental to avoid a contract where both parties believe that the contract is capable of being performed when in fact it is not

Scott v. Coulson: A contract for the assignment of a policy of life insurance which was made on the wrong assumption by both parties, that the assured was still alive. The assured was in fact dead. It was held that the assumption upon which the contract was based, was not true and therefore the seller was entitled to the return of the policy and also the money payable under it.

MISTAKE IN EQUITY

- Equity may provide one or both parties with a remedy for a mistake even if the mistake is considered at common law to have no effect on the contract.
  - i.e. if the mistake is not recognized at common law because it is not sufficiently fundamental or not operative by reason of the objective principle.
- However, if the contract is deemed void at common law, equity will treat it as a nullity.
- Remedies provided by equity may take 3 forms:

i. Rescission

- Setting aside of a transaction.
- Generally, in equity a contract affected by common mistake is voidable (i.e. can be rescinded by one of the parties)
- In some cases, even where a mistake is deemed in common law not to be sufficiently fundamental as to render a contract void, the court may exercise its equitable jurisdiction to set aside the contract so as to relieve the party prejudiced by it from hardship.
- The courts have applied the principle that in equity a contract is liable to be set aside or rescinded if the parties were under a common misapprehension either as to facts or their respective and relative rights, provided that the misapprehension was fundamental and the party seeking to set it aside was not himself at fault. **[Solle v Butcher]**
- The Courts usually exercise its discretion by attaching to the order of rescission such terms as are required to ensure justice for the other party as well. **[Cooper v. Phibbs]**

Solle v. Butcher: A flat which had been previously let at a standard rent was reconstructed, and included the garage. The parties thought it would not be affected by the Rent Restriction Acts and leased out at a higher rate. The tenant sought a declaration that the rent was £140 and that the rent in excess of that should be refunded. Butcher counter claimed for rescission on common mistake. The Court of Appeal held that although there was a mistake as to the identity of the flat, the lease was not void at common law but could be a ground for relief in equity.

ii. Refusal of Specific Performance

- The court may refuse an application for an order for specific performance on the ground that the party against whom the contract is to be enforced made a mistake.

Webster v. Cecil: The defendant, having refused to sell some property to the plaintiff for £2,000, wrote a letter in which, as the result of a mistaken calculation, he offered to sell it for £1,250. The plaintiff accepted but the defendant refused to complete. Decree of specific performance refused.

iii. Rectification

- Where the terms of the contract have been reduced into writing and owing to a mistake shared by both parties, the written document does not reflect the intentions of the parties as revealed from the previous oral understanding or agreement, the court may rectify the contractual document so as to make it conform to the real intentions of the parties and enforce the contract as rectified.
- Rectification is based on one of the exceptions to the parole evidence rule.

Conditions to satisfy before rectification is granted:

- Legal issue: There must be a legal issue between the parties as to their rights under the contract.
  - This remedy will not be granted in a vacuum.
- Prior common intention: There must be some outward expression of accord or agreement on the terms up to the moment of the execution of the contract

Joscelyne v. Nissen: Father gave a daughter his business in return for her paying the bills to his house. The clause of her paying all the bills was not included in the written agreement.
Held: oral evidence was to be presented to prove that the contract was invalid, as a consequence of the parties not being able to successfully put into the written agreement what actually had been agreed upon. Rectification was allowed.

- Literal disparity: There must be a literal disparity between the terms of the prior oral agreement and those of the written document. A document which accurately records the oral agreement of the parties cannot be rectified.

Frederick E. Rose Ltd. v. Pim: No rectification allowed because rectification is concerned with contracts and documents and not with intentions.

- Rectification is normally granted in respect of a common mistake i.e. the mistake must be shared by both parties.
  - Not available is unilateral, unless there is evidence of fraud, misrepresentation, unfair dealing, estoppel or unless the other party knew of or contributed to the mistake.

2. MISREPRESENTATION

- **Representations:** statements which are intended to influence the other party into entering the contract, but which do not become part of the contract as terms of it.
- **Misrepresentation:** representation which is false or untrue.

Elements

1. There must be a false misrepresentation

- **Operative misrepresentation:** consists of a false statement of fact, made by one party to another, before or at the time of the making of the contract which is intended to and does in fact induce the other party to enter into the contract.
  - The Statement must be one of existing fact i.e. statement relating to past or present state of affairs.
  - General effect is that it renders the contract voidable at the option of the party misled.
  - The party misled may be entitled to claim damages as well if this misrepresentation is fraudulent or negligent, but not if it is innocent.
- **Statement of opinion**: generally not considered as a representation because it is not a positive assertion of fact.
  - Generally, if an opinion turns out to be unfounded, it would not constitute an operative misrepresentation.

Bisset v. Wilkinson: A seller of land told the prospective buyer that the land would carry 2,000 sheep. When this statement turned out to be false, the P brought an action against the seller for misrepresentation. The court held that the seller's statement was nothing more than a statement of opinion which the buyer could adopt if he chose to.

  - Statement of opinion may amount to a misrepresentation of fact, if it is proved in the circumstances, that the person who expressed the opinion did not in fact hold that opinion or could not, as a reasonable man with his knowledge of the facts, honestly hold such an opinion.

Smith v. Land & House Property Corp: vendor of a house described it as "let to a most desirable tenant", when in fact, the vendor knew that the tenant had long been in arrears with his rent and was usually unable to pay the rent on time.
Held that in making the statement, the landlord had impliedly stated that he knew facts which justified his opinion. A reasonable man with knowledge of the facts that the landlord had could not honestly hold such an opinion and as such the statement amounted to a misrepresentation of the state of mind of the landlord and the representee could rescind the contract on that ground.

- **Statement of intention** (or promise to do something in the future): may in some cases amount to a misrepresentation of fact i.e. of the representor's present intention.
  - Where it turns out that at the time the statement was made, the maker had no will or intention to put that stated intention into effect, this constitutes a misrepresentation of the maker's present state of mind.

Edgington v. Fitzmaurice: Directors of a company induced the plaintiff to lend money to the company by issuing a prospectus which stated that the money would be used for the improvement of the company's buildings and the expansion of the company's business. This was false. The Directors actually intended to use the loan to pay off the company's existing debts. It was held that the statement made was clearly a lie and a misrepresentation of the intention of the company.

- **Mere Puffs:** Commendatory statements or mere sales talk usually expressed in vague terms, and used in advertisements and promotional items.
  - They have no effect at law or in equity.
  - Distinction is made between indiscriminate praise and specific promises or assertions of fact which can be verified. The more specific or verifiable the statement, the more likely it is that it would be considered a representation of fact.

Dimmock v. Hallet: At a sale by auction, the auctioneer described the land put up for sale as "fertile and improvable", and the land turned out to be in fact partly abandoned and useless. The court held that the statement was a mere flourishing description given by the auctioneer.

Silence as Misrepresentation

- Generally, at common law mere silence is not regarded as a misrepresentation even if the disclosure of a fact only known to the silent party could have influenced the decision of the other party.

Smith v Hughes: The passive acquiescence of the seller in the self-deception of the buyer will not entitle the buyer to avoid the contract.

- A silent party could be guilty of misrepresentation by reason of misleading conduct.
  - E.g. a person who sits down in a restaurant and orders a meal, represents by his conduct that he can pay for it. **[Ray v. Sempers]**

- **Exceptions to the general rule on silence not being regarded as misrepresentation:**

i. Contracts uberrimae fidei (utmost good faith):

- Special kinds of contracts which have the peculiar feature of one party alone being in possession of the material facts affecting the rights of the parties under the contract.
  - E.g. insurance contracts, contracts to shares in a company and family arrangements.
- The law imposes a burden on a particular party to the contract to disclose material facts known to him.

ii. Where silence distorts a positive representation previously made

- Arises where a representor makes a statement which is true at the time, but because of a change in circumstances, the statement becomes untrue to the knowledge of the representor before the contract is concluded.
- In such a case, the representor comes under a duty to disclose the change in circumstances to the representee before the conclusion of the contract.
- Silence of the representor in such a situation will be deemed as a misrepresentation.

With v O'Flanagan: D, a doctor represented to the P, a potential purchaser of his practice, that the practice was worth a certain sum of money a year. This was true, but by the time the contract of sale was concluded in the same year, the practice had dwindled and was bringing in a substantially less sum a year. D failed to inform the P of this change in the value of the practice before the contract was signed.

iii. Partial disclosure: where a party ventures to make a representation on a matter, it must be a full and frank statement.

- It must not be such a partial account that what is withheld makes that which is said to be absolutely false.
- A half-truth may amount to a misrepresentation because of what is left unsaid.

Curtis v. Chemical Cleaning Co.: The assistant informed the customer that the exclusion clause on the receipt excluded liability for damage to beads and sequins only, when in fact it excluded liability for any damage, howsoever arising. The court held that the statement made was a partial disclosure of the meaning of the clause which conveyed a false impression and therefore it amounted to a misrepresentation. What was omitted rendered what was stated false and misleading in the context.

2. <u>The Representation Must Be Addressed to the Party Misled</u>

- The party who has relied on the misrepresentation must be the one to whom it was made, or to whom it was intended to be passed on; or a member of a class of persons at which the representation was directed**. [Peek v. Gurney]**

3. <u>Inducement</u>: the representee must show that the misrepresentation operated on his mind to induce him to enter the contract.

- i.e. that he relied on the misrepresentation in deciding to enter into the contract.

- **Relevant Principles**:

i. Where the other party did not become aware of the misrepresentation before the conclusion of the contract, it cannot be alleged that he was induced by it to enter the contract.

Horsfall v. Thomas: P bought a gun manufactured for him by D. but inspected the gun before accepting to buy it. The gun had a defect which made it worthless and which D had tried to conceal by inserting a metal plug into the weak spot. P later detected the and sought to rescind the contract on grounds of misrepresentation by conduct. Held: that the P could not rescind the contract on since he did not examine the gun and therefore did not become aware of the misrepresentation before the contract was concluded. Thus the attempted fraud never had an effect on his mind.

ii. Once it is established that the misrepresentation did in fact materially affect the representee's decision to enter the contract, he/she can rescind the contract on that ground even if there were other factors which also induced him to enter into the contract.

Edgington v. Fitzmaurice: P was induced to make loans to the company partly because of a misrepresentation in the company's prospectus; and partly because of his own erroneous belief that debenture holders (i.e. the company's creditors) would have a charge on the property of the company.

iii. If it is shown that the representee did not allow the representation to affect his judgement or decision to enter the contract, even though it was designed to do so, he cannot make it a ground for rescission. **[Smith v. Chadwick]**

iv. Where it is clear that the representee did not rely on the misrepresentation but relied on the accuracy of his own investigation or independent judgement, the representee cannot be said to have been induced to enter the contract by the misrepresentation of the other party.

Atwood v. Small – The parties were negotiating for the sale and purchase of a mine. The vendor made statements as to the earning capacity of the mine which were exaggerated and unreliable but were later confirmed by independent experienced agents of the buyer. The buyer's attempt to rescind the contract after discovering that the statements were false failed. The court held that the buyers did not rely on the vendor's statements since they actually verified their accuracy with their own independent investigations.

v. Where, however, the representee has entered the contract in reliance on the misrepresentation, it is no defence for the representor to assert that if the representee had taken reasonable care, he would have discovered the falsity of the representation made.

Redgrave v. Hurd: D proposed to buy the P's house and to join his practice as a solicitor. P had represented that the practice was bringing in a certain amount a year and produced papers to the D to support the claim. If the papers had been carefully studied, they would have shown that the practice was practically worthless. The D later discovered that the P's statements were untrue and sought to rescind the contract. P sued for specific performance, claiming that if D had read the papers, he would have discovered the fraud. Held: D had in fact relied on the representations made by the P and it was immaterial that a prudent buyer would have discovered the truth. D, was therefore entitled to rescind the contract on grounds of misrepresentation.

vi. If the representor can prove that the representee had actual and complete knowledge of the true facts, then even though the representation made is false, it would not be an operative misrepresentation since the representee cannot claim that he has been misled by it.

4. <u>It must also be established that the misrepresentation was material.</u>

- Whether a misrepresentation is material or not depends in general on the significance that a reasonable business person would have attached to it.

Types of Misrepresentation

1. Fraudulent Misrepresentation: *(Same explanation as in tort)*

- A party induced is entitled to the following remedies:
  - Rescind the contract: i.e. have it set aside and also to recover damages in respect of any loss which he may have suffered by reason of the fraud.
  - Repudiate the contract: i.e. refuse to perform his obligations under the contract and sue to recover any money paid under it.
    - Where the innocent party repudiates the contract and is sued by the representor, he may setup fraud as a defence against any action brought against him for breach of contract or specific performance of the contract; and also counterclaim for damages for deceit.
  - Where the action is founded on deceit, the court would normally award the plaintiff such damages as would put him in the position he would have been in if the tort had not been committed – i.e. if the representation had not been made. **[Doyle v. Olby (Ironmongers) Ltd]**

2. Negligent Misrepresentation: *(Same explanation as in tort)*

The Pas (town of) v Porky: "if in the ordinary course of business including professional affairs a person seeks advice or information from another who is not under any contractual or fiduciary obligation to give it, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and such person then chooses to give the requested advice or information without clearly disclaiming any responsibility for it, then he accepts a legal duty to exercise such care as the circumstances require in making his reply; for a failure to exercise that care, an action for negligence will lie if damage or loss results.

3. Innocent Misrepresentation

- Defined as an untrue statement made in good faith, with an honest belief in its truth, intended to induce a party to enter into a contract.

Newbigging v. Adam: P became a partner of a business and was induced by an innocent misrepresentation of the capacity of certain machinery of the business to provide capital. The court held that though there had been a misrepresentation which allowed the plaintiff to rescind the contract, there was no proof of fraud that would allow him to claim damages.

- **Remedies:** party misled by an innocent misrepresentation may bring an action:
  - Rescission
    - In some cases, the party can claim an indemnity against all losses or liabilities imposed on him by the contract itself Generally, gives the party misled the right to rescind the contract.
    - it does not entitle the party misled to claim damages.
  - Repudiation
    - Also set up the misrepresentation as a defence to any action brought against her for breach of contract or for specific performance of the contract.

- **Distinction between damages and indemnity**
  - **Damages**: all those loses which naturally and reasonably flow from the breach of contract.
  - Indemnity: P is not to be compensated for all the losses flowing from the breach, but is compensated only for those losses incurred by him in the discharge of the obligations created or imposed by the contract he has made.

Whittington v. Seale-Hayne: Ps, poultry farmers, were induced to take a lease of a piece of land by an oral representation that the premises were in a thoroughly sanitary condition. This representation was not contained in the lease and as such was not a term of the contract. Under the lease the plaintiffs covenanted to execute all works or repairs on the property as might be required by the Local Authority. The premises were in fact not in a sanitary condition and were in a state of disrepair. Poultry died and the manager of the farm became ill because the water supply was poisoned. The plaintiff admitted there was no fraud and so they could not ask for damages. He, however, claimed an indemnity for losses. It was held that the lease should be rescinded and the plaintiff could recover for the rents, rates and cost of repairs under the covenant in the lease but nothing else because those obligations were created by the lease agreement itself. The award of the additional expenses such as the loss of the poultry would have amounted to the award of damages.

RECISSION

- Rescission consists in the setting aside of the contract.
- The party misled (representee) may choose to either
  - rescind the contract
  - affirm the contract.
- If the party misled decides to rescind the contract, the general rule is that she must bring her decision to the notice of the representor of her intention to rescind the contract. This can be done in a number of ways:
  - **Informally:** by the representee
    - giving notice to the representor of his intention to rescind the contract
    - recovering the property delivered to the representor under the contract;
    - returning what he has obtained under the contract.
  - **Formally**: achieved by legal proceedings in which the P seeks a declaration in court that the contract is invalid.
- **Exception to the general rule**: Where the representor deliberately absconds and makes it impossible for the representee to give him notice of his decision to rescind the contract, it is sufficient if the party misled shows his intention to rescind by some overt or outward means which is reasonable in the circumstance.

Car & Universal Finance Co. v. Caldwell: a rogue induced the owner of a car to sell his car to him by some fraudulent misrepresentation and paid the owner with a cheque which was subsequently dishonoured. The rogue disappeared but the owner of the car promptly notified the Automobile Association and the Police of the fraud and asked them to help him find the car. The rogue sold the car to a 3rd party after the P and given this notice to the Automobile Association and the Police. The court held that the act of notifying the Automobile Association was sufficient notice of the owner's intention to rescind the contract since the rogue had deliberately, and thus made it impossible for the owner to notify him personally of his intention to rescind the contract.

Limits to the right of rescission

i. **Discretion of the court**: the courts will grant this remedy only if it is satisfied that having regard to the circumstances it would be equitable to do so.

ii. **Possibility of Restitution**: The aim of the court in granting the remedy of rescission is to cancel the contract and restore the parties as far as possible, to the position they were in before the contract was made (*restitutio in integrum*).
  - The general rule is that if restitution is impossible, there can be no rescission of the contract.
  - restitution need not be exact or precise but it must be substantial.
  - the representee can rescind the contract and return the subject-matter even if it is in an altered state.

Erlanger v New Sombrero Phosphate Co.: A company bought and worked a phosphate mine but did not so work it as to make restitution impossible. It was held that the company could rescind the sale on grounds of breach of fiduciary duty by one of its promoters on terms of returning the mine and accounting for the profits of working it.

  - Restitution is however, impossible where the subject matter has been so altered as to change the character of it.

Clarke v. Dickson: The plaintiff was induced to take shares in a partnership by the misrepresentation of the defendant. 4 years later, the company was in bad circumstances and was with the plaintiff's consent converted into a limited liability company. The company was later wound up and the plaintiff discovered the falsity of the representations for the first time. He brought the action to rescind the contract and recover the money he paid for the shares. It was held that the right of rescission was not available because the subject matter of the contract (the shares) had been so altered as to make rescission impossible.

  - If the subject matter has only deteriorated in value but still retains its substantial identity the right to rescind is not lost.

Head v. Tattersall – The plaintiff was allowed to rescind a contract and return a horse sold to him even though the horse was seriously wounded in a trial to test the truth of a warranty.

iii. **Affirmation of Contract:** If the representee, after having discovered the misrepresentation, expressly declares his intention to proceed with the contract, or does an act from which such an intention can be implied, he will be deemed to have affirmed the contract and he cannot thereafter rescind the contract.

Long v. Lloyd: The claimant purchased a lorry from the defendant. The lorry was advertised in a newspaper which described the lorry as being in exceptional condition. The claimant phoned the defendant to arrange a viewing and was told it was in first class condition. There were several instances in which the claimant noticed the car was not in the best shape but accepted the D's offer to pay half the repairs. Claimant brought an action to rescind the contract. The court held that by accepting the offer of payment of half the cost of repairs when he had knowledge of the defects in the lorry, the plaintiff had lost his right to rescind since he had by his actions affirmed the contract.

iv. **Lapse of time**: may act as a bar to the right of rescission.
- In the case of fraudulent misrepresentation, lapse of time of itself does not act as a bar to rescission but may be evidence of affirmation. This is because the courts take the view that time only begins to run from the discovery of the truth.
- In the case of innocent misrepresentation, however, the right to rescind may be barred by the lapse of time even without evidence of the affirmation.

Leaf v. International Galleries – The plaintiff was induced to buy a painting by an innocent misrepresentation that it was painted by Constable. 5 years later he discovered that it was not painted by Constable and sought to rescind the contract for innocent misrepresentation. The court held that the right to rescind was not available to the plaintiff by reason of the lapse of time.

v. **Third party rights**: The right to rescind a contract may be barred by the intervention of third-party rights.
- If the contract is voidable, then once a third party acquires an interest in the subject for value, in good faith and without notice, the party with the right of rescission loses his right to rescind.
- A party who has been induced by fraud to sell goods cannot rescind the contract after the goods have been sold to a third party. **[Phillips v. Brooks]**

3. DURESS

- The common law doctrine
- Consists of the more extreme forms of coercion such as:
  - actual or threatened violence to the person,
  - threats of imprisonment or prosecution or

- threats of violence or
- dishonour to a person's wife, husband or children.

- Generally, a contract which has been obtained by illegitimate forms of pressure or intimidation is voidable on the grounds of duress.

Kaufman v. Gerson: P sued on a contract made between himself and the D in a foreign country. It was found that the P had coerced the D into signing the contract by threats of criminal prosecution against her husband for an offence that the husband had committed. The court would not enforce the contract on the ground that the D's consent was obtained by duress.

- It must be established that the threats were a reason for the plaintiff entering into the contract with the maker of the threats.
- It is **not** required that it be shown that the threat was the only reason for entering the agreement.

Barton v. Armstrong: The respondent, Armstrong, the former Chairman of a company, threatened to kill the appellant, Barton, the MD if the company did not agree to pay a large sum to Armstrong in cash and to purchase Armstrong's shares in the company. There was some evidence that Barton thought the proposed agreement was a satisfactory business arrangement for the company. The deed of agreement was executed and later Barton sought to have it rescinded on grounds of duress. The court held that duress such as the respondent's threats were a sufficient reason for the appellant executing the deed. He was entitled to relief, even if there were other factors which induced him to enter into the contract.

Economic Duress – (Duress by Threatened Breach of Contract)

- Where a party is induced to enter into a contract as a result of a threat by the other party to break an earlier contract, this may constitute economic duress and entitle the party threatened to avoid the contract made.

D & C Builders Ltd. v. Rees: The debtors had taken advantage of the creditors financial situation and threatened to refuse to pay at all if the creditor did not accept the part payment in full satisfaction of the existing debt. It was held that the creditors' promise to accept the party payment in full satisfaction of the debt was obtained by duress and the creditor could set the contract aside.

- It must be shown that the pressure was such that the victim's consent to the contract was not a voluntary act on his part.

Pao On v. Lau Yiu Long: P threatened to break a contract with a company unless the Ds who were shareholders in the company gave them a guarantee against any loss resulting from the performance of the contract. The Ds, thinking that the risk of such loss was small, gave the guarantee to avoid the adverse publicity which the company might suffer if the contract was not performed. The court held that in these circumstances there was no coercion of will so the guarantee was not vitiated by duress. In short the court found there was commercial pressure but not duress since they considered the matter thoroughly, chose to avoid litigation before agreeing to give the guarantee.

4. UNDUE INFLUENCE

- equitable doctrine of coercion which deals with forms of pressure which are usually less direct under the doctrine of duress.
- 2 main situations:
  i. Express use of influence,
  ii. Presumption of undue influence,

Express use of influence

- Arises where there was actual exercise of domination by one party over the will of the other and such coercion led to his entering into the contract.
- The contract may be avoided or rescinded on grounds of undue influence.
- A gift made as a result of influence expressly exercised over the donor over the donee may be set aside.

Morley v. Loughman: L who was a member of a religious sect converted a wealthy man, M, to the sect acting as his spiritual advisor before his death. M placed nearly the whole of his fortune at L's disposal. Upon Morley's death, the executors brought an action to recover the sum given by M to L as a gift. The court held that the recipient of the gift had obtained the money by the actual exercise of undue influence.

Presumption of undue influence

- Arises where the parties stand in a relationship of confidence to one another, which puts one party in a position to exercise over the other an influence which is capable of being abused.
- Fiduciary relationship: one in which one party reposes confidence and trust in the other, and the other, by reason of his position in relation to the confiding party has some influence over him which is capable of being abused.
- Fiduciary or confidential relationships which are r**ecognized by the law as raising a presumption of undue influence**:
  - Parent and Child
  - Guardian and Ward
  - Solicitor and Client
  - Physician and Patient
  - Trustee and Beneficiary
  - Religious / Spiritual Advisor and follower
- Husband / wife relationship is not considered as one raising the presumption of undue influence.
  [National Westminster Bank plc v. Morgan]

Allcard v. Skinner: P unmarried woman became a member of a Church of England Sisterhood on the introduction of her confessor, N, who was the spiritual director of the Sisterhood. While a sister and without independent advice, she made gifts of money and stock to the Sisterhood. She left the Sisterhood and 5 years later, claimed the return of the gifts on the ground that they were voidable by reason of undue influence.
Held that the gifts were voidable by reason of undue influence, but the plaintiff was not entitled to recover by reason of her delay and conduct after leaving the sisterhood. Since undue influence renders a contract voidable, there can be no rescission for undue influence after the affirmation of the contract, or after a third party acquires rights in the subject matter without notice of the facts.

- The presumption of undue influence can be rebutted if the party who benefitted from the transaction can show that the other party acted independently of any influence from him
  - i.e. if the Dt can show that the transaction was the result of the free exercise of independent will.

- The party who benefitted from the transaction must prove that the nature and effect of the transaction was fully explained to the other party by some independent and competent advisor with knowledge of all the relevant facts.

Mercer v. Brempong II: The plaintiff a legal practitioner was retained by the defendant stool to negotiate with the government of Ghana for the payment of compensation to the stool in respect of its lands which had been acquired and also to undertake legal services connected with the stool lands. The government on behalf of the defendant stool paid an amount to the to the plaintiff as solicitor's fee but this was not disclosed to the defendant stool. Subsequently, the parties entered into an agreement for the plaintiff to be paid 10% of the compensation to be received from the government as professional fees. Later the stool became aware of the initial payment made by the government but did not take steps to rescind the contract and subsequent correspondence shows that the stool affirmed the contract. The plaintiff sued to enforce the contract. The court held that the document having been prepared in the local language of the defendant stool and having been explained to the defendants it could not be said that the document was executed as a result of pressure exercised by the plaintiff.

5. UNCONSCIONABLE CONTRACTS

- A dealing whether by contract or by gift is unconscionable where on account of the special disability of one of the parties, he or she is placed at a serious disadvantage in relation to the other**.**

CFC Construction Co (WA) Ltd., Rita Read v. Attitsogbe – The defendant was the trustee of the second plaintiff's will and all her affairs. Thereby creating a fiduciary relationship. She was old, infirm and dependent on the defendant and he got her to enter into a share transfer agreement in which she transferred 5% of her shares in the company to him in exchange for services he rendered to her and to the company. The Supreme Court held unanimously on the facts of the case, that the principal flaw in the transaction between the second plaintiff and the defendant was the failure of the defendant to ensure that the second plaintiff had adequate access to independent advice. They held that the agreement should be set aside on the grounds of unconscionability. The Supreme Court relied on the equitable doctrine of unconscionable bargain to set aside a contract on the ground of one party's old age, which was construed as a disability justifying the invocation of the doctrine.

6. ILLEGALITY

A. On grounds of public policy

- Public policy is a variable or changing notion depending on changing manners, morals and social and economic conditions of a particular society

Categories of cases deemed at common law to be illegal and unenforceable as being contrary to public policy:

1) ***Contracts to commit a crime, tort or fraud on another party***
Examples: Contracts to:
- obtain goods by false pretences,
- defraud shareholders,
- assault a third party,
- punish libel.

Berg & Sadler v. Moore – Plaintiff was a member of a tobacco association and was banned for breaching the rules of the association. He entered into a contract with another member of the association to order goods in his name for him, the plaintiff. The defendant, later refused to hand over the goods to the plaintiff even though the plaintiff had paid for them. The court held that the plaintiff's action to recover the money was founded on his illegal and criminal attempt to obtain goods by false pretences and the court would not aid such a plaintiff to recover his money under such a contract.

- An agreement to deceive even if it is shown to be a common practice in a particular trade will still be held to be illegal and unenforceable as being contrary to public policy.

Brown Jenkinson & Co. v. Percy Dalton: involved the shipment of orange juice contained in barrels, which were found to be old and leaking. The ship owners issued the clean bill of lading upon the request of the shippers but had to compensate the holders of the bill because the barrels were leaking when they arrived. The ship owners sought to recover under the indemnity. The court held that the agreement was in effect an agreement to deceive third parties since it stated that the barrels were shipped in good condition when in fact they were not. It amounted to making a fraudulent misrepresentation, and even though it was shown that this was a common practice and quite harmless, the court held that such an agreement was not enforceable.

2) ***Contracts which directly or indirectly promotes sexual immorality or which is contra bonos mores (against good morals).***
- an agreement which directly or indirectly promotes prostitution is unenforceable by the courts as being contrary to public policy.

Pearce v. Brooks – The plaintiffs, a firm of coach-builders, agreed with a commercial sex worker to hire to her an ornamental coach, with the knowledge that it was to be used by her in furtherance of her trade. She failed to pay the hire and the plaintiffs brought the action to recover the money. It was held that the plaintiffs could not recover because the contract was contrary to public policy.

3) **<u>Contracts which contemplate the performance of acts in a foreign and friendly country which are illegal in or inimical to that country</u>**
- An agreement between parties in Ghana to raise money for subversion in another country would be unenforceable.

Foster v. Driscoll – The parties entered into a contract under which they intended to load a ship with a cargo of whisky to be smuggled into and sold in the U.S. in breach of U.S. prohibition laws, the court held that the object of the agreement was a violation of laws of a foreign country and the agreement was therefore contrary to public policy.

4) ***Contracts which tend to stifle or compromise a public prosecution or which interfere with or pervert the course of justice***
- E.g. a contract or agreement to stifle a criminal prosecution by paying a bribe to a policeman.

Keir v. Leeman – A criminal prosecution was commenced for riot and assault against seven defendants. Before the trial begun, two of the defendants agreed to pay the debt owed together with prosecution costs in consideration that the judgement creditor would not proceed with the prosecution. The judgement creditor accordingly gave no evidence against the defendants. The two defendants were later sued on the agreement. It was held that the agreement was an unlawful compromise and therefore, void.

5) ***Contracts which have as their object, the sale or a public office or honour***
- A contract the object of which is to procure a public office or honour for another for monetary consideration is illegal and unenforceable.

Kwarteng v. Donkor: an agreement between the parties to the effect that if a certain chief was destooled and the defendant could see to it that the plaintiff's nephew was elected as chief of the town, the plaintiff would not recover a debt owed by the defendant to the plaintiff. The defendant helped frame destoolment charges against the chief in question and supported one of the plaintiff's nephews and got him elected. However, the plaintiff's nephew was never enstooled as chief. Plaintiff brought the action to recover the debt. The contract was held to be injurious to the public interest and therefore illegal and unenforceable.

- No monetary consideration ought to influence the appointment to an office in which the public are interested. **[Okantey v. Kwaddey]**

6) ***A contract or agreement the terms of which are directly or indirectly intended to deceive the authorities***

Alexander v. Rayson: P agreed to let a service flat to the D at annual rent of £1,200. This transaction was expressed in two documents, one a lease of the premises at a rent of £450 a year, the other an agreement by the plaintiff to render certain specified services for an annual sum of £750. It was alleged that the object of the plaintiff was to produce only the lease to the Assessment Committee, to convince them that the rent was only £450 a year, in order to obtain a reduction in the rateable value of the premises. The defendant was ignorant of this alleged purpose. The plaintiff later sued the defendant for recovery of a quarter's instalment due under both documents. It was held that since the alleged fraud was proved, the plaintiff could not recover on the lease or the other contract.

7) ***An agreement which purports to oust the jurisdiction of the courts.***
- Any contract which seeks to destroy the right of one or both parties to submit questions of law to the courts is contrary to public policy and therefore unenforceable. **[In re GPRTU) Tetteh v. Essilfie**]– see constitutional law.

Lee v. The Showmen's Guild of Great Britain – A Trade Union Committee sat on a dispute between two members and imposed penalties on one party and ultimately dismissed him from the Union, depriving him of his right to earn a living. There was a provision in the rules of the Union which stated that such disputes could not be submitted to a court of law. **Lord Denning**: "Parties cannot by contract oust the ordinary courts from their jurisdiction.... They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void…

8) ***Contracts involving the use of one's official position or public office to secure a private reward***

Ampofo v. Fiorini – The plaintiff was an employee of the Forestry Department. He entered into an agreement with the defendant, an Italian businessman to setup a timber business with the plaintiff's help. The defendant agreed to pay the plaintiff every year 35% of the net profits of any company formed by him at any time after the coming into force of the agreement. The defendant had since not paid any money to the plaintiff even though he had since established three companies. The plaintiff brought an action seeking inter alia, specific performance or damages for unlawful interference with the contractual arrangement between the defendant and himself. The plaintiff was still an authorised officer of the Forestry Department for at least two years after the formation of the defendant's timber business. The action was dismissed because the consideration for which the defendant might have entered the agreement was in contravention of the Civil Service Act, 1960 (C.A. 5) and illegal. It was misconduct for a civil servant to take improper advantage of the position in the civil service for private financial gain. The contract, was therefore, rendered illegal and unenforceable.

B. Contracts in Restraint of Trade

- One in which a party restricts his freedom to carry on his trade, business or profession in the future.
- Two main types:

i. Agreements between a vendor and purchaser of a business
ii. Agreements between an employer and an employee

- All contracts in restraint of trade are prima facie contrary to public policy and therefore void.
- Such contracts will be upheld if: It is shown
  - to be reasonable as between the parties
  - It is not unreasonable in the public interest.

Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company Ltd (Lord McNuaghten): The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient

justification, and indeed it is the only justification, if the restriction is reasonable – reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.'

i. Restraint clauses for the sale of a business

- An agreement which stipulates that the vendor will not set up business in competition with the purchaser would generally be enforceable as long as it was reasonable in the circumstances.

Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company Ltd: N who was a manufacturer of guns and other implements of war, sold his business to a company and entered into a contract restraining his future business activities. Under the agreement, N covenanted that he would not "for 25 years, if the company continues in business for that long, engage directly or indirectly in the trade or business of manufacturing of guns etc." The court held that this part of the contract was reasonable to protect the proprietary interest of the purchasers of the business.

ii. Restraint clauses in Employment Contracts

- Generally, where an employee contracts with his employer that he will not compete with him upon leaving his employment, such a restraint will be upheld only where it is reasonably necessary to protect a proprietary right of the employer in the nature of trade connections or trade secrets.
- The employer is not entitled to protect himself against mere competition by his former employees.
- **Circumstances where employer may be entitled to impose the restraint:**
  - Where the employer can show that his former employee has acquired knowledge of trade secrets such as a secret process or method of manufacture
  - Where the nature of the employment is such that the employee may acquire the trust of, or influence over the customers, such that he may be able to take the employer's business with him if he sets up in competition.

Herbert Morris v. Saxelby – The plaintiff company was a manufacturer of hoisting machinery in the UK and the defendant had been in their employment as draughtsman from the time he left school. After several years' service, the defendant was engaged by the company as engineer for two years and thereafter left the company under an agreement which contained a covenant by the defendant that he would not, during a period of seven years from his ceasing to be employed by the company, either in the UK or in Ireland, carry on business in the sale or manufacture of hoisting machinery. The court held that the covenant or the restraint in this case was wider than was required for the protection of the proprietary interests of the plaintiff company and therefore unenforceable.

Legal Consequences

- Arises where a court determines that a particular clause of covenant in an agreement is in restraint and thus enforceable.
- Generally, the invalidity of a particular provision or a part of the contract does not nullify the whole contract.
- If the valid parts of the contract or the valid terms are severable, the court will proceed to enforce the valid part of the contract. **[Goldsoll v. Goldman]**
- **Severance:** generally allowed where in a proper construction of the contract it is possible to readily separate the invalid portion from the remainder of the contract
  - Common in contracts in restraint of trade.

EFFECTS AND CONSEQUENCES OF ILLEGALITY

- The consequences of illegality may vary depending on whether the contract is
  - illegal at its inception
  - illegal in its performance

1. Contract Illegal at its Inception

- Arises where the formation of the contract itself is
  - expressly or impliedly prohibited by statute
  - illegal as being contrary to public policy.

- Where the contract is illegal at its inception, n***either party to the contract can enforce it, even if the party seeking to enforce the contract was not aware that the contract was illegal and had been deceived by the other party.***
- The principle is that no person can claim any right or remedy whatsoever under an illegal contract in which he has participated.

Olatiboye v. Captan: The statute stated that no person could sell diamonds or buy or export diamonds unless he had a licence. The plaintiff, who did not have the requisite licence sued to recover from the defendant the price of certain diamonds he had sold to him. It was held that the statute clearly prohibited the sale of diamonds without licenses, therefore the sale was illegal and unenforceable.

2. Contract Illegal in its Performance

- Arises where the contract in itself may be lawful at its inception, but one of the parties, with or without the knowledge of the other, exploits it or performs it in an illegal manner.

i. Where a perfectly legal and valid contract is performed in an illegal way, ***the party responsible for the illegal performance may not be allowed to enforce the contract or rely on any contractual rights or remedies under the contract.***

Anderson v. Daniel: involved a contract for the sale of fertilizer. The contract itself was not illegal but the statute provided that the seller had to deliver to the buyer an invoice which stated the composition of the fertilizer when delivering the fertilizer to the buyer. It was an offence to fail to do so. The seller delivered 10 tons of fertilizer to the buyer without the requisite invoice. The seller later brought an action against the buyer for the price. The court held that his action must fail because he had failed to perform the contract in the only way that the statute allowed it to be performed.

ii. The innocent party will be entitled to enforce the contract and rely on the available remedies if it is shown that he did not condone or participate in the illegal performance in anyway.

Archibold v. Spanglett; P employed the defendant to carry a third party's goods for reward from Leeds to London. There was a statute which provided that: "no person shall use a vehicle for carriage of goods unless he holds an A licence for others for reward". The defendant knew that the vehicle they used did not carry the required licence but the plaintiffs did not know this. During the journey, the load was lost and the plaintiff sued for the loss. It was held that the plaintiff was entitled to sue for damages.

iii. If, however, it is established that the other party was privy to or condoned the illegal performance, neither party will be allowed to enforce any rights under the contract.

- Here the contract is treated as if it was illegal at its inception.

Ashmore & Ors v. Dawson Ltd. – The plaintiffs entered into a contract with the defendants for the transportation of two tube banks to a port for shipment. The defendants sent articulator lorries which could not lawfully carry the loads. The plaintiffs watched while the defendants loaded on to the lorries the 25ton tube banks, with the result that the exceeded the statutory maximum weight allowed for such lorries. On the way one of the lorries toppled over and the plaintiff brought an action for damages. The court held that the plaintiff could not recover because even though the contract was lawful at its inception, its performance was illegal to the knowledge of the plaintiffs and with their participation.

Recovery of Money or Property Transferred Under an Illegal Contract

i. Where the contract is found to be illegal, monies paid or property transferred under such a contract are generally not recoverable, especially if the plaintiff has to rely on or disclose the illegality in order to establish his claim.

- *In pari delicto potior est conditio defendentis* – **In equal fault, the stronger is the situation of the defendant.**

Parkinson v. College of Ambulance Ltd. – The case involved an agreement under which the defendant agreed to procure a knighthood for the plaintiff in consideration of a monetary payment to be made by the plaintiff to be used by a charitable organisation. The payment was made but the knighthood never materialised. It was held that the action must fail since it was founded upon a transaction, which was illegal at common law because it was a contract which tended to promote corruption in public life.

Exceptions to the Rule:

A party can recover money or property transferred to the other party:

1. ***If he can establish his claim without reliance on the illegal contract.***

Amar Singh v. Kulubya – A statutory ordinance in Uganda prohibited the sale or lease of "Maila" land by a non-African except with the written consent of the Governor. Without obtaining this consent, the plaintiff (an African) lease "Maila" land of which he was the registered owner, to the defendant (a non-African). The agreement itself was void for illegality and no leasehold interest vested in the defendant. After the defendant had been in possession for several years, the plaintiff gave him notice to quit and ultimately sued for recovery of the land. The court held that the plaintiff should succeed since his claim to possession was not based upon the agreement which was illegal but was founded on the independent ground of his registered ownership.

2. ***Where the parties are not in pari delicto (equally guilty) the court in certain circumstances will allow the innocent party to recover any monies or property that he has transferred to the other party under the contract.***
   - This relief is usually granted to the P upon proof that he was induced to enter into the contract by fraud or duress or oppression at the hands of the defendant.

Hughes v. Liverpool Victoria Friendly Society: The plaintiff took up five insurance policies with the defendants on the lives of persons in which she had no insurable interest. She was induced to do so by a fraudulent misrepresentation on the part of the defendants' agent that the policies were valid and would be paid. The policies were in fact illegal and void. It was held that since the plaintiff was not in pari delicto with the defendants, she was entitled to recover the premiums she had paid.

3. ***The party who is a member of a protected class is not considered to be in pari delicto with the other party. Such party will therefore be entitled to recover any moneys or property transferred to the other party under the contract.***
   - Arises where the contract formed is illegal because it violates a statutory provision which was enacted to protect a certain class of persons from oppression or exploitation by another class of persons by virtue of the latter's stronger bargaining position.

City & Country Waste Ltd. v. Accra Metropolitan Assembly: P was engaged by D, the metropolitan assembly to render waste disposal services within Accra for a period of 7 years. D abruptly terminated the contract and sought to rely on the illegality of the contract as it had not gone through the required procurement processes prescribed by statute as a defence to avoid payment for breach of contract and services rendered. Held: in relation to the D's non-compliance with the statutory provisions binding on it, P was not in pari delicto and was entitled to payment for services rendered as well as damages.

4. ***locus poenitentiae (i.e. an opportunity to repent or change his mind)***
   - A party to contract despite its illegality is allowed a *locus poenitentiae* and may be allowed to recover any money or property transferred under the contract, provided he begins proceedings before the illegal purpose has been performed either in whole or part**.**

Kearley v Thomson – The defendants, who were solicitors of the petitioning creditor in certain bankruptcy proceedings, agreed neither to appear at the public examination of the bankrupt nor to oppose his discharge in consideration of money paid to them by the plaintiff. The defendants did not appear at the examination and before any application had been made for the discharge of the bankrupt the were sued by the plaintiff for the return of the money. The court held that the contract was illegal as tending to pervert the course of justice it was held that the non-appearance at the examination was a sufficient execution of the illegal purpose to defeat the plaintiff's right to recovery. The court stated that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered.

   - It must be shown that the plaintiff repented and not merely that the defendant deliberately failed or was unable to perform his side of the contract.

Kwarteng v. Donkor – An attempt to rely on this defence by in this case failed. The court held that at no time did the plaintiff repent of the agreement and the reason why he sought to recover his money was not because he had had any qualms about the transaction but because it was not carried to a conclusion beneficial to himself.

DISCHARGE OF CONTRACTUAL OBLIGATIONS

1. DISCHARGE BY PERFORMANCE

- For a party to be discharged from further performance or to sue for the performance of the other party, his performance must be **precise** and **exact**
  - i.e. it must be strictly in accordance with the terms of the contract and must leave nothing else to be done.

Re Moore & Co. v. Landauer: Ds agreed to buy from the Ps 3,000 tins of canned fruit from Australia to be packed in cases containing 30 tins. When the goods were delivered it was found that a substantial part of the consignment was packed in cases containing 24 tins, even though the total number of tins ordered was delivered. Held that the Ds were entitled to entitled to reject the whole consignment on the ground that the Ps failed to perform their obligations in accordance with the terms of the contract i.e. treat themselves as discharged from their obligation to accept the goods or to pay for them.

- Where the contract is bilateral and requires one entire piece of work to be done by one party. The complete performance of the work is a condition for the liability of the other party to perform unless the parties have stipulated otherwise.
  - Partial or defective performance is not acceptable.

Cutter v. Powell — D agreed to pay Cutter 30 guineas if he performed his duties as a second mate on a ship sailing from Jamaica to Liverpool. He acted as mate on the ship but died 19 days before the ship arrived in Liverpool. Cutter's widow brought an action to recover a portion of the agreed sum. The action failed because by the terms of the contract, Cutter was obliged to perform a given duty till it arrived at Liverpool, in exchange for the sum agreed upon. Since he had not been able to fully perform his obligations under the contract, he could not compel the performance of the defendant.

General exceptions to the requirement of exact and precise performance of entire contracts:

1. **Doctrine of Substantial Performance**
   - If the performance falls short of the required performance only in some relatively trivial respect the innocent party is not completely discharged from performance.
     - He must pay the price agreed upon for the work done or the services rendered but he may counterclaim for the loss he has suffered by reason of the incomplete or defective performance.
   - Generally, where the cost of rectifying the defects in performance is a small proportion of the total contract price, the courts are likely to consider the contract substantially performed.

Hoenig v. Isaacs — The parties entered into a contract for the decoration of a one-roomed flat. P, the decorator, had completed the work but there were certain defects, which would cost £56 to repair. The total contract price was £750. The court held that looking at all the relevant circumstances, the contract had been substantially performed and, therefore, the plaintiff could sue for the contract price, subject to a counterclaim by the defendant for damages for the cost of repairing or rectifying the work done.

2. **Acceptance of Partial Performance**
   - Where a promisor has partially performed his obligations under the contract, he will be entitled to payment for his part performance if it can be inferred from the circumstances that there was a fresh agreement between the parties under which the promisee agreed to pay for the partial performance.
     - An agreement to pay for the partial performance can only be implied if it was open to the recipient either to accept or reject the benefit of the work and he voluntarily decided to accept it.
   - The party who tendered the partial performance can sue the other party to recover payment that is commensurate with the benefit bestowed on
     - quantum meruit (reasonable price for work done)
     - quantum valebat (reasonable sum for goods actually supplied).
   - **Section 14 (1) of SGA**: Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them but if he accepts the goods so delivered, he must pay for them at the contract rate.

Mabsout v. Fara Bros (Ghana) Ltd – On the basis of an oral agreement, the appellant performed managerial duties for the respondents as their representative in Kumasi. Upon being summarily dismissed he brought an action in the High Court in which he claimed £G 6,000 being

reasonable remuneration for work done for the respondents. On appeal, it was held that the acceptance by the respondents of the services rendered by the appellant at the request of the respondents raised a presumption in law of a promise to pay on quantum meruit basis for the services rendered.

3. **Prevention of performance by the promisee**
- Arises where the party, who has only partially performed his obligations, was prevented through the fault of the other party from completing his obligations under the contract.
- In such a case the performing party may sue to recover damages for breach of contract or he may sue to recover reasonable remuneration on quantum meruit for the work he has done.

Planche v Colburn — The plaintiff agreed to write a book for publication by the defendant as part of a series being published by the defendants. It was agreed that the plaintiff would receive £100 on the completion of the book. He collected material and wrote part of the book, but the defendant abandoned the series altogether before the plaintiff finished writing the book. The plaintiff brought the action claiming payment on quantum meruit. The court held that the plaintiff could obtain a reasonable remuneration on quantum meruit.

4. **Divisible Contracts**
- Generally, a contract is divisible where the obligation to pay for one part of the contract is independent of the performance of the other parts. Common in building contracts.

Appleby v. Myers — Contract for the supply and installation of expensive machinery almost completed, to be paid at end. Frustrated by fire without either party being at fault. It was held that those installing the equipment could not recover for the cost of the work which had been done as the contract was for a complete job which had not been completed. There is no reason why accrued rights should not be enforced after frustration of a contract, but the right must have accrued unconditionally prior to the occurrence of the frustrating act. The mere conferring of some right prior to the frustration of the contract, will not give rise to a restitutionary right on a quantum meruit basis. This was not a divisible contract.

2. DISCHARGE BY BREACH

- In certain cases, a breach by one party releases or discharges the other party from his duty to perform his obligations under the contract.
- Not every breach discharges the innocent party from his liability or obligation to perform.
- The right of a party to treat a contract as discharged arises in 2 kinds of cases:
  1. The right of a party to treat a contract as discharged arises where the party in default commits an anticipatory breach i.e. where the party in default repudiates the contract before performance is due.
  2. Where the party in default commits a fundamental breach of contract.

1. Anticipatory Breach

- Repudiation occurs when a party by his words or conduct demonstrates that he does not intend to perform his obligations under the contract.
  - It is an absolute refusal to perform communicated either by words or by conduct.
- Such repudiation amounts to anticipatory breach where the party in default renounces his obligations under the contract even before the time fixed for performance.
- In this case the innocent party is entitled to treat the contract as discharged and maintain an action for damages immediately.
- The repudiation may be explicit or implicit.
  - ***Explicit*** where the defendant expressly declares that he will not perform the contract when the time for performance arrives.
  - ***Implicit*** where a reasonable inference can be made from the defendant's conduct that he no longer intends to perform his side of the contract.

Hochster v. De La Tour: The defendant agreed to employ the plaintiff as his courier during a foreign tour commencing June 1. On May 15, the defendant informed the plaintiff that he had changed his mind and would not require his services. The plaintiff brought the action for breach of contract on May 22. The defendant's objection was that there could be no breach of the contract until June 1, which was the date fixed for performance. The defendant's argument was rejected on the ground that the anticipatory breach was itself a breach of the contract and it entitled the plaintiff to sue immediately for damages. **(explicit repudiation)**

Frost v. Knight: D promised to marry the plaintiff after his father's death. D then broke off the engagement during his father's lifetime and the plaintiff brought the action for damages for breach of promise to marry. The plaintiff's action succeeded. **(implicit repudiation)**

- Before the other party or innocent party can treat himself as discharged it must be established that the defaulting party made his intentions very clear beyond reasonable doubt that he did not intend to perform.

Federal Commerce v. Molena Alpha Inc. — Wrongful repudiation — A situation where one party honestly believes that the terms of the contract justify his refusal to perform.

- Where one party repudiates his obligations under the contract before performance is due the innocent party has **options:**

Option 1 –Affirmation of contract

- ***The innocent party can affirm the contract and treat the contract as still being in force.***
- The innocent party is said to have affirmed the contract if after becoming aware of the other party's repudiation he makes it clear by his words or conduct that he refuses to accept the breach as a discharge of the contract.
- Effect of such affirmation
  1. Where a party affirms the contract, the contract remains in force for the benefit of both parties.
  2. If in the interim, the defaulting party changes his mind and decides to perform, the contract is fulfilled and the defaulting party incurs no liability.
  3. The defaulting party is entitled to take advantage of any frustrating event which may occur in the interim.
     - If after the affirmation of the contract by the innocent party any frustrating event occurs before the date fixed for performance, the contract would be terminated and both parties would be discharged from performance.
     - The innocent party's right to accept the repudiation and claim damages will be lost by reason of the frustrating event.

Avery v. Bowden: The defendant chartered the plaintiff's ship and promised to load it with cargo at Odessa within 45 days. The ship sailed to Odessa to be loaded with the cargo and remained there for a while. While the ship remained there the defendant repeatedly told the plaintiff to go away since he had no cargo to load the ship with. The plaintiff, however, remained there in the hope that the defendant would fulfil his promise. Before the 45 days elapsed, the Crimean war broke out and the contract was frustrated because the purpose of the contract became illegal. The plaintiff sued for damages for breach of contract. It was held that even though the defendant's repudiation amounted to anticipatory breach which would have entitled the plaintiff to sue for damages immediately, that right to damages had now been lost by reason of the frustration of the contract.

Option 2 –Innocent party affirms the contract; proceeds to perform his side of the contract and sues for payment

- This option is only possible where the innocent party can perform his side of the contract without assistance of the other party.

White & Carter (Councils) Ltd. v. McGregor — W & C contracted to display advertisements of M's garage company for 3 years on litter bins. The same day McGregor said they no longer wished to be on bins. W & C refused cancellation and displayed the ads, and brought an action for the price. Held: that the plaintiff was not obliged to accept the breach of contract and could continue with the contract since they could do so without the defendant's cooperation. They were thus entitled to full payment for the three years advertising.

- **2 limitations or qualifications to the principle in the case:**
  1. It must be possible for the innocent party to perform his side of the contract without any cooperation from the guilty party
  2. The performing party must have some legitimate interest (financial or otherwise) in proceeding with performance instead of claiming damages.

Option 3 – Accept the repudiation and treat the contract as discharged

- The innocent party may treat the contract as having come to an end or as conclusively discharged and sue for damages.
- Where he chooses this option both parties are released from further performance and the innocent party may sue the defaulting party for damages. **[Frost v. Knight; Hochster v. De La Tour]**

2. Fundamental Breach

- Arises where the other party without expressly or impliedly repudiating his obligations commits a fundamental breach of the contract
- **2 tests** for determining whether a breach is fundamental or not.

1. The first test ***depends on the degree of importance that the parties attached to the particular term which has been broken.***
   - The courts will decide whether the parties regarded that particular term which has been broken was of major importance to the contract of the parties or of relatively minor importance.
   - If the court concludes that the term is a condition then a breach of that term entitles the innocent party to treat the contract as discharged. If the term is a warranty, the innocent party can only sue for damages.
2. The second test *depends on the consequences of the breach which has occurred.*
   - The courts look to see whether the events which the breach gives rise to go to the root of the contract
   - i.e whether it frustrates the commercial basis of the contract or deprives the innocent party of substantially all the benefit he expected to derive.

3. Discharge by Frustration

- Arises where an unforeseen or unexpected contingencies or events occurs to make the performance of the contract impossible, illegal or radically different from the performance that was contemplated.
- Operates to discharge the parties from the obligations they have undertaken to perform under the contract.

Davis Contractors v. Fareham U.D.C: The plaintiff agreed to build 78 houses for the defendant within 8 months for a fixed price. Due to bad weather, shortage of labour and slow demobilisation after the war, the work took 22 months, and cost more than was anticipated by the contract. The plaintiff contended that the contract had been frustrated. Applying the test, the court held that the contract was not frustrated.
Held: (Lord Radcliffe): "Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. It is not hardship or inconvenience or material loss which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would if performed be a different thing from that contracted for."

Application of the Test for Frustration

1. The contract must be construed in light of its nature and the relevant surrounding circumstances existing at the time the contract was made.
2. The scope and nature of the original obligations undertaken by the parties must be examined.
3. Then the scope and nature of the contractual obligations must be assessed after the event has occurred.
4. The two must be compared to decide whether the new obligation to be performed would be radically different from what was undertaken under the contract originally.

- A mere rise in cost or expense will generally not frustrate a contract.
- For a contract to be frustrated the unexpected event must affect the subject matter of the contract or radically change the fundamental obligations created by the contract.

Illustrations of the doctrine of frustration

i. ***Destruction of a physical thing***: where it is clear from the nature of the contract that the continuing availability of a particular thing or a given person is essential to the fulfilment of the object of the contract, if by some extraneous circumstances such a thing or person is no longer available, the contract will generally be deemed to have been frustrated. **[Taylor v. Caldwell]**

ii. ***Unavailability of a person***: In contracts for the performance of personal services, the occurrence of an event such as the death of a person, serious illness or accident or the person being called out for war or detained may result in the frustration of a contract.

Morgan v. Manser: D, a music hall artiste entered into an agreement with the P by which he appointed the P as his manager for a term of 10 years. After two years, P was called up for service in the army and was not demobilized until after 8 years. P sued D for certain breaches of the agreement and the defendant alleged that by reason of his call up to the army, the agreement had been frustrated. It was held that there was such a change of circumstances and for such a duration that the original contract, looked at as a whole, was frustrated by the call up of the defendant.

iii. ***Non-occurrence of an expected event***: For a contract to be deemed frustrated by reason of the non-occurrence of an event it must be shown that the event in fact formed the basis of the contract.

Krell v. Henry: There was a contract for the hire of a room to view the coronation procession of King Edward VII. The coronation was cancelled because of the king's illness. It was held that the contract was frustrated since the basis of the contract was this event which had been cancelled.

iv. ***Changes in the law***: It is generally accepted that governmental intervention by way of legislation which renders the performance of the contract impossible or illegal results in the frustration of the contract.

Denny, Mott & Dickson v. Fraser & Co.: A contract for the sale and purchase of timber contained an option to purchase a timber yard. By a wartime control order, trading under the agreement became illegal. One party wanted to exercise the option. It was held that the contract was frustrated by supervening legislation prohibiting the importation of goods of that description.

Events not sufficient to constitute frustration

i. ***Hardship or extra expense or mere inconvenience***: an event which causes serious inconvenience, hardship, financial loss or delay in the performance of the obligations is generally not sufficient to constitute frustration of the contract**. [Davis Contractors v. Fareham U.D.C]**

ii. ***Inflation***: It is doubtful that inflation can be relied on of itself as a ground for holding that a contract is frustrated. The general position is that any depreciation in the currency in which the contract price is expressed is a risk which must be borne by the relevant party.

British Movietonews v. London & District Cinemas (Viscount Simon's Obiter): "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

DOCTRINE OF FRUSTRATION AND LEASES

- It is accepted that the doctrine of frustration in appropriate circumstances applies to leases.

Cricklewood Property & Investment Trust Ltd. v. Leightons Investment Trust Ltd: A building lease was granted 1936 to the lessees for a term of 99 years for the building of shops. Before any buildings could be erected, the World War 2 broke out and government restrictions made it impossible for the lessees to erect the shops they had covenanted to build. The lessees alleged that the contract had been frustrated. It was held by the majority of the House of Lords that even though the doctrine of frustration could apply to a lease, this particular lease was not frustrated by these events. Since the lease still had 90 years to run and the interruption in performance was likely to last only for a small fraction of the term, the entire lease could not be deemed to have been frustrated.

SELF-INDUCED FRUSTRATION

- A party cannot rely on a self-induced frustration as discharging him from performance.
- Where a party causes the event in question. The contract is not frustrated. The party is deemed to be in breach of contract.

Maritime National Fish Ltd. v. Ocean Trawlers Ltd: The appellants chartered the respondent's trawler for use in the fishing industry for a period of 12 months. Both parties knew that the vessel could only be used with an otter trawl and that it was an offence to use the vessel with the otter trawl without a licence from the Minister. The appellants, who were

operating 5 trawlers, applied for 5 licences but were only granted 3 and asked to name 3 trawlers. They named 3 trawlers that did not include the vessel they had chartered from the respondents. They then sought to rely on the failure to obtain a licence as a ground of frustration of the contract. It was held that the appellants could not rely on the lack of licence as the cause of the frustration of the contract because it was self-induced.

- The onus lies on the party who alleges that the frustration was self-induced to prove that it was in fact caused by the other party.

Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.: The event which occurred was an explosion in a ship which prevented the ship owners from delivering the ship to the charterers according to the terms of their contract. The charterers claimed damages, arguing that the frustrating event (the explosion) was self-induced. It was not possible to say whether the explosion was caused through the fault of the ship owners or not. It may or may not have been the fault of the ship owners. The House of Lords held that the burden of proof lay on the charterers, who were the plaintiffs, who alleged that the frustration was self-induced, to show that the ship owners were at fault, and since the plaintiff could not prove this, the action failed.

EFFECTS/CONSEQUENCES OF FRUSTRATION

- The rule at common law is that the occurrence of a frustrating event brings the contract to an end forthwith.
- Frustration does not render the contract void ab initio.
  - It starts out as a valid contract but ends automatically (as to the future) when the frustrating event occurs.
- Future obligations are discharged but accrued obligations remain
  - Each party remains under a duty to fulfil his contractual obligations which have become due before the frustrating event.
  - It however discharges both parties from further performance of the contract.
- Where money is paid to secure performance of a contract, and performance fails as a result of the frustration of the contract, the party who paid can recover the amount if there is a total failure of consideration. **[Fibrosa Case]**

Fibrosa Case (Fibrosa Spolka Ackyjna v. Fairbairn Lawson Combe Barbour Ltd.) *overruled the case of Chandler v. Webster saying that the doctrine of the total failure of consideration does apply.*
An English company agreed to sell certain machinery to a Polish company for the price of £4,800. Delivery was to be made in 3 or 4 months. The Polish company had paid only £1,000 when the war broke out and the contract became frustrated. The Polish company sued for the return of the £1,000 they had paid to the English company. The court held that the plaintiffs, the Polish company, was entitled to recover the £1000 they had paid because there was a total failure of consideration – in that the plaintiffs got nothing for the money they had paid

STATUTORY PROVISIONS ON THE CONSEQUENCES OF FRUSTRATION OF CONTRACTS (Sec 1-3)

- When a contract is deemed to have been frustrated, both parties are discharged from further performance of the contract. **[Section 1]**
- All sums paid to any party under the contract before the frustration of the contract and the discharge of the parties are recoverable by the party who paid them *[* ***Section 1(2)*** *adopts the principle in the fibrosa Case but excludes the qualification that moneys paid are only recoverable where there is a total failure in consideration.*
- All sums payable or due to be paid to any party under the contract before the time of discharge ceases to be payable.
- However, a party who has spent on the performance of the contract can recover or retain from monies received from the other party an amount which should not exceed the expenses he has in fact incurred or the total sum payable under the contract. **[Section 1 (3)]**
  - The amount to be paid is as the court may consider just
- In computing the expenses incurred by the party, the courts may include overhead expenses, cost of personal services rendered etc.
  - Insurance receipts will not be included unless there is an obligation under the contract to insure.
- The provisions in part one **do not apply** to:
  - Charterparty (except time charterparty)
  - Any contract for the carriage of goods by sea.
  - Contracts of insurance
- Severance: Where it appears to the court that a part of any contract which has been wholly performed before the time of discharge can be properly severed from the remainder of the contract. The court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat section 1 as only applicable to the remainder of the contract. **[Section 2]**
- Where the parties agree expressly as to what should be the effect of the contract they have made, the provisions in the Act will not apply. **[Section 3]**

R.T. Briscoe (Ghana) Ltd. v. Essien –Supervening legislation frustrated The performance of the contract. The court held that:
although the defendant incurred some expenses in obtaining a timber concession and in preparing some logs for the plaintiffs before the contract was frustrated, those expenses can be recovered when the logs are sold to the Ghana Timber Marketing Board. The defendant will recover the expenses twice and will be unjustly enriched if he is allowed to retain those expenses out of the sums paid to him by the plaintiffs. The expenses contemplated by section 1, subsection (3) of Act 25 are those which must have benefited the plaintiffs.

4. DISCHARGE BY AGREEMENT

- The parties to a contract may be discharged by their own agreement.
- The parties to an existing agreement may enter into a subsequent agreement to extinguish the rights and obligations created by their earlier contract.

Fish & Meat Co. Ltd v. Ichnusa Ltd – The court held that an existing contract can be discharged by mutual agreement and expressly by another contract or agreement in which a clear intention to discharge the previous contract is shown.

i. In some cases, ***the parties may intend to extinguish the original contract in its totality and put an end to their contractual relations altogether.***
  - Here, the original contract is deemed to have been rescinded.

ii. In other cases, ***the parties' intentions may be to extinguish the former written contract and replace it with a new and self-contained agreement.***
  - The result of such an agreement is that the earlier written contract is deemed to have been rescinded and substituted with the new agreement.

Japan Motors Trading Co. Ltd. v. Randolph Motors Ltd. The plaintiffs entered into an agreement to sell their motor workshop to one J.K.R. Subsequently, J.K.R floated the defendant as a limited liability company and a new agreement was entered into between the plaintiffs and the defendants on the same terms as between the plaintiffs and J.K.R. The plaintiffs brought an action to recover the outstanding sale price. The defendants resisted and contended, inter alia, that the earlier agreement with J.K.R did not bind them. The court held that the parties themselves agreed to substitute the subsequent agreement for the previous one.

REMEDIES FOR BREACH OF CONTRACT

- Basically, every breach of contract entitles the injured party to **recover damages** for the loss he has suffered.
- Remedies may be either under the common law or may be equitable in character, with certain differing consequences:
  - **common law remedies**: provided that the breach is proved, the remedy should follow and be available as of right.
  - **equitable remedies: these** are discretionary and are granted only subject to the requirement that it is equitable to grant them. They will be granted by reference to the maxims of equity.

- **Common law remedies are of four main types**:
  1) ***Unliquidated damages***: these are assessed by the court according to the breach itself and the losses arising from it.
  2) ***Liquidated damages***: these are set sums identified by the parties prior to formation of the contract.
  3) ***Restitution of payments made in advance of a contract***: recovery is possible where there is a complete failure of consideration or where there is a mistake of law.
  4) ***Quantum meruit***: recovery for an amount of work already done
- **Equitable remedies are usually of four main kinds**:

1) ***Specific performance*** – where in certain circumstances the terms of the contract are enforced.
2) ***Injunctions*** – where in certain circumstances parties are prevented from enforcing the contract.
3) ***Rescission*** – where parties are allowed, if it is possible in the circumstances, to return to their pre-contractual position.
4) ***Rectification*** – where a written contract is altered on order of the court in order to reflect the actual agreement accurately.

RECOVERY OF DAMAGES

- The general objective of the courts in awarding damages is to ***place the injured party or the innocent party, as far as money can do it, in the position he would have been in if the breach had not occurred***, i.e., if the contract had been performed.

Royal Dutch Airlines (KLM) and Another v. Farmex Ltd: Ds entered into an air carriage contract with the Ps to ship a consignment of mangoes to London. The Ds failed to deliver the consignment on schedule and when the consignment eventually reached London the mangoes were declared unwholesome. The plaintiffs sued the defendants jointly and severally claiming, inter alia, damages.
Held that with regard to the measure of damages for breach of contract, the principle adopted by the courts was **restitution in integrum**, i.e. if the plaintiff has suffered damage, not too remote he must, as far as money can do so, be restored to the position he would have been in had that particular damage not occurred. What was required to put the plaintiff in the position they would have been in was sufficient money to compensate them for what they had lost.

Limitations on the Availability of Damages

- Three factors to take into account that may limit the availability of damages: **Causation; Remoteness and Mitigation of loss**

i. Test of Causation

- ***A claimant can only recover damages if the breach of contract caused his loss.***
  - It is not enough that there is breach of contract and loss
  - The loss must be a consequence of the breach. As such, an intervening act that occurs between the breach of contract and the loss may breach the chain of causation.
- ***The breach of contract may be a cause of the loss, i.e. one of several causes, rather than the sole cause.***
  - Where the loss has been brought about as the result of two different causes, only one of which is the breach of contract, the breach may still be considered to be the cause of the loss and liability may result.

Smith, Hogg & Co v. Black Sea Insurance: a ship sank not just because of the prevailing conditions while it was out at sea but also because it was generally not seaworthy. It was still held that the loss was the result of sending the ship out to sea not properly serviceable for the voyage. Without the poor condition of the ship, the loss may not have occurred.

ii. Test of Remoteness of Damage - Reasonable Foreseeability

- The general principle is that damages will never be awarded for a loss that is too remote a consequence of the breach.

Hadley v. Baxendale: a mill owner contracted with a carrier to deliver a crankshaft for his mill. The mill was actually not operating at the time because the existing crankshaft was broken. The carrier did not know at the time the contract was formed that the mill owner did not have a spare crankshaft. The carrier was then late with delivery by several days, during which time the mill was unable to grind corn and thus supply its customers with corn. The mill owner sued for loss of profit. He was unsuccessful because the carrier was unaware of the importance of prompt delivery. The Court of Exchequer accepted the defendant's submission that the loss was too remote and should not be recoverable. It would have been an entirely different position if the defendants had been made aware that the mill would be inoperable without the part but they were not aware that this was the only crankshaft that the claimant possessed.
Alderson B identified that: 'Where the parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising either naturally, i.e. according to the usual course of things, for such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.'

- The rule is analysed into 2 branches:
  1. **General Damages:** covers losses which arise naturally i.e., in the usual course of things, from the breach of contract itself.
     - Such losses are recoverable because they are the natural result of the breach of contract and are reasonably foreseeable as the likely result of the breach.
     - This is measured objectively, according to what loss is a natural consequence of the breach
  2. **Special Damages:** covers losses which may reasonably be supposed to have been in the contemplation of both parties as the probable result of the breach.
     - Such losses are those which arise from special or exceptional circumstances, outside the ordinary course of things.
     - The defendant is liable for such losses only if they could reasonably be supposed to have been within the contemplation of the defendant as likely to result from the breach of contract.
     - The defendant is liable for such losses only if he knew of the special circumstances that gave rise to them.
     - Measured subjectively and based on the specific knowledge of potential losses that is in the minds of both parties at the time the contract is formed.
- The test reformulated and explained by **Asquith L.J. in the case of Victoria Laundry Ltd v. Newman Industries Ltd**.:

i. To give the claimant a complete indemnity for any loss suffered by the claimant, no matter how remote, is too harsh a test to apply to the defendant.
ii. As a result, recoverable loss should be measured against a test of reasonable foreseeability. The loss should be one which at the time the contract was formed would be reasonably foreseeable to result from the breach.
iii. Foreseeability of loss is itself dependent on the knowledge that is possessed at the time of formation of the contract.
iv. Knowledge possessed at the time of formation can be of two types:
- **Common knowledge** – that knowledge which any reasonable person would be expected to have of loss that would naturally arise from the breach (***general damages)***;
- Actual knowledge enjoyed by the defendant – knowledge which was particular to the parties at the time that the contract was formed ***(special damages).***

Juxon-Smith v. KLM Dutch Airlines: P who described himself as a frequent traveller, a well-known international businessman and a dealer in sophisticated mining, communication and security equipment, bought a business class ticket from the D airline under an air carriage contract. The airline was to fly the P from Accra to London from where he would continue this journey to Brussels, Belgium. According to the plaintiff the reason for the trip was to enable the plaintiff bid for an international contract which was worth US$6 million. The defendant however failed to fly to London in breach of the contract. Claiming that the breach was deliberate which caused him to lose the bid for the said contract, the plaintiff sued.
The Supreme Court held, unanimously dismissing the appeal, that where a party has sustained a loss by reason of a breach of contract, he was, so far as money could do it, to be placed in the same situation with respect to damages, as if the contract had been performed. **In contracts for the carriage of persons, the normal measure of damages for failure to carry, was the cost of obtaining substitute transport less the contract price and consequential losses such as hotel expenses and the like and non-pecuniary losses such as physical inconvenience and discomfort.**

iii. Likelihood of Loss

- Generally, as long as the kind of damage or loss caused by a breach of contract was within the reasonable contemplation of the parties at the time the contract was made, it is immaterial that the chain of events which resulted was unlikely or far more serious than what was reasonably contemplated.
- The principle, therefore, is that it is enough that the defendant should have foreseen the particular head or type of damage, not its quantum or extent.

Wroth v.Tyler: the defendant failed to complete his contract to sell a house for 6,050, and the value of the house rose to £11,500. It was held that the defendant was liable to pay £5,500 as damages. A rise in the price of the house was in the contemplation of the parties when the contract was made, and it is irrelevant that they never expected a rise which would nearly double the price.

BASIS OF ASSESSMENT OF DAMAGES

- There are normally said to be three bases for assessing awards of damages in contract claims even though these themselves can be broken down into more specific areas:
    - loss of a bargain
    - reliance loss
    - restitution (recovery of payments made).

(i) Loss of a bargain: The idea here is to place the claimant in the same financial position as if the contract had been properly performed. This may represent a number of situations for which the claimant may recover:

- ***Defective goods or services***: the difference in value between the goods or services of the quality indicated in the contract and those actually delivered where they are of inferior value.
    - This sum can be assessed according to the diminution in value or the cost of bringing them up to the contract quality.
- ***Failure to deliver goods or provide services or to accept delivery***: damages will ordinarily be based on the difference between the contract price and the price obtained in an 'available market'.
    - This can apply where there is either a failure to deliver the goods or services and an alternative supply has to be found, or
    - where there is a failure to accept delivery and an alternative market has to be found.
- ***Loss of profit***: a claimant may recover for the profit on contracts that he would have been able to complete but for the breach of contract.
    - This will only be the case where the loss is not too remote a consequence of the breach.
- ***Loss of a chance***: in rare circumstances the courts have allowed a claimant to recover a loss that is entirely speculative in the circumstances, although generally in contract law a speculative loss is not recoverable.

(ii) Reliance loss

- A claimant is entitled also to recover for expenses he has been required to spend in advance of a contract that has been breached.
- This will normally be based on the defendant's knowledge, either actual or imputed, that expenses would be incurred in advance of or in preparation for performance of the contract by the other party.
- ***A claim for reliance loss will normally be made where the amount of any loss of profit in the circumstances is too speculative to be able to calculate effectively***. **[Anglia Television Ltd. v. Reed]**
- Generally, it is not possible to claim for both loss of profit and reliance loss since it is said to be compensating twice for the same loss. However, it is possible where the claim for lost profit concerns only net rather than gross profit which would include the reliance loss.

(iii) Restitution

- Restitution in the context of a breach of contract is simply a repayment to the claimant of any money or other benefits that he has passed to the defendant in advance of the contract that has been breached.

a) Assessment of Damages for Breach of Contract for the Sale of Goods

- The Sale of Goods Act, 1962 (Act 137) vividly illustrates the principle on assessment of damages in the context of a breach of a contract for the sale of goods.
- The basic principle is that the courts attempt to place the innocent party in the position he would have been in if the contract had been performed.
- If the price of the goods has in the meantime **risen**, the measure of damages would be the difference between **the market price on the date fixed for delivery and the contract price.**
- If the price has **fallen** and is lower than the contract price, the buyer suffers no loss and **is only entitled to nominal damages**.
- Where the buyer intends to resell the goods, it is generally accepted that the resale price may be used as a reference point.
    - In such a case, the seller would be required to pay as damages, the difference between the contract price and the resale price even if the seller had no notice of the sub-contract.
- Where it is the buyer who is in breach of contract, by wrongfully refusing to accept goods delivered under a contract of sale, the plaintiff seller will have to be placed in the position he would have been in if the contract had been performed.
    - Where there is an available market, the measure of damages in this case is ascertained by the difference between the contract price and the market price of the goods where the contract price is higher. Where the market price is higher than the contract price, the seller would be entitled to only nominal damages.

Section 54 (2) SGA: -Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the market or current price and the contract price
(a) at the time or times when the goods ought to have been delivered;
(b) in any other case, at the time or times of the refusal to deliver the goods.
Where there is no available market for the goods in question, the value of the buyer's loss must be otherwise ascertained.

b) Compensation for Wasted Expenditure

- Where a victim of a breach of contract can establish properly incurred expenditure in reliance on the defendant's promised performance and can show that as a result of the defendant's breach, such expenditure has been wasted, he can recover compensation for such wasted expenditure.

Anglia Television Ltd v. Reed: Ps had incurred expenses in preparation for the filming of a television play. Subsequently, they entered into a contract with the defendant, under which he was to play the leading role in the play. D repudiated the contract and the Ps tried hard to find a substitute, but failed. They abandoned the play and sued for damages compensation for their wasted expenditure. The court held that the Ps were entitled to recover the whole of the wasted expenditure on the ground that the D must have known perfectly well that much expenditure had already been incurred on director's fees and the like. According to the court, he must have contemplated, or at any rate, it is reasonable to be imputed to him that if he broke his contract, all that expenditure would be wasted, whether or not it was incurred before or after the contract.

MITIGATION OF DAMAGES

- Generally, a plaintiff is entitled to such damages as would have been suffered by a person **acting reasonably after the breach**.
- This means that where the party not in default, is in a position to take any action which would reduce or avoid the losses resulting from the breach of the contract, he is required to do so.
- Generally, the common law imposes on a plaintiff the duty to mitigate.
    - i.e. the innocent party who has suffered a breach of contract has a duty to take reasonable steps to minimise the extent of their loss arising from the breach.
    - P is prevented from claiming any part of the damage or loss which could have been avoided by mitigation.
- Whether or not the plaintiff has failed to take reasonable steps to mitigate the loss caused by the breach is a ***question of fact*** depending on the particular circumstances of each case.
    - The burden of proving such failure rests upon, the defendant.

Payzu v. Saunders: a contract to deliver goods by instalments, payment to be made within one month of each delivery. The buyers failed to pay for the first instalment on time and the sellers treated this as sufficient grounds to repudiate the contract, which they did. The sellers refused to deliver any more instalments on credit, but offered to continue deliveries at the contract price if the buyers would pay cash at the time of the order. The buyers rejected this offer and sued for damages since the price of the goods had risen. The court held that the sellers were liable in damages for breach of contract, since the circumstances did not warrant their repudiation of the contract. It was further held that the buyers could have mitigated their loss by accepting the sellers' offer to deliver in exchange for immediate cash payment. The damages were therefore to be calculated not in the normal way i.e., by the difference between the contract price and the market price, but by calculating the loss which the buyers would have suffered if they had acted reasonably after the breach and mitigated their losses by accepting the seller's offer.

SCOPE OF DUTY TO MITIGATE

1. ***The plaintiff is expected to do only what is in the normal course of business.*** He is not required to take:
   - risks with his money,
   - steps which might damage his commercial reputation,
   - any complicated legal action against a third party in order to mitigate his loss.

Pilkington v. Wood: P, because of the negligence of the D, his solicitor, bought a house with a defective title. The plaintiff sued the defendant for damages. The defendant contended that the plaintiff should have mitigated his loss by suing the vendor on the covenant of title implied by statute. The court rejected this argument on the ground that the duty to mitigate did not go so far as to oblige the injured party to embark on a complicated and difficult litigation against a third party. The plaintiff was, therefore, entitled to the difference between the market value of the property with a good title and its value with a defective title, at the time of the breach.

2. ***If the plaintiff in fact avoids or mitigates the loss by taking certain steps after the breach, he cannot recover any damages for such avoided loss.***
   - For example, if in a contract of sale, the seller fails to deliver the goods and the buyer succeeds in buying equivalent goods on the market at the same price as the contract price, the buyer cannot thereafter, sue the seller for any loss since he has in fact avoided the loss.

3. ***The plaintiff may recover damages for any loss or expenses incurred by him in reasonably attempting to mitigate his loss following the defendants breach.***

Banco de Portugal v. Waterlow: W contracted to print a series of bank notes for the bank. In breach of contract, they printed and delivered a second batch to a third party in the mistaken belief that he had the bank's authority. The third party and his associates put the notes in circulation. When Banco de Portugal discovered the blunder they called in all 500 escudo notes and redeemed both the authorized and unauthorized notes. The bank claimed the cost of printing the notes as well as the cost of redeeming the unauthorized notes. W contended that as the authorized and unauthorized notes could be distinguished, the bank need not have paid out on the unauthorized notes. The House of Lords held that the bank could recover the sum as it had acted reasonably to maintain confidence in the currency.

MITIGATION AND ANTICIPATORY BREACH

- The application of the rules on mitigation is of great significance in the assessment of damages in cases of anticipatory breach.

i. Where the innocent party choses to accept the repudiation and sue immediately for breach of contract, he comes under a duty to mitigate his losses and will be entitled to recover only such damages as he would have incurred if he had taken such reasonable steps in mitigation.
   - The duty to mitigate arises as soon as the party not in breach accepts the repudiation.

Section 48 of SGA assessment of damages for non-acceptance:
(1) The measure of damages in an action under **section 47** is the loss which could reasonably have been foreseen by the buyer at the time when the contract was made as likely to arise from the breach of contract.
(2) Where there is an available market for the goods, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price,
(a) if a time has been fixed for acceptance, or if the buyer repudiates the contract before the time of performance, and the seller does not accept the repudiation, at the time or times when the goods ought to have been accepted;
(b) in any other case, at the time or times of the refusal to accept the goods.
(3) In this section a time is not fixed for acceptance by reason only that the goods are to be accepted within a reasonable time.

ii. Where the plaintiff upon anticipatory breach by the defendant choses to reject the repudiation and affirm the contract no duty to mitigate arises until the date fixed for performance arrives and the defendant still refuses to perform.
   - the duty to mitigate does not arise until the date fixed for acceptance arrives and the buyer still refuses to perform. **[Section 54 of Act 137]**

Tredegar Iron & Coal Co. v Hawthorn Bros. & Co.: the Ds had contracted to buy coal at 16s. a ton from the plaintiffs, delivery to be made in February. On February 16, the Ds repudiated the contract; but obtained and communicated to the plaintiffs an offer from a third party to buy the coal at 16s.3d a ton. The plaintiffs refused this offer and insisted on the performance of the contract. The defendants, having failed to take delivery, the plaintiffs ultimately sold the coal for only 15s a ton. It was held that the plaintiffs were entitled to damages amounting to Is a ton. The repudiation, not having been accepted as such was a nullity, and there was no breach of contract until the expiration of the time fixed for the delivery of the goods.

DAMAGES FIXED BY THE CONTRACT- (Liquidated Damages & Penalties)

- Sometimes a contract may contain a clause which stipulates or prescribes a fixed amount of money as being payable upon a breach of the contract by one party.
- ***Liquidated Damages Clause:*** A clause in a contract which is a genuine pre-estimate of the loss of one party in the event of breach by the other party.
  - Generally upheld and enforceable by the courts
- ***Penalty Clause:*** essentially a stipulation which is intended to operate as a threat to keep the potential defaulter to his bargain and not a genuine pre-estimate of the innocent party's possible loss. A clause in which the fixed sums are in the
  - nature of penalties or punitive
  - obviously greater than any loss likely to be suffered by the innocent party; and is
  - stipulated as in terrorem of the offending party or as a security to the promisee for the performance of the contract.
  - generally unenforceable by the courts
- Whether a particular clause or stipulated sum is a liquidated damages clause or a penalty clause is ***a question of construction*** determined by:
  1. the nature of the contract;
  2. the terms of the clause; and
  3. the surrounding circumstances.
- Generally, the burden of showing that the fixed amount in a contract is a penalty and not liquidated damages lies on the party who is sued for damages.

Law v. Redditch Local Board: "The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole of the contract. If the intention is to secure performance of the contract by the imposition of a fine or penalty, then the sum specified is a penalty; but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages."

- Guidelines for the determination of whether a fixed sum is a penalty or liquidated damages **[(Lord Dunedin) Dunlop Pneumatic Tyre Co. Ltd v. New Garage Motor Co]:**

1. A fixed sum will be held to be a penalty:
   - if the breach consists only of the payment of a sum of money, and the sum stipulated as payable upon breach is a sum greater than the sum which ought to have been paid.
   - if the sum stipulated is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have resulted from the breach.

2. If a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious damage, and others trivial damage, there is a presumption (but no more) that it is a penalty.

3. A fixed sum payable upon breach may still qualify as liquidated damages even if the consequences of each particular breach are incapable of precise calculation.
   - This is so as long as the stipulated figure is justifiable as a genuine pre-estimate of possible loss.
   - In other words, the fact that the consequences of the breach are such as to make precise pre-estimation impossible is no obstacle to the sum stipulated being a genuine pre-estimate of damage. On the contrary, this is just the kind of situation where it is probable that the pre-estimated loss was a true bargain between the parties.

RECOVERY OF NON-ECONOMIC LOSSES

- Usually, a breach of contract leads to financial losses or at least losses which can easily be quantified in terms of money.
- The courts are generally reluctant to compensate a plaintiff non-pecuniary loss or ***for purely subjective losses*** such as

disappointment, injured feelings, etc. in cases of breach of contract.
- However, in appropriate circumstances, damages may be awarded to compensate the plaintiff for mental distress, disappointment etc.
  - Where the predominant object of the contract was to provide mental satisfaction, pleasure or entertainment, and as a result of a breach the contract fails to achieve this object, damages may be recovered.

Jarvis v. Swan's Tours: damages were awarded against a package tour operator who provided accommodation falling short of the standard promised and so spoilt the client's holiday. It has also been held that if the purpose of the contract is to provide protection from harassment and because of its breach, the plaintiff is harassed, damages for the resulting distress are recoverable.

Equitable Remedies

- See remedies under equity
- Equitable remedies are available in both contract and tort, although equity is much more closely associated with contract law.
- The whole purpose of equitable remedies is that they should operate where an award of damages is an inadequate remedy and justice is not served.
  - Equitable remedies are at the discretion of the court,