THE LAW OF CONTRACT IN GHANA

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2011

Published in 201 1 by

Frontiers Printing & Publishing Company

ChadwickHouse, #8, BirimRoad, Adabraka

P.O. Box CT 195 3, Cantonments.

Accra. Ghana

(www.firontiers-group.com)

Printed in Ghana by Buck Press Ltd.

(www.buckpress.com)

ISBN: 978-9988-1-5216-1

PREFACE

Contract law is not only a significant source of regulation of most activities in society, it is also one of the most important building blocks for a variety of other subjects traditionally taught in the law student's training. Over the years, in addition to the statutory reforms made in the law on consideration, guarantees, third party rights and frustration of contracts via the Contracts Act of Ghana, 1960 (Act 25), judicial innovation in the law of Contract has also been refreshing and engaging. The courts have adapted and developed the Common Law rules in areas such as the formation of contracts, consequences of illegality, privity of contract and remedies. The book therefore seeks to present the Common Law principles of contract as modified by Ghanaian statute and judicial developments. Having had the privilege of teaching the Law of Contract at the Faculty of Law, University of Ghana, for the past twenty years, this book represents for me, a great opportunity to contribute to the comprehensive statement of the law of Contract as it applies in Ghana.

The book aims to provide an in depth understanding of the basic and traditional principles and concepts of contract law as they apply in Ghana. It is recognized that in order to equip lawyers to plan, predict, advocate and make or reform the law, they must have more than a static knowledge of the legal rules. They must be acquainted with the reasoning behind the rules as well as the practical issues which arise in their implementation. An attempt is therefore made to discuss as many cases as possible, giving an insight into the adjudicative process and the reasoning of the courts in fashioning and applying the principles of contract law. In order to give some perspective on the trends and reasoning behind the principles, the book includes useful commentaries and academic opinions on the impact of the concepts and principles presented. A number of extracts from journal articles arc included to present the perspectives and views of some scholars as well as novel approaches which have been suggested for the solution of problems in contract law.

The material has been organized and structured in a simple manner to ensure that readers easily grasp the import of the principles discussed and appreciate the interactions between the various concepts. The materials presented in the book are outlined in considerable detail, with an elaborate table of contents and numerous sub-headings. This is intended to facilitate ease of reference for users, flexibility in selection and to guide and direct the user's attention. Ultimately, it is hoped that the book will serve as a comprehensive and useful resource for the study of the law of contract in Ghana.

ACKNOWLEDGEMENTS

I am profoundly grateful to Professor G. K. A. Ofosu-Amaah, who taught me the Law of Contract some twenty-seven years ago at the Faculty of Law, University of Ghana and got me interested in a career of teaching law. I would like to express my sincerest gratitude to Justice S. K. Date-Bah, Justice of the Supreme Court of the Republic of Ghana, who painstakingly read through the manuscript and made very important suggestions for its enhancement. I thank all my colleagues at the Faculty of Law, University of Ghana, for their support and encouragement throughout the years. I am especially grateful to Professor C. E. K. Kumado, Professor Nii Ashie Kotey, and Mrs. Ama Hammond, who read through the manuscript and made comprehensive comments and suggestions for its improvement. Special thanks also go to Miss Zeinab Ayariga who assisted with the editing of the book. To my husband, Arthur and children, Joel, Sharon and Christine, you are my greatest source of inspiration. I am grateful to God for making you a part of my life. Notwithstanding all the inputs and contributions acknowledged, I remain exclusively responsible for any shortcomings or errors that may be found in the book.

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1.0 INTRODUCTION

The subject of contract law deals with a form of activity which is characteristic of and essential to community life the making of bargains and consensual transactions for the fulfillment of day to day requirements. Contracts are made by people every day, whether the parties recognize it or not. Each time one spends money on anything a newspaper, a bus ticket, an airline ticket, a pair of shoes, a meal in a restaurant, laundry services, books, or signs a lease, one concludes a valid and legally binding contract. Contract law is relevant to most of the major relationships which individuals enter into in society: employment, housing (whether by purchase or by renting) and generally as consumers of goods and services. Contract law is also of great importance to corporate organizations since most companies conduct their business transactions through contracts with customers, suppliers and employees.

Contracts differ widely in size, content, form and duration. The contents and subject matter of the contract may differ widely: sale, hire purchase, insurance, employment, marriage, mortgage, leases etc. Some of the agreements or transactions made in everyday life are recognized by the law as giving rise to enforceable rights and obligations, while others are not. The law of contract is simply that branch of the law which governs the effort to achieve and carry out voluntary agreement. The principles of the law of contract are basically concerned with determining whether or not an agreement or transaction is legally enforceable and if so, what should be the consequences of its breach.

The term "contract" is often used to refer to an agreement, consisting of the exchange of promises, which is recognized by law as giving rise to enforceable rights and obligations. Sir Frederick Pollock states that the most popular and exact description of a contract that can be given is one which defines a contract as a promise or set of promises which the law will enforce.1 This definition emphasizes the fact that a contract consists essentially either of an exchange of promises between two or more parties or a promise given in exchange for the performance of an act.

The American Restatement (Second) of Contracts (1981)2 defines a contract Pollock, Frederick (1902) Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England, 7th ed., London: Stevens & Sons Limited, p.l.

2 The Restatement of Contract is one of nine Restatements produced by the American Law Institute, which was founded in 1923 to promote the clarification and simplification of the law. As a statement of law, it has no binding force, but has been extremely influential, with many of its sections being adopted by state courts as representing the law as 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 recognises a duty? This definition emphasises three important aspects of a contract: the concept of promise, legal duty and remedy.

In every case involving a contract the courts are concerned with three basic issues:

1. What exactly is the promise or promises that have been made by the parties? This inquiry helps to determine the terms of the contract which define the scope of the contractual liabilities undertaken by the parties to the contract.

2. Does the promise or do the promises create any legal duty? This involves a determination of whether the essentials of the formation of contracts have been complied with such as to make the parties' promises legally enforceable. This inquiry often involves the determination of issues relating to the existence of consideration, capacity, vitiating factors or the legality of the object of the contract.

3. Upon determination of (a) and (b) the final issue is what kind of remedy should be given to the aggrieved party in the event of a breach or failure of the other party to perform the contractual duty.

The common law has long emphasized the commercial essence of contract and stressed the fact that the central notion of contract is the concept of a bargain. Contract law only enforces promises which are made as part of a bargain, i.e. promises which are given in exchange for something else. A bargain has been defined as an agreement of two or more persons to exchange promises or exchange a promise for a performance? Thus every contract, by definition, involves at least two parties and consists of an exchange of promises or the exchange of a promise for an act. Conventional learning establishes that a "bare" or "naked" promise, i.e., a promise for which nothing has been given or promised in exchange is not enforceable as a contract.

1.1 PROMISES AND CONTRACTUAL OBLIGATIONS

Contracts are essentially about promises and undertakings. The distinguishing feature of contractual obligations is that they are not imposed by the law but are rather undertaken by the contracting parties voluntarily. A party is bound by a contract only because he/she has voluntarily undertaken to do or not to do something, in which case if he/she performs that thing badly, or fails to perform at all, the party to whom the promise was made can have a cause of action against him/her for breach of contract.

The word "promise" is generally used in ordinary speech to refer to a commitment or an undertaking to do or not to do something in the future and most contracts do contemplate the future performance of some obligation by one or more of the parties. However, even though the word "promise" bears this meaning in the law of contract, it could also be used in a wider sense to refer to any statement or undertaking about existing facts. Thus a party could be deemed to have made a promise as to the present state of affairs or even as to past events. A statement or undertaking as to the present state or condition of a thing to be sold for example, would constitute a promise in that it guarantees ascertain state of affairs, and if such statement or undertaking turns out not to be true it would amount to a breach of promise.

1.2 ELEMENTS OF A VALID CONTRACT

Generally, the following elements are the traditional tools of analysis on the creation of a valid and enforceable contract.

(1) Offer and Acceptance

Contracts are bargains and the most usual way to make a bargain is for one party to propose the terms or conditions on which he is prepared to transact with the other party and for the other party to accept, modify or reject them. The determination of the existence of agreement is therefore usually made within the context of "offer and acceptance". Thus in determining whether or not a contract has been made, the courts usually begin by looking out for a promise by one party, which usually takes the form of an "offer" and a corresponding "acceptance" of the offer by the other party. This exchange of promise for promise or promise for an act is what constitutes the bargain or agreement.

(2) Intention to Create Legal Relations

The second element which must be established for the creation of an enforceable contract is an intention to create legal obligations, which simply requires that the parlies must have clearly evinced or manifested an intention that their agreement, or exchange of promises was intended to have legal consequences or to be legally enforceable. This requirement is important because in everyday domestic and social life, a great majority of the consensual agreements and arrangements made are often not intended to create any legal relations between the parties.

(3) Capacity to Contract

Further, it must be established that the parties have capacity or power in law to create contractual relations between them. Issues of capacity arise where the ability of one or both parties to assume contractual obligations is limited by the law to ensure their protection for policy reasons. Such special categories of persons whose capacity to contract is limited by statute or under the common law include infants, mentally incompetent persons and drunkards.

(4) Consideration

Lastly, the promise that is to be enforced must be supported by "consideration" unless the agreement is in the form of a deed, that is, if it is in writing, signed and attested.9 The element of consideration is crucial in the determination of whether or not a valid contract has been made. The element of consideration in a sense provides the court with a reason to enforce the contract. Thus the courts will enforce a promise made in favour of a party only if such party can show that he/she has given something of value in exchange for the promise made to him/her, i.e., consideration. Consideration may be in the form of a return promise or the actual performance of a stipulated act.

1.3 ASCERTAINING THE FACT OF AGREEMENT

The concept of agreement is the basis or essence of every contract. A contract is essentially the outward manifestation of agreement between the parties with regard to a common objective. This manifestation of agreement may be made wholly or partly in writing, orally, by conduct or by a combination of all three. Thus one of the first inquiries in dealing with any contractual dispute is to determine whether or not there is an agreement between the parties at all.

1.3.1 Nature and Test of Agreement

How do the courts determine whether the parties have in fact agreed to enter into a particular contract? In other words how do the courts decide whether the words or conduct of the parties constitute a manifestation of agreement?

Earlier judicial opinion seemed to suggest that actual agreement or consensus ad idem or "meeting of minds" was essential for the formation of a contract. It has been held that the absence of consensus ad idem has the effect of putting the parties at cross purposes and unless the courts can find evidence of actual agreement on the part of both parties it may be compelled to hold that there is no contract.10 The phrase "meeting of minds" seemed to suggest that the existence of agreement required that the parties must have arrived at the same mental state with regard to the contractual terms. This, however, is not the object of the court's investigation when seeking to determine whether the parties are agreed.

In determining whether or not the parties have come to an agreement the courts lay particular emphasis on external appearance rather than the actual intent or state of mind of the parties. The courts operate on the basic principle that agreement is not a mental state but rather an act and, therefore, a matter of inference from conduct.12 In ascertaining the existence of agreement, therefore, the parties are to be judged, not by what they had in mind but by what can be objectively inferred from what they have said, written or done (external appearance).

1.3.2 The Objective Test

It is a fundamental principle of common law that the test of agreement is an objective one and not a subjective one. The objective test of agreement is premised on the judgment of intention from the reasonable meaning of the words and conduct of a person as opposed to his actual intentions. This approach is contrasted with the subjective test which attempts to ascertain the intentions of the parties from their actual state of mind. It has been emphasized that the function of the judge is not to seek to discover some elusive mental state of the parties, but rather to ensure that as far as possible, the reasonable expectations of honest men are not disappointed.

In the Ghanaian case of P. Y. Atta & Sons Ltd v. Kingsman Enterprises Ltd:"

The plaintiff company, P.Y. Atta & Sons Ltd, had a lease from the Government of Ghana in respect of a plot of land at the Ring Road South Industrial Area, Accra, for a term of 50 years from 11 May 1972. PYA put up buildings on the land and carried on business there. In 1993, pursuant to the request of the defendant-company, Kingsman, for a lease of a portion of the land to construct stores for its business, the parties executed a document, exhibit B. Although (as stated in the habendum of the document) PYA conveyed to Kingsman " all the residue now unexpired of the said term of 50 years granted by the head lease", the terms of the agreement indicated, among others, that Kingsman would pay rent, give two of the stores to be constructed to PYA and Kingsman could not assign or underlet any part of the stores without the prior consent of PYA. Between 1993-1997, the parties dealt with the terms of exhibit B as if it was a sublease and Kingsman complied with its terms, paid rents and gave the two stores to PYA. Subsequently, in November 1997, Kingsman wanted to construct another building on top of the store for use as offices but PYA refused to give its consent as required under the agreement. Kingsman in response alleged that it did not need the consent of PYA after all because by the habendum in the agreement, it was an assignment that was conveyed to it and not a sublease; and that consequently, it has never been a tenant of PYA. Kingsman therefore started construction.

PYA sued at the Hight Court for, inter alia, an order for rectification of the agreement by the addition to the habendum, of the words "less one day" or less such other period as would make the agreement reflect the true character of a sublease. Kingsman counterclaimed for a declaration, inter alia, that on its true and proper construction, the agreement constituted, an assignment and not a sublease. The High Court found for Kingsman. The Court of Appeal affirmed the decision of the trial High Court. PYA further appealed to the Supreme Court.

The Supreme Courts noted that in considering every agreement, the paramount consideration was what the parties themselves intended or desired to be contained in the agreement. The intentions should prevail at all times. The general rule was that a document should be given its ordinary meaning if the terms used therein were clear and Unambiguous. In conflicting situations, the process of determining the intentions of the parties should be objective. The objective approach in that context, implied the meaning that the words in the document would convey to a reasonable person seized with the facts of the case. In such exercise, the entire document, the effect it had on the parties, the conduct of the parties and the surrounding circumstances would have to be taken into account. And where two or more clauses were found to be inconsistent, effect was to be given to that which was calculated to give real effect to the intention of the parties.

The Supreme Court held, unanimously allowing the appeal, that it was clear from the agreement signed by the parties and on the evidence, especially the conduct of the defendant company between 1993 and 1997, all against its own interest, that the agreement was not a correct version of the concluded contract, because it was expressed in terms amounting to an assignment rather than a sublease. That on the evidence, was a mutual mistake and when in 1997, differences arose between the parties as to the real nature of the written agreement, the plaintiff company commenced legal action early enough to avoid laches on its part. The

plaintiff company had not, by conduct, disentitled itself in equity to the remedy of rectification.

1.3.3 Application of the Objective Test

Sometimes there is a disparity between a person's actual intentions and the objective and reasonable meaning of his words or conduct. In such cases, the courts generally apply the objective test and give effect to the reasonable objective meaning of the words or conduct of the parties as opposed to what they allege to be their actual intentions. In applying the objective test, 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 its objective sense. The court considers what the parties said or did and how such statements or conduct would have been understood by a reasonable, objective bystander and imputes that intention to the parties, rather than seeking to establish the actual state of mind of the parties.

The application of the objective test represents a more pragmatic approach since it is almost impossible to ascertain the actual state of mind of the parties to the contract. The application of the objective test ensures certainty. It has been noted that if the objective test were not applied a party to a contract could never rely on a contract he had made since there is always the possibility that the other party had some undisclosed misunderstanding or intention with respect to the nature and effect of the contract.

The objective principle has been clearly summed up in Freeman v. Cooke and adopted by Lord Blackburn in Smith v. Hughes as follows:

Thus if party A behaves in such a manner as to lead B to reasonably believe that he (A) was accepting B's offer to enter into a particular contract, and party B acts on that belief and enters into a contract with A, there will be deemed to be a contract, even if in fact, A did not intend to accept B's offer at all. Conversely, if A makes an offer which can reasonably bear only one meaning and B, understanding the offer in that reasonable sense, accepts it, A cannot escape liability by saying, however truthfully, that he intended the offer to mean something else.

The objective test comes into play where one party makes an offer to another, which is accepted in a sense different from that intended by the offering party. Even though on the face of it the parties appear to have agreed, there is in fact no real consensus because the offer that has been accepted is not the offer that was made. For example, A offers to sell his Toyota car to B. B accepts thinking that the car being offered for sale is A's Mazda car. Is there an enforceable contract between A and B? If it is assumed that contracts are normally formed by a correspondence of offer to acceptance, then applying the objective test would yield the following logical sequences:

1. A makes an offer of X to B. B accepts, thinking that what was being offered is Y. If a reasonable man in the position of B would have understood the offer to mean X then,

applying the objective test, the court would conclude that there is a contract between A and B for X.

2. A makes an offer of X to B. B accepts thinking that what was being offered is Y. If a reasonable man in the position of B would have understood the offer to mean Y, then the courts, applying the objective test, would conclude that there is a contract between A and B for Y.

3. A makes an offer to B, intending to offer X and B accepts thinking that what is being offered is Y. A reasonable man in the position of B would have understood the offer to mean either X or Y. In this case, no contract may be deemed to exist between the parties because of the lack of correspondence between the offer and the acceptance.

The case law as discussed below illustrates the application of the objective test and the broad principles which guide the process of determining of the existence of agreement in different situations.

Where there is no Ambiguity

Generally, if there is no ambiguity in the words or conduct of the parties, and any reasonable observer of the promisor's conduct would have supposed, and the promisee did suppose, that the promisor was making a particular promise, for example X, the promisor will be bound by promise X if it is comprised in a bargain. In Tamplin v. James:

The defendant attended an auction at which a certain property, called the "Ship Inn" was put up for sale as Lot 1. The particulars of the sale and the plan, which was openly displayed at the auction showed clearly the extent and dimensions of the property. The defendant did not bid for the property at the auction, but afterwards he made an offer privately to the auctioneer to buy the property and the offer was accepted. Later, defendant refused to complete the contract on the ground that he had made the offer in the mistaken belief that the property being sold as Lot 1 included two adjacent plots which the plan showed were not part of the property at all. Defendant admitted that he had not examined the plans at all, but had assumed that the property included the adjacent plots because he had known the property since his infancy and had always observed that the Inn and the two adjacent plots had always been occupied by the same tenants.

The court held that the defendant was bound by the contract to buy Lot 1 without the adjacent plots. Since there was no ambiguity in the plans, the defendant could not be allowed to avoid performance simply by alleging that he had made a mistake. In coming to this decision the court disregarded the defendant's actual state of mind at the time he made the offer and applied the interpretation that any reasonable man would have given to his conduct in the circumstances. Here the vendor reasonably believed that in making the offer the defendant meant what he said, that is, he intended to purchase the Inn as it had been shown in the plan and nothing more.

Where Words and/ or Conduct of Parties are Ambiguous

In Tamplin v. James, the statements and conduct of the parties were clear and unambiguous, allowing a straightforward application of the objective test. In some cases the facts may be ambiguous in that they may be capable of two different but equally reasonable interpretations.

Where the words used or the conduct of the one party are capable of two different but equally reasonable interpretations and the parties actually misunderstand each other, neither party intending to mislead the other, the court is likely to hold that there is no contract on the ground that there is no correspondence between the offer and the acceptance.

Two things may have the same name and the parties may have concluded the contract using that name, but each intending a different meaning from the other. Here the words used are capable of two different but equally reasonable interpretations and the parties, unknown to each other, intend the two different meanings and therefore misunderstand each other. The question is whether any contract results.

In Raffles v. Wichelhaus:

The case involved a written agreement for the sale of 125 bales of cotton by plaintiff to defendant. The contract stated that the cotton was to "arrive ex Peerless from Bombay". Unknown to both parties, there were two ships called "Peerless" arriving from Bombay, one leaving Bombay in October, the other in December. Seller's cotton was on the December Peerless. Buyer had assumed it was the October Peerless. Buyer refused to accept the cargo of the ship arriving in December. Seller sued for breach of contract.

Even though this case is often cited as authority for the court's application of the objective principle, the court for procedural reasons never really made a determination as to whether or not there was a contract between the parties. What was decided was that it was open to the defendant to show that the contract was ambiguous and that he had intended the October ship. As Cheshire, Fifoot and Furmston explain, if the case had gone to trial it would then have been open to the jury to determine, either that there was no contract or that there was a contract for the sale of the cotton on board the October ship or the December ship. This would likely have involved the application of the objective test, that is, whether a reasonable man would have deduced that the agreement as made related to the October ship or the December ship. The interesting question which remained was what if the jury thought that the parties intended different ships and there was no way of determining which particular ship the contract related to? The case itself does not provide the answer to this conundrum even though it has been speculated that the result would have been that there is no contract between the parties.

Simpson states:

In terms of contract law the judges seem to have thought that, once it appeared that there were two ships sailing from Bombay which answered the contractual description, and no way of telling which of the two was intended, the contract was latently ambiguous. Consequently

a jury should have been allowed to hear the evidence and decide whether the parties meant the same ship, and if so which, or different ships.

What would have happened if there had been no demurrer, and the case had gone to a jury? Obviously if the jury thought the agreement related to the October ship, the plaintiff would lose; if the December ship was meant, then the plaintiff would win. But what if the jury thought the parties meant different ships or that there was just no way of telling to which ship the contract related? The judge would then have the tricky task of directing them as to what consequence followed, as a matter of law, from this. But in Raffles v. Wichelhaus there was no need for the judges to reach any conclusion on what a suitable direction would have been.

What then was to be done? This has all the seductive fascination of a conundrum, and it has subsequently captured the imagination of generations of scholars and students of the law of contract. Consequently they have tried, with some desperation, to prise an answer to the conundrum out of the texts of the reports of the case".

Thus even though Raffles v. Wichelhaus is often cited by law teachers to support the principle that there will be deemed to be no contract if the words used are capable of two different but equally reasonable interpretations and the parties intended different things, it would appear that the case is cited more for what it was expected to decide than what it actually decided. In Falck v. Williams:

The plaintiff sent an offer in code to the defendant by telegram. The offer was rendered ambiguous because of the lack of punctuation. The telegram could refer to one or the other of two contemplated transactions. The defendant accepted the offer, thinking that it related to a contract for the carriage of coal from Sydney to Barcelona. The plaintiff intended it as a contract for the carriage of coal from Fiji to the U.K. The plaintiff brought the action to enforce the contract in the sense in which he intended it.

It was held that since it was not possible to determine one reasonable objective meaning of the words used and the parties were clearly at cross purposes there was no contract between the parties.

In determining whether or not the parties are agreed, the courts have held that 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 may not be able to enforce the contract in the sense in which he intended it.

In Scriven Bros v. Hindley & Co.

The defendants bid at an auction for two lots, believing them both to be hemp. It turned out that Lot A was hemp, but Lot B was tow, a commercially inferior commodity of a much lower value. Defendant's mistake arose from the fact that both lots were sold under the same shipping mark "S.L". It was established from the evidence that hemp and tow were never landed from the same ship under the same shipping mark. The auctioneer knew that the buyers were mistaken, but he thought they were simply mistaken as to the value of the tow. Defendant refused to pay for the second lot containing tow and the plaintiffs sued.

The court held that the plaintiffs could not enforce the contract since the plaintiff's conduct had contributed to the defendant's mistake. The plaintiffs could only succeed if the defendants were estopped from relying on what was now found to be the truth, and this was not the case.

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.

In Hartog v. Colin & Shields:

The defendant offered to sell to plaintiffs 30,000cedis skins at prices quoted per pound. In so quoting the defendants had mistakenly stated the prices as per pound instead of per piece which made the skins much cheaper. In all their previous negotiations both parties had quoted the price as per piece. It was customary in their trade to quote prices per piece and not per pound. Plaintiffs however quickly accepted the offer and sued to enforce the contract.

The court held that the plaintiff's action must be dismissed. The plaintiff could not reasonably have supposed that the offer made by the defendants contained their real intention. This decision suggests that in appropriate cases, the courts apply the subjective test in ascertaining the state of mind of the party seeking to enforce the contract.

It follows from the objective test that the courts would not ordinarily be concerned about one party's unilateral, undisclosed private misconceptions about the quality of the subject matter of a contract, as long as such misconception was not induced by the other party's words or conduct. Thus if one party is mistaken only about the quality of the subject matter and that mistake was not caused by the other party, the court will uphold the contract in spite of that party's unilateral and undisclosed mistake. This principle was emphasized in the case of Smith v. Hughes, the facts of which were as follows:

The plaintiff, a farmer, asked the defendant's manager, who was a trainer of horses, if he would like to buy some oats and showed him a sample. Defendant wrote to say he would like to buy the whole quantity of oats. Plaintiff delivered a portion of the oats, but defendant, upon seeing the oats, refused to accept them, saying the oats were new and he had no use for new oats. Plaintiff refused to take the oats back and sued. It was not clear from the evidence whether the word "old" had been used. Defendant insisted that plaintiff had said he had some "good old oats" for sale while plaintiff insisted that the word "old" was never used.

At the trial the judge directed the jury as follows: (i) Was the word "old" used? If so, verdict must be given for the defendant; (ii) If the word "old" was not used, did the plaintiff believe that the defendant believed or was under the impression that he was contracting for old oats? If so, the verdict must be given for the defendant.

The jury found a verdict for the defendant and plaintiff appealed. A new trial was ordered on the ground that the directions given to the jury at the trial were misleading. According to the Court of Appeal, the issue was not whether or not the plaintiff believed that the defendant believed or was under the impression that the oats were old, for in that case, there would have

been no liability on the part of the plaintiff as long as he did not induce that belief in the mind of the defendant. According to the court, the question of whether under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer would entitle the latter (buyer) to avoid the contract could only be answered in the negative.

The relevant issue was whether the plaintiff believed that the defendant believed that he the plaintiff was contracting that the oats were old. The former represents a mere mistake as to the quality of the subject matter which was not disclosed to the plaintiff or caused by him in any way, but the latter if found to be so, would constitute a mistake as to the terms of the contract. Cockburn C. J. noted in his judgement:

It only remains to deal with an argument which was pressed upon us, that as the defendant in the present case intended to buy old oats, and plaintiff to sell new, the two minds were not ad idem; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was thus induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not ad idem as to the age of the oats; they certainly were ad idem as to the sale and purchase of them.

The case law shows that the courts take the position that as far as possible, apparent contracts must be upheld to ensure certainty in commercial practice. Thus where the parties are agreed with respect to the same terms on the same subject matter, it is irrelevant that in entering the contract they were both influenced by some misunderstanding or mistaken assumption with regard to the quality or value of the subject matter.

In Frederick E. Rose (London) Ltd. v. William H. Pirn Jnr & Co. Ltd:

The plaintiffs in London received an order from their house in Egypt for "Moroccan horsebeans described here as feveroles". The plaintiffs, not knowing what feveroles were, asked the defendents, who responded that feveroles were the same thing as horsebeans, adding that they (the defendants) were in a position to supply them. The plaintiffs therefore went ahead to enter into an oral contract with the defendants for the purchase of horsebeans and the contract was subsequently reduced into writing. The defendants later delivered the horsebeans to the plaintiffs, who in turn sold and delivered them to an Egyptian firm. Upon being delivered in Egypt, it was found that although what was delivered was horsebeans, they were not feveroles and an action was brought for damages for breach of warranty.

The Court of Appeal refused to declare the contract void even though the plaintiffs had apparently entered into the contract on the mistaken assumption that feveroles were the same thing as horsebeans. Lord Denning L.J. explained:

The goods contracted for horsebeans were essentially different from what they were believed to be 'feveroles'. Nevertheless the parties to all outward appearances were agreed. They had agreed with sufficient certainty on a contract for the sale of goods by description, namely,

horsebeans. Once they had done that, nothing in their minds could make the contract a nullity from the beginning.

The position taken in the Ghanaian case of Addison v. A/S Norway Cement Export Ltd seems to follow this line of thinking. In that case:

The respondents, a company resident in Norway, jointly financed with the Government of Ghana a new company, C. Ltd., which took over the former Ghana Cement Works. The respondents were also awarded a contract for the supply of £4,000,000 worth of clinker, gypsum and paper bags to C. Ltd. The appellant, having assisted the respondents in the negotiations for both the creation of C. Ltd. and the subsequent contract, apparently agreed with the respondents that he be remunerated with cash, shares in C. Ltd. and an option to purchase further shares at an agreed price. Differences arose between the two parties and protracted negotiations to resolve them were unsuccessful. The appellant therefore brought an action against the respondents on an amended claim for N80, 000 cedis as the commission for work with respect to the clinker contract which was allegedly the subject of an oral agreement made on July 27, 1969.

The trial judge, on the evidence before him, was unable to ascertain with certainty the terms of the alleged agreement of July 27, 1969. He therefore held that there was no consensus ad idem between the parties and therefore there was no binding contract existing between them. It was submitted on appeal, inter alia, that the judge was wrong when he held that the parties were not ad idem since the respondents had not pleaded this or mistake. Kingsley Nyinah J. A. stated:

It is my understanding of the facts in evidence that when the parties to this suit entered upon their transaction, they each and both of them had, as an essential part of their business contemplation, the eventual enjoyment of the fruits and benefits that they both knew and expected would accrue from that enterprise. And as has been so cogently pointed out in both judgments, just read, the evidence is clear and undisputed that the defendants themselves readily acknowledged, both before the suit and then at the trial, the great and helpful part that the plaintiff had so actively played, not only at the negotiations stage of their venture, but also thereafter. It is a matter of no mean significance, strongly supporting the plaintiff's posture at the trial, that the defendants furthermore conceded the plaintiff's just entitlement to certain benefits under their venture with him. That being so, I deem it only fair and proper that this court to which the plaintiff has properly turned for redress does not stultify due justice by being too legalistic and too technical when considering the question of whether or not the plaintiff was able to discharge the burden that his own writ and statement of claim committed him to execute. In all the circumstances of the interpretation of the transaction herein, therefore, and in order that the true intention of the parties be duly respected and recognised, I would prefer equity to technicality and strict law. This court has a duty to protect the substance of the parties' agreement and not to destroy it. I have no doubt at all in my mind, having regard to the facts and circumstances of this case that the parties herein did agree on the sum of 80,000cedis as properly due unto the plaintiff.

Here, the court was able to construct a contract out of the exchanges between the parties even though the terms of the oral agreement appeared to be uncertain. The court relied on the available documentary evidence to determine the terms of the oral contract. The majority decision was clearly influenced by the court's perception that its role is to uphold apparent contracts where possible and to ensure that the express intentions of contractual parties are not defeated.

Chapter Two

OFFER AND ACCEPTANCE

2.0 INTRODUCTION

In determining whether the parties have reached agreement, the courts normally begin by looking out for an offer and a corresponding acceptance. It is important to note from the outset, however, that not all contracts are formed by a process of a direct offer and an acceptance. In some cases a contract may be inferred from the conduct of the parties without necessarily establishing the existence of a direct offer made by one party to the other and a corresponding acceptance. This chapter provides an overview of the basic principles of offer and acceptance which are often considered to be the starting point for the formation of contracts.

2.1 PROCESS OF FORMATION OF CONTRACT

The process of formation of any contract is never simple, easy or instantaneous. It usually involves an extended period of negotiation and bargaining, during which offers are made, considered, modified and explained. The offer may ultimately be accepted by the other party, but such purported acceptance could be made in clear or uncertain terms, it may be made hesitantly, conditionally, with or without enthusiasm, or may introduce new terms. In most cases therefore, in order to determine whether or not an agreement has been made, the courts have to conduct a meticulous examination of all the statements made or correspondence exchanged between the parties and/or their conduct, to establish whether a definite offer was made by one party which has been clearly accepted by the other.

This process of examination of written correspondence had to be undertaken by the court in the case of Gibson v. Manchester City Council, the facts of which were as follows:

In November 1970 the Manchester City Council sent to their tenants details of a proposed scheme for the sale of Council houses at favourable prices. Gibson responded immediately by paying the administration fee of £3 and forwarding his application on a printed form. The Council wrote back stating that the Council may be prepared to sell the houses at certain prices. The Council's letter stated: "This letter should not be regarded as a firm offer of a mortgage. If you wish to make a formal application, fill this form and return it".

Gibson filled the form but left out the purchase price and asked for a reduction. The Council refused to reduce the price, whereupon Gibson asked the Council to proceed with the processing of his application. Before further action could be taken the Labour government took over control of the Council and ordered that no house be sold unless there was already an existing contract to sell the house. The Council refused to sell the house to Gibson and Gibson sued. The court examined the correspondence that had been exchanged between the parties to see if at any point in time a definite offer had been made by the Council which had been accepted by Gibson.

The court held that it was impossible to construe the letter of the Council as a contractual offer, which was capable of being converted into a contract upon acceptance by Gibson. The wording of the letter made it clear that the Council was not making any definite or firm offer of a mortgage. The court noted further that the application forms returned by Gibson could not be deemed as an acceptance because no offer had been made as yet. The more accurate interpretation was that it was Gibson who made an offer to buy the house by submitting his filled application form, but that offer had not yet been accepted by the Council. There was therefore no legally binding contract concluded between the parties for the sale of the house and the Council was therefore not liable for the breach of any contract.

The Ghanaian case of Aidoo and Others v. Attorney General and Another also illustrates the investigative process which the court has to conduct in seeking to ascertain the existence of a contract. The facts of the case are as follows:

The Kanda Estates, comprising 233 houses and 120 flats, was established for allocation to Ghanaians. All but 61 of the houses were allocated to Ghanaians on hire purchase basis. The 61 houses were reserved for occupation by Members of Parliament. After the 1966 coup d'etat, the Members of Parliament who had failed to pay their rents on the respective houses they were occupying within the 61 houses were ejected from them and the National Liberation Council government then decided to allocate all the houses which were then vacant to those who needed them. In 1967, the Kanda Tenants Association, of which all the plaintiffs in this case were members, was formed. The first plaintiff was the Secretary of the Association. The Association entered into negotiations with the then Progress Party government for the sale of the 61 houses to its members who were individually occupying the houses. It was agreed between the government and the Association that those houses should be sold individually to the then sitting tenants.

When the National Redemption Council government came into power in 1972, the Kanda Estates Tenants Association took up the matter with that government. The result was that the government caused a letter to be written to the individual tenants, offering to sell to them the houses occupied by them. Each letter included a form, which was required to be filled by applicants for further action by the government. Each of the plaintiffs accepted the offer by filling in the forms as required. Subsequently, the plaintiffs received letters from the Ministry of Works and Housing, indicating that only 13 of the said houses would be sold to the sitting tenants. The defendant further threatened the plaintiffs, who were retired civil servants with forcible ejection if they failed to vacate the houses. The plaintiffs, members of the Kanda Estate Association, brought the action against the government alleging that the government had agreed to sell to them certain houses in Kanda Estates of which they were tenants.

The court considered the various correspondences exchanged between the parties on the proposed sale and held that there was in existence a completed contract between the parties for the sale of the said houses to the plaintiffs. Anterkyi J., in his judgement stated as follows:

When the National Redemption Council assumed the reigns of government, the Association of the plaintiffs repeated to that government their request for the sale to them. This request

was met by the government by Exhibit A (through the Ministry of Works and Housing), which stated that the sale of the house was to be "at its current replacement value", and that the Ministry was "working out the terms and conditions for the sale, the results of which will be communicated to you in due course" The forms Exhibit B attached to Exhibit A were to be completed and forwarded for further action.

These forms were accordingly completed by the plaintiffs and sent to the Ministry. The Ministry of Works and Housing did receive them. It is my view that a direct offer was made by Exhibit A for sale with conditions and terms which even though the defendants had not seen or known might be accepted by the tenant upon his filling in the forms in Exhibit B. I cannot read into Exhibit A that the sale was to be made subject to the terms and conditions being agreed upon by the tenant by a reply that he would first like to know the conditions and terms before filling in the forms in Exhibit B. In effect the decision in Exhibit A is to this effect: "I offer to sell you the house at its current value and with certain terms and conditions. You may accept by filling in the attached forms and sending them to me." The filling in and the return of the forms constituted an unconditional acceptance of the offer. It was absolute and corresponded with the terms of the offer. There was therefore a complete contract.

2.2 WHAT CONSTITUTES AN OFFER?

An offer may be defined as a statement or conduct indicating a willingness to contract on terms stated or on terms which can reasonably be inferred from conduct, and made with the intention that it will become binding as soon as it is accepted. In the case of NTHC Ltd v. Antwi, an offer was defined as 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?

An offer may be made to a particular individual, groups or classes of persons or to the world at large. To qualify as an offer, the statement or conduct must indicate a willingness to enter a bargain. This is shown by indicating in the offer what the offeror requires of the offeree by way of acceptance in return for the promise. It is this notion which distinguishes a contractual offer from a bare gratuitous promise. Further, the statement or conduct must indicate the terms on which the maker is prepared to be bound.

An offer must be made with the intention that it will become binding once it is accepted by the other party. In other words the making of a contractual offer carries with it some sense of finality, in that it solicits a definite acceptance leading to a contract. In this regard, a contractual offer is distinguished from an "invitation to treat" which in essence constitutes an attempt to initiate the bargaining process by soliciting or attracting offers from the party to whom it is addressed. As explained in Chitty on Contracts:

A communication by which a party is invited to make an offer is commonly called an invitation to treat. It is distinguishable from an offer primarily on the ground that it is not

made with the intention that it is to become binding as soon as the person to whom it is addressed simply communicates his assent to its terms."

In NTHC Ltd v. Antwi, the Supreme Courts had to determine whether an offer had been made which was capable of being converted into a contract upon acceptance. The facts of the case were as follows:

The plaintiff at some point worked for the defendant. During the period of her employment, she received a letter dated 17th of January 2005 signed by the Board secretary informing her about the decision of the Board of Directors to sell the company's houses being occupied by staff and the first offer was made to her. She was to indicate her interest in writing by the 31st of January 2005 if she was interested. The house in question was house No 4 Plateau Close, East Legon Extension, the cost price of which was quoted as $70,307 or its cedi equivalent and payment was to be made in 6 months.

The plaintiff indicated her acceptance of the offer in writing on the 31st of January 2005 and requested that the necessary bank accounts details into which payment was to be made should be made available to her. There was no further correspondence between the parties until the plaintiff received a letter from the defendant dated 7th November 2005, stating that the Board of Directors had decided to withdraw the offer of sale of the said property signed by the Deputy Managing Director. The plaintiff had, however, by this time left the employment of the defendant and had begun working for a different employer on 8th August, 2005.

The defendant in a second letter addressed to the plaintiff requested that she vacate from the house in question following her resignation from the company. Based on these, the plaintiff instituted an action against the defendants, claiming that the exchange of letters in January 2005 resulted in an agreement that the defendant would sell the house to the plaintiff which was enforceable, the remedies of specific performance and a perpetual injunction to restrain the defendants from ejecting her from the property. The defendant on the other hand asserted that the letter of 17th January 2005 was not an offer but an invitation to staff to make an offer to purchase the premises. There was therefore no enforceable contract between the parties.

The High Court held that no contract had been formed and that the company's proposal to sell the property was not a definite enough offer of the property to the plaintiff. Hence the plaintiff's actions were dismissed since no contract had been formed. On appeal, however, the judgment was reversed. The Learned judge concluded that the letter of 17th January, 2005 contained an offer because the letter was not that of an enquiry but referred to a specific house and the offer was made to the appellant and a certain price was to be paid within a certain period and the appellant was only to indicate her acceptance if she accepted the terms offered. The defendant/respondent then appealed to the Supreme Court that the Court of Appeal erred in holding that the communications between the parties constituted an offer.

The Supreme Court had to decide which of the interpretations given to the letter of 17th January, 2005 was right. The court in coming to its conclusion considered the basic principles of offer and invitation to treat and distinguished them. The court stated that an invitation to treat is distinguished from an offer on the basis of the proposal's lack of an essential

characteristic of an offer, namely, its finality which gives a capacity to the offeree to transform the offer into a contract by the mere communication of his or her assent to its terms. The appellant in this case relied heavily on the case of Gibson v. Manchester City Council. The Supreme Court was, however, of the opinion that there were marked differences between the two cases, noting that the Manchester City Council letter obviously lacked finality, unlike the proposed sale of the house in the current case to the plaintiff 'which was an offer of an identified property at a price certain, leaving only the details of the bank accounts to be communicated and the price to be paid. These, however, according to the court, were subsidiary questions which did not affect the finality of the offer. The letter of 17th January, 2005 in which the plaintiff was given the first offer to purchase the house was therefore held to constitute an offer and not an invitation to treat.

2.3 OFFER DISTINGUISHED FROM "INVITATION TO TREAT"

As noted, to qualify as a contractual offer, the statement or conduct must have been made with the intention that it would become binding as soon as it was accepted. The law therefore distinguishes between contractual offers (which are converted into contracts as soon as they are accepted) and statements of intention which are only intended to solicit or attract offers from other people and are not intended to result in any immediate binding obligation.

In NTHC Ltd v. Antwi, the Supreme Court, in establishing the distinction between offers and invitations to treat explained:

Accordingly, the offer has to be definite and final and must not leave significant terms open for further negotiation. By significant, we here mean terms that are essential to the bargain contemplated.... It is this need for finality and definiteness which leads to the analytical need for the concept of invitation to treat. If a communication during negotiations is not the final expression of an alleged offeror's willingness to be bound, it may be interpreted as an invitation to the other party to use it as a basis for formulating a proposal emanating from him or her that is definite enough to qualify as an offer. Thus the indefinite communication may be what generates an offer from the other side. An invitation to treat is thus to be distinguished from an offer on the basis of the proposal's lack of an essential characteristic of an offer, namely, its finality which gives a capacity to the offeree to transform the offer into a contract by the mere communication of his or her assent to its terms.

The distinction between offers and invitations to treat has been said to be based on intention, convenience and commercial usage and practice.13 In commercial practice, a seller of goods or services or a person seeking business would usually have to first of all solicit offers for possible bargains by way of display of the goods, circulation of brochures or catalogues or the placing of advertisements announcing or publicising the availability of the goods or services and providing information about them. Such preliminary activities, which are usually only intended to solicit offers from potential customers are not normally considered by the law as contractual offers in themselves, capable of being converted into a contract upon acceptance. Such statement of intention or conduct are merely invitations to the public to

make offers and attempts to initiate the bargaining process and are, therefore, referred to as "invitations to treat".

Common Examples of "invitations to treat" include:

(a) Tender notices

(b) Display of goods in a shop window with prices attached

(c) Advertisement of goods or services in newspaper.

(d) Circulation of catalogues or price lists

(e) Auction notices

In the absence of evidence to the contrary, such statements or conduct are deemed to be invitations to treat and not contractual offers.

2.3.1 Tender Notices

A notice stating that goods are to be sold by tender and inviting people to submit tenders for their purchase is an invitation to treat and not an offer which is deemed to have been accepted when a person submits the highest tender. Similarly, a notice inviting suppliers to submit tenders of the lowest price at which they are prepared to supply goods is not deemed as an offer to buy from the person with the lowest price, but is simply an invitation to treat. Thus, tender notices are merely intended to invite tenders and to ascertain whether an acceptable offer can be obtained. It is the tender which constitutes the "offer" which may or may not be accepted.

In Spencer v. Harding:

The defendants sent out a circular stating that they were instructed to offer for sale by tender certain goods and gave the date and time when the tenders would be received. The plaintiffs alleged that the circular amounted to an offer to sell the goods to the highest bidder and they, the plaintiffs had submitted the highest bid, and defendants had refused to sell to them.

The court held that the circular or tender notice was not an offer. It amounted to nothing more than a mere proclamation that the defendants were ready to chaffer for the sale of the goods and to receive offers for the purchase of them. The advertisement inviting tenders was held to be mere invitation to the public to send in tenders. It contained no promise, either express or implied, to accept the highest tender.

Acceptance of Offers and Standing Offers

It follows that since the tender notice or invitation constitutes an invitation to treat, it is the tender that is considered to be the offer which may or may not be accepted by the invitor. Thus the acceptance of the tender would normally conclude a contract between the invitor

and the party who submits the winning tender. However, it has been noted that whether or not the acceptance of the tender will result in a binding contract between the parties depends on the nature and wording of the invitation.

Basically, if the invitation contains an explicit promise to buy a specified quantity of goods from the supplier within a particular period, an acceptance of a tender would normally lead to the conclusion of a contract between the parties. However, where the invitation does not include any definite promise to buy, but simply states that the invitor will buy the goods from the tendering party as and when it sees fit to order such goods, an acceptance of a tender in response to such an invitation may not immediately result in a binding contract between the parties.

The acceptance only signifies that the invitor finds the tendering party's price acceptable and that if he orders the goods, he intends to order them from the tendering party. If, subsequent to the acceptance of the order, the invitor proceeds to place an order for a specified quantity of the goods from the tendering party, his order will then constitute an acceptance of the offer (tender) and result in the conclusion of a contract between the parties. Thus every order placed will create a separate contract for the sale of the goods. In this situation the tender constitutes a "standing offer" which subsists for a period and is capable of recurrent acceptances during the period of its existence, each acceptance resulting in a separate contract.

In Great Northern Railway v. Witham:

The plaintiffs advertised for tenders for the supply of stores. The defendant submitted a tender stating: "I undertake to supply the company for twelve months with such quantities of [specified articles] as the company may order from time to time". The company replied by letter accepting the tender, and subsequently gave various orders, which were executed by the defendant. Ultimately the company gave an order for goods within the schedule, which the defendant refused to supply. The company sued for breach of contract.

The court held that the company must succeed. The tender was said to be a standing offer, which was converted into a series of contracts by the subsequent orders placed by the company. The placing of an order by the company (which created a separate contract) precluded the possibility of revocation by the defendant. Thus the defendant was contractually bound to supply the goods that had been ordered, even though he could take steps to regain his liberty of action for the future.

In the Ghanaian case of Perbi v. Attorney General the facts were as follows:

In 1967 the government of Ghana advertised for tenders by the supply of food items to a hospital for a fixed period of five months. The plaintiff accepted the tender and supplied the required items as and when demanded. The agreement provided that the government was free to purchase the items elsewhere if the plaintiff failed to supply within time or when the items supplied were of bad quality. The agreement further provided that each party could terminate the agreement by giving a month's notice in writing. Sometime in 1967 the government gave

only two days' notice of its intention to terminate the agreement before the expiration of the five months on the ground that the agreement was a mere arrangement or standing offer which could be terminated at short notice. In an action by the plaintiff for breach of contract, the main issue for determination by the court was whether the agreement was a binding contract or a mere standing offer incapable of giving rise to enforceable legal rights.

The court held that where there was a tender by a purchasing body to buy goods needed by them, an acceptance of such a tender would constitute a binding contract although the parties would not be bound to buy any specific quantity of goods. Nevertheless the purchasing body would be bound to buy and pay for all the goods that were in fact needed by them. There would be a breach of contract if the purchasing body in fact needed some of the articles, the subject of the tender and did not take them from the tenderer. The court held further that in this case there was a complete and valid contract between the parties because the items specified in the tender were required by the defendant who had agreed to purchase all the said items from the plaintiff. The court noted that if the parties did not contemplate a binding agreement but merely an offer capable of acceptance, the agreement would not contain stipulations in respect of breach and notice of termination.

The decision in Perbi v. Attorney General emphasized that by making a firm promise to purchase all its requirements of food items from the tenderer, the hospital had concluded a binding contract to purchase from the latter all the specified items that the hospital had need of in the designated period. The court concluded that the nature of the invitation and the terms of the standard contract used by the government showed clearly that the parties contemplated a binding contract and not simply a standing offer which was capable of acceptance from time to time.

Date-Bah S.K., in his article "Requirements Contracts and Mutuality" conducts a useful review of the decision in Perbi v. Artorney-General and discusses die issue of mutuality in requirements contracts. The following excerpt is instructive.

Great Northern Railway v. Witham (1873) L.R. 9 C.P. 16, to the following effect:

"I am instructed to inform you that my directors have accepted your tender, dated, etc. to supply this company at Doncaster station any quantity they may order during the period ending October 31", 1872 of the descriptions of iron mentioned on the enclosed list, at the prices specified therein."

The Court of Common Pleas seems not to have treated this communication as an acceptance of the tender; rather it treated the tender as a standing offer that could be converted into specific contracts by specific orders for the goods. The court seemed to leave open the possibility that the supplier of the goods could have given notice to the railway company before any order for goods was made and thereby ceased to be liable under the tender. This view implies that the purported acceptance quoted above was not regarded by the court as having turned the defendant's standing offer into a requirements contract. It is a permissible inference to make from the court's refusal to regard the above communication as an acceptance that they regarded the promise contained in it as illusory, perhaps because there

was no commitment to buy any quantity, nor was there any commitment either to buy all the requirements in the Doncaster station from the defendant. There was merely a promise to buy such unspecified quantities of the goods in the future as the plaintiffs chose. Thus the plaintiffs' future conduct would be entirely in accordance with their future will.

Witham's case may be contrasted with the case that is the subject of this note: Perbi v. Attorney-General [1974] 2 G.L.R. 167. In this case, Hayfron-Benjamin J. (as he then was), enforced a requirements contracts. A requirements contract is one in which a promisor undertakes to buy all his requirements of particular services or goods from the promisee. The obligation looks very one-sided and therefore requirements contracts raise issues as to their compatibility with the common law notion of bargain and mutuality of obligation. Is the promise of the promisor to take all his requirements from the promisee an illusory promise? In Perbi v. Attorney-General, Hayfron-Benjamin J. (as he then was), is to be regarded as having answered this question in the negative. In net effect then, this was an agreement under which the contractor bound himself to supply all the requirements of the Tetteh Quarshie Hospital of certain goods. There was no obligation on the part of the hospital to have these requirements. The hospital could change the nature of the commodities they used. If the new commodities included no goods included in the contractor's agreement there would be no obligation to order from him. Also, probably, the hospital could close down altogether and cease to have any requirements and this would involve the government in no breach of contract. In the light of these considerations, was the government's promise an illusory one?

The answer has to be "no." The reason is that the government in fact assumes an obligation. The government's future conduct is not entirely governed by its future will; its freedom of action is fettered to this extent that it cannot order the goods specified in the contract except from the contractor. And so long as the hospital requires these goods, this is a very real obligation and certainly real enough to satisfy the requirements of the bargain theory of consideration. The promisor's promise in a requirements contract is not illusory only if it is probable that he will require some of the goods the subject-matter of the contract. If a housewife agrees with an atomic energy unit to supply her with all her requirements of radio-isotopes, it may well be that the housewife so manifestly has no need of radio-isotopes that her promise is illusory and is therefore.no consideration. However, the Ghana Government's promise in the case under discussion was quite clearly not illusory since the articles contracted for were things for which there was a need at the Tetteh Quarshie Hospital. It is this existence of an objective need for the goods or services that saves many requirements contracts from want of mutuality. Hayfron-Benjamin J. was thus quite right in holding that the agreement here was a binding contract and not, as in Great Northern Railway v. Witham, a mere standing offer by the contractor that could be converted into specific contracts by the specific orders of the offeree."

2.3.2 Display or Exhibition of Goods for Sale

It is a well established principle of contract law that a display of goods in a shop with prices marked is not an offer binding the shopkeeper to sell at those prices. It is merely an

"invitation to treat" and it is for the customer to offer to buy the goods, which offer the shopkeeper may or may not accept. In Fisher v. Bell:

A shopkeeper displayed a flick knife in his shop window with a ticket behind it stating "Ejector knife -4s". He was charged with offering the knife for sale contrary to the Restriction of Offensive Weapons Act.

The court held that according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract. Similarly, the display of goods with prices marked on the shelf of a self-service shop is also in law an "invitation to treat" and not an offer to sell at that price.

This principle applicable to the display of goods in a self-service shop was enunciated in the case of Pharmaceutical Society of Great Britain v. Boots Cash Chemist (Southern) Ltd:

The defendants adapted one of their shops to a "self-service" system. Under this system, a customer, upon entering the shop was given a basket, allowed to select the items he required, place them in the basket and take them to the cash desk. Near the cash desk there was a registered Pharmacist who was authorised, if necessary, to stop any customer from buying and removing from the shop, certain drugs listed as poisons in the Pharmacy and Poisons Act. The plaintiffs alleged that the defendants had infringed the provision in section 18 of the Act which made it unlawful to sell any listed poison "unless the sale is effected under supervision of a Registered Pharmacist".

The critical issue was this: "Under the self-service system, at what point was the contract of sale concluded?" The plaintiffs argued that the display of the goods in a self-service shop with the prices attached was an offer, which was accepted as soon as a customer selected an item and placed it in his basket. If the item was a poison the contract was concluded before the registered pharmacist had a chance to see it.

The defendant argued that the display of goods in the self-service shop was merely an invitation to treat. An offer to buy was made when the customer selected the item and placed it in his basket. That offer was accepted at the cash desk when the shopkeeper accepted the customer's money in payment for the goods. At that point the registered pharmacist would have had the chance to supervise the sale.

At first instance the court accepted the defendant's contention and held that there was no infringement of the provision. The court decided that the display of the goods in the self-service shop was only an invitation to treat and not an offer. This position was upheld on appeal.

The Court of Appeal stated:

The transaction is not different from the normal transaction in a shop. The shop-keeper is not making an offer to sell every article in the shop to any person who may come in, and such person cannot insist on buying by saying: "I accept your offer". Therefore, in my opinion, the

mere fact that a customer picks up a bottle of medicine from a shelf does not amount to an acceptance of an offer to sell, but is an offer by the customer to buy. There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price P (Emphasis mine)

The rule has been said to be based on practical considerations including the fact that it allows a customer to return goods after selection, gives a customer the chance of examination and allows the shopkeeper to refuse to sell for his own reasons. In theory, however, if a display of goods in a shop is made with a sufficient statement of intention it could be considered as an offer which can be accepted by a customer. The application of the general rule to self-service systems has, however, been challenged by some writers. It has also been noted that this traditional contractual analysis of offer and acceptance presents problems in criminal law with regard to criminal statutes which make it an offence to sell or offer goods of a prescribed description for sale.

The following excerpt questions the proposed justification for the extension of the rule to self-service shops and makes interesting reading.

J. Unger, "Self-service Shops and the Law of Contract" (1953) 16 M.L.R. 369

The decision of the Court of Appeal in Pharmaceutical Society of Great Britain v. Boots [1953] 1 Q.B. 401, affirming the judgment of Lord Goddard C. J. [1952] 2 Q.B. 795, provides welcome authority for the familiar and elementary proposition that a display of goods in a shop is not an offer but only an invitation to treat. But in extending this proposition to self-service shops it has been endowed with an unfortunate element of rigidity.

Whether a display of goods amounts to an invitation to treat or to an offer must depend upon the intention of the shopkeeper, and the principal reason for assuming that shop window displays are intended only as invitations to negotiate is that there might be a larger number of customers willing to buy than the shopkeeper would be able to supply. This was explained by Lord Herschell in Grainger and Son v. Gough [1896] A.C. 325, although that case was concerned with an advertisement by catalogue rather than by window display. The situation is clearly different where goods are displayed in bulk on the counter or shelves of a shop, since the offer disappears when the last item of stock has been sold. Lord Herschell's argument would, therefore, justify different treatment of a display of a sample in a shop window or show case and of a display of stock on the counter or shelves. But Lord Goddard refused to draw this distinction. It would mean that "on the customer picking up the article the property would forthwith pass to him and he would be able to insist upon the shopkeeper allowing him to take it away, though in some particular cases the shopkeeper might think that very undesirable. On the other hand, if a customer had picked up an article, he would never be able to change his mind and to put it back." This as Romer LJ added, would quickly destroy the popularity of these shops.

But, with respect, it cannot be said that because a display is considered to be an offer a customer must be treated as having bought an article as soon as he has picked it up. Although an offer can be accepted by conduct, the offeree's action must clearly and finally demonstrate

the intention to accept as, for instance, the act of boarding a bus, or inserting a coin in an automatic ticket machine. The picking up of an article displayed is capable of many explanations, and whatever view be taken of the meaning of the display the customer should always be free to explain that he had picked up the article merely to examine it, or that he had taken it reserving the right to put it back and substitute another article for it.

It must also be remembered that the customer would not be able to take the article away before he had paid for it. "Passing of the property and right to possession are two different things," as was shown by Hallett J. in Dennant v. Skinner [1948] 2 KJB. 164. A similar confusion of the making of a contract and its performance appears in Lord Goddard's statement that since the offer to buy is made by the customer "there is no sale effected until the buyer's offer to buy is accepted by the acceptance of the price."

2.3.3 Advertisements

Generally, advertisements in newspapers advertising the availability of goods for sale are deemed to be "invitations to treat" and not contractual offers.

In Partridge v. Crittendon.

The plaintiff inserted an advertisement in a periodical which read "Bramblefinch cocks, Bramblefinch hens, 25's each". Plaintiff was charged with unlawfully offering for sale a wild live bird contrary to the Protection of Birds Act.

It was held that the advertisement was an invitation to treat and not a contractual offer to sell the birds. The plaintiff could, therefore, not be guilty of the offence charged. According to Lord Parker, in dealing with advertisements and circulars, unless these come from manufacturers, there is business sense in their being construed as invitations to treat and not offers in themselves. In Dormenyor v. Johnson Motors Ltd:

The defendants, car repairers, advertised on radio and made public announcements that they had spare parts for the repair of vehicles including Peugeot cars. Relying on the advertisements, the plaintiff caused his extensively damaged Peugeot car to be towed to the defendants' garage in June 1980. His agent gave no instructions on what was to be done and had no job card prepared as was customary to show the conditions for the repairs. The defendants therefore refused to repair the vehicle on the ground that no formal agreement had been concluded for the repairs. Within two weeks the defendants wrote to the plaintiff informing him that commencement of repairs would depend on a "receipt of a written official acceptance of our estimates." The plaintiff, however, ignored the letter. In February 1981, he wrote for the release of his car to him. But on 25 February 1981 the defendants replied that the car could be released only on payment of the sum of 4,500 being their storage and risk charges. The plaintiff refused to pay the charge and sued, inter alia, for damages for breach of contract and wrongful detention of his car. The defendants counterclaimed for the storage charges. On 6 February 1986 the court ordered the defendants to release the car. Even though the defendants were willing to release the car, the plaintiff failed to take delivery and pressed on with his claim contending that the car had further deteriorated.

It was held that even if these advertisements had been established with certainty, they could not by themselves constitute valid binding agreements. Considering the nature of work to be done on the vehicle, it would have been necessary for a prudent person to be present for the estimation of what was to be repaired and the cost of it. The defendants' letter to the plaintiff warning that repairs would commence on a receipt of a written official acceptance of the estimate was a reasonable condition, for the repairer would have to be sure that the owner would accept his repairing the vehicle at the estimated cost. The court observed further that even if the plaintiff had relied on the advertisements, the letter was a call to him to accept or reject it. It indicated to him that his vehicle would only be repaired on conditions contained in the letter given him. The plaintiff was therefore unwise not to have written as requested. There was thus no consensus as to what was to be done.

It must be noted, however, that whether or not an advertisement constitutes an offer depends on the wording of the advertisement. It has been held that a unilateral offer made by way of advertisement would qualify as a contractual offer." In the American case of Lefkowitz v. Great Minneapolis Surplus Stores, a newspaper advertised the sale of three fur coats worth $100 each for $1 each first come first served. Plaintiff showed up first. Defendant refused to sell saying house rules allowed sales only to women. The court held that the newspaper advert was an offer. It was clear, explicit and definite and it left nothing open to negotiation. The plaintiff was allowed to claim.

2.3.4 Circulation of Catalogues and Price Lists

The issue or circulation of price lists or catalogues advertising goods for sale constitutes an invitation to treat and not a contractual offer which can be deemed to be accepted by the placing of an order for the goods. The circulation of catalogues and price lists is generally considered to be a mere attempt to induce or attract offers and not an offer itself. The justification for this position has been said to be that any other interpretation would result in the seller being contractually bound to supply to every person who places an order even if his stock is depleted.

In Grainger & Son v. Goug, it was held that the transmission of price lists by a wine merchant in England did not amount to an offer to supply an unlimited quantity of wines at the stated prices, such that as soon as an order was given, there was a binding contract to supply that quantity. The court noted that if that were so, the merchant would find himself in a number of contractual obligations to supply quantities of wines which he would be unable to, since his stock would necessarily be limited. On the same basis, advertisements on the internet would also not constitute contractual offers, but rather invitations to treat.

2.3.5 Auction Sales

Auction sale is a common form of commercial activity, which clearly illustrates the dynamics of offer and acceptance. This section discusses the application of the basic principles on the formation of contracts in sales by auction. In Ghana, the law on auction sales has been largely codified the Sale of Goods Act, 1962, (Act 137) and the Auction Sales Law, 1989 (P.N.D.C. Law 230).

Generally, an auctioneer can only offer goods for sale by auction with the consent of the owner. For every auction sale, the law requires that there must be a notice announcing the sale, which must contain a clear description of the goods to be sold and give particulars of the quality and quantity of the goods.

Section 13 of the Auction Sales Law, 1989 (P.N.D.C. Law 230) states:

(1) Where the goods to be sold by auction are not perishable or damaged goods the auctioneer shall give not less than seven days notice of sale to the District Secretary of the district where the sale is to take place.

(2) A notice of sale shall

(a) state the time and place of the sale: and

(b) give a catalogue of the goods to be sold.

A notice advertising an auction sale is merely a statement of an intention to sell and not a binding contract. It has therefore been held that in the absence of fraud, an intending purchaser has no right to sue if the auction is put off or the items withdrawn. In Harris v. Nickerson:

The defendant, an auctioneer, advertised in the London papers to the effect that certain materials including plant and office furniture would be sold at a certain place on a certain day. The notice stated "The highest bidder to be the buyer". The plaintiff, a broker, had a commission to purchase at the sale the office furniture advertised to be sold. He went to the place indicated, attended the sale and purchased certain lots. But the goods described as "office furniture" had been withdrawn and were not put up for sale. The plaintiff brought the action for damages for loss of time etc.

The court held that the auction notice or advertisement was a mere declaration of intention and not a binding contract. The defendant was, therefore, not liable in damages.

Auction Sales Rules of Offer and Acceptance

The following principles governing the formation of contracts in auction sales have been codified by statute:

(1) Where the goods are sold in lots, each lot put up at the auction sale constitutes the subject matter of a separate contract of sale.

(2) The auctioneer, by putting up the goods and inviting bids, makes an invitation to treat and not an offer.

(3) At an auction sale each bid constitutes an offer, which may or may not be accepted. Thus it is the bidder who makes the offer, which the auctioneer may or may not accept.

(4) The contract of sale is complete when the auctioneer announces his acceptance by the fall of the hammer or in any other customary manner.

(5) At any time before the Auctioneer announces his acceptance the bidder is entitled to withdraw or revoke his bid. This rule is in accordance with the universal contractual principle that an offer can be revoked at any time before acceptance.

Kinds of Auction Sales

There are basically two kinds of auction sales, which are: (i) Auction Sale Subject to a Reserve Price; and (ii) Auction Sale without Reserve Price.

Auction Sale Subject to a Reserve Price

Section 17(1) of the Auction Sales Law, 1989 (P.N.D.C. Law 230) states:

The auctioneer shall state the particulars or conditions of sale by auction of any goods or land, whether such sale is without reserve, or subject to a reserved price, and whether a right to bid is reserved by the vendor.

Where the sale is stated to be subject to a reserved price this means that there is a specific price below which the vendor will not sell the goods (i.e. the reserve price). Where the sale is advertised as one subject to a reserved price the vendor or his agent can bid, once only, openly at the beginning of the auction, before any other bid is made.

Secondly, where the sale is one subject to a reserve price, the auctioneer is not bound to sell the goods to the highest bona fide bidder if his bid is below the notified reserve price. This is so even if the auctioneer accidentally knocks down the goods to him.53 The Auction Sales Act codifies the common law principle applied in the case of McManus v. Fortescue as follows:

Where the sale is subject to a reserved price, the sale shall not take effect even when the property is knocked down to the highest bidder if the highest bid is lower than the reserved price and in such a case the highest bidder has no right of action

Provided that where an auctioneer signs a memorandum of the contract after accepting a bid below the reserved price he thereby impliedly warrants that he has authority to sell at the price named, and is liable to the purchaser for breach of warranty of authority.

Auction Sale without Reserve Price

If the sale is advertised as a sale "without reserve price" this means there is no minimum price below which the seller will not sell the goods. The law therefore presumes that the vendor is prepared to sell the goods at the highest price bid at the auction, no matter what that price may be. Accordingly, where the auction sale is without reserved price, the law stipulates that the highest bona fide bidder will be entitled to buy the goods at the price bid whether the auctioneer accepts his bid or not. Secondly, where the auction sale is advertised as a sale "without reserve", neither the owner nor his agent can bid at the auction and the auctioneer cannot knowingly accept such a bid.

The Auction Sales Act codifies the principle as stated in the case of Warlow v. Harrison, $B the facts of which were as follows:

Defendant, an auctioneer, advertised the sale of a horse by auction, stating in the notice that it would be a sale "without reserve price". The plaintiff attended the sale and bid 60 guineas for the horse. After the plaintiff had made his bid, one Henderson, the owner of the horse, bid 61 guineas for the horse. The auctioneer knocked the horse down to Henderson, the owner and entered his name as purchaser of the horse. The plaintiff contended that since he was the highest bona fide bidder, he was entitled to buy the horse at the price bid. The defendant refused to sell the horse to the plaintiff.

The court held that where an auctioneer puts up goods for sale and pledges that the sale shall be without reserve, he thereby makes a contract with the highest bona fide bidder to sell to him the goods at the price bid, whether the sum bid is equivalent to the value of the goods or not. The court held further that where an auction sale is advertised as a sale "without reserve" neither the vendor nor any person on his behalf shall bid at the auction. The plaintiff, being the highest bona fide bidder, was therefore entitled to buy the horse at the price bid.

2.4 BILATERAL AND UNILATERAL CONTRACTS

Basically, a contract concluded between two or more parties could take one of two forms: Unilateral Contracts and Bilateral Contracts. A unilateral contract is formed where a promisor makes a promise in exchange for the actual performance of an act by the promisee as opposed to a counter promise. The contract is described as unilateral because only the offeror makes a promise. The offeree is not required to make a counter promise, but rather, to perform the stipulated act.59 It is only when the offeree performs the specified act that the offeror becomes contractually bound to fulfil his promise.60 The distinguishing feature of unilateral contracts, therefore, is that the acceptance consists of the actual performance of a stipulated act and not the making of a promise. A typical example of unilateral contracts can be found in situations where a person offers a reward for the performance of a particular act, such as finding and returning a lost item or providing information leading to the arrest of a criminal etc.

On the other hand, a bilateral contract is formed when one party makes a promise in exchange for a return promise from the other party. Bilateral contracts, therefore, consist of two promises which depend on each other. A typical example of a bilateral contract is a contract for the sale and delivery of goods at a future date, which is necessarily created by the exchange of promises.

2.5 GENERAL OFFERS

Unilateral contracts are often created by general offers. A general offer is an offer made to the public at large or to a particular person by way of public notice. Basically two kinds of

general offers can be distinguished: The First kind refers to General offers that can only be accepted by one person usually the first in time to perform the stipulated conditions. For example, offers of rewards for the return of lost property/or offers of rewards for information leading to arrest and conviction of criminals. These are invariably treated as offers because they are clearly made with the intention to be bound as soon as a member of the public performs the stipulated conditions, without the need for further bargaining. The second kind refers to General offers that are capable of acceptance by numerous persons.

A classic example of a general offer can be seen in the case of Carlill v. Carbolic Smokeball Co, the facts of which were as follows:

The defendant advertised that they would pay £100 to anyone who contracted influenza after using their medical preparation, the carbolic smokeball, in accordance with prescribed instructions for a fortnight. The plaintiff used the smokeball in accordance with the instructions, but caught influenza within the prescribed period. She sued the company for the £100.

One of the arguments put up by the defendants was that if the advertisement was to be construed as a contract at all, it was a contract with the whole world and one could not contract with the whole world. The court held that the advertisement constituted an offer made to the public i.e. a general offer, and stated further that although the offer was made to the whole world, the contract was made only with that limited portion of the public who came forward to perform the conditions of the offer on the faith of the advertisement.

An interesting question arises in situations where an act is performed according to the specifications of a general offer at a time when the performer is not aware of the existence of the offer. The question which arises is this: Where a person performs an act stipulated by a general offer at a time when he was ignorant of the existence of the offer, can he sue on any contract? In other words can the performance of an act done in ignorance of the offer promising a reward amount to an effective acceptance of the offer?

In principle a performance cannot properly be said to constitute acceptance of an offer if it was made in ignorance of the offer. Thus even though the performance may correspond to the stipulated condition in the offer it may be ineffective because it cannot be said to have been made in response to the offer. This raises the question of when a general offer takes effect to create a power of acceptance. Generally, an offer takes effect when it is communicated to the offeree. Thus, before an offer can be accepted the offeree must know of the existence of the offer and an offeree's acceptance which consists of the performance of a stipulated act must be made in response to the offer so as to constitute a bargain.

In Gibbons v. Proctor:

The respondent, Proctor, on May 29, instructed printers to prepare handbills offering a reward for information leading to the conviction of a person who had committed a criminal assault. The information was to be given to Police Superintendent named Penn. The printed handbills were delivered to Superintendent Penn in the evening of the 29th and he sent them by post to

neighbouring Police Stations where they were to arrive on the morning of May 30. Before that happened, however, in the early hours of May 29, the appellant, Gibbons, a Police Officer, met another Policeman named Coppin. Coppin showed Gibbons his notebook, which contained a description of the offender for whose conviction the reward was later to be offered.

Gibbons realised that the description corresponded with that of a man he knew who was already in custody for another offence and told Coppin to inform Superintendent Penn. On the afternoon of May 29, Coppin told his superior, who in turn wrote to Superintendent Penn. Penn received the letter on the morning of May 30 the morning on which the handbills reached the local Police Station. The prisoner indicated was later convicted and Gibbons sued for the reward.

It was held at first instance that Gibbons could not recover the reward because the offer of reward had not been published until after the information had been given. On appeal it was held that the information was passed through his fellow Policemen as his agents to forward the information to the proper officer Penn and that the information ultimately reached Penn at a time when the plaintiff knew that the reward had been offered the information having been given to Penn after the offer was made.

The requirement that an offeree must know of the offer at the time of the alleged acceptance accounts for the rule that cross offers do not create a contract. Thus where two persons make identical offers to each other simultaneously (cross offers), neither party knowing of the other's offer at the time of making his own, the two offers do not constitute a contract. In the classic case of Tinn v. Hoffman & Co, the defendant wrote to plaintiff offering to sell plaintiff a quantity of iron at a certain price. On the same day plaintiff wrote, offering to buy iron from the defendant at the same price. The letters crossed in the post. The court held that cross offers are not an acceptance of each other and therefore do not create a binding contract. This position could be supported on the ground that to ensure certainty, an acceptance can only be effective if it is made with reference to a previous offer such that the offer and the purported acceptance can be deemed to constitute one bargain.

2.6 ACCEPTANCE

To constitute a contract, an offer as defined must have been accepted by the party to whom it is made. Whether an offer has been duly accepted is a question of fact which is determined by a thorough review of the negotiations between the parties. Acceptance has been defined as the final and unqualified expression of assent to the terms of an offer. Acceptance may be by words, conduct or in writing.

2.6.1 Acceptance by Conduct

A classic example of acceptance by conduct is found in the case of Brogden v. Metropolitan Railway Co:

Brogden had been supplying coal to the defendant company for a number of years without any formal written agreement. The parties decided to regularize their relations by entering into a written agreement. The defendant's agent sent a draft form of the agreement to Brogden. Brogden included the name of an arbitrator in the contract and signed it and returned it to the company marked "approved". The company's agent put the draft agreement in his desk and nothing further was done to complete the execution of the contract. Both parties thereafter, proceeded to act in accordance with the terms of the draft agreement, supplying and paying for the coal in accordance with its terms. A dispute arose between the parties and Brogden denied that there was any binding contract between them.

The issue for the court was this: If it is assumed that the delivery of the draft document by Brogden to the company with the addition of the arbitrator's name was a final and definite offer to supply coal on the terms contained in the document, was that offer ever accepted by the company, if so when and how?

The court, noting that keeping the draft agreement did not amount to acceptance since it was not an overt act, held that even though there had been no further communication from the Railway Co. after it received the draft agreement (offer), the subsequent conduct of the parties could only be explained by assuming that they had both agreed to the terms. The court found that acceptance could be implied from the parties' conduct of selling and buying coal on the specified terms included in the draft contract. Thus a contract came into effect either when the company ordered its first load of coal from Brogden upon those terms or at least when Brogden supplied it.

2.6.2 Acceptance and Counter-offers

In order to qualify as an acceptance, the response of the offeree must be a final and unqualified assent to the terms proposed in the offer. To conclude a contract, the offeree's response must be an absolute and definite acceptance of the terms proposed in the offer and must leave no room for doubt. Accordingly, for the response to qualify as an effective acceptance, it must be an absolute and final assent to the terms and conditions stipulated in the offer.

Thus, a reply or response to an offer which varies the terms of the offer or introduces terms different from those indicated in the offer amounts in law to a counter-offer and not an acceptance. A counter-offer constitutes a rejection of the original offer and amounts to the making of a new offer by the offeree. Secondly, a counter-offer operates to destroy or nullify the original offer such that it cannot subsequently be accepted.

The classical case which illustrates the principle is Hyde v. Wrench, the facts of which were as follows:

On June 6, defendant wrote to plaintiff offering to sell his farm to him for £1,000. Plaintiff's agent immediately called on defendant and made an offer of £950. Defendant asked for time to consider it. On June 27 defendant wrote to say he could not accept the plaintiff's counter

offer. On June 29, plaintiff wrote accepting the earlier offer of June 6. Defendant refused to sell the farm to plaintiff and plaintiff sued for specific performance.

The court held that there was no valid binding contract between the parties. In making an offer to buy the property for £950 plaintiff had made a counter-offer which effectively rejected defendant's original offer. After that, plaintiff could not revive the original offer by tendering an acceptance of it. The counter-offer had killed or destroyed the original offer.

The principle has also been applied in the Ghanaian case of Deegbe v. Nsiah

& Antonnelli

The plaintiff (D), a legal practitioner, was a tenant in the house of the defendant (N). In April 1977, N sold the house to the co-defendant (A). On May 31, 1977 a firm of solicitors acting on behalf of A gave D notice to vacate the house on or before August 31, 1977. On August 10, 1977 D brought an action to specific performance of an alleged contract by N to sell the house to him for 65,000cedis. In an accompanying statement of claim he deposed that N had before the sale to A made an offer to sell the house to him and that he had subsequently accepted the offer by a letter he wrote to N, a copy of which he attached to his statement of claim. In a section of that letter, he had implored N to "consider a serious reduction in the price quoted for the house". N denied making any offer to D.

On the issue of whether there was a contract between N and D, the court held, dismissing the appeal, that an acceptance must be an absolute and unqualified acceptance of all the terms of the offer. A qualified acceptance operates as a rejection of the offer. The plaintiff's letter was an invitation to the defendant to make a fresh offer, which he never did. It was clear therefore that the parties were not ad idem and there was no contract between the plaintiff and the defendant. There could therefore be no specific performance because there was no concluded contract between the plaintiff and the defendant and the latter was free to sell his house to the co-defendant.

2.6.3 Counter-offer and Inquiry

It is important, however, to distinguish a counter-offer from an inquiry for more details about the terms of the offer. Generally, a mere inquiry or request for further information which does not introduce new terms is not a counter-offer and, therefore, does not destroy the original offer. Whether a response to an offer amounts to a counter offer or an inquiry depends on the facts of each case arising. A case which illustrates the distinction between counter offers and inquiries is Stevenson, Jacques & Co. v. McLean:

The defendant offered on Saturday to sell to the plaintiffs 3,800 tons of iron at "40s net cash per ton" open till Monday. The plaintiffs in response sent a telegram to the defendant asking for particulars of delivery and method of payment. The telegram stated: "Please let us know if you will accept 40 for delivery over 2 months, and if not the longest limit you will give". The defendant treated the telegram as a counter offer and sold the goods to a third party. Subsequently, the plaintiffs sent a telegram of acceptance. The defendant also wrote to the

plaintiffs informing them that the offer had been revoked, but the revocation arrived after the plaintiffs had despatched their acceptance.

The court held that the plaintiffs' response was not a counter-offer but a mere inquiry or request for information which should have been answered and not treated as a rejection of the offer.

The distinction between a counter-offer, which operates as a rejection of the offer and an inquiry or request for information, which leaves the offer and the contracting process intact, is not always easy to make. The following case illustrates that making this important distinction could indeed be tricky for the courts.

In Doinins Fisheries Ltd v. Bremen-Vegesacker-Fisheries:'"

The defendants had orally offered to sell to the plaintiffs a vessel at an agreed price. An agreed deposit was paid by the plaintiffs to the defendants. The defendants later reduced the terms of the oral agreement into writing and included an instalment payment schedule for the balance of the purchase price. The plaintiffs by a letter of November 23, 1970 accepted the terms but requested for a moratorium before the commencement of the instalment payments. The defendants rejected the moratorium request by a letter of December 28, 1970. The plaintiffs by a letter of January 5, 1971 wrote to the defendants stating that the instalment proposals were acceptable to them. The letter was delivered by hand on the same day.

On January 6, the defendants verbally told the plaintiffs that they were no longer prepared to sell the vessel to them as they (the defendants) had concluded a contract to sell the vessel with a different person on December 30, 1970. The plaintiffs brought an action for inter alia, a declaration that the defendants had by a contract sold the vessel to them and an order of specific performance. The defendants, however, inter alia, contended that the request for moratorium amounted to a rejection and counter-offer which was subsequently rejected and, therefore, no contract existed between them and the plaintiffs.

The court held as follows:

(1) Having regard to all the surrounding circumstances and particularly to the deposit payments by the plaintiffs as well as previous negotiations held between the parties, the plaintiffs' letter of November 23, amounted to an acceptance of the defendants' offer.

(2) Assuming however that the plaintiff's letter (of November 23) did not constitute acceptance of the offer and that no contract was concluded on November 23, that portion of the letter which dealt with the defendants' instalment proposal did not amount to rejection and counter-offer but to a request for information which was different from a counter-offer. Consequently, the offer was still open after November 23 and it was validly accepted by the plaintiffs on January 5, 1971.

(3) Even though the defendants had by their conduct intended to revoke the offer made to the plaintiffs, the purported revocation was ineffectual because it was not communicated to

the plaintiffs before they confirmed their acceptance on January 5, 1971. Consequently, there was a valid and enforceable contract to sell the vessel to the plaintiffs.

Abban J. explained:

A great deal, I think, depends on the interpretation, which should be put on the letter, exhibit D, written by the plaintiff's representative in reply to the letter of offer, exhibit C. Learned counsel for the defendants contended that the plaintiffs, by their letter, exhibit D, did not accept the terms of the offer in their entirety. Counsel ably argued that the said letter, exhibit D, accepted all the terms of the offer but one, namely, item 2 (c) of exhibit C, which item stated that the balance of 27,000 cedis should be paid "by twelve equal monthly instalments of 2,250.00, payment to commence from the end of the month in which the contract of sale was executed." Counsel submitted that there was a paragraph in the plaintiffs' said letter, exhibit D, which modified this item 2 (c) of exhibit C. He further submitted that the said modification did not only amount to a rejection of the said item 2 (c) built also to a counter-offer which was rejected by the defendants' letter of 28 December 1970: see exhibit E

Having regard, therefore, to all the surrounding circumstances of the case, and particularly to exhibits A and B, as well to the previous negotiations that had already take place between the defendants and the plaintiffs, it seems to me that the plaintiffs' said letter, exhibit D, amounted to acceptance. Exhibit D accepted all the terms of the offer including the said item 2 (c). If the plaintiffs had intended not to accept item 2 (c), as is being contended by the defendants, the plaintiffs would hot have enclosed the cheque for 41,000.00 to complete the payment of the deposit of 3,000.00. The defendants, having accepted the said deposit in pursuance of the terms of the agreement, could not turn round to say that there was no acceptance of their offer in its entirely.

2.6.4 Communication of Acceptance

Generally, it is not enough for the offeree to make up his mind to accept the offer. There must be an external manifestation of assent, i.e., some words spoken or act done by the offeree which can be regarded as the communication of the acceptance to the offeror. The general rule therefore is that an acceptance has no effect unless and until it is communicated to the offeror or otherwise brought to his notice.

This principle was vividly illustrated in the case of Entores Ltd v. Miles Far East Corporation:

The plaintiffs in London made an offer by telex to the defendants in Holland. The offer was accepted by a telex communication received on the plaintiff's telex machine in London. Subsequently, there was a breach of contract and the question arose whether the contract was made within the jurisdiction i.e. in England. The defendants argued that the contract was made in Holland and not in England.

The court held that where a contract is made by means of instantaneous forms of communication, the contract becomes complete only when the acceptance is actually communicated to or received by the offeror. Since communications by telex or telephone are

virtually instantaneous the postal rule does not apply. The contract was made at the place where the acceptance was received and not where the acceptance was despatched. In Fofie v. Zanyo:

The defendant and three others, as administrators to an estate, offered in a letter to sell a building out of the estate to the plaintiff. The plaintiff contended that he accepted the offer and made instalment payments of the purchase price. The defendant denied that the plaintiff accepted the offer and contended, inter alia, that the payments were in relation to an earlier ten-year tenancy that the administrators had granted the plaintiff.

The Supreme Court held, inter alia that before it could be said that there had been an acceptance of an offer by an offeree, there had to be (a) positive evidence by words, in writing or conduct from which the court might infer acceptance; and (b) the acceptance had to have been communicated to the offeror. The court noted that even though no specific method of acceptance was prescribed by the defendant, since the offer to sell the house to the plaintiff was made by a letter, one would have thought that the acceptance would be by letter. However, not only was there no such evidence, but also none was communicated to the defendant. The plaintiff's acceptance of the defendant's offer was, therefore, a mere mental acceptance. But that was not enough to constitute acceptance. Accordingly, the plaintiff failed to prove the existence of a sale contract between him and the defendant.

Another important principle relating to the communication of acceptance is that for the acceptance to be effective it must come from the offeree himself or his authorized agent.

In Powell v. Lee:

The defendants were managers of a school who had decided to appoint a headmaster. The plaintiff made an offer by applying for the position and the plaintiff and two other candidates were short listed for consideration. The Managers of the school passed a resolution that the plaintiff should be appointed as Headmaster. No directions were given as to the communication of the resolution to the plaintiff. One of the managers, without being asked to do so, informed the plaintiff that he had been selected. The decision was later on changed and the plaintiff sued for breach of contract.

The court held that the purported acceptance was not effective because it had not been officially communicated by the Board of Managers. There was therefore no contract.

Exceptions to the General Rule on Communication of Acceptance

There are a number of exceptional situations where the law will recognize that an acceptance is effective even though it has not been brought to the actual notice of the offeror. These include the following:

Express or Implied Waiver of Requirement of Communication

Where the terms of the offer expressly or impliedly waive or dispense with the requirement of communication, the acceptance will be deemed to be effective even if it is not brought to

the notice of the offeror. Generally, in general offers or offers for unilateral contracts the law implies from the nature of the offer that the requirement of actual communication of acceptance is waived. In Carlill v. Carbolic Smokeball Co, Bowen L.J. noted as follows:

One cannot doubt that, as an ordinary rule of law, an acceptance of an oiler made ought to be notified to the person who makes the offer, in order that the two minds may come together. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so. And I suppose there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

Now, if that is the law, how are we to find out whether the person who make; the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases, you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition, notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained.

On this basis, the court could not uphold the defendant's argument in Carlill v. Carbolic Smokeball Co., that the plaintiff's acceptance of the defendant's offer to pay £100 to anyone who contracted influenza after using the carbolic smokeball for two weeks was not effective because it had not been communicated to the company. It was implied from the nature of the offer that the requirement of notification of acceptance of the offer was waived.

Acceptance by Modern Communication Methods

In the modern business situation many contracts are concluded by means of correspondence through various forms of communication including the post, telegram, telephone, telex, e-mail etc. More recent developments in modern communication systems have led to the adaptation of existing principles for determining when a contract is deemed to have been concluded.

Acceptance by Post

Where an acceptance is communicated by post, when does it become legally effective? The court had to choose between a number of possibilities: (i) when the letter of acceptance is actually received by the offeror; (ii) when it should under normal circumstances have been received; (iiii) or when it is posted.85 The common law adopted the rule, sometimes referred to as the "postal rule", that where an acceptance is communicated by letter sent through the

post, the acceptance is complete and takes effect at the time when the letter of acceptance, properly addressed, is posted.86 Similarly, an acceptance by telegram takes effect when the telegram is handed in for transmission to the addressee.

The authority for the postal rule as stated is the case of Adams v. Lindsell.

On September 2, 1817, the defendants wrote to the plaintiffs offering to sell a quantity of wool on certain terms. The defendant required an answer "in course of post". The defendants misdirected their letter so it did not reach the plaintiffs until September 5. On the same day, that is, on the 5th, the plaintiffs posted a letter of acceptance. The letter of acceptance was received by the defendants on September 9. If the original offer had been properly addressed a reply would have been received by the 7th. Meanwhile on September 8, the defendants, not having heard from plaintiffs, sold the wool to third parties.

It was held that the plaintiffs' acceptance became legally effective on September 5, the date on which the acceptance letter was posted. Thus a contract had been concluded on September 5 and the defendants, having sold the wool to third parties on the 8th, were in breach of that contract.

A number of principles have been developed by the courts to govern the implementation of the postal rule. These include the following:

(1) For the postal rule to apply the letter of acceptance must have been posted and for this purpose a letter is deemed to have been posted when it is in the control of the Post Office.

(2) Generally the postal rule only applies when it is reasonable to use the post as a means of communicating acceptance.

In Henthorn v. Fraser, the court stated: "The rule is applicable where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating acceptance of an offer". Generally an offer communicated by post may be accepted by post but depending on the circumstances it may be reasonable to accept an offer by post even if the offer was not communicated by post.

The postal rule applies even if the letter of acceptance is delayed or wholly lost in the post and never reaches the offeror.

In Household Fire and Carriage Accident Insurance Co. v. Grant:

One Kendrick was the agent of the plaintiff company in Glamorgan. The defendant handed to Kendrick a written application for shares in the company. Kendrick forwarded the application to the plaintiff company in London and the Secretary of the company made out a letter of allotment in favour of the defendant. The letter was addressed to the defendant and posted. The letter never arrived but the defendant's name was entered on the register of shareholders and dividends were credited to him. The company later went into liquidation and sued the

defendant for the balance due upon the shares. The issue was whether there had been an effective acceptance which had concluded a contract between the parties.

The court held that the acceptance of the defendant's offer became effective as soon as the letter of acceptance was posted and it was irrelevant that the letter never arrived.

(4) The postal rule can be excluded by the terms of the offer. Thus the rule does not apply where the terms of the offer explicitly or impliedly indicate that the acceptance will become effective only when it is actually received by the offeror.

In Holwell Securities Ltd v. Hughes:

By clause 1 of an agreement entered into between the defendant and the plaintiffs, the plaintiffs were granted an option to purchase certain freehold property from the defendant. Clause 2 of the agreement provided: "The said option shall be exercisable by notice in writing to the defendant at any time within six months from the date hereof..." On 14th April, 1927, the plaintiffs' solicitor wrote a letter to the defendant giving notice of the exercise of the option. The letter was posted, properly addressed and prepaid, but it was never in fact delivered to the defendant or to his address. No other written communication of the exercise of the option was given or sent to the defendant before the expiry of the time limit on 19th April. In an action against the defendant seeking specific performance of the option agreement, the plaintiffs contended that since a contractual offer could be accepted by posting a letter of acceptance, the time of acceptance being the moment of posting, the option had been validly exercised when their letter of 14th April was posted.

The court held that the option had not been validly exercised. The rule that an acceptance of an offer could be effected, so as to constitute a binding contract, merely by posting a letter of acceptance, did not apply when the express terms of the offer stipulated that the acceptance had to reach the offeror. The court stated that the clause in the agreement which stated that the option was to be exercised "by notice in writing" to the defendant meant that the written document had to be communicated or notified to the defendant and this was inconsistent with the application of the postal rule. The word "notice" implies bringing the information to the actual attention of the vendor.

(5) The postal rule applies exclusively to acceptances communicated by post or by telegram. The rule does not apply to acceptances made by telephone, telex, facsimile machine or other forms of instantaneous or near instantaneous transmission. Acceptances communicated through such means become effective only when they are actually received by the offeror.

(6) The postal rule does not apply to letters containing rejections, counter offers or revocation of offers or revocation of acceptances. Such responses become legally effective only upon actual communication to the party to whom they are addressed.

Acceptance by Telex

Telex is considered as a form of instantaneous communication and is, therefore, treated in accordance with the general rule of acceptance that a contract is formed at the place where acceptance is communicated to the offeror. In Entores v. Miles Far East Corporation, the court declined to extend the postal rule to telex communications on the ground that such communications are virtually instantaneous and the parties could be regarded as negotiating in each other's presence.

Acceptance by Electronic Mail

Since the internet extends across international boundaries, issues of jurisdiction are inevitably raised in contractual disputes and the question of where and when an electronic contract was formed often becomes critical. As a starting point, it has been held that problems of proof aside, an offer or acceptance communicated by e-mail, is clearly binding. Section 23 of the Electronic Transactions Act, 2008 (Act 772) of Ghana provides that an agreement is valid even if it was concluded partly or in whole through an electronic medium.

The issue of whether the postal rule should apply to acceptances communicated by e-mail has been the subject of extensive academic debate. In Ghana, the provisions in sections 18 and 19 of the Electronic Transactions Act, 2008 (Act 772) which make provision for the determination of the time of receipt of an electronic record could be relied on in determining when an offer or acceptance communicated by electronic mail takes effect.

Section 18 of Act 772 deals with the despatch of an electronic record and provides:

Unless otherwise agreed between the originator and the addressee, the despatch of an electronic record occurs when it enters an information processing system outside the control of the originator or the agent of the originator.

Section 19, which deals with "Receipt of electronic record", states:

(1) The time of receipt of an electronic record shall be determined as follows:

(a) If the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs at the time when the electronic record enters the designated information system; or

(b) If the addressee has not designated an information system, receipt occurs when the electronic record enters an information system of the addressee through which the addressee retrieves the electronic record.

(2) An electronic record is deemed to be despatched at the originator's registered place of business and is deemed to be received at the registered place where the addressee has its place of business unless otherwise agreed by the originator and the addressee.

\Thus according to the Electronic Transactions Act, an offer, acceptance or payment of consideration for the formation of a contract, which is expressed in an electronic record is generally deemed to have been sent or despatched at the time that the record enters the information processing system outside the control of the originator. With regard to the receipt

of such communications, the Act takes the position that where the addressee has designated an information system for the purpose of receiving electronic records, receipt is deemed to occur at the time when the electronic record enters the designated information system. However, if no information system has been designated to receive electronic records, receipt is deemed to occur when the electronic record enters an information system of the addressee through which the addressee retrieves the electronic record.

Acceptance by Facsimile Transmission

An acceptance by facsimile transmission, being a form of instantaneous communication, is treated in accordance with the general rule that a contract is formed at the place where acceptance is communicated to or received by the offeror.

2.6.5 Prescribed Method of Acceptance

The offeror is generally entitled to prescribe the mode or method of acceptance in his offer and when he does so, the offeree is required to comply with such prescribed method. Thus if the terms of the offer indicate the method of acceptance, for example, by return post, in writing or some other form, the offeree must respond in the manner indicated. The general rule, therefore, is that where the mode of acceptance has been prescribed by the offeror, the offeree must comply with the prescribed method and acceptance in any other form or communicated in any other way would normally not be binding on the offeror. In Financings Ltd. v. Stimpson:

The defendant on March 16, at the premises of a dealer signed a hire purchase form, offering to take the plaintiff's car on hire purchase terms. On March 18 he paid a deposit of £70 and was allowed to take the car away from the dealer's premises. The defendant was dissatisfied with the car and on March 20, he returned it to the dealer, offering to forfeit his deposit so as to cancel the contract. Four days later the car was stolen from the dealer's premises and badly damaged. On March 25, the plaintiffs, (owners of the car), not having been told that the defendant had returned the car, signed the hire purchase forms. It was a term of the hire purchase agreement that the Finance Company would not be bound until it signed the agreement. In other words acceptance of the offer to buy could only be made by the signing of the contract.

The court held that the defendant had revoked his offer by returning the car to the dealer. It was enough that he had made it clear that he did not want to go on with the transaction so the hirer was not liable. On the issue of whether the purported acceptance was effective, the court noted that the terms of the offer made it clear that acceptance should be made by the signing of the forms by the plaintiff (Finance Co.). Therefore giving the hirer the car did not amount to acceptance. There was, therefore, no contract since the offer was revoked before acceptance i.e. the signing of the contract.

Where the offeror has prescribed a particular method of acceptance, but not in terms insisting that only an acceptance communicated in that mode will be binding, an acceptance communicated by any other mode which is no less advantageous to the offeror will be

effective to conclude the contract. Normally, where the offeror prescribes a particular method of acceptance, he usually does so to achieve a particular objective, most often to ensure speedy and safe delivery of the acceptance. It has been held, therefore, that an acceptance by a mode which accomplishes that objective just as well or better than the stipulated method may be binding on the offeror. In Tinn v. Hoffman, where acceptance was requested by "return of post", it was held that that does not mean exclusively a reply by letter or return of post, but you may reply by telegram or by verbal message, or by any other means no later than a letter written by return of post. If the offeror intends only to be bound by an acceptance in a particular manner, he must state so. Thus where the offeror insists that acceptance must be communicated in a specific manner and that manner only, acceptance communicated in any other way may not be binding on the offeror.

Prescription of Silence as Mode of Acceptance

An interesting question which has arisen with respect to the communication of acceptance is whether an offeree is bound by an offeror's prescription of silence as a mode of acceptance. Where an offeror states that he will assume that there is a contract if the offeree does not respond to his offer within a certain period, will the offeree be bound by any contract if he fails to respond? In other words can an offeree's silence be deemed to be an acceptance in accordance with an offeror's prescription? If so, in what precise circumstances? As a general rule, an offeror is not allowed to arbitrarily impose contractual liability on an offeree by stipulating that his silence will be construed as acceptance. Thus an offeree who does nothing upon receiving an offer which prescribes silence as the mode of acceptance is not bound by any contract.

In Felthouse v. Bindley:

An uncle and a nephew entered into negotiations about the sale of a horse. There was a misunderstanding about the price to be paid for it. The uncle subsequently wrote to the nephew proposing that they split the difference and stating "If I do not hear from you I shall consider the horse sold at that price". Later, the horse was mistakenly sold by the auctioneer to another party and the uncle sued. It was established from the evidence that the nephew had actually decided to accept the offer but did not communicate his acceptance to the uncle. He had rather directed the auctioneer not to sell that horse because it had already been sold.

The court held that there was no contract because the nephew (offeree) had not communicated his acceptance to the offeror and the offeree was not bound by the offeror's prescription of silence as a mode of acceptance.

The rule has been justified on the ground that silence itself is equivocal and does not necessarily imply acceptance. The offeree by keeping silent may or may not have intended to accept the offer; he may have forgotten to respond or may have intended to reject the offer by ignoring it. Secondly, since the offeree is not legally bound to do anything in response to an offer made to him, if he does nothing, the law cannot in principle, imply an acceptance from his silence or inactivity. To do so would constitute an imposition of contractual liability on

the offeree. The rule, therefore, protects the offeree from having to go to the trouble of rejecting so as not to be bound.

An interesting question, however, is whether, on the flip side, the offeror could be deemed to be bound by a contract if the offeree is silent in accordance with the offeror's prescription and intends by his silence to accept the offer. In this case, the offeror would be hard pressed to find any justification for disputing his liability in a resulting contract. It would appear that where the offeror has expressly stated that silence would be considered as acceptance, (thereby waiving the requirement of communication of the acceptance), the offeree's silence in response to the terms of the offer could be binding on the offeror. In this case, since the offeror prescribed silence as a mode of acceptance, he cannot be heard to complain that the acceptance was not communicated to him. Thus it has been noted that in Felthouse v. Bindley, if the nephew (the offeree) had sought to enforce the contract against the uncle (the offeror) on the ground that his silence amounted to acceptance he probably would have succeeded. On this basis it has been noted that perhaps the true principle in Felthouse v. Bindley is that the offeror cannot by ultimatum impose contractual liability on the offeree by imposing on him the obligation to state his non-acceptance but if the offeree unequivocally manifests his intention to accept there would be a contract.

The provisions of the Electronic Transactions Act, 2008 (Act 772) on unsolicited goods, services or communications noted below are of relevance to the issue of silence being imposed as a mode of acceptance.

50(1) Except in the case of a notice sent by an electronic communications provider to a customer in relation to the service, a person shall not send unsolicited electronic communications to a consumer without obtaining the prior consent of the consumer.

(2) A person who sends electronic commercial communication to a consumer shall provide the consumer:

(a) with the option to cancel the subscription to the mailing list of that person, and

(b) with the identifying particulars of the source from which that person obtained the consumer's personal information at the request of the consumer.

(3) An agreement shall not be deemed to have been concluded where a consumer fails to respond to an unsolicited communication, and the consumer is entitled to recover the costs associated with the cancellation of unsolicited communication.

(4) A person who contravenes subsection (1) commits an offence and is liable on summary conviction to a fine of not more than five thousand penalty units or a term of imprisonment of not more than ten years or both.

(5) A person who sends unsolicited commercial communications to another person or who continues to send unsolicited commercial communications after cancellation of the subscription commits an offence and is liable on summary conviction to a fine of not more than five thousand penalty units or a term of imprisonment of not more than ten years or both.

These provisions are clearly intended to discourage the practice of imposing contracts for unsolicited goods and services on customers through electronic media by defining such activities as offences punishable by law.

2.7 TERMINATION OF OFFERS

The following are the circumstances in which an offer can be deemed to have been terminated such that a purported acceptance cannot convert it into a binding contract.

2.7.1 Rejection of Offer

Generally, an offer may be terminated by a rejection or counter offer, which has been communicated to the offeror. The communication to the offeror of an outright rejection or counter offer terminates the power of acceptance and the offeree cannot thereafter accept the offer.

2.7 2 Lapse of Time

Where there is a time limit for the duration of the offer arid there is no acceptance within the specified period the offer lapses. Where no time limit is fixed for the duration of the offer, the offer lapses after the expiration of a reasonable time. What is a reasonable time depends on the circumstances of each case and the nature of the transaction. Relevant factors in determining what is a reasonable time may include rapid fluctuations in price, the perishable nature of goods involved, the mode of communication of the offer (by telegram or telephone) indicating some urgency and the customs of the relevant trade.

In Aning v. Kingful:

In November 1970, K married A customarily with the consent of the latter's family and presented her with a Bible and a ring. The spouses mutually agreed to have a church wedding. Thereafter they lived together for nearly six and a half years as man and wife. During that period K was not gainfully employed and A therefore had to feed and maintain him at her premises. K, however, secured employment in March 1976 and soon thereafter left A's premises. A claimed that K had refused to marry her under the Marriage Ordinance, Cap. 127 (1951 Rev.) and brought the instant action for damages for 010,000 for breach of promise of marriage. At the trial A deposed, inter alia, that K promised in 1970 in the presence of witnesses to marry her within three months in a church but that he had failed to fulfil that promise and had set up a home with another woman. K in his defence denied that he had been living with another woman. He deposed that he left A's house as a result of a misunderstanding but he was willing to receive her back. He furthermore deposed that their agreement to have the wedding was dependent on his being financially able to afford it.

The court held that a promise to marry generally is in law a promise to marry within a reasonable time. K, apart from disclosing that he had been maintaining A, did not give any particulars about his financial inability to marry. Consequently, on the preponderance of the

evidence, A had succeeded in proving that K's financial position allowed him to marry her but that he was refusing to do so without just cause.

2.7.3 Revocation of Offer

It is a basic and fundamental principle of contract law that an offer may be revoked at any time before acceptance. Thus once the offer is effectively revoked it is terminated and the offeree cannot thereafter accept it. In some cases however, the offeror may make an additional promise to keep the offer open for acceptance by the offeree for a specified period of time. Such offers are often referred to as "firm offers". What then is the legal effect of a promise to keep an offer open for a specified period of time?

At common law, a promise to keep an offer open for acceptance for a specified period of time is not binding on the promisor in the absence of consideration. In other words a firm offer is binding on the promisor only if the offeree provides some consideration for the promise to keep the offer open, for example the payment of money as in options. Thus at common law, in the absence of consideration an offeror who has promised to keep his offer open for a specified period may revoke his offer during that period as long as the offer has not yet been accepted.

In Routledge v. Grant, the defendant made an offer to take a lease of the plaintiff's premises. The defendant stated that his offer would be open for acceptance for a period of six weeks. Before the expiration of the six weeks the defendant revoked his offer and the plaintiff sued. The court held that the defendant was entitled to revoke his offer at any time before the offer was accepted since no consideration was given for the promise to keep the offer open.

This common law position has, however, been changed by section 8(1) of the Ghana Contracts Act 1960 (Act 25), which states: "A promise to keep an offer open for acceptance for a specified time shall not be invalid as a contract by reason only of the absence of any consideration therefore" Thus under Ghanaian law, a promise to keep an offer open for acceptance for a specified period of time is binding on the promisor even in the absence of consideration.

Generally, for a revocation of an offer to be effective, it must actually be brought to the notice of the offeree. Thus it has been held that where the revocation is communicated by post it does not take effect until the letter of revocation is actually received by the offeree.

In Byrne & Co v. Leon Van Tienhoven, the facts were as follows:

On October 1, the defendants posted a letter to the plaintiffs offering to sell them 1,000 boxes of tinplates. On October 8, the defendants posted a letter revoking their offer. On October 11, the plaintiffs telegraphed their acceptance. On October 15, the plaintiffs confirmed their acceptance by letter. On October 20 the defendants' letter of revocation reached the plaintiffs.

The court held that a contract was concluded on October 11. The revocation became effective on October 20, when the letter was received and this was after the contract had been concluded.

Even though there must be actual communication of revocation to the offeree, it has been held in one case that such communication need not come from the offeror himself. It is enough if the offeree receives notice of the revocation through a reliable third party. In Dickinson v. Dodds:

The defendant made an offer to the plaintiff to sell certain houses, stating that the offer would be left open until Friday 9 o'clock. On Thursday afternoon the plaintiff was informed by one Berry that the defendant had sold the house to one Allan. Nevertheless the plaintiff handed the defendant an acceptance letter a few minutes before the time limit expired. The defendant refused to accept the plaintiff's acceptance letter saying he had already sold the house to someone else. The plaintiff sued.

The court held that there was no contract. The offer had been unequivocally revoked and the revocation had been communicated to the offeree before his purported acceptance. The offer could not be accepted after the offeror had, to the knowledge of the offeree, sold the house to a third party. The court was of the view that a person cannot accept an offer which he knows has been revoked.

This decision could lead to uncertainty because the communication of the revocation in this case was done by a third party, not the offeror himself. Questions could arise as to what kind of indirect information would be sufficient to establish that the offeree knew of the revocation. It also puts the burden on the offeree to decide which source of information is reliable and which is not. Generally the source of information in question must be such that a reasonable man would give it credence or rely on it.

Revocation of General Offers

Since general offers are usually made to a large and indefinite class of people the question arises as to how they could be revoked. In the case of general offers made to the whole world such as reward offers, it is sufficient if the offeror revokes the offer through the same channel as the offer was made. In Shuey v. United States, where the plaintiff sought to claim the reward for information provided after the notice advertising the reward offer had been withdrawn through a newspaper advertisement, the court held that the general offer had been effectively revoked.

As stated an offer for a unilateral contract is one which requests the performance of an act as opposed to the making of a promise. In unilateral contracts the acceptance consists of the complete performance of the stipulated act and not the making of a return promise. Thus the question arises as to whether the offer could be revoked before the completion of the act which has been started in response to the offer. For example, in Carlill v. Carbolic Smokeball Co, could the company have revoked its offer after Mrs. Carlill had used the smokeball for say, eight days?

Logically, in a true unilateral contract, acceptance should consist of the complete performance of the stipulated act such that it is only after the act has been fully performed that his acceptance is deemed complete. Since an offeror is entitled to revoke his offer at any

time before acceptance, it would seem that the offeror is entitled to revoke the offer at any time before the act is completed. It must be noted that the offeree is not bound to perform the act at all. Since the offeror is under no compulsion to complete the performance it only seems logical that the offeror should also be entitled to revoke his offer at any time before the completion of the act.

The strict position however seems less than equitable where the offeree has spent money, time and effort in beginning the performance in reliance on the offeror's promise. To address this unfairness it has been proposed in one case that where appropriate, the courts should imply from the offeror's offer a second promise to the effect that once the offeree embarks upon performance the offeror will not revoke the offer.

In Errington v. Errington:

A father bought a house in his own name for his son and daughter-in-law to live in. He allowed them to live in the house and promised that if the couple would pay off the rest of the instalments due on the house the house would become their property. The couple stayed on and paid the instalments until the father died, whereupon his personal representative sought to revoke the offer and eject the couple from the house.

The court held, per Lord Denning, that this was a unilateral contract and in the circumstances the court could imply a second promise on the part of the offeror that once the couple begun with the payments and continued to pay the house would be conveyed to them. Thus the offeror could not revoke the offer and eject the couple from the house.

It must be noted, however, that a basic rule governing the court's ability to imply terms into a contract is that the courts will do so only when it is absolutely necessary so as to give business efficacy to the transaction or if the court is satisfied that the parties, as reasonable men, must have intended that term to apply, but left it out because "it goes without saying". These stringent grounds for implying a term into a contract may not always exist.

In Luxor (Eastbourne) Ltd v. Cooper, the court refused to imply this second promise because in its opinion there were no grounds for doing so. In that case:

O offered A £10,000 if A introduced a party to O to buy two cinemas owned by O. A introduced a person who agreed, subject to contract, to buy the cinemas. Before the contract of sale could be concluded, O declined to proceed with the sale. A was thus prevented from completing the act required by O's offer. A sued for the commission.

The court held that the offeree's action must fail because the commission was payable only upon completion of the sale which was in fact never made. The House of Lords held that there was no room for an implication that O promised not to revoke once A begun performance. In the opinion of the court the transaction was perfectly reasonable without the implication of such a term.

2.8 PROBLEMS OF COMMUNICATION - BATTLE OF FORMS

The growing use of printed contract forms in modern business transactions has given rise to peculiar problems relating to the formation of business contracts and the application of the rules on offer and acceptance to such contracts. Most contracts of sale involving commercial houses are concluded by the use of standardized forms such as local purchase orders, pro-forma invoices etc. These are printed forms which invariably state the terms on which the offer is made and the terms of the acceptance. Often, each party purports to contract with reference to his own set of standard terms and these terms sometimes conflict. The conflicting terms may relate to issues concerning the supplier's liability for defects, loss or damage, price variation clauses etc. Usually the conflict in the terms of the offer and the acceptance is not realized until after the goods are delivered or after the services have been rendered and a dispute arises.

A typical situation follows this pattern:

(i) A buyer makes enquiries about the price, quality and conditions of delivery of goods from the seller.

(ii) The seller in response sends a quotation (pro-forma invoice) stating the price and other terms of the contract of sale and incorporating in the printed offer form the seller's conditions of sale.

(iii) The buyer then makes an order on a printed form (local purchase order form) stating the quantity, date of delivery etc. and also incorporating in his purported acceptance the buyer's own conditions or terms. [It may state for example, "order placed subject to our conditions"].

(iv) The seller receives the order, confirms or acknowledges his acceptance of the order by letter, referring to his (seller's) conditions of sale.

The task of the court is to determine whether the parties have entered into a contract and if so what the terms are. The classic case which deals with the issue of battle of forms is the case of Butler Machine Tool Co. v. Ex-Cell O Corporation (England) Ltd. In that case:

The sellers offered to supply to the buyers a machine for a specified sum. The sellers' offer was expressed to be subject to certain terms and conditions including a "price escalation clause", which stated that the price payable for the machine would depend on the ruling prices at the date of delivery. In reply the buyers placed an order for the machine on their (i.e. the buyers') own terms and conditions. The buyers' conditions did not include a price variation clause. At the bottom of the buyers' order form there was a tear-off acknowledgement form stating: "We (sellers) accept the order on the terms and conditions stated herein", [i.e. on the buyer's form]. The sellers signed the acknowledgement slip and returned it to the buyers with a letter stating that they were entering the order in accordance with their (i.e. the seller's) offer. The question was whether there was a contract, and if so, on which terms.

It was held at the first trial that the contract was finally concluded on the seller's terms i.e. that the sellers were entitled to rely on their price escalation clause. In reaching this decision the trial judge did not apply the traditional method of offer, counter offer and acceptance. He stated that in the sellers' quotation one found the price variation clause appearing under a most emphatic heading stating that it was a term or condition that was to prevail. The trial judge was of the opinion that the sellers' conditions, being emphatic, continued throughout to the end. On appeal it was held:

(i) That the documents had to be considered as a whole and upon such consideration it was held that the decisive document was the acknowledgement form of June 5 that was completed and returned to the buyers by the sellers.

(ii) That the buyers' order was not an acceptance of the sellers' offer found in his quotation. It was a counter offer (since its terms and conditions were different) which the sellers accepted by their letter accompanying the acknowledgement form.

(iii) The contract was, therefore, concluded when the sellers accepted the buyers' counter offer without any objection. A contract was therefore concluded on the buyers' terms and the terms of the contract did not include the price escalation clause.

It was noted that the sellers' quotation (the offer) contained a number of terms and conditions including a price escalation clause. The clause stated: All orders are accepted only upon and subject to the terms of our quotation and the following conditions. These terms and conditions shall prevail over any terms and conditions in the buyer s order. The buyers' order stated: "Please supply on terms and conditions as below and overleaf" the order contained a list of the goods ordered and additional terms which were different from those stipulated in the quotation. Notably, the buyers' order form contained no price escalation clause. At the bottom of the buyers' order form there was a tear-off acknowledgement slip which stated: Acknowledgement: Please sign and return to Ex-Cell O. We accept your order on the terms and conditions stated herein and undertake to deliver by the slip left out the delivery date and signature to be filled in by the sellers. The sellers filled in the acknowledgement form, signed it and returned it to the buyers with a letter stating: We acknowledge receipt of your order for the supply of the machine, this being delivered in accordance with our earlier quotation.

According to Lord Denning, if these documents are to be analyzed in our traditional method this would be the result:

(a) The sellers' quotation was an offer by the sellers to buyers containing the terms and conditions stated on the back of the form.

(b) The buyers' order was not an acceptance of the sellers' offer since it contained different terms. It was a counter offer with no price escalation clause.

(c) The counter offer destroyed the original offer.

(d) The sellers' letter and the completed acknowledgement form constituted an acceptance of the buyers' counter offer.

(e) The sellers' reference to their quotation referred only to the price and identity of the machine. There was no specific reference to the price escalation clause.

It is worth noting, however, that if the sellers had made specific reference in their last communication to their (i.e. the sellers') own terms including the price escalation clause, then that final communication would have constituted a counter offer to the buyers' offer (counter offer). In that case no contract would have been concluded because there would be no acceptance of the buyers' counter offer. Since the buyers had made it clear before the machine was delivered that they did not agree to the price escalation clause.

Chapter Three

INTENTION TO CREATE LEGAL RELATIONS

3.0 INTRODUCTION

Even where the parties have reached agreement in the sense that there is an offer and a corresponding acceptance, and both parties have provided consideration, this may not necessarily result in an enforceable contract. The law does not always affirm the existence of an enforceable contract simply from the presence of mutual promises because in every day domestic and social life, agreements are often made. Which are not intended to be enforceable in the law courts if they are dishonoured. The common law, therefore, recognizes that an intention to create legal relations is an independent element, which must be proved, in addition to offer, acceptance and consideration, to ensure the enforceability of a contract.

Whether or not there is an intention to create legal relations is always a question of inference to be drawn by the courts based on the nature of the agreement, the surrounding circumstances and an objective constriction of what the parties said, did or wrote. There are, however, some broad guiding principles which the courts have traditionally applied in establishing the existence of an intention to create legal obligations. The courts distinguish between two broad categories of contracts: (i) Social, family and other domestic agreements; and (ii) agreements of a business or commercial nature. In domestic agreements there is a strong presumption that the parties did not intend to create legal relations, even though this presumption could be rebutted by evidence to the contrary. In commercial agreements, however, the law presumes that there is an intention to create legal relations, unless the parties have expressly stated otherwise, or unless the parties can prove the contrary.

3.1 ESTABLISHING AN INTENTION TO CREATE LEGAL RELATIONS

First of all, where the parties have expressly declared or clearly indicated in their agreement an intention not to create legal relations between them, the agreement will not be enforceable in a court of law, provided that neither the agreement nor the stipulation is itself illegal. Thus where the parties enter into an agreement on any subject matter, including business or commercial matters and state expressly that the agreement is not intended to be binding or legally enforceable by either of them, the courts will abide by their intentions as expressed and hold the agreement to be unenforceable.

In Rose & Frank Co v. Crompton Bros:

The defendants were an English firm which manufactured tissue paper. They entered into an arrangement with the plaintiffs, an American firm whereby the plaintiffs were made sole agents of the defendants for the sale in the U.S. of the tissue paper manufactured by the defendants. The arrangement was to last for 3 years with an option for extension. The document contained the following clause described as an "honourable pledge clause":

"This arrangement is not entered into, nor is this memorandum written as a formal or legal agreement. It shall not be subject to legal jurisdiction in the law courts either in the U.S. or England, but it is only a definite expression and record of the purpose and intention of the parties concerned to which they each honourably pledge themselves."

A dispute arose between the parties and the defendants terminated the agreement without notice and refused to fulfil or execute a number of orders it had already accepted from the plaintiffs. The plaintiffs sued for damages for breach of the agreement and for non-delivery of the goods comprised in the orders.

With regard to the plaintiffs' claim for damages for breach of the written agreement under which the defendants gave the plaintiffs selling rights, the court held that the claim must fail since the parties had specifically declared that the document was not to have any legal consequences. Since the parties had so declared there was no legally binding obligation on the parties to give orders or accept them or to perform any of the obligations under the agreement. Scrutton L. J. stated:

Now it is quite possible tor parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do hot intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations such an intention is readily implied, while in business matters the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour, and to exclude all idea of settling disputes by any outside intervention.

With regard to the plaintiffs' second claim for damages for non-delivery of the goods comprised in the order they had made, the court found that the claim was not based on the terms contained in the original agreement, which was not legally enforceable, but was based on the specific orders which had actually been accepted by the defendants before they terminated the agreement. The court held with respect to this second claim, that each individual order made by the plaintiffs and accepted by the defendants created a new and separate contract, (inferred from the conduct of the parties), which was enforceable without reference to the original agreement itself. The court held, therefore, that there was no liability for breach of the written agreement since it was stated to be legally unenforceable. However, the specific orders given and accepted constituted legally binding contracts, which had to be performed, and for which an action could lie for breach. In Jones v. Vernon's Pools Ltd:

The plaintiff claimed that he had sent in a pools coupon to the defendants who denied having received it. The conditions on the pools coupon stated that the "sending in of the coupon in respect of the pool should not give rise to any legal relationship, rights or duties whatsoever. All such arrangements and transactions should be binding in honour only."

The court held that this express condition prevented any action in relation to the pools coupon. There was no intention to create legal relations.

Sometimes the intention to create legal relations may be negated by the provision of a statute. An example can be found in section 2 of The Football Pools Authority (Amendment) Decree, 1975 (NRCD 358) which states:

It is a basic condition of the sending in and the acceptance of every coupon that it is intended and agreed that the conduct of the Football Pools and everything done in connection therewith; and any coupon and any agreement or transaction entered into; shall not give rise to any legal relationship whatsoever or be legally enforceable or the subject of litigation. All such arrangements are binding in honour only.

Where there is no express exclusion of the intention to create legal relations, the courts consider the nature of the agreement, its terms and the circumstances surrounding the agreement to determine whether such an intention can be inferred. In Hammond v. Ainooson:

The defendant, an owner of a fishing boat which had become unserviceable, verbally agreed with the plaintiff to supervise the repairs for a fee and that the plaintiff would be responsible for the sale of all the fish that would be caught by the boat. An attempt was made to draw up a written contract but the defendant promised to abide by the terms whether reduced into writing or not. The defendant, contrary to the terms of the agreement employed another person to sell the fish caught by the boat. The plaintiff brought an action for a sum for the services rendered to the defendant. The defendant denies there was an agreement and contends that on the evidence, there was no agreement sufficiently certain or definite to be enforced and that if there was an arrangement for the plaintiff to supervise the repairs for a fee, that cannot amount to an enforceable contract because the parties did not intend to create a legal relationship.

The court held, upon considering all the circumstances, that there was a contract between the parties resulting in legal obligations which could be enforced.

3.2 AGREEMENTS MADE IN THE DOMESTIC OR SOCIAL SETTING

Generally, engagements of pleasure such as invitations to dinner, games or other kinds of social engagements made every day life are usually not treated as giving rise to enforceable obligations because it is presumed that the parties do not contemplate the creation of legal obligations or relations between them. In individual cases, however, the courts apply the objective test to determine whether there was an intention to create legal relations or not. In Coward v. Motor Insurers Bureau:

Coward was a pillion passenger on a motor cycle owned and driven by one Cole. There was an accident, caused by Cole's negligence which resulted in both of them getting killed. Coward's widow brought an action against the insurers and it was necessary to determine whether there was a legally binding contract between Coward and Cole.

It was held that the arrangement between Coward and Cole, whereby Coward paid a weekly sum to Cole for transporting him to and from work, was not intended to create legal relations

between them. The court was of the view that it was unlikely that the parties engaged in such an arrangement contemplating that one was legally bound to carry and the other bound to be carried to work.

In the case of agreements made in the domestic setting, especially between family members it is presumed from the nature of the agreement that there is no intention to create legal relations. In these kinds of transactions the law applies a presumption that the parties did not intend to create legal relations between them. It must be noted, however, that even in these categories of agreements there will be deemed to be an enforceable contract if there is objective evidence to support such a conclusion.

3.2.1 Agreements Entered into Between Husband and Wife

In the case of agreements entered into between a husband and wife in the domestic setting, it is generally presumed that there is no intention to create legal relations between them and, therefore, such agreements are usually not enforceable in a court of law.

In Balfour v. Balfour:

The defendant was a civil servant stationed in Ceylon. His wife alleged that while they were both in England on leave he had promised to pay her £30 a month as maintenance during the time they were forced to live apart. She sued for breach of this agreement.

The court held that no legal relations were contemplated and the wife's action must fail. Atkin L J. explained:

[I]t is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves agreements such as are in dispute in this action agreements for allowances, in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration. They are not contracts because the parties did not intend that they should be attended by legal consequences.

The relationship of husband and wife does not automatically preclude the formation of a binding contract between them. In some cases the context in which the agreement is made may indicate a clear intention to create legal relations. Thus the presumption that legal relations are not intended between spouses does not apply where the spouses are not living together in amity i.e. where they are divorced, separated or about to be separated. This is so especially if the agreement was designed to deal with the marriage break-up."

In Merritt v. Merritt:

The husband had left the matrimonial home to live with another woman. The matrimonial home, which was subject to a mortgage was in the joint names of the husband and wife. The husband and wife met and husband agreed to pay wife £40 a month out of which the wife was to make the outstanding mortgage payments on the house. The wife insisted that husband put it in writing. The husband signed a piece of paper, which stated that he would transfer the house to the wife if she paid off the mortgage as agreed. The wife paid off the mortgage and the husband refused to transfer the house to the wife.

The court held that the application of the objective test led to the conclusion that the parties intended that their agreement would create legal relations and an action for breach of contract could be sustained. In Pettitt v. Pettitt:

The husband had applied for a declaration that he had a beneficial interest in the proceeds of the sale of a house. The parties were married with two children. They lived in a house devised to the wife by her deceased grandmother until 1960, when the wife sold the house and bought the cottage which is the subject matter of this case, with the money realized from the sale. The parties lived in the cottage until 1965 when the wife left the husband because of cruel treatment. She presented a petition for divorce and obtained a decree on the ground of cruelty. The husband left the cottage and the wife returned. The husband claimed that while they lived there he had done work to the premises, which he valued at £723 and that his work had enhanced the value of the cottage by £1,000.

The court held that the wife was entitled to the full beneficial interest in the house. The court was of the view that the improvements made by the husband were of an ephemeral character and that it would be unreasonable for a spouse to obtain a permanent interest in the house in return for making improvements of this character. In Acheampong v. Acheampong:

The parties were married under customary law. The wife instituted an action against the husband for a breach of promise to marry her under the Marriage Ordinance, Cap 127(1951 Rev.). Counsel for the defendant raised a preliminary objection as to whether a spouse married under customary law could, while that marriage was subsisting, sue the other spouse for breach of promise to marry under the Ordinance.

The court held that a woman married under customary" law was capable of suing her husband in contract or in tort in the same way as she could sue any other person. The legal fiction that husband and wife were one in law was riot part of the customary law. The court noted further that a customary marriage was distinct from Ordinance marriage. The incidents of the two types of marriage were different. Therefore if a woman married under customary law had given consideration for the promise to convert the marriage into an Ordinance one, she was entitled to sue for breach of that promise.

3.2.2 Agreements Entered into between Parent and Child

Generally, it is presumed by the law that agreements made between a parent and a child within the domestic setting are not intended to create legal obligations. An illustration can be found in the case of Jones v. Padavatton.

Mrs. Jones lived in Trinidad. Her daughter worked at the Indian Embassy in Washington. Her mother requested her to go to England and study law and offered her a monthly allowance while she read for the Bar. The daughter reluctantly accepted the offer and moved to England in 1962. In 1964, Mrs. Jones bought a house in England. The daughter lived in the house with other tenants using the rents to cover her expenses. In 1967, Mrs. Jones and her daughter quarrelled and Mrs. Jones brought the action claiming possession of her house. At the time of hearing the daughter had passed only a portion of Part I of the Bar examinations. The issue was whether in entering into this agreement the parties intended to create legal relations.

The court held that the agreement was not intended to create legal relations between the mother and daughter, noting that this was one of those family arrangements which depend on the good faith of the promises, which are made and are not intended to be rigid, binding agreements.

3.2.3 Other Domestic Arrangements

Another group of cases involves agreements made in the domestic setting, between persons who may or may not be related, but not between spouses or parent and child. Where the agreement was made in the domestic setting, but not between spouses or between a parent and a child, the courts look at the terms of the agreement and the circumstances in which it was made, in order to determine whether or not there was an intention to create legal relations. The courts will infer the existence of an intention to create legal relations, if it is found that the agreement, although made in the domestic setting, has a commercial flavour to it. An illustration can be found in the case of Simpkins v. Pays:

The defendant owned a house in which she lived with X, her granddaughter and the plaintiff, who was a tenant. The three of them took part together each week in a competition organized by a Sunday newspaper. The entries were made in the defendant's name but there were no regular rules as to who paid for postage and other expenses. One week the entry was successful and defendant obtained a prize of £750. Plaintiff claimed 1/3 of the sum but defendant refused to pay on the ground that there was no intention to create legal relations between them.

It was held that even though there are many family agreements which do not create enforceable contracts between the parties, on the present facts there was a "mutuality in the arrangements between the parties" which led to the conclusion that the parties intended to create legal relations between them. It was a joint enterprise to which each contributed in the expectation of sharing any prize that was won. There was, therefore, a legally binding contract between the parties.

In Parker v. Clark:

The defendants, an elderly couple, agreed with the plaintiffs, who were 20 years younger that if the plaintiffs would sell their cottage and come and live with them the husband would leave the plaintiffs a portion of his estate in his will. The agreement provided for the sharing of household expenses etc. The plaintiffs sold their house and moved in with the defendants. Later difficulties developed between the two couples and the defendants repudiated the agreement and asked the plaintiffs to move out. The plaintiffs claimed damages for breach of contract.

It was argued on behalf of the defendants that the agreement amounted to no more than a family arrangement of the type considered in Balfour v. Balfour and that there was no intention to create legal relations. It was held that even though the agreement was one made in the domestic setting, the circumstances clearly indicated that the parties intended to create legal relations between them. The intention to create legal relations was implied from the fact that both parties knew it was necessary for one of them to take the drastic and irrevocable step of disposing of his own house in order to adopt the arrangement. In the American case of Hamer v. Sidway, an uncle promised his nephew: "If you will refrain from drinking, smoking, swearing and playing-cards for money until you attain the age of 21 years I will pay you £5,000". The nephew complied and claimed the sum. The court held that the contract was legally enforceable since it required the promisee to refrain from doing things which he was entitled to do.

3.3 COMMERCIAL AGREEMENTS

In commercial or business agreements the courts presume that there is an intention to create legal relations. This presumption is only rebutted where the parties have expressly stated in their agreement that it is not to be binding in law or where the parties are able to prove the contrary. In the absence of any express stipulation in the commercial agreement to the contrary, the burden of rebutting the presumption lies on the party who claims that there was no intention to create legal relations. In Edwards v. Skyways Ltd:

The defendant, an airline company, agreed with the British Airline Pilots Association to pay certain "ex gratia" payments to a number of pilots who had been made redundant. The plaintiff, a redundant pilot, brought the action to recover the amount. The company refused to pay, arguing that the agreement was not intended to create legal relations because of the use of the term "ex gratia to describe the payments.

The court held that the subject matter of the agreement related to business matters and, therefore, the onus of establishing that there was no intention to create legal obligations was on the defendant. The defendant company had not discharged this burden. The use of the words "ex gratia" simply referred to the fact that the company had no pre-existing duty to make the payments, but the use of those words did not mean that the offer made, when accepted would not create any legal relations.

Chapter Four

CAPACITY TO CONTRACT

4.0 INTRODUCTION

This chapter deals with the legal capacity of persons to enter into valid and enforceable, contracts. There are certain categories of persons who in the opinion of the law do not have full capacity to enter into contractual relations. For public policy reasons such persons are deemed to be in need of protection when it comes to the creation of contractual relations and the assumption of contractual liability. These categories of persons include:

(i) Infants or Minors

(ii) Mentally Incompetent Persons

(iii) Drunken or Intoxicated Persons

4.1 CONTRACTUAL CAPACITY OF MINORS

The law on the minor's capacity to contract in Ghana is still largely governed by the traditional common law principles developed over a century ago, most of which have been amended and updated by legislation in the United Kingdom. Before 1969, a person below the age of 21 years was considered to be a minor or an infant under the common law for purposes of contract. This was the position until the passing of the Family Law Reform Act of 1969 in the UK, which lowered the age of majority to 18. This statute of course has no application in Ghana. The Infants Relief Act of England of 1874, which makes extensive modifications to the common law rules on the contractual capacity of minors, is also not applicable in Ghana, not being an English statute of general application.

With regard to the definition of minority under Ghanaian Law, it is noted that section 32 of the Interpretation Act, 1960 (CA 4) defines an "infant" as a person who has not attained the age of 21 years. The Companies Code defines an "infant" as any natural person under the age of 21 years or such other age as may from time to time be declared by any enactment to be full age for legal purposes.

Even though recent legislation tends to adopt 18 years as the age of majority for various purposes, there is currently no statutory provision which stipulates 18 years as the age of majority for purposes of contractual liability. Article 28 of the 1992 Constitution, which mandates Parliament to enact laws that will ensure the overall welfare of children in Ghana, states that "for the purposes of this article, "child" means a person below the age of 18 years". The Children's Act, 1998 (Act 560), the Act which reforms and consolidates the law relating to children also defines a child as a person below the age of 18 years. It has been argued, based on these statutory provisions that the age of majority for purposes of contractual capacity under Ghanaian law has been reduced to eighteen years. The position, however, remains at the very least unclear, since there is currently no statutory provision which stipulates the age of majority for purposes of contractual liability to be 18 years. Thus in the

absence of such statutory provision the common law age of majority of 21 years remains applicable in Ghana.

The rules on the contractual capacity of minors often arise with respect to contracts entered into by young professional entertainers or athletes; out of credit transactions entered into by minors or out of cases involving the employment of minors. At common law the general rule is that contracts entered into between a minor and an adult are not binding on the minor but are binding on the adult party. In other words a contract entered into between a minor and an adult cannot be enforced against the minor, but can be enforced against the adult. There are, however, certain categories of contracts which are deemed by the common law to be binding on the minor. These are contracts for "necessaries", beneficial contracts of service and voidable contracts.

4.1.1 Contracts for "Necessaries"

At common law, where a minor enters into a contract for the purchase of "necessaries" such a contract is binding on the minor and he is liable to pay a reasonable price for the goods. The term "necessaries" refers generally to those things without which a person cannot reasonably exist and include food, clothing, lodging, education, training in a trade, and other essential services such as medical services. It has been held however that the word "necessaries" is not confined only to articles necessary to the support of life such as food, shelter, clothing and medicine, but also includes articles and services fit to maintain the particular person in his station of life i .e. his "status and wealth". A statutory definition of the term "necessaries" is provided in section 2(3) of the Sale of Goods Act of Ghana, 1962 (Act 137) which states: "necessaries are goods suitable to the condition in life of the person to whom they are delivered and to his actual requirements at the time of the delivery".

In Chappie v. Cooper, where a married minor entered into a contract for the purchase of a coffin to bury her husband it was held that the contract was one for "necessaries" and the minor was liable to pay for it. Alderson B in that case provides a comprehensive test for determining what should qualify as "necessaries":

Things necessary are those things without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Then the classes being established, the subject matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse according to his rank, his education may vary according to the station he is to fill and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of age. But in all these cases, it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed.

For the minor to be liable for necessaries it must be proved, not only that the goods are suitable to the situation or condition in which he is, but also that the goods are suitable to his actual requirements at the time of delivery. Thus if the minor is already sufficiently provided

with goods of the kind in question such that he could not require any more, a contract to purchase such good would not be binding on the minor as a contract for "necessaries" and the price cannot be recovered.

In Nash v. Inman, a Saville Row tailor had delivered to the infant defendant, an undergraduate student at Cambridge eleven fancy waistcoats. He brought the action to recover the price. It was held that the action must fail since it was established during the trial that the infant was already adequately supplied with clothes. The goods were therefore not suitable to his actual requirements at the time of the delivery.

The wider principle is that no contract is binding on a minor if it prejudicial to his interest, even if it would otherwise be valid. Thus even where it is established that the goods or services qualify as necessaries the minor will not be bound if the terms of the contract are harsh and onerous. In Fawcett v. Smethurst, the infant entered into a contract under which he hired a car for the transport of his luggage. The contract stipulated that the infant would be absolutely liable for any damage to the car, whether caused by his negligence or not. The court held that the contract was not enforceable against the infant even though the transport of his luggage was a necessary service, because its terms were found to be harsh and onerous. This principle accounts for the rule that in contracts for the purchase of necessaries the infant is only liable to pay a reasonable price for them and not necessarily the price being charged by the adult party for the goods.

4.1.2 Beneficial Contracts of Service

The second category of contracts which are generally binding on infants are beneficial contracts of service or apprenticeship contracts. The law recognizes that it is in the interest of the infant that he should be able to obtain employment, learn a trade or acquire some instruction or training for a profession. The only way the infant can achieve this is by entering into a binding contract with an instructor or trainer in the form of an apprenticeship contract or contract of service. Thus the term "necessaries" is defined to include education, training or instruction in a trade or profession which are as essential for the infant's survival and economic wellbeing as food, shelter and clothing.

The principle, therefore, is that where an infant enters into a contract of apprenticeship or a contract of service under which he receives instruction or training, the contract is binding on the infant, provided that the terms of the contract, construed as a whole, are substantially to the benefit of the infant.

In Clements v. London & Northwestern Railway:

A minor, who was a railway porter, agreed to join an insurance scheme to which his employers contributed. Under the scheme he agreed to give up any claims for injury which he may be entitled to under the Employers' Liability Act. It was found that his rights under the scheme were in some ways, more and in other ways less beneficial than those under the Act: The issue was whether the contract was enforceable against the infant.

It was held that the contract, construed as a whole was beneficial to the infant and was, therefore, binding on him. It is instructive to compare this case to that of De Francesco v. Barnum, the facts of which were as follows:

A fourteen year old girl bound herself by an apprenticeship contract to the plaintiff for a period of 7 years to be taught stage dancing. The terms of the agreement included the following: The infant would not marry during the period of apprenticeship: the infant could not accept any professional engagements without the plaintiff's prior consent; and the plaintiff was not bound to provide the infant with engagements while she was employed. The allowance that the plaintiff agreed to pay the infant was ridiculously low. The plaintiff had the right under the agreement to terminate the contract at any time that he determined that the infant was unfit for stage dancing.

The court held that the provisions of the contract, considered as a whole were harsh and unreasonable and not to the benefit of the infant. The contract was therefore unenforceable.

The principle on beneficial contracts of services has been applied to contracts which allow the minor to earn a living through the exercise of a profession or occupation, whether as an athlete, entertainer or through the practice of any other professional skills. However, it remains a mandatory precondition for the infant's liability that the terms of the contract, on the whole, must be to the minor's advantage. Thus in the case of Doyle v. White City Stadium Limited:

The infant, a professional boxer, entered into a contract to fight for £3,000, win, draw or lose subject to the rules of the British Boxing Board of Control. One of the rules stated that a boxer who was disqualified in a fight would forfeit his "purse". The minor was disqualified for hitting below the belt. He brought an action to claim the £3,000.

The court held that the rules of the Board were on the whole for his benefit as a professional boxer since they encourage clean and fair fighting. The infant was, therefore, bound by the rules even though in this instance they operated against him.

In Roberts v. Gray, an infant was held liable for his failure to perform a contract for a tour with the plaintiff, a noted billiards player on the ground that the contract was for the instruction of the minor and was therefore, enforceable against him. In Chaplin v. Leslie Frewin (Publishers) Ltd, the infant contracted to give a firm of publishers the exclusive right to publish his memoirs. The court held that this kind of contract would be binding on the infant if it was on the whole for his benefit.

Trading Contracts

It must be noted that at common law, the principle which makes a beneficial contract of service binding on the minor does not extend to trading contracts. At common law, trading contracts entered into by a minor do not qualify as necessaries and are, therefore, not enforceable against him, no matter how beneficial the terms may be to him. Thus a minor trader cannot be sued for the non-delivery of goods he has contracted to sell or for the payment of the price of goods delivered to him for purposes of trade.

It would thus appear that if a minor chooses to enter into any occupation other than trading, contracts entered into in furtherance of that objective are binding on him as long as the terms are substantially to his benefit. If he chooses to earn a living by trading however, the law raises an absolute bar to liability, leaving the adult party with no remedy whatsoever, even where the terms of the contract are fair and beneficial to the minor trader. The rule on trading contracts is based on the centuries old common law position that "the law will not suffer an infant to trade which may be his undoing". The justification for the rule on trading contracts is that an infant who trades risks his capital. If he exercises some profession or calling he may incur expenses but he does not risk his capital.

It is therefore a well-settled principle at common law that a minor or infant is not bound by a trading contract. Thus an infant is not liable for goods supplied to him for the purpose of trade or for damages if he fails to deliver goods that he has contracted to sell as a trader. In Cowern v. Nield, the infant defendant was a hay and straw dealer. The plaintiff, the adult party had paid for a consignment of hay, which the infant had failed to deliver. The court held that the infant was not liable for trading contracts and therefore not liable to refund the money. In Mercantile Union Guarantee Corp. Ltd v. Ball, the infant was a haulage contractor. A lorry was delivered to him on hire purchase for the purpose of his trade. The infant failed to meet the payments and was sued. The court held that the contract, being a trading contract, was not enforceable against the infant.

4.1.3 Voidable Contracts

The third category of contracts which are binding on the minor are described as voidable contracts. Contracts within this category are described as voidable because they are binding on the minor unless and until he repudiates the contract during his minority or within a reasonable time after attaining majority.

Voidable contracts are contracts by which the minor acquires an interest in some subject matter of a permanent nature, which gives rise to continuous or recurrent obligations. In voidable contracts, minority does not constitute a complete bar to liability, even though the minor is allowed to repudiate the contract under specific circumstances. The minor is bound by the contract if he does not divest himself of liability by repudiating the contract during his minority or within a reasonable period after he has attained majority.

In Ghana, contracts which are considered voidable on grounds of minority include lease contracts, contracts affecting land or immovable property, contracts for the acquisition of shares in a company and marriage settlements. For such contracts the law is quite stringent in holding the minor liable for the legal consequences of the contract he has entered into as long as he maintains it. Where the minor repudiates the contract, he is not ordinarily entitled to avoid liability for obligations, which have already arisen under the contract, even though he is no longer liable for future obligations under the contract. The minor is also not entitled, upon repudiation, to claim money or property transferred to the other party under such a contract, unless he can establish a complete failure of consideration.

The general principle, therefore, is that where a minor enters into a contract by which he acquires an interest in a subject matter of a permanent nature with recurrent obligations attached to it, he is bound by the obligations as long as he retains the contract.

Leases /Purchase of Land

Where the minor enters into a contract for a lease he is subject to the liabilities imposed by such a contract (usually the payment of rent) for as long as he maintains the contract. He may repudiate the contract during infancy or within a reasonable time after attaining majority but he remains bound by the contract unless and until he repudiates it.

It is important to note that section 12(2) of the Conveyancing Decree, 1973

(N.R.C.D. 175) provides that: The persons expressed to be parties to a conveyance shall, until the contrary is proved, be presumed to be of full age and capacity at the date thereof. The provision simply states that the parties to a conveyance will be presumed to be of full age unless the contrary is proved. It is submitted, however, that the wording of section 12(2) of N.R.C.D. 175 does not lead to the inescapable conclusion that where a party is shown to be a minor he is deemed automatically to lack capacity to enter into a conveyance. The more likely interpretation appears to be that where it is proved that a party to a conveyance is a minor, the question of the extent of his or her liability would have to be determined in accordance with the general common law rule as stated above. In other words the minor would be bound by the conveyance unless and until he takes steps to repudiate it.

Purchase of Shares

A minor who enters into a contract for the purchase of shares acquires an interest in a subject matter of a permanent nature carrying with it certain obligations which he is bound to discharge unless and until he repudiates the contract. Thus a minor who has purchased shares in a company can be sued to pay a call i.e. a demand to pay to the company what is still due on the shares.

4.1.4 Minor's Liability in Loan Contracts

Generally, a person who lends money to a minor cannot recover it at common law, but can, in equity, recover that part of the loan which was actually used by the minor to purchase necessaries.41 In view of this rule and of the fact that many University students eligible to participate in the national student loan scheme were likely to be below the age of twenty-one, the Ghanaian legislature was careful to include the following provision in the Students Loans Scheme Law, 1992 (P.N.D.C. Law 276), which provides:

A student who takes advantage of the scheme, shall, in the formation of the contract and for the purpose of recovery of the loan be conclusively deemed and treated as a person of full age whether he is in fact of full age or not.

This provision ensures recovery of loans under the said scheme irrespective of the age of the recipient.

4.1.5 Minor's Liability in Torts

Minors are generally liable for their torts. A minor is however not answerable for a tort which is directly connected with a contract which is not otherwise enforceable against him. In other words, where the cause of action in tort arises directly out of a contract which is not binding on the minor, the minor would not be liable for the tort. The purpose of this rule is to prevent an adult plaintiff from using a tort action as an indirect way of enforcing against the minor, a contract which is ordinarily not binding on him. The rule therefore makes it impossible for an adult party to indirectly enforce an unenforceable contract against the minor by changing the form of action from one of contract to one of tort.

In Fawcett v. Smethurst, the minor hired a car to fetch his luggage from the station. The contract included a term which made the minor liable for any damage caused to the car with or without his fault. The minor drove the car several miles beyond the station. The car caught fire and was damaged without his fault. The court held that even though the contract qualified as a contract for necessaries it was unenforceable against the minor because of the onerous term in the contract which made the minor liable for damage caused to the car with or without his fault. The minor was not liable in tort either because to hold the minor liable in tort would be an indirect way of enforcing an otherwise unenforceable contract against him.

It must be noted, however, that this rule only applies where the breach in question consists of doing an act which is contemplated or authorized by the terms of the contract. Where the minor's breach consists of the doing of 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 in tort. In such a case the cause of action in tort is deemed to be separate and independent of the contract.

In Ballet v.Mingay, an action of detinue was brought against the minor for the return of certain articles including an amplifier and microphone which the minor had borrowed or hired from the respondent and had without the owner's authority, lent to a friend. It was held that since the terms of the bailment contract did not permit him to part with possession of the articles at all, the minor's action fell outside the scope of the contract altogether and he was, therefore, liable, for the tort of detinue.

Fraudulent Misrepresentation of Age by Infant

The courts have also had occasion to deal with situations where the minor mispresents his age to the adult party to induce the adult party to contract with him. Where the contract entered into is not ordinarily binding on the infant, will the minor be liable for the tort of deceit or not?

Where a minor fraudulently misrepresents his age and thereby induces another person to enter into a contract which is ordinarily unenforceable against the minor, the contract remains unenforceable against the minor despite his fraud and the minor will not be liable for the tort of deceit either because the cause of action in tort arises directly out of the contract which is not binding on the minor. Thus, at common law, where a minor obtains property or money from another, by a fraudulent misrepresentation of his age, he cannot be sued in contract or

compelled to refund the money since the fraud is directly connected with the contract. An action for deceit in torts will not lie against the minor because to allow such a tortious action would constitute an indirect way of enforcing an otherwise unenforceable contract.

In Leslie Ltd v. Sheill, the plaintiffs were a firm of registered moneylenders. They sued the defendant, a minor to whom they had given two loans each of £200. At the time of obtaining the loans, the defendant had falsely represented to the plaintiffs that he was of full age. It was held in accordance with this principle that a minor who had obtained a loan (under a contract which is ordinarily unenforceable against the infant) by fraudulently misrepresenting his age could not be compelled to pay back the loan. In other words the contract remained unenforceable against the minor despite his fraud and no action in tort could lie against him either.

Equity, however, in certain circumstances intervenes in order to prevent the minor from benefiting from his own fraud or deceit. In equity, where a minor obtains property (whether consisting of goods or money) by means of a fraudulent misrepresentation of his age, he could be compelled to restore that property to the person deceived provided that the property is identifiable and still in the possession of the minor. This is known as the doctrine of equitable restitution.

The operation of this doctrine is limited in a number of ways. If the minor has sold the goods or spent the money obtained by fraud, he cannot be compelled to replace the goods or to refund an equivalent sum from his own resources since that would constitute repayment and, therefore, amount to enforcing an otherwise unenforceable contract. The rule is that restitution stops where repayment begins.

In Leslie Ltd v. Sheill, the money could not be recovered from the infant defendant because he had used or spent it. The court stated here that there was no question of tracing the money and no possibility of restoring the very thing that was obtained by fraud. If the minor still had the £400 (the exact notes) in his possession he could have been made to restore the money under the equitable principle of restitution but here the money had been spent and any order to return it would constitute an order of repayment which would amount to enforcing the contract for the loan.

Thus it appears that where a minor fraudulently induces an adult to grant him a loan, the adult party cannot rely on the doctrine of equitable restitution to recover the amount except in the unlikely event that the minor still has in his possession the identical notes and coins given to the minor. The view has been taken that this position empties the remedy of almost all its practical content since the rule seems to ensure that an adult party can seldom recover the money owed and is further disabled from recovering any property purchased with the money borrowed under false pretences.

4.1.6 Minor's Right to Enforce Contract Against Adult Party

Apart from the three categories of contract discussed all other contracts with minors are not binding in any way on the minor, even though they may be enforceable by the minor against

the adult party. A minor, however, has no capacity to institute an action directly or by himself. He can only sue by his next friend who has to act by a lawyer. Similarly, a minor can defend an action only through a guardian ad litem.

Generally, a minor cannot obtain an order of specific performance against an adult party because the remedy is normally not available against the minor. Specific performance is an equitable remedy issued at the discretion of the court. The court in exercising its discretion is guided by the general principle that where there is a lack of mutuality the remedy will not be granted against one party. Thus specific performance will generally not be granted against a party who has entered into a contract with a minor since the remedy does not lie against a minor. A court of equity will not lend its aid where the remedy is not mutual. However, where the minor has fully performed his obligations under the contract, such that there is nothing that the other party could possibly ask a court to specifically decree, the remedy could be available to the minor party.

In Lartey v. Bannerman:

The defendant, a lessee of the State Housing Corporation, contracted to sell his property to B.L. B.L. informed the defendant that he was buying the property for his daughter the infant plaintiff. After B.L. had, in pursuance of the contract, paid part of the purchase price and given the balance to his solicitor to be given to the defendant when he executed the deed of assignment, the defendant refused to execute the deed of assignment. Consequently, B.L. brought an action in his own name for inter alia, specific performance against the defendant. While giving evidence, however, B.L. testified that his daughter was a minor. He was therefore cross-examined about his authority to commence and maintain the action. The writ was subsequently amended to indicate that the plaintiff was suing by B.L. her next friend. The defence thereupon claimed that the agreement could not be specifically enforced as it purported to have been made with an infant. The trial court judge refused to decree specific performance on the ground of the absence of mutuality in contracts involving infants.

On appeal, the court held (allowing the appeal) that the sole justification for the rule that specific performance may not be granted to an infant was that because of the privileged position of the infant the other party could not obtain the remedy against him. The basis of the rule therefore disappeared where the infant came before the court requesting the decree after he had performed his side of the bargain, because there was nothing that the other party might possibly ask a court to specifically decree. The court held that the remedy of specific performance should be available to the plaintiff to compel the defendant to perform his part of the contract. Amissah J.A. stated:

The rule that specific performance may not be granted to an infant is well-known. But remembering that the sole justification for it is that because of the privileged position of the infant, the other party cannot obtain the remedy against him in case of need, the basis of the rule seems to disappear where the infant comes before the court with a request for the decree after he has performed his side of the bargain. For in that case there is nothing that the other party may possibly ask a court to decree specific performance for. The cases which deny

specific performance to an infant, some of which the learned trial judge referred to, do not in my view, preclude a court from granting the remedy if the infant has performed his side of the bargain.

4.2 CONTRACTUAL CAPACITY OF MENTALLY INCOMPETENT PERSONS

A lunatic is a person of unsound mind, a mentally incompetent person, an insane person or one who is not compos mentis. The contractual capacity of mentally incompetent persons is governed by a number of rules formulated by the courts. The general common law position is as stated in lmperial loan Co. v. Stone:

Unsoundness of mind would be a good defense to an action upon a contract if it could be shown that the defendant was not of a capacity to contract 'and the plaintiff knew it.

The plaintiff in this case had sued on a promissory note issued by the defendant. The defendant pleaded that at the time he issued the note the plaintiff was aware of his insanity. The plaintiff denied knowledge of this. The jury found for a fact that the defendant was insane at the material time but was divided on the issue of the plaintiff's knowledge of the defendant's insanity. The trial judge entered judgment for the defendant but this was reversed on appeal. It was held that a plea of insanity, to justify a plea of incapacity had to satisfy the twin test of unsound mind in fact and knowledge of the fact by the other contracting party.

When a contract is entered into by a mentally incompetent person, the first question asked is whether at the time of contracting he was incapable of understanding the nature of the contract due to his mental disability. If it is shown that the mentally incompetent person was incapable of understanding the nature and effect of the contract he has entered into, the contract is voidable at the instance of the mentally incompetent party only if he can prove that the other party knew or ought to have known of his mental disability at the time of contracting. The burden of proving such knowledge has been held to lie on the mentally incapacitated party. It must be noted, however, that a mentally incompetent person will be deemed to be bound by a contract made by him during a lucid interval even if his disability is not known to the other party. Also a mentally incompetent person is liable to pay for necessaries supplied to him, where the supplier expected that the goods would be paid for, whether or not the supplier was aware of his disability.

4.3 CONTRACTUAL CAPACITY OF DRUNKEN OR INTOXICATED PERSONS

The contractual capacity of drunken or intoxicated persons is generally said to be the same as that of the mentally afflicted. If at the time of contract, a person was so drunk or intoxicated as not to know the consequences of his act and his drunkenness or intoxication was known to the other party at the time of contracting, the contract made will be deemed to be voidable at the instance of the drunken or intoxicated party. The drunken party, however, has the option of ratifying the contract when he becomes sober, so as to make the contract valid.

In Matthews v. Baxter, the parties had agreed for Matthews to buy houses from Baxter. At the time of the agreement, Matthews was so drunk that he did not know what he was doing. When he became sober he ratified and continued the contract and the contract was held to be a binding one.

It has been noted that such a contract is almost always voidable since it is almost impossible for the other party not to know of the extent of the intoxication of the drunken party. A drunken person in a contract for necessaries is under the same obligation as an insane person to pay a reasonable sum for the goods supplied.

Chapter Five

CONSIDERATION

5.0 INTRODUCTION

Consideration is an essential aspect of the fundamental notion of bargain, the other aspects being offer and acceptance. Indeed, consideration, offer and acceptance have been described as "an indivisible trinity - different facets of one identical notion of bargain."1 The doctrine of consideration has emerged as a universal requisite of the common law for the enforcement of agreements not made under seal and has been characterized as "one aspect of the fundamental notion of bargain around which almost the whole of simple contract is built".

In contract law, a promise is said to be part of a bargain if it is given "for consideration". A promise is given for consideration when the promisor asks for something in return for his promise and gets what he asks for. Thus a promise is generally not binding unless something of value such as a return promise or an act has been given in exchange for that promise. This is why an offer to make a contract is often described as a promise with a price tag. The price tag is what is termed the "consideration". The doctrine of consideration therefore has to do with the reason for the enforceability of promises as contracts. The promisee must be able to show that he has provided consideration for the promise which he seeks to enforce, thus giving the courts a reason to lend its authority to the enforcement of the agreement. Thus at common law, it is one of the most fundamental principles that an agreement is not enforceable unless it is made by deed or supported by consideration.

In the case of Marfo & Others v. Adusei, the first appellant under the terms of a mortgage agreement, attempted to sell a farm of the respondent. The parties agreed to postpone the sale for one year. However, the first appellant sold the farm three months later. The trial court accepted the respondent's evidence that the first appellant had agreed to postpone the sale for a year and held that the sale which was made earlier than agreed was unlawful.

On appeal it was held, inter alia, that the trial court's finding that there was an agreement to postpone the sale could not be interpreted as an agreement enforceable at law because there was no evidence upon which he would be justified in law in holding that there was a contract between the first appellant and the respondent, the performance of which could be enforced against the first appellant in a court of law. There was no agreement by deed, and there was no consideration moving from the respondent to the appellant.

5.1 DEFINITION OF CONSIDERATION

In the course of the 19th century, the prevailing view was that a plaintiff or promisee could establish the existence of consideration in one of two ways: he either had to prove that he had conferred a benefit on the defendant (promisor) for which the defendant's promise was given; or he had to establish that he suffered or incurred a detriment as a result of acting on the defendant's promise. Simply put, a promisee who wished to enforce a promise had to

establish either that he had conferred a benefit on the promisor or that he had himself suffered a detriment as a result of promisor's promise. Some of the earliest definitions of consideration were, therefore, based on this benefit/detriment concept.

In Curie v. Misa, consideration was defined as:

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

In Thomas v. Thomas it was stated:

Consideration means something which is of value in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff or some benefit to the defendant, but at all events it must be moving from the plaintiff.

The definition of consideration in terms of benefit/detriment was later found to be limiting. It was realized that the benefit/detriment equivalent did not apply in all cases. Especially in contracts consisting of mutual promises; for example, where two parties enter into a contract for the sale of goods to be delivered and paid for at a future date. By judicial authority both parties are bound as soon as the contract is concluded even though nothing has changed hands at that point. It is not clear, however, what economic benefit the buyer has received, or what detriment the seller has suffered at that point.

As the law developed further the definition of consideration was modified to move away from the benefit/detriment concept and consideration began to be viewed as the price of a bargain, referring to whatever was given in exchange for the promise of the other party. The concept of consideration was seen as the price paid by the plaintiff for the defendant's promise, such price consisting either in the doing of some act or the making of some promise in exchange, for the defendant's promise.

A more modern definition of consideration is Pollock's widely accepted definition approved and adopted by Lord Dunedin in the House of Lords decision in Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co, Ltd, which states:

An act or forbearance of one party, or a promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

Section 75 of the American Restatement of Contract 2nd states:

Consideration for a promise is: (a) an act other than a promise, or (b) a forbearance, or (c) the creation, modification or destruction of a legal relation, or (d) a return promise bargained for and given in exchange for the promise.

The more modern definitions of consideration place more emphasis on the contemporary bargain theory which underlies the common law concept of contract and reflects better the commercial character of the English contract." The newer definitions also emphasize the fact that to constitute consideration, the promise or act must be given in exchange for the promise

of the other party. Thus consideration may consist of the performance of an act, a counter promise or a forbearance requested or given in exchange for the other party's promise.

5.2 KINDS OF CONSIDERATION

Consideration is usually classified into three categories: executed- executory or past consideration. Consideration is said to be executory when it consists of a promise (to be performed in the future), which is given in return for a counter promise. This kind of consideration arises for bilateral contracts, where the contract is formed by the mutual exchange of promises, a good example of which is a contract for- the sale of goods to be performed in the future. Consideration is said to be executed when it consists of an act which is performed in exchange for a promise. Executed consideration arises in unilateral contracts, which are typically formed by the exchange of a promise for the actual performance of an act, such as reward contracts. The performance of the act constitutes the acceptance as well as the consideration. Consideration is said to be past where the act constituting the consideration is wholly done or the detriment wholly suffered before the promise is made.

5.3 RULES GOVERNING CONSIDERATION

Over the years a number of rules have been developed by common law to govern the application of the doctrine of consideration. The doctrine of consideration can be stated in a series of more or less settled rules riddled with exceptions. The Ghana Contracts Act, 1960, (Act 25) has also made significant inroads in the rules governing consideration at common law. The Act has modified most of the common law rules on consideration even though the basic requirement of consideration for the enforcement of contracts is still central to the law of contract in Ghana. The rules governing the application of the doctrine of consideration in the Ghanaian law of contract may be summed up below.

5.3.1 Past Consideration

As noted, consideration is described as past where the act constituting the consideration is wholly done or the detriment wholly suffered before the promise is made. At common law, past consideration is not sufficient to support the enforcement of a contract. The rule on past consideration is premised on the fundamental principle that to constitute consideration the promise must be given in exchange for the act.

The consideration is past if the promise comes after the act has been fully performed without any reference to the promise, which is made later. The promise is subsequent to and independent of the act and, therefore, the promise and the act do not constitute one and the same transaction. Thus the promise is not deemed to have been given in exchange for the act, but rather constitutes a promise of a gift subsequent to the act. So for example, if A makes a

present of a car to B and a year later, B promises to pay for it there is no consideration for B's promise to pay. The consideration (the act of giving the car) is past in the sense that it was wholly done before the promise was given. The promise is subsequent to and independent of the act, which is alleged to constitute consideration.

In Roscorla v. Thomas:

The defendant sold a horse to the plaintiff. After the sale the plaintiff asked the defendant if the horse was sound. The defendant responded that it was. The horse turned out to be unsound and the plaintiff brought the action for breach of warranty.

It was held that the sale itself created no implied warranty that the horse was sound. The warranty had to be regarded as independent of and subsequent to the contract of sale itself. Since the warranty was based upon the previous transaction it constituted past consideration

In Eastwood v. Kenyon, the plaintiff, Eastwood had been a guardian and an agent of Mrs. Kenyon while she was a minor and had voluntarily incurred expenses in the improvement of her property. When the infant came of age she promised to pay the money that Eastwood had borrowed for the improvement of her property etc. The plaintiff sued to enforce the defendant's promise. The court held that the moral obligation of the defendant to fulfil the promise was not sufficient consideration and since the acts had been wholly done before the promise was given, the consideration was past and the promise was therefore unenforceable.

Whether the consideration is past or real is a question of fact to be determined from the facts of each case. The fact that the parties have used the word "consideration" has been found not to be conclusive. In Re Mcardle:

A number of children by their father's will were entitled to a house after their mother's death. While their mother was alive one of the children and his wife lived in the house. The wife made various improvements to the house and at a later date all the children signed a document addressed to her stating: "In consideration of your carrying out certain alterations and improvement to the property, we hereby agree that the executors shall repay you from the estate the sum of £488 in settlement of the amounts spent by you on such improvements".

The wife sued to enforce this promise. The court held that since all the work on the house had in fact been completed before the document was signed, this was a case of past consideration and it was not sufficient to support the document signed as a binding contract.

5.3.2 Exceptions to Past Consideration Rule

Act Specifically Requested by Promisor

A number of exceptions to the rule on past consideration must be noted. First of all, it has been established that past consideration will be sufficient to support a subsequent promise if the prior act or service (which constitutes the consideration) was done or rendered at the express request of the promisor. Thus if the act was done or the services rendered at the

request of the promisor without any promise of payment at that point, and the promisor subsequently makes a promise to pay for the service, such a promise is enforceable and the act although done in the past would constitute sufficient consideration.

In Lampleigh v. Brathwaite:

The defendant had killed a man and had been convicted of murder. He asked the plaintiff to do all he could to obtain a pardon for him from the king. The plaintiff exerted himself to this end, journeying to and from London at his own expense and was able to obtain the pardon for the defendant. Later the defendant promised to pay the plaintiff £100 for his trouble. He failed to pay and the plaintiff sued.

The court held that even though the alleged consideration was wholly given before the promise of remuneration was made the promise was enforceable because the act constituting the consideration was done at the express request of the defendant. In this case, the request of the promisor creates a link between the act constituting the consideration and the promise, even though no promise of reward or payment was made at the time of the request. Thus the act and the subsequent promise could be regarded as constituting one transaction.

Act Done by way of Business

The second exception to the rule on past consideration is that an act done before the giving of a promise will constitute consideration if the act was done by way of business and the parties understood at the time of performance that the act was to be remunerated or paid for and the payment, if promised in advance done or the services are rendered by way of business and not as an act of friendship. Here, it is presumed that both parties must have understood that the act would ultimately be paid for. In this case the subsequent promise is treated as an admission of the bargain and serves to fix the amount of the remuneration to be paid. In the case of Re Casey's Patent, Stewart v. Casey:

A and B, joint owners of certain patent rights, wrote to C stating that "in consideration of your services as the practical Manager in working our patents, we hereby agree to give you one third share of the patents". A and B subsequently refused to fulfil this promise arguing that the promise was made only in return for C's past services as Manager and, therefore, there was no consideration to support it.

The court held that the nature of the past services raised an implication that the services would be paid for. The subsequent promise to pay was therefore simply an admission of the bargain and served to fix the amount of the remuneration that had to be paid. In Pao On and Others v. Lau Yiu Long and Others, the exceptions to the past consideration rule were stated by Lord Scarman as follows:

An act done before the giving of a promise to make a payment or to confer a benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request. The parties must have understood that the act was to be remunerated further by a payment or the conferment of some other benefit and payment, or the conferment of a benefit, must have been legally enforceable if it had been promised in advance.

5.3.3 Consideration Need not be Adequate

It has been settled for centuries that the common law courts will not inquire into the adequacy of consideration. This means that the courts will ordinarily not seek to assess the value of the defendant's promise and compare it to the value of the act or promise given by the plaintiff in exchange for it to determine whether the consideration is adequate. 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. It is immaterial that his promise is far more valuable than the price he asked for.

This principle is based on the doctrine of freedom of contract which presumes that the parties are capable of determining their own interests and making their own bargain. The courts will generally not upset a bargain between two persons of full age and understanding on the basis that the bargain appears to be unfair or unjust or that the consideration given is in the view of the court inadequate.

In Bolton v. Madden it was noted that "the adequacy of consideration is for the parties to consider at the time of the making of the contract, and not for the court to consider when it is sought to be enforced".

In Adjabeng v. Kwabla:

The defendant bought land from the father of the plaintiff for £40. The plaintiff brought an action alleging, inter alia, that the consideration for the sale was inadequate (he thought the land was worth about £200).

The court held that in the absence of fraud or misrepresentation, inadequacy of consideration cannot be a ground for avoiding a sale validly made.

The principle on adequacy of consideration is also clearly illustrated in the case of Chappell & Co. Ltd v. Nestle Co. Ltd.

The plaintiffs were the owners of the copyright in a dance tune called "Rockin' Shoes". The Hardy company made records of the tune which they sold to Nestle" company for 4d each and Nestle" company offered the records to the public for 1 s 6d each, but required in addition to the money, three wrappers of their sixpenny bars of chocolate. When Nestle" received the wrappers, they threw them away. Their main aim was to advertise their chocolate but they also made a profit on the sale of the records. The plaintiffs sued for infringement of copyright. Defendants (Nestle" company) were liable unless they could rely on section 8 of the Copyright Act. Under that section a person may make a record of a musical work provided that this is designed for retail sale and provided he pays to the copyright owner a royalty of 6 1/2 % of the "ordinary retail selling price". The defendants offered the statutory royalty based on the price of Is 6d per record. The plaintiffs refused the offer, contending that the money price was only part of the consideration for the record and that the balance of the price was represented by the three empty wrappers.

The court held that it would be unrealistic to hold that the wrappers were not part of the consideration. The offer was to supply a record, in return, not only for the money, but for the chocolate wrappers as well. Lord Somervell stated:-

The question, then, is whether the three wrappers were part of the consideration I think they are part of the consideration. They are so described in the offer. It is said that when received the wrappers are of no value to Nestle's. This I would have thought irrelevant. A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn. (Emphasis mine)

5.3.4 Forbearance as Consideration

As noted, consideration may consist of an act, promise or forbearance. Forbearance simply refers to refraining from doing what one has a right to do. Generally, forbearing from doing or promising to forbear from doing what one has a right to do amounts to good consideration for another promise.

In the case of Delia & Delle v. Owusu-Afriyie, it was held that a promise to forbear or actual foibearance in response to a request, express or implied, from the promisor constitutes valid consideration. In that case:

The parties to the suit were in business in Kumasi. The defendant-appellant-respondent referred to as the defendant admitted taking money from the plaintiffs-respondents-appellants referred to as the plaintiffs, who are husband and wife, and that he was under obligation to pay the money. What the defendant however disputes is the amount of money which remains unpaid and the interest payable on the said amount. The plaintiffs claim that sometime in 1995, the defendant became indebted to them in the amount of US$ 172,666 and that the defendant executed a statutory declaration affirming the indebtedness in which he promised to repay the money before 31st December 1995. The defendant however failed to settle the debt. The plaintiffs admitted that the defendant had made a total payment of US$106,000 by installments towards the settlement of the debt thus leaving a balance of US$66,660 unpaid. After the plaintiffs had a solicitor's letter written to the defendant formally demanding the payment of the outstanding debt, a writ was indorsed with a claim for the payment of the said debt, interest on the said balance from 31 December 1995 to the final date of payment among others.

The defendant claims that the extent of his indebtedness to the plaintiffs did not amount to the said sum and the statutory declaration he executed was obtained by fraud even though he acknowledged that he executed it. He thus counterclaimed for an order that the statutory declaration procured was by fraud and that it was consequently of no legal effect.

The trial court judge in his judgment dismissed the counterclaim of the defendant and held that the allegation of fraud had not been proven. He further held that the plaintiffs had proved with credible evidence that the defendant was indebted to them and accordingly entered judgment for the plaintiffs in the sun of US$66,660 with interest at the current bank rate from

1st January 1996 till date of judgment. The defendant was dissatisfied and appealed to the Court of Appeal. The Court of Appeal allowed the appeal dismissed the plaintiffs' claim for interest and reduced the quantum of the indebtedness from US$66,660 to US$24,000. The plaintiffs therefore appealed to the Supreme Court claiming that the judgment was against the weight of evidence.

The Supreme Court held that a statutory declaration is not, in itself a cause of action. But the statements of fact made in it may be used to found a cause of action. In the instant case, the defendant made a statement in the declaration acknowledging the debt in the sum of US$ 172,660. The said statutory declaration however contained a fresh contractual promise for which there is consideration, that is, if the defendant failed to honour his promise then the plaintiffs would be free to sue after the stipulated time. This could be reasonably interpreted as an implied request for the plaintiffs to forbear from suit before the 31st of December 1995, in exchange for the promise to pay off his indebtedness before the date. The plaintiffs' actual forbearance in the instant case would amount to consideration.

In Hamer v. Sidway:

An uncle promised a nephew who was an infant at the time: "If you would refrain from drinking liquor, using tobacco, swearing, playing cards for money until you are 21 years I will give you £5,000 on your 21st birthday". The nephew complied and later sued to enforce the promise. It was argued that the nephew provided no consideration since what he did was not a detriment to him but was in fact a benefit to him, not to the uncle.

The court held that the nephew's forbearance amounted to good consideration. It was sufficient that the nephew had restricted his lawful freedom of action within certain prescribed limits upon the faith of the uncle's promise. In White v. Bluett, however:

The defendant had given his father a promissory note for money which he had borrowed from his father. The defendant failed to honour the note and the father's executors brought the action to recover the debt owed. The defendant's defence was that his father had before his death, promised to waive or forego the debt if in return the son would stop bothering his father with complaints about the distribution of the father's estate which the son thought did not favour him. The defendant therefore alleged that the father had promised that if he (the son) ceased to complain, the father would not enforce the note or recover the debt.

The court held that there was no consideration. The son had no right to complain in the first place since the father was entitled to distribute his property as he wished. Abstaining or forbearing from doing what one had no right to do did not amount to consideration. Generally, a promise not to enforce a valid legal claim against another party is sufficient consideration for a promise given in return. It is a settled principle that a promise not to enforce a legal claim made by an intending or actual litigant can be consideration for another's promise to pay money or to confer some other benefit.

In Callisher v. Bischojfsheim, Cockburn C.J. stated:

The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it.

In the Ghanaian case of Kwaddey v. Okantey:

In a land suit previously instituted by the defendant for the recovery of possession and mesne profits, the then Land Division of the Supreme Court, Accra, gave a judgement in favour of the plaintiff. On appeal, the Court of Appeal set aside the judgment of the Land Court and gave judgment in favour of the defendant. On further appeal by the plaintiff to the Judicial Committee of the Privy Council, the appeal abated by reason of legislation passed upon Ghana becoming a Republic in 1960. The parties made attempts to settle the case, but negotiations broke down. Subsequently, the defendant applied to the court for issue of a writ of possession to execute the judgment of the Court of Appeal. The application was resisted by the plaintiff who instituted the instant action for (1) a declaration that by virtue of a compromise concluded in 1965 in respect of the Court of Appeal judgment, the defendant had waived all his rights and interests in the said judgement and that he was thus not entitled to execute it and (2) a claim for perpetual injunction against the defendant and his agent.

The court, in reliance on the principle stated in Callisher v. Bischoffsheim, held that an agreement to compromise an action may amount to good consideration. Consequently, the plaintiff was entitled to judgment since the defendant's offer to stop further litigation on being paid £200 was good consideration from which he could not resile.

5.3.5 Sufficiency of Consideration

It is often stated that consideration need not be adequate, but it must be sufficient. It is important to distinguish between the "adequacy'" and "sufficiency" of consideration in this context, even though the two words, in ordinary parlance may be treated as synonyms. The term "adequacy of consideration" is used in connection with the assessment of the value or relative worth of the consideration being offered by one party for the promise of the other. In this regard, as already noted, the courts traditionally exhibit a strong reluctance to interfere with the contents of the parties' agreement on the basis that the promise or act of one party is worth more than the promise he is receiving from the other. The courts generally refrain from making this kind of assessment to determine the adequacy of the consideration because the parties are considered to be the best judges of their own interests. Thus, the principle that consideration need not be adequate.

However, while the court will not denounce a contract on grounds of inadequacy of the consideration, they have shown great interest in ensuring the "sufficiency" of consideration,

that is, the validity of the acts or promises which should qualify as consideration for a contract. In this regard, the common law courts developed a number of rules to ensure that the consideration is sufficient, that is, the act or promise itself satisfies the definition of consideration and is capable in law of supporting an enforceable contract. In determining the sufficiency of consideration, the courts are concerned with ensuring that the promises or acts qualify as consideration in the true sense and are therefore deemed "sufficient".

Over the years, the common law has identified certain kinds of promises or actions which are not considered as sufficient consideration. These include promises to perform pre-existing legal obligations and part payment of debts. It is important to note from the outset that these common law rules have however been heavily modified by statutory law in Ghana, in particular by the Contracts Act, 1960 (Act 25). To enhance clarity, the respective common law rules will first be examined, followed by the statutory modifications and a discussion of the impact and implications of the changes effected by the Contracts Act, 1960 (Act 25).

5.4 REFORM OF SPECIFIC RULES ON CONSIDERATION BY THE GHANA CONTRACTS ACT, 1960 (ACT 25)

5.4.1 Promise to keep Offer Open for Specified Period of Time: Section 8(1) of Act 25

At common law, a promise to keep an offer open for acceptance for a specified period of time is not binding on the promisor unless it is supported by consideration.40 Thus at common law, a person who has promised to keep an offer open for acceptance for a specific period of time is, in the absence of consideration, nevertheless entitled to revoke the offer at any time in spite of the promise. This rule has been amended by section 8(1) of the Ghana Contracts Act, 1960 (Act 25), which states:

A promise to keep an offer open for acceptance for a specified time shall not be invalid as a contract by reason only of the absence of any consideration thereof.

Thus, under Ghanaian law a promise to keep an offer open for acceptance for a specified period of time is binding on the promisor even if no consideration is provided. In other words, in Ghana, consideration is not a pre-requisite for the enforceability of a promise to keep an offer open for acceptance for a specified time. The Memorandum to the Contracts Act provides this illustration:

A offers to sell his house to B for G 2,000 and says that the offer will be open for one week. Before the week expires A sells the house to X Provided that there is some evidence from which a court can infer that B has accepted A's promise to keep the offer open (not the offer to sell the house) B will have an action against A for breach of this contract. [Emphasis mine].

This illustration appears to indicate that even though there is no requirement of proof of consideration flowing from the promisee for such a promise to be binding, there must be

some evidence from which the court can infer that the promisee has accepted the promise to keep the offer open before it will be deemed to be enforceable.

Interestingly, there is no indication in the statute as to the form that such evidence of acceptance should take. This apparent gap in the law has evoked much discussion on the mode of formation of this "one-sided" contract under section 8(1) of the Act 25 and the practical implications of this innovation introduced by the Contracts Act.

The following extract provides some insight into the core issues raised by section 8(1) of the Contracts Act with regard to the formation of a contract to keep an offer open for acceptance for a specified period of time:

J. D. Heydon, "Gratuitous Options: Section 8(1) of the Contracts Act" (1969) 6 U.GI.J. p 40, 44-45

Section 8(1) contemplates that for a contract to be formed validly under it, every normal requirement for validity must be present except consideration; and the draftman's memorandum reinforces this view by stating that in each case there must be some evidence from which a court can infer that the offeree has accepted the offeror's promise to keep the offer open. Therefore there must be an offer to keep the main offer open, an acceptance, an actual or presumed intention to enter into legal relations and sufficient certainty.

(a) Offer to keep the offer open

It is thought that the offer must at least be expressly made; it would be hard to imagine the court implying a contract valid under section 8(1) without some clear offer from the party who will incur the sole obligation under this "unilateral" contract.

(b) Acceptance

Can acceptance be implied from the offeree's conduct? If O makes an offer to sell his house to A and a further offer to keep the main offer open for a week, would a counter-offer for the house of itself amount to an acceptance of the offer to keep the offer open? Surely not, since it would be hard to imagine that an offer to keep an offer open is accepted by rejection of the substantive offer. If it were, the meaningless result would be that O was bound to keep an offer open for a week which A was incapable of accepting because he had made a counter-offer rejecting that offer.

Would a request for information not amounting to a counter-offer amount to an acceptance? This leaves the original offer open for acceptance, and it certainly indicates a desire to do business on the terms indicated. But it may leave the offeror uncertain as to what his position is. He should be entitled to know what future conduct is allowed to him: he should know whether or not he is breaking a contract.

Would conduct indicating some interest in the offer to sell amount to acceptance of the offer to keep the main offer open? If in our example above A begins to investigate facts about the house, would this amount to acceptance whether O hears about it or not? It seems clearly

undesirable to allow acceptance in these circumstances, for the normal rule that acceptance of an offer should be communicated to the offeror in clear terms should apply. The doctrine of consideration may justify very few of the claims made for it, but the presence of consideration in a contract does assist in establishing the moment of contracting. If the need for consideration is waived, as in section 8 (1), the courts will be forced to tighten up the other requirements of proof of an agreement, and therefore it is likely that they will demand express acceptance under section 8(1). Of course, if the offeror waives the need for communication of acceptance, and runs the risk of any hardship to himself that may result, effect will be given to his wishes.

If acceptances are not to be valid unless communicated expressly and clearly to the offeror, what will be the position of postal acceptances? It is suggested that the same reasons of policy which make postal acceptances binding on posting (because it is the normal mode of business in those circumstances, because it is the mode of acceptance understood by the offeror, etc.) should apply to a section 8(1) contract. And it is thought that the problems that arise when a posted acceptance is sent before the rejection of an offer which arrives before acceptance would be solved under section 8(1) in the normal way.

5.4.2 Part Payment of Debt - Section 8(2) of Act 25

At common law a promise to waive or forego a debt or part payment of a debt is not binding on the promisor unless there is some fresh consideration flowing from the promisee. The rule is sometimes referred to as the rule in Pinnel's Case. At common law, a creditor, after making a promise to forego part of a debt can still claim it if there is no fresh consideration flowing from the debtor to support the promise. The rule is based on the premise that the payment of a smaller sum cannot constitute sufficient consideration for a promise to forego the rest of the debt. Why? First of all, it is argued that the part payment is no more than what the promisee is already legally bound to do (in fact it is less); and secondly, there is said to be no benefit accruing to the creditor, who receives less than he is entitled to, neither does the debtor suffer any detriment in paying part only of what he owes. Thus even if the creditor expressly agrees to accept the lesser amount as a discharge of the whole debt, he is not bound by his promise in the absence of fresh consideration and he can subsequently sue to recover the rest of the debt. The rule was birthed in the ancient case, Pinnel's Case: In that case:

Pinnel brought an action in debt on a bond against Cole for the payment of £8.10 on November 11,1600. Cole pleaded that at the request of Pinnel, he had paid him the sum of £5 2s on October 1 and that Pinnel had accepted that lesser amount in full satisfaction of the debt.

Even though the plaintiff was given judgment on a point of pleading, the court was careful to note that it would have found for the defendant, in the absence of the technical flaw. It must be noted that the court first of all recognized the principle that the payment of a lesser sum on the day the debt was due in satisfaction of a greater was no satisfaction of the whole. However, it further noted that a debt could be discharged, not simply by the payment of part of it, but by the debtor complying with some new or additional requirement introduced by the

creditor, for example, tendering part payment at a place different from that agreed or on a date earlier than that agreed. In this case, the fact that the defendant paid the lesser amount on an earlier date, at the request of the plaintiff (as Cole had done) would have been sufficient to discharge the debt.

The rule in Pinnel's Case was reconsidered and reaffirmed by the House of Lords in the case of Foakes v. Beer, the facts of which were as follows:

Mrs. Beer had obtained a judgement against Dr. Foakes for £2,090. Foakes asked for time to pay. The parties agreed that if Foakes paid £500 immediately and the balance in instalments Mrs. Beer would not take any legal proceedings on the judgement. Even though judgement debt bears interest from the date of judgment, the agreement did not expressly make any reference to the interest. Dr. Foakes eventually fully paid the judgment debt. Mrs. Beer then brought an action to recover the interest. Dr. Foakes refused to pay, arguing, relying on the agreement that Mrs. Beer had promised to forego the interest in return for Foakes' payment of the principal. Beer argued that there was no consideration for her alleged promise to forego the interest.

The House of Lords held that Mrs. Beer's claim should be upheld. The court held that even if the agreement could be construed as a promise by Beers to forego the interest in exchange for Foakes' payment of the principal, the agreement would still be unenforceable for lack of consideration. Foakes only did what he was already contractually bound to do. Part payment of a debt cannot constitute a discharge of the whole debt.

The impact of this rule could be most inconvenient in commercial life and has been criticized on that basis. The rule on part payment of debts has been modified by the Contracts Act, 1960 (Act 25), even though it remains the position at common law. Section 8(2) of the Ghana Contracts Act changes the common law rule discussed above and states:

A promise to waive the payment of a debt or part of a debt or the performance of some other contractual or legal obligation shall not be invalid as a contract by reason only of the absence of any consideration therefor.

Thus under Ghanaian law a promise to waive a debt or part of it is binding on the promisor even in the absence of any fresh consideration. This means that under section 8(2) of the Contracts Act, 1960 (Act 25), a creditor, after promising to accept part payment of a debt in full discharge of the entire debt cannot go back and sue for the rest of the debt on the ground of lack of consideration. The promise, according to Act 25, is binding in the absence of consideration. The impact of the legislative change effected by section 8(2) of the Contracts Act with regard to waivers of payment of debts and performance of obligations is extensively considered in the following article.

S. K. Date-Bah, "The Doctrine of Consideration and the Modification of Contracts" (1973) 5 R.G.L. 1047

The problem of Pinnel's Case and of Foakes v. Beer is also dealt with by the Contracts Act, 1960. Section 8(2) provides:

A promise to waive the payment of a debt or part of a debt or the performance of some other contractual or legal obligation shall not be invalid as a contract by reason only of the absence of any consideration therefor.

Pinnel's Case covers situations where the promisor seeks a release from, and not, as in Stilk v. Myrick, additional remuneration for, the performance of his pre-existing contractual duty. In consequence of Pinnel's Case and Foakes v. Beer, the English common law has refused the enforcement of voluntary releases given in consideration for less than the promisor was already bound to perform. This [sic] rule has frustrated the expectations of many a debtor, but it is now also abolished in Ghana.

The abolition of the rule in Pinnel's Case should however not mean that recalcitrant debtors can now extort releases from creditors in a weak bargaining position. The English case of D. & C. Builders Ltd. v. Rees [1966] 2 Q.B. 617 C.A., illustrates the kind of unconscionable exercise of economic duress which should not be permitted to succeed. The facts were as follows: the plaintiffs were a small building company who did work for the defendants to the tune of about £700. After some payments, the defendants' debt to the plaintiffs was reduced to about £480. The plaintiffs pressed for payment of this amount for months without success. To the knowledge of the defendants, the plaintiff company was in desperate financial straits. Taking advantage of this weak position of the plaintiffs, the defendants offered them £300 in full satisfaction. At the trial, evidence was given as follows: "If I did not have the £300 the company would have gone bankrupt. The only reason we took it was to save the company. She knew the position we were in." The plaintiffs after receiving the £300 sued for the balance owed them by the defendants, who set up the previous modification agreement as a defence.

As Lord Denning points out since the decision in Rookes v. Barnard the tort of intimidation is probably committed when a promisor or debtor threatens to break his contract in order to induce the creditor or promisee to release him from any part of his pre-existing obligation. It would thus not constitute any remarkable judicial innovation for the Ghanaian courts to hold that agreements procured through such tortious conduct are against public policy and are not enforceable, even though the requirement of consideration has been abolished in Ghana as far as modification agreements are concerned.

5.4.3 Pre-Existing Legal Obligations

Traditionally, the common law has taken the position that a promise to perform or the performance of a pre-existing legal obligation does not constitute sufficient consideration for another promise. The reason offered is that since the promisor is already legally bound to perform the act which he performs or promises to perform, he suffers no detriment in performing it and the promisee obtains no benefit from the performance since the promisor is already bound to perform the obligation in question.

A pre-existing legal obligation may arise in three different ways:

(a) Pre-Existing Legal/Public Duty The duty may arise from a public duty imposed on a person by the general law, usually by virtue of the person's position, status or employment. To illustrate, let us assume that party A, who is a civil servant, promises to perform a service for party B which he is already legally bound to perform by reason of his employment, in return for a promise by party B to pay some money to him. At common law such a performance would not amount to sufficient consideration and the purported contract would be unenforceable.

(b) Pre-Existing Contractual Duty owed to Contracting Party: This kind of pre-existing duty arises from an existing contract entered into between the promisor and the promisee himself. It is therefore described as a pre-existing contractual obligation owed to the promisee himself. For example, parties A and B may have already entered into a building contract with a fixed price, the building to be completed at an agreed time. Due to subsequent developments, party A obtains a promise from party B to make an additional payment in return for A's promise to complete the building of the house at the time earlier agreed on. At common law, the performance of the pre-existing contractual obligation (to complete the house on time) would not constitute sufficient consideration for B's promise to pay the additional amount.

(c) Pre-Existing Contractual Duty Owed to Third Party - This kind of pre-existing duty arises from an existing contract entered into between the promising party and a third party. It is therefore referred to as a pre-existing contractual obligation owed to a third party. To illustrate, let us assume party A contracts with party C to do X. Subsequently party A contracts with party B, promising to perform X (which he is already bound to perform under his contract with C) in return for a promise from party B. At common law party A's promise to perform X, which is a pre-existing contractual duty owed to a third party (c) is sufficient consideration for party B's promise.

5.4.4 Pre-Existing Obligations & Section 9 of Act 25

Section 9 of the Contracts Act, 1960 (Act 25) virtually abolishes the common law rule on pre-existing legal duties and provides that:

The performance of an act or the promise to perform an act may be sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not.

Thus under Ghanaian law, the performance or the promise to perform an act which one is already under a legal duty to perform constitutes sufficient consideration for another promise. Section 9 covers all three kinds of pre-existing legal obligations discussed. The phrase "legal duty" could refer to:

(i) a public duty imposed on a person under the general law, i.e. an act already enjoined by some legal duty; (ii) a pre-existing contractual duty owed by the promisor to the promise under an existing contract between them, in which case it would be an act enforceable by the contracting party"; or (iii) a pre-existing contractual duty owed to a third party under an

existing contract between the promisor and that third party, in which case it would be an act which is not directly enforceable by the other contracting party.

The subsequent sections discuss the common law rules on pre-existing public duties, pre-existing contractual duty owed to the promisor himself and pre-existing contractual duty owed to a third party and considers the impact of the statutory revisions contained in the Contracts Act, 1960 (Act 25).

Pre-Existing Legal/Public Duty

At common law the performance or a promise to perform a pre-existing duty imposed on the promisor under the general law does not constitute sufficient consideration for another promise. Thus at common law where a person is already under an existing legal duty to perform a particular act, a promise to perform, or the performance of that act will generally not amount to consideration.

In Colins v. Godefroy, the plaintiff received a subpoena to appear at a trial as witness on behalf of the defendant. The defendant promised him a sum of money for his trouble. Generally, a person who receives a subpoena is bound by law to attend court and give evidence. The court held that there was no consideration for the promise to pay since the plaintiff was under a legal duty to attend. The common law courts, however, have held that if the promisor promised or undertook to do more than what he was legally bound to do, such performance would constitute sufficient consideration for another promise.

In Glasbrook Bros. Ltd v. Glamorgan County Council:

The managers of a mining company, who feared violence from striking miners, requested protection from the Police. The mine owners asked the Police to provide a stronger guard than the Police Chief thought was necessary. The extra protection was provided and the mine owners promised to pay for it. Subsequently the mine owners refused to pay arguing that the Police were already under a pre-existing legal duty to provide the protection.

It was held that even though the Police are generally under a legal duty to provide protection, in this case the protection provided was greater than what they were legally bound to provide and, therefore, there was sufficient consideration.

Section 9 of the Ghana Contracts Act

Section 9 of the Ghana Contracts Act, 1960 (Act 25), however, changes the common law rule on pre-existing public duty as stated in Colins v. Godefroy above. It states:

The performance of an act or the promise to perform an act may be a sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not.

Thus under Ghanaian law the performance or promise to perform a pre-existing public duty constitutes sufficient consideration for the enforcement of another promise. This was affirmed in the case of Kessie v. Charmant:

The plaintiff was the Ambassador to Liberia. The defendant suggested that the plaintiff should use his official position and bring his influence to bear on the Liberian government in order to assist the defendants in their business transactions. In return, the defendants promised to give the plaintiff 5% share in the company they proposed to set up and an office of directorship in that company. The plaintiff thereafter helped the defendants in several ways and the proposed company was formed. Subsequently the defendants refused to perform their promise.

It was held that even though the plaintiff as Ambassador was already under a pre-existing legal duty to assist the defendants in their business endeavours, his act of performing this duty amounted to consideration under section 9 of the Ghana Contracts Act. However the court found that the entire contract was unenforceable on grounds of public policy. The contract was held to be unenforceable on the ground that where a public officer uses his official position to procure a business advantage for another in return for a private reward such an act is injurious to the public interest and tends to undermine the high standards expected of public officials. The contract was, therefore, unenforceable, not on grounds of lack of consideration, but on the ground that it was contrary to public policy.

Pre-Existing Contractual Duty Owed To Promisee

At common law a promise to perform or the performance of a pre-existing contractual obligation already owed to the promisee does not constitute sufficient consideration for another promise. In other words at common law where the consideration consists of the performance, or a promise to perform a contractual obligation which is already owed to the other party, such consideration does not constitute sufficient consideration for another promise. In the case of Stilk v. Myrick:

In the course of a voyage from London to the Baltic, two seamen deserted the ship. The captain, being unable to replace them, promised the rest of the crew that if they would work the vessel home, the wages of the two deserters would be divided amongst them.

The court held that the agreement was void for want of consideration. There was no consideration for the promise to pay extra because before sailing from London all the sailors had under their contract undertaken to do all they could under all emergencies of the voyage. Those who remained were bound by their original contractual obligations to assist to bring the ship safely to its destination. The sailors' consideration consisted of the performance of a pre-existing contractual obligation which under the common law is not sufficient to support another promise.

In Hartley v. Posonby, however, even though the facts were similar to those of Stilk v. Myrick, the court found that the shortage of labour on the ship was so great as to make the further continuation of the voyage exceptionally hazardous. The court therefore held in that case that the exceptional circumstances led to the frustration of the contract and discharged the remaining sailors from the original contract, leaving them free to enter into a new contract with the captain, under which they agreed to offer their services for extra remuneration.

It is important to note that even under the common law, the rule in Stilk v. Myrick has recently been modified to some extent to accommodate modification agreements if certain conditions exist. In Williams v. Roffey Bros. & Nicolls Contractors Ltd, the facts were as follows:

The defendants were a firm of building contractors. They entered into a contract for the refurbishment of a block of 27 flats. They subcontracted part of the work to the plaintiffs who were carpenters. After part of the work had been done the plaintiffs run into financial difficulties. The difficulties arose because the plaintiffs had underestimated the cost of work and partly because of faulty supervision of the workmen. The plaintiffs and defendants had a meeting at which the defendants agreed to pay the plaintiffs an additional amount of money for the completion of the work. The plaintiffs continued working but the defendants failed to pay as agreed and the plaintiffs stopped work and sued.

The court held, per Glidewell L J., that the present state of the law on this subject could be expressed in the following proposition:

(1) If A has entered into a contract with B to do work for, or to supply goods or services to B in return for payment by B, and;

(2) At some stage before A has completely performed his obligations under the contract, B has reason to doubt whether A will, or will be able to complete his side of the bargain; and

(3) B, thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and

(4) As a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit; and

(5) B 's promise is not given as a result of economic duress or fraud on the part of A;

(6) Then the benefit to B is capable of being consideration for B 's promise so that the promise given will be legally binding.

The present position at common law, therefore, appears to be that where a person who is already under an existing contractual obligation to perform a particular act, promises to perform that act or actually performs it in exchange for another promise, such promise or performance would constitute sufficient consideration provided the promise is made without any duress or fraud on the part of the promisor and the performance of the obligation, or the promise thereof would confer a benefit on the promisor or obviate or avoid a disbenefit.

Section 9 of the Ghana Contracts Act, 1960 (Act 25) changes entirely the common law rule on pre-existing contractual duty owed to the promisor as stated in Stilk v. Myrick. Section 9 of Act 25 states:

The performance of an act or the promise to perform an act may be a sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not."

Thus under Ghanaian law, the performance or the promise to perform an act which one is already under a legal duty to perform constitutes sufficient consideration for another promise.

Pre-Existing Contractual Obligation Owed To A Third Party

At common law the performance of a contractual duty owed to a third party constitutes sufficient consideration for another promise.

In Shadwell v. Shadwell, a nephew was already engaged to marry a girl i.e, he was contractually bound to do so. The uncle promised to pay the nephew £150 yearly if he would go ahead and marry her. The court held that there was an enforceable contract. Since the contractual duty was owed, not to the promisor himself, but to a third party, the performance or promise to perform the duty would confer some benefit on the promisor, since he (the promisor) is not in a position to enforce that duty personally.

The rule is the same under section 9 of the Contracts Act, 1960 (Act 25) which states:

The performance of an act or the promise to perform an act may be a sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not. (Emphasis mine)

Thus even though the provision in section 9 of the Contracts Act changes the common law rules in Stilk v. Myrick and Colins v. Godefroy on pre-existing duties, the provision confirms the common law rule that the performance of a pre-existing duty owed to a third party constitutes sufficient consideration for another promise. The performance of a pre-existing contractual obligation owed to a third party, therefore, constitutes sufficient consideration both at common law and under the Contracts Act.

5.5 OVERALL IMPACT OF SECTION 9 OF CONTRACTS ACT- ISSUES ARISING

As noted, section 9 of the Contracts Act introduces the rule that the performance of an act or the promise to perform an act constitutes sufficient consideration even if the performing or promising party is already under a legal duty or contractual obligation to perform that act. The performance of a pre-existing contractual obligation in exchange for a new promise typically arises in modification contracts, where the parties seek to modify the original terms of their contract by one party promising to do more usually in exchange for the performance of an existing contractual obligation owed by the other party. Section 9 takes an innovative approach in regulating modification contracts by stipulating that the performance of the pre-existing contractual obligation constitutes sufficient consideration for the new promise, thus abolishing the rigid requirement for fresh consideration for the validation of such contracts.

The abolition of the requirement of fresh consideration for the validity of modification contracts raises the spectre of promises being extorted by threats to breach existing contracts and the risk of legitimizing such conduct. On the face of it, if A procures from B by some form of threat or coercion, a promise to pay extra remuneration to A in return for A's

performance of his existing contractual duties towards B, such a contract would not be unenforceable for lack of consideration according to section 9 of the Contracts Act. Would such a contract be enforceable at all? Probably not, even though the grounds for the unenforceability would not be the lack of consideration, but rather the vitiating factor, undue influence or duress.

The Memorandum to the Contracts Act, 1960 (Act 25) in illustration (n) states:

Section 9 clarifies a doubtful corner in the law of consideration by making it clear that the mere fact that a person is already legally bound to do what he now promises (or performs) does not prevent his promise (or performance) from being good consideration. It does not affect the possibility that such a promise may be void on some other ground, e.g. because it is contrary to public policy. [Emphasis mine].

The Memorandum provides the following illustration:

A calls a policeman to help him beat off an attack which he expects from some gangsters. The policeman says he will only help A if A agrees to pay him 0100,000. A agrees. The contract is not invalid because there is no consideration, but it may be invalid as contrary to public policy or voidable on the ground of undue influence.

With regard to contracts involving the performance of pre-existing public duties imposed by law by reason of the performing party's status or employment, the application of the rule in section 9 of the Contracts Act could also highlight the risk of public servants demanding remuneration for the performance of their legal duties. Again, on the face of it, if a public servant demands remuneration for his performance of a pre-existing duty imposed on him by reason of his employment, such performance would qualify as consideration "notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not."

Such a contract, however, would not be enforceable at all in view of the fact that such a contract is likely to be contrary to public policy as one which tends to promote corruption in public life. Even though the performance of the pre-existing public duty would constitute sufficient consideration under section 9 of the Contracts Act, if the purpose of the entire contract is found to be contrary to public policy the contract would not be enforceable, not for lack of consideration but on grounds of public policy.

The judgment of Annan J.A. in Kessie v. Charmant is instructive:

I turn then to consider the last leg of the case as to consideration, namely, whether it is shown to be sufficient. The common law rule is that although consideration need not be adequate it has to be shown to be sufficient and merely to repeat an existing obligation is not generally considered sufficient. Such a case at common law is the situation where the plaintiff is already under a public duty imposed by law to perform the act which is relied on as consideration.

'It may readily be appreciated that a person, who by his official status or through the operation of the law is under a public duty to act in a certain way, is not regarded as furnishing consideration merely by promising to discharge that duty: see, Cheshire and Fifoot, Law of Contract (6th ed.), p. 76. This proposition of the common law, however, is one of those which the Contracts Act, 1960, has done away with. The present position is therefore as set out in section 9 of the Act. No issue therefore arises in this case as to sufficiency of consideration. I conclude that no difficulty arises in this case in respect of any aspect of the law as to consideration.

The defendants' case in this area is that the plaintiff's admitted status as his country's diplomatic representative in Monrovia in 1960 debarred him from demanding or accepting any financial or other remuneration or reward for services rendered by him to a Ghanaian registered company in that capacity. Any contract for reward for such services rendered is therefore illegal as being contrary to public policy and therefore void ab initio.

Is the plaintiff's contract then illegal? In my view that contract was entered into upon an unlawful consideration. The plaintiff was required to use his official position to render services to the defendants by bringing his official influence to bear on a foreign government, to whose country he was accredited as an ambassador, for the betterment of the defendants' business transactions and with a view, to the plaintiff's own financial advantage. In sum, the purpose of the contract was that the plaintiff was to procure an advantage for the defendants in his official capacity and for a private reward. That in my judgment is clearly an unlawful purpose and contrary to public policy.

Such an act is injurious to the public interest and tends to undermine the high standards which one is entitled to expect of public officials in a responsible position of authority or influence. In my judgment, the plaintiff's contract, as well as the offer of a gift of five per cent shares are illegal transactions and therefore void.

On the impact of section 9, it has been noted that:

Section 9 of the Contracts Act takes the bolder step of dispensing with the requirement of consideration altogether in the modification of contracts, thus ensuring contractual flexibility in the enforceability of renegotiated contracts. The provision also paves the way for the Courts to deal with the issues raised by renegotiated contracts solely on policy grounds without any entanglement with the rules of consideration. The effect of the provision in section 9 therefore is to shift the problem of enforceability of modification contract to the domain of the law on public policy and the doctrine of duress. This poses to our courts the task of achieving a balance between ensuring contractual flexibility on one hand, and restraining the extortion or coercion of modification contracts on the other.

This balance can be effectively achieved by the development of clear principles for the determination of the presence or absence of economic duress, and to this end, the definition of duress at Common Law and the principles of public policy may have to be redefined to cover all forms of coercive conduct and the misuse or exploitation of stronger bargaining power in the negotiation of modification contracts.

Commenting on the impact of section 9 of the Contracts Act, 1960 (Act 25) on modification contracts, Date-Ban states that the statutory rule adopts a more efficient approach to the problem of extortion of promises by contracting parties by threats of breach of contract. In his view section 9 addresses the issue directly as one of economic duress, rather than seeking to achieve the same outcome through the flat mechanical application of the doctrine of consideration. The following excerpt of his article is informative.

S. K. Date-Bah, "The Doctrine of Consideration and the Modification of Contracts" (1973) 5 R.G.L. 10

The intended consequence of the doctrine of consideration in the area of the modification of existing contractual relationships is to prevent economic blackmail and duress. It is bad social policy to enable promisors to break or threaten to break contracts in order to secure acts or promises additional to those which the other contracting party is under an obligation to perform. But, it is questionable whether consideration is the doctrine best suited for achieving this social policy objective of preventing economic duress and blackmail.

If one views the doctrine of consideration in the light of the classical benefit-detriment dichotomy, one sees that the doctrine is peculiarly fashioned to operate where the parties are reaching a fresh agreement, but is pre-eminently unsuited for application to the modification stage of agreements. In the usual executory contract, the parties are both benefit-promisors and detriment-promisees, thus exemplifying the common law idea of a contract as a "bargain."

But at the modification level, the plaintiff-promisee may often be the person receiving the benefit. The benefit-detriment notion is, therefore, inapplicable. There are here benefit-promisees and detriment-promisors, instead of the other way round. In other words, if one applies the bargain theory of consideration, one is bound to be hard put in finding consideration for modificatory agreements, because these are not meant to be "bargains". Rather, they usually involve one party making concessions in order to facilitate performance, where difficulties have been encountered by the original promisor, or where any other circumstances have required concessions being made in order to enable the smooth performance of already existing contractual obligations. It is therefore unrealistic to demand that such modification agreements should satisfy the tests of the bargain theory of consideration.

To insist on the necessity for consideration, when contracts are modified, is merely to deny enforceability to an important category of promises, namely, those that enable businessmen to make a "re-adjustment of a going business deal." The law must give businessmen some flexibility in this area, in the interest of smooth business dealing. Parties who have entered into a business transaction should have the freedom to re-adjust their mutual rights and obligations, in the light of their experience in the actual course of the performance of the contract. To deny the enforceability of promises made by businessmen in an endeavour to modify their rights and duties is to frustrate their justifiable expectations and their legitimate attempt at ordering their affairs in the way they consider is best in their own interest. To

frustrate these expectations thus, by the flat mechanical application of the doctrine of consideration to modification agreements, is most undesirable.

5.6 SECTION 10 OF ACT 25 - CONSIDERATION NEED NOT MOVE FROM PROMISEE

The general rule at common law is that consideration must move from the promisee. This means that a person in whose favour a promise is made can only enforce such promise if he provided the consideration for it himself or herself. It follows that a promisee cannot sue on a promise if the consideration for that promise was provided by a third party.

In Tweddle v. Atkinson:

H and W got married. After the marriage a contract was entered into between X and Y, who were the fathers of H and W. The contract provided that each should pay a sum of money to H and that H should have the power to sue for such sums. After the death of X and Y, H sued the executors of Y for the money promised him.

The court held that the action must fail because H was not a party to the contract and no consideration moved from him. Thus the promise, as far as H was concerned was a gratuitous one.

The common law rule that a person cannot sue on a contract if he did not provide the consideration himself applies even if the contract was clearly made for that person's benefit. There appears to be little justification for the rule where the parties clearly intended that a third party should benefit from their contract.

The common law rule that consideration must move from the promisee has been abolished by section 10 of the Ghana Contracts Act which states:

No promise shall be invalid as a contract by reason only that the consideration for it is supplied by someone other than the promisee.

Thus according to the Contracts Act, consideration need not move from the promisee and a person in whose favour a promise is made may enforce the promise even if the consideration for the promise was provided by some other party.

5.7 THE DOCTRINE OF PROMISSORY ESTOPPEL

Sometimes the parties to an existing contract may 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 any fresh consideration by the promisor for this promise. The promisor's promise varies or suspends his strict contractual rights under the existing contract. An example is where a landlord agrees to charge a tenant only half of the

agreed rent for six months upon the bereavement of the tenant. Such arrangements or agreements involve the modification of an existing contract which is invariably already supported by consideration. Agreements of this nature have been described as modification contracts or variation agreements and in such agreements it has been noted that the argument for the presence of consideration is not as strong as it is in the case of formation of contracts. Agreements involving the suspension of the contractual rights of one party are of practical importance in commercial practice as well as common contractual relations.

Such agreements often become necessary in the case of misfortunes, temporary recessions, and other obstacles in economic activity such as strike actions, outbreak of hostilities etc., which could disrupt the continued performance of contracts and necessitate the variation of the terms of an existing contract. The question which arises is whether such modification or variation agreements are enforceable in the absence of fresh consideration from the promisee.

At common law a promise to waive or suspend one's contractual rights under an existing contract would normally not be binding on the promisor unless there was some additional consideration provided by the promisee. The promise would be treated as gratuitous and unenforceable on the same principle which underlies the rule on waivers or part payment of debts. In equity, however, a principle was developed to deal with such modification agreements involving promises by a contractual party to suspend his strict legal rights under a contract for a period of time. This equitable principle is referred to as the doctrine of promissory estoppels. The doctrine, which was first applied as far back as in 1877, was initially developed to deal with such variation agreements in the case of leases.

One of the earliest cases in which the principle was applied is the case of Hughes v. Metropolitan Railway Company, the facts of which were as follows:

In October 1874 a landlord gave his tenant 6 months' notice to repair the premises. He stated that if the tenant failed to comply the lease would be forfeited. The following month the tenant suggested that they enter into negotiations for the sale of the leasehold to the landlord and during that period no repairs were done with the landlord's concurrence. In December the negotiations were broken off. Meanwhile the tenant had done nothing to repair the premises. On the expiry of the 6 months from the date of the original notice, i.e. October, the landlord claimed to treat the lease as forfeited and brought an action for ejectment.

It was held by the House of Lords that the opening of the negotiations amounted to an implied promise by the landlord that, as long as the negotiations continued he would not enforce the notice and it was in reliance on this promise that the tenant did nothing to repair the house during the period that the negotiations were being carried out. As held by the court, the 6 months allowed for repairs were therefore to run, not from October, when the notice was originally given, but from December, when the negotiations broke off. Lord Cairns stated:

It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of

leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

The court found that since the landlord had by his conduct represented to the tenant that his strict rights under the contract would not be enforced during the pendency of the negotiations, and the tenant had relied on this representation and refrained from making the repairs during that period, it would not be equitable to allow the landlord to now enforce his strict contractual rights retrospectively. Thus the landlord could only enforce his strict contractual rights after the period of negotiations had expired.

The principle was further applied in a number of cases involving leases and was ultimately confirmed in the renowned case of Central London Property Trust v. High Trees House Ltd (The High Trees Case). The facts of the case were as follows:

In September 1937, the plaintiffs leased a block of flats to the defendants for a period of 99 years at a rent of £2,500 per annum. In January 1940, plaintiffs agreed in writing to reduce the rent to £1,250 because of the war conditions which had caused many vacancies in the flats. No express time limit was set for the operation of this reduction. From 1940 to 1945 the defendants paid the reduced rent. In 1945 when the war had ended the flats were fully occupied again and the plaintiff company claimed from the defendants the full rent since the beginning of 1945 and for the future. The plaintiffs tested their claim by suing for rent at the original rate for the last two quarters of 1945.

The court held that the plaintiffs were entitled to the rent at the original rate from the last two quarters in 1945 and thereafter. He stated (obiter) that if the plaintiffs had sought to recover the balance of the rent for the period of the war i.e. between 1940 and 1944, they would not have been able to do so because they would have been estopped by the promise they had made to suspend their full legal rights during the period of the war.

Lord Denning stated:

But what is the position in view of development in the law in recent years? The law has not been standing still since Jordan v. Money. There has been a series of decisions over the last fifty years which although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on. In such cases, the courts have said that the promise must be honoured.

Thus the doctrine of promissory estoppel begun to emerge to estop or disentitle a promisor from insisting on his strict legal rights under a contract after he has promised to suspend those rights even in the absence of consideration as long as certain conditions existed.

5.7.1 Scope of the Doctrine

The principle of promissory estoppel was fully stated thus by Lord Denning in Combe v. Combe

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word .

In sum, the principle is to the effect that if one party to a contract, by his words or conduct, leads the other party to believe that his strict rights arising under the contract will not be insisted upon, intending that the other party should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on his strict legal rights where it would be inequitable for him to do so, even though the first party, upon giving reasonable notice, may resume his full legal rights under the contract.

Since the decision in the High Trees Case many cases have sought to identify the limits and scope of the doctrine of promissory estoppel. The case law shows that the following requirements must exist before the doctrine of promissory estoppel will apply.

Existing Contractual Relationship between the Parties

First of all, the doctrine applies where there is an existing contractual relationship between the two parties and the contract is usually one which gives rise to continuing or recurrent obligations. The very definition of the doctrine presumes the existence of a contract between the parties which is only varied by the promise of one party not to insist on his strict legal rights arising from that existing contract.

In the High Trees Case the contract was one which gave rise to the recurrent obligation to pay rent and the promisor (landlord) promised to suspend his strict legal rights to receive full rents under the contract for a specified period. In Adjayi v. R.T. Briscoe (Nigeria) Ltd. the contract involved the recurrent obligation of the payment of instalments under a hire-purchase agreement and the promisor was alleged to have promised to suspend his strict legal rights to receive the instalment payments for a period of time. In Tool Metal Manufacturing Company v. Tungsten Electric Company, the contract involved the recurrent obligation to pay royalties and compensation under a licence for the use of a patent.

Clear Unequivocal Promise

Secondly, there must be a clear and unequivocal promise or representation, intended to affect the legal relations of the parties, to the effect that the promisor would not insist on his strict legal rights arising out of the contract. Such representation or promise may be express or

implied from the promisor's conduct as was done in the case of Hughes v. Metropolitan Railway Company, where the promise was implied from the landlord's conduct in commencing the negotiations with the tenant.

In the case of IBM World Trade Corporation v. Hasnem Enterprise Ltd, the Supreme Court noted that in England and Ghana, promissory estoppel can only be used indirectly as a cause of action where the plaintiff has an independent cause of action or as a direct cause of action in the limited situations or proprietary estoppels. The court noted further that it is clear from the authorities that a party relying on the principle of promissory estoppel, must make out a clear case that such a promise was made, intended to be binding, intended to induce him to act on it and that he in fact acted upon it. Such an alleged promise or representation forms a vital part of the cause of action and must be proved. It is not a matter of conjecture and speculation. Where it is to be inferred, the facts must justify the inference.

Reliance

The promisee must show that he conducted himself or his affairs in reliance on the representation or promise of the promisor. This requires that the promisee must have altered his position in reliance on the promise i.e. he must have been led to act differently from what he would otherwise have done. This can be established by showing that the promisee, in reliance on the promise, did something he would not have done, or refrained from taking steps he would otherwise have taken, as was the case in Hughes v. Metropolitan Railway Company.

In WJ. Alan & Co. Ltd. v. El Nasr Export and Import Co., Lord Denning explained:

I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement, that the other must have been led to "alter his position". But that only means that he must have been led to act differently from what he otherwise would have done. And if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have acted on the belief induced by the other party.

Effect of Principle Generally Suspensory

One important qualification of the doctrine of promissory estoppel is that it generally operates only to suspend and not to wholly extinguish the promisee's existing obligations or the promisor's legal rights. In accordance with this fundamental principle it has been held that the promisor may, upon giving reasonable notice, resume the rights which he has suspended and revert to the original terms of the contract. Such notice need not be formal but must give the promisee a reasonable opportunity of resuming his original position.

In Tool Metal Manufacturing Co. Limited v. Tungsten Electric Company:

In 1938, Tool Metal Manufacturing Co. entered into a formal agreement with Tungsten Electrical Company under which Tool Metal licensed Tungsten to deal in certain metals, for which Tool Metal owned the patents, in consideration of Tungsten paying a royalty of 10%

up to a certain amount and, thereafter, 30% compensation. The agreement was to last until 1947, and was terminable by six months notice in writing on either side. After the outbreak of the war in 1939, the payment of compensation was suspended but royalties were paid until March 1942. In 1942, Tool Metal agreed to waive their right to the 30% compensation and to accept a flat rate of 10%. No compensation was claimed during the war. In September 1944, Tool Metal submitted to Tungsten Electric the draft of a proposed new agreement which contained a provision for the revival of compensation and which was rejected by Tungsten Electric. In 1945, Tungsten Electric brought an action against Tool Metal for breach of contract in the 1938 agreement and alleged in their claim for damages that it had been agreed that no compensation should be payable after December 31, 1939. Tool Metal denied the alleged agreement and counterclaimed for damages to cover royalties and compensations not paid since 1942. Tool Metal claimed the waived 20% in respect of material which had been used since June 1, 1945.

The court held that the temporary arrangement to suspend the payment of compensation was binding in equity on Tool Metal until terminated by proper notice and the presentation of the draft new agreement in 1944 did not constitute such notice. In 1950, Tool Metal commenced an action claiming compensation as from January 1, 1947, treating their delivery of the counterclaim in the first action as sufficient notice to terminate the agreement to suspend payment of compensation. The House of Lords held that the counterclaim constituted sufficient notice that Tool Metal intended to resume their original rights under the contract. Tool Metal was, therefore, entitled to full payment after giving reasonable notice of their intention to resume their strict legal rights under the contract. In Adjayi v. R.T. Briscoe:

The defendant had contracted with the plaintiffs for the hire purchase of eleven lorries. The plaintiff sued to recover instalments due under the contract and obtained judgement. The defendant appealed to the Supreme Court of Nigeria and pleaded promissory estoppel, alleging that the plaintiffs had voluntarily promised to suspend the payments of the instalments until certain conditions were fulfilled and that plaintiffs had acted contrary to that promise.

The Privy Council dismissed the appeal. Lord Hodson, delivering the judgment of their Lordships, slated:

The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights, an equity will be raised in favour of the other party. This equity, however, subject to the qualifications; (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position.

Where subsequent events make it impossible for the promisee to resume his original position the rights of the promisor would be deemed to be extinguished altogether. Thus the doctrine will operate to extinguish the rights of the promisor if in reliance on the promisor's promise

the promisee had already assumed new commitments in relation to the subject matter which it would be inequitable for him to reject; or if the promise was intended to permanently extinguish and not merely suspend his rights under the contract.

Circumstances Must Be Inequitable

Another important qualification is that the principle will apply only if it would be inequitable for the promisor to go back on his promise and insist on his strict legal rights under the contract. This point is well-illustrated in the case of D & C Builders v. Rees:

The defendant owed plaintiffs, a small firm of builders £482 in respect of work done for the defendants. The defendants delayed payment for several months and finally offered £300 to the plaintiffs, stating that if the plaintiffs did not accept it as a full discharge of the entire debt they would get nothing. Plaintiffs were in desperate financial straits. The plaintffs accepted the £300 in full settlement of the debt of £482 and subsequently sued the defendants for the balance.

The court held that the doctrine of promissory estoppel could not be applied here because on these facts it would not be inequitable to allow the creditor to now insist on his strict legal rights. The settlement or the promise to forgo the rest of the debt was not truly voluntary since the defendant had improperly taken advantage of the plaintiff's financial position. Defendant was, therefore, liable to pay the balance. Lord Denning explained:

In applying this principle, however, we must note the qualification: the creditor is only barred from his legal rights when it would be inequitable for him to insist upon them. Where there has been a true accord, under which the creditor voluntarily agrees to accept a lesser sum in satisfaction, and the debtor acts upon that accord by paying the lesser sum and the creditor accepts it, then it is inequitable for the creditor afterwards to insist on the balance. But he is not bound unless there has been truly an accord between them. In the present case, on the facts as found by the judge, it seems to me that there was no true accord.

Doctrine Does Not Create Entirely New Rights where None Existed Before

Another important qualification that has been made is the fact that the doctrine operates only to prevent the enforcement of the strict legal rights of the other party, but it does not create entirely new rights where none existed before.101 The principle applies where there is an existing contract, the terms of which one party promises to suspend and the party who has relied on this promise can rely on the doctrine as a defence if the other party tries to enforce his contractual rights retrospectively. The principle therefore only operates to prevent a party from insisting on his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. It does not create new contractual rights in the absence of consideration based only on the fact that one party has made a promise which the other has relied on. In Combe v. Combe:

A wife started proceedings for divorce and obtained a decree nisi against her husband. The husband then promised to give her £100 per annum as maintenance. The wife did not apply to the Divorce Court for maintenance but this forbearance was not at the husband's request. The decree was made absolute and the husband failed to make the payments. The wife sued the husband on the promise.

At first instance judgment was given for the wife even though there was no consideration provided for the promise. The trial judge relied on and purported to apply the doctrine of promissory estoppel, holding that since the husband had made a promise, intended to be binding, which had in fact been relied upon by the wife, there was an enforceable contract even though the wife provided no consideration. On appeal it was held (per Lord Denning) that the doctrine does not apply in these circumstances since it cannot operate to create a cause of action where none existed before. It could only be relied upon as a defence and the husband's promise was unenforceable for lack of consideration.

The court held that the principle in the High Trees Case, does not create a new cause of action where none existed before, stating further that the principle of promissory estoppel could be used as a shield and not as a sword. Lord Denning stated:

Much as I am inclined to favour the principle of the High Trees Case, it is important that it should not be stretched too far lest it should be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties. Seeing that the principle can never stand alone as giving a cause of action in itself, it can never do away with the necessity of consideration when it is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.

The Ghanaian courts, at least in the case of Tsede v. Nubuasa, have shown a willingness to go a step further than Lord Denning was prepared to go in Combe v. Combe in widening the scope of enforceability of promises where necessary. The decision in this case gave much value to the plaintiff's reliance on the defendant's promise, deeming it sufficient consideration to make the promise enforceable.

In Tsede v.Nubuasa

One C.N., a relative of the defendants, incurred a debt of £1,340 1s 5d. in the course of his employment by the plaintiffs. On his being asked to pay the money, he took the plaintiffs to the defendants. The defendants promised to pay the debt on behalf of their relative C.N. within one week. They caused a note, exhibit B, to be prepared in favour of the plaintiffs to that effect. They were able to pay only £G 50. The plaintiff took action against them for the balance. It was contended on their behalf that there was no consideration for their promise to pay the debt and therefore the contract was not enforceable.

It was held that even though on the face of exhibit B there was no consideration for the promise to pay, consideration need not always be express; it could be implied from the circumstances of a particular case. The court held further that 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. Such an agreement to forbear could be implied from the facts of the case and the plaintiffs were, therefore, entitled to succeed.

The following excerpt from an article by Date-Bah S.K. comments on the impact of the decision in Tsede v. Nubusa on the law of consideration in Ghana.

Date-Bah S. K. [1969] Tsede v. Nubuasa: A Welcome Inroad into the Doctrine of Consideration Vol. VI No. 1 UGLJ 60-63

The chief defect of the doctrine of consideration in its traditional form is that it has sometimes frustrated the reasonable expectations of parties to agreements. This is because the doctrine's purpose has been to ensure that only bargains should be enforceable by law. But parties whose agreement may not constitute a bargain may, nonetheless, be reasonably induced into believing that a promise given them is meant to be a binding obligation. A party may, therefore, proceed to rely on such a promise. The subsequent refusal by a court to enforce the other party's deliberate promise, because it was not supported by consideration, can cause injustice. In Ghana, we have reformed the doctrine of consideration in some of its more undesirable aspects. But there is still a need for a wider category of promises.

The justification for a wider category of enforceable promises is not merely a moral one, namely, that a man's word should be his bond. There is also an economic justification for not permitting people to resile from serious promises deliberately given. As Dean Roscoe Pound has said, "Wealth, in a commercial age, is made up largely of promises." In an economic system where credit is of vital significance, it is important that the law should give as wide a protection as possible to serious promises, especially those in a business setting. The law must lend its weight to the enforcement of commercial morality and business probity in order to sustain the confidence of the business community in the security of the commercial transactions into which its members enter. Such confidence is necessary in this community, if Ghana is to be able to keep up the process of commercial expansion and investment which is of vital importance for its general process of economic development.

It is for these reasons that the decision of Prempeh J. in Tsede and Others v. Nubuasa and Another is to be welcomed. It is submitted that this decision brings the Ghanaian law near to making the principle of promissory estoppel a sword, and not a mere shield. In the United States of America, the principle of promissory estoppel based on a promisee's reasonable reliance to his detriment on a deliberate promise given him has become recognised as a basis of liability. It is believed that Prempeh J.'s judgment in the instant case has, perhaps unwittingly, brought the Ghanaian law near to the adoption of such a basis of promissory liability.

An overview of the case law and the statutory reforms on the law on consideration in Ghana would seem to suggest that the doctrine of promissory estoppel would hardly be resorted to as

a means of ensuring enforceability of deliberate promises. The doctrine is particularly relevant with regard to modification contracts, which in Ghana, are already binding as per section 9 of the Contracts Act. As already shown, the effect of sections 8(2) and section 9 of the Ghana Contracts Act, 1960 (Act 25) is to give effect to modification agreements without the constraints of the strict requirement of proof of consideration.

Thus in Ghana, since the issue of enforceability of modification agreements has been comprehensively addressed by statute, the doctrine of promissory estoppel would seem to be of little significance. Indeed it has been noted that the Ghanaian statutory reforms on the enforceability of modification agreements provide contractual parties with much greater security than is available under the doctrine of promissory estoppel and the statutory rules also tend to be more flexible and certain in their application.

Chapter Six

TERMS OF CONTRACT

6.0 INTRODUCTION

The terms of a contract define the scope and extent of the obligations undertaken by the parties to the contract. Thus after a contract has been made, it is necessary to examine the contents of the contract to determine what the terms of the contract are. Generally, a contract may be wholly oral, wholly in writing or partly oral and partly in writing. In exceptional circumstances, a statute may demand that a particular kind of contract must be in writing to be enforceable.

In the course of negotiations leading to the formation of a contract, the parties involved may make a number of statements. These statements may or may not form part of the contract. If a statement forms an integral part of a contract it is said to be a term of the contract such that when it is breached, the innocent party is entitled to sue for damages for breach of contract. A statement made in the negotiations leading up to the making of a contract which does not qualify as a contractual term is said to be a mere representation.

A mere representation is one which induces the other party to enter into the contract, but does not form part of the contract itself. It is important to distinguish the terms of a contract from mere representations, because the consequences are different. Even though a misrepresentation gives rise to certain legal consequences, it does not amount to a breach of the contract since it does not form part of the contract itself. The terms of a contract, therefore, are the statements, promises or propositions, which form part of the contract and which define the respective rights and obligations assumed by the parties under the contract.

1 See section 11 of the Contracts Act, 1960 (Act 25) which states: Subject to the provisions of any enactment, and to the provisions of this Act, no contract whether made before or after the commencement of this Act, shall be void or unenforceable by reason only that it is not in writing or that there is no memorandum or note thereof in writing.

2 For example,the Conveyancing Decree, 1973(N.R.C.D. 175) requires that a transfer of an interest in land shall be by a writing signed by the person making the transfer or by his agent duly authorised in writing in order to be valid. The Hire Purchase Decree, 1974 (N.R.C.D. 192) also requires that all hire purchase agreements and conditional sale agreement must be in writing in order to be valid and enforceable. Other contracts that are required by statute to be in writing include: (i) mortgages (section 3(1) of the Mortgages Decree, 1972 (NRCD 96); (ii) moneylending contracts (section 12 of the Moneylenders' Ordinance, 1941, Cap 176 (1951) Rev.); (iii) bills of exchange (section 1 of the Bills of Exchange Act, 1961(Act 55)); (iv) Contracts of guarantee (section 14 of the Contracts Act, 1960 (Act 25)).

Even after the courts have determined what the terms of the contract are, that does not necessarily conclude the matter. Even though all the terms of a contract have to be performed, they do not all have equal significance. Some terms are of more significance than others, especially when it comes to the consequences of their breach. Some terms are

considered to be of major significance to the contract such that when they are breached by one party, the innocent party is entitled to terminate the contract altogether. Other terms are said to be of such minor significance that when they are breached by one party, the other party only has a right to sue for damages, but cannot terminate the contract altogether. Thus, after ascertaining the terms of the contract, there is the need to consider their relative importance, and in this regard, the law classifies the terms of a contract into *conditions, warranties and innominate terms.*

Further, it must be noted that the actual words used by the parties, even when these are stated in a written contract, do not always represent the full extent of the agreement. In certain limited circumstances, in addition to the express terms of the contracts, the courts may recognize the need to import or imply into the contract certain terms. Terms may be implied in a contract to give the contract "business efficacy" or may be implied by statute or by custom.

This chapter, therefore, covers a discussion of (i) the process of ascertainment of the terms of a contract; (ii) the classification of the terms of the contract and (iii) implied terms and the grounds for their implication into a contract. Finally, the chapter considers the special and difficult problems presented when a contract contains exclusion or exemption clauses, which are contractual provisions or terms, which seek to limit or exclude the liability of one of the parties in specific situations.

6.1 ASCERTAINING THE TERMS OF THE CONTRACT

On the issue of ascertainment of the terms of a contract, it is convenient to begin by looking at the matter from the standpoint of oral and written contracts. If the contract was made orally, it is likely that the terms will be found in the statements made by the parties during the negotiations leading to the contract. The offer and acceptance in a contract for the sale of a car may simply comprise of: "I offer you 010 million for the car"; and "I accept". However, prior to this there may have been various assurances from the seller, such as: "The car is a 2000 model; It has done only 50,000 kilometres; the seller has owned it since it was new; it has never been involved in an accident;" or "no mechanical defects have been noticed on the car." If any of these statements turn out not to be true, would the buyer be entitled to repudiate the contract and/or sue for damages for breach of contract? Generally, a party can only sue for damages for breach of contract if the statement in question constitutes a term of the contract. If the statement is a mere representation and it turns out to be false, the party misled by it may be entitled to certain remedies depending on whether the breach is innocent, negligent or fraudulent, but the innocent party cannot sue for breach of contract because the statement is not a term of the contract.

6.1.1 Tests for Ascertaining the Terms of an Oral Contract

It is generally said by the courts that whether a statement is a term of the contract or a mere representation depends on whether the parties intended it to be a contractual term or not. The test is therefore one of contractual intention and therefore is an objective one. The intention of the parties can only be deduced from the totality of the evidence. Thus 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 be a term of the contract or not.

In making the determination, the level of importance attached to the statement in question is of significance. This is illustrated in the case of Bannerman v White the facts of which were as follows:

In the course of negotiating the purchase of hops, the buyer asked the seller if any sulphur had been used in their treatment, adding that, if it had he would not even bother to ask the price. The seller answered that no sulphur had been used. The parties continued with the negotiations which eventually resulted in a contract of sale. It was later discovered that sulphur had been used in the cultivation of a portion of the hops and the buyer, when sued for the price claimed that he was justified in refusing to observe the contract.

The court had to determine whether the statement or assertion that sulphur had not been used in the treatment of the hops was intended to be part of the contract since the jury found no fraud on the part of the seller. The jury in this case found that the buyer had made abundantly clear the importance he attached to the seller's answer and the seller was aware that the intention was that the statement should be a part of the contract. Thus the statement by the seller that sulphur had not been used was a term of the contract and the breach of it entitled the buyer to reject the good.

This factor is, however, subject to the limitation that if it was made clear that the statement, however significant, should be independently verified by the party to whom it is made, such statement will not be considered as a term of the contract.

Where the party to whom the statement was made was given an opportunity to make an independent investigation or to verify the statement that would be clear evidence that the party making the statement was not warranting its accuracy and this may lead to an inference that the statement was not intended to be a term of the contract. In Ecay v. Godfrey, a seller of a boat stated that it was sound, but advised the buyer to have it surveyed. It was held that the statement was not a term of the contract. Here it was clear from the evidence that the maker of the statement did not intend to undertake contractual liability for its accuracy since he advised the other party to take steps to verify his statement.

Three broad tests are generally used by the courts as guiding posts to the determination of whether or not a particular statement was intended as a term of the contract. Other determining factors, which are considered by the courts in ascertaining the terms of a contract include the following: (i) relative means of knowledge of the parties; (ii) lapse of time between the making of the statement and the time of contracting; and (iii) whether or not the terms were reduced into writing.

Relative Means of Knowledge of Parties

Where the party who made the statement had special knowledge, skill or experience regarding the matter in question, as compared to the other party, the courts are more willing to infer an intention that the statement should constitute a term of the contract. In these

circumstances, the maker of the statement, by reason of his superior knowledge or skill, can reasonably be presumed to have undertaken contractual responsibility for the accuracy of the statement. Where however, both parties have the same means of knowledge about the matter and they are aware of this, it is improbable that a statement made by one of them will qualify as a term of the contract.13 In such a case, the inference is that one party would not be relying on the other, but rather on his own means of knowledge in entering into the contract. In Oscar Chess v. Williams:

The plaintiffs were car dealers. The defendant wished to obtain from them on hire purchase a new Hillman Minx car and to offer to them his second hand Morris car in part exchange. The amount that the defendant would pay depended on the age of the Morris car. The defendants informed the plaintiffs that the Morris car was a 1948 model. In stating so, the defendant relied on the date stated in the car's registration book. The plaintiff accepted this as the year of manufacture of the car and based on this, valued it at £290. The parties then orally agreed that the plaintiffs would arrange for the hire purchase of the new Hillman car, and take the Morris, valued at £290. The agreement was carried out and eight months later, the plaintiffs found that the date of the Morris was not 1948, but 1939, making the car worth only £ 175 and not £290 as assumed. It turned out that the date stated in the registration book had been altered by a previous holder before it reached the defendant. The registration book showed that there had been five changes of ownership of the car between 1948 and 1964.

The issue was whether the statement made by the defendant about the year of manufacture of the car constituted a term of the contract. It was held (on appeal) that the statement did not amount to a term of the contract. In reaching this conclusion, Denning L J., relying on the means of knowledge of the parties, stated:

What is the proper inference from the known facts? It must have been obvious to both that the seller had himself no personal knowledge of the year when the car was made. He only became owner after a great number of changes. He must have been relying on the registration book. It is unlikely that such a person would warrant the year of manufacture. The most he would do would be to state his belief, and then produce the registration book in verification of it. In these circumstances the intelligent bystander would, I suggest, say that the seller did not intend to bind himself so as to warrant that it was a 1948 model.

This case may be contrasted with that of Dick Bentley Production Ltd v. Harold Smith Ltd, where the plaintiff, Bentley, asked Smith, a car dealer, to find him a "well vetted" Bentley car. Smith found a car, which he told Bentley, had done only 20,000 miles since it was fitted with a replacement engine and gear box. This statement was untrue and when the car proved to be unsatisfactory, Bentley sued for damages. The Court of Appeal held that the defendants' statement was a term of the contract and that the plaintiffs were entitled to damages. The court referred to the decision in Oscar Chess and stated that in the present case it was very different. As Lord Denning M.R. put it: "Here we have a dealer, Smith, who was in a position to know, or at least to find out, the history of the car. He could get it by writing to the makers. He did not do so... He ought to have known better."

Even where a party expresses an opinion on a matter, the fact of his superior knowledge or means of knowledge may result in an inference that he was warranting that he had reasonable grounds for the opinion he expressed. In other words, the courts will construe it as a term that the opinion was sound and reliable and was made with reasonable skill and care.

In Esso Petroleum v. Mardon:

An experienced representative of Esso Petroleum Company told Mardon, who was thinking of operating a petrol station, that the company estimated that the throughput of petrol on the site would reach 200,000 gallons in the third year of operation, and thereby persuaded Mardon to enter into a tenancy agreement for the site for three years. After the transaction, Mardon found that not more than 60,000 to 70,000 gallons could be realized. Mardon continued to lose money and was unable to pay for the petrol supplied. Esso then sued to recover possession of the site and the money due. Mardon claimed damages in respect of the representation, alleging, among other things, that the forecast or representation constituted a term of the contract.

The court observed:

It was a forecast made by a part (Esso) who had special knowledge and skill. It was the yardstick (the e.a.c.) by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their disposal. They were in a much better position than Mr. Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it and he does act on it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill. It is just as if Esso said to Mr. Mardon: "Our forecast of throughput is 200,000 gallons. You can rely on it as being a sound forecast of what the service station should do. The rent is calculated on that footing". If the forecast turned out to be an unsound forecast, such as no person of skill or experience should have made, there is a breach of warranty.

Reliance at time of Contracting

Generally, if A is reasonably relying on B's statement at the time of contracting and B knows or ought to know that A is relying on the statement, it is likely to be held to be a term of the contract. Here the courts seek to establish whether the statement was designed to be a part of the contract and not merely an incident in the preliminary negotiations. Thus the smaller the interval between the statement and the time of contracting, the more likely it is that A is relying on that statement.

In Bannerman v. White, the seller contended that the conversation was merely preliminary to the contract and not part of the contract. The buyer contended that the whole interview was one transaction and that since he had declared the importance he attached to his inquiry, the seller must have known that if sulphur had been used there could be no further question of a purchase of the hops. The jury found that the seller's statement was understood and intended

by both parties to be part of the contract, in that the seller must have known that the buyer was relying on the statement he made at the time of contract.

The courts in determining this factor treat the making of the contract as one protracted process. In Schawel v. Reade:

The plaintiff wanted a horse (stallion) for stud purposes. He went to the defendant's stables to examine a horse, which had been advertized for sale by the defendant. While he was inspecting the horse, the defendant interrupted him, saying "You need not look for anything: the horse is perfectly sound." The plaintiff therefore stopped the examination. A few days later, the price was agreed. Three weeks later the sale was concluded. The horse in fact was unfit for stud purposes.

The trial judge asked the jury two questions: (i) Did the defendant, at the time of the sale, represent to the plaintiff that the horse was fit for stud purposes? (ii) Did the plaintiff act on that representation in the purchase of the horse? The vital question was whether the representation was intended to be part of the contract which resulted, in particular, whether the representation had been made "at the time of the sale". The jury found that the statement constituted a term of the contract.

Reduction of Terms into Writing

Another factor, which the courts take into account, is whether the oral statement in question was later reduced into writing by the parties. Where the parties later reduce their oral agreement into writing, the omission or exclusion of an oral statement from the written document may lead to the inference that the parties did not intend it to be a term of the contract.

In Routledge v. McKay:

The plaintiff and defendant were discussing the possible purchase and sale of the defendant's motorcycle. Both parties were private persons. The defendant, taking the information from the registration book, said on October 23, that the cycle was a 1942 model. On October 30, a written contract of sale was made, which did not refer to the date of the model. The actual date was later found to be 1930.

The buyer's claim for damages failed in the Court of Appeal, partly on the ground that the said statement was omitted from the written contract and partly on the basis of the time interval between the making of the statement and the conclusion of the contract.

6.1.2 Collateral Contracts

As we have seen, an oral statement made in the course of the oral negotiations may not qualify as a term of the resulting contract if it was not included in a subsequent written contract. In order to escape this conclusion, the law provides yet another way in which such a statement could be given contractual effect, even though it is found not to be a term of the

resulting contract itself. To give such a statement contractual effect, the plaintiff could establish that the statement amounts to a collateral term or formed part of a collateral contract. A collateral contract is a contract, which exists side by side another contract, the consideration for which is the entering into of that other contract.

Let us assume A and B have negotiated a contract, but have not yet concluded it. B says to A: I will not conclude the contract with you unless you give me an assurance of X. A gives B the assurance or promise in return for B's entering into the contract with him. Two contracts come into existence: (i) the main contract entered into between A and B; and (ii) a collateral or unilateral contract in which A gives B the assurance or promise X in exchange for B's entering into the main contract with A. Thus a collateral or unilateral contract comes into existence, in addition to the main contract entered into, such that if A docs not fulfil his promise X, B can sue on the collateral contract, even though the promise of X does not form part of the main contract entered into between them.

The principle of collateral contracts was explained in the case of Heilbut, Symons & Co. v. Buckleton as follows:

A tells B: "If you will make such and such contract. I will give you one hundred pounds". If B provides the consideration by entering into the specified contract, there comes into existence a unilateral (or collateral) contract with A. If that promise is not fulfilled, B can sue for breach of that collateral contract. This second contract is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence.

A collateral contract is, therefore, one which exists side by side with the main contract made between the parties. In other words, it is collateral to the main contract. The principle of collateral contracts serves as a means of ensuring remedial flexibility in the law of contract.

In De Lassale v. Guildford a tenant had declined to hand over his counterpart of a lease until he had the landlord's oral assurance that the drains were in good order. The lease did not contain any clause about the drains, which turned out not to be in good order. The court held that in addition to the contractual terms contained in the lease, there was a collateral contract under which the landlord promised that the drains were in good order and the tenant was entitled to damages for breach of that term or undertaking.

The analysis is as follows: In consideration of A signing the lease or entering into the written contract, B had promised that the drains were in good order. Thus two contracts came into existence at the same time: (i) the bilateral contract contained in the written lease; and (ii) the collateral contract (unilateral contract) under which B promised that the drains were in good order in consideration of A signing the written lease. The establishment of the collateral contract helps to achieve a fair result and implements the true intentions of the parties.

It must be noted that a collateral contract could be found to exist even if the collateral term directly contradicts the express terms of the main contract. In City and Westminster Properties Ltd v. Mudd.

The contract was a lease, which contained a covenant not to use the premises for purposes other than trade. Under an earlier lease, the defendant had been in the habit, contrary to the lease, of sleeping on the premises. He insisted he would not sign the new lease unless the plaintiffs (landlords) agreed to his sleeping there. The landlord, who was unwilling to include a clause to that effect in the lease itself, orally assured the tenant that he could sleep there. Later the landlord brought an action against the tenant for forfeiture of the lease on the ground that the defendant was sleeping on the premises contrary to the express terms of the written lease.

The action failed. Even though the collateral term, i.e., the term that the tenant could use the premises for residential purposes was in outright contradiction of the express terms of the written contract, the courts found that all the ingredients for the existence of a collateral contract existed and such a finding would implement the true intentions of the parties to the contract. The court stated:

The defendant says that it was in reliance on this promise that he executed the lease and entered on the onerous obligations contained in it. He says, moreover, that but for the promise made he would not have executed the lease, but would have moved to other premises available to him at the time. If these be the facts, there was a clear contract acted upon by the defendant to his detriment and from which the plaintiffs cannot now be allowed to resile.

The principle of collateral contract may be applied even where the party receiving the assurance or collateral promise is not a party to the main contract entered into. The principle of collateral contract still applies where A makes a promise to B in consideration of B arranging for A to enter into a contract not with B himself, but with C. When B arranges for C to enter into a contract with A, he (B) provides the consideration for A's promise and thereby concludes a (collateral) unilateral contract with A. B can therefore sue to enforce A's collateral promise even though the main contract is entered into between A and a third party, C. In Shanklin Pier Ltd v. Detel Products Ltd:

The plaintiffs were the owners of a pier at Shanklin, in the Isle of Wright. They wished to paint the pier and consulted the defendants, a firm of paint manufacturers. The defendants told them that their paint was suitable for the purpose, and, acting on the faith of this statement, the plaintiffs caused to be inserted in their agreement with their contractors who were to paint the pier, a provision requiring them to use the defendants' paint. The paint proved to be unsuitable and the plaintiffs sued the defendants for breach of warranty based on a collateral contract.

The court held that the plaintiffs were entitled to damages. Although the contract of sale was between the defendants and the contractors (and not the plaintiffs (owners), the plaintiffs were able to sue the defendants on the collateral contract because the plaintiffs had given the consideration required for the defendants' promise i.e. by requiring the contractors to purchase the defendants' paint for the job.

The most significant extension of the application of the principle of collateral contract, however, can be seen in the case of Wells (Merstham) Ltd v. Buckland Sand And Silica Ltd.

B, a chrysanthemum grower, visited A, a sand merchant. B was looking for sand suitable for growing chrysanthemums. A said that their BW sand would be suitable and produced an analysis showing that it had a low iron oxide content, which made it suitable. Subsequently, B entered into a contract with C to buy from C, BW sand which C had purchased from A. If B had bought the sand directly from A there would clearly have been a contractual undertaking by A that the sand was suitable for the purpose. It was not suitable and B's chrysanthemums died.

The court held, per Edmunds J., that nevertheless a collateral contract arose between A and B since B had given consideration to A for A's promise by buying the sand from C. This decision goes further than all the other cases on collateral contracts, in that here there was no evidence that A requested B to enter into the contract with C or even contemplated the possibility that B might do so. However, the court held that it was sufficient that: (i) A's promise was one that B might reasonably regard as being contractual in nature; and (ii) that B had bought the sand in reliance on that promise.

An unsuccessful attempt was made in the Ghanaian case of CAST. v. Nketia to rely on the principle of collateral contract. The facts of the case were as follows:

By the terms of his employment, the plaintiff/respondent in the case could have his appointment terminated by three months' notice in writing. His employers terminated his appointment without notice, but paid him three months' salary in lieu of notice and other entitlements. He sued, relying on a letter written by the employers which stated inter alia that "members of regional staff are able to look forward to a career with the company which, subject to satisfactory service, should take them to retirement age", as amounting to a collateral contract.

It was held on appeal that it was not open to the trial judge to find that the letter in question was evidence of another collateral contract of employment the terms of which were capable of derogating from the clear stipulations of the amended letter of employment.

6.1.3 Written Contracts

There are certain critical principles which apply exclusively to written contracts. These are discussed in the following sections.

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. The terms of such a written contract are, therefore, said to be limited to the contents of the written document and nothing more. As a general rule, where the agreement is wholly reduced into writing, extrinsic evidence will not be admitted to add to, vary or contradict the terms of the written agreement. This is known as the "parole evidence rule".

In Motor Parts Trading Co v. Nunoo:

The appellants, relying on a written agreement signed by the respondent, instituted proceedings for arrears of instalments due under the agreement, damages for breach of contract and an injunction. The respondent contended that the written agreement did not contain all the terms agreed upon between the parties; that there was an oral collateral agreement not included in the written agreement because the appellants wanted to evade payment of income tax on the amount involved in the transaction; that the appellants did not honour this collateral agreement and, therefore, he repudiated the written agreement.

In the High Court, Charles, J. found that the collateral agreement was obtained by fraud in that the appellants had no intention of carrying it out. He therefore dismissed the claim in whole. It was held, allowing the appeal, that when a transaction has been reduced into or recorded in writing by agreement of the parties, extrinsic evidence is in general inadmissible to contradict, vary, add to or subtract from the terms of the document.

In Wilson v. Brobbey:

In an action to recover the value of goods credited to the defendant by the plaintiff, the plaintiff tendered in evidence an invoice, exhibit A, signed by the defendant. Although the defendant, who was literate, admitted signing the document, he contended that he signed it as a guarantor on behalf of one A to whom the goods were supplied and not as a purchaser and that in fact he did not read the document. He sought to join A as a co-defendant. The trial magistrate rejected the defendant's contention and found for the plaintiff on the strength of the oral testimony coupled with exhibit A.

The defendant appealed and the main issue was how far the defendant could be allowed to lead parole evidence to contradict the terms of the invoice. It was held, dismissing the appeal, that where parties had embodied the terms of their contract in a written document, extrinsic or oral evidence would be inadmissible to add to, vary, subtract from or contradict the terms of that instrument.

The parole evidence rule is, however, subject to a host of exceptions including the following:

1. Parole evidence may be admissible to establish or prove the existence of a collateral contract.

2. Parole evidence may be admissible to establish the existence of a vitiating factor such as mistake, misrepresentation, duress, undue influence, fraud etc.

3. Parole evidence may be admissible to establish the plea of non est factum (this is not my deed).

4. Parole evidence may be admissible to prove the existence of a custom or trade usage, which should apply to the contract.

5. Parole evidence also may be admissible to show that the operation of the entire contract had been suspended until the occurrence of some event.

6. Where a word or phrase in a written document is ambiguous parole evidence is admissible to explain such word or phrase.

7. If it can be shown that the written document is incomplete in that it was not intended to contain all the terms of the contract, then extrinsic evidence may be admitted to fill the gaps.

8. Where it is shown that a written document which was intended to a previous oral agreement does not accurately reflect the contents the oral agreement, extrinsic evidence will be admissible to "rectify" or the written document prior to its enforcement.

6.1.4 Signed Contracts

Generally, where a document containing contractual terms is signed in the abscence of fraud or misrepresentation, the party signing it is bound by its terms and it is wholly immaterial whether he read the document or not. L 'Estrange v. F. Graucob.

The buyer of an automatic slot machine signed and handed over to the sellers, an order form, which contained, in ordinary print and writing, the essential terms of the contract. Certain special terms were also stated in small in print including the term that "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby expressly excIuded. The machine was later delivered by the sellers to the buyer, who paid to then an instalment of the price. The machine did not work satisfactorily and the buyer brought an action against the sellers for breach of an implied warranty that the machine was fit for the purpose for which it was sold The sellers argued that the contract expressly provided for the exclusion of all implied warranties. The buyer replied that at the time that she signed the order form she had not read it and knew nothing of its contents and the clause exluding the warranties could not be easily read, owing to the smallness of the print

It was held that the buyer's action must fail and the sellers were entitled to judgement. It was stated: "When a document containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not". In Inusah v. DHL Worldwide Express:

The defendant was a limited liability company operating as carriers. The plaintiff presented a parcel containing 22 American Express traveller's cheques valued at US$6,000 at the office of the defendants to be delivered to his bankers in London. After the plaintiff had paid the postage he was issued an air bill (exhibit D) which he read and signed. Subsequently, the plaintiff was informed by his bankers that they received only three travellers cheques valued at $1,500 from the defendants. Following the refusal of the defendants to pay him the difference, the plaintiff brought an action against them to, inter alia, recover the balance and damages for breach of the contract to deliver. The court found that exhibit D contained a disclaimer clause limiting the liability of the defendants in the event of any special, incidental or consequential damages arising out of the carriage to $100.

It was held, relying on L'Estrange v. Graucob Ltd, that the general rule was that when a document containing contractual terms was signed, in the absence of fraud or

misrepresentation, a party of full age and understanding was bound to the contract to which he appended his signature. In such a case it would be immaterial whether he read the document or not. In the instant case, the plaintiff was a literate trained professional, a man of full age and responsibility. Since he read the disclaimer clause limiting the defendant's liability to $100 and then signed the same, he was bound by those conditions.

Where a party who is seeking to rely on a contractual clause in a written contract is guilty of misrepresenting its effect to the other party, he may be precluded from relying on such clause, even if the other party has signed the contractual document. In Curtis v. Chemical Cleaning And Dyeing Co:

The plaintiff took her wedding dress to the defendants to have it cleaned. She was asked to sign a form headed "Receipt". She asked why she had to sign the form and was told that it was because the defendant company would not accept liability for damage to the beads and sequins on the dress. The receipt in fact contained the following condition: "This article is accepted on condition that the company is not liable for any damage howsoever arising." When the dress was returned, there was a stain on it which could not be explained. The plaintiff sued.

It was held that the employees of the defendants had created a false impression or misrepresented the effect of the clause in question, and this disentitled the company from relying on the clause, except with regard to damage caused to beads and sequins.

Lord Denning stated:

[B]y failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption only related to the beads and sequins and that it did not extend to the material of which the dress was made. It was done perfectly innocently, but nevertheless a false impression was created [I]t was a sufficient misrepresentation to disentitle the cleaners from relying on the exemption, except in regard to beads and sequins.

Doctrine of Non Est Factum

The general rule is that a party of full age and understanding is normally bound by his signature to a document, whether he read the document or not. In certain circumstances, however, a party who has been misled into executing a deed, or signing a document of a class and character different from that which he intended to execute or sign can escape liability on the signed document by pleading the defence of non est factum in an action brought against him for the enforcement of the document.

Generally, the mistaken party will escape liability if he is able to satisfy the court that the signed instrument is radically different from what he intended to sign and that his mistake was not due to his own carelessness. Where the plea is upheld, it makes the document entirely void, that is, a complete nullity, such that even an innocent party cannot acquire any rights under it.

The cases show that plea of non est factum applies where:

(i) A party's signature has been procured by the fraud of another party.

(ii) The other party's fraud was such as to lead the party to believe that the nature and contents of the document were fundamentally different from what they actually were; and

(iii) The party who has signed is not guilty of negligence in so signing.

The declaration of a signed document as invalid by reason of the plea of non est factum is not merely on grounds of the fraud, but also on the ground that the mind of the signer did not accompany the signature. In other words, he never intended to sign that particular document and, therefore, in the contemplation of the law, he never did sign the document to which his name is appended. Thus the plea scriptum predictum non est factum (he did not in truth consent to what he had done) avails him.

An old case illustrates the application of the doctrine. In Lewis v. Clay, the defendant, Clay was induced to sign a promissory note by the cunning deception of a friend who caused him to believe that he was merely witnessing the friend's signature on several private and highly confidential documents. The documents produced to Clay for his signature were entirely covered with blotting paper except for four blank spaces that had been cut out in it. Clay had signed his name in the blank spaces. The court held that the defendant could successfully plead non est factum.

Scope of the Doctrine of Non Est Factum

Even though the application of the doctrine was originally limited to blind and illiterate persons, it now applies to all persons, who are permanently or temporarily unable, through no fault of their own, to have a real understanding of the effect of a document without explanation. However, mere negligence in not reading the document before signing it will cause an attempt to rely on the plea to fail. The courts have held that the plea of non est factum is not available to a person who signed the document without taking the trouble to find out at least the general effect of the document.

The leading case, which provides a comprehensive overview of all the authorities, is the case of Saunders v. Anglia Building Society (Gallie v. Lee):

Mrs. Gallie, a widow of 78 years, had made a will leaving her house to her nephew, Parkin. Lee, a friend of Parkin, was heavily in debt, and discussed with Parkin how money might be raised on the house. In Parkin's presence, Lee put before Mrs. Gallie a document, which he told her was a deed of gift of the house to Parkin. Mrs. Gallie did not read the document, because she had broken her spectacles. The deed was in fact a deed of sale of the house to Lee for £3,000, the receipt of which Mrs. Gallie acknowledged in the deed but did not in fact receive. Using this document, Lee purported to mortgage the house to the defendant Building Society and borrowed £2,000. Lee defaulted in paying the instalments on the mortgage and

the Building Society sought to recover possession of the house. Mrs. Gallie sued for a declaration that the deed was void, pleading non est factum, and applied for the recovery of the title deeds.

The court of first instance upheld her plea. The Court of Appeal reversed this decision and this was affirmed by the House of Lords. The House of Lords was influenced by the fact that Mrs. Gallie had not read the document and was thereby negligent, as well as the need to do justice to the Building Society, which was in no way negligent. Lord Denning observed that "the man who does not take trouble to read the document should be liable in each case to the innocent holder. His remedy is against the man who deceived him."

Lord Reid's judgement in the House of Lords decision explains the reasoning behind the plea and why the plea was not available in these circumstances.

The plea of non est factum obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable, through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general, I do not think he can be heard to say that he signed in reliance on someone he trusted."

It must be noted that the injured party is not without a remedy if he cannot rely on the plea of non est factum. He can sue the person who defrauded him for the fraud or misrepresentation. However, the effect of the fraud is to make the contract voidable, not void, thereby ensuring that an innocent third party who acquires an interest in the subject matter of the contract before it is avoided acquires a good title.

There are a couple of instructive Ghanaian cases on the subject. In Nkrumah v. Serwah & Others:

The plaintiff, an educated man, brought an action for, inter alia, a declaration of title and an order of possession of a house against the first defendant and the second defendant respectively. The trial judge found on the evidence that the plaintiff had sold the house to the second defendant who in turn sold it to the co-defendant (the mother of the plaintiff, who was joined as co-defendant on the application of the first and the second defendants). The co-defendant eventually sold it to the first defendant. The plaintiff appealed against this decision and contended, inter alia, that the transactions between the co-defendant and the second defendant and first defendant could be rebutted by the plea of non est factum (which she did not plead).

The court held inter alia, that apart from the fact that the plea of non est factum was not open to the co-defendant because she had not pleaded it, there was nothing from the evidence to support the plea since it was clearly borne out that in her dealings with the second defendant, she had the full advantage of legal advice and there was not the slightest indication that she was coerced or pressurized into executing the deeds of assignment. Besides, as her lawyer verified on her behalf, the relevant documents there could not have been the result of any mistake as to the essential nature or character of the document she executed to support that plea. In Wilson v. Brobbey:

The defendant was sued on a document, which stated the value of certain goods, which had been sold and delivered to him by the plaintiff. He argued that he had signed the document in the belief that he was signing as a guarantor on behalf of one A to whom the goods had actually been supplied. Even though the defendant was literate, he did not in fact read the document before signing.

It was held that where parties have embodied the terms of their contract in a written document, extrinsic or oral evidence is not available to add to, vary, subtract from or contradict the terms. Mere negligence in not reading a document before signing it is not a good defence so as to establish the plea of non est factum. In Quao v. Squire:

The plaintiff, an educated man, alleged that he intended to convey a piece of land to the wife of his eldest son. He signed the title deeds on the land and gave them to the surveyor. Sometime later, the surveyor, accompanied by the plaintiff's younger son, called on him and falsely represented to him that some mistake had been detected in the document he signed and that a new one had been prepared. He was asked to sign the new one, which he did, without reading it. It turned out that this new document was a conveyance of his plot of land to his younger son, who in turn conveyed it to the defendant.

When the defendant began to develop the plot, plaintiff brought an action against him seeking a declaration of title to the land and also applied for an order of interim injunction against the defendant. Plaintiff argued that in as much as he signed the document in error it was not his deed non est factum.

It was held that the onus of proof rested on the one who pleaded non est factum to establish it. Here the plaintiff had not discharged the onus of showing that he signed the document without negligence. Taylor J. stated:

Clearly, since he was an educated person, he could easily have read the document. He did not however read it himself, but he merely signed it. His reason for not reading it is, according to him, because he believed the representation made to him. The person to whom it was conveyed has now conveyed it to the defendant, who acquired it for valuable consideration, without notice of any of the circumstance surrounding the execution of the document. How far can the said circumstances affect this innocent purchaser?

The court held that the plaintiff could not rely on the plea since he was negligent in failing to read the document before signing.

In the case of Board of Directors Orthodox Secondary School v. Tawlma Abels the court explained the distinction between the plea of non est factum and the defence of duress and undue influence.

In that case the Headmaster of the school had signed a note acknowledging responsibility for 3321.64cedis, being school fees collected, but not accounted for. He was sued on the document and he pleaded non est factum, on the ground that, he had been coerced and also that constructive force had been used to get him to execute the document.

The court held that there was no evidence that the defendant was coerced or pressurized into signing the document. Even if there was such evidence, it could not, in law support the plea of non est factum. The plea of non est factum is different from the common law defence of duress and the equitable defence of undue influence. It was noted that in cases where the plea of non est factum was applicable, the signer's mind did not accompany what he did, but in cases of duress and undue influence the mind does accompany the signing even though the signature is induced by force or threat of force or by the relationship between the parties.

Illiterate Persons and Written Contracts

The position of the English law with regard to illiterate persons and the extent to which they are to be bound by a written contract was expressed in the case of Thompson v. London, Midland and Scottish Railway. In that case:

The plaintiff, who could not read, had an excursion ticket bought for her by her niece. On the face of the ticket were printed the words: "Excursion. For conditions see back"; and on the back was a notice that the ticket was issued subject to the conditions in the defendant company's time tables and excursion bills. On the excursion bills excursion tickets were stated to be issued subject to the conditions shown in the company's current time tables. The time tables, which could be obtained for sixpence each, stated: "Excursion tickets are issued subject to the general regulations and to the conditions that the holders shall have no rights of action against the company in respect of injury (fatal or otherwise) however caused".

In an action brought for damages for personal injuries the jury in the trial court found that the defendant company had not taken reasonable steps to bring the conditions to the notice of the plaintiff. On appeal, however, the Court of Appeal held that as a matter of law when the ticket was accepted the contract was complete, and therefore there was no evidence on which the jury could find as they did. The court held that the fact that the plaintiff could not read did

not alter the legal position; that she was bound by the special contract made on the excursion ticket on the acceptance of the ticket; and that the indication of the special conditions by reference to the time tables was sufficient notice of their existence and contents. Lord Hanworth observed, interestingly that: "The plaintiff in this case cannot read; but, having regard to the authorities, and the condition of education in this country, I do not think that avails her in any degree."

Based on the decision in this case, Chitty on Contracts states the general rule on the binding nature of exemption clauses, so far as illiterate parties are concerned as follows: "It is immaterial that the party receiving the document is under some personal, but non-legal, disability, such as blindness, illiteracy, or an inability to read our language. Provided the notice is reasonably sufficient for the class of persons to which the party belongs (e.g. passengers on a ship or railways), he will be bound by the conditions."

This position appears quite drastic, to say the least, even in a society with notably high literacy rates. In Ghana, where only 57.4% of the population is literate, a rule which holds illiterate persons bound by the contents of a written document would indeed be difficult to justify. It must be noted that under Ghanaian law, there is no presumption that an illiterate person appreciates or understands the meaning and effect of a legal instrument, or any instrument, simply because he signed it or put his mark on it. Thus no such presumption can be made with regard to an unsigned contractual document which is merely handed over to an illiterate consumer. In the interest of fair dealing between a literate and illiterate party, the law imposes a quasi-fiduciary relationship.

Ghanaian law places an obligation on the literate party to the contract to explain the contents of the contract to the illiterate party such that if the literate party does not discharge his good faith duty, by explaining the contents of the contract to the illiterate party, the contract is void. The Ghanaian position was enunciated in the case of Atta Kwamin v. Kufour, the facts of which were as follows:

The case involved a lease signed between a Gold Coast chief and an English gold prospector. After the signing of the lease, an agreement was entered into which contained a clause whereby the plaintiff's predecessor in office, another chief, was alleged to have agreed to give up all his rights and interest in the land, which was the subject matter of the lease, in consideration of a payment to him of £300. It was an agent of this predecessor chief who had signed this agreement, which had been drawn up on their behalf by the English prospector. All the Africans involved in the transaction were illiterate. The plaintiff then alleged that the clause was understood only to be intended to confirm and recognize the lease granted by the other chief and that in so far as it purported to surrender the rights of the Enkawie stool, which he represented, it was invalid and ineffectual. His grounds were, first, that the agent had no authority to surrender his chief's rights and, secondly, that the agent did not understand the memorandum of the agreement.

The Privy Council held that though the agreement had been read over to the parties, this was not enough. It had to be further proved that the plaintiff's agent had assented to the legal

document with an intelligent appreciation of its contents. Speaking of the agent, the court insisted that "the possibilities of misunderstanding are so obvious as to render it imperative on the appellant, who alleges his intelligent consent to a contract expressed in a language which he did not understand, to prove that it was clearly explained to him". The Privy Council stated:

When 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 of Ashanti, who does not understand English, and cannot read or write, has appreciated the meaning and effect of an English instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact, to be decided like other such questions upon evidence.

There is a marked difference between the position taken by the Privy Council in dealing with the liability of illiterate persons on written contracts and the rule adopted by the English courts. According to Date-Bah, this difference may be explained, "if the English solution is justifiable at all, in terms of the difference in the social conditions prevailing in England and Ghana". The Ghanaian position is given legislative backing in section 4 of the Illiterates' Protection Ordinance (CAP 262) which provides as follows:

Every person writing a letter or other document for or at the request of an illiterate person, whether gratuitously or for a reward, shall:

(i) Clearly and correctly read over and explain such letter or document or cause the same to be read over and explained to the illiterate person;

(ii) Cause the illiterate person to write his signature or make his mark at the foot of the letter or other document or to touch the pen with which the mark is made at the foot of the letter or other document;

(iii) Clearly write his full name and address on the letter or other document as writer thereof:...

In Waya v. Byrouthy, the plaintiff, Waya, an illiterate person, signed with his thumbprint a purported hire purchase agreement with the defendant. Under it Waya was to hire purchase the lorry from Byrouthy, who was given by the agreement, a right of seizure in the event of Waya's default on the instalments. On July 17,1957, Byrouthy seized the lorry and subsequently sold it. Waya sued Byrouthy, claiming the return of the lorry or its value with damages for unlawful seizure and loss of earnings.

The initial seizure was found to be wrongful since there was no agreement as to the amount and frequency of the instalments to be paid. The court held further that where an illiterate person executes a document, any other party to the document who relies upon it must prove that it was read over and if necessary interpreted to the illiterate person. The court stated, per Adumua-Bossman J.:

As has always been held in this court, the burden is always on the party relying on the document to prove that it was read over (and if necessary interpreted) to the illiterate person, and that it was apparently understood by him. No such evidence has been adduced on behalf of the defendant in this case.

In U.T.C. Ltd. v. Tetteh & Two Ors:

The second defendant, a near-illiterate, was induced to sign a guarantee agreement in the belief that he was signing as a witness to the signature of the first defendant. The guarantee in its true sense actually bound him to pay a specified sum should the first defendant owe the plaintiffs that sum. When he was sued on the document, he raised two defences: the plea of non est factum and illiteracy. The plaintiffs contended that, the second defendant was negligent in not having taken reasonable steps to acquaint himself with the contents of the document before he signed. He also contended that the second defendant must be held liable since the document had been read over and interpreted before he signed.

With regard to the defence of illiteracy, the court held that that defence puts a heavy burden on the plaintiff to prove not only that the document was "read over and interpreted" to the defendant but also that he fully appreciated the meaning and the effect of the said document before he signed it. This burden was held not to have been discharged in this case.

In Boakyem and Others v. Ansah:

In July 1948, the Odikro of Kotropei, by a deed of conveyance, granted a piece of land situated in Akwamu to the plaintiff-respondent. The execution of the deed of conveyance was attested to by the defendant-appellant, the Mankrado of Senchi and the head of his family. Both witnesses were illiterate. In 1960, the defendant granted permission to two others to build on the said land. The plaintiff sued the Mankrado and the other two in the High Court, Accra, for: (a) a declaration of title of ownership to the said land, (b) £G200 damages for trespass and (c) perpetual injunction. The main point for the consideration of the trial court was who was the owner of the land of which the land in dispute formed part, the plaintiff's grantor, i.e., the Kotropei stool or the defendant's stool, i.e., the Senchi Mankrado stool?

The plaintiff contended that the land belonged to the stool of Kotropei and further maintained that the defendant was estopped from asserting that the Kotropei stool had no title in the disputed land because he and the head of his family knew of the grant of the land to him yet they did not raise any objection. Furthermore, they were attesting witnesses to the execution of the deed of conveyance, the contents of which were fully explained to them. He added that when he was going to build on the land he informed the defendant, but he did not raise any objection.

The defendant's case was that (i) Kotropei stool and its subjects were granted permission to occupy the land in question as licensees and that the Kotropei stool could not exercise any right of ownership over the land such as making a grant, (ii) when he attested to the deed of conveyance as a witness he did not know that the land being conveyed formed part of his stool land (iii) his mark and that of the head of his family to the deed were obtained by trick

and (iv) the land in question had been the subject of a series of arbitrations held in 1946,1947 and 1957 between himself and the Odikro of Kotropei who had been found to have wrongly granted some plots of land adjacent to the one in dispute to certain persons.

The trial court gave judgment for the plaintiff and the defendant appealed to the Supreme Court. It was held, allowing the appeal, that where an illiterate person attests to the execution of a document as a witness by making his mark on it, there is no presumption that he has any knowledge of the contents of the documents. The presumption is, rather, the other way round, and a heavier onus rests upon any person claiming that an illiterate who has attested to a document is aware of the contents of such document to prove it. The Mankrado of Senchi, the defendant, was therefore not estopped from denying the title of ownership of the Odikro of Kotropei to the disputed land by the mere fact that he had attested to the document conveying the land to the plaintiff, as the evidence did not conclusively prove that the defendant, an illiterate, understood the contents of the document.

6.2 CLASSIFICATION OF THE TERMS OF THE CONTRACT

Not all promises or terms in a contract are of the same importance even though they all have to be performed. Non-performance of any term of a contract entitles the injured party to the award of damages by the defaulting party. Traditionally, certain terms are considered to be essential that a breach of them is said to go to the root of the contract and therefore, entitles the injured party, not only to claim damages, but also to put an end to the contract. Such terms are referred to as “conditions”. Conditions may be contrasted with "warranties", which are defined as subsidiary or minor terms of the contract. A breach of a term, which is classified as a warranty only entitles the injured party to damages but does not entitle him/her to terminate the contract. Whether a term is a condition or a warranty was often determined or settled by a consideration of the terms of the contract at the time the contract was made, not after it had been breached, so the classification did not take into account the consequences of the breach which had occurred.

Subsequent judicial developments, however, led to the realization that not all terms of contract can be pre-classified either as conditions or warranties. Indeed

Many contractual terms may not fit into either categories, but rather belong to a class or category of terms known as intermediate or innominate terms. For this category of terms, the consequences of their breach can only be determined or evaluated in the light of the class events which occur after the breach. Here the court consider the nature of the breach or the consequences of the breach and depending on the gravity of the breach, the injured party may or may not be able to terminate the contract

6.2.1 Conditions

A condition is a term of a 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. Thus a condition in this sense refers to a term of a contract, which is so essential to the contract, that

upon its breach, the innocent party would be entitled to treat the contract as terminated and consider himself discharged from the obligation of further performance of the contract and in addition sue for damages.

In Social Security Bank Ltd v. CBAM Services Inc:

The parties successfully negotiated a contract where the appellant in this matter (CBAM), successfully negotiated for the appellant (SSB), an agency of Moneygram, a worldwide money transfer service with respect to Ghana (Moneygram). As part of the agreement between the parties, SSB reserved the right to determine the agreement by giving 3 months' notice in writing to CBAM where the latter was in breach. It was also agreed by the parties that, CBAM, in addition to whatever advertisement and promotion programmes that Moneygram embarked on, would be responsible for advertising and promotions. This was, however, subject to the submission of all its advertising and promotional programmes and materials for written approval prior to embarking on the programmes.

The bank terminated the agreement on the ground that such prior written approval was not given to CBAM before it embarked on such a programme.. CBAM succeeded in obtaining judgment at the High Court for breach of contract which decision was affirmed by the Court of Appeal. The present matter was further brought on appeal before the Supreme Court.

In dismissing the appeal, the Supreme Court was of the opinion that, it is open to parties to a contract to expressly provide that either of them has an option to terminate the contract. A breach of fundamental or essential term is one of the grounds upon which a contract may be terminated. Where this is that stated ground, and the allegation that the term is essential or fundamental is disputed, a court is bound to determine the issue as a primary fact. But a contract may also be determined where, the innocent party is empowered by the terms to terminate. The Supreme Court noted that a breach of an obligation in a contract that would, of necessity, call for an election on the part of non-offending party to exercise his right of determination in the contract, must fit into any one of the following situations: (i) that which goes to the whole root of the contract and not merely to part of it; or (ii) that which makes further performance impossible; or (iii) that which affects the very substance of the contract. In considering the effects of the breach, the court takes into cognizance the consequence of the breach.

A waiver of a right to terminate a contract or forbearance may be either oral or written and may either be inferred from the conduct of the party affected by the breach complained of. The question whether a particular conduct would amount to a waiver that is intended to be acted upon is, of course, determinable on a case by case basis.

6.2.2 Warranties

Conditions may be contrasted with warranties, which are subsidiary terms of the contract, the breach of which does not go to the root of the contract and thus only entitles the injured party to sue for damages. A breach of a warranty does not entitle the innocent party to repudiate the contract or treat himself as discharged from the obligation to perform the contract.

In Wallis, Son & Well v. Pratt and Haynes93 Fletcher Moulton LJ. stated:

A party to a contract who has performed or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognised that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations, which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract.

In Neoplan (GJiana) Ltd v. Harmony Construction Co. Ltd, the court accepted the definition of a warranty as "a term of a contract which was collateral to the main purpose of the contract, that is, which is not so vital as to effect a discharge of the contract, if the circumstances are, or become inconsistent with it."

Two cases illustrate the distinction. In Bettini v. Gye, Bettini entered into a contract with Gye, the Director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in operas and concerts, both public and private, for a period of three months. Among the terms of the contract was an undertaking that he would be in London at least six days before the commencement of the engagement, for rehearsals. He arrived only two days before the engagement commenced and Gye thereupon refused to go on with the contract. He was sued by Bettini for breach.

The issue was whether the stipulation or term of the contract "to arrive in London 6 days before" was a condition of the contract or a warranty. It was held that having regard to the length of the contract and the nature of the performances to be given, the rehearsal clause was not vital to the agreement. It was not a condition, but merely a warranty, and accordingly its breach did not entitle Gye to treat the' contract as terminated. Gye was only entitled to damages for the breach of the term, which was a warranty. In Poussard v. Spiers:

There was a similar contract for the employment of an actress to play a leading role in an operetta. She fell ill 5 days before the first performance. Her illness appeared to be serious and its duration uncertain. She was unable to take up her role until a week after the commencement of the performance.

The producers were thus forced to take on a substitute and terminated her contract.

It was held that the defendants were justified in terminating her contract, that is, there was a breach of a condition.

Up until now the courts determined the status of a term of the contract by considering its significance to the contract at the time that the contract was made. They look at the language of the parties (to determine their intention); the context in which the term arose; the usual way in which terms of that nature are considered in the particular trade or business; past decisions etc., to determine whether the term should be treated as a condition or warranty. If it is found to be a condition, when it is breached, no matter how slight the consequences of the breach may be, the innocent party was allowed to repudiate the contract. If it is found to be a warranty, when it is breached, no matter how serious the consequences of the breach may be, the innocent party was not allowed to repudiate the contract, but could only sue for damages.

6.2.3 Innominate or Intermediate Terms

Obviously the advantage in pre-classifying a particular term of a contract as a condition or warranty is that it ensures certainty. In commercial transactions in particular, it is important that a party or his legal advisors should be able to know right from the outset what his rights will be in the event of a breach by the other party and to make his decision accordingly. If the term broken is a condition, the innocent party will know with certainty that its breach will entitle him to terminate the contract as well as sue for damages.

However, the advantage of certainty must be weighed against the need to reach a fair and just conclusion in individual cases. Since any breach of a condition gives rise to the right of termination, it means the innocent party can refuse to perform the contract even if the breach of the condition is trivial in nature and he has suffered little or no loss as a result of it. For example, it is a condition of a contract for the sale of goods that the goods must be delivered on the date stipulated in the contract. If the seller delivers the goods even one day later, or even earlier, there is a breach of a condition which allows the buyer to terminate the contract by rejecting the goods, whether the breach has actually caused him any loss or not.

To ensure flexibility and justice on a case by case basis, the nineteenth century distinction, which pre-classified all terms of a contract as "condition" or "warranties" has now given way to a more flexible test based on the gravity or seriousness of the breach and of its consequences.98 In recent years, the courts do not stick strictly to the approach of pre-classifying terms either as conditions or warranties, depending on their significance to the contract at the time the contract is made. The courts have recognized a new category of terms, known as innominate or intermediate terms. These terms lie somewhere between conditions and warranties in that the consequences of a breach of such a term does not depend on its prior classification as a "condition" or "warranty", but rather depends on the seriousness of the breach which has occurred and its impact on the contract.

Innominate or intermediate terms are, therefore, terms which cannot be pre-classified either as conditions or warranties. In determining the consequences of a breach of such a term, the courts consider not the importance of the term itself, but rather the consequences of the breach, after it has occurred. If the events, which occur after the breach are of a serious nature, the term is treated as a condition and the innocent party is entitled to terminate the

contract and sue for damages. If the events which occur after the breach are of a relatively trivial nature the term is treated as a warranty and the innocent party is not allowed to terminate the contract, but can only sue for damages for the breach.

Thus the innominate term concept looks at the nature and effect of the breach on the contract to determine if, as a result of the breach, the innocent party has been deprived of substantially all the benefit that he expected to receive under the contract. If so, the breach is deemed to be of a serious nature, and the innocent party is entitled to treat the contract as terminated by the breach. If not, then the breach is said to be trivial only, and the innocent party is not allowed to terminate the contract, but can only sue for damages for the breach.

The case which recognized innominate terms as a third category of terms of a contract is that of Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd.

The case concerned a contract for the charter of a ship, "The Hong Kong Fir", for a period of 24 months. The term in the contract which had been breached was the ship owner's express promise that "the ship was seaworthy, she being fitted in every way for ordinary cargo service". The vessel was' delivered and sailed from Liverpool to Newport, USA, and loaded a cargo for Osaka. The engine room staff were inefficient and the engines were very old, with the result that the ship was held up for repairs for five weeks on her way to Osaka, where it was found that further repairs, requiring 15 weeks to complete, were necessary to make her seaworthy. The charterers purported to rescind the contract. Previous authorities showed that such a term was deemed to have been breached by the slightest failure to be so fit.

The court of first instance and the Court of Appeal, however, took a contrary view and held that the clause, in their view, was an innominate term in the sense that it could be broken by the presence of trivial defects and rapidly remediable defects such as a missing nail from one of the timbers, as well as by defects, which must inevitably result in the total loss of the vessel. Thus the unseaworthiness (a breach of the term of seaworthiness) of the ship, could, depending on the nature of the defect, entitle the charterer to rescind the contract; or the breach might be of such trivial consequence that the charterer would have to abide by the contract, and could only claim damages if he suffered a loss. In other words, the term could not be pre-classified either as a condition or a warranty. It was an innominate term, in the sense that certain breaches of it could entitle the innocent party to terminate the contract (if they were serious enough); while other breaches would only entitle the innocent party to claim damages, but not to terminate the contract (if the breach was trivial).

In the Hong Kong Fir case, the breach of the term that the ship was seaworthy in all resulted in 20 weeks delay. But at the end of it all, the charterers still had 20 months to run. The breach, therefore, did not substantially deprive the charterer of the whole benefit of the contract and they were, therefore, held not entitled to terminate the contract altogether.

In Cehave N.V. v. Breme Handelsgesellschaft MBH (The Hansa Nord),

A German company agreed to sell to a Dutch company, 12,000 tons of U.S. citrus pulp pellets, to be used in cattle food. Clause 7 of the contract provided: "Shipment to be in good

condition". The pellets were shipped from Florida. The buyers paid the price of approximately £ 100,000, and obtained the shipping documents. On arrival in Rotterdam, part of the cargo in one hold was found to be severely damaged by overheating. Since shipment, the market price of the goods in Rotterdam had fallen to about £86,000. The buyer rejected the whole cargo. The sellers refused to return the price. Upon application by the buyers, the Rotterdam court ordered the sale of the whole cargo. It was bought for £30,000 by B, who then sold the pellets back to the buyers at that price. The buyers used the cargo to make cattle food, almost as they would have done with sound pellets.

Mocatta J. upheld the finding of an arbitrator that the buyers were entitled to reject for breach of condition. The Court of Appeal held otherwise, stating that the term was an innominate term. The court stated that the term "shipped in good condition" was neither a condition nor a warranty, in the strict sense. It is one of those intermediate stipulations, which gives no right to reject unless the breach goes to the root of the contract. The term was an innominate term and the breach of the sellers was not such as goes to the root of the contract, since the goods were still of merchantable quality. Therefore the buyers were not entitled to reject the whole cargo because of that breach, but were only entitled to claim damages.

It is important to note that where there is a well-established custom, usage or authority to the effect that a particular clause constitutes a condition, the courts will give effect to it as such.

6.3 IMPLIED TERMS

The actual words used by the parties, i.e. the express terms of the contract, even if they are set out in a formal, written contractual document, do not always represent the full extent of the parties' agreement. The courts, in certain cases, may imply or import terms into the contract in addition to the terms that the parties have themselves included in the contract. The circumstances in which the courts will imply terms into a contract are, however, strictly limited. The courts are traditionally unwilling to add to the express terms of a contract because they do not consider it their role to make a contract for the parties, but rather to interpret the parties' contract. In certain specific and limited circumstances, however, the courts may be willing to imply terms into a contract. Generally, terms may be implied into a contract by the court itself (judicially implied terms), by custom, by statute, or by course of dealing.

6.3.1 Terms Implied by the Court

In certain restricted circumstances, the courts will imply certain terms into a contract if it is necessary to give the contract business efficacy, that is, in order to make the contract work. Sometimes the parties to a contract, may, either through forgetfulness or through poor drafting, fail to incorporate into the contract, certain terms which they would have included in the contract if they had adverted their minds to them. In such cases, the courts, in order to give the transaction "business efficacy", may imply such terms as are necessary to achieve

that result. The rationale here is that the court, by implying such terms into the contract, is merely giving effect to the intention of the parties in order to give "business efficacy" to the contract.

The leading case on this principle is The Moorcock, the facts of which were as follows:

The defendants were the owners of a wharf and jetty on the river Thames. The plaintiff was the owner of the steamship "Moorcock". It was agreed between them that the ship should be discharged and loaded at the defendant's jetty, hire being paid for the use of cranes and other facilities on the wharf. Both parties knew that the ship would settle on the riverbed at low water. While the ship was lying there, the tide ebbed and the ship came to rest on a ridge of hard ground beneath the mud and sustained damage. The owner of the vessel sued for damages for breach of an implied term that the owners of the wharf had taken reasonable steps to ensure that the berth was safe, and that if they had, they would not have invited ships to lie there.

The Court of Appeal held that the parties must have intended to contract on the basis that the ground was safe for the vessel at low tide, and therefore a term was implied into the contract that the berth was reasonably safe for the purpose of loading and unloading. The ship owner recovered damages for the breach of the implied term that the owners of the wharf had taken reasonable care to ensure that the berth was safe.

Bowen L. J. explained the grounds for the implication thus:

I believe if one were to take all the cases, and there are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy to the transaction as must have been intended at all events by both parties who are businessmen. The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.

Subsequent cases which have applied the principle in The Moorcock have emphasized that a term will be implied in a contract only if upon the evidence it must be taken to have been naturally intended by the parties to form part of their contract, and was necessary to give business efficacy to the contract. In other words, there are grounds for implying a term into a contract only where without the implied term, the contract would not be workable.

Thus the court will not imply a term merely because it would be reasonable to do so, or because it would improve the contract, or make its performance more convenient. It must be established in all cases that it is necessary to imply the term so as to make the contract workable. The test is, therefore, always one of necessity and not mere reasonableness.

In Reigate v. Union Manufacturing Company (Ramsbottom) Limited and Elton Cop Dyeing Company, Limited:

Plaintiff had invested £1,000 in the capital of the defendant company. The defendant company appointed him their sole agent for the sale of certain goods for 7 years. The issue was whether the defendant company could terminate the agency agreement at any time by ceasing to do business, in the absence of an express term to that effect or whether there should be an implied term that the company could not terminate the agency agreement during that period.

The court held that it could not imply a term that the company could not terminate the agency at any time by ceasing to carry on business. In fact it was pointed out that unlike cases where the parties would have nodded "of course" to this term; in this case, they would at once have disagreed as to what the position was. The court was also influenced by the fact that it was clear that the parties had thought sufficiently about the matter and had expressed two conditions on which the contract could have been terminated: first, upon the death of the agent and secondly by six months notice after the expiration of seven years. Thus, they must have thought about the matter at hand and deliberately refrained from making such a stipulation in the contract.

Scrutton L J. stated:

The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear". Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.'"

In Eyre v. Measday:

The plaintiff had undergone a sterilization procedure in 1978. The gynaecologist had emphasized that the procedure was irreversible and the plaintiff and her husband believed that she was sterile after the operation. The fact is that there is a slight risk of pregnancy even after such an operation. Plaintiff subsequently became pregnant. She sued for damages. The English Court of Appeal was faced with the issue of whether or not in a sterilization operation by the defendant gynaecologist, there should be an implied term that the gynaecologist was guaranteeing that after the operation the plaintiff would be sterile.

The court held that no such term could be implied because no such term arose by necessary implication. In fact, from the circumstances, the plaintiff was not entitled to assume that the gynaecologist was giving such a guarantee. If the plaintiff wanted such a guarantee, she should have specifically asked for it.

In Atuwo v. Agip Ghana Ltd:

Some months after joining the defendant company as an accountant, the plaintiff's appointment was terminated because of redundancy. He was offered all the benefits, which

would have accrued to him under his contract as well as two months pay in lieu of notice, but he chose to bring an action claiming damages for breach of contract. He alleged that although the agreement did not specify a fixed term of years it was so framed, that it should be construed as a permanent appointment with an implied term that the company would employ him for at least 15 years.

The court held that the plaintiff's employment was lawfully terminated upon three months' notice and there were no grounds for implying any term into the contract that the company would employ the plaintiff for at least 15 years. Apaloo J observed:

The Plaintiff was not employed for a fixed term of years, and in order to sustain his contention of breach of contract, he argues that after finishing his probation, the company impliedly agreed to employ him for a minimum of 15 years. The question then is: What is the law on implying terms in a written contract? I think the locus classicus oh this is the decision of the English Court of Appeal in The Moorcock, in which it was laid down that no stipulation ought to be implied in a contract unless upon the evidence it must be taken to have been naturally intended and necessary to give business efficacy to the contract. The only real reason why it was argued that the contract of employment contained an implied term that the company would employ him for a minimum period of 15 years, is that a provision in the contract states the number of days he would be entitled to paid leave if he remained in the company's service for over 15 years. In my opinion, that is too thin a thread on which to hang so serious an argument. I can see nothing in the circumstances of this case, which entitles me to say that both parties intended such a term. It certainly does not seem to me necessary to give business efficacy to the contract. By parity of reasoning, I hold that the Plaintiff's action fails on the ground that such a stipulation cannot, on the evidence in this case, have been mutually intended and necessary to give business efficacy to the contract.

6.3.2 Terms Implied by Custom

In the normal course of things a contract is not an isolated act, but rather an incident in the conduct of business. Often, the contract is set against the background of customary practice that is familiar to all those who engage in the particular trade or business. Thus quite often, negotiations leading to the making of a contract are carried out against the background of certain commercial or business practices or usages and it may safely be assumed that such customs or usages are intended to govern the parties' contract. In view of this, the courts in some cases may admit evidence of such customs or practices and give effect to them in interpreting the contract even though the parties have not expressly stated those terms. Thus in addition to the express terms stated by the parties, the courts may imply certain terms based on customs and usages that normally govern contracts of that nature. The assumption is that since the parties contracted with reference to the known usages and customs of the trade, business or profession, they must have intended that those terms would apply to their contract.

Ordinarily, for terms to be implied by custom or usage, the court must be satisfied that the custom or usage is notorious or well known, certain and reasonable, and must not contradict the intention of the parties. In the case of Quartey v. Norgah, the plaintiff brought the action against the defendant for thirteen cows, being the plaintiff's share of the products of two cows left with the plaintiff by the defendant. The plaintiff founded his claim on, inter alia, the allegation of terms of a custom of cattle breeders. It was held that the court would enforce a usage as a custom once it was proved that it was accepted as a binding rule regulating the conduct of parties to a transaction within a particular trade.

An example of a term implied by custom can be found in the case of Hutton v. Warren, where the tenant of a farm, on leaving the farm after the required notice by the landlord, was held to be entitled to a fair allowance for seeds and labour expended on the land, the benefits of which the landlord stood to reap. This term was implied in the contract even though there was no express term to that effect. Parke B. observed in that case as follows:

It has long been settled, that in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions, the parties did not mean to express in writing, the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.

It must be noted that a custom or usage which would otherwise be implied in a contract may be excluded by the parties, either expressly or impliedly, where it is inconsistent with one of the express terms of the contract. In the case of Les Affreteurs Rdunis Societe Anonyme v. Leopold Walford Ltd

Walford, as a broker, had negotiated a charter party between the owners of the SS Flore and the Lubricating and Fuel Oils Co. Ltd. There was a clause in the charter party that the owners promised the charterers that they would pay Walford, on signing the charter, a commission of 3 per cent on the estimated gross amount of hire. The owners, defending an action brought by Walford for this commission, pleaded that there was a custom of the trade which stipulated that the commission was payable only when hire had actually been earned. The Flore had been requisitioned by the French government before the charter party could be operated and no hire had in fact been earned.

It was held that the custom that the commission of brokers was payable in respect of hire duly earned under the charter party had been excluded or negatived by the express term in this contract, that the commission was "payable on signing the charter, ship lost or not." It was stated in that case that an alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and further that a custom will only be imported into a contract where it is consistent with the tenor of the document as a whole.

6.3.3 Terms Implied by Statute

In some cases there are statutes or legislative enactments, which mandatorily imply certain terms into certain contracts for policy reasons. Over the years certain contractual terms have been accepted as implicit or implied in certain kinds of contracts, such that such terms must of necessity be implied into the contract, unless there is a contrary express term. In Ghana, legislation governing the sale of goods, tenancy agreements and hire purchase agreements, to name a few, (the Sale of Goods Act, 1962 (Act 137), Conveyancing Decree, 1973 (N.R.C.D. 175) and the Hire Purchase Decree, 1974 (N.R.C.D. 292) imply certain standard terms into every contract for the sale of goods, tenancy agreement and hire purchase respectively. Such terms, which are implied by statute, are equally applicable to the parties' contract as the terms they have expressly included in their contract.

The following terms found in sections 9-14 of the Sale of Goods Act, 1962 (Act 137) of Ghana are implied into every contract for the sale of goods:

1. An implied condition that the goods are in existence in the case of specific goods.122

2. An implied warranty on the part of the seller that he has the right to sell the goods at a time when the property is to pass.123

3. In a contract for the sale of goods by description, an implied condition that the goods shall correspond exactly with the description.124

4. In a contract for the sale of goods by sample, an implied condition that the goods shall correspond exactly with the sample.125

5. An implied condition that the goods are free from defects unknown to the buyer and a further implied term that in certain circumstances, the goods are reasonably fit for the purpose for which they are required.126

The Conveyancing Decree, 1973 (NRCD 175) also implies certain covenants or terms into a conveyance of freeholds and leaseholds. These implied terms or covenants include the right to convey, the right of quiet enjoyment, freedom from encumbrances, covenants relating to the payment of rent, repair to adjoining premises, alterations and additions, injury to walls, assignment and subletting, illegal or immoral user, nuisance or annoyance, and yielding up the premises by the transferee.

The Hire-Purchase Decree, 1974 (N.R.C.D. 292) implies the following terms into every hire purchase agreement and conditional sale agreement: (a) a term that the hirer or buyer shall have and enjoy quiet possession of the goods; (b) a term that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass; (c) a term that the owner or seller will have a right to sell the goods at the time when the property is to pass. The Mortgages Decree, 1972 (NRCD 96) also implies certain covenants in any mortgage including the covenants relating to the right to mortgage, quiet enjoyment, freedom from encumbrances, further assurance, maintenance, repairs and protection of the mortgage security.

In the case of Farah v. Robin Hood Flour Mills Ltd and Another, the court had to consider whether the implied term in the Sale of Goods Act that the goods are reasonably fit for the purpose for which they were required was breached or not.130 The facts of the cases were as follows:

On June 4, 1961,2,000 bags of flour ordered by the plaintiff, a baker, from the first defendants, a Canadian company, arrived at Takoradi, C.I.F., on board the S.S. Kindat. On June 9, the plaintiff paid the cost of £G4,275 0s 5d to the Bank of West Africa Ltd., and was given the bill of lading and other documents to enable him to take delivery of the flour from the harbour. He started to remove the flour from the harbour to his warehouse in town. He completed the removal on the June 12,1961. He opened ten bags and found that all ten were infested with weevils. He immediately reported to a Mr. Millington, a local representative of the defendants. He told Mr. Millington that he did not like the whole consignment. Mr. Millington suggested a survey. A survey by Lloyds confirmed the flour was weevil-infested. All the bags were subsequently collected by the medical officer of health and destroyed on June 16, 1961, as unfit for human consumption. The plaintiff sued the defendants for a refund of the purchase price as money paid for a consideration that had wholly failed, and other damages, including the profits he would have made if he had baked all the 2,000 bags of flour.

The court held that from the nature of the contract and the circumstances of the parties there was an implied condition that the flour sold to the plaintiff would be fit for human consumption. As the flour was eventually destroyed as unfit for human consumption, the defendants were guilty of a breach of this implied condition.

6.4 STANDARD FORM CONTRACTS AND EXEMPTION CLAUSES

A standard form contract is a contract, the terms of which are often set out in printed form in a written document and used as a standard contractual document with little or no variation in all contracts of a particular kind.131 In most cases the contract applies in the same form to every purchaser, customer or client without any modification. Standard form contracts are sometimes referred to as contracts of adhesion, because they are prepared by one party to the contract, usually the supplier of goods or services, who includes his/her own terms and conditions and offers them to the customer or client on a take-it-or-leave-it basis.

The use of standard form contracts became more popular with the introduction of large scale or mass production of goods and services, which required as a matter of practicality, the standardization of contracts. The operations of companies involved in mass production of goods and services necessitated the use of standard form contracts. Standard form contracts are, therefore, used mostly by large companies such as railway companies, utility services companies, banks, hotels, airline companies, insurance companies, laundry companies, etc.

Thus use of standard form contract obviously is more cost effective and time saving. Obviously, the work of bankers and insurers would be most cumbersome and endless if the

terms of each and every contract made with individual customers or clients had to be specially negotiated and designed for each transaction. The use of standard form contracts also serves as a device for allocating contractual risks and simplifies the contractual process by making it clear, right from the onset, the rights and responsibilities that each party bears.

6.4.1 Exclusion Clauses

Exclusion or limitation clauses, a familiar feature of standard form contracts, are contractual terms which purport to limit or exclude the liabilities of one party which may arise under the contract. Over the years objections have been raised to the use of exclusion clauses as a device to exploit and abuse the superior bargaining power of one party to the contract, invariably, the large scale commercial supplier of goods and services. The courts have long been hostile to exemption or exclusion clauses since they are often not negotiated freely by the parties, but are rather imposed on one party by the other. It must be noted, however, that standard form contracts are not always made between a supplier and a customer or consumer, but are also used in commercial transactions between parties of equal bargaining power.

The public policy concerns raised by the use of standard form contracts are of course more evident in consumer-supplier relations than in commercial transactions between parties of similar bargaining power. The courts have, therefore, been more occupied with ensuring the protection of consumer welfare with regard to the use of exclusion clauses in consumer contracts. The common law courts sought to redress the balance by developing restrictive rules for the interpretation of exclusion clauses and imposing stringent requirements of notice as conditions for the validity of such clauses. The concerns of the courts drew them into a long running judicial battle with drafters of standard form contracts, which has resulted in the introduction of regulatory legislation in the United Kingdom.

Exclusion clauses are sometimes contained in written documents, delivered by one party to the other to conclude the contract. This may take various forms. A passenger boarding the "State Transport" bus is given a ticket containing printed words setting out the terms of the contract of carriage. A purchaser of goods at a supermarket receives a receipt containing clauses and terms governing the sale of an item, often including exclusion clauses for the protection of the seller. The receipt or ticket given by a laundry service to a customer often contains clauses excluding the liability of the laundry service company in the event of loss or damage to items received.

The question is whether these terms or clauses printed on such documents form part of the contract entered into, so as to be binding on the customer, whether or not he reads them. The position of the common law has been that for such a clause to be effective, it must be shown that it was properly incorporated into the contract as a term of it. In this regard, the 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. Thus the answer to the question whether the clause forms part of the contract invariably depends on whether or not a particular term has been sufficiently brought to the customer's attention, to make it a term of the contract. Several

principles have been developed to deal with the enforcement of exclusion clauses contained in standard form contracts, which form the subject matter of the subsequent sections.

6.4.2 Enforcement of Exclusion Clauses in Contracts

Especially where the contract is made between parties of unequal bargaining power, the general principles of offer and acceptance have proved to be inadequate in dealing with the special problems presented by the use of standard form contracts. First of all, it is important to note that in seeking to exempt himself from liability for breach of the contract, the party relying on the exclusion clause thereby deprives the other party of all remedies he expected to have under the contract. The far reaching effect of exclusion clauses makes the issue of notification quite critical.

Generally, standard form contracts entered into with consumers are usually contained in some printed ticket, notice or receipt, which is given to the consumer at the time he enters into the agreement. In most cases, the consumer neither has the time nor energy to scrutinize the document, and even if he were to do so, it would not help him much since the conditions are often not negotiable. The consumer cannot discuss or vary the terms in any way. It is only when a dispute arises that he realises how limited his rights are under the contract.

In view of these matters, the courts have over the years developed certain principles requiring effective notice to be given to the consumer of the existence of the excluding or limiting clause in the contract before it is concluded between the parties.

6.4.3 Incorporation of Exclusion Clauses in the Contract

As a starting point, the court must satisfy itself that the excluding or limiting clause is in fact an integral part of the contract. Since the exclusion clause is intended to be a term of the contract, like any other term, it must be shown that both parties were aware of its existence and consented to its inclusion in the contract.

Generally, where the exclusion clause is contained in a written contract signed by the consumer, the person who has signed the document is normally bound by the clause, even if he did not read the contents of the document or did not understand it, unless there was a misrepresentation of the effect of the clause or unless the person who signed can rely on the plea of non est factum. Where, however, the document containing the contractual terms is not signed by the person receiving it, but is merely delivered to him, it must be shown that the terms of the contract were adequately brought to his notice. Thus where the exclusion clause is contained in an unsigned written contractual document a party can only rely on the clause if it is shown that the clause was properly incorporated into the contract as a term of it.

To establish this, the party relying on the clause must show that he did what was reasonably sufficient in the circumstances to give the other party notice of the clause before or at the

time the contract was made. If the party seeking to rely on the clause has done what was reasonably sufficient in the circumstances to bring the clause to his notice, the person receiving the document will be bound, whether he read it or not, and whether he knew it contained terms or not.

In Parker v. South Eastern Railway:

The plaintiff deposited a bag in the cloak room at the railway station. He was given a ticket with a number, date and the words "See back" on the front of it. On the back of the ticket were several printed clauses. Amongst the clauses was the following: "The Company will not be responsible for any package exceeding the value of £10. The plaintiff did not read the ticket. His bag, worth £24.10 was lost. Plaintiff sued, and the defendants relied on the exclusion clause.

The trial judge directed the jury to consider whether the plaintiff had read or was aware of the special condition on the ticket, upon which the bag had been deposited. The jury answered in the negative and accordingly judgement was entered for the plaintiff. On appeal by the defendants, the Court of Appeal held that the jury had been misdirected. The real question was whether the defendants had done what was reasonably sufficient to give the plaintiff notice of the condition. A new trial was ordered.

Whether or not sufficient notice has been given of the exclusion clause is a question of fact based on the evidentiary circumstances. The courts consider all the circumstances and the situation of the parties.

The case law reveals a number of broad guidelines.

(1) Where the conditions or exclusion clause was printed on the back of a ticket or document, without any reference to it on the face of the document, such as "See back for conditions", the courts are likely to hold that reasonable notice was not given. Also where the condition printed on the ticket is obliterated by a stamp; faded or otherwise illegible, the courts are likely to hold that reasonable notice was not given.

In Richardson, Spence & Co v. Rowntree:

The plaintiff contracted with the defendants to be carried as a passenger on their steamer from Philadelphia to Liverpool. She paid her passage money and received a ticket, which contained a number of printed terms including one limiting the liability of the defendants to $100. The ticket was handed to her folded up, and the conditions were obliterated in part by a stamp in red ink. She sustained injuries during the voyage and sued the defendants.

The jury found that although she knew that there was writing on the ticket, she did not know the writing contained conditions. Accordingly, the question was whether reasonably sufficient notice had been given and the jury found that it had not. The question whether the party relying on the clause has done what is reasonably sufficient to bring the clause to the notice of the other party is always a question of fact, depending on the circumstances.

(2) The courts have held that if the particular clause relied on by the party seeking exemption is exceptionally far reaching or unusual in that class of contract, he must show that he took special measures to bring it to the notice of the other party. In other words, the more far-reaching the clause, the greater must be the clarity of the notice given to satisfy the requirements of reasonableness.

In Thornton v. Shoe Lane Parking Ltd:

The plaintiff drove into the entrance of the defendant's car park, where a notice was posted, stating: "All cars parked at owner's risk". A light changed from red to green as he drove in. He took a ticket from a machine and drove into the garage. He looked at the ticket to see the time printed on it and saw other printed words, which he did not read. When plaintiff collected the car, there was an accident in which he suffered personal injuries partly through the negligence of the defendants. He sued. Defendants relied on the ticket, which stated that it was issued "subject to the conditions of issue as displayed on the premises". The conditions displayed inside the garage stated that: "The customer is deemed to be fully insured... the Company will not be liable for any loss, misdelivery or damage to the vehicle or injury to the customer."

The court of first instance held that the defendants were liable and they appealed. The court was of the opinion that the clause was so wide and destructive of rights that the court should not hold any man bound by it, unless it was drawn to his attention in the most explicit way. As Lord Denning put it, "In order to give sufficient notice, it would need to be printed in red ink with a rend hand pointing to it -something equally startling".

The case of Interfoto Picture Library Ltd v. Stiletto Visual Programme is also instructive on the subject, even though the clause in question was not an excluding or limiting clause.

In this case, the plaintiff ran a photographic transparency lending library. The defendants were advertisers. Following a telephone conversation between them, the plaintiff delivered to the defendants, 47 transparencies, together with a printed note containing 9 printed conditions. Condition 2 provided that the transparencies were to be returned within 14 days, failing which, a holding fee of £5 a day and VAT would be charged. After 4 weeks, the transparencies had not been returned whereupon plaintiffs sent an invoice to the defendants for £3,783.50, as a holding charge for the transparencies.

The court considered the issue of whether condition 2 was sufficiently brought to the defendant's attention to make it a term of the contract. The court held not. The reason being that if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that the particular condition was fairly brought to the attention of the other party and in this case the court was of the view that the plaintiffs had not done enough to bring that particular clause to the defendants' notice.

(3) For the exclusion clause to be effective, the party relying on it must show, not only that he gave the other party reasonable notice of it, but also that notice of the clause was given before or at the time the contract was entered into and not after.

If the notice of the clause is given after the contract has been concluded, it will be held to be ineffective. The principle is based on the fact that once the contract has been made, none of the parties can alter its terms without the consent of the other. In Olley v. Marlborough Court Ltd:

A husband and wife arrived at a hotel as guests and paid for a week's stay in advance. They went up to the bedroom allocated to them and on one of the walls was a notice stating that the "proprietors will not hold themselves responsible for articles lost or stolen unless handed over to the managers for safe custody". The wife then closed the self locking door of the bedroom, went downstairs and hung the key on the board in the reception office. In her absence the key was wrongfully taken by a third party who opened the bedroom door and stole her furs.

It was held that the notice in the hotel room, which purported to exempt the proprietors of the hotel from liability for the loss of any articles left in the rooms, was not incorporated in the contract between the proprietors of the hotel and the plaintiffs, because notice of it was given after the contract had been concluded. According to the court, the contract was made in the hall of the hotel, before the plaintiff entered her bedroom and before she had an opportunity to see the notice.

(4) For the exclusion clause to be enforceable, the document containing the clause must be one, which can properly be described as a contractual document, that is, it must be one, which a reasonable person would expect to contain the conditions or terms of the contract.

. Thus if the document in question is the sort of ticket which a reasonable man would suppose to be merely a voucher or receipt, given as evidence of payment, the mere delivery of such a document would not amount to the giving of reasonable notice. In Chapelton v. Barry U.D.C.:

The plaintiff, who wished to hire a deck chair on a beach went to a pile of deck chairs belonging to the defendant council. Near to the chairs was displayed a notice stating: "Barry Urban District Council. Hire of chairs 2d per session of 3 hours". The notice went on to state that the public was requested to obtain tickets for their chairs from the chair attendants and that those tickets should be retained for inspection. There was nothing on the notice relieving the defendant council from liability for any accident or damage arising out of the hire of the chair. The plaintiff obtained two chairs from the attendant for which he paid 4 d and received two tickets. The plaintiff glanced at the tickets and slipped them into his pocket and had no idea that they contained any conditions. On the other side of the ticket were the words: "Available for three hours. Time expires where indicated by cut-off and should be retained and shown on request. The council will not be liable for any accident or damage arising from the hire of the chair". The plaintiff put the chair up in the ordinary way on a flat part of the beach, and then sat down on a chair which gave way, the canvas having come away from the top of the chair. In an action against the defendants the county court judge found that the accident was due to the negligence of the defendants, but that the defendants were exempted from liability as the plaintiff had sufficient notice of the special contract printed on the ticket.

It was held on appeal, that the ticket was a mere voucher or receipt for the money paid for the hire of the chair, and that the conditions upon which the local authority offered to hire out the chairs were those contained in the notice put up near the pile of chairs, and that as that notice contained no limitation of liability for any accident or damage arising from the hire of the chairs, the local authority were liable to the plaintiff.

(5) 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 only on certain specific terms, the other party will be bound by those terms even if in the particular transaction, he was not specifically notified of those terms.

Sometimes the circumstances of the transaction are such that, the party relying on the clause need not have given actual notice of the clause to the other party. Terms may be incorporated into a contract by course of dealing between the parties. If there are circumstances which show that the other party should have known that the contract was being made on those conditions or terms, he will be deemed to have reasonable notice of the clause even if his attention was not actually drawn to it. For a term or an exclusion clause to be held to be incorporated into a contract on grounds of previous course of dealing, the course of dealing between the parties must be regular and consistent, that is, the parties must have dealt with each other consistently and regularly on those specific terms for a long time, such that a clear pattern can be found.

In Mccutcheon v. David Macbrayne Ltd.:

The plaintiff had had his car shipped on the defendant's ship. The ship was negligently sailed into a rock and sank. Plaintiff's car was lost and he sued for the value of the car. Defendants relied on a condition in their contract of carriage, which purported to exclude liability for negligence. It was found that it was their practice to require consignors to sign "risk notes", which contained the conditions, but on this occasion, the defendant's representative forgot to ask the plaintiff to sign the risk note. The plaintiff had consigned goods on a number of previous occasions. Sometimes he was asked to sign a risk note. Sometimes he was not. He had never read the risk note. He did not know what conditions it contained.

The defendants argued that because of the knowledge gained by the plaintiff's agent on the previous occasions when he had signed the risk notes, the plaintiff should be bound by the conditions printed in the note, even though on this occasion he had not signed one.

The court held that there was no consistent course of dealing between the parties. Sometimes the plaintiff's agent was asked to sign the note, sometimes he was not. It is the consistency of a course of conduct which gives rise to the implication that in similar circumstances, a similar result should follows. Where the conduct is not consistent, there is no reason why it should produce an invariable result. Here the plaintiffs were offered an oral contract, even though they were previously offered a written contract.

In Hollier v. Rambler Motors Ltd, the court held that three or four transactions over a period of five years did not establish a "course of dealing" which could attract the operation of the principle.

In this case, the plaintiff entered into an oral contract with the defendants for the repair of his car. The plaintiff had had his car repaired or serviced by the defendants three or four times during the previous five years. On at least two of these occasions, the plaintiff had signed an invoice, which contained the clause "The Company is not responsible for damage caused by fire to customers' cars on the premises. Customers' cars are driven by staff at owner's risk". On this particular occasion, the plaintiff did not sign any such document. A fire broke out in the garage in the course of repairs and the plaintiff's car was damaged. The defendants sought to rely on this clause in the invoice.

The Court of Appeal held that they could not import the exemption clause into the oral contract made with the plaintiff. Where, however, both parties belong to a particular trade, and it can be inferred that it is well known to both parties that a particular term or condition is generally used or intended to apply to their contract, the courts will give effect to the condition, even if it is not stated. In British Crane Hire Corporation v. Ipswich Plant Hire Ltd:

Both parties were in the business of hiring out heavy earth moving equipment. The defendants were carrying out some drainage work themselves and urgently needed a drag line crane. They agreed by telephone to hire one from the plaintiffs. Charges were agreed upon, but nothing was said about the conditions of hire. Plaintiffs, in accordance with the usual practice, sent it, with a printed form to be signed by the defendants. Before the form was signed, the crane sank in marsh ground.

Under the conditions on the printed form, which were similar to those used by all firms in the plant hiring business, including the defendants themselves, the hirers were liable to indemnify the owners of the crane for the damage caused to it. Defendants argued that the condition printed on the form which they had not yet signed, was not incorporated into the contract, and therefore was not enforceable.

The court held that the usual conditions, which were in the unsigned form, were incorporated into the contract. As reasonable persons in the trade, the defendants must have known that the plaintiffs would not let out their crane, except on some such terms. Here the parties were both in the same trade and were of equal bargaining power. The defendants themselves knew that firms in the plant hiring business always imposed the same conditions with regard to the hiring out of their equipment. In fact the defendants themselves used that condition. In these circumstances, the court held that the conditions on the printed form must be held to have been incorporated into the contract, even though the form had not yet been signed.

6.4.4 Interpretation of the Clause

After it has been determined that the clause was properly incorporated in the contract, it is also necessary to go further to determine whether the exclusion clause, when interpreted,

applies to the particular loss or event which has occurred. In other words, it must be shown that the words used in the exclusion clause, when construed, cover the specific breach which has occurred.

This is essentially a question of construction or interpretation of the language of the particular exemption clause. Here, the courts adopt a defensive approach and apply special rules of interpretation when it comes to exclusion clauses, especially those found in contracts where there is a marked disparity in the bargaining power of the parties.

6.4.5 Contra Proferentem Rule

In cases involving exclusion clauses, it is the party seeking to impose the exemption who proffers the written instrument. Thus if there is any ambiguity in the words used, it is resolved against the party seeking to rely on the clause the proferens.

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 and not the party who seeks to rely on it. The case law is as instructive as it is interesting. In Wallis, Son and Wells v. Pratt and Haynes:

The defendants sold to the plaintiffs by sample a quantity of seed described as "common English sainfoin". Seed that was equal to sample was delivered, and a part of it was resold by the plaintiffs as "common English sainfoin". When it came up, it was found not to be "common English sainfoin", but "giant sainfoin", a seed which is indistinguishable but of inferior quality. The plaintiffs settled a claim brought against them by the sub-purchaser and sued to recover the amount they had paid. The defendant relied on a term in the written contract which stated: "Sellers give no warranty, express or implied, as to growth, description, or any other matters

The trial court gave judgement for the plaintiffs, but was reversed by the Court of Appeal. The decision of the Court of Appeal was reversed by the House of Lords on the grounds given by Fletcher Moulton L. J. The court held that the sellers had broken an implied condition in the Sale of Goods Act to the effect that the goods delivered should correspond exactly with the description. Since they were in breach of a condition, and not a warranty, an exemption clause designed to protect them from a breach of warranty could not avail them.

In Andrews Bros (Bournemouth) Ltd v. Singer & Co Ltd:

The plaintiff contracted with the defendants to buy some "new Singer cars". One of the cars delivered by the defendants was a used car. Plaintiffs sued for damages and the defendants sought to rely on an exclusion clause in the contract which stated: "All conditions, warranties and liabilities, implied by statute, common law or otherwise are excluded." Defendants had, however, breached their express promise to deliver "a new Singer car."

It was held that the buyers were entitled to damages because the contract was a contract for the sale of "new Singer cars" and the term "new Singer cars" was an express, and not an implied term of the contract and was, therefore, not excluded by the exclusion clause: Thus even though the sellers had covered the loophole identified in the Wallis case, by including the word "conditions", they had omitted to refer to "express terms" in the exclusion clause. They could not rely on an exemption clause which referred to terms "implied by statute, common law or otherwise" to escape liability for the breach of an express term of the contract. It was stated, per Scrutton L. J. that "if a seller desires to protect himself from liability for breaking an express term of the contract he must do it by much clearer language than that used in this contract". It has, however, been pointed out that even if the word "express" had been used in the exclusion clause, the sellers could not have relied on the exemption clause because such a clause would empty the contract of its contents.

6.4.6 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. This is because the courts consider it most unlikely that one party would agree to allow the other contracting party to exclude liability for his own negligence. Thus the courts require that very clear words must be used if a party's liability for negligence is to be excluded. The general rule, therefore, is that 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.160 The applicable rules were stated in Lord Morton's judgement in Canada Steamship Lines v. The King as follows:

1. If the clause contains language, which expressly exempts the party relying on the clause from the consequences of negligence, then effect ought to be given to it. For example, if the word "negligence" or its synonym is used in the clause.

2. If not, then the courts ought to consider whether the words are wide enough in their ordinary meaning, to cover negligence on the part of the party seeking to rely on it. In this regard, clauses excluding liability for "any act or omission"; or "any damage whatsoever, or howsoever arising", would be sufficient.

3. The court, assuming the second test is satisfied, must consider whether or not the clause may cover some kind of liability other than negligence, such as strict liability. This is a matter of construction of the contract.

Thus if the clause contains language, which expressly exempts the party relying on the clause from the consequences of negligence, then effect ought to be given to it. For example, if the word "negligence" or its synonym is used in the clause. If not, then the courts ought to consider whether the words are wide enough in their ordinary meaning, to cover negligence on the part of the party seeking to rely on it. Here the courts could go further to decide whether the clause by necessary implication, should cover negligence.

Sometimes a party is potentially liable both on the basis of negligence in torts and on the basis of strict liability in contract. Here, the courts have adopted the restrictive approach of interpreting the exclusion clause to exclude liability for breaches in contract and not liability for negligence, unless the clause expressly specifies negligence. Thus where the exemption clause does not expressly refer to negligence, and the defendant is potentially liable in 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.

In White v. John Warwick & Co:

The plaintiff contracted with the defendants for the hire of a tradesman's tricycle. The tricycle supplied under the agreement had a defective saddle. The plaintiff was thrown off the tricycle when the saddle tipped up, and was injured. Clause II of the agreement provided that the defendants were not "liable for any personal injuries to the riders of the machines hired". The plaintiff sought damages, alleging (i) that the defendants were strictly liable in contract for supplying a tricycle which was not reasonably fit for the purpose for which it was required; and (ii) were also liable for negligence, in that they had failed to take care to ensure that the tricycle supplied was in a proper state of repair and in working condition. Plaintiff claimed, that the defendant's exclusion clause, could only apply to the breach of contract liability, but it did not cover his liability in negligence.

The court, construing the clause contra proferentem, decided, that in the absence of the exemption clause, the defendant would have been liable for (a) negligence and (b) breach of an implied term that the tricycle was reasonably fit for its purpose strict liability. Since the excluding clause did not expressly refer to negligence, it was held that it only operated to exclude the second kind of liability, that is, the strict liability under the implied term and not negligence.

If, however, there is no ground of liability other than negligence to which the clause couid reasonably refer, then the courts may be willing to give effect to the clause as excluding the party's liability for negligence. In Alderslade v. Hendon Laundry Ltd:

The plaintiff sent articles of clothing to the defendant's laundry to be washed, and they were lost. Plaintiff sued and the defendants pleaded an exemption clause, which stated: "The maximum amount allowed for lost or damaged articles is 20 times the charge made for the laundering." The defendants did not expressly exclude their liability for loss caused by their negligence. The word "negligence" was not used. The issue was whether or not the clause covered loss caused by negligence.

The court held that the clause covered losses caused by the defendants' negligence. This is because loss or damage caused to clothing is more likely to be the result of negligence than anything else. Thus the clause could reasonably be construed to exclude liability for negligence, even though the word "negligence" was not expressly used. The court was also influenced by the fact that the clause in question was one limiting the liability of the company, and not one excluding its liability altogether. It has also been held that if 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.

6.4.7 Exclusion of the Liability of Third Parties

Can an exclusion clause operate to protect a third party, i.e. a person who is not a party to the contract containing the clause? This section looks at cases where an excluding or limiting clause seeks to exclude the liability of third parties, for example, where a party attempts to exclude liability for the negligence of his servants or agents. This question becomes relevant in contracts of carriage, for example, where the carrier may have effectively excluded his liability under the contract and an injured passenger seeks to obtain redress by suing the servant or agent of the carrier, whose negligence has caused him damage.

The position is quite ambivalent at common law. In Adler v. Dickson:

The plaintiff was a passenger on a vessel, travelling on a first class ticket. The ticket was a lengthy printed document containing some excluding clauses. The ticket contained a general clause that 'passengers are carried at passengers' entire risk' and a particular clause that the 'company will not be responsible for any injury whatsoever to the person of any passenger arising from or occasioned by the negligence of the company's servants'. While the plaintiff was mounting a gangway, it moved and fell and she was thrown onto the wharf from a height of 16 feet and sustained serious injuries. She brought an action for negligence, not against the company, but against the master and boatswain of the ship.

The Court of Appeal held that while the clauses protected the company from liability, they could not avail anyone else. It is important to note that the decision was based on the fact that the ticket did not, on its true construction, purport to exempt the master or boatswain. The court was divided on the issue (considered obiter) of what the position would have been if the ticket had stated that the master and boatswain were also exempted from liability.

In Scruttons Ltd v. Midland Silicones Ltd:

A drum containing chemicals was shipped in New York by X on a ship owned by the United States Lines and consigned to the order of the plaintiffs. The bill of lading contained a clause limiting the liability of the shipowners, as carriers to $500. The defendants were stevedores who had contracted with the United States Lines to act for them in London on the terms that the defendants were to have the benefit of the limiting clause in the bill of lading. The plaintiffs were ignorant of the contract between the defendants and the United States Lines. Owing to the defendants' negligence the drum of chemicals was damaged to the extent of £593. The plaintiffs sued the defendants in negligence and the defendants pleaded the limiting clause in the bill of lading.

The court held that the plaintiffs were entitled to damages and the stevedores were not entitled to rely on the limitation of liability contained in the bill of lading. The decision was

upheld by the Court of Appeal and the House of Lords. The court on appeal stated that it is a fundamental principle that only a person who is a party to a contract can sue on it and a stranger to a contract cannot take advantage of provisions of the contract even where it is clear from the contract some provision in it was intended to benefit him.

In Ghana, the general rule on privity of contract has, subject to certain exceptions, been abolished by section 5 of the Contracts Act, 1960 (Act 25). The provision, which deals with Third Party Rights, states as follows:

5(1) Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract.

(2) Subsection (1) does not apply to -...

(b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto.

Section 5(2)(b) of the Contracts Act therefore negates the doctrine of vicarious immunity in line with English decisions like Scruttons v. Midland Silicones Ltd. Thus under the Contracts Act, 1960 (Act 25), third parties cannot take advantage of an exemption clause in contracts of which they are not parties. The effect is that servants or agents of a party to the contract derive no benefit from an exemption clause in a contract made between their principals and third parties.

6.4.8 Doctrine of Fundamental Breach of Contract

It must be pointed out that with respect to the devices applied by the courts in the interpretation of exclusion clauses, most of them could be overcome by a skilful drafter. It became obvious after a while that the courts were being compelled to stretch the rules of interpretation, often engaging in hostile interpretation, resulting in the courts being accused of "misinterpretation" of the clause. There was, therefore, the need to come up with substantive rules to control the use of exclusion clauses, principal among which was the doctrine of fundamental breach of contract.

The doctrine of fundamental breach was, until the decision in Photo Production v. Securicor, the most powerful judicial tool used to control the use of exemption clauses. The doctrine was based on the concept that a party to a contract is only entitled to rely on an exclusion clause when he is carrying out his contract, not when he is deviating from it or when he is guilty of a fundamental breach of the contract, i.e., where he commits a breach which goes to the root of the contract. On this basis a substantive rule of law emerged which stipulated that certain kinds of breaches and types of contractual terms were so fundamental that no exemption clause, however widely drawn, could exclude liability. Under this doctrine, a person who had committed a breach of a fundamental term of a contract, or who had

committed a fundamental breach of the contract should not be entitled to rely on any exclusion clause in the contract to exclude his liability for such breach.

A fundamental term of contract is one which underlies the whole contract such that where it is not complied with the performance becomes totally different from that which the contract contemplated. In this sense it has been said that a fundamental term is one which is more fundamental to the contract than a condition. In simple terms, if a party delivers something totally different from what he contracted to deliver, it is not simply a breach of a condition of the contract, but it amounts to total non-performance and he is deemed to be guilty of a fundamental breach of the contract. According to the doctrine of fundamental breach he cannot rely on any exclusion clause to exclude his liability for such a fundamental breach of the contract.

In Nichol v. Godts, a seller contracted to sell to a buyer "foreign refined rape oil, warranted only equal to sample". The oil delivered corresponded with the sample, but was found not to be "foreign refined oil" at all. The court held that the seller was not protected by the exclusion clause he had inserted. Pollock C. B. remarked that "if a man contracts to buy a thing, he ought not to have something else delivered to him".

This reasoning was applied in the case of Karsales (Harrow) Ltd v. Wallis.

The case involved the sale of a Buick car on hire purchase. The buyer had inspected the car earlier on and decided to obtain it on hire purchase. The contract entered into contained a term that "no condition or warranty that the vehicle is road worthy or as to its age, condition or fitness for any purpose is given by the owner or implied herein". One night a car was left outside the defendant's premises. When the next day, the buyer inspected it, it appeared to be the Buick car in question. But it was a mere shell. Several vital engine parts were defective or missing. The cylinder head was off, all the valves were burnt, two of the pistons were broken and the car was incapable of self propulsion. The defendant refused to accept it or pay the hire purchase price. When an action was brought against him to recover the price, the defendant pleaded the state of the car. In response to the defendant's plea, the plaintiffs relied on the exemption clause.

The court held that the plaintiffs could not rely on the clause to exclude their liability here. Lord Denning stated:

It is now settled that exemption clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects... The party cannot rely on an exemption clause when he delivers something "different in kind" from that contracted for or has broken a fundamental term or contractual obligation of the contract. The general principle is that a breach which goes to the root of the contract, that is. a fundamental breach of the contract disentitles the party from relying on the exemption clause.

In Szc Hai Tong Ltd v. Rambler Cycle Ltd:

The respondents despatched goods by sea from England to Singapore. The bill of lading required that the goods must be delivered "unto order or assigns", that is, goods were to be

delivered upon the production of a bill of lading. The carrier in breach of this requirement, released the goods to a consignee who did not produce any bill of lading. Under the contract, the carrier's liability was to cease absolutely after the goods had been discharged from the ship. The carrier sought to rely on this clause to avoid liability for the breach. The Privy Council held that the carrier was liable.

The court held that even though the clause, on the face of it was comprehensive, it must at least be modified so as not to permit the shipping company from deliberately disregarding their obligations as to delivery. The carrier could not contract to deliver to the holder of the bill of lading (main purpose) and also contract that he was at liberty to deliver to someone who did not hold the bill of lading. Lord Denning pointed out that no court could allow a fundamental breach to pass unnoticed under the cloak of a general exemption clause.

In Alexander v. Railway Executive:

The plaintiff was a stage performer. Together with an assistant X, he had been on tour and he now deposited in the parcels office at Lauceston Railway station, three trunks containing certain properties. He paid 5d for each trunk, obtained a ticket for each and promised to send instructions for their dispatch. Some weeks later, and before such instructions were sent, X persuaded the parcels clerk by telling a series of lies, to allow him to open the trunks and remove several articles. X was subsequently convicted of larceny. The plaintiff sued the defendants for breach of contract and the defendants pleaded the following term: "The company is not liable for loss, misdelivery or damage to any articles, which exceed the value of £5, unless at the time of deposit, the true value and nature of the articles have been declared by the depositor and an extra charge paid." There had been no such declaration or payment.

The court held that the act of allowing an unauthorized person to have access to and remove luggage of a depositor, without production of the cloakroom ticket, constituted a fundamental breach of the contract and the railway company was therefore not protected by an exclusion clause which excluded liability for loss or misdelivery of luggage deposited with the railway. It was emphasized that the word misdelivery as used in the clause did not cover a deliberate deliver}' to the wrong person. Similarly, a ship owner, who without justification, deviated from the agreed or usual rule cannot rely on an exemption clause.

Modifications in Doctrine of Fundamental Breach

The courts over time, applied the doctrine of fundamental breach to the effect that no matter how extensive an exemption clause it could not exclude liability for a fundamental breach of contract. Thus where the breach was categorised as fundamental or going to the root of the contract, such breach totally disentitled the party in breach from relying on an exemption clause, no matter how widely drawn. Expressed in this way, the principle constituted a substantive rule of law, which stipulated that even the widest exclusion clause would not be

effective if the party relying on it has completely failed to carry out his fundamental obligations under the contract.

A number of problems were encountered in the implementation of the doctrine of fundamental breach in this way. First of all, the concept of "fundamental term" or "fundamental breach" was not altogether easy to define. When is a term said to be fundamental? A fundamental term has been defined as something more than a condition of the contract or something which underlies the whole contract such that if it is not complied with, the performance becomes something totally different from that which the contract contemplates. The difficulty with the definition, however, is that it is quite indistinguishable from the classic definition of a condition formulated by Fletcher Moulton in Wallis, Son and Wells v. Pratt and Haynes. The fluidity of the concept also made it difficult to construct a rational theory from the point of view of the practitioner. It thus became impossible to predict the court's decision and give reliable advice on the enforceability or otherwise of such clauses.

It was also further noted that the doctrine of fundamental breach in its absolute form did not differentiate between cases where the excluding or limiting clause was contained in a contract between parties or equal bargaining power and cases where intervention was necessary for the protection of the party with a weaker bargaining power. As a means of ensuring consumer protection, the doctrine achieved fairness in many cases. However, when applied to commercial transactions negotiated and concluded between parties of equal bargaining power, the doctrine was likely to upset fair bargains entered into for the reasonable allocation of contractual risks. In this sense, therefore, the doctrine ran counter to the basic principle of freedom of contract.

With time the courts declined to apply the doctrine of fundamental breach as a substantive rule of law which stipulated that no exclusion clause can operate to protect a party who is in fundamental breach of his contract, no matter how explicit the clause may be. Instead the courts adopted the position that the question whether an exemption clause is applicable where there was a fundamental breach of contract, was simply a question of the true construction of the contract. On this view, the question in each case is simply whether or not the particular clause can be construed so as to cover the breach. As a rule of construction, the issue of whether or not an exclusion clause is effective would depend on the interpretation of the particular contract before the courts and the intentions of the parties.

The case, which nailed the coffin of the application of the doctrine of fundamental breach in its absolute form was that of Photo Production v. Securicor Transport.

In this case, the plaintiffs contracted with the defendants for the provision of a night patrol service for their factory, of four visits a night, costing approximately 27 p a visit. The main perils which the parties had in mind were fire and theft. The contract was on the defendants' printed form, incorporating standard conditions, which provided as follows:

"Under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and

avoided by the exercise of due diligence on the part of the company as his employer; nor in any event, shall the company be held responsible for any loss suffered by the customer through ... fire or any cause, except in so far as such loss is solely attributable to the negligence of the company's employees acting within the course of their employment."

One Sunday night, Musgrove, an employee, while carrying out a night patrol, deliberately started a small fire, which got out of control and burned down the factory valued at £615,000.

The Court of Appeal reversed Mackenna J's holding that the clause exempted the defendants from liability and that they could not rely on the clause because of the doctrine of fundamental breach. The House of Lords overruled the decision of the Court of Appeal, and held that the application of the doctrine of fundamental breach as a substantive rule of law was no longer good law, and that in all cases, the question whether and to what extent an exclusion clause was to be applied to any breach of contract was a matter of construction of the contract.

The court also held that when parties were bargaining on equal terms, they should be free to allocate the risks as they think fit, making provision for respective risks, according to the terms they choose to agree on. The court noted further that the words of the exclusion clause were clear, and on their true construction, they covered deliberate acts as well as acts of negligence, so that the clause operated to relieve the defendants from responsibility for their breach of the implied duty to operate with due regard to the safety of the premises.

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; and in considering whether it is fair and reasonable, the court will consider whether the clause is in standard form, whether there was equality of bargaining power, the nature of the breach and so on. All in all, the court considers all the circumstances of the case, including the nature of the breach to determine whether the clause should operate to exclude the liability of the party.

Thus the application of the doctrine of fundamental breach as a substantive rule of law has now given way to a test of reasonableness. In applying the test of reasonableness the courts consider a number of relevant factors including (i) whether the contract is a commercial one entered into between parties of equal bargaining power or a consumer contract entered into between an individual and a company, where there is a wide disparity in the bargaining power of the individuals; (ii) whether there was the opportunity for the other party to insure; (iii) the level of remuneration received for service; (iv) any attempt at allocation of risk between the parties and (v) the efficiency of the arrangements.

In the interesting case of George Mitchell (Chesterhall) Ltd v. Finney Lock Seeds Ltd:

Some farmers, called George Mitchell Ltd. ordered 30 pounds of cabbage seed from Finney Lock Seeds Ltd. It was supplied. It looked just like cabbage seed. The farmers planted it over 63 acres. Six months later, there appeared out of the ground a lot of loose green leaves. They looked like cabbage leaves, but they never turned in. They were not cabbages in our common parlance because they had no hearts. The crop was useless for human consumption. Sheep or

cattle might eat it if they were hungry enough. It was commercially useless. The price of the seed was $192. The loss to the farmers was over $61,000. They claimed damages from the seed merchants. The trial judge awarded them that sum with interest. The total came to nearly $ 100,000. The seed merchants appealed. They said that they had supplied the seed on a printed clause by which liability was limited to the cost of the seed - that is $192.

The court held that the present position of the law was to apply the test of reasonableness that is, whether having regard to all the circumstances it would be fair and reasonable to allow the defendants to rely on their limitation clause. The court decided that having regard to all the relevant circumstances it would not be fair or reasonable to allow the defendants to rely on the limitation clause. The following factors were considered:

(a) The clause was not negotiated between persons of equal bargaining power. It was inserted by the seed merchants in their invoices without any negotiation with the farmers.

(b) The buyers/farmers, had no opportunity at all of knowing or discovering that the seed was not cabbage seed, whereas the sellers could and should have known that it was the wrong seed altogether. They should have tested it before putting it on the market.

(c) The buyers/farmers were not covered by insurance against this risk, nor could they insure. But, as to the seed merchants, it was possible for them to insure against this risk.

(d) Also, such a mistake as this could not have happened without serious negligence on the part of the seed merchants themselves or their suppliers, so serious that it would not be fair to allow them to escape responsibility for it.

(e) In all the circumstances, it was held that it would not be fair or reasonable to allow the seed merchants to rely on the clause to limit their liability.

In the U.K., the Unfair Contract Terms Act of 1977 and the Unfair Terms in Consumer Contracts Regulations, 1994 contain extensive rules which currently regulate the enforceability of excluding and limiting terms. These statutes however do not apply in Ghana. It is clear that there is an urgent need for legislative intervention to regulate the enforcement of exclusion clause in consumer contracts in Ghana.

Chapter Seven

PRIVITY OF CONTRACT

7.0 INTRODUCTION

In considering the enforcement of contracts, a preliminary issue which arises is whether a person who is not a party to a contract can enforce it under any circumstances. This raises the issue of privity of contract. The common law position on privity of contracts since the middle of the nineteenth century is that a person cannot be entitled to enforce or be bound by the terms of a contract to which he is not a party. The doctrine of privity of contract stipulates that only persons who are parties to a contract are entitled to take action to enforce it.

Thus under the common law doctrine of privity of contract a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it. Only those parties to the contract are bound by it and are able to enforce the contractual obligations under the contract. This means that a person who stands to gain a benefit from the contract (a third party beneficiary) is not entitled to enforce the contract even if he or she is denied the promised benefit. The rule on privity is based not only on the fact that there is no contractual relationship or privity between the third party plaintiff and the defendant, but also on the fact that the third party plaintiff has not provided any consideration for the promise which he seeks to enforce.

7.1 RULE ON PRIVITY OF CONTRACTS

The common law principle on privity of contracts is generally taken to derive from a number of key cases.

In Tweddle v. Atkinson the plaintiff was the son of the late John Tweddle. Tweddle had arranged with the late William Guy that a marriage portion would be given to the plaintiff as part of the marriage and the plaintiff sued to enforce it. The courts ruled that he could not, the rule being that a promisee cannot bring an action unless the consideration for the promise moved from him. Wightman J. opined: "[I]t is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit".

In Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd:

The appellants were manufacturers of tyres, covers, tubes etc., while the respondents were retailers of same. In a sale contract between the appellant and A. J. Dew & Co., a wholesale company, the latter undertook not only to desist from selling below the minimum price set by the former (except to members of their co-operative society, who are entitled to a maximum of 10% discount) but also to compel all retailers who purchased from them to undertake to do same. The respondents purchased from Dew & Co. under the said terms but went ahead to sell below the minimum price. The appellants sought to claim damages for the breach.

The House of Lords rejected the contention of the appellants on the grounds that there was no contract between the appellants and the respondents. This doctrine was fully and authoritatively stated by Viscount Haldane thus:

My Lords, in the law of England certain principles are fundamental. One is that only a person who is party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request.

In Taddy & Co. v. Sterious & Co.

The Plaintiffs, who were manufacturers of tobacco, sold their products subject to printed terms and conditions, fixing a minimum price below which the products were not to be sold, and containing the following proviso: "Acceptance of the goods will be deemed a contract between the purchaser and Taddy & Co. that he will observe these stipulations. In the case of a purchase by a retail dealer through a wholesale dealer, the latter shall be deemed to be the agent of Taddy & Co." The plaintiff sold to one Netten, who then, resold for his own profit to the defendants. The defendants had notice of the conditions, but sold to the public at a price below the stipulated minimum.

An action for breach brought by Taddy & Co. against the defendants was dismissed for want of contractual relationship. Swinfen Eady J. stated:

Conditions of this kind do not run with goods, and cannot be imposed upon them. Subsequent purchasers, therefore, do not take subject to any conditions which the Court can enforce. In my opinion, when the wholesale dealer sold the goods for his own profit, he was not in any sense whatever the agent of Taddy & Co., and the mere insertion in the condition of the words that he was to be deemed to be an agent could not make him one.

Even at common law the doctrine of privity of contracts has not been applied without considerable criticism and reluctance. In Darlington Borough Council v. Wiltshier Northern Ltd: Steyn J. stated: "... there is no doctrinal, logical or policy reason why the law should deny the effectiveness of a contract for the benefit of a third party where that is the expressed intention of the parties".

The doctrine of privity of contract has been criticized as being out of touch with modern trends in contract law. It has been pointed out that the doctrine does not accord with the reality of many commercial contracts: in particular, the doctrine of privity has been said to be inappropriate and unhelpful in multiple linked contracts which involve multiple parties such as construction contracts and contracts for the carriage of goods.

Date-Bah in his critique of the received law on third party contractual rights states:

Basically, the reason for the negation of third party contractual rights in the received law is founded on doctrine or dogma. It is based on the need to keep the doctrine of privity of contract intact. But there is no reason why the concept of privity of contract should be completely sacrosanct. It is believed that legal doctrine should be used as a tool for achieving socially or commercially desirable results. The advantages and disadvantages of doctrines, such as that of privity of contract, have to be continuously under evaluation and where any disadvantages of a doctrine can be averted by appropriate modification of the doctrine such a modification should be adopted. Indeed in the area of the assignment of contractual rights, English law has already recognised the need for such modification of the doctrine of privity of contract, in the interest of commercial convenience.

7.2 LEGISLATIVE CHANGES TO THE DOCTRINE OF PRIVITY -CONTRACTS ACT, 1960 (ACT 25)

In Ghana, the Contracts Act, 1960 (Act 25) has abolished the common law rule on privity of contracts and abolished the rule subject to certain exceptions. The statutory provisions which changed the received law on privity of contract are found in sections 5,6 and 10 of the Contracts Act, 1960 (Act 25).

5.(1) Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract.

(2) Subsection (1) does not apply to—

(a) a provision in a contract designed for the purpose of resale price maintenance, that is to say, a provision whereby a party agrees to pay money or otherwise render some valuable consideration to a person who is not a party to the contract in the event of the first-mentioned party selling or otherwise disposing of any goods, the subject-matter of the contract, at prices lower than those determined by or under the contract; or

(b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto.

6. Where under the provisions of section 5 of this Act a person who is not a party to a contract is entitled to enforce or rely on a provision in the contract;

(a) no variation or rescission of the contract shall prejudice that person's right to enforce or rely on the provision if he has acted to his prejudice in reliance thereon, unless he consents to the variation or rescission; and

(b) subject to paragraph (a), any party against whom the provision is sought to be enforced or relied on shall be entitled to rely on or to plead by way of defence, set-off, counterclaim or otherwise any matter relating to the contract which he could have SO relied

on or pleaded if the provision were sought to be enforced or relied upon by the other party to the contract.

10. No promise shall be invalid as a contract by reason only that the consideration therefore is supplied by someone other than the promisee.

7.3 SECTION 5 (1) OF THE CONTRACTS ACT, 1960 (ACT 25) -CONFERMENT OF BENEFIT ON THIRD PARTY

Section 5(1) of Act 25 states:

5. (1) Any provision in a contract....which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract. (Emphasis mine)

Section 5(1) of the Contracts Act recognizes an ins quaesitum tertio arising by way of contract where there is an intention to confer a benefit on a third party. A careful reading of section 5(1) of the Contracts Act reveals that the intention to confer some benefit on the third party by the parties to the contract is an important prerequisite for the enforceability of third party rights. A person who seeks to enforce some rights under a contract of which he is not a party (third party) can only do so if the contract purports to confer some benefit on him, either as a designated person or as a member of a class persons. On the face of it this means that the parties to the contract must have had the third party within their contemplation as someone or a member of a group on whom they purport to confer some right or benefit arising from the contract, and such intention or contemplation must be evident in the contract itself.

Date-Ban, in his analysis of the conditions for the applicability of section 5(1) of Act 25 states:

Section 5(1) requires that the contract must have purported to confer a benefit on the third party. This, in effect, means that the promisee must have an intention to confer a benefit on the third party, since third party beneficiary contracts usually seek to implement primarily the promisee's intention with regard to the beneficiary. It is submitted that an intent to confer a benefit on a third party must mean either an intent to confer a gift on him or an intent to discharge an obligation owed to him. Where neither of these two intents exist, there probably is no intent to confer a benefit.

In Koah v. Royal Exchange Assurance, Archer J. (as he then was) staled inter alia, that: "Here in Ghana, the Contracts Act, has changed the law with a fanfare of trumpets and has made it clear that third parties not parties to a contract can sue but if and only if and when the contract purports to confer a benefit on that third person." (Emphasis mine).

The courts, in implementing section 5(1) of Act 25, have consistently emphasized that for the third party rights to be enforceable, the benefit of the third party must have been within the contemplation of the parties to the contract. In Ejura Farms (Ghana) Ltd. and Anor. v. Hartley:

E.F.G. Ltd., the first defendants, entered into a contract with A.F.S. Ltd. The plaintiff, a stranger to the contract, guaranteed c30,000 to E.F.G. Ltd. in respect of the contract, and requested his bank, the second defendants, to act as his agent in respect of the guarantee offering the bank government stock as security. Later without the plaintiff's knowledge, the terms of the contract between the two firms were varied. E.F.G. Ltd. subsequently called for the payment of the guarantee, which the bank paid, reimbursing itself from the plaintiff's stock. The plaintiff alleged that since he was not aware of the variation of the contract, E.F.G. Ltd. had wrongfully called for the payment of the guarantee, and he wrote demanding a refund from E.F.G. Ltd. E.F.G. Ltd. refused to pay on the ground that the plaintiff was a total stranger to them in respect of the agreements between themselves, A.F.S. Ltd. and the bank. The plaintiff therefore sued E.F.G. Ltd. and the bank basing his action on conversion, or alternatively on the ground of money had and received. E.F.G. Ltd. sought to have the action against them struck out on the ground that it was frivolous and vexatious and disclosed no cause of action against them. The High Court dismissed the motion and E.F.G. Ltd. appealed. During the hearing counsel for the plaintiff conceded that it was impossible to identify any specific sum of money or chattel of the plaintiff which could form the subject-matter of conversion. He therefore rested his argument on the alternative ground of money had and received.

The court held, allowing the appeal, that there was no privity of contract between the plaintiff and the first defendants. Moreover, the plaintiff could not on the facts disclosed in the pleadings and in the said contracts seek third party benefits from the contract under the statutory exceptions contained in Part II of the Contracts Act, 1960 (Act 25), since the plaintiff was clearly not within the contemplation of the parties to the said contracts and no provision thereof conferred or purported to confer any benefits on him as a non-party whether as a designated person or as a member of a class of persons stated in section 5(1) of Act 25.

7.3.1 Incidental Beneficiaries

Section 5(1) of the Contracts Act does not allow incidental beneficiaries of contracts to sue on them. This is borne out by the Memorandum to the Contracts Bill, 1960 which states that section 5 (1) of the Act "does not apply merely because a contract in fact confers a benefit on a third person." In other words, the fact that the third party claimant stands to gain some benefit from the contract is not sufficient. It must be established that the parties to the contract in fact contemplated benefiting the third party and such intention is evident in the contract, either expressly or by necessary implication.

In Yeboah & Anor. v. Krah:

The plaintiff-respondent sought to enforce against.the alleged insurers of the first defendant, whose vehicle had negligently caused damage to the plaintiff's vehicle, a judgment obtained against the first defendant. One of the arguments put forward by the plaintiff was that the motor insurance policy conferred an enforceable benefit on persons injured by the assured. It was contended on his behalf that a third person whose claim against an assured is to be met by insurers was a person for whose benefit the contract of insurance was made. Consequently, he was entitled to enforce the contract against the insurers under section 5 (1) of the Contracts Act.

This argument was rejected in the following terms by Amissah J.A. delivering the opinion of the Court of Appeal:

A contract of insurance of the kind under consideration is not a contract for the benefit of a third person. It is a contract to indemnify the assured. Whether or not the insurers pay up on the policy, the third party is entitled to his damages as against the assured if the third party had suffered injury as a result of the negligence of the assured. The injured party's right to be compensated for his injury is against the negligent person and is wholly independent of the existence of a contract of insurance between that person and the insurer.

According to Date-Bah, "The learned judge does not probably mean to say that an injured third party would not in fact be benefited by the insurers' due performance of their obligation of indemnifying their assured. But such benefit in fact makes the third party a mere incidental beneficiary who cannot sue because there is no intent to confer a benefit on him".

In Baidoo v. Sam, where the plaintiff-appellant, a 'front man', prayed the court to set aside a transfer of a salt winning business by the principal to the defendant-respondent, Taylor J. S. C. dismissed the appeal, stating: "A fortiori in this case where there is no provision whatsoever reserved in the contract for the benefit of the plaintiff, his action in suing to have the contract to which he is a perfect stranger set aside is quite wrong".

Another case in which the effect of section 5 of the Contracts Act 1960 was considered is Koah v. Royal Exchange Assurance, which involved a "named driver clause" in a third party motor insurance policy. The import of such a clause is that the contract provides insurance cover for only a named driver, such that any other person who drives the car is outside the risk assumed by the insurers. Such other drivers are third parties to the contract between the named driver and his insurers. It was established in Koah v. Royal Exchange Assurance that a person who suffers injury as a result of a vehicular accident can only claim damages from the insurer of the vehicle if the driver of the vehicle at the time of the accident is the person named in the policy or belongs to a defined class of persons named in the policy. Thus, no third party can claim from the insurer. Similarly a third party who cannot trace his injury through a named driver cannot claim under the policy. Further, a third party claimant cannot rely on section 5 (1) of the Contracts Act to sue on a named driver policy because the contract does not purport to confer a benefit on anyone apart from the named driver.

In Koah v. Royal Exchange Assurance:

The plaintiff was awarded damages in an earlier judgment against one Kojo Arku, the named insured and owner of the vehicle, for injuries sustained from an accident negligently caused by one Braima Salaga, the driver of the vehicle at the material time. The insurance cover underwritten by the defendants indemnified only Kojo Arku against injured third parties. The plaintiff in this action sought to enforce the earlier judgment against the defendant insurance company upon which the defendants averred that the insurance policy restricted indemnity only to the named insured i.e. Kojo Arku.

It was held, dismissing the action, that since the vehicle was being driven at the material time by a person other than the insured the defendants could not be held liable; and further that section 5(1) of Act 25 could not inure to the benefit of Braima Salaga since he was neither a party to the policy nor did the terms thereof purport to confer any benefit on him. In his judgment, Archer J. (as he then was) stated:

In the first place, Kojo Arku [the named driver] who was a party to the contract cannot recover from the defendants because he was not driving at the material time. In the second place. Braima Salaga, the driver at the material time cannot recover from the defendants because he was not a party to it and moreover the contract of insurance did not purport to confer any benefit on him.

7.4 SECTION 10 OF CONTRACTS ACT

Under traditional English contract doctrine, a promisee cannot sue on a promise for which he has supplied no consideration. This rule is often expressed as follows: consideration must move from the promisee. In Tweddle v. Atkinson:

The defendants were the executors of the plaintiff's father-in-law, Guy. Guy, while alive, together with the plaintiff's father, promised to pay the plaintiff, who was then engaged to Guy's daughter, a certain amount of money each should he go ahead to marry his daughter. The plaintiff went ahead and married her but Guy defaulted and the plaintiff brought this action to recover payment from the executors of Guy's estate.

It was held, dismissing the action, that an action must be brought by the person from whom the consideration moved. No legal entitlement is conferred on a third party to an agreement, who has not provided any consideration for the promise. Thus since the plaintiff did not provide the consideration for the promise he was not entitled to sue to enforce it.

The abolition by section 5 (1) of the Contracts Act, 1960 (Act 25) of the common law rule on privity of contracts necessitated a correlative change in the common law rule which requires that consideration must move from the promisee. This change is effected by the provision in section 10 of the Contracts Act which states: "No promise shall be invalid as a contract by reason only that the consideration therefore is supplied by someone other than the promisee." Section 10 abolishes the traditional common law rule that a person cannot enforce any rights under a contract for which he has not himself provided consideration. The provision entitles a third party, who has not himself supplied consideration for a promisor's promise, to sue on it

or enforce rights under it, provided someone else has supplied consideration for the promise. Date-Bah notes that in this regard, it would seem that the word "promisee" as used in section 10 refers to the person for whose benefit a promise is made and not the person to whom the promise is made.

7.4.1 Exceptions to the Rule on Third Party Rights

The legislature in section 5(2) of the Contracts Act is careful to lay down two important exceptions to the rule on third party rights. It has been noted that the exceptions outlined in the Act were acknowledged by Lord Denning in his campaign for the recognition of third party rights as instances where third party rights should not, as a matter of principle be enforceable.

In Beswick v. Beswick, where Lord Denning argued strenuously for the recognition of third party contractual rights, he had this to say:

Where a contract is made for the benefit of a third person who has a legitimate interest to enforce it, it can be enforced by the third person in the name of the contracting party ... It is different when a third person has no legitimate interest, as when he is seeking to enforce the maintenance of prices to the public disadvantage, as in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. or when he is seeking to rely, not on any right given to him by the contract, but on an exemption clause seeking to exempt himself from his just liability. He cannot set up an exemption clause in a contract to which he was not a party.

It is interesting to note that the two exceptions statutorily recognized in section

5(2) (a) and (b) of the Ghana Contracts Act exactly reflect the sentiments expressed by Lord Denning above. The Act takes into account important public policy considerations and imposes a bar on the enforcement of resale price maintenance clauses against third parties and also prohibits third party reliance on exemption clauses for immunity from liability.

Enforcement of Resale Price Maintenance Agreements

Section 5(2) of the Contracts Act provides: (2) Subsection (1) does not apply to

(a) a provision in a contract designed for the purpose of resale price maintenance, that is to say, a provision whereby a party agrees to pay money or otherwise render some valuable consideration to a person who is not a party to the contract in the event of the first-mentioned party selling or otherwise disposing of any goods, the subject-matter of the contract, at prices lower than those determined by or under the contract; or

(b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto."

Section 5(2) of the Contracts Act provides that the general rule on enforceability of third party rights in section 5(1) does not apply to any provision in a contract designed for the purpose of resale price maintenance. This refers to a provision whereby a party agrees to pay money to a person who is not a party to the contract in the event that the first-mentioned party sells any goods which are the subject-matter of the contract, at prices lower than those determined or fixed in the contract. The Contracts Act, for policy reasons, disallows the application of the rule in section 5(1) to resale price maintenance clauses in sale contracts. Thus according to section 5(2), where a contract of sale, often entered into between a manufacturer and wholesaler, contains a provision which binds the wholesaler as well as retailers who buy from the wholesaler (third parties) not to sell the product below a certain fixed price, the manufacturer will not be entitled to sue any third party retailer who sells the goods in breach of that resale price maintenance clause in the contract of which he (the third party retailer) is not a party. This exception is based on economic policy which frowns on price fixing and other activities which tend to be restrictive of competition. The purpose of section 5(2)(a) is to restrict the enforceability of resale price maintenance agreements to the actual parties to the agreement. Thus third parties are precluded from suing to enforce agreements in restraint of trade and may also not be sued on such agreements.

A clear example of resale price maintenance agreement is found in the case of Dunlop Pneumatic Tyre Co. v. Selfridge & Co. In this case:

The plaintiff manufacturer of tyres entered into a contract with a dealer in tyres under which the dealer undertook, among other things, not to sell tyres to certain kinds of customers at prices below the current list prices of the manufacturer. The dealer could, however, sell at a discount to certain classes of customers, which included the defendant in the case, provided that the dealer obtained from such customers an undertaking not to sell the plaintiff's products to private customers at prices below the plaintiff's list prices. The action was brought on the contract between the dealer and his customer, the plaintiff maintaining that the defendant customer had broken his undertaking not to sell the plaintiff's products below his list prices. The contract between the dealer and the defendant customer provided that, in such situations, the defendant was to pay to the plaintiff £5 for each product of the plaintiff's sold below the list price.

The plaintiff was denied recovery in that case on the general ground that there was no privity of contract between the parties. If section 5 of the Contracts Act were to be applied to these facts, the result would have been the same, since it falls squarely within the exception in section 5(2) of the Act.

Third Party Rights and Exemption Clauses - Section 5(2)(b)

Section 5(2)(b) of the Contracts Act, 1960 (Act 25) provides that the general rule on the enforceability of third party rights does not apply to a provision in a contract purporting to exclude or restrict the liability of a person who is not a party to the contract. Thus under section 5(2)(b) a person who is not a party to a contract cannot invoke section 5(1) to rely on an exemption clause in that contract to escape liability.

The illustration in the Memorandum to the Contracts Act states as follows:

A sends goods by sea to England. The contract of sea carriage provides that the ship owner and his servants and agents are not to be liable for damages to- the goods except in certain circumstances. Any servant or agent of the ship owner who negligently damages the goods cannot protect himself from liability in tort by relying on this clause at common law (See, Ardler v. Dickson [1955] 1 Q.B. 158) and section 5(1)(b) preserves this rule.

The rule makes it impossible for a third party to rely on an exemption clause in a contract of which he is not a party, to escape liability. Section 5(2)(b) thus unequivocally abolishes the so-called principle of vicarious immunity, which has been upheld in a number of English cases.

7.5 RELATED PROVISIONS - SECTION 6

Section 6 of the Contracts Act states:

(6) Where under the provisions of section 5 of this Act a person who is not a party to a contract is entitled to enforce or rely on a provision in the contract

(a) no variation or rescission of the contract shall prejudice that person's right to enforce. or rely on the provision if he has acted to his prejudice in reliance thereon, unless he consents to the variation or rescission; and

(b) subject to paragraph (a), any party against whom the provision is sought to be enforced or relied on shall be entitled to rely on or to plead by way of defence, set-off, counterclaim or otherwise any matter relating to the contract which he could have so relied on or pleaded if the provision were sought to be enforced or relied upon by the other party to the contract"

The import of section 6(a), which is a corollary of section 5, is that where a third party has an enforceable right under a contract by virtue of section 5(1), such right cannot be taken away by the two parties to the contract agreeing to vary or rescind the contract, once the third party has acted to his prejudice in reliance on the contract, unless the third party consents to such variation or rescission. Thus even though third party rights are subject to the right of the contractual parties to amend or vary the terms of the contract, such amendments and variations cannot be made to prejudice the interest of the third party if he has already acted on the original terms of the contract to his detriment, except with the consent of the third party.

Section 6 (b) reflects the derivative nature of the rights of third party beneficiaries and stipulates that the legal position of third parties cannot be better than that of the promisee under the contract since the third party derives his legal rights from the promise made to the promisee. Consequently, 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. The Memorandum states: "For example fraud or misrepresentation could be pleaded against the third party under section 6(b)".

Chapter Eight

MISTAKE

8.0 INTRODUCTION

The topic of "vitiating factors" relates to factors which could negate the apparent consent of one or both parties to a contract and thus render an apparent contract unenforceable in some respect. Thus "vitiating factors" are simply legally recognized factors, which make an apparent contract lose its validity when it comes to its enforcement. In contract law, 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. The vitiating factors which are recognized by the law are mistake, misrepresentation, duress, undue influence and unconscionability.

A contract which is unenforceable could be void ab initio or voidable in the sense that the contract could be avoided or rescinded by one party under certain circumstances. A void contract is a complete legal nullity, does not confer any rights or impose any obligations on the parties and has retrospective effect. A voidable contract, however, is one which is valid unless and until it is avoided or set aside by the party entitled to do so.

8.1 MISTAKE

In contract law, to be mistaken is to be wrong as to a matter of fact that influences the formation or the making of a contract. It has been noted that the word "mistake" as used in contract law has a more restricted meaning.than it has in ordinary parlance or common speech in that the courts will not declare a contract void simply because one or both of the parties claim to be mistaken about some fact or simply because one party claims he would not have entered the contract if he had known the true facts.

The basic question which arises under the law on mistake therefore is this: If one or both of the parties enter into a contract under some misunderstanding or mistaken assumption, in what circumstances will the court intervene to hold the contract void and unenforceable on grounds of the mistake? In other words, when does mistake on the part of one or both parties have any legal effect on a concluded contract?

8.1 1 Legal Effect of Mistake

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. This means that the assumption made by the parties must have been factually wrong at the time the contract was concluded. This point is clearly illustrated in the case of Amalgamated Investment & Property Ltd. v. John Walker, the facts of which were as follows:

The plaintiffs were negotiating to buy a commercial property from the defendants. Both parties knew that the plaintiffs intended to develop the property and to do that they needed to obtain planning permission from the authorities. The parties also knew that if the property had been listed as a building of special or historic interest, development would be restricted and the value of the property would be considerably less.

On August 14, before the contract of sale was concluded, the plaintiffs asked the defendants whether the building was listed as a special building of historic interest. The defendants answered in the negative which was true at the time. The contract was later signed on August 25. On this date the property had not in fact been listed as a building of special interest. Unknown to both parties, the government had it in mind to do so. On August 26, a day after the contract was signed, the building was placed on a statutory list as a building of special and historic interest and government officials informed defendants of this decision. The building was worth much less once it had been listed and the plaintiffs brought the action seeking to have the contract rescinded on the ground of common mistake.

It was held that in determining the effect of the mistake on this contract, the critical date was the date on which the contract was signed i.e. August 25. 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.

Before looking at the various principles which regulate the effect of mistake on contracts, it is important to note that mistake operates differently at common law and in equity.

8.1.2 Effect of Mistake at Common Law

At common law mistake operates so as to negate or in some cases to nullify consent. The legal effect of mistake at common law, therefore, is to render the contract void ab initio. A void contract is a complete legal nullity, i.e. it confers no rights and imposes no duties on the parties. Thus 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.

In view of this far reaching effect of mistake on contracts at common law the operation of the doctrine of mistake is confined within very narrow limits. The common law considers that it is in the interest of commercial convenience that as much as possible apparent contracts should be upheld and enforced. Thus, the courts are generally most reluctant to declare a contract void on grounds of mistake and have developed very stringent conditions which must be established before an alleged mistake will be deemed to operate to render the contract void.

8.1.3 Effect of Mistake in Equity

In equity, mistake has a wider scope but its effect is less drastic. In fact equity will give effect to mistake in circumstances where the common law will not. In equity, mistake operates in the following ways:

1. Mistake may be a defence in an action for specific performance (i.e. Mistake may be a reason for the refusal of a request for specific performance).

2. Mistake may also entitle the parties to have a written contract rectified (Rectification).

3. Mistake may also be a ground for the rescission of a contract.

8.2 DIFFERENT KINDS OF MISTAKE

There are three main kinds of mistake which are recognised at common law: (i) mutual mistake; (ii) unilateral mistake; and (iii) common mistake. Mutual mistake arises where the two parties make different mistakes. In unilateral mistake only one party makes a mistake, while in common mistake both parties make the same mistake.

8.2.1 Mutual Mistake

Mutual mistake is said to exist 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. Here, the two parties, unknown to each other are at cross purposes, in that, each party is mistaken as to the other party's intention, even though neither party realizes that their respective promises have been misunderstood. An example of mutual mistake could exist where A offers to sell his car to B, intending to sell his Mercedes Benz to B, but B accepts the offer, thinking that A intends to sell him his BMW car. The question is this: Is there a contract, if so, what is the subject matter of the contract of sale?

In deciding whether or not a contract should be deemed to exist, the courts apply the objective test to determine whether an agreement can be inferred from the facts or not.

8.2.2 Unilateral Mistake - Mistake as to the Identity of a Contracting Party

A unilateral mistake exists where only one party to the contract is mistaken. The other party is usually aware of the first party's mistake and makes no mistake himself. The most common example of unilateral mistake is mistake as to the identity of a contracting party, where one party (A) contracts with another (B), believing that the party with whom he contracts (B) is an entirely different person (C). Issues relating to mistake as to identity arise 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). In simple terms,

mistake as to identity arises where A contracts with B, believing that B is C and the question is whether the courts should enforce the resulting contract or declare it void on grounds of the mistake.

8.2.3 Common Mistake

Common mistake exists where even though there is genuine agreement between the parties, the parties have both contracted in the mistaken belief that some fact which is the basis of the contract is true when in fact it is not. This kind of mistake is common to both parties, that is, both parties make the same mistake about the circumstances surrounding the transaction. For example, both parties could make the same mistake about the value or quality of the subject matter of the contract.

In common mistake, there is no question of lack of agreement between the parties. The exact offer made by A is accepted by B. The contention however is that since both parties are mistaken about some fact which is the basis of their contract, that mistake robs the contract of its efficacy and the contract must therefore be declared void by reason of the mistake." Where both parties have entered into an agreement on a fundamental assumption of fact which turns out to be false, the courts generally apply the objective test to determine whether the mistake is sufficiently fundamental as to make the contract void on grounds of mistake.

8.2.4 Mutual Mistake or Mistake as to the Terms of the Contract

Generally, it follows from the essential nature of a contract that if there is no genuine agreement between the parties, or if the offer does not correspond to the acceptance, no contract should ensue. Thus if the offeree thinks that the thing being offered is different from what is in fact being offered, or that the terms being proposed by the offeror are different from those actually proposed, and he accepts on that mistaken assumption, it is clear that on the face of it there is no genuine agreement between the parties, because the offer which was accepted by the offeree is not the offer that was made by the offeror.

However, the intentions of the parties to the contract are objectively determined. Thus a contract will be deemed to exist if an agreement can be inferred from the objective facts even if the parties actually intended different things. In other words, the court will apply the objective test, i.e., the court will determine the intentions of the parties by considering their words and conduct as they would have been understood by a reasonable man and enforce the contract in that reasonable sense even if the actual intentions of the parties were different.

In Smith v. Hughes, Blackburn J. summed up the position of the law as follows:

If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the 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.

In cases where mutual mistake is alleged, if the party has exhibited all the outward signs of agreement to the proposed terms, he will be deemed to be bound by the contract to which he has manifestly expressed his assent even if his actual intentions were different. Thus the application of the objective test could prevent a party who has entered into a contract from setting up his mistake as a defence to an action brought against him for breach. In Tamplin v. James, it was held that if a reasonable man would have understood the contract in a certain sense then despite the party's alleged "mistake", he would be held bound by the contract in that reasonable sense.

In spite of the overriding principle on the objective determination of the existence of contract, there are certain situations where, even though the parties appear to have agreed, mutual mistake or mistake as to the terms of the contract may operate to negate consent and render the contract void.

Where Words used are Patently Ambiguous or Rendered Ambiguous by Surrounding Circumstances

Where the terms of the contract suffer from such latent ambiguity that it is impossible to determine objectively what the contract relates to, and the offer is innocently accepted in a sense different from that which was intended by the offeror, the court may be compelled to declare the contract void on the ground that there is no correspondence between the offer and the acceptance.

By way of illustration, two things may have the same name, and A makes an offer to B, using that name in reference to one of those things. B accepts the offer thinking that A is referring to the other. Provided Ihere is nothing in the terms of the contract to establish which of the two things is the subject matter of the contract, the contract may be held to be void on grounds of mutual mistake. Similarly, if A makes an offer to B, which is ambiguous in its terms, or is rendered ambiguous by the surrounding circumstances, and B innocently accepts the offer in a sense different from that which was intended, unless an objective interpretation can be determined, the contract may be held unenforceable on grounds of B's mistake.

In Scriven Bros. v. Hindley & Co:

The plaintiffs instructed an auctioneer to sell certain bales of hemp and tow, which bore the same shipping mark and were described in the catalogue as so many bales in different lots with no indication of the difference in their contents. The defendant's buyer bid for tow, believing it to be hemp. The bid was accepted by the auctioneer without realizing the defendant's mistake. The plaintiffs sued to enforce the contract and the defendant pleaded mistake.

It was clear that the offer and acceptance did not correspond. The plaintiffs intended to sell tow, while the defendant's buyer, misled by the description in the plaintiff's catalogue, intended to bid for hemp. Owing to the ambiguity of the circumstances it could not be

affirmed which commodity was the subject of the contract. Therefore there was no binding contract.

Where the Offeree knows that the Offeror's offer does not represent his Real Intentions

Where due to a mistake in the expression of the offer, the offer does not contain the real intention of the party making it and the other party knows of this mistake and seeks to take advantage of it, the law will not recognize that a contract has come into existence. In other words, the law will not allow the offeree to accept an offer which he knows does not contain the real intention of the offeror.

In Hartog v. Colin & Shields, the case involved a contract for the sale of hare skins. Previous negotiations between the parties had been carried on by reference to the price "per piece", as was customary in the trade. However, in quoting the price eventually, the defendant mistakenly quoted the price "per pound", making the skins much cheaper. The plaintiff promptly accepted and sought to enforce the contract. It was held that the plaintiff could not reasonably have supposed that the offer as stated contained the offeror's real intention. Here the plaintiff realized the mistake and sought to take advantage of it. The court, however, held that the law would not allow a party to snap at an offer, which he knows does not contain the real intention of the other party. There was therefore no contract.

Finally it must be emphasized that where the parties are agreed from all outward appearances on the same terms and on the same subject matter, even if both parties are mistaken in their innermost minds about the quality of the subject matter, the contract remains valid.

8.2.5 Unilateral Mistake - Mistake as to the Identity of a Contracting Party

As stated, unilateral mistake arises where only one party to the contract is mistaken. The other party is aware of the first party's mistake and makes no mistake himself. The most common example of unilateral mistake is mistake as to the identity of a contracting party. Mistake as to identity 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) and the question is whether the courts should enforce the resulting contract or declare it void on grounds of the mistake as to identity.

The starting point is the general and obvious rule that where a person makes an offer to a particular person, it can only be accepted by the person to whom it is addressed. Another person cannot accept the offer and constitute himself a contracting party with the offeror who never intended to contract with him.

In Boulton v. Jones:

Boulton had just taken over the business of one Brocklehurst, with whom Jones was used to dealing. Jones had a right of set-off against Brocklehurst. Jones sent an order for goods addressed to Brocklehurst, intending to set the price off against the debt owed him by

Brocklehurst. Boulton received the order and supplied the goods to Jones without informing him that the business had changed hands. Jones refused to pay for the goods and Boulton sued.

The court held that since Jones' offer was addressed to Brocklehurst personally, Boulton could not set himself up as a contracting party with Jones. There was no contract between Jones and Boulton and, therefore, Jones was not liable for the price of the goods. It must be noted that there was a personal element in the contract because of Jones' right of set-off against Brocklehurst personally.

8.2.6 Mistake as to Identity Induced by the Fraud of One Party

The typical situation in which mistake as to identity arises, however, is where a dishonest person (a rogue), induces an owner of goods to sell them to him, by fraudulently misrepresenting his identity i.e. impersonating some other person. The rogue does not pay for the goods but promptly resells them to an innocent third party. Usually the third party pays for the goods in good faith, quite unaware of the dishonest way in which the rogue acquired them. The owner subsequently discovers that the goods are in the possession of the third party and seeks to recover them from him.

The central question for the courts to determine is whether the apparent contract concluded between the owner and the rogue is void on grounds of mistake as to identity or merely voidable by reason of the fraudulent misrepresentation of the rogue (arising from the impersonation).

Typically, in order to resolve this issue the courts would have to consider one of the following two scenarios.

Where Mistake as to Identity is Established

If it is established that there was a mistake as to the identity of the contracting party the resulting contract is deemed to be void. This means that the rogue does not acquire any legal title or right of ownership to the goods. In accordance with the nemo dat quod non habet rule, (which stipulates that a person cannot transfer to another a better title than he himself possesses) it follows that if the rogue acquired no title to the goods, then he could not legally have transferred any title to the innocent third party even though the third party gave value and acted in good faith and without notice of the rogue's lack of title.

The conclusion would therefore be that the third party obtained no title to the goods and the original owner would be entitled to recover the goods from the third party. The third party's only remedy would be to find the rogue if he can and sue him to recover his money.

Where Mistake as to Identity of Contracting Party is not Established

If mistake as to identity cannot be established, the resulting contract will not be deemed to be void, but merely voidable on grounds of the rogue's fraudulent misrepresentation. A voidable

contract is one which is valid unless and until it is disaffirmed or avoided. In this case the rogue will be deemed to have obtained title to the goods even though the title is voidable. If the owner were to take steps to avoid the contract, the rogue's title would be rendered void and the rogue would thereafter not be able to pass on a valid title. However, if the rogue's title has not yet been avoided by the time he sells the goods to the third party, the rogue passes on a valid title to the third party. This entitles the third party to keep the goods and the owner cannot thereafter recover the goods from the third party. The deciding factor, therefore, is whether or not mistake as to identity of the contracting party can be established.

8.2.7 Establishing Mistake as to Identity of Contracting Party

In all cases involving an alleged mistake as to the identity of the contracting party, the courts have to determine first of all, the status of the contract entered into between the owner of the goods and the rogue. The question is whether the contract is void for mistake or simply voidable for fraudulent misrepresentation. This depends on whether mistake as to the identity of the contracting party can be established.

A number of guidelines have been proposed for determining whether mistake as to identity can be established. According to Cheshire, Fifoot and Furmston's Law of Contract, to prove mistake as to the identity of the contracting party, the party pleading the mistake must generally prove the following:

(i) That he intended to deal with some person other than the person with whom he has apparently made a contract and the latter was aware of this intention. (ii) That at the time of entering into the contract, he regarded the identity of the other contracting party as a matter of crucial importance. (iii) Thirdly, that he took reasonable steps to verify the identity of that party.

First of all, it must be shown that the offeror had in mind a definite, identifiable person, other than the person who accepted the offer, with whom he intended to contract. In other words, the party who alleges to have made a mistake as to identity of the other contracting party must show, not only that he did not intend to deal with the person with whom he contracted, but that he actually had in mind a definite and identifiable person, other than the person with whom he contracted, with whom he intended to deal. This requirement presupposes a confusion between two distinct entities. The import of this distinction is that it must be shown that A contracted with B, believing that B was C; not simply that A contracted with B, believing wrongly that B was solvent or creditworthy, even if B induced that belief. In other words the mistake must be related to the identity of the contracting party and not his attributes.28 It is only a mistake as to the very identity of the contracting party that will render the contract void.

In the case of Cundy v. Lindsay:

The rogue, named Blenkarn, hired a room on 37 Wood Street, Cheapside, London, close to a well-known and reputable firm called Blenkiron & Co., which carried on business at 123

Wood Street, Cheapside, London. Blenkarn wrote a letter to the owner of a business, Lindsay, ordering a large quantity of handkerchiefs and signing his name such that it appeared as Blenkiron & Co. It was read as such by the Lindsay firm, who knew of Blenkiron & Co. as a reputable firm. The handkerchiefs were despatched to Blenkiron & Co., using the rogue's address. The rogue took possession of them and sold them to Cundy, who paid for them in full. Upon discovering the fraud, the owners, Lindsay, sued Cundy to recover the goods or their value.

The issue was whether the contract between the owners (Lindsay) and Blenkarn (the rogue) was void on grounds of mistake as to identity. This depended on whether it could be established that Lindsay intended to deal with a definite, identifiable party other than the rogue Blenkarn.

The House of Lords held that Lindsay intended to deal with the well-known and reputable firm of Blenkiron & Co., of whose existence they were aware and not Blenkarn, of whom they had never heard. This was a clear case of an offer made by A to B, which was accepted by C, with whom A never intended to deal. Here there was an identifiable and definite person other than the rogue, with whom the owners intended to contract, which was the company, Blenkiron & Co. Lord Cairns stated:

Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds, never, even for an instant of time rested upon him, arid as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever.

The decision in Cundy v. Lindsay must be contrasted with that of King's Norton Metal Co. Ltd. v. Edridge, Merritt & Co. Ltd, the facts of which were as follows:

The rogue, one Wallis, wrote to the King's Norton Co., the owners, on letterheads purporting to be that of a company named Hallam & Co. The rogue made false representations that the company owned a large factory and had properties in several countries. He then ordered from King's Norton a quantity of goods, which were sent by King's Norton to the address of the rogue's fictional company, Hallam & Co. The rogue took possession of the goods, never paid for them, but sold them to an innocent purchaser. The issue was whether King's Norton had entered the contract under a mistake as to the identity of the contracting party. Again, this depended on whether there was a definite, identifiable person, other than the rogue's company, with whom King's Norton intended to contract.

The court held that the case must be distinguished from Cundy v. Lindsay. In this case the court held that King's Norton intended to deal with whoever was the writer of the letters (the rogue). Here the rogue had not misrepresented himself to be someone else but had merely misrepresented his attributes. There was therefore only one candidate, the rogue, who posed under the alias of "Hallam & Co". "Hallam & Co", did not exist, and therefore there was no other definite, identifiable entity with whom the owners intended to contract. The mistake was not one as to identity, but merely as to attribute.

It was held, therefore, that there was a contract between the owners and the rogue, even though the contract was voidable by reason of the rogue's fraudulent misrepresentation. The rogue therefore acquired title, (which was voidable) and therefore passed on a valid title to the third party. The court stated that if it could have been shown that there was a separate entity called Hallam & Co. and another entity called Wallis, then the case might have come within the ambit of Cundy v. Lindsay.

Contracts Inter Praesentes - Where the Parties Contract in Each Others' Presence

So far the cases on mistake as to identity looked at involve contracts that were concluded through the post, with the parties at a distance from each other. Where the parties transact in each others' presence, it is more difficult to establish that the plaintiff intended to contract with some person other than the one who was physically present.

Where the parties deal with each other face to face, 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 none else.

In Philip v.Brooks:

A man named North, called in person at the plaintiff's shop and selected some pearls and a ring. He then wrote out a cheque for £300, saying, "I am Sir George Bullough" and gave an address. The plaintiffs knew of one Sir George Bullough as a person of high standing and credibility. They checked the directory to confirm that the address given by the man was indeed the address of Sir George Bullough. Upon confirming that it was, the plaintiffs allowed North to take the ring away and accepted his cheque. North then pledged the ring to the defendants for £350. The cheque was dishonoured. The plaintiffs sued the defendants for the return of the ring, alleging that in the circumstances they never intended to sell the goods to North, but rather to Sir George Bullough.

The court held that the presumption applied to these facts and held that even though the plaintiffs believed that the person to whom they handed the ring was Sir George Bullough, nevertheless they intended to contract with the person who came into their shop, who they identified by sight and hearing. The contract thus made was not void, but simply voidable on grounds of fraudulent misrepresentation. Thus the rogue obtained a title which was valid until disaffirmed by the plaintiffs. Since the plaintiffs had not avoided the rogue's title by the time he sold the goods to the third party, the latter obtained a valid title to them, and the owners could not recover the goods from the third party.

In Ingram v. Little the facts were as follows:

A rogue, calling himself Hutchinson, went to the residence of the plaintiffs and negotiated for the purchase of their car, which they had advertised for sale. The plaintiffs agreed to sell it to him for £717 and the rogue proposed to pay by cheque. The plaintiffs declined to sell the car to the rogue at that point, stating that they would not under any circumstances accept a

cheque. The rogue then told the plaintiffs that he was P. G. M. Hutchinson, with business interests in Guildford and gave them his home address. On hearing this one of the plaintiffs slipped out of the room, consulted the telephone directory to check that there was such a person as P.G.M. Hutchinson and to verify that the address given by the rogue was in fact the address of P. G. M. Hutchinson. Being reassured, the plaintiffs, who had never previously heard of P. G. M. Hutchinson, agreed to sell the car to the rogue. The rogue, who was not P.G.M. Hutchinson, later sold the car to the defendant, and disappeared.

The court held in this case that on the facts, the plaintiffs intended to deal with P. G. M. Hutchinson only and not the rogue. Therefore the rogue could not accept the offer. The transaction was said to be in two stages. Up until the time when the rogue produced the cheque book, there was no contract between the plaintiffs and the rogue for the sale of the car. It was noted that even if there was a contract before this stage that contract was rescinded when the plaintiffs declined to accept the cheque in payment. According to the majority, when the negotiations resumed, the identity of the buyer became crucial and the plaintiffs only concluded the sale after they had ascertained that the buyer was in fact P.G.M. Hutchinson, and not simply the man who was physically present. It was held therefore that the contract between the plaintiffs and the rogue was void on grounds of mistake as to identity and the rogue acquired no title to the car and transferred no title to the third party, who was required to return the car to the owner.

It is interesting to note, however, that in Lewis v. Averay, which is the most recent case on the issue, the court declined to follow the decision in Ingram v. Little and applied the reasoning in Phillips v. Brooks.

In Lewis v. Averay:

A rogue, posing as Richard Greene, the well known film actor, called on the plaintiff and offered to buy his car which had been advertized for sale. The plaintiff accepted the offer and was given a cheque, signed R. A. Green. The plaintiff, afraid that the cheque might be worthless, refused to allow the rogue to take the car away immediately. The rogue, in order to prove that he was in fact Richard Greene, produced a special pass of admission to Pinewood Studios bearing an official stamp. Satisfied with this, the plaintiff handed over the log book and allowed the rogue to take the car away. The cheque, which had been stolen, was dishonoured and the rogue sold the car to the defendant. The plaintiff brought the action to recover the car from the third party who bought it from the rogue.

The court held that the action must fail. The court applied the presumption that where the parties transact face to face, the offeror is deemed to have intended to contract with the person who was physically present and no one else. The presumption was not rebutted by the facts of the case. The contract between the owner and the rogue was, therefore, not void for mistake, but simply voidable by reason of the rogue's fraudulent misrepresentation and, therefore, the third party obtained a valid title.

Rebuttal of Presumption in Contracts Inter Praesentes

There are certain circumstances in which the law recognizes that the presumption which applies in face to face contracts is effectively rebutted.

Where the rogue dishonestly claims that he is acting as an agent for another person (a supposed principal) the presumption which applies in contracts inter praesentes will be deemed to be rebutted. In such a situation, there is no contract between the owner and the rogue, even though they transact in each others' presence, because the contract is not purported to be made with the rogue himself but with the supposed principal. There is also no contract with the supposed principal since the rogue in fact had no authority to act on his behalf. The apparent contract made, even though the parties transacted face to face, is therefore void. In Hardman v. Booth:

The plaintiff visited.the offices of Gandell & Sons and met one Edward Gandell, the rogue. Edward Gandell was not a member of the firm of Gandell & Sons, and had no authority to act on its behalf. He convinced the plaintiff that he was authorized to act as agent for the firm and gave the plaintiff an order in the name of the company. The plaintiff supplied the goods, which were intercepted by the rogue and sold to an innocent third party. Plaintiff sued to recover the goods from the third party.

The court held that there was no contract between the owner and Edward Gandell himself since the contract was not purported to be made with him personally, but rather with Gandell & Sons, the supposed principal. There was also no contract between the owner and Gandell & Sons because Edward Gandell had no authority to bind the firm in any way. Therefore the apparent contract made between Edward Gandell and the owners was void even though the parties transacted face to face. The plaintiffs could therefore recover the goods from the third party, since they did not acquire any title to the goods.

In Lake v. Simmons:

The appellant, a jeweller, was insured with a company against loss by theft, with the exception of jewellery "entrusted to a customer". A woman named Esme Ellison, posing as the wife of a wealthy customer, one Van der Borgh, made a few purchases from the appellant to inspire confidence, and then was allowed to take away two pearl necklets of considerable value "on approval" for "her husband". She made away with the jewellery and the question arose whether the loss was covered by the insurance policy, or came within the exception clause.

The court held, that even though the parties transacted inter praesentes, no contract ensued between them because the plaintiff was made to believe he was dealing with a different person, and it was on that footing alone that he parted with the goods. The House of Lords therefore held that the loss did not fall within the exception clause because there was no contract between the appellant and the woman who impersonated the wife of their customer. The court distinguished the facts of this case from those of Phillips v. Brooks Ltd.

The more recent decision of the House of Lords in Shogun Finance Limited

v. Hudson attempts to address the difficult problem of the effect of fraudulent misrepresentation by a rogue or dishonest person on the formation of a contract. The House of Lords in this case, took the opportunity to conduct a comprehensive review of the state of the law on unilateral mistake, examining in great detail the judicial thinking in some of the key decisions on the impact of fraudulent misrepresentation on contracts made inter praesentes and otherwise. In Shogun Finance Limited v. Hudson:

A rogue applied to buy a Mitsubishi Shogun on hire purchase. The rogue gave his name as Mr. Patel and produced Mr Patel's driving license. Although the negotiations relating to the transaction were held with the car dealer, the written contract in which the false name was given, was signed with the finance company. The finance company did a credit check on Mr Patel. Finding no problems, the company allowed the rogue to drive the car away. Then the rogue sold the car to Mr. Norman Hudson. Under Section 27 of the Hire Purchase Act, 1964, a non-trade buyer of a car who buys in good faith from a hirer under a hire purchase agreement becomes the owner. Thus Mr. Hudson would have been the owner of the car if the hire purchase agreement entered into between the rogue and Shogun Finance was valid. Shogun Finance argued that the hire purchase agreement was not valid on the basis that there was a mistake as to identity. Shogun Finance claimed against Mr Hudson for conversion.

The majority of the House of Lords held that there was no contract of hire purchase between Shogun Finance and the rogue, so the Mr. Hudson was not the owner of the car under section 27 of the Hire Purchase Act, 1964. The finance company was entitled to avoid the contract on the basis of unilateral mistake, because it was clear that the finance company only intended to deal with the person whom, after carrying out checks, it deemed to be creditworthy, and that person was the person who was named in the written hire purchase contract, and not the rogue, who was posing as Mr. Patel. The decision seemed to follow the principle in Cundy v. Lindsay that where the contract is not made inter praesentes, there is no presumption that the owner intended to sell to the rogue, where identity is of key importance to contracting. The majority held that this was not a contract inter praesentes, since the apparent contract was formed with the finance company and not the car dealer with whom the negotiations were made. The third party was, therefore, deprived of the protection afforded under section 27 of the Hire Purchase Act, 1964.

The dissenting judgments of Lord Nicholls and Lord Millet are of particular interest in that they tried to argue, quite strongly, for the complete overruling of Cundy v. Lindsay, to pave the way for the application of the presumption that one intends to contract with the person with whom one is dealing to contracts made in writing as well as contracts inter praesentes. The dissenting judges advocated the adoption of a general principle to the effect that where a rogue obtains goods from an owner by fraudulent misrepresentation (whether it is a misrepresentation of his attributes or of his identity; and whether the fraud is perpetuated "face to face" or not) the contract between the rogue and the owner should be deemed to be voidable rather than immediately void. The dissenting judges expressed the opinion that such a position would be more in line with the recent trends in judicial thinking and would accord belter with basic principles regarding the effect of fraud on the formation of contracts.

In all the cases involving fraudulent misrepresentation and mistake as to identity the ultimate question for the law is: which of the two -innocent' parties should bear the loss occasioned by the fraud: the owner of the goods or the third party purchaser? The minority in Shogun Finance Ltd v. Hudson expressed the view that as a matter of legal policy it would be more appropriate for the loss to be borne by the owner, be.ng the one who takes the risks inherent in parting with his goods without payment, rather than the third party purchaser.

8.2.8 Common Mistake

Common mistake arises where the two parties have in fact reached agreement, but that agreement is based upon a fundamental mistaken assumption which is shared by both parties. This kind of mistake exists where parties have both contracted in the mistaken belief that some fact which is the basis of the contract is true when in fact it is not. Here both parties make the same mistake about the circumstances surrounding the transaction. For example, A offers some pearls to B for sale both part.es wrongly believing them to be genuine pearls. B now contends that since the agreement was based on the common mistaken belief that the pearls were real the agreement must not be allowed to stand. Here both parties are mistaken about the quality of the subject matter of the contract and the question is whether the contract should be declared void on grounds of that mistake.

Common mistake is different from mutual and unilateral mistake in that in the case of common mistake, there is no question of lack of agreement between the part.es. The exact offer made by A is accepted by B. There is correspondence between the offer and the acceptance, but the contention is that since the parties to the contract were both mistaken about some fact which is the basis of their contract, [hat mistake nullifies their apparent consent and robs the contract of its efficacy and, therefore, the contract must be declared void.

What is the court's approach in cases of common mistake, where both parties enter into the contract upon a fundamental assumption of fact which turns out to be false? The courts generally seek to determine whether the mistake is sufficiently fundamental as to make the contract void on grounds of mistake. The common law is very restrictive in its approach. The cases show that to a large extent the courts are only prepared to declare a contract void on account of common mistake if the mistake is such that it empties the contract of all its contents or if the mistake radically affects the substance of the contract.

Common mistake may arise in different forms: mistake as to the existence of the subject matter of the contract; mistake as to title and mistake as to the quality of the subject matter of the contract. The following sections discuss the various kinds of common mistake.

Mistake as to the Existence of the Subject Matter

Generally, at common law, a common mistake will render a contract void if it is such that it eliminates the very subject matter of the agreement, in other words, if it empties the contract of all its content or otherwise makes it impossible to perform.

Where the parties are mistaken as to the very existence of the subject matter of the contract, the courts may deem such a mistake sufficiently fundamental as to render the contract void in that it eliminates the very subject matter of the contract. Thus, where unknown to the parties, the subject matter of the contract, at the time the contract is made does not exist, the contract may be void on grounds of common mistake.

This principle has been applied in a number of cases dealing with what is sometimes referred to as res extincta cases where the subject matter of the contract has perished or is otherwise non-existent. In such cases the parties contract on the common mistaken assumption that the subject matter exists, when in fact it does not. Here the parties" mistake empties the contract of its content such that it cannot be performed and the courts may concede that the mistake is sufficiently fundamental as to render the contract void.

In Couturier v. Ilastie:

A contract was made for the sale of a cargo of corn, which the parties supposed to be on board a vessel a voyage from Salonica to England. The cargo, had in fact, before the date of the contract of sale, become so heated that it had been unloaded at Tunis and sold for what could be obtained. The buyer contended that since the cargo was not in existence, he was not bound to pay the price.

The sellers argued that on the true construction of the contract, this contract was not a mere contract for the sale of a specific cargo, but that the purchaser bought the adventure, and assumed for himself all risks arising from the shipment of the cargo. In other words, seller contended that his only duty was to deliver the bill of lading to B to enable buyer to receive the cargo if it arrived or collect the benefit of the insurance policy if the cargo failed to arrive. The House of Lords rejected the seller's construction of the contract and that the buyer was not liable to pay for the corn. The case was treated as one which involved solely the construction or interpretation of the contract. The court found that the contract contemplated the sale of existing goods and the parties expected that there was something which was to be sold at the time of the contract, and something to be purchased. Therefore since the object of the contract of sale was no longer in existence, the buyer was not liable to pay the price.

Looked at closely, the decision in Couturier v. Hastie involved the interpretation or construction of the contract only. In fact the word mistake was never used in the case. Thus generally, whether or not the non-existence of the subject matter of the contract will render a contract void depends principally on the construction of the terms of the contract.

If, on the true construction of the contract it is found that one party guaranteed or impliedly promised that the subject matter of the contract was in existence, and this turns out to be

false, the contract so made is not void. The contract remains valid, and the party who made the promise can be sued for damages for breach of contract.

In the case of McRae v. Commonwealth Disposals Commission:

The defendants invited tenders for the purchase of an oil tanker which they described as lying on Jourmand Reef, off Papua, together with its contents, which they said was oil. The plaintiff submitted a tender of £285 which was accepted. They then incurred considerable expense in modifying a vessel for salvage work etc. There was in fact no such tanker, neither was there a place known as Jourmand Reef. The plaintiff sued for damages for breach of contract. The defendants argued that the contract was void because the subject matter of the contract did not exist.

The defendants were held liable in damages. They had promised that the tanker existed and were, therefore, in breach of contract. Here there was ho common assumption that the tanker existed. The defendants stated that the tanker existed and the plaintiffs merely relied on the assertion made by the defendants.

It is important to note that the Sale of Goods Act of Ghana actually imposes an obligation on the seller of goods to ensure that the goods are in fact in existence at the time when property is to pass. Section 9 of the Sale of Goods Act, 1962 (Act 137) provides: "In a contract for the sale of specific goods there is an implied condition on the part of the seller that the goods are in existence at the time when the contract is made". Where the goods are not in existence the contract of sale is not automatically deemed to be void, but remains valid and the buyer can sue the seller for damages for breach of an implied condition of the contract.

Mistake as to Title

The principle of res extincta has been extended to cases where what is proposed to be sold or transferred to a person is already owned by him. Such cases are referred to as res sua. Where a person agrees to purchase property which, unknown to himself and the seller, is already owned by the buyer, such a contract may be void by reason of the common mistake as to title. Here the contract is treated as a nullity because the transferor has nothing to sell or convey. In Cooper v. Phibbs:

A agreed to take a lease of a salmon fishery from B, both parties believing that the fishery was the property of B. It was subsequently discovered that A was actually the owner of the fishery. The contract was set aside in equity on the ground that it was legally incapable of performance since A was already the owner of the property.

The court applied the principle that if the parties contract under a common mistake or misapprehension as to their respective and relative rights, the result is that the contract is liable to be set aside as having proceeded on a common mistake. This principle must, however, not be applied too widely and must not be taken to mean that every time a person purports to sell property of which he is not the owner the contract is void. Normally, a seller is taken to guarantee that he has title to the property sold. It is only where the buyer happens

to contract to purchase property which unknown to both parties, is already owned by the buyer that the contract may deemed to be void (a nullity) from the beginning.

The Sale of Goods Act of Ghana provides in section 10(1) that: "In a contract of sale there is an implied warranty on the part of the seller that he will have a right to sell the goods at the time when the property is to pass." Thus, where the seller does not have title to property which he sells, the contract is not automatically void. It remains valid and the buyer can sue the seller for damages for breach of an implied warranty of the contract.

Mistake as to the Quality of Subject Matter

The law on mistake as to quality tends to be the most complicated and controversial in the law on common mistake. 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.

The leading case on common mistake as to quality is the case of Bell v. Lever Bros Ltd, the facts of which were as follows:

The respondents, Lever Bros Ltd., entered into an employment contract with v the appellants Bell and Snelling, under which Bell and Snelling were appointed to act as Chairman and Vice Chairman of the Board of the Niger Company, a subsidiary of Lever Bros. The employment contract was to last for a period of 5 years'. One of the terms of this employment contract was that the appellants were not allowed to make any private profit for themselves by doing business on their own account. However, the appellants, unknown to Lever Brothers, engaged in business on their own account and did not disclose their profits to the respondents, Lever Bros.

After a while, but before the 5 year employment contract expired, the subsidiary was merged with another company, and Bell and Snelling became redundant. Lever Bros, therefore entered into a second agreement with Bell and Snelling to pay them £30,000 and £20,000 as agreed compensation for terminating their contracts before they expired and the payments were duly made.

After the compensation had been paid. Lever Bros discovered that Bell and Snelling had secretly engaged in conduct which amounted to a breach of duty. The significance of these breaches was that it would have entitled Lever Bros, to legally terminate their appointments without offering them any compensation at all. The jury found that at the time of negotiating the compensation, Lever Bros, had no knowledge of the breaches and also that Bell and Snelling did not have in mind the breaches while negotiating, neither did they appreciate the significance of their breaches at the time. They were, therefore, found not to be guilty of fraudulent concealment.

Lever Bros, brought the action seeking rescission of the compensation contracts and recovery of the moneys they had paid to the appellants on the ground that the compensation had been paid under a common mistake. The plaintiffs' argument was that the agreement between them and Bell and Snelling had been made under a common mistake as to the nature of the

employment contract which was to be terminated. According to them both parties had contracted under the mistaken assumption that the employment contract that was being terminated was valid and could be terminated only by paying compensation; when in fact it was an invalid contract or breached contract, which could be legally terminated without the payment of any compensation. The question for the court was whether the mistake shared by both parties was sufficiently fundamental as to make the contract void.

The court held that even though there was a mistake on the part of both parties as to the quality or the nature of the employment contract, the mistake was not sufficiently fundamental as to render the contract void. According to the majority, on the facts, the respondents, Lever Bros, seemed to be very anxious to carry out the re-organization of the company (i.e. the merger) and also to secure the appellants' consent to the termination of their employment contracts. In their view, Lever Bros, might have entered into the compensation agreements even if they had known of the breach of Bell and Snelling. Further, since Lever Bros, achieved exactly what they set out to achieve, it was irrelevant that they could have done so by some other means. The parties' mistake as to the nature of the employment contracts to be terminated was therefore, found not to be sufficiently fundamental as to make the entire contract void.

The approach adopted by the House of Lords in Bell v. Lever Bros appears to be quite stringent. Lord Atkin stated the principle which applies in the case of mistake as to quality of the subject matter as follows:

"Mistake as to quality of the thing contracted for will not nullify consent unless:

(a) It is the mistake of both parties;

(b) 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".

In other words, for a mistake as to quality to operate to render a contract void it must be a mistake as to a certain quality without which the identity of the subject matter would be radically different from what it was believed to be. The cases show that the courts are extremely reluctant to hold a contract void on the ground that the parties have made a common mistake with regard to the quality of the subject matter.

In Leaf v. International Galleries Ltd:

The plaintiff bought from the defendant a picture which both believed was painted by Constable. Several years later, when plaintiff tried to sell it he found out that it was not painted by Constable at all. Plaintiff sought to rescind contract on grounds of common mistake.

It was held that the mistake was not sufficiently fundamental as to make the contract void. There was no mistake at all about the subject matter of the sale. It was a specific picture called "Salisbury Cathedral". The parties were agreed in the same terms on the same subject matter, and that was sufficient to make a contract.

In Harrison & Jones v. Bunten & Lancaster:

The buyers agreed in writing to buy from the sellers "100 bales of Calcutta kapok, Sree brand", equal to standard sample. The sellers delivered goods which in all respects answered this description and which were equal to sample. It appeared, however, that both parties had entered into the contract in the belief that "Calcutta kapok, Sree Brand" was pure kapok and consisted of tree cotton. The truth was that it contained a mixture of bush cotton and was commercially a different and inferior category of goods.

The buyers' contention that the common mistake as to the quality of the subject matter rendered the contract void was rejected by the court. The court held that when goods are sold under a known trade description without misrepresentation and without breach of warranty, the fact that both parties are unaware that the goods of that known trade description lack any particular quality is completely irrelevant.

The parties are bound by their contract, and there is no room for the belief that the contract can be treated as a nullity on the ground of mutual mistake, even though the mistake from the point of view of the purchaser may turn out to be of a fundamental character. The common mistake as to the quality of the subject matter of the contract was not sufficiently fundamental as to render the contract void.

In Frederick E. Rose Ltd v. William Pirn:

The plaintiffs in London received an order from their house in Egypt for "Moroccan horsebeans" described here as "feveroles". The plaintiffs, not knowing what feveroles were, enquired of the defendants, who said that feveroles were the same as horsebeans, which they were in a position to supply. The plaintiffs thereupon made an oral contract with the defendants for the purchase of horsebeans and the contract was later put into writing. The defendants delivered the horsebeans to the plaintiffs, who in turn sold and delivered them to the Egyptian firm. When they reached Egypt, the . Egyptian buyers found that the horsebeans were not the same as feveroles and claimed damages for breach of warranty. The plaintiffs also in turn sought to have the contract rectified, and also claimedthat the contract was void for mistake.

It was held that even though it was clear that the parties contracted under a common mistake (they supposed that feveroles was just another name for horsebeans when it was not), the mistake was not one which rendered the contract void from the beginning. Denning L.J. stated:

I am clearly of the opinion that the contract was not a nullity. It is true that both parties were under a mistake, and that the mistake was of a fundamental character with regard to the subject matter. The goods contracted for horsebeans were essentially different from what they were believed to be 'feveroles'. Nevertheless, the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that, nothing in their minds could make

the contract a nullity from the beginning, though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity.

In Nicholson & Venn v. Smith-Marriot:

The defendant put up for auction table napkins described as bearing the crest of Charles I and as the authentic property of the monarch. In reliance on this description, the plaintiffs bought the napkins for £787. It was later discovered that the napkins were Georgian and worth only £105.

It was held that the plaintiff had acquired an article "essentially different from the thing as it was believed to be" within the test laid down by Bell v. Lever Bros.

Whenever it can be inferred from the terms of the contract or its surrounding circumstances that an agreement has been reached based on a particular contractual assumption which is fundamental to the continued validity of the contract and that assumption is not true, the contract may be declared void on that ground. In Sheikh Bros Ltd v. Ochsner:

The appellants contracted with the respondent to grant him a licence to cut, process and manufacture all sisal grown on a particular estate in Kenya of which they were the lessees. In return, the respondent deposited a certain sum of money and undertook to deliver to the appellants 50 tons of sisal fibre, manufactured by him every month. The estate was, in fact, not capable of producing such a quantity of sisal as would meet this requirement.

The court held following the tests laid down in Bell v. Lever Bros that the contract was void.

Based on this principle, a common mistake may be found to be sufficiently fundamental to make a contract void where both parties believe that the contract is capable of being performed when in fact, it is not. In Scott v. Coulson, the case involved 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.

In Associated Japanese Bank (Int'l) v. Credit Du Nord, the facts were as follows:

A high class fraudster, one Jack Bennet, approached the plaintiff bank with a scheme to raise money by the sale and lease back of a number of engineering machines. The bank agreed to buy the machines from Bennett for a little over £1 million and to lease them back to him. The plaintiff bank insisted that the transaction should be guaranteed and the defendant Bank became the guarantor. It turned out that the machines in fact did not exist and Mr. Bennet, having obtained the £1 million, disappeared without keeping up with the payments under the lease. The plaintiff bank sought to enforce the guarantee against the defendant bank, neither bank having bothered to verify the existence of the machines.

Steyn J. held that the action must fail first on the ground that as a matter of construction of the contract of guarantee, it was either an express or implied condition that the machines

existed. Secondly, Steyn J. stated that he would be prepared to hold that the contract of guarantee was void on grounds of common mistake since in his view the test laid down in Bell v. Lever Bros was satisfied.

8.2.9 Mistake in Equity

We have seen that the doctrine of mistake operates within a very restricted scope under the common law. At common law, a contract may be held to be valid in spite of the fact that the parties were genuinely mistaken as to some apparently essential aspect of the contract, either because the law considers that the mistake is not sufficiently fundamental as to render the entire contract void or because of the operation of the objective principle. In practice, the common law rules on mistake could in some cases, be a source of hardship to parties who may have genuinely contracted under a mistaken assumption.

The operation of the common law rules on mistake could result in a party being held bound to a contract to purchase something which he did not intend to buy or something that is completely worthless to him. Clear examples of this can be seen in Bell v. Lever Bros., where the plaintiffs were held bound to a contract under which they had "mistakenly" paid £50,000 to secure the release of employees who could have been laid off without any payment at all; Frederick Rose v. Pim, where the plaintiffs were left with a large quantity of horsebeans which were of no commercial value to them; Leaf v. International Galleries where the plaintiff obtained no relief from a contract he had entered into for the purchase of a picture which was totally different from what which he believed it to be; and Harrison & Jones v. Bunten & Lancaster, where the plaintiffs were left holding large quantities of "Calcutta kapok, Sree brand" a product which was commercially different from and inferior to the product which they had intended to buy. In all these cases, however, the common law is motivated by the need to ensure commercial certainty i.e. apparent contracts must be upheld, even if the result does not achieve justice in the individual cases.

Equity differs from the common law in that it seeks to mitigate, the harsh effects of the restrictive approach adopted by the common law to cases involving mistake. How does equity achieve this? First of all equity follows the law. Thus if a contract is void at common law equity will also treat it as a nullity. Beyond this, equity in certain cases will intervene to relieve one of the parties from the effects of a mistake even where the contract is deemed to be valid at common law in spite of the mistake. In other words, equity will 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. Thus in some cases a contract, which is deemed to be valid at common law in spite of a mistake, may be held in some manner to be unenforceable in equity, particularly when an equitable remedy is what is sought as the instrument of enforcement of the contract. The remedies provided by equity may take three forms: (a) Rescission; (b) The Refusal of Specific Performance; and (c) Rectification.

Rescission

One of the most important kinds of equitable reliefs available for mistake is the remedy of rescission. This is an equitable remedy the essence of which is the setting aside of a transaction. Generally, in equity, a contract affected by common mistake is not void, but voidable. This means that the contract may be rescinded by one of the parties on the ground of the mistake.

In some cases even where a mistake is deemed at common law not to be sufficiently fundamental as to render a contract void, the court, in the exercise of its equitable jurisdiction may grant the remedy of rescission and set the contract aside so as to relieve the party prejudiced by it from hardship..However, the court generally will only do so if it can do justice to the other party to the contract. Thus the court in most cases will exercise its discretion by attaching to the order of rescission such terms as are required to ensure justice for the other party as well.

When will the court grant the remedy of rescission to set a contract aside on grounds of mistake? Generally, 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 as to their relative and respective rights, provided that the misapprehension was fundamental and the party seeking to set it aside was not himself at fault.

In Cooper v. Phibbs, the House of Lords set aside the contract for the lease of a fishery which contrary to the belief of both parties, already belonged to the lessee or buyer. In order to ensure justice to the lessee, the court in granting the order of rescission, ordered that the respondents should have a lien on the fishery for the money which they had spent on improving the property.

In Solle v. Butcher, the facts were as follows:

After making certain structural alterations to a flat, the defendant let it out to the plaintiff for seven years at a rent of £250 per year. Both parties believed at the time of the letting that the alterations had so altered the identity of the flat as to make it a new dwelling house, and so released it from the controlled rent imposed by the Rents Acts. In fact this was not the case, and the plaintiff brought the action against the defendant claiming the rent he had overpaid since the controlled rent of the flat was £140. The defendant counterclaimed, alleging that he was entitled to eject the lessee as the lease had been entered into under a common mistake and was therefore void.

The Court of Appeal held that although there was a mistake as to the identity of the flat and this was in the social context a mistake on a matter of considerable importance, nevertheless the lease was not void at common law. The mistake could be a ground for relief in equity, even though it did not render the contract a nullity from the beginning. Lord Denning stated:

A contract is also liable in equity to be set aside if die parties were under a common misapprehension either as to the facts or as to their relative and respective rights, provided the

misapprehension was fundamental and that the party seeking to set it aside is not himself at fault.

In Grist v. Bailey:

A house was sold at a very low price because the parties believed that it was still occupied by a statutory tenant. Unknown to the parties at the time of contract the tenant had died. The value of the property with vacant possession was much higher than the agreed price. Plaintiff sued for specific performance and defendant counterclaimed for rescission oh the ground that the contract was voidable for mistake. The contract was set aside on terms even though' the mistake did not render the contract void at common law.

In Magee v. Penine Insurance Co Ltd:

There was an agreement between the Insurance Company and the plaintiff to pay a certain sum to the assured (plaintiff) on the occurrence of a certain risk.

The plaintiff signed an insurance proposal form stating on the form that he held a provisional licence. The plaintiff in fact had no licence. In so stating the plaintiff had not been dishonest, but had in fact, misread the form. It was the basis of the contract of insurance that the plaintiff's answers were true. Plaintiff's car which he had insured was involved in an accident and he claimed £600 from the Insurance Company. The Insurance Company offered £385, and then later discovered that the plaintiff never had a licence and refused to pay.

It was held that the settlement agreement was made on the assumption that the insurance policy was valid and binding when in fact it was voidable by reason of the plaintiff's misrepresentation. The parties, in entering the agreement made a mistake which was fundamental to the whole agreement. It was held, however, that this common mistake did not make the contract void under common law, but it made the contract liable to be set aside in equity. In Laurence v. Lexcourt Holding Ltd:

The case involved a lease of office premises. At the time of the letting, the parties to the lease assumed that there was planning permission for the whole of the premises to be used as offices when in fact the permission related only to a part of the premises. The tenants asked that the lease agreement be set aside on the ground of this common mistake. The lease agreement was rescinded on this ground.

Refusal of Specific Performance

Specific performance is a discretionary remedy. Thus, in broad terms, the courts will grant an order of specific performance only if, having regard to all the circumstances it would be fair and just to do so. In the exercise of its discretion the court may refuse an application for an order of specific performance on the ground that the party against whom the contract is to be enforced made a mistake. This may be done even if the mistake is not recognized at common

law because it is not sufficiently fundamental or not operative by reason of the objective principle.

The court will normally exercise its discretion to refuse an order for specific performance against the defendant if it is clear that the defendant entered into the contract under an honest mistake and if the enforcement of the contract would impose a heavy burden on the party who has contracted under an accidental mistake. In some cases the court has found that where one party has contracted under an accidental mistake, it would be against all reason and justice to enforce the contract against him, even if the mistake is not operative at common law.

In Webster v. Cecil:

The defendant offered to sell to the plaintiff several plots of land for £1,250. Immediately after he had despatched the offer he discovered that he had made a mistake in adding up the prices of the plots and had thus offered his land for sale at this price instead of the £2,250 which he intended. He informed the plaintiff of the mistake without delay, but not before the plaintiff had concluded the contract by acceptance. The plaintiff must have known of the defendant's mistake since his previous offer of £2,000 had been refused. The plaintiff now sought specific performance of the contract.

Specific performance was refused in this case on the ground that the defendant had mistakenly entered into the contract. This contract is likely to be void at common law too on grounds of mutual mistake.

In Malins v. Freeman:

The defendant went Jo an auction intending to bid for property A. He arrived late but in time to hear the auctioneer describe Lot 3 in terms which were wholly inapplicable to property A. He began to bid for Lot 3, supposing it to be property A, and in due course Lot 3 was knocked down to him for an extravagant price. Lot 3 was quite a different property. The defendant's mistake could not be ascribed in any way to the conduct of the plaintiff or his agents but the court refused to decree specific performance.

The court held that specific performance should not be issued to compel the defendant to perform the contract. The court was of the view that the defendant never meant to enter into the contract and therefore it would not be equitable to compel him to perform it. It must be noted that in Malins v. Freeman, even though the defendant's mistake was due to his own carelessness and not due to any fault of the plaintiff, the court was prepared to exercise its discretion not to grant specific performance of the contract. This decision may be contrasted with that of Tamplin v. James, where the defendant bid for and bought some parcels of land in the private undisclosed mistaken belief that the lot included the two pieces of land attached thereto. In Tamplin v. James, it appears that there was little excuse for the defendant's misapprehension since the plans of the property to be sold were clearly exhibited at the auction. However, the court in exercise of its discretion, found that no hardship would be

caused to the defendant if the order of specific performance was granted and, therefore, made the order for the enforcement of the agreement as it stood.

Rectification

The third way in which equity intervenes to relieve parties to a contract of the effect of mistake is by the remedy of rectification. The remedy of rectification is an equitable remedy which may be available where the terms of the contract have been reduced into writing and the parties made a mistake in recording an oral agreement previously made.

Where an agreement has 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 their previous oral understanding or agreement, the court in exercise of its equitable jurisdiction 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 parol evidence rule, under which parol evidence is admissible to establish that the intention of the parties expressed in the written agreement does not represent their true intention as expressed in their previous oral agreement.

Before the remedy of rectification will be granted a number of conditions must be satisfied:

Legal Issue

First of all, there must be a legal issue between the parties as to their rights under the contract. This means that the remedy will not be granted in a vacuum. It is only available within the context of a dispute between the parties as to their rights arising from the contract as documented.

Prior Common Intention

It has been held that for the remedy of rectification to be available there must be some "outward expression of accord or agreement" on the terms up to the moment of the execution of the written contract."- The question has been considered whether such accord must amount to a complete concluded and binding contract before the remedy of rectification can be granted. The courts have held that there is no need for a prior binding contract but there must be a "continuing common intention" or definite accord on the terms; or there must be certain "agreed points" between the parties before the execution of the written contract.

In Joscelyn v. Nissen:

The case involved an agreement between a father and a daughter in which the father had proposed that the daughter take over his car-hire business. Earlier on in the subsequent discussions, it was made clear that if the proposal were accepted, the daughter should pay all the household expenses, including electricity, gas and coal bills due in respect of the part of the house occupied by her father. This oral bargain clearly disclosed the common intention of the parties but it could not be described as a final and binding contract. The agreement was

later reduced into writing, and the written contract on its true construction placed no liability upon the daughter to pay the bills as was previously agreed. The daughter took over the business as proposed, but refused to pay the bills.

The father brought the action requesting that the written document be rectified to reflect their common intention in the previous bargain. The daughter argued that the remedy of rectification was not available since there was no previous final and binding contract imposing that liability on her.

The court, quoting the judgement of Simonds J. in Crane v. Hegeman-Harris Co. Inc. stated, in holding that the agreement could be rectified:

It is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point the parties were in .agreement up to the moment when they executed their formal instrument, and the formal instrument docs not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties.

In sum, you do not need a prior contract, but you do need to establish a prior common intention.

Literal Disparity between Previous Agreement and Written Document Thirdly, for the remedy of rectification to be available there must be a literal disparity between the terms of the prior oral agreement and those of the written document. Clearly a document which accurately records the oral agreement of the parties cannot be rectified.

This is so even if the parties entered into the contract with an inner misapprehension as to the meaning of the terms they agreed on.

In Frederick E. Rose Ltd v. William Pim:

The plaintiffs received an order for the supply of feveroles to an Egyptian firm. The plaintiffs,,not knowing what feveroles were, inquired from the defendants, who informed them that they were the same as horsebeans, which they could supply. The plaintiffs, therefore, orally contracted to buy a certain quantity of horsebeans to meet their order. A subsequent written contract recorded the same terms. It turned out that feveroles were very different from horsebeans, and the plaintiffs sought to have the contract rectified to read feveroles, intending to claim damages on the rectified agreement. Here the oral agreement referred to horsebeans in the mistaken belief that they were the same as horsebeans. The written agreement also referred to horsebeans. The court held that there could be no rectification because there was no disparity between the parties' common intention expressed earlier and the written document. Lord Denning stated:"... rectification is concerned with contracts and documents, not with intentions. Therefore in order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly."

Rectification Generally Available only where Mistake is Shared by both Parties The remedy of rectification is normally granted in respect of a common mistake i .e. the mistake must be shared by both parties. Where the mistake alleged is unilateral, i.e., on the part of one party only, rectification is not available unless there is evidence of fraud, misrepresentation, unfair dealing or estoppel or unless the other party knew of or contributed to the mistake.

In the absence of any of these elements, the remedy of rectification will not be granted where a party executes a document in ignorance of the fact that the other party is operating under a mistake. In Riverlate Properties v. Paul:

A landlord granted a lease of part of a house intending to make the tenant liable for part of the cost of external repairs. The tenant did not know of this intention, and the lease did not contain any provision to that effect.

It was held that the landlord was not entitled to rectification or to rescission on terms of altering the lease to conform to his intention. Rectification could not be granted since (a) the defendant did not share the plaintiff's mistake (b) the defendant did not know that the document did not reflect the plaintiff's intention and (c) the mistake of the plaintiff was in no way attributable to anything said or done by the defendant.

8.3 SUMMARY OF LAW ON MISTAKE

Steyn J. in Associated Japanese Bank (Int'l) Ltd. v. Credit Du Nordm outlines the following as the steps that the courts are likely to follow in order to determine whether or not an operative mistake exists for which some remedy must be given:

1. First of all, before one can turn to the rules of mistake, whether at common law or in equity, one must first determine whether the contract itself by express or implied condition precedent or otherwise, provides for who bears the risk of the relevant mistake. There is scope for invoking the law on mistake only if the contract is silent on this point.

2. Usually, whether the case will be treated under the rules of common law mistake or mistake in equity will depend on the kind of remedy demanded. For example, if parties ask for a declaration that the contract is void, the rules of common law mistake will be applied. If they ask for rescission or rectification, then the rules of mistake in equity will apply.

3. If common law mistake is pleaded, the court must first consider this plea and determine in accordance with the principles of common law whether the contract is void at common law on grounds of mistake. If the contract is void at common law, no question of mistake in equity arises. (Equity follows the law). Thus if the contract is deemed void at common law, it will also be void in equity.

4. However if it is determined that there is no operative mistake at common law, the courts will then have to go on to consider whether mistake in equity can be established, that is, the

courts then consider whether any of the equitable remedies discussed is available to the parties.

In Grist v. Bailey, the defendant contracted to sell to the plaintiff a freehold house for £850, subject to an existing tenancy. At the time both parties believed that the house was occupied by a tenant who was entitled to remain in the house under the protection of the Rent Act (statutory tenant). It turned out that this was not the case and the tenant had left the house.

It was held, that there was no mistake sufficient to avoid the contract at common law. However, the court upheld the defendant's counterclaim for the rescission of the contract. Thus, even where the contract is deemed valid because there is no operative mistake at common law, it may nevertheless be rescinded if the relevant requirements are fulfilled.

Chapter Nine

MISREPRESENTATION

9.0 INTRODUCTION

Before a contract is concluded, various statements may be made by the parties to each other. Earlier on we noted that such pre-contractual statements may qualify as terms of the contract, if it is ascertained that the party making the statement intended them to be part of the contract being entered into. However, such preliminary statements may not be intended to have contractual effect or to be terms of the contract, even though they may influence the party to whom they are made in his decision to enter into the contract.

Such 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 are referred to as "representations". A misrepresentation is simply a representation which is untrue or false. The basic question which arises is this: Where a party is induced to enter into a contract by a false statement of fact or misrepresentation made by the other party, what kind of remedy is available to the party misled? This chapter will discuss what constitutes misrepresentation, the various kinds of misrepresentations and the remedies available for each kind. There are three kinds of misrepresentation: fraudulent, negligent and innocent misrepresentation. The general effect of a misrepresentation which induces a party to enter into a contract is that it renders the contract voidable at the option of the party misled. This means that a person who has been induced by a misrepresentation to enter into a contract has the right to rescind the contract. The party misled may be entitled to claim damages as well if the misrepresentation is fraudulent or negligent, but not if it is innocent.

9.1 WHAT CONSTITUTES AN OPERATIVE MISREPRESENTATION?

An 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.

First of all, there must be a false representation. This means that there must be some statement made or some conduct from which a statement can be implied. The defendant must be shown to have made some representation, either by words or by conduct. To constitute an operative misrepresentation, the statement must be one of existing fact i.e., it must be a statement relating to a past or present state of affairs. Generally, a statement of existing fact is distinguished from a statement of intention or a statement of opinion. A statement of intention or opinion is generally not considered as a representation because it is not a positive assertion of fact. For example, the statement "I think the land is worth 010,000" would constitute an opinion, while the assertion "I paid 010 million for it" would be a representation or statement of fact.

Generally, if the statement is one of opinion only, and it turns out to be unfounded, it would not constitute an operative misrepresentation since it is not a positive assertion of fact.

In Bisset v. Wilkinson a seller of land in New Zealand told the prospective purchaser that the land, if properly worked, would carry 2,000 sheep. This proved to be wrong. However, the buyer knew that the land in question had never been used for sheep farming by the seller or anyone else. The court held that since the buyer was aware of this fact, he should have known that the seller's statement could not be anything more than a statement of opinion which the buyer could adopt if he chose to. It was held, therefore, that the buyer could not rescind the contract since the seller's statement could only be taken as expressing a mere opinion or statement of his belief. Here the seller had no personal knowledge of facts on which the statement was based and, therefore, could only be taken to be expressing an opinion or a statement of his belief

A statement of opinion may, however, 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. In these circumstances, the statement so made would constitute a misrepresentation of fact i.e. a misrepresentation of the state of mind of the person who makes the statement and would be a valid ground for rescission of the contract.

In Smith v. Land & House Property Corp the 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. It was held that in making the statement, the landlord had impliedly stated that he knew facts which justified his opinion. The court took the position that a reasonable man with knowledge of the facts that the landlord had could not honestly hold such an opinion. The statement therefore amounted to a misrepresentation of the state of mind of the landlord and the representee could rescind the contract on that ground.

Normally, a representation of fact is distinguished from a statement of intention or a promise to do something in the future. The distinction is based on the fact that an assertion of the truth of a fact relates to an existing fact or past state of affairs and does not contain any element of futurity. However, a statement of intention, even though it relates to the future, may in some cases amount to a misrepresentation of fact, i.e. a misrepresentation of the representor's present intention. Where a statement of intention is made, it implies at least that the alleged intention does exist. If 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. In Edgington v. Fitzmaurice:

The 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. Bowen L.J. stated:

... There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

Generally, commendatory statements or mere sales talk usually expressed in vague terms, and used in advertisements and promotional items are considered as mere puffs and have no effect at law or in equity. In this regard, statements about the attributes of products for sale used in advertisements such as "this soap powder washes whiter than snow" or "this product gives lasting satisfaction" are not considered as representations of fact. In private contracts of sale, some amount of latitude is allowed where the seller makes commendatory statements about the product being put up for sale in order to attract buyers. Thus in Dimmock v.Hallet, where 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. It must be noted that a 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.

9.11 Silence as Misrepresentation

Could silence ever constitute misrepresentation? Generally, at common law mere silence is not regarded as misrepresentation even if disclosure of a fact known to the silent party would have influenced the decision of the other party. In Smith v. Hughes, it was emphasized that "the passive acquiescence of the seller in the self-deception of the buyer will not entitle the latter to avoid the contract". However, this is so only if the silent party is not guilty of any misleading conduct. In other words, there could be misrepresentation by conduct, even though the party may not have said anything. Thus it has been held that a person who sits down in a restaurant and orders a meal, represents by his conduct that he can pay for it. In the case of Walters v. Morgan, Lord Campbell stated:

The purchaser is not bound to disclose any fact exclusively within his knowledge which might be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, but a word or gesture intended to induce the vendor to believe in the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree of specific performance of the agreement.

There are some exceptional cases where a party's silence could constitute a misrepresentation of fact. These are:

Contracts Uberrimae Fidei

Some special kinds of contracts have the peculiar feature of one party alone being in possession of the material facts affecting the rights of the parties under the contract. In such special contracts the law imposes a burden on a particular party to the contract to disclose material facts known to him. Such special kinds of contracts are referred to as contracts uberrimae fidei (contracts involving the utmost good faith). Examples of contracts uberrimae fidei include insurance contracts, contracts to take shares in a company and family arrangements.

Where Silence Distorts a Positive Respresentation Previously Made

In some cases a representor may make a statement which is true at the time, but because of a change in circumstances, the statement may become 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. If the representor, being aware of the changed circumstances, and knowing that the representee is relying on the original statement, fails to inform him of the change in circumstances, his silence in those circumstances will be deemed as misrepresentation. In With v. O'Flanagan, the facts were as follows:

In 1934, the defendant, a doctor represented to the plaintiff, a potential purchaser of his practice, that the practice was worth £2,000 a year. This was true, but by the time the contract of sale was concluded in May the same year, the practice had dwindled and was bringing in only £5 a week. The defendant failed to inform the plaintiff of this change in the value of the practice before the contract was signed.

It was held that the representation should be treated as continuing until the contract was signed. Since the statement became false to the knowledge of the representor, he should have communicated the changed facts to the purchaser before the contract was signed. In these circumstances, his silence amounted to misrepresentation.

Partial Disclosure

Even though a party to a contract may be legally justified in remaining silent about some material fact that affects a contract he is entering into, where he ventures to make a representation on the 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 absolutely false. In some cases, an omission of facts in a partial disclosure may render what is actually said false or misleading in the context. In other words, a half truth may amount to a misrepresentation because of what is left unsaid.

In Curtis v. Chemical Cleaning Co, where 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 to 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.

9.1.2 The Representation Must Be Addressed to the Party Misled

The next requirement is that the misrepresentation must have been addressed to the party misled. In other words, 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. In Peek v. Gurney:

The appellants sued the promoters of a. company, claiming that he had purchased the shares of the company in reliance on certain false statements stated in the company's prospectus. The appellant was not a person to whom shares had been allotted on the formation of the company. He had merely purchased the shares from allottees.

It was held that the prospectus was addressed only to the first applicants for shares and that the intention to deceive could not be supposed to extend to people other than the first allottees. Upon the allotment of the shares, the prospectus had done its work; it was exhausted.

9.1.3 Inducement

Another important requirement is that the representee must show that the misrepresentation operated on his mind to induce him to enter the contract, that is to say, that he relied on the misrepresentation in deciding to enter into the contract. It follows that there can be no remedy for a misrepresentation if: (i) the plaintiff never became aware that the misrepresentation had been made before he entered the contract; (ii) the plaintiff was not influenced by the misrepresentation or did not allow it to affect his judgement; or (iii) if the plaintiff knew that the statement was false.

In determining whether or not a person to whom a misrepresentation has been made was induced by it to enter into the contract, the following principles are relevant:

1. First of all, 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.

In Horsfall v. Thomas:

Thomas bought a gun which had been manufactured for him by Horsfall. The gun had a defect which made it worthless and apparently Horsfall had tried to conceal the defect by inserting a metal plug into the weak spot in the gun. Thomas never inspected the gun before accepting to buy it, but upon using it the gun burst. He later detected the defect and the attempt at concealment and sought to rescind the contract on grounds of misrepresentation by conduct.

The court held that the plaintiff could not rescind the contract on grounds of misrepresentation (by conduct) since he never examined the gun and therefore did not become aware of the misrepresentation before the contract was concluded. Not having become aware of the misrepresentation before entering the contract, the plaintiff could not have been induced by it to enter the contract. The attempted fraud never had any effect on his mind since he never formed any opinion as to whether or not the gun was sound before entering into the contract.

2. 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 the contract.

In Edginton v. Fitzmaurice the plaintiff 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. It was held that the plaintiff could rescind the contract even though the misrepresentation was not the only inducement for his entering the contract.

3. 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.

In Smith v. Chadwick, a prospectus contained a false statement that a certain important person was on the board of directors. However the plaintiff admitted in cross-examination that he had not been in any way influenced by this fact. The court held that since the plaintiff was not induced by the misrepresentation to enter the contract he could not rescind on grounds of the misrepresentation.

4. 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.

In Atwood v. Small:

The parties were negotiating for the sale and purchase of a mine. The vendor, in making the offer made statements as to the earning capacity of the mine which were exaggerated and unreliable. The buyers agreed to accept their offer if the statements as to the earning capacity of the mines could be verified. The buyers then appointed experienced agents to investigate the matter. The agents, who visited the mine, were given every opportunity and facility for forming an independent judgement. They reported that the vendor's statements were true and later the contract was completed.

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 by their own independent investigations and declared that they were satisfied with the result.

5. 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.

In Redgrave v. Hurd:

The defendant proposed to buy the plaintiffs house and to join the plaintiff's practice as a solicitor. The plaintiff had represented that the practice was bringing in £300-£400 a year. The plaintiff produced papers to the defendant to support his claim. If the papers had been carefully studied, they would have shown that the practice was practically worthless. The defendant did not read the papers and went ahead to contract to buy the house and join the practice in reliance on the plaintiff's statements as to the value of the practice. . The defendant later discovered that plaintiff's statements were untrue and sought to rescind the contract. Plaintiff sued for specific perfonnance, claiming that if the defendant had read the papers, he would have discovered the fraud.

The court held that the defendant had in fact relied on the representations made by the plaintiff and it was immaterial that a prudent buyer would have discovered the truth. The defendant was, therefore, entitled to rescind the contract on grounds of misrepresentation.

6. 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.

Finally, apart from the requirement that the representee must have been induced by the representation, it must be established that the misrepresentation was material. Whether a representation is material or not depends in general on the significance that a reasonable business person would have attached to it.

9.2 KINDS OF MISREPRESENTATION

There are three kinds of misrepresentation which are discussed belo.

9.2.1 Fraudulent Misrepresentation

The definition of fraudulent misrepresentation can be found in Lord Herschell's formulation in the case of Deny v. Peek, where the law was stated as follows:

First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.

To establish fraudulent misrepresentation, therefore, it is essential to prove the element of fraud i.e. the absence of any honest belief in the truth of the statement. Simply showing that the statement was made without the exercise of care is not sufficient to establish fraudulent misrepresentation. In Derry v. Peek:

A company obtained permission to run trams by animal power. They applied for permission to run the trams by steam or mechanical power if the consent of the Board of Trade could be obtained. The Directors of the company believed that the Board would give its consent as a matter of course since they had already submitted their plans to the Board and no objection had yet been made. The Directors therefore issued a prospectus saying that the company had the right to run trams by steam or mechanical power. The respondents purchased shares in the company in reliance on this representation. The Board of Trade refused to give their consent and the company was wound up. The respondents sued for fraudulent misrepresentation or deceit.

The court held that to succeed the plaintiff had to prove fraud and that the element of fraud had not been established here since the plaintiff had not shown the absence of an honest belief on the part of the Directors in the truth of the statement they made. The facts showed that the Directors honestly believed that the statement they made was true, since they had sufficient ground to believe that the permission would be granted.

Where fraud is proved the maker of the statement is guilty of fraudulent misrepresentation, which generally entitles the party misled to rescind the contract. Apart from being a ground for rescission of the contract, fraudulent misrepresentation also gives rise to an action for damages for deceit. A party who has been induced to enter into a contract by a fraudulent misrepresentation is entitled to any of the following remedies:

(a) He may 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.

(b) If the contract has not yet been performed, the party misled may repudiate the contract (i.e. refuse to perform his obligations under the contract) and sue to recover any moneys paid under it.

(c) Where the innocent party repudiates the contract and is sued by the representor, he may set up the 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. Therefore, if the plaintiff would not have entered into the contract but for the misrepresentation, the court will compensate him for all the losses he has incurred as a result of entering into the contract.

In Doyle v. Olby (Ironmongers) Ltd.

The plaintiff contracted to buy the defendant's business in reliance on the defendant's representations as to the profitability of the business which turned out to have been fraudulently made. In this case where the plaintiff had been tricked into buying a business which he would otherwise not have bought at all, the court awarded him his overall loss up to his final disposal of the business, less any benefits he had received.

The court held that the proper damages for deceit/fraudulent misrepresentation as distinct from damages for breach of contract should be all the damage directly flowing from the tortious act of fraudulent inducement which was not rendered too remote by the plaintiff's own conduct, whether or not the defendant could have foreseen such consequential loss. Thus the court applied this principle in holding that the defendant was bound to make reparation for all actual damages flowing directly from the fraudulent inducement and it did not lie in the mouth of the fraudulent person to say that the damages could not reasonably have been foreseen by the defendant. In appropriate circumstances, the plaintiff in an action for deceit will be entitled to recover in respect of consequential damage such as injury to his person or property or expenses incurred in moving into a house which he had been fraudulently induced to buy, as long as it was not too remote.

9.2.2 Negligent Misrepresentation

A representation is negligent if it is made carelessly and in breach of a duty owed by the representor to the representee to take reasonable care that the representation is accurate.

Generally, a misrepresentation cannot be regarded as negligent unless the representor owed a duty of care to the representee. Initially at common law, there was no liability at all for negligent words or misstatements, especially where the only damage resulting was financial damages. All misrepresentations were classified either as innocent or fraudulent. With time the courts recognized that an action for negligent misrepresentation could arise in certain circumstances where the representor owed a duty of care to the representee to ensure that the statement was accurate. Initially, such duty of care was only deemed to exist where there was an existing contract between the representor and the representee or where there was a fiduciary relationship between them.

In Nocton v. Ashburn:

A solicitor advised his client to release part of a mortgage. The client took his advice, the security became insufficient and the client suffered loss. The client brought the action against the solicitor, claiming that the advice given was fraudulent and improper and claimed compensation for his loss.

The court held that there had been no fraud sufficient to found an action in deceit or fraudulent misrepresentation. However, the client could still claim relief since the advice was given without sufficient skill and care and therefore constituted negligent misrepresentation. The court based its decision on the fact that there was a fiduciary relationship between the parties (solicitor-client relationship) and by failing to exercise the due care required by such a

relationship the solicitor was in breach of the duty of care arising from this fiduciary relationship.

The view that an actionable negligent misrepresentation could arise only out of a contractual relationship or fiduciary relationship between the parties was upheld in the case of Candler v. Crane, Christmas & Co.

In that case, the plaintiff was considering the possibility of investing in a limited liability company. To assist him make his decision, he asked to see the accounts of the company. The Managing Director instructed the defendants, who were the accountants of the company, to see to the preparation of the accounts.

The clerk of the accountants, who had been requested to prepare the accounts, was told that the accounts were required to be shown to the plaintiff, who was a potential investor in the company. The clerk prepared the accounts, showed them to the plaintiff and discussed them with the plaintiff, who later decided to invest in the company. It was found later that the accounts were carelessly prepared and contained numerous false statements, and gave a wholly misleading picture of the state of the company. The company was wound up a year later and the plaintiff lost the whole of his investment. The plaintiff brought the action against the defendants.

The court held that the clerk was not guilty of fraud but was extremely careless in the preparation of the accounts. However, the action was dismissed on the ground that the defendants owed no duty of care to the plaintiffs.

It was held that a false statement, made carelessly, but not fraudulently, by one person to another, though acted upon by the other to his detriment, was not actionable in the absence of any contractual or fiduciary relationship between the parties. Thus the court held therefore that there was no liability for the misrepresentation since there was no contractual relationship between the plaintiff and the company's accountants, neither was there any fiduciary relationship between them. The restrictive position adopted by the majority in Candler v. Crane Christmas Co. Ltd was, however, subsequently rejected in the important case of Hedley Byrne v. Heller & Partners, where the House of Lords finally expanded the scope of liability for negligent misrepresentation.

In Hedley Byrne v. Heller & Partners the facts were as follows:

The plaintiffs, advertising agents, had Easipower Ltd as their clients. They placed substantial advertisement orders for Easipower Ltd at their request. The plaintiffs subsequently became concerned about the financial standing of Easipower and inquired from their bank a reference or statement on the financial standing of Easipower Ltd. The plaintiffs' bank, not having the relevant information, requested same from Easipower's bankers who gave a favourable response, and stated that Easipower's financial standing was good for its ordinary business transactions.

The plaintiff relied on this reference and placed large orders on behalf of Easipower. Easipower defaulted causing plaintiffs a huge loss. The plaintiffs brought the action against

Easipower's bankers, alleging that they were negligent in giving the reference on Easipower's financial standing and therefore should be liable in damages for negligent misrepresentation.

The court held that even though there was no contractual or fiduciary relationship between the plaintiffs and Easipower's bankers, there existed a duty of care owed by the defendants to the plaintiffs by reason of the special relationship that existed between them and the defendants would have been liable for the negligent misrepresentation if they had not attached a disclaimer to the reference they gave. The plaintiffs' action failed only because in giving the reference, the defendants had attached a disclaimer, stating that the reference was being given "without responsibility".

The court recognized in Hedley Byrne that a duty of care could be established even if there was no contractual or fiduciary relationship between the parties. Such a duty of care could be deemed to exist if there was a special relationship between the parties, which demanded that care should be taken that the statement being made was accurate. In effect, the majority in Hedley Byrne v. Heller & Partners overruled the majority decision in Candler v. Crane Christmas.

When will this special relationship be deemed to exist? Such a special relationship would be deemed to exist in cases involving professional or business relationships, where even in the absence of contract, it can be established that the representor knew or ought reasonably to have known that the representee was likely to act or rely on the representation to his detriment. The duty of care is generally owed by professionals, including barristers, solicitors, accountants, surveyors, etc., not only to their clients, but even to persons other than their immediate clients, as long as they should have reasonably anticipated that they would rely on their work.

It has been noted that such a special relationship does not necessarily require direct contact between the parties, but exists where the statement was made in connection with a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance attached to the answer. The elements of this special relationship are therefore (i) voluntary assumption of responsibility by the representor and (ii) foreseeable detrimental reliance. In the Hedley Byrne case, even though the parties had never met, the defendant bank knew that the information was to be passed on to a customer of the inquiring bank, who would rely on it in deciding whether or not to extend credit to Easipower. This is what created the duty of care.

It has been recognized however that no liability arises in purely social relationships, even if the advice is given by a professional person. Thus where a person suffers loss as a result of acting on friendly advice carelessly given, no liability arises. However, even where the parties are friends, the duty of care may be deemed to exist if the representor voluntarily assumes responsibility in a business connection and the advice is not given on a purely social occasion. It has also been held that a duty of care may arise between the parties to a contract during pre-contractual negotiations if one party gives advice in such circumstances that it is clear that the other party will rely on the superior skill and knowledge of the representor. In

Esso Petroleum v. Mardon, where a tenant was induced to take a lease of a petrol station from an oil company by a forecast of the potential output of the station, which turned out to be exaggerated, the court held that since the tenant relied on the salesman's superior knowledge and experience, a duty of care arose between them and the company was liable for the negligent misstatement.

A Canadian court has aptly summarized the net effect of all the cases on negligent misrepresentation since the Hedley Byrne decision as follows:

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 is being trusted, or that his skill or judgement was being relied on, and such a 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; and for failure to exercise that care, an action for negligent misrepresentation will lie if damage or loss results.

9.2.3 Innocent Misrepresentation

An innocent misrepresentation is an untrue statement made in good faith, with honest belief in its truth, intended to induce a party to enter into a contract. An innocent misrepresentation is one which is neither fraudulent .nor negligent. An innocent misrepresentation generally gives the party misled the right to rescind the contract but it does not entitle the party misled to claim damages. A party misled by an innocent misrepresentation may repudiate the contract (i.e; refuse to carry out his obligations under the contract) and set up the misrepresentation as a defence to any action brought against him for breach of contract or for specific performance of the contract. Instead of waiting to be sued, the party misled by an innocent misrepresentation may bring an action for rescission of the contract and in some cases claim an indemnity against all losses or liabilities imposed on him by the contract itself but he will not be awarded damages.

In addition to the right to rescind the contract, a party who has been misled by an innocent misrepresentation is entitled to be indemnified against all losses or liabilities incurred by him in the discharge of obligations created by the contract even though he is not entitled to claim damages. In Newbigging v. Adam:

The plaintiff entered into an agreement with the defendants by which he was admitted as a partner into a manufacturing business. Thereafter, he provided £10,000 of new capital. He was induced to enter into the agreement by a material innocent misrepresentation as to the capacity of certain machinery. The business failed and the plaintiff sued for rescission of the agreement, for recovery of his capital and for an indemnity against all claims which might be made against him by virtue of his having become a partner.

The court held that the plaintiff was entitled to the rescission of the contract and to be discharged from all liabilities imposed on him by the partnership agreement.

In seeking to explain the distinction between the award of indemnity and damages, Bowen L J. stated in Newbigging v. Adam:

When you are dealing with innocent misrepresentation, the proposition is that the plaintiff is to be replaced in status quo, but with this limitation: He is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but he is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter.

Damages are all those losses which naturally and reasonably flow from the breach of contract. In the case of an indemnity, the plaintiff 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. This distinction is clearly illustrated in the case of Whittington v. Seale-Hayne:

In that case the plaintiffs, 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 that was subsequently executed and therefore it was not a term of the contract. Under the lease, the plaintiffs covenanted or agreed to execute all such 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. The water supply was poisoned and as a result, the poultry died and became worthless. The manager of the farm also became ill. The plaintiff was also notified by the Local Authority to pay certain moneys for the repair of the premises and had to renew the drains. The plaintiff brought the action for rescission on grounds of innocent misrepresentation.

The plaintiff admitted that there was no fraud and so they could not ask for damages. He, however, claimed an indemnity for losses which were particularized as follows:

a. Value of their stock

b. Loss of profit on sales

c. Loss of breeding season

d. Medical expenses of farm manager

e. Removal of storage and rent

f. Rates

g. Rent

h. Money spent on repairs of outbuildings etc.

It was held that the lease should be rescinded and the plaintiff could recover for the rents, rates and cost of repairs made under the covenant in the lease, but nothing else. Since the obligations to pay the rent and rates and to effect repairs on the property were obligations created by the contract itself (these obligations were imposed on the plaintiff by the lease agreement itself) he was entitled to be indemnified against them. The court stated that in this case, the plaintiffs were not required by the lease contract to erect buildings and sheds, to stock the premises with poultry, or to employ a farm manager. Consequently they could not recover the expenses they incurred in so doing.

These other expenses made were not in relation to obligations imposed by the lease agreement itself, even though they were expenses which the plaintiff had incurred in his use of the land. If these other additional expenses had been awarded (cost of the shed, the medical expenses (manager), value of stock etc.), it would have amounted to awarding damages. An innocent misrepresentation, therefore, in general gives the party misled a ground for resisting an action for breach of contract or for specific performance. The party misled also has the right to rescind the contract, but he cannot also claim damages, only an indemnity.

9.3 RESCISSION

It will be noted that for all three kinds of misrepresentation, the party misled is at least entitled to rescind the contract. Rescission consists in the setting aside of the contract. The aim of the court in granting the remedy of rescission is to cancel the contract and to restore the parties as far as possible, to the position they were in before the contract was made. The courts upon rescission of the contract attempt to achieve "restitutio in integrum"

It is a fundamental principle that a misrepresentation renders a contract voidable at the option of the party misled. This means that the party misled (representee) may elect either to rescind or to affirm the contract. If the party misled decides to rescind the contract, the general rule is that he must bring his decision to the notice of the representor. This can be done in a number of ways. In theory, rescission can be effected informally by the representee giving notice to the representor of his intention to rescind the contract. This may be done by the representee recovering the property delivered to the representor under the contract; or by the representee returning what he has obtained under the contract. More importantly, rescission is achieved by legal proceedings in which the plaintiff seeks a declaration in court that the contract is invalid.

The courts have, however, recognized one exception to the general rule that a rescission takes effect only when it is brought to the notice of the representor or the guilty party. 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 circumstances. In the case of Car & Universal Finance Co v. Caldwell the facts were as follows:

A rogue induced the owner of a car to sell his car to him by some fraudulent misrepresentation. The rogue paid the owner with a cheque which was dishonoured when the owner presented it the next day. Subsequently, the rogue could not be traced 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 third party after the plaintiff (owner) had given this notice to the Automobile Association and the Police. The issue was whether the owner's act of notifying the Police and the Automobile Association amounted to a rescission of the contract between him and the rogue.

It was 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 absconded, and thus made it impossible for the owner to notify him personally of his intention to rescind the contract. In a situation such as this, the owner's conduct clearly indicated that he did not intend to continue with the contract. Since the contract was rescinded before the car was sold to the third party, the rogue's title had been effectively avoided before he purported to transfer title to the third party. By reason of the nemo dat quod non habet rule, therefore, the third party acquired no valid title and the owner was entitled to recover the car from him.

The limits to the right to rescission have been identified to include the following:

9.3.1 Discretion of the Court

First of all it must be noted that rescission is an equitable remedy and.therefore is a discretionary one. This means that the courts will grant this remedy only if it is satisfied that having regard to the circumstances it would be equitable to do so.

9.3.2 Restitution

An essential condition for the rescission of a contract is the possibility of restitution. The very object of the rescission of a contract is to cancel the contract and restore the parties to the position they were in before the contract was entered into. There must therefore be a giving back and a taking back on both sides. Normally, a party who wishes to rescind a contract for misrepresentation must be in a position to restore to the other party any benefits he may have obtained under the contract. The principal ground on which the right of rescission may be lost is where it is impossible to restore the parties to their original positions.

The general rule, therefore, is that if restitution is impossible, there can be no rescission of the contract. So for example, if you are fraudulently induced to buy a cake, you may return it and get your money back; but if you have eaten it, you would not be in a position to restore the seller to the position he was in before the contract was entered into. The equitable principle is that restitution need not be exact or precise but it must be substantial. In other words, the representee can rescind the contract and return the subject-matter even if it is in an altered state. In such a case the plaintiff can account for any profits derived from its use and also

make allowance for any deterioration caused by his dealing with the subject matter. In 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.

Rescission is, however, impossible where the subject matter has been so altered as to change the character of it. For example, where an animal purchased under the contract has been slaughtered the plaintiff cannot rescind and return the corpse. In Clarke v. Dickson:

The plaintiff was induced to take shares in a partnership by the misrepresentation of the defendant. Four 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. The shares that the plaintiff bought were shares in a partnership. What he was returning were shares in a corporation in the process of being wound up. It must be noted however, that if the subject matter has only deteriorated in value but still retains its substantial identity the right to rescind is not lost. In 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.

9.3.3 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.

In Long v. Lloyd:

The plaintiff purchased a lorry from the defendant. The lorry, which was advertized in the newspaper, was described as being in exceptional condition. The plaintiff, after phoning the defendant to arrange a viewing, was told that it was in first class condition. The plaintiff went to view it the following day and was told that it was capable of doing 40 miles per hour and 11 miles to the gallon. On the test drive, the plaintiff found that the speedometer was not working and he had to pull a wire before the accelerator would work. He still decided to purchase the lorry. On the first journey the plaintiff noticed certain faults with the lorry and contacted the defendant, who offered to pay half of the costs of repairs. However, on a further

journey, the lorry broke down completely and the plaintiff then sought to rescind the contract and brought an action against the defendant for innocent misrepresentation.

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.

9.3.4 A Lapse of Time

Lapse of time may act as a bar to the right of rescission. An important distinction must be made here. 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 any evidence of affirmation.

In Leaf v. International Galleries, the plaintiff was induced to buy a picture by an innocent misrepresentation that it was painted by Constable. Five 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.

9.3.5 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.

Therefore, 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.

Chapter Ten

DURESS AND UNDUE INFLUENCE

10.0 INTRODUCTION

The common law doctrine of duress and the equitable principles on undue influence generally deal with situations where the consent of a contracting party has been obtained by some form of pressure which is considered by the law as improper. Since a contract is based essentially on the consent of the parties, agreements obtained by coercion or undue exertion of pressure are generally not enforceable. Thus a party who has entered into a contract as a result of pressure may be entitled to relief either under the common law doctrine of duress or the equitable principles of undue influence.

10.1 DURESS

Generally, at common law a contract which has been obtained by illegitimate forms of pressure or intimidation is voidable on the ground of duress. At common law the definition of duress was a narrow one consisting only of the more extreme forms of coercion. At common law, duress was said to consist of 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. In Kaufman v. Gerson:

The plaintiff sued on a contract made between himself and the defendant in a foreign country. It was found that the plaintiff had coerced the defendant into signing the contract by threats of criminal prosecution against her husband for an offence that the husband had committed. In fact, the consideration for the contract between the plaintiff and the defendant was that the plaintiff would not prosecute her husband.

The court would not enforce the contract on the ground that the defendant's consent was obtained by duress. It must be established that the plaintiff was induced by the threats to enter into the contract which he sought to rescind. In other words it must be established that the threats were a reason for the plaintiff entering into the contract with the maker of the threats. However, it is not required that it be shown that the threat was the only reason for entering the agreement. In Barton v. Armstrong:

The respondent, Armstrong, the former Chairman of a company, threatened to kill the appellant, Barton, the Managing Director 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 die 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.

10.1.1 Economic Duress - Duress by Threatened Breach of Contract

In recent times, the courts have recognized economic duress as a factor which may render a contract voidable, provided that the conduct which constitutes such duress must always amount to a coercion of will which vitiates consent. In cases where a party is induced to enter 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. .

In D & C Builders Ltd v. Rees, where 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 part payment in full satisfaction of the debt was obtained by duress and the creditor could set the contract aside.

In North Ocean Shipping Co v. Hyundai Construction Co Ltd the facts were as follows:

The defendants, a firm of shipbuilders, had agreed to build a tanker for the plaintiffs, who were ship owners. It was agreed that the contract price was $30 million, payable in five instalments. After the plaintiffs had paid the first instalment the international value of the dollar fell drastically and the defendants demanded an increase of 10% in the price and threatened not to complete the ship if it was not paid. The plaintiffs had made a profitable contract to charter the ship upon completion and so could not afford the risk of any delays. The plaintiffs, therefore, even though advised that the defendants had no legal right to claim the additional 10%, paid the defendants the original price and the extra 10%. Some eight months later, they brought the action to recover the additional 10% they had paid to the defendants.

The court held that in principle this was a case of economic duress, since the threat not to build the ship was both wrongful and highly coercive of the plaintiff's will. It was held, however, that the plaintiffs had lost their right to set the contract aside by their affirmation of the contract.

The courts have been careful to point out that it is not any threat to break a contract that will amount to duress. All the circumstances must be considered, in particular the nature of the pressure applied and the nature of the demand made in order to determine whether there was a coercion of will which vitiates consent. In all cases 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.

In Pao On and Others v. Lau Yiu Long and Others

The plaintiffs threatened to break a contract with a company unless the defendants, who were shareholders in the company, gave them a guarantee against any loss resulting from the performance of the contract. The defendants, 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. The court found that in this case the defendant considered the matter thoroughly, chose to avoid litigation, and formed the opinion that the risk in giving the guarantee was more apparent than real. In short there was commercial pressure but no coercion. Lord Scarman stated:

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent [I]n a contractual situation, commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent".... In determining whether there was coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not.

10.2 UNDUE INFLUENCE

The term "undue influence" is generally used to describe the equitable doctrine of coercion which deals with forms of pressure which are usually less direct than those discussed under the doctrine of duress. The cases reveal two main situations to which the doctrine of undue influence may apply: (i) Express Use of Influence, where the party charged has actually exercised undue influence in the sense of dominating the will of the other party; and (ii) Presumption of Undue Influence

10.2.1 Express Use of Influence or Domination of Other Party

Where it can be shown that one party exercised such domination over the mind and will of the other party that his consent to a contract cannot be said to have Ten independently given the party who was so dominated can rescind the contract on grounds of undue influence.Here the onus is on the part of the person seeing to rescind the contract to prove actual coercion or a high degree of domination or control leading to the loss of independence of will or consent. In Allcard v. Skinner, it was noted that undue influence exists where there is "some unfair and improper conduct, some coercion from outside, some overreaching, some form of

cheating and generally, though not always, some personal advantage obtained by the guilty paty."

Once it is shown that 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 so made may be avoided on grounds of undue influence. On the basis of this pnnciple a gift made as a result of influence expressly exercised over the donor by the donee may be set aside on grounds of undue influence.

In the classic case of Morley v. Loughman, the facts were as follows:

Loughman a man of no means, and a member of a religious sect known as Exclusive Brethren, was employed as a travelling companion to Morley, an epileptic of large fortune. While so employed, he converted Morley to his own religious views, and as a result Morley left his home and took up residence with loughman, with whom he lived for the seven years of his life. During; this period, Morley consulted with Loughman on spiritual matters, allowed him to regulate his diet and his medicine, and placed nearly the whole of his fortune at Loughman's disposal. Upon Morley's death, the executors brought an action to recover the £140,000 given by Morley to Loughman as a gift.

The court held that the recipient of the gift had obtained the money by the actual exercise of undue influence Here it was not necessary to decide whether or not any special relationship existed between the parties, because Loughman took possession, so to speak, of the whole life of the deceased (Morley) and the gifts were not the result of the deceased's own free will, but the effect of that influence and domination.

10.2.2 Presumption of Undue Influence where there is a Fiduciary Relationship between Parties

There is a presumption of undue influence 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. Most of the cases on undue influence, therefore, relate to gifts and easy bargains or sales at excessive or ridiculous prices. The presumption of undue influence arises in confidential or fiduciary relationships. A fiduciary relationship is 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.

Where the parties are in such a fiduciary or confidential relationship, the law on grounds of public policy presumes that a transaction made between them for the benefit of the party in whom the confidence was reposed, was the result of undue influence unless the benefiting party can prove the contrary. The presumption of undue influence applies whenever the relationship between the parties is such that one of them is by reason of the confidence reposed in him by the other party, able to take unfair advantage of the other. All the circumstances of the case must be considered to determine whether the relationship exists.

The fiduciary or confidential relationships which are recognized by the law as raising a presumption of undue influence include the following:

- Parent and Child;
- Guardian and Ward;
- Solicitor and Client;
- Physician and Patient;
- Trustee and Beneficiary;
- Religious/Spiritual Advisor and follower (or any person to whom he stands in that relationship).

It has been judicially established, however, that the husband/wife relationship is not considered as one raising the presumption of undue influence.

In Allcard v. Skinner.

The plaintiff, an unmarried woman of 27 years, 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 in 1879 and 5 years later, she claimed the return of the gifts on the ground that they were voidable by reason of undue influence.

The court held that at the time of the gift the plaintiff was a professed sister and as such was bound in absolute submission to the defendant as a superior of the sisterhood. She had no power to obtain independent advice and she was in such a position that she could not exercise her own will as to the disposal of her property. It was held therefore 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 benefited from the transaction can show that the other party acted independently of any influence from him i.e. if the defendant can show that the transaction was the result of the free exercise of independent will. The most usual way of doing this is by showing that the other party obtained and followed independent advice before entering into the transaction. This requires that the party who benefited 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.

In 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 adequate compensation to the stool in respect of its lands which had been acquired and also to undertake legal services in litigation connected with the stool lands. The government, oil behalf of the defendant stool paid an amount to the plaintiff as solicitor's fee, but this was not disclosed to the defendant stool. Subsequently, the parties entered into, an agreement, prepared by the stool clerk for the plaintiff to be paid ten per cent of the compensation to be obtained as professional fees. A copy of this agreement was sent to the Chief Lands Officer in Accra authorizing him to pay the said ten per cent to the plaintiff as his professional fees. Later the stool became aware of the initial payment to the plaintiff but did not take steps to repudiate or rescind the contract between the parties. Subsequent correspondence between the parties indicated that the stool affirmed the contract. The plaintiff sued to enforce the contract.

The court held, inter alia, that undue influence meant any influence by which the exercise of free and deliberate judgment was excluded at a time when the interest or benefit in question was given to another by someone over whom such influence was exercised. In so far as the agreement was concerned, it was prepared in the Nsuem language. The Ohene (Chief) of Nsuem and three of his sub-chiefs signed the agreement whilst the other sub-chiefs who were illiterate made their marks after the contents had been read and interpreted to them in the Twi language by the stool clerk. It could not, therefore, be said that the agreement ex facie was executed as a result of pressure exercised by the plaintiff on those who signed it.

10.3 UNCONSCIONABLE CONTRACTS

Traditionally, the common law courts, did not find any reason to try and save a man from his improvident bargain unless it was tainted with fraud or undue influence. With time however, the courts of equity have recognized the need to intervene in cases where a contract is excessively harsh, especially where one of the parties was poor, relatively ignorant, elderly and/or disadvantaged. The courts of equity, therefore, have over the years assumed an undoubted jurisdiction to grant relief against every species of fraud, including cases where it may be apparent, from the intrinsic nature and subject of the bargain itself, that it was one which no man in his right senses would make on the one hand, and no honest and fair man would accept on the other; in that case there is said to be an inequitable and unconscionable bargain.The Ghanaian courts have established the principle that 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." In the recent case of CFC Construction Co (WA) Ltd, Rita Read v. Attitsogbe, 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. The Supreme Court stated:

In our opinion, therefore, the courts in Ghana have the right to set aside as unconscionable any dealing, whether by contract or by gift, 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.... Poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary: these are all circumstances which in the right context can justify the courts' intervention on the basis of the equitable principles embodied in the doctrine of unconscionable bargain. Where a party successfully makes a case that he or she has a special disability, or the facts of a case lend themselves to an application of the doctrine, the onus devolves on the dominant party to demonstrate that the transaction was fair, just and reasonable. If the dominant party fails to show that the transaction was fair, just and reasonable, the court is entitled to set the transaction aside.

In the case of Kwamin v. Kufuor:

A lease was signed between a Gold Coast chief and an English gold prospector. Subsequent to the signing of the lease, an agreement was entered into which contained a clause whereby the plaintiff's predecessor in office, another chief, was alleged to have agreed to give up all his rights and interest in the land, the subject-matter of the lease, in consideration of a payment to him of f 300. It was an agent of this predecessor chief who had signed this agreement, which had been drawn up on their behalf by the English prospector. All the Africans involved in the transaction were illiterate. The plaintiff then alleged that the clause was understood only to be intended to confirm and recognise the lease granted by the other chief and that in so far as it purported to surrender the rights of the Enkawie stool, which he represented, it was invalid and ineffectual. His grounds of asserting this claim were, first, that the agent had no authority to surrender his chief's rights and, secondly, that the agent did not understand the memorandum of the agreement.

The Privy Council held that though the agreement had been read over to the parties, this was not enough. It had to be further proved that the plaintiff's agent had assented to the legal document with an intelligent appreciation of its contents. Speaking of the agent, they insisted that, "the possibilities of misunderstanding are so obvious as to render it imperative on the appellant, who alleges his intelligent consent to a contract expressed in a language which he did not understand, to prove that it was clearly explained to him."

Another case, which raised the issue of unconscionability was that of Acquaye & Ors. v. Halm, the facts of which were as follows:

The case involved a loan transaction. The plaintiffs claimed it was a mortgage transaction while the defendant alleged that it was a contract of sale with an option to re-purchase. All the parties were natives of the Gold Coast and according to the plaintiffs they had borrowed £200 from the defendant, a well-known moneylender. The plaintiffs were illiterate and therefore it was the defendant who explained the meaning of the English documents in the vernacular to the plaintiffs. The documents were in fact a deed of absolute conveyance, and an agreement for the re-purchase of the land conveyed, but the plaintiffs were made to believe that the documents embodied a mortgage agreement. They did not appreciate that the

defendant considered the transaction as one of sale until the defendant put in a claim to the government, as owner of the land, when the government sought to acquire the land.

Following Kwamin v Kufour, King-Farlow J. held that the illiterate borrowers were not to be bound by the deeds in question. He said: "In equity, as is well known, an agreement not proved to be actually fraudulent may be presumed to be so unconscionable that it is tainted with fraud and therefore voidable. This presumption will be made for the benefit of the weaker party, where the parties to the agreement dealt with each other on very unequal terms."

The court noted:

What then is the presumption in this case? ... On the one hand we have illiterate and ignorant natives hard pressed for money; on the other hand an astute and educated moneylender who, despite his posing to the Court as a sort of eleemosynary institution, and as anxious to confer benefits on his fellowmen and his financially weaker brethren, and despite his close connection with the plaintiffs' stool, lent them £200 at 100 percent per annum interest on the security of their Korle Bu lands, the value of which he estimated three years later at £45,000 in a formal claim upon the public funds ... Obviously this was altogether improper and a gross abuse of his dominant position over the illiterate natives.

In the more recent decision in the case of CFC Construction Co (WA) Ltd, Rita Read v. Attitsogbe, the Supreme Court recognized old age as a disability justifying the invocation of the doctrine of unconscionable bargain. In that case, the Supreme Court noted, upon a comprehensive review of the case law in the Australian, Canadian and English jurisdictions, that the courts in Ghana have the right to set aside as unconscionable any dealing, whether by contract or by gift, 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.

The facts of CFC Construction Company (WA) Ltd/ Read v. Attitsogbe were as follows:

The Second plaintiff was the widow of the deceased owner of the first plaintiff company, a construction company. She claimed to be the sole shareholder and director of the first plaintiff company. By April, 1986, she was "old and weak" by the admission of the defendant in his counterclaim. The plaintiffs further claimed that on or around 13th September, 1991, an extraordinary general meeting of the company had been convened and had sanctioned the removal of the defendant as director. The defendant, however, claimed that contrary to the averments by the plaintiffs, he remained a director as he had not been validly removed in accordance with the Companies Act, 1962(Act179) and counterclaimed for sums owed to him as a result of services he claimed to have rendered to the first plaintiff. During the trial, evidence was adduced to attest the fact that a share transfer agreement was signed by the second plaintiff which sought to transfer five per cent (5%) of the second plaintiff's total shareholding to the defendant on 13th July, 1981 although no consideration was given by the defendant. The defendant however claimed that although he did not pay in cash for the shares, he paid in kind (in the form of services rendered to both the first and second

defendants). It was thus revealed that the defendant was also the trustee of the second plaintiff's will and all her affairs, therefore, creating a fiduciary relationship.

The High Court held, per Aryeetey J. as he then was, that the defendant's relationship with the second plaintiff was one of confidentiality which raises a presumption of undue influence. This decision was upheld by the Court of Appeal. The defendant thus appealed to the Supreme Court and the issue for consideration was whether or not the defendant had been validly allotted shares in the first plaintiff company. The Court thus had to consider whether the doctrine of undue influence was correctly applied and whether there was any allied doctrine, such as the equitable doctrine of unconscionable bargain, which should or could have been considered by the courts below.

The Supreme Court unanimously held on the facts of the case, that the principal flaw in the transaction between the second plaintiff and the defendant was the failure by the defendant to ensure that the second plaintiff had adequate access to independent advice. Accordingly, the Supreme Court held, independently of the doctrine of undue influence, that the transfer of 5% of the second plaintiff's shares in the first plaintiff to the defendant should be set aside on the ground of unconscionability, noting that the second plaintiff comes within the category of special disability on account of her old age, infirmity and dependency on the defendant.

In Dikyi & Others v. Ameen Sangari Industries Ltd the plaintiffs alleged that the defendants' company obtained a lease from their Nsona family, acting by the then occupant of the stool, Nana Tandoh IV. The lease was for 99 years and the rent was 0500 plus one sheep and a bottle of schnapps. This agreement was executed on behalf of the family by Nana Tandoh IV and on behalf of the defendant company by the present occupant of the stool, Nana Tandoh V, who was at the time of execution of-the lease the heir-apparent to the stool and was also a director shareholder of the defendant company. The lease agreement did not contain any clause for the periodic renewal of the consideration. Subsequently, on the ground that the consideration payable was too low, the family tried to secure an increase in the annual rent payable and approached the chairman of the company, one Mr. Wassick Sangari for renegotiation of the terms but their approach was spurned by the defendants. This prompted the family to seek redress from the courts. The family brought the action under section 18 of the Conveyancing Decree, 1973 (N.R.C.D. 175) for the lease to be set aside on the ground that the terms were unconscionable. At the end of the plaintiffs' evidence, the defendants made a submission of no case. When they were put to their election, they chose to rest their case on the evidence led by the plaintiffs.

It was held that section 18 of the Conveyancing Decree, 1973 (N.R.C.D. 175) empowered the courts to set aside an agreement in respect of the alienation of an interest in land on the ground of unconscionability. The court held that given the inordinately low consideration, the duration of the lease, the fact that it solely benefited the defendants and at the end of the term the family was going to be left with an over-exploited land and the exclusion of any clause permitting renegotiation of the price, the bargain constituted an affront to equity and good conscience. The lease was one which could not fail to raise an exclamation from any reasonable person as a result of the shock it gave to the conscience. It was noted that it was

clear that the defendants, a group of shrewd businessmen, had used one of their members who had considerable influence in the family not only because of filial affection but also the potent influence he had as the heir apparent to the stool to negotiate on their behalf with the family for the lease. On the totality of the evidence, the lease was considered as unconscionable and accordingly set aside.

Chapter Eleven

ILLEGALITY AND THE ENFORCEMENT OF CONTRACTUAL OBLIGATIONS

11.0 INTRODUCTION

Another factor which may defeat an otherwise valid contract is the illegality of the purpose of the contract. Although a contract may be-complete in all respects, it may be held to be unenforceable if its purpose or object is illegal or contrary to the policy of the law. The concept of illegality seems to be derived from two sources. First of all, a contract may be illegal because it involves the doing of something which is unlawful because it is prohibited by statute. Secondly, a contract may be unenforceable, not because it is prohibited by statute, but because it involves the doing of something which is considered to be against the public good or public interest. Such contracts are said to be "contrary to public policy" or contrary to the general policy of the law.

11.1 CONTRACTS WHICH ARE ILLEGAL ON GROUNDS OF PUBLIC POLICY

The common law forbids certain kinds of contracts on the ground that their purpose offends general principles of public policy. The concept of public policy has proved difficult to define. It is generally accepted, however, that the concept of public policy is applied by the courts to emphasize the fact that no court will assist a plaintiff to enforce a contract, which in its view, is injurious to society. Injury to society, however, is not easy to define. Contracts have been held unenforceable because they are contrary to the general policy of the law, or against the public good, or against good morals etc. It is clear, however, that the courts in applying the concept of public policy have been of the view that any contract which tends to prejudice the social or economic interest of the community must be forbidden.

It must further be noted that public policy is a variable or changing notion, depending on changing manners, morals and social and economic conditions of a particular society. By its very nature, the law on public policy cannot remain unchanged. It changes with the passage of time. Beyond that it changes with the place, since social and economic conditions are invariably reflected in the ideas of public policy. For this reason, notions of public policy in the U.K. are bound to be different from the notions of public policy in Ghana and therefore the role of the courts is to adapt the common law notions of public policy to fit the peculiar social and economic circumstances in Ghana.

The following are the categories of cases which are deemed at common law to be illegal and unenforceable on grounds of public policy.

11.1.1 Contracts to Commit a Crime, Tort or Fraud on Another Party

It is clear that a contract which has as its object the deliberate commission of a criminal offence or a tort is illegal and unenforceable as being contrary to public policy. This rule has been applied to contracts designed to obtain goods by false pretences, contracts to defraud shareholders, contracts to assault a third party, contracts to publish libel etc. In all these cases the object of the contract is the commission of a crime or a tort and the courts have held them to be illegal and unenforceable on grounds of public policy.

In Berg & Sadler v. Moore:

The plaintiff was a former member of a tobacco association. He had been put on the stop list for breaching the rules of the association. He arranged to have a member of the association order some goods in his name for him, the plaintiff. The order was given in the name of the member of the association even though it actually was intended for the plaintiff. Later the defendant refused to deliver the goods to the plaintiff even though he had been 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.

On the basis of this principle 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.

In Brown Jenkinson & Co v. Percy Dalton.

The case involved a contract for the shipment of orange juice contained in barrels. It was found that the barrels were old and leaking, and the plaintiffs; (the ship owners), advised the defendants (shippers) that a claused bill of lading should be issued. The defendants wanted a clean bill of lading and promised that if the ship owners would sign a bill of lading which stated that the goods were shipped in "good condition", they would give them an indemnity against all losses the ship owners might incur under the bill of lading as issued. The ship owners issued the clean bill of lading and had to compensate the holder 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.

11.1.2 Contracts Which Promote Sexual Immorality

Generally, any contract which directly or indirectly promotes sexual immorality or which is contra bonos mores is treated by the law as illegal on grounds of public policy. Such contracts fall under the category of contracts which are contrary to good morals. On this basis, an agreement which directly or indirectly promotes prostitution is unenforceable by the courts as being contrary to public policy. In 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. On the same basis, it would seem to follow that a prostitute cannot sue for her fees.

11.1.3 Contracts which Interfere with Regulations of Foreign Countries

Contracts which contemplate the performance of acts in a foreign and friendly country which are illegal in or inimical to that country are unenforceable as being contrary to public policy. On this basis, an agreement between parties in Ghana to raise money for subversion in another country would be unenforceable on this ground. In Foster v. Driscoll, where the parties entered into a contract under which they intended to load a ship with a cargo of whisky to be carried across the Atlantic and smuggled into and sold in the U.S, the court held that the object of this agreement was a violation of the laws of a foreign country and the agreement was therefore contrary to public policy.

In Regazzonia v. Sethia:

The respondents agreed to sell and deliver to the appellant’s jute bags, both parties intending that they would be shipped to India and exported from there to South Africa. The parties were aware that the export of jute from India to South Africa was prohibited by Indian law.

It was held that an English court would not enforce a contract if its performance would involve the doing of acts in a foreign and friendly state which violated the law of that state.

11.1.4 Contracts Prejudicial to the Administration of Justice

Contracts which tend to stifle or compromise a public prosecution or which interfere with or pervert the course of justice are unenforceable as being contrary to public policy. A good example is a contract or agreement to stifle a criminal prosecution by paying a bribe to a Policeman to drop charges against a person. In Keir v. Leeman:

A had commenced a prosecution for riot and assault against seven defendants who had assaulted and ejected a Sheriff's officer and his assistants while they were levying an

execution in respect of a judgment debt due to A. Before the trial begun, S and Y agreed to pay to A the amount of the debt, together with costs, in consideration that A would not proceed with the prosecution. A accordingly gave no evidence against the defendants. S and Y were later sued on the agreement.

It was held that the agreement was an unlawful compromise and, therefore, void.

11.1.5 Contracts Leading to Inefficiency and Corruption in Public Life

The common law takes the view that the public has an interest in the proper performance of the duties of public servants, and is entitled to be served by the fittest persons available. Thus contracts which have as their object, the sale of a public office or honour are unenforceable as being contrary to public policy. On the same basis, a contract the object of which is to procure a public office for another for monetary consideration is illegal and unenforceable. In 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 organization. The payment was made but the knighthood never materialized. It was held that a contract for the purchase of a title, however the money was to be used, was an improper and illegal contract and was therefore unenforceable.

In Kwarteng v. Donkor:

The case involved 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.

In Okantey v. Kwaddey:

On 13th December, 1939, the Shippi of Anahor conveyed to Alfred Edmund Okantey a piece of Anahor quarter land. The Osu Mantse approved the conveyance to Okantey, who erected boundary pillars. On the 10th December, 1951 the Shippi 'granted' the same land to Obodai Annan. Four months later Obodai Annan conveyed it to one Torto, and he in turn conveyed it in 1954 to Beatrice Okyerewa Kwaddey. She commenced to build on it. Okantey commenced an action against her in the Land Court on the 21st March 1956 for possession. The court held that the onus of proof lay on Okantey, the present appellant. The court therefore delivered judgment in favour of the respondent since he was in possession. The appellant appealed to the Court of Appeal which reversed the decision of the court and held that as the appellant

was the first to go into possession, he was entitled to succeed in an action for recovery of possession against the respondent. In 1966, the appellant applied for a writ of possession against the respondent, but execution was stayed at the instance of the respondent, who issued a writ of summons in the Accra High Court against the appellant praying the court to restrain the appellant from interfering with her possession of the land together with the house which she had built.

The respondent's attempt to have the issue resolved with the help of the Minister of Justice proved futile. She alleged further that, the appellant, who was desirous of becoming a lay magistrate, requested her to approach one Mr. Ayeh Kumi to procure for him die office of a local court magistrate as consideration for him to abandon all his rights under the 1959 judgment. After approaching Mr. Ayeh Kumi, he demanded that the appellant's decision to waive his rights under the judgment should be reduced into writing by the appellant. The letter was written by the appellant and delivered by the respondent but the request never materialized. The appellant later informed the respondent that he was no longer interested in the post of local court magistrate and that, if the respondent paid him £G300, he would waive all his rights under the judgment. In the presence of witnesses, both parties bargained and agreed on the sum £G200 which the appellant received in full as consideration for not pursuing the judgment.

The appellant denied the allegations but admitted that he did write a letter to the then Minister of Justice in 1964 soliciting the minister's help for the post of local court magistrate. However, the minister revealed that the judgment in favour of the appellant had aroused anger in political circles and he would only assist him if he would give up his rights under the 1959 judgment. In lieu of this, the appellant wrote a letter giving up his rights as consideration for the appointment. After hearing the parties, the learned High Court judge found as a fact that the appellant visited the respondent and compromised his rights under the judgment for the sum of £G200 which the respondent paid to him in the presence of witnesses and therefore granted the respondent the reliefs she sought. The counsel for the appellant continued to argue that there was no contract except the one which was tainted with illegality for the appointment to the position of magistrate.

It was held that even if the contract was not void by statute, it would be void at common law as contrary to public policy. On principles of public policy no money consideration ought to influence the appointment to an office in which the public are interested; the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons.

The appellant has admitted writing a letter to the then Minister of Justice waiving his rights under the judgment in his favour to enable the minister to appoint him a local court magistrate. The respondent's version was that the letter containing the appellant's waiver of his rights was addressed and handed to Mr. Ayeh Kumi and not to the minister. Whether the letter was addressed to the minister or to Mr Ayeh Kumi is immaterial. The letter was so tainted with illegality that no court of law will countenance it. The letter itself has not been

tendered in evidence but the appellant's own confession that he did write such a letter is sufficient to clothe the whole transaction with illegality.

11.1.6 Contract to Deceive Public Authorities

An agreement the terms of which are directly or indirectly intended to deceive the authorities is against public policy and therefore unenforceable on that ground. In Alexander v. Rayson:

The plaintiff agreed to let a service flat to the defendant at an 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 of 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.

11.1.7 Contracts to Oust the Jurisdiction of the Courts

Generally, an agreement which purports to oust the jurisdiction of the courts is contrary to public policy and void. It is a long established principle that 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 Lee v. The Showmen's Guild of Great Britain:

ATrade 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.

It was held that on the true construction of the relevant rule under which the plaintiff was charged, his conduct did not amount to unfair competition as alleged and therefore the fine and expulsion were ultra vires. Lord Denning commented on the provision ousting the jurisdiction of the court and stated as follows:

Parties cannot by contract oust the ordinary courts from their jurisdiction. They can, of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. 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. They cannot prevent its decisions being examined by the courts. 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.

It must be noted, however, that arbitration clauses which simply provide that the parties must resort to arbitration before submitting any disputes to court have always been recognized as valid. Such a clause is valid and enforceable because it does not purport to oust the jurisdiction of the court, but simply requires that the issue be submitted to arbitration before the cause of action accrues or arises.

In re Ghana Private Road Transport Union (GFRTU); Tetteh v.Essllfie, the Supreme Court held that the courts would normally respect the wishes of parties to an agreement to submit their disputes to an arbitration. However, the courts always have the power to inquire into the validity of such exclusionary clauses to determine if they relate to the ordinary conditions of the contract only; or can be classified as being against public policy and make the enforcement of such a clause illegitimate. Thus it is not all constraints or the rights of a party to an agreement to have recourse to the law courts that are invalid; this would depend on the nature and ambit of such constraints and each case must therefore be determined on its peculiar facts and circumstances.

11.1.8 Contracts to use Official Positions or Public Office to Secure Private Reward

Contracts involving the use of one's official position or public office to secure a private reward are unenforceable on grounds of public policy. In Ampofo v. Fiorini:

The plaintiff was an employee of the Forestry Department. He entered into a discussion and agreement with the defendant, an Italian business man to form a timber business with help from the plaintiff. The defendant agreed to pay to the plaintiff every year a sum equal to thirty-five per centum (35%) of the net profits of any company formed by him at any time after 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. Plaintiff brought this action seeking inter alia, specific performance or damages for unlawful interference with the contractual arrangement between the defendant and himself. Plaintiff was still an authorised officer of the forestry department for at least two year 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 a misconduct for civil servant to take improper advantage of the position in the civil service for private financial gain. Such a conduct was injurious to public interest, as his expectation of private financial gains was bound to conflict with his official duties. The contract was, therefore, rendered illegal and unenforceable.

11.2 CONTRACTS IN RESTRAINT OF TRADE

A contract in restraint of trade is one in which a party restricts his freedom to carry on his trade, business or profession in the future. Agreements which have generally been held to raise the issue of restraint of trade can be divided into two main groups: (i) Agreements between a vendor and purchaser of a business; and (ii) Agreements between an employer and an employee.

The issue arises in the case of the sale of a business where a vendor of the goodwill in a business agrees not to carry on a similar business in competition with the purchaser. In the case of agreements between an employer and employee, the issue arises where an employee agrees, upon leaving an employment that he will not compete against his former employer by setting up business on his own or entering the service of a rival trade. Since it is in the public interest that people should be free to practise their professions and pursue their trades, the law takes the position that all contracts in restraint of trade are prima facie contrary to public policy and therefore void. However, such contracts will be upheld if (a) It is shown to be reasonable as between the parties; and (b) It is shown that it is not unreasonable in the public interest.

Contracts in restraint of trade are governed by the principles stated by Lord McNaughten in the case of Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company, Limited as follows:

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."

11.2.1 Restraint Clauses in Contracts for the Sale of a Business

It is often the case that the vendor of a business covenants or contracts that after the sale he will not set up business in competition with the purchaser. In the case of a purchaser who has bought a business from its previous owner, the purchaser is said to have paid the full market value for the acquisition of the proprietary interest including the goodwill in the business. Clearly, if the seller of the business were free to immediately set up in competition next door, the purchaser would not get the full value of what he has paid for.

The law accepts, therefore, that it would be reasonable for the parties to agree that some restraint be imposed on the vendor. Thus, 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.

In Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company Limited: Nordenfelt, who was a manufacturer of guns and other implements of war, sold his business to a company for $287,500, and entered into a contract restraining his future business activities, tinder the agreement, Nordenfelt 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.

For such an agreement to be enforceable, the restraint must be reasonable in terms of the area covered, the duration of the restraint and the activities covered. This means that the restraint must not be wider in terms of area and time than is necessary to protect the proprietary interest acquired by the purchaser. The restraint must also generally be limited to the business activity in respect of which the goodwill has been built. Thus it has been held that a covenant by a vendor of a business that he will not brew beer is invalid if the vendor never brewed beer as part of the business, for there is no goodwill in respect of the brewing of beer to protect.

11.2.2 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.

Thus, if the employer can show that his former employee has acquired knowledge of trade secrets such as a secret process or method of manufacture, he will be entitled to impose such restraint on the employee as will afford him reasonable protection of that interest. Further, 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, then the employer would be entitled to impose the restraint.

In the case of Herbert Morris v. Saxelby:

The plaintiff company was a manufacturer of hoisting machinery in the U.K. 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 U.K. 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. Here, there was no evidence that the defendant (former employee) ever came into personal relations with any of the company's customers or that he had any influence over any of them to enable him divert their customers from the plaintiff company to any other firm. The court found that all documents containing confidential information or trade secrets or formulae were closely monitored and the information they contained was so detailed and minute, it would be impossible for any employee to carry it away in his head. It was also found that the tabulated information did not constitute trade secrets as such. Lord Parker explained that the doctrine as stated by Lord McNaughten does not mean that an employee cannot make use of the skill he has acquired on the job elsewhere. The court intervenes only where use is made, not of the skill per se, but of the secrets of the trade or profession which he has no right to reveal to anyone else.

It has also been held that for the restraint to be reasonable, it must afford no more than adequate protection of the party in whose favour it is imposed.31 In Kores Manufacturing Ltd v. Kolok Manufacturing Ltd:

Two companies agreed that neither of them would, without the other's consent, employ any person who had been in the employment of the other within the previous 5 years. It was found that both companies had trade secrets which they were entitled to protect, but the agreement applied to all employees, some of whom would have had no access at all to secret information of any kind.

Even though this agreement was between two companies, the effect was to restrain the employees and the courts applied the same principles. The court held that the agreement was far wider in scope than was necessary to protect the parties and was therefore void and unenforceable.

What are the legal consequences where a court determines that a particular clause or covenant in an agreement is in restraint of trade and thus void and unenforceable? 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. Severance is generally allowed where on a proper construction of the contract it is possible to readily separate the invalid portion from the remainder of the contract. It is very common with contracts in restraint of trade.

11.3 EFFECTS AND CONSEQUENCES OF ILLEGALITY

The consequences of illegality may vary depending on whether the contract is illegal at its inception or illegal in its performance. A contract is said to be illegal at its inception where it is tainted with illegality at the time it was made i.e. where the formation of the contract itself is prohibited by statute or the contract is illegal as being contrary to public policy. Where the making of the contract is prohibited expressly or impliedly by statute or where the contract is made in violation of a principle of public policy the contract is clearly illegal from its inception and, therefore, unenforceable by the courts.

Where the contract is illegal at its inception, neither 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. The principle is the same whether the contract is prohibited at common law on grounds of public policy or where its very formation is prohibited by statute.

In Re Mahmoud & Ispahani:

A statute provided that a contract for the sale of linseed oil would be void unless both parties to the contract of sale had a licence. The plaintiff seller entered into a contract to sell linseed oil to the defendant. The plaintiff had a licence and when he asked the defendant, the defendant lied to him that he also had a licence. The defendant did not in fact have the requisite licence. Later, the defendant committed a breach of the contract by refusing to take delivery of the goods. The plaintiff sued the defendant for damages for non-acceptance.

The court held that the plaintiff could not maintain an action for damages because the contract in question was illegal as having been made in violation of the statute. The courts refused to enforce the agreement on the ground that to enforce it would undermine the purpose of the statute.

In 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 licences, therefore since it was established from the evidence that the plaintiff had no licence, the sale was illegal and unenforceable.

In Holman v. Johnson, Lord Mansfield explains the principle as follows:

The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act if, from the Plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, (that is, out of an illegal consideration) or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a Plaintiff. So if the Plaintiff and defendant were to change sides, and the defendant was to bring his action against the Plaintiff, the latter would then have the advantage of it.

11.4 ILLEGALITY IN PERFORMANCE

In some cases the contract 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. A common example is where a lawful contract is performed in a manner prohibited by statute.

For example, a contract for the carriage of goods may itself be a lawful contract, but may be performed illegally because the carrier's driver in driving the vehicle exceeds the speed limit or does not have a valid licence. Does such an illegal performance render the contract unenforceable? If so, is it unenforceable by one or both parties?

The courts have developed a number of principles to guide the determination of the effect of illegal performance on a contract, which may be summarized as follows:

1. 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. This is generally so where the illegal act is central to the performance of the contract and not merely incidental to it.

The case of Anderson v. Daniel involved a contract for the sale of fertilizer. The contract itself was not in anyway illegal, but the statute provided that the seller had to deliver to the buyer an invoice which stated the composition of the fertilizer. When making delivery of the fertilizer to the buyer. It was an offence to fail to do so. The seller delivered 10 tons of fertilizer to the buyer for the price. The court held that his action must fail because he had failed to perform the contract in only way that the statute allowed it to be performed. Thus plaintiff, being the offending party was deprived of any contractual right or remedy under the contract.

2. Where a legal contract is performed in an illegal manner, 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 any way.

In Archibold v. Spanglett:

The plaintiff employed the defendant for reward to carry a third party's goods load of whisky from Leeds to London. The agreement was between the defendant's lorry driver and the plaintiff company's traffic manager. There was statute which provided that: "no person shall use a vehicle for carriage of goods unless he holds a licence. Which entitles him to carry goods 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. Here, the contract not illegal at its inception, but had merely been performed in an illegal way by defendant. The plaintiff, being unaware of the defendant's illegal performance and not having condoned it in any way, was entitled to recover damages for its breach,

In Schandorf v. Zeini:

The appellant held a lease of a plot of land which contained a covenant against underletting without the lessor's consent. He constructed a house on the plot and in 1969 sold the unexpired term of the leasehold property, furniture and a cooker to the respondent for 19,290.00cedis. The respondent commenced payment by instalments to the appellants. The

keys to the house were given to the respondent who moved into the house on the 11 February 1970 and continued payment of the outstanding balance, part of which was made in foreign exchange. Second appellant left the country for good leaving first appellant in charge. By March 7 1972, respondent had overpaid the appellant by 661.00cedis but the appellant refused to convey the house to him. Respondent brought the action for specific performance of the oral agreement and for the recovery of the 661.00cedis overpayment. Appellants, however, denied there had been an agreement for the purchase of the house. Instead there was tenancy agreement for a completely furnished house for six years. Trial judge found for the respondent.

The appellant's argument in the appeal was that the specific performance ordered by the trial judge was misdirected on the basis that the absence of the prior consent of the lessors and part payment made in foreign exchange offended the Exchange Control Act, 1961(Act 71), which made the contract one which was contrary to public policy and therefore void and unenforceable. He further contended that the land involved was stool land and thus any such transaction came under section 8(1) of the Administration of Lands Act, 1962 (Act 123). As such since the consent of the Minister was neither sought nor obtained, hence the sale of the property was void as it offended the provisions of the Act.

It was held that the court will not assist a plaintiff who in order to recover under a contract relies upon his own illegal act even if at the time of making the contract he did not intend to break the law. Such an illegality must form the basis of the plaintiff's claim for relief. The respondent was not obliged to disclose that he had paid the whole purchase price of the alleged sale before he could succeed on his claim and the court should not therefore deny him assistance merely because some illegality in his performance came to the notice of the court. The court noted that a sub-lease in contravention of the covenant always gave the head-lessor a right to damages and he might determine the lease but the sub-lease was not void ab initio. Section 8(1) of the Administration of Lands Act, 1962 (Act 123) did not require the concurrence of the Minister to precede disposition. The Minister's concurrence could be sought after making all arrangements for the disposition.

3. 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.

In Ashmore & Ors v. Dawson Ltd:

The plaintiffs entered into a contract with the defendants, a haulage company, 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 25 ton tube banks, with the result that they exceeded the statutory maximum weight allowed for such lorries. On the way, one of the lorries toppled over and the plaintiff brought an action against the defendants 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.

11.5 RECOVERY OF MONEY OR PROPERTY TRANSFERRED UNDER AN ILLEGAL CONTRACT

One important consequence of illegality is that 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. The rationale behind this rule is that the court will not lend its aid to a party who has paid money or transferred property under an illegal contract in his attempt to recover it. The principle is expressed in the maxim: "in pari delicto potior est conditio defendentis" ("in equal fault, the stronger is the situation of the defendant").

In Parkinson v. College of Ambulance Ltd:

The Secretary of a charitable organisation promised the plaintiff that he would secure for him the title of knighthood if he would make a sufficient donation to the organization's funds. In consideration of this promise, the plaintiff paid £3,000 and promised more when he should receive the honour. The knighthood never materialized and the plaintiff sued for the return of the money.

It was held that the action must fail since it was founded upon a transaction, which was illegal at common law on the ground that it was a contract which tended to promote inefficiency and corruption in public life.

In Taylor v. Chester:

The plaintiff sued for the return of half a £50 note which he had delivered to the defendant. The defendant pleaded that the half note had been deposited with her by way of a pledge to secure a debt owed to her by the plaintiff. The plaintiff's reply was that the debt owed to the defendant was in respect of the provision of wine and suppers supplied by the defendant for the purpose of being consumed by the plaintiff and several prostitutes in a debauch that was meant to incite the prostitutes to disorderly conduct.

The court held that the plaintiff could not recover the half-note because in order to get rid of the defendant's defence, the plaintiff had to set up this immoral and illegal contract in which he had participated. The plaintiff therefore could not establish his claim for the recovery of the note without disclosing and relying on an illegal contract and therefore the action had to fail.

11.5.1 Exceptions to General Rule that Moneys Paid and Property Transferred Under an Illegal Contract are Irrecoverable

Claim not Founded on Illegal Act

First of all, a party can recover money or property transferred to the other party if he can establish his claim without reliance on the illegal contract. Thus the plaintiff can do so if he can found his action on some independent and lawful ground without relying on the illegal contract. Thus the plaintiff may recover property transferred under an illegal contract to the defendant, if he can frame a cause of action which is completely independent of the illegal contract such that he is not compelled to disclose the illegality.

In 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) agreed to lease "Maila" land of which he was the registered owner, to the defendant for one year and thereafter on a yearly basis. 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 seven weeks' notice to quit and ultimately sued for recovery for the land.

The court held that the plaintiff should succeed since his claim to possession was based not upon the agreement, which was admittedly illegal, but was founded on the independent ground of his registered ownership. The plaintiff succeeded because he was not compelled to rely on the illegal agreement in order to establish his claim.

Where Plaintiff is not in Pari Delicto with the Defendant - Where Parties Are Not Equally Guilty

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 plaintiff upon proof that he was induced to enter into the contract by fraud or duress or oppression at the hands of the defendant.

In 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.

In Kwarteng v. Donkor:

The defendant in 1948 borrowed £600 from the plaintiff and managed to pay back only £80 by 1950. The two entered into an agreement which was later reduced into writing. The agreement provided that, if the Agogohene, Kwaku Dua is destooled as a result of a committee of enquiry or defendant helps the Krokomase people to elect one of their relatives as the Agogohene, plaintiff faithfully promises to dash the whole amount of £520 to Kofi Donkor the defendant. The defendant, an influential person, helped to frame the destoolment charges against the said Kwaku Dua and testified against him. He was eventually destooled. The defendant also supported the candidature of the plaintiff's nephew who though elected was never enstooled. The plaintiff therefore brought this action to recover £520 which he maintains defendant still owed him. He sought to evade his agreement to forego this amount by alleging that it was illegal and contrary to public policy.

It was held that an agreement to improperly use influence to secure for someone the election to a public stool merely for financial consideration and irrespective of the candidate's merit is injurious to the public interest and illegal. The court held further that money paid in furtherance of an illegal contract cannot be recoverable where the parties are in pari delicto, stating that the law on public policy in Ghana would not be advanced by distinguishing between a case where actual money is paid over in pursuance of an illegal transaction, and one where, as in this case, the consideration is a promise to forego a debt. Apaloo J. stated:

It seems to me fairly well established that except in well recognised circumstances money paid in pursuance of an illegal contract cannot be recovered by action. One of the exceptions of this rule is where the parties are not in pari delicto. In my opinion, in this case both parties are in pari delicto. The plaintiff voluntarily was willing to part with as much as £520 as consideration for the defendant using his influence, as he well knew, corruptly to secure for his nephew enstoolment to the public stool of Agogo. The defendant on his part was willing to lend his influence and services in return for that sum. There is no question here of one man holding a rod and the other having no alternative but to submit.

In Addy v. Irani:

The plaintiff was a sales manager and the defendant was an executive chairman of the same company. The plaintiff claimed that the defendant made available quantities of flour to him to sell at prices well above the controlled price and the profits were equally shared between them. The plaintiff claimed that at the request of the defendant, he advanced some moneys to the defendant to smuggle out of the country and bank it for him. Plaintiff had converted some of the money he advanced to the defendant into US dollars, contrary to the Exchange Control Act. The plaintiff sued when the defendant denied receiving the moneys.

The plaintiff's action failed. The court stated that no one could found an action on an illegal act. In the instant case, the plaintiff had not averred that he was an innocent agent or unwilling party or unwitting servant or the underdog in the whole transaction. He claimed in his own pleading that he willingly contributed to the illegal business and took his fair share of

the profits. He was therefore in pari delicto with the defendant and could not recover any moneys under the illegal agreement.

Class Protecting Statutes

In some cases 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. Such statutes are described as class protecting statutes. In Ghana examples of class protecting statutes would include the Conveyancing Decree, 1971, NRCD 175 and the Hire Purchase Decree, 1972 (NRCD 292).

In such a situation the law takes the position that as between the two parties, it is the party in the stronger position who should bear the duty to comply with the statutory provision. Thus to further the objectives of the law, the law stipulates that where a contract is made in violation of such a provision in a class protecting statute, the party who is a member of the 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.

In Kiriri Cotton Co. Ltd v. Dewani:

The appellant company let a flat in Kampala, Uganda, to the respondent for a term of seven years and received a premium of 10,000 shillings. It was against the Rent Restriction Ordinance to take premiums from tenants. Both parties did not know that it was illegal. The Ordinance made no provision for the recovery of illegal premiums. The tenant brought the action to recover the premium he had paid.

It was held that the tenant could recover the premium from the landlord. The court applied this principle and held that if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other. It being imposed specially for the protection of the other, then they are not in pari delicto (i.e. equally guilty) and the money so paid can be recovered.

The Supreme Court's 2008 decision in the case of City & Country Waste Ltd v. Accra Metropolitan Assembly which deals with the consequences of illegality of contracts in Ghana is worthy of discussion. The Supreme Court in this case had to decide whether or not to follow the orthodox approach of the English courts which dictates that a plaintiff will only be allowed to recover money or property transferred under an illegal contract if he is not in pari delicto with the defendant and the plaintiff can only establish this if he can show that he was induced to enter into the illegal contract by the fraud, duress or oppression of the other part; or that the plaintiff was ignorant of the fact that made the contract illegal or that he or she was a member of a vulnerable class protected by statute. Upon a thorough consideration of the impact of the traditional English authorities and the case made for a review of the law as well as legislative reforms made in certain common law jurisdictions, the Supreme Court opted to

adapt the strict and technical English approach in order to ensure justice and prevent unjust enrichment of one party to the illegal transaction.

In City & Country Waste Ltd v. Accra Metropolitan Assembly:

The plaintiff was a limited liability company incorporated under the laws of Ghana and carried out the business of waste collection, disposal and management as well as landfill services, whilst the defendant was a statutory body. The defendant engaged the plaintiff company to render waste disposal services within the city of Accra in an agreement in December 1997, which was to last for seven years, with the option that both parties could renew it for a further seven years. In June, 2001, the defendant terminated the agreement. The plaintiff company, however, claimed that the termination constituted a breach of contract and, therefore, brought the present action, claiming inter alia, cost of services provided and damages for breach of contract. The defendant on its part challenged the enforceability of the contract and claimed that it was executed under duress and in breach of the Local Government Act as well as other regulations of the defendant. The defendant thus counterclaimed for, inter alia, a declaration that the agreement was null and void.

The High Court at first instance held, per Justice Ofoe, that the agreement was not executed under duress but was illegal on grounds of public policy. However, he went on to enforce certain obligations in the contract although he had declared the contract to be illegal. On appeal, the Court of Appeal dismissed the defendant's claims but however reversed the trial judge's findings that the contract sued on was illegal. The defendant thus appealed to the Supreme Court on the grounds that since the contract was in breach of statutory provisions and other regulations, the Court of Appeal erred in law by holding it to be legal and enforceable and they also erred in holding that even if the contract was illegal it was nonetheless enforceable.

With regard to the issue of whether or not the contract was illegal, the Supreme Court held that considering the circumstances of the case, a necessary implication had to be made from the statutory provisions on district tender boards that contracts entered into in breach of them were illegal and that the combined effect of the various provisions, when construed purposively indicates that there is a prohibition on concluding contracts in disregard of them. The Court noted that "to hold otherwise would defeat their purpose."

With respect to the restitution of the benefit conferred on the defendant, the Court stated that the general rule was a prohibition on the recovery of benefits conferred under illegal contracts. However the exceptions to this general rule are: where the parties are not in pari delicto (equally at fault); and where a party to an executed contract repents before performance. The court noted that on the facts of the case, it was the in pari delicto exception which was germane and further noted that in this case the benefit to be recovered from the defendant was not money paid or property transferred but rather the value of services rendered.

The Court thus finally held that balancing the need to deny enforceability to the contract sued on by the plaintiff against the need to prevent unjust enrichment of the defendant, and

considering that in relation to the defendant's non compliance with the statutory provisions binding on it, the plaintiff was not in pari delicto in a broad sense, we have come to the conclusion that the Plaintiff must be paid reasonable compensation for the services it rendered to the defendant. The Supreme Court thus reversed the Court of Appeal's finding that the contract was not illegal and affirmed the orders of the High Court.

The decision in City & Country Waste Ltd v. Accra Metropolitan Assembly makes significant strides in the development and adaptation of the law relating to the consequences of illegality of contracts, certain aspects of which have been found to be restrictive in their application and which have benefitted from legislative reform in some common law jurisdictions.59 As noted by the Supreme Court, a review of the traditional English authorities shows that in determining what should be the consequences of the illegality of a contract, the law adopts a "rather technical approach", under which recovery of money or property transferred under a contract is only allowed where the plaintiff can show that he was induced to enter the contract by fraud, duress or oppression of the other party; or was ignorant of the fact which made the contract illegal or where the plaintiff belonged to a vulnerable class protected by statute. A strict adherence to this rule in certain cases tends to unduly penalise the plaintiff since the ban on recovery of money or property transferred under an illegal contract applies without due consideration of relevant factors such as where the illegality involved is minor or insignificant, wholly or largely due to the fault of the defendant or merely incidental to the contract in question.

The Supreme Court adopts the bold and innovative step of implementing the structured discretionary approach (recommended by the English Law Commission and which has been given legislative effect in the New Zealand Illegal Contracts Act of 1970), which involves a balancing of such relevant factors as the seriousness of the illegality involved, whether the plaintiff was aware of the illegality and the purpose of the rule which renders the contract illegal, in determining whether or not the plaintiff should be allowed to recover money or property transferred under an illegal contract or be paid reasonable compensation for services rendered to the defendant under an illegal contract. As the Court points out, urgent legislative reform is required to replace the current technical rules with a more flexible discretionary approach to be implemented on a case by case basis in order to better serve the ends of justice.

Locus Poenitentiae - Where One Party to an Executory Contract Repents Before Performance

This exception applies where money has been paid or property transferred for an illegal purpose which has not yet been performed and the plaintiff changes his mind and withdraws from the contract. A party to a contract despite its illegality is allowed a locus poenitentiae (i.e. an opportunity to repent or change his mind) and may be allowed to recover any money or property transferredundef the contract, provided he begins proceedings before the illegal purpose has been performed either in whole or in part.

In 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 they 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, and 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.61 It must be noted that the mere frustration of an illegal contract owing to circumstances beyond the plaintiff's control does not entitle the plaintiff to recover his property under this exception.

In Bigos v. Boustead:

The parties had entered into an agreement in breach of the provisions of the Exchange Control Act of 1947, whereby B had agreed to make available £150 worth of Italian currency to A to enable A's wife and daughter to travel to Italy. As security, A deposited with B a share certificate. The promised money was never delivered and A sued B to recover the share certificate.

A argued that since the contract had not yet been performed he was entitled to a locus poenitentiae, but this contention was rejected by the court on the ground that there was no true withdrawal or change of mind on A's part. The contract had merely been frustrated by B's failure to supply the money. An attempt to rely on this defence in the case of Kwarteng v. Donkor also failed. The court held in that case 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.

Chapter Twelve

DISCHARGE OF CONTRACT

12.0 INTRODUCTION

This chapter deals with the ways in which one or both parties to a contract may be freed or discharged from their obligation to perform a contract. There are a number of ways by which one or both parties to a contract may be discharged from their obligations to perform the contract. Contracts may be discharged by: agreement, performance, breach, or frustration.

12.1 DISCHARGE BY AGREEMENT

The parties to a contract may be discharged by their own agreement. The parties to an existing contract may enter into a subsequent agreement to extinguish the rights and obligations created by their earlier contract. In Fish & Meat Co. Ltd v. Ichnusa Ltd, Prempeh J. noted: "It is a general rule of law that one of the modes in which an existing contract may be discharged is by the same process and in the same form as that in which it is made, that is by mutual consent of the parties."

In Fish & Meat Co. Ltd v. Ichnusa Ltd the facts were as follows:

By a written contract dated December 4, 1961, the defendants who owned a fishing vessel agreed to sell all their fish catches exclusively to the plaintiffs. The defendants were, however, to maintain their own vessel and its crew. The same parties entered into another contract on the December 29, 1961, whereby the plaintiffs were to purchase the defendants' fishing vessel. At the trial, evidence was led to show that in the plaintiffs' reply to a letter written by the defendants, the plaintiffs referred to some of the terms of the December 4 contract. On May 3, 1962, the plaintiffs informed the defendants in a letter that they were no longer going to purchase the vessel. On the July 17, 1962, the vessel arrived in Ghana and the plaintiffs nevertheless started business with it, paid for its maintenance and the salaries of its crew. They alleged that the defendants later took possession of the vessel, sold all its fish catches and threatened to remove it from Ghana. The plaintiffs therefore sued, inter alia, for accounts of all fish sold and payment to them of all the proceeds from the sales. On the evidence, the trial judge held that the operative agreement was on the December 29, 1961 one and that it was the defendants who breached that contract.

The court held, inter alia, 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. In the instant case, the December 4, 1961 contract was extinguished by the December 29, 1961 contract since the character and terms of it were different from and inconsistent with the December 4, 1961 contract.

The court further considered the issue of whether a letter referring to the terms of a discharged contract will operate to revive that contract and discharge a subsisting contract

made subsequent to the first contract. It was found that this depends on the construction of the letter and the second contract and also upon the letter being written after the execution of the second contract. It was held that the December 4, 1961 contract could not be said to have been revived by the plaintiffs' letter referring to the terms of the December 4, 1961 contract after execution of the December 29, 1961 contract to regulate the contractual relations of the parties.

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

In Japan Motors Trading Co. Ltd v. Randolph Motors Ltd?

The plaintiffs entered into an agreement to sell their motor workshop to one J.KJR. 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. Thus with the consent of all the parties, the transaction in the previous agreement was incorporated in the new one and the defendants-were substituted for J.K.R., thereby discharging him from his obligation under the agreement. It was a kind of novation since it was clearly the intention of the parties that the liability of J.K.R. under the original agreement to the plaintiffs was to be discharged in consideration of the defendants performing the same obligation in favour of the plaintiffs. The only transaction which was, therefore, binding on the parties was the one contained in the subsequent agreement.

12.2 DISCHARGE BY PERFORMANCE

12.2.1 Requirement of Exact and Precise Performance of Entire Contracts

Generally, a party must perform all his obligations under a contract completely and exactly in order to be discharged from further performance or in order to be entitled to sue to enforce the other party's performance. For a party to be discharged from further performance and be entitled to sue to enforce the performance of the other party, his own performance must be precise and exact i.e. the performance tendered must be strictly in accordance with the terms of the contract and must leave nothing else to be done. Thus, as a general rule, where one party tenders defective or incomplete performance of an entire contract, the other party is discharged from his liability to perform his side of the contract and the performing party cannot sue to recover payment for partial or defective work done.

In the earlier cases, the general principle applied by the courts was that where the contract was bilateral and required one entire piece of work to be done by one party, the complete performance of the work was a condition for the liability of the other party to perform, unless the parties had stipulated otherwise in their contract.

In Cutter v. Powell:

The defendant agreed to pay Cutter 30 guineas if he performed his duties as a second mate on a ship sailing from Jamaica to Liverpool. Cutter proceeded to act as mate on the ship, but died 19 days before the ship arrived at 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 i .e. to serve as mate on the ship 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.

In Sumpterv. Hedges:

The plaintiff had agreed to erect on the defendant's land two houses and stables for a fixed sum. Plaintiff did part of the work and abandoned the" ' contract and the defendant had to complete the buildings himself. The plaintiff-sued to recover the value of the work he had done. It was held that the plaintiff could not recover the value of the work done. He had failed to perform completely and, therefore, was not entitled to payment.

In Re Moore v. Landauer:

The defendants agreed to buy from the plaintiffs 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 agreed number of tins was delivered.

The court held that the defendants were entitled to treat themselves as discharged from their obligation to accept the goods or to pay for them i .e. the defendants were entitled to reject the whole consignment on the ground that the plaintiffs failed to perform their obligations in accordance with the terms of the contract.

In Bolton v. Mahadeva, the plaintiff contracted to install a central heating system in the defendant's house for the sum of £800. He installed the system but it did not work well and the defendant refused to pay for it. The court held that the plaintiff could recover nothing.

The above cases illustrate the principle that a party who does not perform perfectly can recover nothing. This could in some cases result in injustice. First of all, it would clearly be unjust to hold that a workman should be entitled to nothing for the most trivial defect in performance. More importantly, the application of the general principle could lead-to the unjust enrichment of the other party, who takes the benefit of the partial performance' without

having to pay anything for it. For these reasons, the law developed certain qualifications and exceptions to the rule in order to mitigate its effect and achieve justice between the parties.

From the point of view of the party to whom the performance is due, the question which arises is whether he can repudiate the contract and not pay anything at all for the defective or incomplete performance or accept the defective or incomplete performance tendered by the other party and pay less for it. From the point of view of .the party who has performed defectively or incompletely, the question is whether he can recover anything at all for the defective or incomplete performance He has, tendered; For example, in a building contract, if the builder builds a house up to a certain point and abandons it, can he claim payment for the incomplete work done?

A number of principles have been developed in the ease law to deal with such situations.

Doctrine of Substantial Performance

First of all, the law developed the doctrine of substantial performance to mitigate the impact of the principle, of exact and precise performance of entire contracts. The doctrine of substantial performance is premised on the fact that there are degrees of defectiveness or incompleteness in performance: the defect or shortfall in performance may be trivial, minor, substantial or total. The principle of substantial performance states that if the performance tendered falls short of the required performance only in some relatively trivial respect, the party not at fault is not completely discharged from performance. He must pay the price agreed upon for the work done or the services rendered, but may counterclaim for the loss he has suffered by reason of the incomplete or defective performance. This means there will be a deduction for the partial non-performance or the trivial defect in performance.

What constitutes substantial performance of a contract depends on the nature of the contract and all the circumstances. The courts look at the nature of the defects in performance and the proportion between the cost of rectifying the defects and the total contract price. Generally, where the cost of rectifying the defects in performance is a relatively small proportion of the total contract price, the courts are likely to consider the contract as substantially performed."

In Hoenig v. lsaacs, the parties entered into a contract for the decoration of a one-roomed flat. The plaintiff, 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.

Acceptance of Partial Performance

The second exception to the rule requiring exact and precise performance before recovery applies where the innocent party voluntarily accepts the partial performance tendered by the other party. Even though a promisor has only 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 tendered. This inference is made where the other party, having the option either to accept or reject the partial performance, chooses to accept and keep the benefit of the partial performance. In this case the party who tendered the partial performance can sue on quantum meruit (i.e. for a reasonable price for work done) or quantum valebat (reasonable sum for goods actually supplied) to recover payment that is commensurate with the benefit bestowed on the other party. The principle is clearly illustrated in section 14(1) of the Ghanaian Sale of Goods Act, which slates: 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. In Mabsout v. Far a 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, Kumasi, in which he claimed £G 6,000 being reasonable remuneration for work done for the respondents. It was dismissed by the trial judge.

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.

It must be noted that the performing party will only be entitled to sue on quantum meruit if the party not in default had the option either to accept or reject the partial performance, not if it was forced on him against his will. In other words, an agreement to pay for the partial performance can only be implied from the circumstances if it was open to the recipient either to accept or reject the benefit of the work done, and he voluntarily decided to accept it. Clearly, this option exists in cases where a seller of goods delivers less than he contracted to sell because the buyer can elect either to accept or reject the goods delivered. Thus, if he decides to accept the lesser quantity, then he must pay for them.

In Sumpter v. Hedges, Collins L.J. explained the point as follows:

There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land.

Prevention of Performance by Promisee

The third exceptional situation arises where a party who has only partially performed his obligations under an entire contract is prevented through the fault of the other party from, completing his obligations under the contract. In such a case the law allows the performing

party two options: (a) He can either sue to recover damages for breach of contract; or (b) He may sue to recover reasonable remuneration on quantum meruit for the work he has done, the leading authority for this principle is Planche v. Colburn.

In that case, the plaintiff had agreed to write a book on costume and ancient armour 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.

In Skanska Jensen International v. Klimatechnik Engineering Ltd:

The defendants, who carry on business in Ghana as civil engineers had secured a contract from Glahco Hotels & Tourism Development Co. Ltd, owners of the Golden Tulip Hotel, to do civil engineering works in the new Executive Wing of the hotel. Their contract permitted subcontracting and they invited the plaintiffs who are renowned refrigeration engineers based in Cyprus to be Sub-Contractors. Between May and November 1996, discussions took place between the defendants and the plaintiffs about the subcontract, but nothing concrete materialized from those discussions. The defendants signed their agreement with Glahco Hotels, in September 1996. According to the plaintiffs, the defendants warned them in November 1996 not to expect any sub-contract. However, on or about the 26th of November 1996 the defendants informed the plaintiffs that the sub-contract was available and that if they were still interested they should come down to start the job immediately. This urgency was probably due to the fact that according to the defendants their own.contract with the owners required them to have an air-conditioning engineer on the site by October 1996.

The plaintiffs replied, accepting the offer. The plaintiff's Managing Director testified that he came to Ghana on 7th December 1996, expecting to sign a sub-contract but this did not happen. Between 19th and 21 st December 1996, the plaintiffs held discussions with the defendants on the terms of the subcontract and on 23rd December 1996 minutes of their meeting were signed. The minutes were tendered in evidence as Exhibit G. It contained the main terms of their contract. The parties further considered a draft sub-contract. It was a standard form contract used in the building industry. They made several change's there to by way of additions, outright cancellations or substitution.

The draft sub-contract was tendered in evidence as Exhibit H. In this case; the parties merely initialed each page and each addition, cancellatipn or other amendment. In particular, even though page 25 was printed with the usual concluding words: "IN WITNESS whereof the parties hereto etc." andspaces were provided for their signatures, the parties did not sign it. Paragraph 9 of Exhibit G explained that they agreed that "the subcontract will be prepared and signed as per attached draft". From the Respondents' evidence, they expected that the sub-contract would be prepared and made ready for signature soon thereafter. But that did not happen. Later, he informed the plaintiffs that a director of the defendants' was coming into

the country and, he the director, would like to discuss the terms of the sub-contract with the plaintiffs' representative. A meeting took place on 27th January 1997 between the defendants' said director and the plaintiffs' Managing Director. According to the plaintiffs, this meeting confirmed the main issues of the contract. On 19th March 1997 three documents were submitted to them. These were tendered as Exhibits K, Kl and K2. Exhibit K was a letter which explained what was involved in having the draft subcontract prepared. Kl was the new subcontract and K2 was "Bill of Quantities." Meanwhile the plaintiffs were carrying out the HVAC works in the hotel.

The plaintiffs were unhappy about a number of important matters which had been discussed and agreed upon but had been left out. They wrote a letter dated 20th March 1997 to the defendants "objecting to the unauthorized deletions from the subcontract and demanding that the terms as agreed between them be reinstated in it. A copy of this letter was tendered as Exhibit "L". The record does not show that exhibit L evoked any response from the defendants. On 3rd April 1997. the plaintiffs wrote a further letter to the defendants Exhibit "M" in which they gave a summary of the HVAC works they had executed on the West Wing between 3rd December 1996 and 25th March' 1997. On the same 3rd April 1997 the defendants sent a letter to the plaintiffs terminating the plaintiffs' employment because according to them, the plaintiffs had failed to provide the performance guarantee mentioned in Exhibit H. This letter was tendered as Exhibit S.

The learned High Court judge found as a fact that the only binding contract between the defendant and the plaintiff was contained in the minutes of the meeting held by them on 23rd December 1996, Exhibit G. This she found, the plaintiffs had partly performed. She also found that the draft subcontract Exhibit H was not a binding contract between the parties. The defendants, therefore, could not rely on any part of that document to terminate the contract. The termination of the plaintiffs' contract on that ground was unlawful. She dismissed the, 1st defendants' counterclaim as a "sham" and then proceeded to consider what relief was available to the plaintiffs. She said the plaintiffs' alternative claim was based on "quantum meruit, i.e, it was claiming the sum of USD 224,533.29 as a reasonable remuneration for the services rendered". She upheld the Respondents' said claim and entered judgment for them in the sum of USD 224J533.29 or its equivalent in cedis at the ForexBureau rate of exchange at the dale of payment.

The defendants appealed against the judgment of the High Court lo the Court of Appeal. The ground of appeal particularized in the Notice of Appeal was the omnibus ground" that: the judgment was against the weight of evidence adduced at the trial". On 15th January 2001, the defendants filed the following additional grounds of appeal amongst others: that the learned Trial Judge erred by ignoring the assessment of quantum by the independent consultant to the project and granted the relief as set out in the claim for breach of contract by the Plaintiff as "liquidated and that the award in dollars in a quantum meruit matter is wrong as the dollar is not legal tender in Ghana.

The Court of Appeal, in dismissing the appellant's appeal, found that the learned trial judge was justified in dismissing the Appellants' counterclaim which she had described as a "sham"

and further upheld the Respondents' claim in quantum meruit for the sum of USD 224,533.29 or its equivalent in cedis at the Forex Bureau rate of exchange at the time of payment.

The Appellants appealed to the Supreme Court. The grounds of appeal included the statement that the judgment was against the weight of evidence on record, the Learned Justices of Appeal did not consider the principles governing quantum meruit and did not apply the said principles of reasonable quantum independently assessed and the Learned Justices of Appeal erred in ignoring the assessment of quantum meruit by the independent consultant to the project and affirmed the decision of the High Court of Justice granting the Respondent's claim for breach of contract as liquidated claim.

The Supreme Court unanimously allowed the appeal. The court was of the opinion that there are two grounds for assessment of the value of quantum meruit for work done: (a) reasonable remuneration fixed by the court; or (b) quantum meruit assessed at the contract rale. Where one party starts to perform the contract but is prevented from completing it by the other party's breach, he can claim quantum meruit at the contract rate. In this sort of situation, the amount is really an apportionment of the total contract price. It is the ratio which the work done bears to the total volume of work required to be perform under the contract.

Where there is no concluded contract, then the court must assess reasonable remuneration having regard to all the circumstances. An example is where one party does work at the request of another during negotiations which are expected to lead to a contract between them but are broken off and no contract results as in the instant case. In the circumstances, the plaintiff-respondent became entitled to reasonable remuneration for work done to be assessed by the court and not an assessment based at the contract rate. In the result, both the trial High Court and Court of Appeal erred in accepting the figure claimed by the plaintiff-respondent for work done and which was based on the contract price.

Divisible Contracts

The next exception to the general rule applies to divisible contracts. The law makes a distinction between entire contracts and divisible contracts. Whether a contract is entire or divisible depends on the construction of the contract. Generally, a contract is divisible where the obligation to pay for one part of the contract is independent of performance of the other parts. In building contracts for example, it is common for the parties to provide for the payment at intervals or at stages. Also, certain employment contracts may provide for payment at weekly or monthly intervals. Where the contract is divisible, completion of each distinct part or each stage entitles the performing party to payment and the obligation to pay arises independently of performance of the whole contract

12.3 DISCHARGE BY BREACH

Another ground for the discharge of a contract is the breach of the contract by one party. In certain cases, a breach by one party releases or discharges the other party from his duty to perform his obligations under the contract. The first point to note is that a breach of contract, no matter what form it takes, always entitles the innocent party to maintain an action for damages. However, it is not every breach which discharges the innocent party from his liability or obligation to perform. The right of a party to treat a contract as discharged arises only in two kinds of cases:

1. Firstly, where the party in default has repudiated the contract before performance is due or before the contract has been fully performed. Where, the party in default repudiates the contract before performance is due, such repudiation amounts to anticipatory breach.:i

2. Secondly, where the party in default has committed what is described as a fundamental breach of the contract. A breach is said to be fundamental if, having regard to the contract as a whole, the promise which has been violated is of relatively major importance to the contract.

12.3.1 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. Repudiation may be explicit or implicit. It.is explicit where the defendant expressly declares that he will not perform the contract when the time for performance arrives. Repudiation is implicit where the reasonable inference that can be made from the defendant's conduct is that he no longer intends to perform his side of the contract. For example, where pne party does a deliberate act which makes it impossible for him to perform his obligations under the contract. For example, where A has contracted to sell a specific painting to B, A's act of selling the painting to C would constitute an anticipatory breach of the existing contract with B.

In Frost v. Knight, the defendant promised to marry the plaintiff after his father's death. The defendant 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.

Before the other party can treat himself as discharged, it has to be established that the defaulting party made his intention clear beyond reasonable doubt that he did not intend to perform his side of the contract. In other words, there must be an absolute refusal to perform before there can be said to be repudiation. To prove such an intention the courts look at the nature of the contract, the surrounding circumstances and the motives which prompted the alleged repudiation.

It must be noted that even if one party repudiates the contract or commits an anticipatory breach, the contract does not end automatically. Since the parties voluntarily agreed to enter into the contract, they must also both agree or consent to its termination. Thus where one party to a contract commits an anticipatory breach of the contract, the party not in default has the following options: (a) He may treat the contract as at an end or as conclusively discharged and sue for damages immediately; or (b) He may affirm the contract and treat it as still being in force in spite of the other party's breach until the date fixed for performance arrives.

Option 1: Where the Innocent Party Accepts the Repudiation and Treats the Contract as Discharged

The innocent party's first option is to treat the contract as discharged by reason of the other party's repudiation or anticipatory breach and take immediate proceedings. Where the innocent party chooses this option, the contract is finally discharged and both parties are released from further performance. The innocent party is not obliged to accept or pay for any further performance and may sue the defaulting party for damages as soon as the repudiation occurs.Once the innocent party elects to treat the contract as discharged, the contract is terminated and the party in default is liable in damages for any past or earlier breaches and for the breach which led to the discharge of the contract, even though he is excused from further performance. In Hochester 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. 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.

In the case of In Re Timber & Transport Kumasi-Krusevac Co. Ltd; Zastava v. Bonsu and Anor:

By a written agreement entered into on July 20, 1971 between Timber & Transport Co., Ltd. (T. & T. Co., Ltd) and a Yugoslav company, the two companies were, to be merged and a new company established under the T. & T. Kumasi-Krusevac Co., Ltd. Clause 15 of the agreement provided dial the agreement was to remain irrevocable for ten years and no member or Director of the company as re-named could present a petition or make an application to the court seeking the winding-up or liquidation or in any way seek or attempt to bring the existence of the company to an end. Notwithstanding clause 15, the petitioner, the Yugoslav company, petitioned for the official winding-up of the company.

The appellate court held, inter alia, that the crucial issue which was avoided by the trial judge was whether the agreement was still binding on the parties. The court stated that the well established principle was that where one party manifested a clear intention not to be bound any longer by the terms of his contract or where he openly repudiated it the innocent party

might treat the contract as at an end and seek such remedies as were open to him. Where the breach was fundamental, the innocent party might accept the breach and treat it as absolving him from his own obligations under the contract. The question whether a breach was fundamental was for the courts to determine. In the circumstances of this case, if the averments contained in the petitioner's affidavit were established, they would indicate that by 1978 the respondents had clearly shown by conduct that they did not regard the 1971 contract as binding and in that case the petitioners would be justified in treating the contract as at an end.

Option 2: Affirmation of Contract by Innocent Party

As noted, where one party commits an anticipatory breach, the party not in default has the option of affirming the contract and treating it as still being in force until the date fixed for performance in spite of the repudiation. The innocent party will be deemed 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. For example, in a contract for the sale of goods, delivery to be made on July 1, if on June 1, the seller informs the buyer that he will not deliver the goods when the date for delivery arrives, the buyer may decide not to accept this repudiation and clearly inform the seller that he will await delivery on the July 1. The effect of such affirmation is as follows:

1. The contract remains in force for the benefit of both parties. This means that both parties remain liable to perform their respective obligations under the contract. In a contract for sale of goods, for example, if the seller repudiates his obligations under the contract and the buyer affirms the contract in spite of the anticipatory breach, both parties remain subject to their obligations under the contract, i.e. the seller is still bound to deliver and the buyer is still bound to accept the goods and pay the price.

2. If in the interim, the defaulting party changes his mind and decides to perform, the contract is thus fulfilled and the defaulting party incurs no liability.

3. The defaulting party is entitled to take advantage of any frustrating event or supervening circumstance, which may occur in the interim i.e., before the time for performance.

If after the affirmation of the contract by the innocent party, any frustrating event occurs before the date fixed for performance, the contract will be terminated (by reason of the frustration) and both parties will be discharged from performance. The innocent party's right to accept the repudiation and claim damages will be lost by reason of the frustration of the contract.

In 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 45days 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. In Joseph v. Boakye:

The appellant agreed to sell land to the respondent at 060,000. The terms of the agreement were, inter alia, the delivery of an abstract of title within seven days to the respondent and the payment of a 020,000 deposit which was to be forfeited if the respondent breached the contract, or refunded if the vendor breached it. The respondent transferred a car valued at 010,000 to the appellant as part payment of the deposit. Within two days of the agreement the appellant delivered to the respondent an unsigned deed of assignment, which recited the appellant's abstract of title. Following a suit by a third person challenging the title of the appellant's assigner, the respondent brought an action to reclaim the car transferred contending that the appellant had breached the contract by not delivering the abstract. The appellant counterclaimed for the balance of the deposit. The trial judge held that the appellant had not delivered the abstract.

On appeal it was held, inter alia, that if one contracting party expressly or by conduct repudiated a contract, the other could either accept the repudiation and treat the contract as rescinded or refuse to do so, and regard the contract as still alive, so that his rights would fall to be determined when the time for performance arrived. He could not, however, insist on performance and at the same time adopt the remedies open to him on rescission. In the present case, it was the respondent who broke the contract by refusing to complete on the due date. The appellant could, if he chose, have held him to his bargain and sought specific performance, but he did not. He accepted the breach and having rightly rescinded the contract, sold the property to someone else and forfeited the partial deposit. Having repudiated the contract, the appellant could not at the same time rely on the contract to found his counterclaim for the balance of the deposit.

In Hasnem Enterprises Ltd v. IBM World Trade Corporation:

The plaintiffs bought a photocopier from the defendants and for a number of years the defendants maintained and serviced the machine for a fee anytime they were invited to do so. On one occasion, when the machine broke down, the defendants refused to do so. The plaintiffs sued and argued, inter alia, that it was the policy of the defendants to maintain and service their products exclusively. The defendants denied and argued, inter alia, that the plaintiffs had not fully settled an outstanding bill and were in breach of the alleged exclusive maintenance policy by allowing a third party to service the machine previously.

The court held that even if there was an exclusive maintenance contract between the parties, the plaintiffs knew that their settlement of any outstanding bill before the defendants would be obliged to honour any further calls from them was of the essence to the agreement. The plaintiffs' default in paying their outstanding bill was therefore a clear breach of the after call

service agreement. Accordingly, the defendants' refusal to service the plaintiffs' machine thereafter constituted their election to treat the breach as a repudiation of the contract, thereby discharging the contract. Furthermore, the plaintiffs' acceptance of services from a third party also constituted a breach of the agreement and since it went to the root of the contract, it did riot only entitled the defendants to repudiate the contract but it also signified the plaintiffs' acceptance of the defendants' repudiation of the contract. Accordingly, the defendants were not liable to the plaintiffs for refusing to respond to their later calls.

Option 3: Affirm the Contract, Perform one's Obligations under the Contract and Sue for Payment?

Where one party repudiates the contract, the innocent party can affirm the contract and treat it as still in force and wait (until the date fixed for performance) to see if the defaulting party will perform. The question which has arisen is whether the innocent party can affirm the contract and proceed to perform his side of the contract in spite of the other party's repudiation or anticipatory breach and then sue for payment. This is only possible where the innocent party can perform his side of the contract without the assistance of the other party. For example, if A engages B to build him a ship and A repudiates the contract before the date fixed for performance, can B ignore the repudiation and go ahead to build the ship and sue for payment under the contract?

This issue arose in White & Carter (Councils) Ltd v. McGregor:

The plaintiffs were advertising contractors who supplied litter bins to Local Authorities. The bins were then placed on the streets. They were allowed to attach to these bins, plates or stickers carrying advertisements and the plaintiffs obtained profits by advertising in this way for companies. The defendant owned a garage, and in 1954 the Sales Manager of the company entered into an agreement with the plaintiffs under which the plaintiffs were to display certain advertisements for the defendants for a certain period of time. The Sales Manager in fact had no authority to make this contract with the plaintiff and so the owner of the company, when he heard of it wrote to the plaintiffs the same day to cancel the contract.

The plaintiffs refused to accept this repudiation. They ignored it and went ahead to prepare the necessary plates and stickers and attached them to the bins and displayed them for the specified period of 3 years. The plaintiffs then brought the action to recover the amount agreed upon in the contract for their performance and the defendant refused to pay.

It was held by the majority that the plaintiffs were entitled to sue for the price of the services rendered. The majority was of the view that the plaintiffs were entitled to go ahead and perform as they did, since they could do so without the defendant's co-operation, and then sue for the price agreed upon in the contract. It was held therefore that the plaintiff was entitled to disregard the defendant's repudiation and perform his side of the contract and sue for the contract price. This was, however, said to be subject to the following qualifications:

1. The innocent party could do so only if he could perform his obligations under the contract without any cooperation from the repudiating party.

2. Secondly, the innocent party could only do so if he could show that he had a legitimate interest, financial or otherwise, in performing the contract, rather than claiming damages. If the innocent party had no such legitimate interest, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself.

In Hounslow London Borough Council v. Twickenham Gardens Development Ltd:

The defendant contractor was employed by the Borough to do building work on the Borough's land. The contract provided that if the contractor failed to proceed diligently with the work, the architect might give him notice specifying the default, and if the default continued for 14 days, the Borough might by notice terminate the contract. After 4 years, the Borough gave notice under this procedure to terminate the contract. The contractor refused to accept the repudiation and continued working. The Borough sought an injunction to restrain the contractor from continuing with the work.

The court stated the two limitations or qualifications to the principle in White & Carter (Councils) Ltd v. McGregor 0 as follows: (i) It must be possible for the innocent party to perform his side of the contract without any co-operation from die guilty party; (ii) the performing party must have some legitimate interest in proceeding with performance instead of claiming damages. The decision in White & Carter (Councils) Ltd v. McGregor was held not to be applicable in this case because the first requirement was not satisfied.

12.4 DISCHARGE BY FRUSTRATION

After a contract has been made, unforeseen contingencies or events may occur through no fault of the parties which may make performance of the contract physically impossible or which may radically change the nature of the obligations under the contract, When such events occur the contract is said to be frustrated and the parties are discharged from the obligations they have undertaken to perform under the contract. Thus, a contract is said to be frustrated where an unforeseen or unexpected event occurs to make the performance of the contract impossible, illegal or radically different from the performance that was contemplated. The doctrine of frustration of contract allows the court to bring the contract to an end and do justice between the parties.

Starting from 1863, with the decision in Taylor v. Caldwell, the courts began to develop a substantive doctrine of frustration of contract to deal with situations where unforeseen contingencies or events rendered the performance of a contract impossible or rendered the contractual obligations radically different from what was originally undertaken. The doctrine of frustration of contract was first introduced as being based on an implied condition or term in the contract. In Taylor v. Caldwell.

The case involved a contract for the hire of a music hall for 4 days. After the contract had been made, the hall was burnt down through no fault of either party. The plaintiff sued the defendant for damages for breach of contract on the ground that the defendant had failed to provide the hall as agreed.

It was held that where from the nature of the contract, it is clear that the parties must have known that the performance of the contract would be impossible, unless at the time for performance, a specific thing continued to exist, then such a contract was not an absolute contract, but was subject to an implied condition that the parties should be excused if, before breach, performance became impossible due to the perishing of the thing without default of the contracting parties.

The implied condition theory was to the effect that even though there was no express contractual term to deal with the event which had arisen, a term could be implied in the contract that if the parties had anticipated and considered the possibility of that event occurring, they would have decided that the contract would be discharged. The argument was that in implying such a term, the court was only giving effect to what the parties really meant to do.

The implied term theory was upheld as the basis of the doctrine of frustration until about 1956, after which the theory came under heavy criticism. With time, the implied term theory was criticized as being fictitious and artificial. The theory has now been replaced by a new and more realistic principle that in applying the doctrine of frustration, the court is simply imposing on the parties the just and reasonable solution that the new situation demands. Instead of the implied term approach, the courts now apply the doctrine of frustration only if they consider that to hold the parties to further performance, would in the light of the changed circumstances, alter the fundamental nature or the contrac

Lord Radcliffe in Davies Contractors v. Fareham U.D.C. stated the test for determining when a contract is deemed to be frustrated as follows:

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 itself 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.

12.4.1 Applying the Test for Frustration

In applying the test for frustration, first of all, the contract itself must be construed in the light of the nature or type of contract and the relevant surrounding circumstances existing at the time the contract was made. Then the scope and nature of the original obligations undertaken by the parties must be determined. The "obligation" referred to is the fundamental obligation

created by the contract and not just any term or obligation at all. Indeed it should be an obligation which if unfulfilled by a party would entitle the other to sue for a breach of the contract. Next the scope and nature of the contractual obligations must be assessed after the event has occurred and the two must be compared to decide whether the new obligation to be performed after the event has occurred, would be radically or fundamentally different from what was undertaken under the contract originally.

It has been emphasized that a mere rise in cost or expense will not suffice. There must be a change in the significance of the obligation undertaken, such that the obligation, if performed, would be a different thing than what was contracted for. In other words, it must be shown that the unexpected event affects the subject matter of the contract or radically changes the fundamental obligation created by the contract, such that if the obligation were to be performed it would be completely different from what was originally undertaken under the contract. In other words it must be such that the party to perform can legitimately say: "this is not what I promised to do". It must be noted that whether or not a contract is frustrated is a matter of law for the court to consider, and in doing so the court applies the objective rule or approach.

In Afordi & Others v. Ghana Publishing Corporation the Supreme Court noted that the doctrine of frustration in the narrow common law sense of frustration or in the wider international business law notion of force majeure, presupposes conditions of factual impossibility or commercial impracticality, or other insurmountable impediments as defined by the parties themselves. In that case:

In 1968, the second defendant, Ghana Publishing Corporation (GPC), applied; for 44 residential houses from a state sister corporation, Tema Development Corporation (TDC), the first defendant to be used as accommodation for its workers under a House ownership (Hire-purchase scheme) of TDC. A deposit was paid under the scheme leaving a balance to be paid on each house which was to be paid over a defined period of time. GPC started a system of deducting 20% of the salaries of accommodated workers under their employment as housing allowances, presumably to use part or all of it in payment for the outstanding balances on the houses.

There had been complaints from workers that the monthly deductions were often higher than the monthly amounts due to TDC as advances on the property balances. In 1979, under the AFRC a housing committee unit which was set up directed that the 20% housing allowances which was deducted by the GPC and other establishments be stopped and the allowances paid out to the employees so that the plaintiffs could pay directly to the TDC. Pursuant to this documents were issued to the plaintiffs known as rent cards which were used for the recording of payments. Later TDC informed the plaintiffs individually by standard form letters that they had finished paying off the balances on their occupied premises and went ahead to execute some form, of leases between itself and the plaintiffs some of whom took the trouble to have the documents registered at the lands registry. GPC attempted to stop TDC from continuing to issue leases to the plaintiffs, whereupon the plaintiffs instituted the proceedings in the High Court.

In a judgment delivered on the 3rd of March 1998, the trial court dismissed the case of the plaintiffs, who then took their case to the Court of Appeal. The Court of Appeal upheld the judgment of the trial court. The plaintiffs then initiated this appeal to the Supreme Court. The Supreme Court held, unanimously dismissing the appeal that from the facts of the case there was a contractual relationship between the two institutions, TDC and GPC, since TDC had acknowledged part payment on the disputed properties under the hire-purchase arrangement and there was no similar arrangement entered into by the plaintiffs or any similar employees. The salary advances were not meant to be advances paid on behalf of the plaintiffs for their individual accounts, so as to liquidate the balances on their houses and make them individual owners. GPC was thus systematically liquidating its own balances with the TDC by the monthly deductions and this did not in law disturb its ownership of the properties in question.

The action of the AFRC did not convert the plaintiffs and other similarly situated employees into owners of the TDC properties occupied by them. The committee only changed the mode of payment and directed that the plaintiffs and other employees pay directly to the TDC and further advised the Managing Director of TDC to issue rent cards directly to the employees concerned. Therefore the contention of counsel for the plaintiffs that the contract between GPC and TDC was automatically frustrated and abrogated by the AFRC directive is not sustainable. The court was of the opinion that counsel for the plaintiffs had invoked the doctrine of frustration rather too hastily. This is because the doctrine of frustration in the narrow common law sense of frustration or in the wider international business law notion of force majeure, presupposes conditions of factual impossibility or commercial impracticality, or other insurmountable impediments as defined by the parties themselves. Some of these conditions may result from acts of God or of nature, governmental interventions such as blockades and Wars, and indeed from lawful governmental prohibitions in the form of statutes, rules and regulations. From the instant case, the directive of the AFRC did not in any way create any impossibility or impracticability by the issuance of the rent cards. Neither did it make the hire-purchase agreement between GPC and TDC illegal or in any way render the performance of the executory portions of the agreement impossible or commercially impracticable.

12.4.2 Illustrations of the Doctrine of Frustration

Destruction of a Physical Thing

Generally, 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, the contract will be deemed to have been frustrated if by some extraneous circumstances such person or thing is no longer available. In Taylor v. Caldwell, which involved the hiring of a music hall the unavailability of the hall, due to it having been burnt down accidentally resulted in the frustration of the contract.

The same principle applies in the case of the unavailability of a person, especially in cases involving contracts for the performance of personal services e.g. an artist who contracts to

paint a picture or a person who contracts to serve as apprentice. In contracts for the performance of personal services, the occurrence of an event such as the death of the person, serious illness of accident, or the person being called up for war or detained, may result in the frustration of the contract.

In Morgan v. Manser:

The defendant, a music hall artiste entered into an agreement with the plaintiff by which he appointed the plaintiff as his manager for a term of 10 years. After two years, the plaintiff was called up for service in the army and was not demobilized until after 8 years. The plaintiff sued the defendant 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.

A contract may similarly be deemed to be frustrated by reason of the non-occurrence of an event, which must reasonably be regarded as the basis of the contract. For a contract to be deemed frustrated by the non-occurrence of an event, it must be shown that the event in fact formed the basis of the contract. Here, if the event fails to happen the very basis of the contract becomes eroded and the contract may be deemed to be frustrated. This factor relates to special kinds of contracts into which the parties enter with the mutual understanding that a particular event will happen. If the event fails to happen, the contract may be held to be frustrated on the ground that the substantial object which the parties had in view has become unattainable.

This point is illustrated in the coronation cases. In the case of 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. In Herne Bay Steamboat v. Hutton, however, the contract was for a steamboat to take a party for the purpose of viewing the naval review at Spithead and for a day's cruise around the fleet. The review was cancelled because of the king's illness, but the fleet was still there. The court held that the cancellation of the review did not frustrate the contract.

Mere Inconvenience, Hardship or Financial Loss not Sufficient

It is important to note that an event which causes serious inconvenience, hardship, financial loss or even delay in the performance of the obligation under the contract is not of itself sufficient to constitute frustration of the contract. The frustrated event must affect the subject matter of the contract or the fundamental obligation created by it; and the event must be such that it renders the contractual obligation radically different from what was originally undertaken under the contract.

In Davies Contractors Ltd 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 demobilization after the war, the work took 22 months, and cost £17,000 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.

In Barclays Bank Ghana Ltd v. Sakari:

The plaintiff bank granted the defendant, its long standing customer, a loan of over two million cedis (repayable within twenty months), for the purchase of two Mercedes Benz trucks required for the operation of the defendant's business. On receiving the loan, the defendant, without the consent of the bank, used the loan to purchase a Saurer tanker, instead of the Mercedes Benz trucks as agreed with the bank. A week after the purchase of the tanker, the tanker was seized by the government on the grounds that Saurer vehicles were to be operated exclusively by the state and not individuals. The loan remained unpaid. Some years later, the bank brought the action against the defendant for the recovery of the loan and the accrued interest. The defendant pleaded the common law defence of frustration of the loan agreement arising from the unexpected seizure of the Saurer tanker by the government.

The High Court held that since it was a term of the loan agreement that the defendant was to operate the Saurer tanker and repay the loan from its proceeds, the loan agreement was frustrated by the seizure of the tanker by the government. The plaintiff appealed and the Court of Appeal upheld the High Court decision and the plaintiff then appealed to the Supreme Court. The Supreme Court held that at common law, the doctrine of frustration would be applicable where an external event of some kind, not the responsibility of either party, rendered further performance of the contract impossible or radically different from what had been contracted for.

The Supreme Court noted that whether in any particular situation frustration had occurred or not was a question for the court to determine; and it was not any event affecting any term of the contract that would amount to frustration. The basic duty of the court was to construe the contract to discover the obligation created therein. On the facts of this case, the obligation created under the loan contract was for the defendant to repay, the loan with interest and not the performance of the purpose for which the loan was sought (i.e. the operation of the vehicles to be purchased). The court noted:

Now what is the obligation created under this loan contract, a breach of which would entitle the other to sue? The obligation of the bank was to advance the money, which it did; and that of the defendant was to repay the loan together with interest, if any. This is the obligation of the parties under this loan contract, and indeed almost all loan contracts. When a bank lends money to its customer, the obligation of the customer is to repay the loan. If the loan is sought for, let us say, a business venture, and the business flops, resulting in massive financial loss to the customer, this misfortune, though may be due to no fault of this customer, does not change the nature of the obligation of the customer to repay the loan he has contracted for. He will still be obliged to fulfil his obligation. Thus the obligation of a

borrower in a loan contract, as opposed to other types of contracts, is to repay the loan and not the performance of the purpose for which the loan was sought.

The issue whether a high rate of inflation could frustrate a contract arose in the case of Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.

In that case, a contract was entered into in 1929 under which the defendants agreed at all times thereafter to supply water to a hospital at a fixed price of seven pence per 1,000 gallons. By 1978 the equivalent cost of supplying the water was about 20 times the contract price. The defendants purported to terminate the contract by giving 6 months notice. The Court of Appeal held that on the true construction of the contract, the defendants were entitled to terminate the contract upon giving reasonable notice.

Lord Denning based his decision on his opinion that by reason of 50 years of continuing inflation, the contract had been frustrated. He held that the contract had been frustrated by inflation outside the realm of the speculation of the parties. The majority, however, did not accept that frustration was the reason for the plaintiff's right to terminate the agreement and based their decision on an entirely different point, the construction of the terms of the contract itself. It is doubtful that inflation could 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 or devaluation of a foreign currency is a risk, which must be borne by the creditor, in cases where the contract does not specify which party should bear the risk.

Changes in the Law which Render Performance Illegal

It is generally accepted that governmental intervention by way of legislation or change in policy, which renders the performance of the contract impossible or illegal results in the frustration of the contract. In Denny, Mott & Dickenson v. Fraser it was held that a contract for the sale of goods to be shipped from abroad to an English port was frustrated if supervening legislation prohibited the importation of goods of that description. It was stated in that case that "it is plain that a contract to do what has become illegal cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done."

In R.T. Briscoe v. Essien:

The plaintiffs claimed £G 17,748 14s as the valueof equipment and balance of cash advances given to the defendant, a timber merchant, for the supply of logs. The defendant pleaded that while he was performing the contract legislation came into force which declared the Ghana Timber Marketing Board the sole buyer of Ghana wawa and redwoods. The performance of the said contract was thus rendered impossible and it was held that both the plaintiffs and defendant were discharged by frustration.

12.4.3 Application of Doctrine of Frustration to Leases

The question whether the doctrine of frustration could apply to leases has been a controversial one for a long time. If a building lease is granted and a. law is passed soon after prohibiting the development of that land is the lease thereby frustrated? For a long time the common law took the view that leases fell outside the purview of the doctrine of frustration since it was believed that the doctrine of frustration could never apply to leases.

This view was based on the argument that a lease creates not a mere contract, but also transfers to the lessee an estate or a property interest. The position therefore was that this estate or property interest conveyed to the lessee continued regardless of any changes in the circumstances and, therefore, even if the property was requisitioned by the government, burnt down by fire or taken over by enemy action the lease was not thereby frustrated. With time, however, this position has been abandoned by the courts, and it is now accepted that the doctrine of frustration in appropriate circumstances could apply to leases.

In Cricklewood Property & Investment Trust Ltd. v. Leightons Investment

Trust Ltd:

A building lease was granted in 1936 to the lessees for a term of 99 years for the building of shops. Before any buildings could be erected, the war of 1939 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. The .court was of the view that 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.

The case of National Carriers v. Panalpina (Northern) Ltd involved a lease of a warehouse for 10 years. After 5 years of the term had run, the Local. Authority closed the street giving the only access to the warehouse because of the dangerous condition of a building opposite. It was likely that the closure would last about 18 months, leaving the lease 3 more years to run. This caused severe disruption of the plaintiff's business and the use of the warehouse. The court held that the lease was not frustrated.

In this case, the House of Lords stated conclusively that the doctrine of frustration must be applicable to all kinds of contracts to ensure uniformity in the law of contracts, and there was no special reason why the doctrine should not apply to leases .The court made the point, however, that it would be relatively rare for the doctrine to apply in practice to frustrate a lease. However, it appears that if events occur which make it impossible for the lessee to use the premises for the intended purpose, for e.g. if in the Cricklewood case, legislation had been passed prohibiting the erection of buildings on such land altogether, it is likely that the case would have been deemed to be frustrated.

12.4.4 Self Induced Frustration

One essential point about frustration is that the doctrine of frustration applies only where performance of the contract becomes impossible without the fault of either party i.e. it applies where unforeseen events render performance of the contract impossible. The rule, therefore, is that a party cannot rely on a self induced frustration as discharging him from performance. In other words, a party cannot claim to be discharged by a frustrating event for which he is himself responsible. In fact, where a party causes the event in question, the contract is not frustrated, but the party is deemed to be in breach of contract.

In 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 granted only 3 and asked to name the 3 trawlers. They named the three trawlers other than the one 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. If they had wanted to, they could have named the vessel they had chartered from the respondents. Here, the appellants had themselves chosen to defeat the common purpose of the contract the alleged frustration was self induced.

Where it is not certain whether the frustrating event was caused by the fault of one party or not, it is for the party who alleges that the frustration was self-induced to prove that the frustrating event was in fact caused by the fault of the other party. In Joseph Constantine Steamship v. Imperial Smelting Corporation:

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, 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.

12.4.5 Consequences of Frustration

The rule at common law is that the occurrence of a frustrating event brings the contract to an end forthwith and it is automatic in its effect. It must be noted that in the case of frustration,

the contract is terminated as to the future only. Frustration does not render the contract void ab initio. The contract starts out as a valid one, but ends automatically when the frustrating event occurs. Thus the effect of frustration is that it discharges both parties from further performance of the contract.

The principle which follows from this is that each party remains under a duty to fulfil his contractual obligations which have become due or accrued before the frustrating event, i.e. before the contract was discharged. The parties are only excused or discharged from performing those obligations, which become due after the discharge of the contract. In sum, future obligations are discharged, but accrued obligations remain.

The effect of this principle was clearly illustrated in Chandler v. Webster.

In this case, the plaintiff agreed to hire a room from the defendant for the purpose of viewing the coronation procession. The price was £141, payable immediately. The plaintiff paid £100, but before he paid the balance, the coronation was cancelled and the contract was thereby frustrated. The plaintiff brought the action to recover the £100 he had paid.

It was held that not only could the plaintiff not recover the £100 he had already paid, he was also liable to pay the balance of £41 which he owed under the contract before it became frustrated (the total sum of £141 was payable immediately). The plaintiff's argument that he was entitled to recover the £100 paid, on the ground of total failure of consideration was rejected by the court. The court came to this conclusion by applying the principle stated above. Since the obligation to pay the £141 had become due before the frustrating event occurred the plaintiff had to pay it. As noted, accrued obligations remain. The parties are only discharged from future obligations.

The effect of the decision in Chandler v. Webster was that if the obligation to pay accrued before the frustration of the contract, then the debtor must pay in full the amount owed. If it became due after the frustration of the contract, then the debtor paid nothing. The harshness of the effect of the decision in Chandler v. Webster resulted in a lot of criticism and inl 942, the decision was overruled by the House of Lords in the case of Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd (The Fibrosa Case).

In this case, 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 £1,000 they had paid because there was a total failure of consideration - in that the plaintiffs got nothing for the money they had paid. The House of Lords reversed the decision in Chandler v. Webster, stating that the conclusion of Collins M.R. in that case, that the doctrine of failure of consideration did not apply where the contract was frustrated was wrong. The principle which emerged from the Fibrosa Case, therefore, was that 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.

Even after the House of Lords decision in. the Fibrosa Case, the state of the common law on the effect of frustration was still unsatisfactory for two reasons:

1. According to the principle established in the Fibrosa Case, money which had been paid under a frustrated contract was recoverable only if there had been a total failure of consideration. This means that if the consideration had been partly performed, the principle would not apply and a party who had already paid could not recover any part of his money.

2. Secondly, the application of the principle in Fibrosa may be unfair to one party who had spent money in beginning to perform the contract, if he is required to refund to the other party the whole of the amount paid to him in advance. For example, if the English company in the Fibrosa Case had expended money in building the machinery, they would have been left with a lot of useless half-built machinery on their hands with no compensation for the money they had spent in beginning to perform the contract.

In view of these loopholes in the state of the common law on the consequences of frustration, the Legislature in Ghana has intervened by enacting specific provisions in the Contracts Act, 1960 (Act 25) to deal with the rights and obligations of the parties to a contract which has become frustrated.

12.4.6 Contracts Act, 1960 (Act 25- Statutory Provisions on the Consequences of Frustration of Contracts

Sections 1-3 deal with the adjustment of the rights and obligations of the parties upon frustration of a contract: Section 1 provides:

(1) Where a contract has become frustrated and the parties thereto have for that reason been discharged from the further performance of the contract...

(2) [A]ll sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged shall, in the case of sums so paid, be recoverable from him, and in the case of sums so payable, cease to be so payable.

The import of section I (2) is that once a contract is frustrated and the parties are discharged, moneys' which have already been paid are recoverable from the party to whom they were paid and moneys which are payable or due to he paid under the contract cease to be payable, whether there is a failure of consideration or not. This statutory provision confirms the common law rule as laid down in the Fibrosa Case, but excludes the qualification that moneys paid are recoverable only where there is a total failure of consideration.

The operation of the rule in Section 1 (2) is, however, subject to the provision in section 1(3) which states:

Where a party has incurred expenses before the time of discharge in, or for the purpose of, the

performance of the contract, the Court may allow him to recover or to retain out of any sum received by him under the contract, such amount (if any), not exceeding the expenses so incurred or the total sum payable to him under the contract, as the Court may consider just having regard to all the circumstances of the case."

Illustrations (a) to (c) of the Memorandum to the Act shed some light on the implementation of the provision.

(a) A contracts to install some machinery in B's factory for a total cost of 01,000,000. After part of the work has been done, the factory is burnt down by an accidental fire. The contract is prima facie frustrated and the 01,000,000 ceases to be payable. Nevertheless, the court may order B to pay A a fair amount not exceeding 01,000,000, or the amount actually spent by A in carrying out the work. Since the court's power is discretionary, the court may apportion the loss equally between A and B.

(b) Same facts as in illustration (1), but B pays 0250,000 in advance. This makes no difference to the legal position. The 0250,000 is prima facie recoverable by B, but the court may permit A to keep some or all of it, and may, in addition, require B to pay a further sum to A if necessary. Again, the total sum allowed to A must not exceed the expenses incurred by him or the total sum payable under the contract.

(c) A in Ghana contracts to buy goods from B abroad for 0500,000 payable in advance, the contract being governed by Ghanaian law. The money is paid and half the goods are delivered but before B can deliver the remainder the import of such goods into Ghana is prohibited at law. The contract has become "impossible of performance or been otherwise frustrated" and prima facie A is entitled to recover his 0500,000. However, since B by delivering half the goods has incurred expenses before the time of discharge, or the purpose of the performance of the contract, the court may permit him to retain some or all of the 0500,000 paid by him.

The import of sections 1-3 of the Contracts Act which deal with the consequences of frustration of contracts can be summed up as follows:

1. First of all, when a contract is deemed to have been frustrated, both parties are discharged from further performance of the contract. (Section 1(1))

2. Secondly, 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))

3. All sums payable or due to be paid to any party under the contract before the time of discharge cease to be payable. (Section 1(2))

4. However, a party who has spent money on the performance of the contract can recover from the other party an amount which should not exceed his expenses or the total sum payable under the contract. (Section 1(3))

5. In computing the expenses incurred by the party, the courts may include overhead expenses, cost of personal services rendered etc. However, insurance receipts are to be ignored by the court except where there is an obligation to insure under the contract. (Section 1 (3))

6. The provisions in Part One of the Contracts Act do not apply to any charterparty (except a time charterparty), or to any contract for the carriage of goods by sea. Also, the provisions of Part One do not apply to contracts of insurance.

7. According to section 3, the parties can agree expressly as to what should be the effect of the frustration of the contract they have made. If that is done, those provisions should be applied and not the provisions of the Act.

8. Where it appears to the court that a part of any contract which has been wholly performed before the time of discharge can properly be 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.

In R.T. Briscoe (Ghana) Ltd v. Essien:

The plaintiffs claimed £G 17,784.145 as the value of equipment and balance of cash advances given to the defendant, a timber merchant, for the supply of logs. The defendant pleaded that while he was performing the contract legislation came into force which declared the Ghana Timber Marketing Board the sole buyer of Ghana wawa and red woods. The performance of the said contract was thus rendered impossible and subsequently both the plaintiffs and defendant were discharged by frustration.

The court held that:

(1) By section 1 of the Contracts Act, 1960 (Act 25), where a contract is frustrated moneys paid there under are recoverable, subject to a deduction for reasonable expenses incurred in the performance of the contract;

(2) 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 could be recovered when the logs were sold to the Ghana Timber Marketing Board. The defendant would recover the expenses twice and would be unjustly enriched if he was 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 were those which must have benefited the plaintiffs.

Chapter Thirteen

REMEDIES FOR BREACH OF CONTRACT

13.0 INTRODUCTION

This chapter discusses the various remedies which are available to a party to a contract in the event of breach by the other party and the circumstances in which they are granted by the courts. Basically, every breach of contract entitles the injured party to recover damages for the loss he has suffered. Other remedies for breach of contract discussed in the chapter are specific performance and injunction, which are equitable remedies, generally granted at the discretion of the court. Generally, a plaintiff may suffer various kinds of losses consequent to a breach of contract by the other party:

1. The plaintiff may have lost the value of the benefit he has conferred on the defendant, for which he refuses to pay. For example, the plaintiff may have offered his services to the defendant, who refuses to pay for it.

2. The plaintiff's claim may be based on expenditure incurred in preparing for the defendant's performance, for example, costs incurred in reliance on the other party's expected performance, which could have been recovered if the contract had been duly performed, for example, where a buyer builds or rents a warehouse for storage of goods to be delivered by the seller under a contract of sale.

3. The plaintiff's claim may be based on the potential benefit or net profit he would have made if the contract had been performed.

4. The claim may be based on personal injury or damage to property occasioned by the breach, sometimes referred to as consequential losses.

5. The plaintiff's claim may be based on compensation for expenses incurred after the breach in attempts to reduce the loss, for example, arranging a substitute purchase or sale, as for example, where the plaintiff buyer may have had to purchase goods from another source at a higher price as a result of the seller's failure to deliver the goods on the agreed date.

13.1 RECOVERY OF DAMAGES FOR BREACH OF CONTRACT

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. In Royal Dutch Airlines (KLM) and Another v. Farmex Ltd:

The defendants entered into an air carriage contract with the plaintiffs to ship a consignment of mangoes to, eventually, London. The defendants 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. The trial judge and the Court of Appeal held for the plaintiffs.

On a further appeal to the Supreme Court it was held that with regard to the measure of damages for breach of contract, the principle adopted by the courts was restitution in intergrum, i.e. if the plaintiff has suffered damage, not too remote he must, as far as money could do so, be restored to the position he would have been in had that particular damage not occurred. What was required to put the plaintiffs in the position they would have been in was sufficient money to compensate them for what they had lost.

13.2 TEST OF REASONABLE FORESEEABILITY - REMOTENESS OF DAMAGE

It is generally recognized that it would be impractical to allow the plaintiff to recover all the losses that in fact result from the breach, no matter how vast and unpredictable they may be. The two concepts which have been applied by the courts to limit the quantum of damages recoverable by a plaintiff are: remoteness of damages and mitigation of damages. A victim of a breach of contract is entitled to compensation for any loss which results from the breach as long as the loss is not too remote or one which the plaintiff could have avoided by taking reasonable steps in mitigation.

With regard to remoteness of damages, the general principle is that the plaintiff is only entitled for recover damages for such kisses' as were reasonably foreseeable as likely to result from the breach of contract! The test for the recovery of damages is, therefore, one of reasonable foreseeability.

This test was stated and explained in the classic case of Hadley v. Baxendale.

In this case, the owners of a mill delivered a broken crankshaft to carriers for carriage from Gloucester to engineers in Greenwich. The carriers delayed for 5 days in delivering it. It appeared that the broken shaft had been sent out as a pattern for a new one, and until it was received, the mill could not operate. The mill owners claimed £300 as loss of profit for the 5 days on which work was not resumed because of the defendant's delay in transporting the crankshaft. The only facts communicated to the carriers were that the article was a broken crankshaft of a mill and that the plaintiffs were owners of the mill.

The court stated the criterion for determining the measure of damages recoverable in an action for breach of contract as follows:

Where two 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 as either arising naturally i.e., in the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it.

This rule is normally analyzed into two branches:

1. The first branch of the rule covers losses which arise naturally i.e., in the usual course of things, from the breach of contract itself. Such losses are described as general damages and they are recoverable because they are the natural result of the breach of contract and are reasonably foreseeable as the likely result of the breach.

2. The second branch of the rule 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. These losses are described as special damages, since they arise, not in the usual course of things, but as a result of special or exceptional circumstances. The defendant is liable for such losses only if he knew of the special circumstances that gave rise to them.

Applying these-principles, the court held in Hadley v. Baxendale, that the plaintiff could not recover for the loss of profits because such loss did not flow naturally from the breach of contract. The special circumstances (the fact that the mill could not be operated until the return of the shaft) was also not communicated to or known to the defendants, as to make the loss one which reasonably should have been in their (defendant's) contemplation. The court found that in the usual course of things the delay would not result in the mill being stopped because it was possible that the mill owners had a spare shaft or that the mill was defective in some other respect.

Thus the loss of profit was not a loss which occurred in the usual course of things or which arose naturally from the breach of contract itself. The loss of profit arose because of the special circumstances of the crankshaft being sent to the engineer as a model for a new one to be made and, therefore, the mill having to be shut down until it was returned. These special circumstances which gave rise to the loss of profit were, however, not communicated to the defendants and therefore could not have been within the contemplation of the defendant as likely to arise from the breach. The loss was, therefore, not recoverable under any of the two branches of the rule in Hadley v. Baxendale. It was too remote.

The test of remoteness of damages laid down in Hadley v. Baxendale was reformulated and explained by Asquith L.J. in the case of Victoria Laundry Ltd v. Newman Industries:

The plaintiffs, who were launderers, decided to expand their business. To do so, they required a larger boiler. The defendants, an engineering firm contracted to sell and deliver to the plaintiffs, a certain boiler of the required capacity. The defendants failed to deliver the boiler until 5 months later. The defendants were aware of the nature of the plaintiff's business. In an action for breach of contract, the plaintiffs claimed: (1) damages for the loss of the profit they would have earned in that period but for the delay in delivery; and (2) damages for the loss of exceptional profits they would have earned on certain lucrative dyeing contracts they had obtained.

The court held that the defendants, with their engineering experience and with the knowledge of the facts possessed by them, could not reasonably contend that they did not contemplate that some loss of profit would result from their delay in delivering the boiler. The defendants were, therefore, liable for the loss of profits caused by their delay in delivering the boiler. On the issue of the profits the plaintiffs would have made on the dyeing contracts they had, the court took into account the fact that the defendants did not know of these dyeing contracts so they could not be liable specifically for the plaintiffs' loss of profits on those contracts. However, the court ruled that the plaintiff could recover a general sum, which might represent the normal profits to be expected from the completion of the dyeing contracts.

It is noted that the fact that the defendant in Victoria Laundry Ltd v. Newman Industries was an engineering firm or a seller rather than a mere carrier was relevant. A defendant in that position would be expected to know more about the use to which the product is to be put than a mere carrier.

In Victoria Laundry Ltd v. Newman Industries, Lord Asquith reformulated the rule in Hadley v. Baxendale and stated the following propositions:

(1) First of all, it was observed that there is actually one rule governing the award of damages which states the test as one of reasonable foreseeability.

(2) Upon breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as likely to result from a breach of the contract.

(3) What was at the time reasonably foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge possessed is of two kinds: imputed knowledge and actual knowledge.

(5) Everyone, as a reasonable person is taken to know the "ordinary course of things" and is therefore taken or presumed to know what loss is liable to result from a breach of contract in the ordinary course. This knowledge is imputed to the defendant. This is the subject of the first branch of the rule in Hadley v. Baxendale, covering the losses which arise naturally, i.e., in the ordinary course of things from the breach of contract itself. These are referred to as general damages.

(6) Added to this imputed knowledge, in certain cases, is knowledge, which the defendant actually possesses, of special circumstances outside the ordinary course of things, which are likely to cause additional or special losses. This attracts the operation of the second branch of the rule in Hadley v. Baxendale. Such additional or special losses are only recoverable if the defendant had actual knowledge of the special circumstances, and therefore should reasonably have foreseen that such additional or special losses would result from his breach. These are referred to as special damages.

In Frqfra v. Boakye:

The respondent who had a contract to supply timber logs to the Mim Timber Co. hired a tractor from the appellant at a rate of 080 a day to enable him haul timber logs from his timber concession in Mim. Under the agreement, the respondent paid a deposit of 01,100. According to the respondent, the appellant assured him that his tractor was in good condition and could haul at least 30 logs a day. The respondent, however, found the tractor to be defective almost from the beginning of the hiring with the tractor hauling a maximum of seven logs a day and a total of 60 logs during a period of a little over a month. Consequently, the respondent brought an action for damages for breach of contract. The trial judge awarded the respondent, inter alia, general damages for breach of contract.

On appeal by the appellant against the award of the damages it was held, inter alia, that in awarding damages for the breach of contract, the test to be applied was whether on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would have realized that such a loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that the loss of that kind should have been within his contemplation. In the present case, the court was right in holding that the appellant should have foreseen that the respondent would suffer loss if his tractor proved defective. Consequently, the award of general damages for breach of contract was proper.

In Juxon-Smith v. KLM Dutch Airlines:

The plaintiff who described himself as a frequent traveler, a well known international businessman and a dealer in sophisticated mining, communication and security equipment, bought a business class ticket from the defendant airline under an air carriage contract. The airline was to fly the plaintiff 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 at the High Court claiming US$600,000 or its cedi equivalent as damages for the breach. The trial Judge upheld the claim and awarded US$50,000 as general damages and costs of 10 million cedis. On appeal by the defendant the Court of Appeal, drastically reduced the awards to US$5,000 and four million cedis respectively on the grounds that they were excessive and unwarranted in law. The plaintiff therefore appealed to the Supreme Court.

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.

The Supreme Court decision in the case of Ashun v. Accra Brewery Limited*4 illustrates the principle of foreseeability of damages with respect to employment contracts. In that case:

The plaintiff was employed as chief of security in the defendant brewery. On 29th November, 1996, the Defendant's managing-director handed the plaintiff a letter in the presence of two other members of the management, informing him that his post in the company had been declared redundant as a result of a manpower rationalization exercise by the company. The letter stated that his services would no longer be required from 2nd December 1996, but that he would be paid up to that day and also be paid three months salary in lieu of notice and a severance award of two and a half months pay for each year of service, commencing from 1st January 1991 .At the meeting, the plaintiff was given his three months' salary in lieu of notice and two days salary for December 1996 and also paid monetary compensation for his accrued leave days. On the 5lh of December 1996, the Plaintiff collected from the Accounts Department of the Defendant the severance award.

After collecting the compensation offered in the letter of 29lh November, 1996, the Plaintiff caused his lawyer to write a letter to the defendant dated 29th January 1997 which asserted that the defendant's conditions of service for Senior Staff of 1st April 1995 had no provision covering redundancy. As such this act of the defendant was arbitrary, unjust, unlawful and in breach of the Industrial Relations Act 1965, Act 299. It requested the holding of amicable bilateral discussions to resolve the dispute. The solicitor to the defendant in a response asserted that in addition to the express conditions of service for the Senior Staff the defendant had implied contractual terms. The solicitor contended, in effect, that the redundancy exercise was in accordance with these terms implied by practice and usage. When the dispute between the parties was not resolved by the correspondence between their solicitors an action was commenced and among the reliefs sought by the plaintiff was a declaration that his redundancy was unlawful and wrongful general damages, monetary compensation of eight (8) months' salary for every year of service, "an order for the payment to plaintiff of all salaries, increments and all other benefits for the remaining six (6) years of service with defendant company."

The learned trial judge interpreted paragraphs 34 and 35 of the Labour (Amendment) Decree 1969, NLCD 342 (which were pleaded and relied on by the Plaintiff) as requiring both parties to negotiate the severance award. He was of the view that the unilateral determination of the amount of the severance award by the defendant was not lawful. He therefore entered judgment for the plaintiff. Both parties appealed from this judgment to the Court of Appeal, the plaintiff complaining, inter alia, that the learned trial judge should have awarded general damages for the wrongful termination of his contract. The Court of Appeal dismissed the plaintiff's appeal and upheld the defendant's on 18th December 2003. The plaintiff then lodged a further appeal to the Supreme Court.

The Supreme Court held that a contract of employment is not necessarily a contract till the retirement age and as such it is terminable. If it is terminated wrongfully, it does not give the aggrieved party the right to be paid salary till his retirement age. However where an employer terminates an employee's appointment in breach of a contract of employment, the employer is

liable to pay damages to the employee. The measure of damages is the quantum of what the aggrieved party would have earned from his employment during a reasonable period, determined by the court, after which he or she should have found alternative employment. This quantum is subject to the duty of mitigation of damages. Nevertheless the duty of mitigation of damages devolves on an employee. Accordingly, he or she has the duty to take steps to find alternative employment. The principles above, however, relate to only contracts not affected by public law provisions.

Concerning the duty of negotiation, the Supreme Court held concerning the interpretation of paragraphs 34 and 35 of the Labour (Amendment) Decree 1969, NLCD 342 (now repealed by the Third Schedule of the Labour Act, 2003 (Act 651)) that no such duty existed and the "provisions do not, by their very terms, apply to redundancy situations, but rather to when an organization is closing down or undergoing an arrangement or amalgamation and this results in the termination of the employer-employee relationship." On the issue of compensation in respect of redundancy, the parties have to revert to their underlying contractual relationship. This is because neither party pleaded any relevant statute on the issue.

The court held further that even though the redundancy package was unilaterally determined by the defendant company, the Plaintiff could have rejected it if he wanted. By accepting the package, he made the termination one by mutual agreement. He therefore had no cause of action against the defendant.

13.2.1 Likelihood of Loss

The test for the recovery of damages as outlined above is that the loss is recoverable if it was reasonably foreseeable as likely to result from the breach. This raises the question of how likely the loss must be in order to be recoverable. In Victoria Laundry v. Newman Industries, it was stated that in order to make the contract breaker liable under the rule in Hadley v. Baxendale, it suffices that if he had considered the question, he would, as a reasonable man have concluded that the loss in question was likely to result. It need not be proved that the defendant could as a reasonable man foresee that a breach must necessarily result in that loss. It is enough if he could foresee that it was likely to result; It is indeed enough if the loss is a "serious possibility", or a "real danger"

In The Heron II:

The case involved a contract to carry a cargo of sugar to Basrah, or, at the option of the owner, to Jeddah. The option was not exercised and the ship arrived at Basrah, but 9 days late, because the carrier had made deviations in breach of the contract. It was the intention of the owner to sell the sugar immediately on arrival in Basrah. He did so, but the price had fallen substantially during the 9 days and he claimed the difference in damages. The defendant did not know of the plaintiff's intention to sell the sugar, but he knew there was a market for sugar in Basrah, and if he had thought about the matter, he must have realised that it was not unlikely that the sugar would be sold on arrival. He must have known that market prices generally fluctuate, but he had no reason to suppose that the price would go down rather than up.

It was held, however, that the loss which the plaintiff incurred was not unlikely and, therefore, he was entitled to the damages claimed.

With regard to contracts for the sale of goods, let us say A contracts to sell and deliver to B a quantity of maize on a fixed date. A fails to deliver on that date and is therefore in breach of contract. In the interim, the price of maize on the market rises. Generally, the loss recoverable by B would be the difference between the contract price and the higher market price. The rise in price is generally treated as a loss which should reasonably be foreseeable as likely to result from a breach of the contract, i.e. the delay in delivery. A seller of goods who defaults in making delivery is expected to foresee that the price of the goods may rise, thus causing the buyer to incur additional expenses in acquiring the goods contracted for.

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.

In 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. Arise 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.

In Parsons Ltd v. Uttley Ingham & Co:

The plaintiffs, pig farmers, bought from the defendants, a hopper for the purpose of storage of food for the pigs. The hopper was to be fitted with a ventilated top. The defendants sealed the ventilator for the purpose of carriage, but after installing it on the plaintiff's farm, forgot to unseal it. The plaintiffs could not detect that the hopper was closed. Because of the lack of ventilation, the pig nuts stored in the hopper became mouldy. As a result of eating the mouldy nuts, many of the plaintiffs' pigs suffered a rare type of intestinal infection and 254 of them died. The plaintiffs brought the action for breach of contract, claiming the value of the pigs, lost sales and turnover amounting to £30,000.

It was held that the defendants who sold the hopper to the plaintiffs must have foreseen that it was likely that the pignuts stored in the unventilated hopper would deteriorate and cause the pigs to be ill. Even though the pigs contracted a far worse illness than could then be foreseen, the defendants were nonetheless liable because it was enough that they should have foreseen the type or kind of damage, not necessarily that they should have foreseen the extent of the damage.

13.2.2 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. Let us suppose that a seller, S, promises to deliver 1,000 bags of flour at 0100 a bag to a buyer B, on May 1, at B's

premises. The seller breaches the contract by failing to deliver the goods as promised. What is the measure of damages that the buyer is entitled to?

Section 54(2) of the Sale of Goods Act, 1962 (Act 137) states:

(2) 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.

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. Thus, the buyer must be placed in the position he would have been in if the 1,000 bags of flour had been delivered as promised, on May 1 at 0100 per bag.

Generally, where there is an available market for goods of that kind, the buyer would have to, as a result of the breach purchase the goods from an alternative source. All that is needed to put the buyer in this position is sufficient money to enable him to buy an equivalent quantity of similar flour on the open market. 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. Thus, if the market price of the flour on May 1 had risen to 120cedis, the buyer would be entitled to an amount of 020 x 1,000 bags = 020,000. If the price of flour 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. Therefore, if there is an available market, the seller would have to sell the goods to an alternative buyer, and if the market price of the goods has fallen then he would incur a loss in having to sell the goods at a price lower than that which he would have obtained under the contract. Thus, 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.

13.2.3 Compensation for Wasted Expenditure

Sometimes it is difficult to establish any loss of profit caused by the breach of contract, but the plaintiff can establish certain expenses he has incurred in anticipation of the defendant's performance of the contract. In such a case, the court will compensate the plaintiff for his expenditure, which has been wasted as a result of the defendant's breach. If 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.

In Anglia Television Ltd v. Reed:

The plaintiffs had incurred expenses in preparation for the filming of a television play. Subsequently, they entered into a contract with the defendant, under which the defendant was to play the leading role in the play. The defendant repudiated the contract and the plaintiffs 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 plaintiffs were entitled to recover the whole of the wasted expenditure on the ground that the defendant 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.

13.3 MITIGATION OF DAMAGES

Generally, a plaintiff is entitled only 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 a duty to take all reasonable steps to mitigate the losses consequent on the breach and prevents him from claiming any part of the damage or loss which could have been avoided by mitigation.

In other words, a party not in default is under a duty to mitigate his losses consequent upon the breach and thus can only recover damages for such losses occasioned by the breach as could not have been avoided by mitigation. For example, if a seller of goods fails to deliver them, or a buyer refuses to accept the goods, the party not in default is expected to act immediately and to buy or sell on the market, if other such goods are available. Likewise, an employee wrongfully dismissed must make reasonable efforts to find a comparable job.

Losses which could have been prevented by the plaintiff taking reasonable steps are generally not recoverable. 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 and the burden of proving such failure rests upon, the defendant.

In Payzu v. Saunders:

The case involved 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 sellers'offer.

In Nutakor and Another v. Adzrah the facts were as follows:

The defendants by an indenture of conveyance containing the usual covenant of title purported to convey a piece of land to the plaintiff in consideration of G£45. In fact the land in question was fami ly land and the defendants had no authority to make any grant of it. When the plaintiff made preparations to commence building operations on the land, he was warned by the family to keep off. Not heeding this warning, he proceeded to erect a building worth over £G4, 000 on the land. The family successfully brought a suit for a declaration of title to and recovery of possession of the land. The plaintiff then sued the defendants claiming the value of the building he had put up on the disputed land and expenses incurred by the plaintiff in defending his title. Trie defendants did not dispute liability for breach of their covenant of title, but contended that they were not liable to pay the plaintiff the cost of his building. They however conceded that the plaintiff was entitled to a return of his purchase price and interest on it up to when the plaintiff learnt of his lack of title. The trial judge rejected the defendants' submissions and awarded the plaintiff £G4,000 damages, taking into account the building erected by the plaintiff. From this judgment, the defendants appealed to the Supreme Court.

On appeal to the Supreme Court it was held that the proper measure of damages was the market value of the land at the date when the purchaser, became seized with knowledge that he had acquired no title to the land by wason of the incapacity of his vendors to give him title. Because of the duty to mitigate damages, no improvement which a purchaser undertook after he had learnt of, his want of title wouldbe legally chargeable to the vendor in breach. On tbs.facfs, the plaintiff here had erected his building subsequent to his discovery of the defect

in his vendor's title. Consequently, the trial judge erred in taking the value of the building into account in assessing the plaintiff's damages.

The case of Society Generate de Compensation v. Moshie Ackerman also illustrates the principle of mitigation of damages. The facts of the case were, as follows:

By a contract drawn in French but executed in Ghana, the plaintiff, an Israeli national, agreed to serve the defendants, an external French company, as the defendants' works supervisor at their building site atTema, Ghana for a fixed period of three years inclusive of a four-month probation period.The plaintiff's salary was made payable in French currency in France with the exception of his living expenses which were to be paid in Ghanaian currency. Each party was entitled to terminate the contract during the probation period without either notice or compensation subject to the express limited right of the defendants to terminate the contract for either "a professional or disciplinary reason." However, before the expiration of the probation period, the defendants summarily terminated the plaintiff's contract on completely different grounds. In an action by the plaintiff for damages for wrongful dismissal, the trial judge held that the proper law of the plaintiff's contract of service was Ghanaian law and not French law and that the plaintiff had been wrongfully dismissed. He accordingly awarded him damages totalling 19,792.70cedis, half of which was ordered to be paid by the defendants in France in French currency.

On appeal, the defendants submitted, among others that the trial judge ought to have confined the damages awarded to the end of the probation period and not to have stretched them to cover the residue of the three-year contract period. Further, he ought to have depreciated the damages since the plaintiff was duty bound to mitigate his loss. It was held, dismissing the appeal (per Anin J.S.C., Koi-Larbi J.S.C. and Lassey J.A. concurring) that:

(1) Since the defendants were not entitled to terminate the contract summarily belore the expiration of the fixed contract period but had only a limited right to terminate it summarily during the probation period, the trial judge was right in adjudging the defendants to be in breach of contract for wrongful termination of the probation and the contract as a whole.

(2) The measure of damages for wrongful dismissal is the loss thereby incurred; and subject to the duty of a plaintiff to mitigate his loss, it will normally be the amount of wages due and payable for the agreed period of service inclusive of any other benefit to which he is entitled by virtue of the contract. Steps to be taken by a plaintiff in mitigating his loss are a question of fact, not of law; and the burden of proof is on a defendant not on a plaintiff who, in the instant case being a senior executive, is under no legal obligation to accept an alternative appointment involving a considerable reduction in status.

In Attitsogbe v. Post Telecommunications Corporation:

The defendant locked a letter box he had rented out to the plaintiff, ostensibly for non-payment of rent. The plaintiff, who had already paid his rentfor 1994 at the time of closure of the letter box, made inquiries and was informed that the letter box was locked for non-

payment of rent. The plaintiff went to the defendant's Postmaster and represented that he had not received his bill whereupon he was given a fresh bill. The plaintiff got confirmation from the Postmaster that the letter box was locked and was informed of the amount of his indebtedness. The bill did not however disclose that he had already paid the rent. Subsequently, after the letterbox remained locked, the plaintiff filed a suit against the defendant for declaration that the closure of the letterbox was wrongful and claimed damages. The plaintiff however admitted under cross-examination at the trial that he did not disclose earlier to the defendant that he had already settled his bill for 1994.

The court held inter-alia that the law imposes on a claimant the duty of taking all reasonable steps to mitigate his loss consequent upon the breach of his contractual right and barred him from claiming any part of the damages due to his negligence to take such steps. Thus any loss which was directly caused by the claimant's failure to fulfil that duty was not recoverable from the defendant.

In the instant case, the plaintiff knew he had paid his rent but failed to disclose it to the defendant but rather gave the defendant the impression that he had not paid the rent. By this, the plaintiff effectively created an avenue whereby his loss would be increased and having done so to his detriment the plaintiff would not be entitled to recover damages for his misrepresentation which was an act done in bad faith. In any event, whatever loss occasioned the plaintiff after the closure of the letterbox would not be recoverable because if the plaintiff had acted in good faith he would have had the box opened earlier by showing evidence of payment.

In Delmas Agency Ghana Ltd v. Food Distributors International Ltd:

The plaintiff-respondent (FDI) ordered and purchased some cartons of yams, to be shipped to the US, allegedly by the defendant-appellant. The plaintiff claimed that the yams were rendered unfit for export, after a heavy rainfall, as a result of the Defendants inaction and sued for loss of profit and the value of the yams claiming an amount of $20,000 from the High Court. In their statement of claim, the plaintiff did not plead special damages, only mentioning the amount of $20,000 in the statement of claim as well as paying a nominal filing fee of 5,500cedis. In the meanwhile they did nothing to minimize their losses.

The trial judged found in favour of the plaintiff and awarded special damages. The Court of Appeal also substantially upheld the trial courts judgments and the case was brought before the Supreme Court, one of the grounds of appeal being that the Court of Appeal erred in making the award of damages when it had found as a fact that the evidence on record did not support the award of damages.

The Supreme Court upheld the appeal in part and awarded only nominal damages based on the following principles: Special damages is distinct from general damages. General damages are such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of the law and therefore need not be proved by evidence. Where the plaintiff has suffered a properly quantifiable loss, he must plead specifically his loss and

prove it strictly. If he does not, he is not entitled to anything unless general damages are also appropriate.

The Court noted further that the law does not allow a plaintiff to recover damages to compensate him for loss which would have been suffered if he had taken reasonable steps to mitigate his loss. Where the plaintiff has failed to mitigate his loss where there were reasonable opportunities for doing so, he is only entitled to nominal damages. Where, for example, a seller of goods fails to deliver, the buyer must go into the market at the relevant time to buy substitute goods. If he fails to do so he cannot recover any further loss that he may suffer because the market price continues to rise or because he is deprived of the opportunities of making a profit out of the use or resale of the goods.

On the same principle, a wrongfully dismissed employee must make reasonable effort to find a comparable job. Thus in assessing damages, acourt has to take into account whatever the plaintiff has done or has the means of doing to minimize his loss. In the normal course of commerce and business, it is reasonable and common sense to expect the plaintiffs to have acted prudently. Thus where a plaintiff incurs loss or expense by taking reasonable steps to mitigate the loss resulting from the defendant's breach, the plaintiff may recover this further loss or expense from the defendant.

13.3.1 Scope of "Duty" to Mitigate

The scope of the obligation to mitigate one's losses upon breach of contract can be summed up in the following three points:

1. First of all, it must be noted that 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, or to take steps which might damage his commercial reputation, or to take' any complicated legal action against a third party in order to mitigate his loss.

In Pilkington v. Wood:

The plaintiff, because of the negligence of the defendant, 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. Secondly, 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. Thirdly, the plaintiff may recover damages for any loss or expenses incurred by him in reasonably attempting to mitigate his loss following the defendant's breach.

In Banco de Portugal v. Waterlow:

Waterlow 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. Waterlow 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.

13.4 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. It has already been pointed out that where a party repudiates a contract before the time fixed for performance, the innocent party has two options: The first is to accept the repudiation and sue immediately for breach of contract. If the plaintiff chooses this option, 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 application of this principle is clearly illustrated within the context of a contract for the sale of goods.

For example, if a buyer who has contracted to buy goods at a future date repudiates the contract before the date fixed for performance, a seller who chooses this first option and accepts the repudiation as terminating the contract would be expected to sell the goods on the market at the first opportunity, if there is an available market. If the price is falling, the seller-plaintiff would not be expected to sit back and allow the price to fall further and then sue for the difference between the contract price and the market price. Thus under the Sale of Goods Act, 1962 (Act 137), where the buyer repudiates the contract of sale before the date fixed for acceptance of the goods and the seller accepts the repudiation, damages in such a case are calculated as the difference between the contract price and the market price on the date of the repudiation. This is because the duty to mitigate arises as soon as the party not in breach accepts the repudiation.

Section 48 of the Sale of Goods Act, 1962 (Act 137) on assessment of damages for non-acceptance provides:

(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 lime 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.

The second option available to the plaintiff upon anticipatory breach by the defendant is to reject the repudiation and affirm the contract. Here the plaintiff treats the contract as still in force in spite of the defendant's repudiation or anticipatory breach and awaits the defendant's performance until the date fixed for performance. If the plaintiff chooses the option to affirm the contract, no duty to mitigate arises until the date fixed for performance arrives and the defendant still refuses to perform.

Thus, under the Sale of Goods Act, 1962 (Act 137), the measure of damages in the case where the seller refuses to accept the repudiation, is the difference between the contract price and the market price on the date fixed for acceptance. This is because where the buyer chooses to reject the repudiation and affirm the contract, the duty to mitigate does not arise until the date fixed for acceptance arrives and the buyer still refuses to perform.

Section 54 of the Sale of Goods Act, 1962 (Act 137), which deals with assessment of damages for non-delivery provides:

(1) The measure of damages in an action under sect ion 53 is the loss which could reasonably have been foreseen by the seller at the time when the contract was made as likely to result 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 market or current price and the contract price.

> (a) if a time has been fixed for delivery, or if the seller repudiates the contract before the time of performance, and the buyer does not accept the repudiation, 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.

(3) In this section a time is not fixed for delivery by reason only that the goods are to be delivered within a reasonable time.

In Tredegar Iron & Coal Co. v Hawthorn Bros. & Co:

The defendants had contracted to buy coal at 16s. a ton from the plaintiffs, delivery to be made in February. On February 16, the defendants 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.

13.5 DAMAGES FIXED BY THE CONTRACT - LIQUIDATED DAMAGES AND 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. Such fixed amounts, where they represent a genuine pre-estimate of the innocent party's possible loss are normally enforceable by the courts as liquidated damages. However, where the fixed sums are in the nature of penalties or punitive in nature, stipulated as a threat to hold the other party to performance and obviously greater than any possible loss that might be occasioned by the breach, the courts will not give effect to such a provision.

On this basis, the law distinguishes between penalty clauses, which are generally unenforceable and liquidated damages clauses, which are generally upheld and enforced by the courts.

13.5.1 Distinction Between Liquidated Damages and Penalties

A clause in a contract qualifies as a liquidated damages clause if it is a genuine pre-estimate of the loss of one party in the event of breach by the other party. A clause is said to be a penalty, if it is 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. A penalty is therefore 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 ppssible loss.

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.

First of all it is established that the fact that the parties have used the terms "penalty" or "liquidated damages" in the contract is not of itself decisive. The courts must still go ahead to decide whether the sum fixed in the contract as payable upon breach is a genuine pre-estimate of probable loss or not. This decision is made by looking at the terms of the contract and the inherent circumstances of the particular contract, judged at the time of the making of the contract, and not at the time of its breach. In the case of Law v. Redditch Local Board, Lopes J. stated:

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.

Certain rules have been laid down for the guidance of the courts in deciding whether a particular sum stipulated in a contract as payable upon breach is in substance a penalty or liquidated damages clause. These rules or guidelines are clearly summarized by Lord Dunedin in the case of Dunlop Pneumatic Tyre Co. Ltd v. New Garage Motor Co, where:

Dealers in tyres agreed with the manufacturers not to resell any of the tyres in violation of certain stipulations as to the price of the tyres. The contract provided that the dealers would be liable to pay £5 for every tyre that they sold in violation of the stipulations.

The court held that the provision was not a penalty, but was a genuine pre-estimate of the loss that would arise in the event of breach, i.e., liquidated damages and was, therefore, enforceable by the courts.

In arriving at this conclusion, the court noted that although damage as a whole to the manufacturers was certain, yet damage from any particular sale would be impossible to forecast. It was just therefore one of those cases where it seemed quite reasonable for the parlies to estimate the damage at a certain figure, and provided the figure was not extravagant, there would seem to be no reason to suspect that it was not truly a bargain to assess damages, but rather a penalty to be held in terrorem.

The following guidelines were given for the determination of whether a fixed sum is a penalty or liquidated damages:

(1) It will be held to be a penalty 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) 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.

(3) 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.

(4) 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.

In Campbell Discount Co. Ltd v. Bridge:

The hirer of a car under a hire purchase agreement paid an initial sum of £105 and promised to pay the balance in monthly instalments. He then informed the Finance Co. that he could not keep up the payments and returned the car to them. By a clause in the hire purchase agreement, the hirer had a right to terminate the agreement at any time, and return the car, but if he did so, he was required to pay "by way of agreed compensation for depreciation" such amount as would make his total payment up to two-third of the purchase price.

It was held that the stipulated sum amounted to a penalty. Lord Morton stated:

I find it impossible to regard the sum stipulated in clause 9 as a genuine pre-estimate of the loss which would be suffered by the respondents in the events specified in the same clause. This was a second hand car when the appellant took it over on hire purchase. The depreciation in its value would naturally become greater the longer it remained in the appe^ants hands. Yet the sum to be paid under clause 9(b) [upon termination] is largest when, as in the present case, the car is returned after it has been in the hirer's possession for a very short time, and gets progressively smaller as time goes on .

13.6 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 for purely subjective losses such as disappointment, injured feelings, etc. in cases of breach of contract. In principle, the courts have traditionally refused to award damages for non-pecuniary losses or to award damages for mental distress, disappointment or injured feelings suffered as a result of a breach of contract.

In Addis v. Gramophone Co Ltd, where the plaintiff sought to recover damages for the indignity he had suffered as a result of being sacked from his job in a humiliating manner, the House of Lords held that he was not entitled to be compensated for the injury to his feelings.

It is important to note, however, that there is no longer an absolute rule that damages cannot be recovered for mental distress in cases of breach of contract. 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.

In 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.

13.7 EQUITABLE REMEDIES

These are remedies which were originally developed by equity to supplement the remedy of damages offered by the common law. The equitable remedies available for breach of contract include specific performance and injunction.

13.7.1 Specific Performance

An order of specific performance is a decree issued by the court which compels a contracting party to do that which he has undertaken to do under a contract. The remedy of specific performance is purely equitable in origin and it acts in personam. Specific performance is a discretionary remedy. This means that the remedy is not available as a matter of right to the person seeking relief, but is subject to the discretion of the court.

It has been held that the dominant principle is that equity will only grant specific performance, if considering all the circumstances, it is just and equitable to do so. The exercise of the court's discretion in granting specific performance is circumscribed by a number of well-known rules.

Conditions for Granting of Specific Performance

As a general rule, specific performance will be granted only where damages will not adequately compensate the plaintiff. The normal remedy for breach of contract at common law is damages. In most cases, this constitutes adequate compensation; for example, where the contract is for the sale of goods which can easily be obtained from an alternative source. In certain cases, however, ain award of damages for a breach of contract may defeat the reasonable expectations of the plaintiff, and would not adequately compensate the plaintiff.

Thus, as a general rule, specific performance will generally only be granted where damages will not adequately compensate the plaintiff. For this reason, specific performance is generally hot ordered in cases of breach of contracts to sell commodities or shares, which are readily available on the market.

Damages will be deemed to be inadequate where the plaintiff cannot get a satisfactory substitute or where the seller refuses to deliver specific or ascertained goods. Indeed, section 58 of the Sale of Goods Act, 1962 (Act 137) states: "In an action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, by its judgement direct that the contract should be specifically performed without giving the seller the option of retaining the goods on payment of damages."

In the case of goods, the impossibility of obtaining a satisfactory substitute may be a ground for granting specific performance of a contract for the sale of unique goods such as heirlooms or great works of art. In contracts involving the sale of land in particular, the courts have traditionally taken the view that damages are an inadequate remedy and therefore the remedy of specific performance is normally available to either party to such contracts.

In Redco Ltd v. Sarpong:

The respondent agreed to purchase a flat from the appellant-company at a cost of 72,000cedis. In 1980 the respondent made a down payment of 19,000cedis, with the remainder to be paid upon completion. The appellant in 1981 informed the respondent that the flat would be ready in December 1981 and was asked to pay a second instalment of 31,400cedis. The respondent agreed and paid 032,000. At the end of 1981 no flat was allocated to the respondent. Seven years later the appellant informed the respondent that the flat now cost 3 million cedis. The respondent immediately sued on his contract and claimed specific performance on the ground that although 21,000cedis was outstanding, what had been paid so far constituted sufficient part performance to warrant the grant of specific performance. In his defence the appellant stated that extraneous circumstances militated against the completion of the flat by the agreed date. The respondent then moved the court for judgment in that the defence disclosed no reasonable defence. Judgment was then given for the respondent.

On appeal to the Court of Appeal against that decision, it was held, dismissing the appeal that the basis upon which specific performance would be granted in equity was quite settled. Certain contracts were of such a nature that time became of the essence, and a mere award of damages was not enough. For example, in contracts of sale where a house vvas required for immediate residence, as in the instant case, a delay of six to seven years without any explanation could not be compensated for by mere damages when it was clear that such damages could not supply the flat for which the respondent had paid a substantial purchase price. There was ample evidence that the conditions set out in the contract to be fulfilled by the respondent had all been, or a substantial part had been fulfilled which in equity would entitle him to his equitable right of specific performance. In Ahumah v. Akorli (No. 2):

In 1961 the defendant negotiated with B.T.C. for the sale of a plot of land for £G1,200. A deposit of £G800 was paid to B.T.C of which the plaintiff contributed half and the defendant half. The defendant then went into possession and managed the land, paying the balance of the purchase price from the money thus obtained. In 1963 B.T.C. executed a formal conveyance to the defendant. The plaintiff then asked the defendant to convey to him his portion of the land, and an area 300 ft. by 300 ft. was demarcated on which stood an engine room for which the defendant demanded an extra £G200. The size of the plaintiff's portion was later reduced to 300 ft. by 100 ft. represented by a site plan, exhibit C, approximately one-third of the whole area and he accepted this but refused to pay for the engine room. Relations between the parties deteriorated and the plaintiff sued for specific performance of an oral contract by which he alleged the defendant was to share the land with him equally. He further asked for an account of the rents, tolls and other moneys collected by the defendant from the land since 25 February 1963 and an order for the payment to him of a one half share of the amount.

It-.was held that this was a case in which specific performance should be ordered because the land was known, the terms of the purchase were known and the price paid by the plaintiff was known. There was no doubt that there was to be some form of sharing, which, in the absence of any fixed proportions to the contrary, the court should ensure was reasonable and equitable. The matter was simplified by the plaintiff's acceptance of the one-third share and the one point of difference, which the court could settle, was the extra payment for the engine room. In Djan v. Owoo:

On 10 January 1975 the first defendant orally agreed to sell his house situate at No. 2 West Loop, Tesano, Accra, for 25,000.00cedis to the plaintiff. The plaintiff paid, inter alia, a deposit of 2,500.00cedis and obtained two receipts signed by the first defendant in which the names of the parties appeared and in which the house to be sold was described. The plaintiff subsequently asked his bankers to issue two cheques, one to the first defendant in full payment of the balance of the purchase price, and the second cheque to the second defendants to redeem the property which had been mortgaged to them by the first defendant. The first defendant refused to complete the sale and later returned the cheques to the plaintiff's bankers.The plaintiff thereupon instituted this action against the first defendant for specific performance of the agreement to purchase the house.

It was held that a contract in writing for the transfer of an interest in land would not be complete in terms of section 2 (a) of the Conveyancing Decree, 1973 (N.R.C.D. 175) unless the following particulars were given: (i) the names of the parties; (ii) the property to be transferred; (iii) the purchase price of the property; and (iv) the defendant must have signed the written contract. Although in the present case there was written evidence of the existence of three of these matters, the contract was incomplete and unenforceable because of the omission of the purchase price which was a material term in every contract of sale. In Prah & Others v. Anane:

By an agreement in writing dated 3rd June, 1958, between the appellants and the respondent, drawn up by the appellants, the respondent allowed her seven-room house to be pulled down

by the appellants for the purpose of building a market. By the same agreement, the appellants promised to erect for the respondent, as a substitute, a "new house containing seven rooms in small sizes each" and reserved to the respondent a right of action in the event of default on the part of the appellants. Shortly after the agreement, the appellants started building the market which took them only three months to complete. They however failed to erect for the respondent the house promised. After a period of over three years the respondent brought this action against the appellants claiming damages for breach of contract. The appellants denied that they had committed a breach of the contract contained in the agreement and maintained that their failure to erect the house for the respondent earlier was due to her inability to select a site for the building.

The learned trial judge rejected the appellants' case and held, inter alia, that they had showed a total lack of consideration for the respondent's interests. The court held further that the appellants had committed a breach of their contract with the respondent and were, therefore, liable to her in damages.

It was held that the conditions in the agreement were mutual and that the respondent, by allowing her house to be pulled down, had fulfilled her part of the agreement. The appellants' failure to fulfil the obligation imposed on them by the agreement showed a total lack of consideration which goes to the root of the contract. Therefore the respondent was entitled to claim for the full value of the contract.

The court noted that the general rule in equity was that an agreement to erect buildings could not be specifically performed, but there are certain exceptions to that general rule. The authorities show that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which specific performance ought to be ordered and also to be considered is whether there is a building of which the particulars are clearly specified.

The question in the instant case was whether from the evidence on record the case for the respondent could be brought within any of the exceptions above stated. The first question is whether the work, as described in the contract, was sufficiently defined. It was held that it was not. The other question was, whether the appellants obtained possession of a piece or parcel of land on which the respondent's building was to be erected by means of the contract for its erection. Clearly they did not. It seemed, therefore, that this case could not be brought within the exceptions laid for an order for specific performance.

Specific performance will normally be granted where the quantum of damages is difficult to assess and would be unfair to the plaintiff. In the case of Domins Fisheries Ltd. v. Bremen-Vegesacker Fischerei:

The defendants, the owners of a foreign fishing vessel 'The Paderborn' offered to sell the vessel to the plaintiffs, a fishing company, for 30,000.00cedis after a lengthy discussion at a meeting held between the solicitors of both parties. The terms of the sale were verbally

agreed upon at the meeting where the plaintiffs, to whom the vessel was of special interest and value, accepted the offer through M., their solicitor. Consequently, M. on behalf of the plaintiffs, paid to the defendants through Q. their solicitor, 02,000.00 as part payment of the agreed deposit of 3,000.00cedis. On the receipt of that amount, Q. embodied all the terms of the sale verbally agreed upon in a letter in which M. was requested to confirm in writing the plaintiffs' acceptance of the terms of sale inclusive of payment of the balance of the purchase price by twelve equal monthly instalments commencing from a specified period. On 23 November 1970, M. in his reply, enclosed a cheque for 01,000.00 as final payment of the deposit and confirmed the plaintiffs' acceptance of the offer but requested a "three-month moratorium before the commencement of the payment of the instalments." The plaintiffs' request was however rejected on 28 December by the defendants through Q. their solicitor. M. therefore, on behalf of the plaintiffs, wrote to Q. on 5 January 1971 to the effect that the instalment proposals were acceptable to the plaintiffs. The letter was delivered by hand on the same day. However, on 6 January, Q. verbally informed M. that the defendants were no longer prepared to sell the vessel to the plaintiffs because the defendants had already concluded a contract on 30 December 1970 to sell the vessel to the Ghana Government.

The plaintiffs sued, claiming, inter alia, a declaration that the defendants had by a contract sold the vessel to them, an order for specific performance of the contract and general damages for loss of use. The defendants, however, contended inter alia that (a) the three-month moratorium requested by the plaintiffs had modified the instalment proposals and that that amounted to. a rejection and counter-offer which was subsequently rejected and therefore no contract was concluded on 23 November 1970, (b) in any case, their offer was validly withdrawn on 6 January 1971, and (c) the remedy for specific performance was not in the circumstances available to the plaintiffs.

It was held that having regard to all the surrounding circumstances and particularly to the deposit payments by the plaintiffs as well as the previous negotiations held between the parties, the plaintiffs' letter of 23 November amounted to acceptance of the defendants' offer. The court noted that specific performance was supplementary to the common law remedy of damages and its grant was discretionary to meet cases where, as in the instant action, remedy by an action for damages was not adequate compensation for breach of contract. Since the vessel in the instant case was of special interest and value to the plaintiffs who might not easily get its kind from another source, an order for specific performance would be granted, even though the vessel was a foreign vessel and it had been transferred to a third party.

The courts will not order a contract to be specifically performed if the contract is incomplete or if its terms are uncertain. In the case of Asare v. Antwi:

The defendant owned several plots of land at Adabraka some of which he sold to interested parties. The plaintiff expressed interest in buying one of these plots provided the price was right. The plot was never identified. Three years later the plaintiff sued the defendant for "specific performance of a 'partly performed' agreement for the sale by the defendant of his plot of land at Adabraka measuring 120 feet by 60 feet, for the sum of 2,000cedis." In support of his claim the plaintiff tendered exhibit A, a temporary receipt, which read, "Receipt from

Mr. S. K. Antwi the sum of fifty pounds (£G50) being part payment of the cost of plot 120 ft. x 60 ft. to be sold to him. (Sgd:) J. G. Asare, 1 December 1964."

The trial judge, Anterkyi J. upheld the plaintiff's claim and'granted both specific performance and an injunction in his favour. He further held that "the parties being Ghanaians intended the contemplated sale and purchase to be controlled by the customary law."

The defendant appealed and it was held, allowing the appeal that there was no effective contract between the parties which could be specifically enforced since (a) there was no agreement as to the purchase price; (b) the parties were not ad idem about the subject-matter of their inchoate agreement; (c) the payment of part of the purchase price per se was not sufficient evidence of part performance of a contract of sale of land, and it could not be deduced from exhibit A that the payment of £G50 was made as part performance of a concluded contract of sale.

Specific performance will not be ordered if it would be impossible for the defendant to comply with the order, for example, the remedy will not be ordered in a contract for the sale of land not owned by the vendor or if the contract is oppressive. Further, specific performance will generally be refused if the plaintiff has acted unfairly or dishonestly. The courts have held that equity cannot be invoked in aid of an illegal transaction, and will, indeed, refuse specific performance of such an illegality.

Jn Zagloul Real Estates Co Ltd (No 2) v. British Airways Ltd:

In June 1986 the plaintiffs Zagloul Real Estates Ltd, a limited liability company registered in Ghana, agreed to lease part of their building situate in Ghana to British Caledonian Airways Ltd (BCAL), an external airline company operating in Ghana for a period of 25 years. In October 1986, the parties, in pursuance of the agreement executed a formal lease and a total rent of 40 million cedis for 25 years was paid in advance by the defendants. Before the execution of the lease, both parties were aware of the External Companies and Diplomatic Missions (Acquisitions or Rental of Immovable Property) Law, 1986 (PNDCL 150), which had come into force on 13th June 1986. The law provided that any lease or tenancy in respect of any immovable property to an external company should receive the consent in writing of the committee established, also, the rent payable should be determined by the landlord or owner and should be approved by the committee and the payment of the said sum must be in convertible currency notwithstanding any agreement to the contrary. To circumvent PNDCL 150, the solicitors of the BCAL prepared a deed of indemnity which was subsequently signed by the parties by which if BCAL, as an.external company were obliged to pay rents to the plaintiffs in convertible currency, then, the plaintiffs would give an indemnity to BCAL to the full extent of the sum of 40 million cedis paid by the lessee (BCAL) and will on demand repay to the lessee the said sum.

Sometime later the operations of BCAL ceased in Ghana and they, with the consent of the plaintiff assigned the remainder of the 25-year lease to British Airways Ltd (BA Ltd), another external company. The Ministry of Foreign

Affairs later requested that BA Ltd pay rent in respect of the leased property in convertible currency (US$ 1900) per month as assessed by the Implementation Committee established under PNDCL 150. The plaintiffs therefore tendered back to BA Ltd the 40 million cedis under the original agreement. B A Ltd refused to accept the payment contending that the advanced payment had discharged them from complying with the provisions of PNDCL 150.

The plaintiffs, therefore, sued the defendants (BA Ltd) in the High Court for inter alia a declaration that, the defendants were obliged to pay the rents for the premises in convertible currency under PNDCL 150 notwithstanding the lease executed in 1986 and an order for the plaintiffs to pay the sum of 40 million cedis by way of refund of the rents for 25 years under the lease. In their defence, the defendants admitted all the material facts except the 40 million cedis which they contended whether should remain so or whether it was the value of the sum paid in 1986 whose value was now 113 million cedis?

The High Court entered judgment for the plaintiffs in terms of the declaration sought. The defendants then appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal affirmed the decision of the High Court which had directed that the defendants comply with the provisions of PNDCL 150. On the issue of the sum to be refunded, it held that it was an issue which should be remitted to the trial High Court for retrial. The plaintiffs, therefore, filed the instant appeal in the Supreme Court against the part of the judgment of the Court of Appeal concerning the remitting to the High Court for retrial, the issue of the refund of the sum of 40 million cedis.

The Supreme Court held that the deed of indemnity was a dishonest device which sought to defeat the intentions of PNDCL 150 and at the same time to enable the defendants to avoid any loss from such a violation. Such an agreement was illegal and therefore void. Having regard to the fact that the deed was void, the issue of the 40 million cedis was not an issue which had to be remitted to the High Court for retrial since it was not legitimate because the deed from which it arose was void and, therefore, unenforceable.

The court normally will not order specific performance of contracts for personal services or contracts the performance of which will require the constant supervision or monitoring of the court. As a rule, the court will not order specific performance of contracts involving the application of personal skill. For example the court will generally not compel an employee to do any work by ordering specific performance of a contract of employment, or by restraining the breach of such contract by injunction, the policy reason being that it would be improper to compel one man to serve another. By the same rule, an employer will not be compelled by equity to keep a servant.

Specific performance will not be ordered where there is lack of mutuality. One of the factors guiding the court's discretion in awarding specific performance is the general condition that the remedy will only be granted where there is mutuality, that is to say, the remedy will be available to a plaintiff only if it could be awarded ' against him. For this reason specific performance wiil generally not be granted to a minor since the remedy does not lie against a minor.

It has been firmly established, however, that where the plaintiff has fully performed his obligations under the contract, such that there is nothing that the other party could possibly ask a court to specifically decree, the remedy could be available to the plaintiff in spite of the lack of mutuality.

In Lartey v. Bannerman:

The defendant, a lessee of the State Housing Corporation, contracted to sell his property to B.L. B.L. informed the defendant that he was buying the property for his daughter, the infant plaintiff. After B.L. had, in pursuance of the contract, paid part of the purchase price and given the balance to his solicitor to be given to the defendant when he executed the deed of assignment, the defendant refused to execute the deed of assignment. Consequently, B.L. brought an action in his own name for inter alia, specific performance against the defendant. While giving evidence, however, B .L. testified that his daughter was a minor. He was therefore cross-examined about his authority to commence and maintain the action. The writ was subsequently amended to indicate that the plaintiff was suing by B.L. her next friend. The defence thereupon claimed that the agreement could not be specifically enforced as it purported to have been made with an infant. The trial court judge refused to decree specific performance on the ground of the absence of mutuality in contracts involving infants.

On appeal, the court held (allowing the appeal) that the sole justification for the rule that specific performance may not be granted to an infant was that because of the privileged position of the infant the other party could not obtain the remedy against him. The basis of the rule therefore disappeared where the infant came before the court requesting the decree after he had performed his side of the bargain, because there was nothing that the other party might possibly ask a court to specifically decree. The court held that the remedy of specific performance should be available to the plaintiff to compel the defendant to perform his part of the contract.

13.7.2 Injunction

An injunction is an order of the court to a party to a contract to do or to refrain from doing a specified act. An injunction restrains the commission or continuance of some wrongful act. It is issued when the conduct of a party is likely to cause injury to the applicant and that injury cannot be adequately compensated in damages. Like specific performance, an injunction operates in personam. An injunction may either be prohibitory or mandatory.

A prohibitory injunction orders a defendant not to do something in breach of a contract he has entered into and it enjoins the defendant to refrain from a particular type of conduct. It is generally only granted in the case of a negative promise, i.e., it lies to compel the defendant to comply with his promise not to do something or not to engage in a particular kind of conduct. This is also known as a restrictive injunction.

A mandatory injunction requires a defendant to reverse the effects of an existing breach. It requires the defendant to do a particular act. If the defendant has already dug a well on your

land a prohibitory injunction will not he helpful but a mandatory injunction ordering the defendant not to allow the well to remain on the land. This is restoratory in its effect. The mandatory injunction in effect orders the defendant to undo what he has done. With mandatory injunctions, a court will apply the 'balance of convenience" test, refusing relief if the hardship caused to the defendant by compliance with the order outweighs the consequential advantages to the plaintiff.

With regard to the period of operation, an injunction may be an interlocutory or interim injunction, which is designed to regulate the position of the parties pending a hearing or final determination of the suit. This may be granted at any time to preserve the status quo. An injunction may also be perpetual which is given after the plaintiff's right has been established. This is also called a permanent injunction.

Prima facie, an injunction will not be granted to restrain actionable wrongs for which damages are the proper and adequate remedy. In deciding whether or not to grant an order of injunction, the court will consider a number of relevant factors to ensure that the order when granted will not unduly prejudice the interests of the parties and will in fact achieve the purpose for which it is given.

First of all the court will generally not order the defendant to do the impossible; nor would it grant an order of injunction if it will confer no appreciable benefit on the plaintiff and would be materially detrimental to the defendant. In Charrington v. Simons & Co Ltd:

The plaintiff was the owner of two orchards (Bramley and Cox) whilst the defendant was a company limited by liability. In 1966, the plaintiff entered into an agreement with the defendant-company, conveying the Cox's orchard and granting it easements and rights over his (the plaintiff) land and reserving certain rights over the land conveyed, including a right of way over a track which served and separated the two orchards and connected them with the main road. The conveyance envisaged the possibility of the construction of a hard surface on the track. The defendant company however covenanted: 'Not to resurface the said track, so as to raise the level of the track above the level of the surrounding land.' However, in August 1967, the defendant company via contractors constructed a ten foot wide strip.of concrete surface on the track which surface for much of its length was above the land adjoining the plaintiff's Bramley orchard. The effect was the inevitable interference with the plaintiff's use of his land. The plaintiff thus sought, inter alia, a mandatory injunction requiring the defendant company to remedy its breach of a covenant contained in a deed of conveyance made between the parties dated 3 June 1966.

It was noted, that when considering a plaintiff's claim for a mandatory injunction, the court has to consider whether in the circumstances as they existed after the breach of covenant, which was admitted by the defendant company, a mandatory order, and, if so, what kind of mandatory order would produce a fair result. The court has to take into account, amongst other relevant circumstances, the benefit which the order would confer on the plaintiff and the detriment which it would cause to the defendant company. The plaintiff should not be deprived of relief to which he was justly entitled merely because it would be disadvantageous

to the defendant company, but he should not be permitted to insist on a form of relief which would confer no appreciable benefit on him and would be materially detrimental to the defendant company.

Thus, a mandatory injunction was granted requiring the defendant company to remove the concrete surface so far as it was above what had been the level of the land on the plaintiff's side of the track immediately adjoining the Bramley orchard before any works on the track had begun; except that the operation of the injunction was suspended for three-years from the date of judgment to give the defendant company an opportunity,-with the plaintiff's consent, so far as that was necessary, to carry out ameliorative works in respect of the difference in level between the concrete Surface and the plaintiff's land, while leave would be given to the plaintiff to apply at any time for removal of the suspension and to the defendant company to apply for discharge of the injunction; and finally, an injunction would be granted restraining the defendant company from resurfacing the track in any way so as to raise the level thereof above that of the adjoining land.

The general rule is that an injunction will not be granted if the effect is to directly or indirectly compel the defendant to do acts, the performance of which the court would not grant specific performance. On this basis, injunction will generally not be granted to require the performance of a contract for personal services.

However, there are some important exceptions to this rule. A service contract may contain negative obligations which could be enforced by injunction without compelling positive performance of the whole contract. In other words an injunction may be granted in respect of the negative provisions in a contract even if the positive terms are not specifically performable.

In Lumley v Wagner, a lady had agreed to sing at a theatre for a specified period at an agreed remuneration. It was held that a decree of specific performance was not available to compel her to honour the agreement. In this case Miss Wagner could not be compelled by a decree of specific performance to sing for Lumley, but an injunction could lie to restrain her from breaking her other undertaking not to sing elsewhere during the agreed period.

An important qualification has, however, been introduced to the effect that an injunction will not be granted if its effect would be to compel the defendant to work for a particular person or face the alternative of starving. In this regard, if A agrees to give the whole of his time to the service of B and contracts not to serve anybody else in any other capacity, an injunction may not be granted to prevent A from breaching that undertaking because the inevitable result would be to compel A to work for B or otherwise starve.